The past year has seen the OxHRH Blog again provide a dynamic and constantly evolving space, populated by the many contributors from all over the world who have shared their expert analyses of cutting edge new human rights developments. And again we have seen the exciting ways in which comparative themes emerge spontaneously from many different contributions. It is this unique opportunity for world-wide comparisons in human rights law that the OxHRH’s Anthology seeks to make the most of each year. Our 2019 Anthology draws together this year’s extraordinary array of blogs into sixteen themed chapters, each preceded by an analysis from a leading academic or practitioner in the field. The result is a multi-authored work of extraordinary depth and diversity, created by all its many contributors and shaped by our commentators. Even more importantly, this is far more than an academic exercise. By comparing and contrasting the approaches to similar questions in different parts of the world, it becomes possible to identify best practice and relevant pitfalls.

Over the last four years, the OxHRH Blog has established itself as an award-winning online forum for human rights researchers, practitioners and policy makers to share cutting edge analyses of developments in human rights law from across the world. The Blog boasts almost 1,000 posts written by more than 400 experts from 40 different countries. It attracts over 10,000 unique visitors each month, while our edge analyses of developments in human rights law are read and disseminated widely, wherever in the world you are reading it. As you scroll through the pages and read posts of interest, I hope the new layout and arrangements of posts will make it easier for you to sort between topics and ideas from across the globe, recognizing the themes and connections which lie within and between chapters.

Motivated by our contributor’s high quality posts from around the world, the editorial team has done another great job in seizing the opportunity that the Anthology provides. Particularly thanks to our very talented and dedicated Regional Correspondents who combine their talent for communication with exceptionally high standards and great dedication. This third edition could not have happened without the enthusiasm and commitment of the OxHRH editorial team as a whole, including Richard Martin, Victoria Miyandazi and Seham Arefi, who brought energy, a careful eye and plenty of hard work to ensure its success. Nor could it have happened without the leadership of our deputy director Dr Meghan Campbell. Many thanks also to the expert commentators on the individual chapters who have helped craft the individual posts into a coherent and well-structured whole. Last, but certainly far from least, I’d like to reiterate how much we value and appreciate all of those who read, contribute and promote the OxHRH Blog. The OxHRH Blog is a forum to be resourced, coloured and shaped by you.

In aspiring to its global inclusivity and appreciation of human rights law issues, the OxHRH Blog benefits greatly from the contribution of its volunteer Regional Correspondents. By promoting the OxHRH Blog in jurisdictions whose experiences of human rights law may be lesser known to readers, by reason of global situation or linguistic barriers, the very universality of rights and the internationality of their claims becomes reflected in the diverse origins and focus of the posts. I send warm regards and well wishes to our Regional Correspondents in Brazil (Thiago Amparo) and Latin America (C. Ignacio de Casas), East Asia (Rahman Ko) and South East Asia (Mariana Cavalcante), East Africa (Piet Olivier) and South Africa (Duncan Okubasu), India (Gaurav Mukherjee), Canada (Ravi Aminath) and Ireland (Eilis O’Keeffe). We owe an enormous amount to Gullan & Gullan, the Oxford Human Rights Hub’s brand-based communication agency, in particular to Kath McConnachie and Carli Schoeman whose creativity, vision and patience have been so important to the OxHRH’s growth over the last four years. Many thanks to you both.

Needless to say our funders have been central to everything we do. Particularly helpful has been the British Academy, which awarded the Hub OxHRH the prestigious five-year Additional Research Project Grant to fund our editors. Many thanks also to the Bertha Foundation for their ongoing support, Oxford University for the recent Teaching Development and Enhancement Project Award and to Hart Publishing which has kindly contributed to the printed copies of the Anthology this year. It is with great pleasure that I present you to the third edition of the Oxford Human Rights Hub’s ‘Global Perspectives on Human Rights’.
Message from the Editors of Global Perspectives on Human Rights

Just several months ago, during the political rough and tumble in the run up to the UK’s referendum on membership of the EU, former Justice Minister Michael Gove remarked that ‘people in this country have had enough of experts’. Who were economists, academics or lawyers to tell us about issues like state sovereignty, immigration or the rights of workers? With the now infamous trades of Republican presidential nominee Donald Trump, a similar post-truth politics has marred the US election campaign. In a litany of unsupported and derogatory statements, Trump has undermined and attacked the rights and dignity of women, ethnic minorities and religious groups. The Washington Post’s fact-checker blog, for instance, found that almost 70% of the statements Trump has recently made were untrue. Further afield, in Australia, disturbing accounts of systemic abuse of children by staff at Australia’s off-shore detention camps for asylums seekers have been swiftly brushed aside as mere falsehoods by Immigration Minister Peter Dutton. This was despite the strong condemnatory statements of UN bodies and the Australian Human Rights Commission calling for the detention centres to be properly investigated, if not closed entirely.

These, admittedly Western, examples hint at some of the urgent and important issues that are currently being discussed, as well as the editorial team’s own experiences that had encouraged us to first approach them. As in previous editions, the selection and categorisation of the posts has been undertaken in the spirit of fostering comparative analysis, as demonstrated most clearly by the chapter introductions. Indeed, by continuing to include the chapter commentaries this year, we have sought to further embrace expertise by asking well-respected and experienced human rights researchers and practitioners to cast their critical gaze over the posts in each chapter and outline the issues and central questions that await the reader. We would like to reiterate our thanks to all our commentators, who responded with the enthusiasm and expertise that had encouraged us to first approach them. Readers may notice that this edition is considerably shorter than previous ones. In an effort to ensure the anthology is succinct, user-friendly and accessible, we have chosen not to reproduce the Blog posts in full in the anthology itself, but rather direct readers (through the hyperlinks provided) to our upgraded website, where they can read and comment on the original post.

We should acknowledge that categorisation of overlapping and interconnected themes is an inherently difficult and imperfect task. Indeed, the chapters in this edition vary slightly from last year’s, reflecting changes in the topics being discussed, as well as the editorial team’s own preferences for identification and demarcation of posts. This year, for example, we have new chapters on the ‘Trajectories of change in international human rights law’ (Chapter 16) as well as ‘Legacies in human rights practice’ (Chapter 15). We hope that the selection of chapters will prove useful in organizing some of the complex and diverse body of work and enable common themes to emerge. We also hope they will highlight similar human rights law themes that are tunefuls and which, through our interactive dialogue based on the content of the blogs, our original keenness for it to be something more than just a collection of posts. It is an extension of the OxHRH blog or regional in nature are likely to remain a pressing issue and will continue to constitute an ever larger part of the agenda of human rights organisations and commentators. This is especially the case when considering the increasing number of posts and commentaries that reflect the growing importance of the human rights field in Africa (Chapter 12), the right to education in India and South Africa (Chapter 13) and the liability of large corporations for environmental damage in Nigeria and Brazil (Chapter 14).

Some of the more focused discussions on particular topics in each chapter reflect special series we have run on the Blog throughout the year, including the ongoing refugee crisis in Europe (Chapter 4) and the impact of Brexit for workers’ rights (Chapter 13), whereas others have arisen organically from the interests of our contributors, such as the proposed repeal of the UK’s Human Rights Act 1998 (Chapter 2) and the law’s response to balancing religious and secular interests in France and Canada (Chapter 9).

And it is on this note that we would like to conclude by reiterating our thanks to the contributors to the OxHRH Blog, whose commentary, analysis and insights have made the OxHRH what it is today. We hope you enjoy reading and reflecting upon the issues captured in this year’s edition of Global Perspectives on Human Rights.

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Seham Areff
Editor, OxHRH Blog

Victoria Miyandazi
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Access to Justice - Helen Mountfield
Constitutions Institutions and Nation Building - Paul Towell
Conflict, Security and Transitional Justice - Helen McDermott
Migration and Asylum - Guy Goodwin-Gill
Criminal Justice - Jon Yorke
Media, Privacy and Communications - Nicole Shrmistou
Equity and Non-Discrimination - Luke Bosio
Gender Based Violence - Fiona de Londras
Religion - Lucy Vickers
Freedom of Speech - Charlotte Green
Children’s Rights - John Eekelaar
Socio-Economic Rights - Jason Brickhill
Labour Rights - Anne Lafaso
Business Resources Environment and Development - Daniel Leader
Legacies in Human Rights Practice - Anne Lafaso
Trajectories of change in intentional human rights - Jaoakko Kuosmanen

CHAPTER COMMENTATORS

Socio-Economic Rights - Jason Brickhill
Labour Rights - Anne Lafaso
Business Resources Environment and Development - Daniel Leader
Legacies in Human Rights Practice - Anne Lafaso
Trajectories of change in intentional human rights - Jaoakko Kuosmanen

CHAPTER

The Right to Education in India and South Africa: Challenges and Opportunities

By: Selin Batur

The right to education in India and South Africa is a fundamental aspect of the duty to protect, as well as the right to participate in the conduct of public affairs. This chapter explores the challenges and opportunities of implementing the right to education in both countries, focusing on the role of the state, civil society, and international actors. The chapter emphasizes the importance of a multidisciplinary approach to the right to education, integrating legal, social, and economic perspectives. The chapter examines the role of the state in guaranteeing access to education, with a special focus on the protection of vulnerable groups such as girls, children with disabilities, and low-income communities. The chapter also addresses the issue of accountability, examining the strategies used by civil society and international actors to enforce the state's obligations and to ensure that education rights are protected. Finally, the chapter discusses the role of international human rights mechanisms in monitoring and protecting the right to education, and highlights the importance of a global perspective in addressing the challenges and opportunities of implementing the right to education in India and South Africa.
**Helen Mountfield**

Helen Mountfield QC is a founder member of Matrix Chambers, a recorder, and a Deputy High Court judge.

As I write (July 2015), the political and legal worlds are reeling from the result of the United Kingdom’s (UK) referendum in which a little over half of the electorate (51.9%) voted to leave the European Union (EU). Their desire was to cure a perceived democratic deficit and to repatriate sovereignty to a level at which it can be controlled. But experience in 21st century Britain suggests that Parliament is a weak guardian against the removal of rights by the executive; and in any democracy, there is always a need for a judicial mechanism to protect the rights of individuals — especially “unpopular” minorities — from being overborne by the perceived needs of the majority.

In any free society, sovereign power cannot mean absolute power, and the concept of the rule of law demands that, whatever its source, governmental authority must be subject to judicial scrutiny. This is scarcely a new concept. Even the great seventeenth century apologist for absolute government, Thomas Hobbes, wrote in Leviathan (1651), that:

“...the safety of the people requireth further from him than when one of these does the like to one of them.”

The principle of the rule of law demands that, wherever it originates, sovereignty is subject to judicial scrutiny. As Hobbes observed, without equal access to justice, the strong dread the possibility of being personally subject to the body politic as a whole. As Hobbes observed, without equal access to justice, the strong have impunity for the wrongs they inflict on the weak, and:

“The safety of the people requireth further from him that or them that have the sovereign power, that justice be equally administered to all degrees of people; that is, that as well as the rich and mighty, poor and obscure persons may be righted of the injuries done them, so as the great may have no greater hope of impunity when they do violence, dishonour or any great injury to the meaner sort than when one of these does the like to one of them.”

