

Oxford Human Rights Hub
A global perspective on human rights

Global Perspectives on Human Rights: Oxford Human Rights Hub Blog (3rd edition)

Edited by Richard Martin, Seham Areff and Victoria Miyandazi

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Message from the OxHRH Director



The past year has seen the OxHRBlog 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 2016 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 colour and texture, 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 social media networks enjoy more than 8,000 followers on Twitter and almost 4,000 on Facebook. With our dedicated editorial team, talented contributors, supportive funders and upgraded website, the Blog is now well-recognised as an extensive, quality resource for those conducting comparative human rights research and teaching, as well as legal practice and policy work.

This year's anthology includes 280 blogs, written by 236 contributors from 37 countries. We cover 59 jurisdictions. Our themes range from access to justice and constitutions, to conflict and security, criminal justice,

business and environment, and socio-economic rights. We cover