However, in England and Wales, there is now real cause for concern that “poor and obscure” people are increasingly unable to obtain access to justice at all, let alone equally administered justice. Steep increases in court and tribunal fees have resulted in a sharp fall-off in access to justice delayed or long-dated in important cases. The Court of Appeal held in UNISON v The Lord Chancellor that their introduction does not undermine the concept of genuine access to justice, but it is hard to follow this logic in the real world, at least as regards justice “equally administered to all degrees of people” (see Michael Ford’s piece on “UNISON v Lord Chancellor: The statistics of Tribunal Fees in the Court of Appeal”). Mathias Chung’s piece on “Grayling’s Enhanced Court Fees” illustrates that there can come a point when fees are at such a level that they inevitably deny access to the courts for many, thus only paying “lip-service” to the Magna Carta. The current proposal to increase fees for immigration appeals by 500% will presumably have — as is probably intended — the effect of reducing numbers of appeals. How the risk of “impunity” for injury to the “meaner” sort of claimant who cannot afford these fees will be avoided is as yet unexplained.

At such a time, the thoughts of those writing on access to justice on the OxHRH Blog are essential reading. Meghan Campbell’s post on “Access to Justice: a facet of gender equality” emphasises how the failure to provide genuine access to justice has a disproportionate effect on women, who are disproportionately likely to suffer violence, dishonour or injury with impunity when the legal system, in effect, excludes them.

Some of the posts in this chapter focus on measures with practical implications for access to justice. As well as the posts on fees, Helen Taylor’s interesting piece from a South African perspective on the need for public processes to court domestic violence as a gender-related open justice principle is an illustration of how the technical details of the judicial process can affect access to justice in practice. Catherine Bridick’s thoughtful piece on the Detention Action case reflects on how an entire judicial process can be contrary to the principle of access to justice, if it is so structurally flawed as to deny any genuine ability to advance one’s case. Outside the UK, Mohammed Nayyeri’s piece comments on the “huge blow” to the right to independent counsel of one’s own choosing under Iran’s New Criminal Procedure.

Other pieces in this chapter look at the consequences of justice delayed or long-dated in important cases. Peris Jones examines the long, but ultimately successful, appeal for justice by the Hillsborough Family Support Group; and Daniel Leader considers the rights of an even older wrong as a result of the Mau Mau litigation. Finally, Julia Salasky’s piece on CrowJustice and funding for human rights and public interest cases invites creativity and imagination regarding how civil society can use new tools to ensure the availability of judicial scrutiny of executive action, at least in some public interest cases.

The story of advances and defeats in the ongoing battle to maintain access to justice continues. There has been a great victory in the Public Law Project litigation against the Lord Chancellor, in which the invidious “residence test” for legal aid was struck down by the Supreme Court; but also a setback when the Court of Appeal overturned a successful challenge to the unrealistic and unworkable “exceptional funding scheme”. Looking forward, there are threats to access to justice in the UK’s likely departure from the EU and consequent removal of the protection of article 47 of the EU Charter of Fundamental Rights; the probable repeal of the Human Rights Act 1998, including the safeguards in article 6 of the European Convention on Human Rights; and the strong possibility of further increases in court fees, procedural limits to judicial review claims, and decreases in public funding for legal advice and representation.

In considering these important issues, the OxHRH Blog will continue to be an essential place to turn. Whatever or whoever body is “sovereign”, a failure to make workable arrangements for judicial remedies for injustice can have dreadful consequences, both for those denied justice, and the body politic as a whole. As Hobbes observed in Leviathan, without equal access to justice, the strong have impunity for the wrongs they inflict on the weak, and:

**THE STORY OF ADVANCES AND DEFEATS IN THE ONGOING BATTLE TO MAINTAIN ACCESS TO JUSTICE CONTINUES**
Chapter 2
Constitutions, Institutions and Nation Building

Paul Yowell
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When Francis Fukuyama heralded the end of history in 1992, his point was about the battle of ideas rather than events; he argued that the period following the 20th century wars and the conclusion of the Cold War would culminate in “the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.” It was a captivating prediction. Reflecting, in 2016, on the early part of the 21st century—an exercise enriched by reading the blog posts collected in this chapter—one may be led to question Fukuyama’s prescience.

China, with one fifth of world population, has embraced the capitalist side of an end-of-history regime with enthusiasm and astonishing success, but it has made only halting steps toward the political freedoms and rights of liberal democracy. As Tasha Fralize reports, the Chinese government carried out mass arrests of lawyers associated with the “rights defense movement” in early 2016, and the National People’s Congress has enacted legislation granting substantial new powers in several domains to a Beijing’s executive authority is also being extended in several domains to a

India’s Constitutional Democracy

Projected by the UN to overtake China as the world’s most populous country by 2022, India has experienced a constitutional democracy and general commitment to the rule of law and judicial independence. India’s powerful Supreme Court has taken on increasingly more cases of democratic politics in the protection of individual rights. But, according to Mythili Vijay Kumar Thallam, a basic principle of separation of powers is under threat. She recounts a landmark judgment in 1993 in which the Indian Supreme Court interpreted articles 124 and 217 of the Constitution in such a way that the Justices, through the creation of a “collegium” for judicial appointments, gave themselves primacy in proposing and approving new judicial appointees. As Arghya Sengupta has written previously on the blog, “For the last two decades when collegium appointments have been operational, the judiciary has been riddled with allegations of nepotism and cronyism in appointments with no scope for holding the collegium to account.” In 2014, the Indian Parliament in a near unanimous vote is both houses approved a constitutional amendment to limit the powers of the Justices in the collegium. In a decision last year, the Supreme Court struck down that amendment pursuant to another remarkable power the Court has created for itself: the power to declare constitutional amendments unconstitutional. Thallam’s post is critical of the decision, in particular its reasoning that any presence of the executive in the appointment process threatens judicial independence.

A general theme that emerges from posts on China, India, and other countries covered in this compilation is that the struggle to establish democracy and human rights often plays out in the rough-and-tumble world of national politics. The vastly differing political conditions prevailing around the globe—which are apparent from the above posts, as well as other recent events, bring us back to Fukuyama. In a 2007 article he wrote that the European Union “more accurately reflects what the world will look like at the end of history than the contemporary United States,” arguing that “in the post-historical world the continuing belief of Americans in national sovereignty would be eclipsed by the EU’s effort to transcend sovereignty and traditional power politics by establishing a transnational rule of law.” On June 23, 2016, the people of the United Kingdom (UK) stunned the world (and, presumably, Fukuyama) by voting to leave the EU. The close vote (52-48%) revealed a society deeply divided over immigration, the value of EU law, and other issues. Many Leave voters said that their main reason was to restore national sovereignty. Brexit will have vast consequences for the UK as well as the EU, with leaders in Brussels and European capitals concerned about the fraying of ties in the Union.

The specific consequences of Brexit remain largely unknown; but they will likely extend to the enforcement of human rights, which was already under threat after the general election of 2015. The Conservative manifesto had included a pledge to reform or repeal the Human Rights Act (HRA), and suggested the possibility of withdrawal from the European Convention on Human Rights (ECHR). One year ago, there was speculation as to whether the EU Charter of Fundamental Rights would play a greater role if judicial power under the HRA or ECHR were withdrawn. Scholars have been closely watching developments that could bring about a reinvigoration of common law fundamental rights jurisprudence. A number of the posts in this chapter chronicle these developments and contribute to this debate (see, for example, the posts by Meghan Campbell, Stephen Dineen and Alison Young, and Tobias Lock and Karstonstian Dzehtsiarou). The Brexit vote has altered the landscape of rights enforcement again. It now seems likely that the EU Charter will eventually cease to be a factor in domestic rights enforcement in the UK. When Theresa May gave a speech on her support for the Remain side in the Brexit debate, she proposed that the UK should leave the ECHR. But, May pledged to implement Brexit but said that this is not the time to withdraw from the ECHR. Will that time come later?

The only thing one could now predict confidently is that debates will continue; and that Brexit, with all of its unknowns, will play a large role in them.

If we needed any further reminder of how national political circumstances bear on human rights, the attempted military coup in Turkey occurred shortly before this compilation was completed, and the aftermath is still unfolding. The indications thus far are that President Erdogan’s attempts to consolidate power pose a serious threat to political freedom and human rights, with thousands having lost their positions in a purge of political and military institutions. With all these developments in 2016, and many more not mentioned here, one could conclude that the ‘end of history’ has not been reached: liberal democracy still faces stiff competition, both ideologically and materially, and the struggle to establish the rule of law still plays out on the national stage more than the transnational one. One might even imagine History to be in a dark humour and remaining—as Mark Twain did of his premature obituary—that reports of her death have been greatly exaggerated.
It is now generally accepted that human rights law applies alongside international humanitarian law in situations of armed conflict. The practical application of both is, however, less certain. Read together, the posts by Eirik Bjorge and Richard Ekins offer an insight into the long-standing relationship between the two states, and reinforce the paramount importance of human rights obligations over business, arms and trade deals. Since March 2011, Syria has been engulfed in a conflict estimated to have taken the lives of over 270,000 people, and forced more than half of all Syrians to leave their homes. Sarah M. Field looks at the uncertainty of UN-coached efforts at peace settlement of the five-year war, which has been described as the worst humanitarian disaster of our time. Field reminds us of the vulnerable position of children in armed conflict and highlights the inclusion of children’s rights in the peace process as vital for international peace and security.

Threats to international security go beyond direct military risks and arms control. In recent years, the UN Security Council (UNSC) has considered the impact of broader development issues on security including, return of resources and climate change. Over two posts, Richard Lappin argues for the inclusion of water security and health crises onto the UNSC’s formal agenda, as well as a comprehensive approach towards dealing with these threats to international security. As Lappin points out, recognition of the potential for development issues to trigger or exacerbate conflicts is essential for the creation of effective responses to new and emerging security threats.

Transitional justice mechanisms are key to restoring peace, security and prosperity to communities emerging from conflict. The effectiveness of efforts aimed at redressing the legacies of human rights abuses are sometimes stymied by scepticism and distrust towards those institutions charged with administering justice. Sebastian Artz highlights the importance of the relationship between the ICC and Africa. She refutes claims that the Court is ‘unfairly targeting’ African leaders and calls upon the ICC to challenge the allegations head on. Yet even if the partiality of the ICC is to be debunked, it is evident that the international criminal justice system is not without its flaws. Anna Ongaro and Alex Dyzenhaus highlight two of the Court’s shortcomings brought to light in the Kenyan case; its tendency to turn a blind eye to the realities of power politics, and its failure to address the inherent weakness of its witness-protection mechanism. Lack of public faith in the administration of justice and the rule of law can also exacerbate tensions within transitions states. Nowhere is this more visible than in Syria, an issue addressed in the posts by Alex Wilks and Francesco Alfonzo. The Venezuelan Supreme Court’s recent annulment of the 2015 law declaring civilians to be armed forces, a move that liberates nearly 80 political prisoners, dealt the latest blow to the struggling opposition-controlled Congress. Many challenges lie ahead, for the National Assembly and for Venezuelan democracy in general. The need for political reconciliation is still present in Sri Lanka. In another post, Alex Wilks sets out the catalogue of challenges that face the Sri Lankan Government and its prospects for achieving a lasting peace. What can be drawn from the situation in Sri Lanka, Venezuela, and every other transitioning state, is the importance of inclusive and consultative processes.

To address the human rights challenges posed by armed conflict, the international community must cooperate to prevent conflict, protect vulnerable populations, and rebuild states and societies in the wake of violence. In 2015, the UN General Assembly adopted a comprehensive set of Sustainable Development Goals (SDGs); a new, universal set of goals, targets and indicators that UN member states will be expected to use to frame their agendas and political policies over the next 15 years. Menaal Safi Munshey’s post focuses on the intersection of SDG 11 (“make cities inclusive, safe, resilient and sustainable”) and SDG 16 (“promote just, peaceful and inclusive societies”), with a focus on violence and crime prevention, promoting the rule of law, ensuring access to justice, and strengthening institutions. The message in this piece is the importance of recognising the interdependence of these two SDGs, and addressing issues of urban violence and poor governance in fragile cities around the world. Like the Millennium Development Goals that preceded them, the SDGs do not solve the problem, but instead, pronounce the international community’s priorities and expectations, establish benchmarks against which we can measure progress, and set the stage for a concerted global effort. Reducing violence is now one of those goals. What remains to be seen is how this can be achieved.
Guy Goodwin-Gill
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At the time of writing (July 2016), the Office of the United Nations High Commissioner for Refugees estimates that there are some 65.3 million forcibly displaced people throughout the world. They include 21.1 million refugees, 40.8 million internally displaced persons, and 3.2 million asylum seekers waiting for decisions. Of the refugees, nearly 5 million have fled Syria, 2.7 million Afghanistan, over a million have fled Somalia, and 5.2 million are Palestinians under the mandate of the UN Relief and Works Agency. The UN also estimates that some 244 million people live in countries other than that in which they were born – a crude description of the ‘migrant’ – and roughly 150.3 million of them are migrant workers. The world population will likely reach 9.7 billion by 2050, with the highest growth in the LDCs (least developed countries). By the same date, the 10-24 age group will top 2 billion. There is already a crisis in youth unemployment, with the International Labour Organisation estimating that 73.4 million young people were unemployed in 2013, with the rate highest in North Africa and Western Asia. In the LDCs, about 15 million young people join the labour force each year, with few prospects of secure employment.

We had much the same information thirty years ago. Unfortunately, the causes remain and — as this chapter shows — state responses focus mostly on control, instead of the drivers of displacement. The majority of posts in this chapter look at the European Union’s (EU) response to the Syrian and Mediterranean refugee crises (see posts by Kenneth Baeth, Francesco Manni, Sajjida Furtak, and Cathryn Costello and Mariagrazia Giulitri). The EU’s declared objectives include stemming flows, protecting external borders, and reducing ‘irregular migration’, with front-line states such as Greece and Italy charged with keeping refugees away. This is to be accomplished, in particular, by returning protection seekers to ‘first countries of asylum’, ‘safe third countries’ and even ‘safe countries of origin’. In short, the goal is that others shall assume responsibility, although perhaps with a measure of financial compensation and a promise to resettle a small percentage of refugees from principal host states, such as Jordan, Lebanon and Turkey.

Little is said, and less is committed, to protection or to the good faith implementation of international legal obligations (see Hélène Lambert’s and Bríd Ní Ghráinne’s posts). This has been especially evident in relation to recent cross-Mediterranean flows, which — understandably — have strained states’ search and rescue capacities. While some countries have sought to lead the way, such as Italy with its Mare Nostrum rescue operation in 2013-14 and Germany with its response to arrivals in 2015, others have equivocated on issues such as rescue at sea, disembarkation, access to a process to identify protection needs (and to meet states’ security concerns), material support and assistance sufficient to avoid inhumane and degrading treatment, and solutions appropriate to circumstances and in conformity with international law. As Stacy Topouzova illustrates, much the same can be said for the manifest failure to manage ‘land’ movements along the ‘Balkan Route’, where fences and indiscriminate controls have contributed to the sum of misery. In both cases, Europe as a whole has failed to appreciate the need to match its formal commitment to basic principles with concrete expressions of solidarity and a fair sharing of responsibility.

How to treat the refugee, the migrant and those on the move between states is a much broader issue, as this collection also shows (see the posts by Christopher Smith, Rachel Wechsler and Andrew Konstant). It encompasses basic principles, including non-discrimination, as well as the conditions of employment, fair wages and access to health services. It includes freedom from arbitrary detention and access to the courts, as Sean Yau Shun Ming shows. In the case of children, access to education and to what flows from the principle of the best interests of the child. As Nikolaos Sitaropoulos’s post implies, it extends to the family, as the fundamental unit of society. Indeed, a wealth of knowledge and experience confirm the critical value of the family in the processes of integration, adaptation, requalification and self-improvement. Measures to restrict family reunion and to maintain separation between family members are intensely damaging, not only to individuals, but also to the communities that will the costs of support.

One among many of the reasons driving irregular movements of refugees and migrants is the absence of legal channels for entry and protection. The promise of greater mobility — which the EU uses to encourage third states to sign on to readmission agreements — tends to remain unfulfilled. The EU finds itself unable effectively to manage migration overall, to return to their countries those who have no lawful basis for remaining, to meet labour market needs (particularly in the unskilled and semi-skilled sectors), and to offer those educational and qualification opportunities which can play a key role in development. Its new style ‘Partnership Agreements’ look no less likely to achieve the immigration control goals desired by Ministers of the Interior, but rather to frustrate the processes of development which are ultimately at least a part of the answer to involuntary displacement.

There is no ‘solution’ to an increasingly globalised and mobile world, but much can be managed better and to the advantage of all. The EU has aspired to a common asylum system, but while it has achieved a degree of legislative standardisation, there is still no equivalence of protection across the region and no effective system by which to share responsibility and, in particular, to relieve the burden borne by front-line states. In September 2015, for example, the EU had agreed to the relocation of 160,000 refugees from Greece and Italy, but by mid-July 2016, just 3,056 had moved.

Beyond its external borders, the EU needs to recognise that refugees keep moving when faced with insecurity and the lack of livelihood and education opportunities in countries of first refuge. The choice is clear: Either pay to improve the former, or wait for the latter to produce a measure of resettlement, or face and be responsible for the consequences.
Hungary's Actions: Past the Borderline of International Law
Bríd Ní Ghráinne | 24th September 2015

Legal Obstacles to an ‘Australian solution’ for Migrants in the Mediterranean
Luigi Lonardo | 12th June 2015

External Processing of Refugee Claims: Problem or Part of the Solution?
The Australian Experience
Sadaf Lakhani and Judith Reen | 29th September 2015

Dignifying Movement: Advocating for Reform of Irish Labour Migration Policy
Rachel Wechsler | 18th December 2015

Can a State Refuse Migrant Family Allowances Due to Irregular Reunification?
Nikolas Stamosopoulos | 27th October 2015

Dios, No Patrias, Libertad: The Dominican Republic’s Unfolding Human Rights Crisis
Christopher Smith | 1st October 2015

Rethinking Asylum-Seeker Detention in Hong Kong
Sean Yau Shun Ming | 18th March 2016

An Unwelcoming Place – The Mistreatment of African Immigrants by the South African State
Andrew Kansfield | 19th June 2015
Criminal Justice

Jon Yorke

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The Criminal Justice posts in this year’s Anthology demonstrate a cogent engagement with some of the key issues facing crime control and punishment policies.

**THEY PRESENT THE EXTENT TO WHICH HUMAN RIGHTS AND OTHER MORAL ARGUMENTS ARE USED TO QUESTION THE LEGITIMACY OF COERCION, THE PROBLEMS OF INCARCERATION AND THE INITIATION OF STATE CONTROLLED PHYSICAL VIOLENCE.**

These posts are an illuminative collection for readers interested in the operation of criminal justice policy, and who are looking for strategic human rights discourse to deconstruct oppressive and dangerous governmental actions.

The first series of posts present dynamic challenges to the procedural implications for criminal justice. Sakshi Aravind laments the failure of UK courts to protect fundamental rights in the obtaining of evidence following the torture of suspected terrorists. However, she cautiously applauds the UK Supreme Court’s application of the principles of irrationality and unfairness to curtal executive discretion concerning “remote circumstances” of extremism. The judicial review theme is continued by Daud Aziz Khokhar, but in the context of problematising the doctrine of separation of powers in adjudication by a Pakistan Military Tribunal. Claire Overman considers how privacy rights standards under ECHR Art. 8 were applied by the Supreme Court in its review of the retention of DNA and other personal data by the Police Service of Northern Ireland.

Procedural implications for autonomous decisions in end of life circumstances are then taken up by Andrew Konstant and Sakshi Aravind. Konstant outlines the question of whether there is a right to die with dignity in South Africa, and Aravind reviews the 2015 Assisted Dying Bill, which was rejected by the UK’s House of Commons in September 2015. Andrew Britton engages with the New Zealand High Court landmark ruling in Taylor v. Attorney General, which held that the blanket ban on a prisoner’s right to vote was inconsistent with the Bill of Rights Act 1990, and Gaurav Mukherjee denounces the governmental protection of the police in their reported criminal acts towards suspected criminals. The commendable actions of Irom Sharmilla Chanu for not accepting the Shree Shakti Award until the Armed Forces Special Powers Act (1958) was repealed by India are told by Ravi Nitesh. He reveals the plight of Chanu and the moral power of demonstrating resistance by peaceful means.

The extent to which a sentence is considered to be legitimate is considered in another collection of posts. Marie Manikis and Kaitlyn O’Shaughnessy review the application of judicial discretion and the Supreme Court of Canada’s striking down of the one-year mandatory minimum sentence for drug trafficking offenders with a prior conviction. The Supreme Court of India jurisprudence on preventing the most serious non-capital offenders being remitted by the Executive is denounced by Vikram Aditya Narayan. Life imprisonment in Russia as considered by the European Court of Human Rights is analysed by Catherine Appleton. She regrets the European Court of Human Rights’ decision to uphold the Russian ban on family visitation, the important role of the European Committee for the Prevention of Torture in providing safeguards, and the necessity of resocialisation as a principle of humane punishment. Rory Kelly reviews the potentially barbarous application of the UK’s Serious Crime Act 2015 and the factors for Serious Crime Prevention Disorders and Gang Injunctions. Elise Maes takes the focus from the consideration of domestic cases, to the multilateral review of the death penalty by the UN Human Rights Council, and the soft law initiation of pressure for a world without the death penalty.

Another series of posts considers some of the contemporary challenges facing the dwindling state right to impose capital punishment. Anuratanshu Dash provides two engaging posts on India, one on the Law Commission’s recommendations of abolition for non-terrorism criminal offences, and the second on the iconic revelations from the execution of Yakub Abdul Razak Memon. Joe Middleton discusses the mandatory death penalty in Africa, with a focus on Kenya, and although there have been no executions in Zambia since 1997, Malawo Mwaba warns of the reintroduction of the punishment following the recognition of the death penalty in the Zambian Draft Constitution. In my own posts, I reflect upon the decision and the aftermath of the Supreme Court of the United States’ acceptance of underdeveloped science in Oklahoma’s lethal injection protocol. Bharat Malkani provides illumination on a discussion at the UN Office of the High Commissioner for Human Rights meeting to identify a focused strategy to protect migrant workers caught within the capital judicial system. Then Carolyn Hoyle provides cogent observations against the use of the death penalty for drugs offences in Indonesia, and Reema Omer recounts the harrowing story of Pakistan’s blasphemy law in the context of the Asia Bibi litigation.

The state monopoly over legitimate (physical) violence is analysed in a further group of posts. John Ehrett offers an insightful engagement with the Supreme Court of the United States review of the killing of fleeing suspects when they pose a threat to the police officer or the public, a particularly topical issue in light of recent, high-profile police shootings in the United States. John Ehrett also examines the illegitimate use of pellets and iron balls in protests in Jammu and Kashmir, and the value of public interest litigation for victims of police violence. Sanya Nitesh discusses the illegitimate use of pellets and iron balls by police officers. Ravi Nitesh discusses the illegitimate use of pellets and iron balls in protests in Jammu and Kashmir, and the value of public interest litigation for victims of police violence. Sanya Nitesh discusses the illegitimate use of pellets and iron balls in protests in Jammu and Kashmir, and the value of public interest litigation for victims of police violence. Soumya Santhini assesses the human rights implications for moral policing concerning inedent exposure in hotels and other lodgings in Mumbai. The repugnance of torture and the failure of Mexico’s law framework to provide safeguards is affirmed by Alex Wilks, while Jack Maxwell presents the extent to which investigations must be carried out following serious police misconduct in the Australian state of Victoria.

This year’s chapter demonstrates the perpetual necessity to review the procedure of criminal justice, and to scrutinise claims of the legitimacy of retributive policies and the parameters of state imposed physical violence. Ensuring that criminal justice policies are transparent is a key human rights initiative. Distilling opaque governmental criminal justice policies is an important step in enabling human rights norms to be used to protect individual liberty and the right to life. These posts contribute to this noble endeavour.
UK and the Assisted Dying Bill: Autonomy in Death Continues to Wait Its Turn
Sakshi Aravind | 17th September 2015

Prisoner Voting Rights in New Zealand: Standing Up for Democracy by Way of Constitutional Shake-Up
Andrew Britton | 14th August 2015

The Prior Sanction Requirement Under Indian Public Law
Gaurav Mukherjee | 18th May 2015

Hungry For Justice For the Last 15 Years: Irom Sharmila Chanu
Ravi Nitesh | 16th March 2015

Administrative Decisions and Terrorist Suspects: The UK Supreme Court’s Decision in Youssef v SSFC
Sakshi Aravind | 27th February 2016

Striking a Fine Balance: A Welcome Judicial Review of Executive Discretion in MM
Sakshi Aravind | 11th January 2016

A Human Rights Perspective of the Supreme Court Verdict on the Basic Structure Doctrine
Daud Aziz Khokhar | 21st August 2015

Goughan v Chief Constable of the Police Service of Northern Ireland: the Need for Evidence-Based Reasoning
Claire Overman | 29th May 2015

Euthanasia Case in South Africa: Does the Right to Life Include the Right to Die with Dignity?
Andrew Konstant | 3rd June 2015

UK and the Assisted Dying Bill: Autonomy in Death Continues to Wait Its Turn
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Hungry For Justice For the Last 15 Years: Irom Sharmila Chanu
Ravi Nitesh | 16th March 2015
The Mandatory Costs of Mandatory Minimum Sentences in Canada
Marie Manikis and Kaitlyn O'Shaughnessy | 19th April 2016

Sentencing and the Possibility of Reform in India
Vikram Aditya Narayan | 26th January 2016

The Meaning of Life Imprisonment – The Case of Khoroshenko v. Russia
Catherine Appleton | 6th October 2015

Not so Civil: The Serious Crime Act 2015 and Civil Preventive Orders
Ray Kelly | 25th November 2015

Justifying Deadly Force in the American Supreme Court
John Ehrett | 15th September 2015

Piercing Face and Body by Hundreds of Iron Balls: Pellet Guns In Jammu and Kashmir Violating Human Rights
Ravi Nitesh | 22nd June 2015

Tackling Moral Policing in Mumbai: A Human Rights Approach
Sanya Samtani | 4th September 2015

Mexico's Torture Problem
Alex Wilks | 22nd April 2015

A Backwards Step for Human Rights Law in Victoria: Bore v Independent Broad-based Anti-Corruption Commission
Jack Maxwell | 12th December 2015
Concerns about privacy, free expression, terrorism and surveillance have been at the forefront of national and international policy debates over the past year. As countries continue to respond to the dramatic revelations from Edward Snowden and the impact of ambitious legislation around the Right to Be Forgotten, the articles within this chapter capture the breadth and urgency of these issues within Europe (and the UK specifically), as well as in China, Hungary and Pakistan. Comparing the contributions clearly shows just how many shared issues countries are grappling with when it comes to navigating security and privacy concerns, or tolerating free speech with efforts to restrict speech that incites violence. At the core of this, the bloggers all asked key questions about where the responsibility of the government, citizens or media companies lies, in an age when we are inundated with data and information.

In his post about Pakistan’s new cyber law, Nauman Asgher condemns the new law for stripping the government unrestricted powers to search and seize any information that they believe is required for a criminal investigation, or as a condition of the bloggers all asked key questions about where the responsibility of the government, citizens or media companies lies, in an age when we are inundated with data and information.

Many of the bloggers repeatedly referred to cases at the European Court of Human Rights (ECtHR) reflecting just how much the court is at the forefront of freedom of expression issues. Tamas Szigeti, for example, highlighted the importance of the case MTE and Index.hu v Hungary in which the judge from the ECtHR disagreed with Hungary’s interpretation of the text, and the requirement that any “person who is in possession of serious and justified reasons for believing that is required for a criminal investigation, or as a condition of the bloggers all asked key questions about where the responsibility of the government, citizens or media companies lies, in an age when we are inundated with data and information.

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As Nicholas Bamforth notes, the Court’s conception of equality as a human right protected by constitutions, statutes, and local ordinances. But what does equality mean? What strategies are most effective for achieving it? How should activists respond to backlash generated by equality gains? And what happens when one group obtains equality in ways that may threaten others’ rights? These questions are to some extent perennial, but contemporary conflicts put them into increasingly sharp focus. The posts in this chapter seek to offer some answers.

International legal victories for the LGBTQ community in the last decade provide a powerful catalyst for rethinking equality as a legal concept. They offer a helpful lens for viewing issues of inequality across race, gender, and class lines. As Max Harris explained, Obergfell v. Hodges is a monumental development for equality law. In Obergfell, the U.S Supreme Court held that governmental bans on same-sex marriage are unconstitutional. The Court anchored its analysis in well-established doctrine concerning the fundamental right to marry. The Court focused on the fundamental right to marry and the intertwined relationship between liberty and equality: when the government denies a right or a benefit to one group that it guarantees to others, particularly against a backdrop of state sanctioned and societal oppression against the group in question, this denies dignity in direct contradiction with what equality requires.

As Nicholas Bamforth notes, the Court’s conception of dignity as central to equality principles has unfurled implications for future legal challenges. Obergfell marks equality as requiring more than formal equal treatment of similarly situated individuals, tacitly suggesting instead that equality has a substantive dignitary component that includes the individual liberty to “define and express . . . identity” free of governmental subordination. Equal dignity may gradually mature into a legal doctrine that can dismantle governmental policies that impede other aspects of individual identity and autonomy.

Obergfell departed from traditional equal protection analysis in another important way. As Tarunabh Khaitan explains, since the 1970s the U.S Supreme Court typically looks for discriminatory intent when analyzing Equal Protection challenges to facially neutral government policies (i.e., those that do not explicitly invoke a suspect or quasi-suspect classification). Many scholars, like Karl Laird, initially suspected that the Court might declare sexual orientation a suspect classification, thus triggering careful scrutiny of same-sex marriage bans and uncovering antigay animus. Nevertheless, the Court did not answer the question of what level of scrutiny applies to sexual orientation classifications, and it was careful to explain that legislatures may enact or defend same-sex marriage bans for reasons other than animus—but, for example, out of respect for constituents’ sincerely held religious beliefs. Instead, the Court focused on the effect of same-sex marriage bans on individual liberty to “define and express . . . identity” free of governmental subordination. Equal dignity may gradually mature into a legal doctrine that can dismantle governmental policies that impede other aspects of individual identity and autonomy.

In Obergfell, advocates illustrated through personal narratives how same-sex marriage bans harm real people, and Justice Kennedy approvingly cites those stories in the Court’s opinion. It is more difficult to ignore a group’s dangerous difference. Broad stereotypes about deviant sexuality like anti-gay harassment at work or in school are well known, and party to accounts from individuals who have suffered discrimination, while their direct pleas to the people and reliance on majoritarian politics have faltered. Still, as Karl Laird observes, many legal scholars and jurists argue that it is undemocratic for judges to defy the people’s will by protecting unpopular groups from discrimination, or by declaring the existence of controversial rights (i.e., the right to choose abortion). This is thus a risk that the public may perceive judicially mandated social change as illegitimate and inappropriate. Worse, when minority groups ask courts to vindicate rights, judicial wins can cause public backlash and regressive legislation. As Olivia Faith Crible illustrates in the context of religious objections to an LGBTQ antidiscrimination court ruling in Northern Ireland, the public may sometimes perceive minority equality gains as favouritism and respond with hostility.

In fact, in the wake of same-sex marriage legalisation and the proliferation of LGBTQ antidiscrimination laws across the globe, conservative opponents have mobilised to preserve traditional morality and secure legal protections for religious or conscientious objections to same-sex relationships and gender nonconformity. For example, as Rachel Wechsler reports, recently in Utah, a family court judge removed a child from a same-sex couple’s home because of unnamed concerns about the child’s best interests. Or, as I argue here, consider North Carolina’s now-inamous legislation that (1) prohibits local governments from including sexual orientation in laws barring discrimination, and (2) requires individuals to use public restrooms according to their birth sex rather than their gender identity. The Court has ruled that this developing counter-strategy is the argument that LGBTQ equality denies equal dignity and liberty to those who are religious and do not wish to be complicit in sin. Douglas NeJaime and Reva Siegel argue that how conservatives are even using this argument to deny services to women regarding contraception, abortion, and reproductive health.

How courts around the world respond to these competing claims to equality will tangibly affect countless lives. Karl Laird argues that the scale usually tips against conscientious objects because the burden on the individual who suffers discrimination in housing, employment, public accommodations, or in the delivery of services is heavier than the burdens on the individual who cannot publicly manifest religious beliefs. But this is a relatively new frontier in equality law, and it is unclear what consensus will emerge.

As the battles over what equality means rage on, and regardless of whether equality guarantees are protected by courts or enacted through majoritarian politics, it is strategically important for minorities to be seen and heard. LGBTQ individuals who have the will and ability to come out and share their stories should continue to do so and with greater frequency and volume. Much opposition to LGBTQ equality stems from fears about others, the unknown, and difference. Unлёaded stereotypes regarding transgender individuals as sexual predators, for example, create momentum for restrictive laws about bathroom use, and laws that treat transgender identity as a mental illness. As Peter Dunne argues, perpetuate stigma and beliefs about dangerous difference. Broad stereotypes about deviant sexuality likewise buttress arguments in favour of sodomy bans; as Karl Laird writes, the Indian Supreme Court criminalised same-sex sodomy in part because of ignorance about the actual experiences of LGBTQ people.

In Obergfell, advocates illustrated through personal narratives how same-sex marriage bans harm real people, and Justice Kennedy approvingly cites those stories in the Court’s opinion. It is more difficult to ignore a group’s request for equality when that group and the issues it faces become more than abstract ideas. Achieving a robust vision of equality may ultimately require a healthy combination of smart legal advocacy, evolving legal doctrine, public education, and a universal acknowledgement of the dignity central to each individual’s humanity.

Luke A. Boso

Luke Boso is a Visiting Professor at the University of San Francisco School of Law, where he teaches Constitutional Law and Feminist Legal Theory. He earned his law degree from the University of California at Berkeley School of Law, and his undergraduate degree from the University of Pennsylvania. He researches and writes about discrimination, LGBT issues, and masculinities—particularly in the context of marginalized subgroups and intersectional identities.

**THIS EMPHASIS ON IMPACT MAY INDICATE A SHIFT IN THE COURT’S JURISPRUDENCE ABOUT EQUALITY’S MEANING.**

Proving that discriminatory intent underlies a facially neutral law is notoriously difficult. The Court’s willingness to consider the disparate impact a policy has on a particular group could give the Court a much more subjective analysis of the substantive equality that goes beyond formal equal treatment. Racial justice advocates would be a primary beneficiary of such a development because racial justice efforts have sometimes advanced on a “micro-justice” narrative framework. The Court, focused on the face of a statute or policy, was careful to explain that legislatures may enact or defend same-sex marriage bans for reasons other than animus—perhaps, for example, out of respect for constituents’ sincerely held religious beliefs. Instead, the Court focused on the effect of same-sex marriage bans on individual liberty to “define and express . . . identity” free of governmental subordination. Equal dignity may gradually mature into a legal doctrine that can dismantle governmental policies that impede other aspects of individual identity and autonomy.

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GENDER-BASED VIOLENCE

CHAPTER 8

WOMEN WHO HAVE EXPERIENCED GENDER-BASED VIOLENCE, OF COURSE, INTERACT WITH THE STATE IN A VARIETY OF WAYS, ALL OF WHICH ARE ALSO SHAPEP (OR AT LEAST VULNERABLE TO BEING SHAPED) BY GENDER STEREOTYPING AND OTHER FORMS OF GENDER-BASED DISCRIMINATION.

Women, for example, who claim to have been victims of sexual violence continue to be expected to act in accordance with expected ‘victim-like’ behaviours, and a failure to do so can result in their credibility being called into question. In her post on the Jian Ghomeshi trial in Canada, Karen Busby illustrates how expectations of ‘good’ victim behaviour may impact on the accounts given by victims in the media, which then contrast with official accounts given to police or in evidence in court, resulting in allegations that the victim witnesses lack credibility. Her post concerned post-attack contact between women and their alleged assailants, but the same pattern might be observed across a broader variety of behaviours or inter-personal engagements.

In order for allegations to result in criminal charges and trials, however, there must be appropriate law in place. This is not always the case. In their posts on rape law in Morocco and criminal laws on violence against women in Pakistan, respectively, Luigi Lonardo and Menndi Sall Murshey eloquently illustrate how the ways in which laws are framed by their terms (e.g. classifying rape as a crime against honour or morality, as opposed to against the woman herself) and case law can impact on the capacity to properly address women’s lived experiences of violence. In other cases, emerging forms of gender based violence have not yet been properly captured in law, as is the case in many countries when it comes to so-called ‘revenge porn’ (discussed in the Namibian context by Ndjodi Ndeuymena) or when women can themselves be charged with crimes relating to their physicality (e.g. by being charged with assault when their breasts touch against a law enforcement officer during a protest, as discussed by Mathias Cheung).

Of course, in many cases, gender-based violence emerges from, or is enabled by, the actions of state agents themselves. In those cases, comprehensive state responses to systemic gender-based violence (such as sexual violence during conflict, forced sterilisations by repressive regimes and similar) are required. In responding, the state must, of course, commit not only to the obligation to ensure the abuses and violations are prevented from now on, but also the obligation to effectively investigate these crimes and to provide an appropriate remedy. As illustrated by Viviana Waiman and Jupe Pablo Perez Leon Aperodo in their posts on sexual violence in Colombia and forced sterilisations in Peru, this is neither straightforward nor impossible, but it does require a strong commitment from government.

Indeed, in many ways that is the key message underpinning all of the posts reproduced in this section: that states must commit to addressing gender-based violence through law, politics, programmes, remedies and state policy. In doing so, and as illustrated by Janine Ewen in her post on sexual violence in Colombia and Viviana Waiman’s policy agenda regarding gender-based violence in Scotland, rights-aware and committed leadership is necessary.
GENDER-BASED VIOLENCE

- Violence against Women in Pakistan – Between Law and Reality
  Menaal Safi Munshey | 24th April 2015
- Addressing ‘Revenge Porn’ in Namibia
  Njodi Ndeunyema | 5th June 2015
- Keeping Abreast of Hong Kong’s ‘Breast Assault’ Case: A Legal and Feminist Critique
  Mathias Cheung | 17th August 2015
- An important step forward for victims of sexual violence in Colombia
  Viviana Waisman | 7th March 2016
- Investigating Alleged Widespread and/or Systematic Forced Sterilizations in Peru
  Juan Pablo Perez Leon Atevedo | 10th June 2015
- “It’s time for women to break the glass ceiling” FM Nicola Sturgeon Places Women and Violence at the Heart of Human Rights and Scottish Legislation
  Janine Ewen | 1st April 2015
- Trafficking of human beings at the ECtHR: Broadening the protection of women and girls through Article 14
  Teresa Fernandez Paredes and Maria Lacayo | 29th January 2016
- Spain’s Commitment to International Human Rights Law: 26 Murdered Children Isn’t Regrettable, It’s Terrifying
  Tania Sordo Ruiz | 12th August 2015
- CEDAW Inquiry into Grave Violence Against Aboriginal Women in Canada
  Megan Campbell | 24th March 2015
- The Pornography of Policing: The “Rape Bait”
  Pratiksha Baxi | 3rd August 2015
- Telling the Whole Truth: Post-Assault Contact in Sexual Violence Cases
  Karen Busby | 4th April 2016
- Rape Law in Morocco
  Luigi Lonardo | 13th November 2015
CHAPTER 9
FREEDOM OF RELIGION

Lucy Vickers
Lucy Vickers is Professor of Law at Oxford Brookes University. Her main research area is equality law and the protection of human rights within the workplace.

Although established internationally as a fundamental right, freedom of religion remains a very contested issue around the world as the posts this year attest. Contributors to the OxHRH Blog have covered a wide variety of matters related to religion, but some areas of common focus can be identified and these illustrate why courts continue to struggle to determine the proper scope of legal protection for religion. A number of contributors address the question of definition of religion, and the problematic role of courts in addressing matters of religious doctrine. The courts in all the situations reviewed would hold themselves to be religiously neutral, and would not claim competence to rule on religious issues. Nonetheless, as various of the posts show, courts often struggle to interpret the law in a religiously neutral way, and to avoid making what may turn out to be religiously infused decisions. A second concern relates to how courts should balance secular and religious interests, with a third concern relating to a particular application of the same theme, that is the matter of how to treat the wearing of religious symbols such as headscarves.

In her post, Kriti Sharma reports on the legal controversy surrounding the Jain practice Santhara (according to which some people of the Jain faith ‘fast unto death’ in order to attain salvation). In its ruling that the practice was unlawful under the criminal code which prohibits suicide, Shama notes that the High Court took upon itself to decide that Santhara was not an essential religious practice, a role that the Court’s attempt to differentiate between absolute and true neutrality seems to achieve an equilibrium between religious and other interests.

In his post, Ravi Amarnath considers two cases in which different conclusions were reached regarding the wearing of a face veil in public forums. In a case involving a citizenship ceremony, the veil could be worn so as to allow the greatest possible freedom in the religious solemnisation of citizenship, where the veil was to be worn in court the interest in avoiding any risk to the fairness of the trial prevailed. In both cases, religious interests in allowing religious attire were balanced against secular interests, with the outcome differing due to the different weights given to the secular interests in question. Jill Marshall’s post focusses on the dress codes as an aspect of identity. She demonstrates that the accommodation of religious attire can be justified on the more secular basis of dignity and identity and not just on religious terms. Such an understanding may well help in the search for an appropriate balance between religious and secular claims.

Two other posts discuss the balance to be struck between religious and secular interests in the context of headscarves. In his post, Ravi Amarnath considers two cases in which different conclusions were reached regarding the wearing of a face veil in public forums. In a case involving a citizenship ceremony, the veil could be worn so as to allow the greatest possible freedom in the religious solemnisation of citizenship, where the veil was to be worn in court the interest in avoiding any risk to the fairness of the trial prevailed. In both cases, religious interests in allowing religious attire were balanced against secular interests, with the outcome differing due to the different weights given to the secular interests in question. Jill Marshall’s post focusses on the dress codes as an aspect of identity. She demonstrates that the accommodation of religious attire can be justified on the more secular basis of dignity and identity and not just on religious terms. Such an understanding may well help in the search for an appropriate balance between religious and secular claims.

THE TENSION BETWEEN THE RELIGIOUS AND THE SECULAR IS PERHAPS SEEN MOST DIRECTLY IN RELATION TO PRAYERS IN PUBLIC MEETINGS, DISCUSSED BY RAVI AMARNATH IN HIS SECOND POST.

One point of contention is the classification by the Court of atheism as a religion. This leads to a concern that any balance struck between the religious and the secular is in effect a balance between two religions. The Court’s attempt to differentiate between absolute and true neutrality seems to add a significant layer of complexity to any debate regarding the balance between religion and the secular. Varun Kesar reports a more successful balancing undertaken by a court in Canada, regarding the teaching on beliefs and ethics in schools. He reports that the Court distinguished the requirement for the neutral presentation of information by teachers from a requirement that the teachers pretend that they themselves are neutral. This suggests that a balance can be achieved which can maintain the freedom of religious schools as far as teaching religion is concerned, whilst upholding the ability of the state to develop in young people the respect and tolerance needed in a multi-cultural society.

Beyond these matters, the blogs also covered other developments related to religion. Ayesha Malik’s post raises questions regarding how to manage the range of conflicting voices claiming to speak for Islam. Dionne Jackson Miller in her post notes the recent changes to the regulation of marijuana in Jamaica, and the special exceptions provided for religious use.

The variety of subjects reported over the year show that religion and belief continue to be contentious issues for human rights law. The contributions also show the common concerns that arise internationally as courts struggle to achieve an equilibrium between religious and other interests.
Charlotte Garden
Charlotte Garden is an associate professor at Seattle University School of Law.

Recent events around the world have highlighted a longstanding question: how should governments robustly protect rights of free speech and association, while also protecting members of minority groups from the dehumanising effects of hate speech and conduct? The sometimes-delicately balance between rights of free speech and meaningful political and social equality is key to legitimate governance, yet also easily subverted to protect entrenched majority interests. The engaging contributions that make up this chapter explore these many-faceted questions, ultimately illustrating the gulf between ideals and practice.

Two entries in this chapter discuss Pakistan’s blasphemy law, under which agricultural worker Asia Bibi was sentenced to death in 2010. This sentence—the first imposed on a Christian woman in Pakistan’s history—was based on a defamation that arose after Bibi’s co-workers refused water that she had touched, because of her religion. Both contributors—Menaal Safi Munshey, and Ayesha Malik—focus on ways to sanctioning Bibi’s sentence. Malik writes that the law under which Bibi was sentenced was imposed by the colonial British government and intended to “apply across denominations.” Yet, despite a 2014 Supreme Court ruling that the “blasphemy laws protect all religions,” Munshey describes a present-day reality in which “law enforcement agencies and the public interpret these sections as only protecting Islam.” Thus, whatever potential this law had for protecting the rights of religious minorities has been subverted on two levels: first, it was not pressed into service by the state to protect Bibi from her co-workers or fellow citizens; and second, it was then actively wielded against her. Bibi’s fate remains unknown, and both authors close their pieces with urgent calls for reform.

To what institutions might we look to protect expressive freedoms, including by protecting members of minority groups from the silencing effects of hate speech? Stephanos Stavros argues that, under recent European Court of Human Rights precedent, “the failure to prosecute hate speech can amount to a breach of the [European Convention on Human Rights].” Yet, Stavros also recognises the dangers of using criminal law to police freedom of expression, observing that it should be used only “sparingly.” Gahan Guarnieri’s entry puts a finer point on these dangers, drawing from the case of Sri Lanka. He critiques a 2015 government proposal for new hate speech laws—purportedly designed to protect Muslims from violence—as a possible staking horse to allow a crackdown on government critics.

Relatedly, a set of contributions focused on free speech in India surface questions about how courts might interpret statutory law to protect free expression, while still allowing government to advance other interests. Gautam Bhatia praises the Indian Supreme Court for its decision in Shreya Singhal v Union of India, which struck down parts of India’s Information Technology Act (ITA) on free speech grounds. Using language and concepts that will be very familiar to American readers (among others), the Court deemed “annoying and inconvenient.” In addition to lucidly explaining the decision, Bhatia notes that one result of the Court’s decision was enhanced procedural protections for web content creators. Besides facilitating meaningful review of ITA website-blocking orders, perhaps the protections will also deter arbitrary enforcement by obligating officials to state regulations for their blocking orders. Claire Dyerman and Andrew Wheelhouse also praise this decision, and suggest that it provides a useful path forward for UK courts grappling with the application of the Communications Act 2003.

In another entry, Vrinda Bhandari called for the Supreme Court of India to follow reasoning reminiscent to that of Singhal in Swamy v Union of India, which had not been decided at the time of her posting. Unfortunately, the Court did not heed her call, instead upholding India’s criminal defamation law. The decision has come under significant criticism, including on grounds that it too easily permits the powerful to invoke the power of the state by calling up the protection of their critics and detractors. Finally, Devashri Mukhopadhyay identifies a similar problem with the enforcement of India’s sedition law, which applies to speech that “excites disaffection” with the government. Mukhopadhyay observes that, even with limiting construction imposed by the Supreme Court, these terms leave substantial room for police interpretation, and therefore risk arbitrary or abusive enforcement.

Karl Laird explores a final wrinkle in the free speech/hate speech puzzle, involving the government’s own speech. It is virtually a given that governments have the right to control their own speech, and at least a moral obligation to refrain from hate speech. But where does private speech end, and government speech begin? Laird’s entry discusses a United States Supreme Court case, Walker v TX Division, Sons of Confederate Veterans, involving a challenge to the Texas Department of Motor Vehicles’s refusal to issue a license plate featuring a Confederate flag (the Confederate flag is a symbol of white supremacy). The Supreme Court had not decided the case when Laird wrote, but one month later it held that the license plate qualified as government speech, meaning Texas was free to reject the Confederate flag plate. To be clear, that Court did not hold that Texas was obligated to do so; moreover, the decision means that Texas would also be free to reject, say, a “Black Lives Matter” plate design. Thus, the Court cleared the way for elected and appointed officials to use their own judgment, subject to the checks of the political process.

Taken together, the pieces in this chapter paint a decidedly mixed picture of courts’ and other institutions’ abilities and willingness to ensure the even-handed application of limits on free expression.

"While each country’s case is different, the fascinating pieces in this chapter provide a useful cautionary tale against locating in any single institution responsibility for protecting free expression and enforcing anti-hate speech laws and norms."
Another first: Reparations Awarded to Victims at the African Court on Human and Peoples’ Rights
Oliver Windridge | 13th August 2015

Subramaniam Swamy v Union of India: Criminal Defamation and the Countours of Free Speech
Vrinda Bhandari | 20th August 2015

Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity
Gehan Gunatilleke | 11th January 2016

Pakistan: A Paradoxical Divinity
Ayesha Malik | 2nd February 2016

Papa Don’t Preach (You May be Found Guilty of Hate Speech)
Claire Overman and Andrew Wheelhouse | 22nd March 2016

Free Speech Under the Indian Information Technology Act: The Supreme Court’s Recent Judgment
Gautam Bhatia | 27th March 2015

Free Speech or Hate Speech? License Plates Drive SCOTUS to a Difficult Place
Karl Laird | 2nd April 2015

The ‘Human Rights Human Wrongs’ Exhibition at the Photographers’ Gallery: Showcasing the Power and Pitfalls of Photography in Human Rights Struggles
Max Harris | 6th April 2015

A Duty to Prosecute Hate Speech under the European Convention on Human Rights?
Stephanos Stavros | 9th April 2015

Blasphemy Laws and Human Rights in Pakistan
Menaal Safi Munshey | 16th April 2015

Criminalising Dissent in Indian University Spaces: Implications of the JNU Incident on Free Speech and Sedition Laws
Devadutt Mukhopadhyay | 20th April 2016
This is in contrast, it seems, with the failure of the political process in Pakistan to produce legislation in response to widespread allegations of child abuse revealed in the blog by Hiba Thobani.

**THESE CHILDREN DO NOT SUFFER THE OPPROBRIUM OFTEN SUFFERED BY JUVENILE OFFENDERS, AND PROTECTING THEM DOES NOT EVEN INVOLVE TREATING THEM MORE FAVOURABLY THAN ADULTS: THEY NEED ONLY THE PROTECTION THE LAW OSTENSIBLY GIVES EVERYONE AGAINST VIOLENCE AND ASSAULT.**

But could not the UNCRC be used by the courts to found a duty on state authorities to enact and implement such laws, despite the strong adult interests at stake that make enforcement difficult?

But if this would be difficult in Pakistan, it seems that it would be much more difficult in securing reparations for children affected by the long-running conflict in Colombia, as described in the post by Elena Buttì. It is very hard for the rhetoric of rights, which is meant to have practical consequences, to achieve such consequences in the absence of effective institutional structures. That should not prevent providing benefits, in this case some form of reparations irrespective of the framework, but this is bound to be patchy and inadequate. Only stability and institutional reconstruction over a period of stability can see the proper safeguarding of children’s rights.

The UNCRC played a large part in the judicial reasoning in the UK case of SG [2015] UKSC 16, the subject of Darryl Hutcheon’s blog. The Supreme Court considered the legality of the cap imposed on the totality of benefits that could be received by claimants in non-working households, irrespective of the number of children. The ground for challenge was its discriminatory effect between men and women, which the majority held to be justifiable.

A majority also held that the UNCRC (in particular, article 3) could be applied by the courts, either as an integral part of the jurisprudence of the European Convention, or even, according to Lord Kerr, in its own right. However only Lord Kerr and Lady Hale (both dissenting) were prepared to hold that article 3 was in fact relevant to the government’s decision, most of the justices thinking that it was not relevant to the issue of discrimination.

But even if relevant, was Article 3 breached in SG? This raises the question of how much weight is to be given to children’s interests when welfare policy is implemented. Should one expect that when such policies affect children even indirectly, they must always aim to achieve the very best outcomes for children, unless outweighed by strong competing interests, or is it enough in such cases that the policy makers have simply paid “sufficient” attention to the children’s interests? Lord Hughes seemed inclined to the latter view (Paras. 152-3) and concluded that the children’s interests had been sufficiently deliberated. But the dissenters were clear that “to deprive (children) of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life” (Lady Hale at para 226) failed the test. It is perhaps important that this was no mere side-effect of the policy. The policy comprised removal of benefits formerly specifically intended for those children, and could therefore be characterised as being directly, and not merely indirectly, about those children. In the dissenters’ view, the harm to those interests was not outweighed by the broad policy motivations of the government. It would have been interesting to see how the government’s reaction had that been the majority opinion. It would probably not have made it any better disposed towards international human rights norms.
The International Covenant on Economic, Social and Cultural Rights (ICESCR) – separated at birth in 1966 from its twin Covenant, the International Covenant on Civil and Political Rights (ICCPR), as a casualty of Cold War ideological differences – now enjoys widespread ratification, with 164 state parties. Parties to the Covenant undertake an obligation under art 2 to achieve the realisation of the rights that it guarantees. General Comment 9, dealing with the domestic application of the Covenant, the Committee on Economic, Social and Cultural Rights, emphasized the obligation of the state parties to give effect to its provisions in their domestic law, particularly by way of constitutional or legislative recognition and by its application by domestic courts. A key theme emerging from the year’s pieces on socio-economic rights is successes and failures in the domestication of socio-economic rights.

Duncan Okubasu observes the trend towards the guaranteeing of socio-economic rights in newly minted constitutions, especially in Africa. The South African Constitution adopted in 1996 may have been the initial example, but Kenya, Angola, Madagascar, Zambia and Zimbabwe have since entrenched these entitlements. Okubasu, however, contrasts formal recognition of socio-economic rights with material change in conditions. He points to the powerful example of Tanzania under its recently elected president, Dr Magufuli. Although Tanzania does not formally recognise extensive socio-economic rights, the government of President Magufuli has become renowned for taking unprecedented decisions to prioritise the basic needs of Tanzania’s people, for example redirecting funds earmarked for the state dinner of the recent president, Dr Magufuli, to buy hospital beds. Okubasu thus illustrates that formal recognition of rights in the text of a constitution may not be enough to result in material change and that such change is possible even without formal recognition of rights. However, the goal of all states ought to be to achieve both formal legal recognition of socio-economic rights and their effective realisation in practice.

A separate post by Russell Solomon discussing Australia’s provision for public health care provides another example of Okubasu’s contrast between a textual guarantee of a right and the actual provision of a public good. As Solomon observes, Australia has a generally high standard of health care, but the level of expenditure remains contentious and much of Australia’s health policy is not referenced to its obligations under the ICESCR, which Australia has ratified.

Margot Young, in a comment on the British Columbia Supreme Court decision in Abbottford (City) v Shantz, identifies an area of Canadian socio-economic rights law that is still lagging behind – the right to housing. Although the case resulted in a successful challenge to bylaws prohibiting the erection of outdoor shelters for homeless people, the court did not decide it on the basis of a right to housing, but relied on the guarantee in art 7 of the Canadian Charter to life, liberty and security of the person. Thus, despite persistent housing challenges, Canadian courts have not given judicial recognition to any positive obligation on the state to provide housing.

A happier account emerges from a series of posts on successful litigation based on the right to education in South Africa. South Africa’s Constitution provides for a justiciable right to a basic education. Importantly, the right is not limited by the availability of resources and is “immediately realisable”, rather than being subject to progressive realisation. A series of cases discussed in 2015 extended the content of the right and resulted in orders requiring the provision of various educational inputs. Victoria Miyandazi observes, Australia has a generally high standard of health care, but the level of expenditure remains contentious and much of Australia’s health policy is not referenced to its obligations under the ICESCR, which Australia has ratified.

The ICESCR envisions that all state parties will give similar effect to the full range of rights that it guarantees in domestic law, policy and practice. The developments in giving effect to the right to education in South Africa therefore provide an example of what is possible when a socio-economic right guaranteed under international human rights law is effectively domesticated into a national constitution and enforced by domestic courts.

The Dr. Magufuli style: Why Apt Priorities Should Follow Constitutional Formulations in Sub-Saharan Africa

Duncan Okubasu Munabi | 12th February 2016

Socio-Economic Rights in Sub-Saharan Africa: Should Follow Constitutional Formulations

Margot Young | 17th December 2015

South African Supreme Court of Appeal Set to Hear the Limpopo Textbooks Case

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The developments in giving effect to the right to education in South Africa therefore provide an example of what is possible when a socio-economic right guaranteed under international human rights law is effectively domesticated into a national constitution and enforced by domestic courts.
SOCIO ECONOMIC RIGHTS

BLOG POSTS

Abbotsford v Shantz: Housing Rights and the Canadian Constitution
Margot Young | 17th December 2015

Forced Evictions and Demolition of Informal Settlements in Kenya
Victoria Miyandazi | 19th November 2015

Long Walk to Education – Scholar Transport Now an Element of the Right to Basic Education in South Africa
Lucy Maxwell | 18th August 2015

The Right to Education post-2015
Shuma Gandzi | 9th July 2015

Fighting for the Right to Education in South Africa
Flora Ramsay and Tunrayo Martins | 2nd July 2015

“The Dr. Magufuli style”: Why Apt Priorities Should Follow Constitutional Formulations of Socio-Economic Rights in Sub-Saharan Africa
Duncan Okubasu Munabi | 12th February 2016

Recent Developments in the Australian Health Policy Further Undermine the Right to Health
Russell Solomon | 4th February 2016

Textbook Provision for Learners in South Africa: Supreme Court of Appeal Judgment in the BEFA Case
Faranaaz Veriava | 25th January 2016

Litigating the Right to Education
Rupert Skilbeck | 18th November 2015

South African Supreme Court of Appeal Set to Hear the Limpopo Textbooks Case
Faranaaz Veriava | 16th November 2015
Repression, Exploitation, Disappointment. These are the words that describe the story of labour rights this year, and in years past.

Repression. Freedom of association’s history is often a story of repression. This certainly is true of the United Kingdom and the United States, where the law has cyclically repressed unions through creative use of criminal conspiracy laws, civil tort laws, and judicial injunctions. At various points, lawmakers immunised unions from these laws, only for clever lawyers to use new laws to repress union activities. Other than for a brief period in the 1970s, British unions won the statutory right of recognition only sixteen years ago. Unions in the US won that right much earlier.

Our blog posts suggest that repression lurks about the world of rights. Last year’s posts reveal several examples of this phenomenon, one from each government branch. In USDAW v Ethel Austin, the Court of Justice of the EU (CJEU) held, in the context of a multi-firm enterprise, that to trigger employee protection under the collective redundancies directive (98/59/EC), an employer must layoff a single mass termination decision, then spread the layoffs across several firms to evade the directive’s requirements. The CJEU thereby effectively reversed the English court decision, holding that a multi-firm enterprise could not make a single mass termination decision, then spread the layoffs across several firms to evade the directive’s requirements.

Michael Ford explains that this decision allows uneven redundancies decisions to trigger employee protection under the collective redundancies directive (98/59/EC), an employer must layoff employees “for a real and substantial reason.” Other than for a brief period in the 1970s, British unions won the statutory right of recognition only sixteen years ago. Unions in the US won that right much earlier.

Three posts discuss exploitation in relatively poor countries. Fabiana Di Lorenzo’s post draws attention to the excesses of child labour in India, where changes to the Child Labour Act make it permissible to employ children below the age of 14 in selected non-hazardous family industries. Relaxed labour standards are a worrisome development in a country where the worst forms of child labour are ubiquitous. Fabian Dimanche’s post discusses Nyamande v Zuva Petroleum SC 43/15, where the Zimbabwe Supreme Court held that unfair dismissal procedures are not triggered where employers cancel employment contracts “fail[s] to offer any real [job] protection” to workers because those protected, employees, are narrowly defined; employers can circumvent the protections “by starving zero hours employees of remunerated hours of work rather than formally dismissing them”; and those harmed are unlikely to litigate “as the fee system disproportionately discourag[e] the low-value actions associated with zero-hours workers’ claims.” In a follow-up post, Brickhill distilled the Report to several significant findings, much of which debunk the police story of self-defence. In happy contrast, Pamela Nuttell reported that New Zealand’s Parliament rejected ZHC.

Additional blogs deal with exploitation associated with zero-hours contracts (ZHC). Mark Freedland and Jeremiah Prast commented that the 2015 regulations of these contracts “fail[s] to offer any real [job] protection” to workers because those protected, employees, are narrowly defined; employers can circumvent the protections “by starving zero hours employees of remunerated hours of work rather than formally dismissing them”; and those harmed are unlikely to litigate “as the fee system disproportionately discourag[e] the low-value actions associated with zero-hours workers’ claims.” In a follow-up post, Freedland and Prast debunk the race-to-the-bottom mentality shared by ZHC proponents. In happy contrast, Pamela Nuttell reported that New Zealand’s Parliament rejected ZHC.

Disappointment. The Labour Rights posts reveal a world where properly enforced international labour standards would substantially promote worker voice and improve employment conditions. The EU and the ECHR have served those functions for the UK since 1973. Alan Bogg praises the Working Time Directive to show the importance of these standards.

Since Brexit, British workers now face a future without the security of the EU employment directives, and possibly without the ECHR. As Sandra Fredman explains, although it is unlikely that Parliament would outright repeal protective legislation, British workers now face the real risk that “rights will be removed by stealth.” Michael Ford demonstrates the extent to which British workers’ rights are vulnerable to labour market deregulation. Brian Christopher Jones shows that further action beyond Brexit would be needed to remove other rights from British workers. Nicola Countouris predicts that Brexit “would (probably) result in a higher level of protection for [EU, not British] casual workers” because it would remove UK opposition to progressive legislation on EU law and the extent to which those rights are vulnerable to labour market deregulation.

REPRESSION, EXPLOITATION, DISAPPOINTMENT. THESE WORDS DESCRIBE LABOUR’S PAST AND PRESENT STORY. CAN WE STOP THEM FROM DESCRIBING OUR FUTURE?
LABOUR RIGHTS

BLOG POSTS

Solidarity Not Separation: The Case for Continued Interaction Between UK and EU Law to Further Equal Rights
Sandra Fredman | 12th May 2016

Brexit, Rights, and the (Potential) Scrapping of the HRA
Brian Christopher Jones | 18th March 2016

Brexit and Worker Rights
Michael Ford | 24th May 2016

Working time and Brexit: Bad Karma?
Alan Bogg | 19th May 2016

Brexit and the Rights of Casual Workers – Tightrope Walking Without a Safety Net
Nicola Countouris | 16th May 2016

Brexit

BREXIT
Daniel Leader

Daniel Leader is a barrister and partner at Leigh Day solicitors. His principal areas of practice are international human rights and environmental law with a particular focus on corporate accountability and business and human rights.

For the past decade policy makers and international lawyers have been grappling with a complex question: in principle can international human rights law apply to corporations as non-state actors and, if so, how can it apply? The debate has grown in importance since increasingly, many corporations operate in developing countries with weak or non-existent regulatory regimes and can act with relative impunity. As a result, communities and individuals in many developing countries are subjected to widespread pollution, human rights abuses and exploiting labour practices at the hands of multinational businesses and are generally powerless to seek redress. The posts in this year’s report provide vivid examples of this “corporate accountability gap”.

In 2005, the United Nations appointed Professor John Ruggie to consider how the accountability gap could be narrowed. The result was the UN Guiding Principles on Business and Human Rights (“the Guiding Principles”) which proposed a cogent policy framework around the “three pillars”: (i) the State duty to protect human rights; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy for whose rights have been violated. The “Protect, Respect and Remedy” Framework was unanimously endorsed by the UN Human Rights Council in 2011.

The Guiding Principles postulate a legal duty upon states to protect against abuses by businesses, but they fall short of proposing that international law imposes binding obligations on corporations themselves. The Inter-American Court recently grappled with these issues judgment in Kalina and Lokono Peoples v Suriname, as reported by Nicolas Carrió-Santellán. The Court has found that multinational corporations can commit human rights violations and that there are legal precedents from the English Courts which similarly held that a parent company can be liable for the acts and omissions of a subsidiary. If the CPP is struck down it will be unclear how the US will meet its international obligations.

By contrast, in the United States, progress is somewhat slower. In his post, Patrick McGinley reports that President Obama’s “Clean Power Plan” (CPP) has set the United States first ever nationwide standards for limiting carbon pollution as part of their commitment under the UN Framework Convention on Climate Change. However, the CPP rule is now the subject of litigation and the Supreme Court has stayed the rule until the litigation has been resolved. If the CPP is struck down it will be unclear how the US will meet it international obligations.

Benedict Coyne reports that in Australia indigenous groups are challenging a proposed coalmine on their traditional lands that could produce 4.7 billion tonnes of greenhouse gas emission per year, equivalent to three times Australia’s annual emissions target. The claimants are also arguing on the basis of indigenous rights and have appealed to the UN Special Rapporteur on the rights of indigenous peoples.

Overall, these posts illustrate the growing importance of human rights to business in multiple areas of corporate activity. The Guiding Principles have helped develop a conceptual framework for business and human rights and tentative progress is being made with regard to regulating some of the most egregious aspects of corporate misconduct. However, progress is slow and access to remedy remains non-existent. Much remains to be done if the corporate accountability gap is to be significantly narrowed over the next decade.

The European Union is now critical to ensure the scheme does not further lose credibility.
Courts and Climate Change: Breakthrough for Judicial Activism in the Netherlands
Anneloes Hoff | 17th October 2015

Indigenous Rights Litigation meets Global Climate Change in Queensland Australia
Benedict Coyne | 8th January 2016

Nigerian Farmers Can Sue Shell in Dutch Court: Precedent for Transnational Cases against Multinationals
Anneloes Hoff | 26th January 2016

Understanding One of the Worst Environmental Disasters in Brazil’s History
Lucia Berro and Carolina Leao | 27th January 2016

A Tale of Two Treaties: The Clean Power Plan
Patrick McGinley | 23rd March 2016

Appalachia in Crisis: A Human Rights Approach to Environmental Justice in the U.S.
Nicholas Stump | 18th April 2016

Bloody Diamonds and the Sordid "Trans-Atlantic Affair": Where to From Here?
Nasren Sheikh-Peremarom | 26th October 2015

Rerouting From the Treaty Road Most Travelled
Bellinda Chinowawa | 9th November 2015

Jade and Conflict in Myanmar: Regional Regulatory Instruments, Regulatory Gaps and Future Implications for Ethical Business
Fabiana Di Lorenzo | 9th January 2016

The Folk Devil Wears Prada? Reflections on State Regulation of the Fashion Industry
Rory Kelly | 14th January 2016

Part I: The intersection of Business and Human Rights at the Inter-American Court of Human Rights
Nicolas Casillas-Santarelli | 11th March 2016

Part II: The intersection of Business and Human Rights at the Inter-American Court of Human Rights
Nicolas Casillas-Santarelli | 11th March 2016

The Seafood Industry and Its Sustainability Challenge – Why the Government of Thailand and Global Retailers Will Work Towards Sustainability and Human Rights
Fabiana Di Lorenzo | 31st July 2015
Anne Marie Lofaso

Anne Lofaso is the Arthur B Hodges Professor of Law at West Virginia University. She is a Research Associate of the OXHRH and was recently the Keesey Fellow at Wadham College and a visiting scholar at the Oxford Law Faculty.

This year, the OXHRH Blog included posts on the human rights legacies of four lawyers: Bram Fischer (1908 – 1975); Justice Thembile Skweyiya (1939 – 2015); Professor Sir Bob Hepple (1935 – 2015); and Justice Antonin Scalia (1936 – 2016). All lived through racialised human rights struggles in their home countries and had a substantial impact on the law. Whereas Fischer, Justice Skweyiya, and Professor Hepple worked to expand human rights law protections in their home country of South Africa and abroad, Justice Scalia worked against such rights, with a few notable exceptions.

Hepple served as legal counsel for Nelson Mandela in 1963. The following year, he was arrested, along with Mandela and other leaders of the African National Congress (ANC), at Liliesleaf Farm, Rivonia. Fischer led the legal team that represented Mandela in the Rivonia trials. Hepple, who had been held in ninety-day detention without trial, fled the country for England, where he lived, practiced and taught law for the next half-century. Although not involved in Rivonia, Skweyiya too dedicated himself to representing numerous activists in the political trials of the 1980s.

In contrast with Fischer, who was imprisoned for his views; Hepple, who was exiled for his views; and Skweyiya, who was segregated for his skin colour, Scalia lived a charmed life. He grew up in the multi-ethnic neighborhoods of Queens, NY. His Italian immigrant father served as a professor at Brooklyn College, a respectable university that educated many Italian and Jewish immigrants at that time. His mother, a first-generation Italian-American, worked as an elementary school teacher. Scalia received a rigorous Jesuit education in Manhattan before studying history at Georgetown, graduating first in his class. He read law at Harvard, where he met his wife with whom he had nine children, before working for Jones, Day in Cleveland – a well-established firm with nineteenth-century roots. Scalia’s formative training then was completed by 1960 – before the Civil Rights movement, before Title VII was enacted, indeed, before any human rights law was passed – save the National Labor Relations Act.

Fischer, Skweyiya, and Hepple worked to make life better for the least fortunate in South Africa. As the posts in this chapter explain, Fischer “rejected Afrikaner nationalism”, “renounced white supremacy”, and “threw himself into the struggle for a non-racial, democratic South Africa”, thereby “casting[ing] his lot with the oppressed and the dispossessed.” Skweyiya dedicated his legal career to the public interest before being elevated to the bench; “[f]or a judge, his voice blended a consistent concern for human rights with a pragmatic interest in how the law affected people and communities”, showing a particular interest in children’s rights. Additionally, “his commitment to public service was unfailing – as Chair of the Skweyiya Commission, as Chancellor of the University of Fort Hare, and finally as Inspector of Prisons.” Hepple remains a standout role model for legal academics. While producing seminal scholarship in international and comparative labour law, he continued to practice law to effect change in the UK and South Africa. He was integral in drafting and championing the UK’s Equality Act, drafting a labour code for Namibia in the early 1990s, and deviating the Commission for Conciliation, Mediation and Arbitration in South Africa, to name just a few of his accomplishments.

As radical and anti-establishment as Fischer, Skweyiya, and Hepple were, Scalia was conservative. Unlike Fischer, who eschewed his privileged roots, Scalia embraced the establishment. In 1972, President Richard Nixon appointed him General Counsel for the Office of Legal Counsel. While at OLC, in 1976, he argued his only case before the U.S. Supreme Court in the United States v. One Penny, where he helped shape the Cable TV industry: two structural legal protections for minority voters. Ruthann Robson reminds us that Scalia “was openly hostile to women’s equality.” Jennifer D. Oliva reminds us that Scalia believed that the Constitution did not prohibit discrimination because of sex. Luke Bosio reminds us that Scalia equated “same-sex sexual intimacy with ‘bigamy, adultery, adult incest, bestiality, and obscenity.’” Joshua Weisbart reminds us that Scalia believed that “minority students with inferior academic credentials may be better off at ‘a less advanced’ school, a slower-track school where they do well.” Andrea McArdle reminds us that Scalia’s record on housing rights is thin and “narrow.” In my own post, I remind us that Scalia infamously quipped that “a ‘smart’ undocumented worker would simply ‘sit home’, ‘eat chocolates’, and collect ‘back pay’.” Finally, Valerie Blake reminds us that Scalia was willing to “turn a blind eye to the wider human matters” when it came to healthcare.

Like Fischer, Skweyiya, and Hepple, Scalia’s moment to impact real change came in the 1980s when President Ronald Reagan appointed him first to the United States Court of Appeals for the District of Columbia Circuit and then to the United States Supreme Court, where he remained for nearly thirty years until his death on 13 February 2016.

The posts, eleven in all, tell the story of a man whose privileged life did little to create empathy for those who have not. Valeria Beatty reminds us of Scalia’s chilling sentiments for those falsely accused: “This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.” Atiba Ellis reminds us that Scalia’s empathy extended to about the end of his own nose.

Scalia’s human rights record is not uniformly incorrigible. In his two-part blog, John Taylor showed that Scalia was often highly protective of religious rights. Regarding the Free Exercise Clause, Scalabroadly protected religious exercise.” Regarding the Establishment Clause, Scalia tended to narrow its reach to permit greater free exercise – a good or bad course of action depending on your point of view. These cases suggest that Scalia’s empathy extended to about the end of his own nose.

The first three men had a great deal in common. All were South African lawyers distinguished for their anti-apartheid activism. The first three men had a great deal in common. All were South African lawyers distinguished for their anti-apartheid activism.
The world is undergoing various changes to which human rights also need to adapt. Globalisation, rising inequality, austerity policies, and the increasing influence of non-state actors have challenged the well-being of future generations to meet their own needs. The Act aims to strengthen existing governance arrangements and reports.

The first of my own contributions to the chapter considers the relationship between human rights and the Sustainable Development Goals (SDGs). The long-awaited new development agenda is more firmly tied to the human rights framework than its predecessor, the Millennium Development Goals (MDGs). The new agenda is explicitly grounded in the Universal Declaration of Human Rights (UDHR) and international human rights treaties, and it is formally acknowledged that the SDGs also seek to realise the human rights of all. Yet, challenges still remain. As the NGOs were major players in efforts to develop the Ruggie Principles (human rights principles for businesses) and that they continue to play a central role in promoting corporations’ compliance with human rights, NGOs have not, however, addressed the absence of a similar body of soft law applicable to NGOs. In his post Schimmel highlights the need for an independent framework and monitoring system from the UN to establish soft law that sets out minimum standards of the moral and social responsibilities of NGOs. Matt Edbrooke’s post also focuses on non-state actors and their role in enforcing human rights violations. He concludes, however, that the UN does not have direct domestic legal implications to the policy, it nevertheless raises questions about its compatibility with human rights.

Marc Limon, Nazilia Ghanea and Hilary Power discuss the history of the process and latest developments of combating religious intolerance in their post. They conclude that although the need for a common and unified international response to address religious intolerance has never been greater, the political processes at the UN are still very much stagnant. Gosia Pearson’s contribution on the European Commission’s Action Plan on Human Rights and Democracy concludes the chapter. The Action Plan highlights – like its predecessor – the EU’s obligation to promote human rights and democracy, the need to safeguard a coherent human rights approach to all EU policies, and to advance the human rights agenda in bilateral and multilateral relations. The Action Plan also sets new strategic priorities that respond to the most pressing human rights challenges posed by 21st century life. Plenty of work remains to revisit the existing framework, as it should be adaptable, and its final form ultimately depends on what we make of it.
States are Bound to Consider the UN Human Rights Committee’s Views in Good Faith
Nikolaos Sitaropoulos | 11th March 2015

The Benefits Cap and the Enforcement of Unincorporated Human Rights Treaties
Paul Scott | 31st March 2015

UN Strategy to Combat Religious Intolerance, Discrimination and Violence: Is It Fit for Purpose?
Marc Limon, Nazila Ghanea and Hilary Power | 10th March 2015

New EU Human Rights and Democracy Action Plan – What Changes Does it Bring?
Gosia Pearson | 8th May 2015

Sustainable Development Goals: A Beacon of Light or Another Stumble in Global Governance?
Jaakko Kuosmanen | 26th September 2015

Taking the Needs of Future Generations into Account: the Case of Wales
Jaakko Kuosmanen | 20th May 2015

Human Rights Advisory Panel urges the UN to compensate Roma, Ashkali and Egyptian families for lead poisoning in IDP camps
Louise Arimatsu | 22nd April 2016

The International Human Rights Law
Responsibilities of NGOs
Noam Schimmel | 20th March 2015

Enforcing a ‘Universal’ Declaration: UN Efforts to hold Non-State Actors Accountable for Human Rights
Matt Edbrooke | 20th July 2015
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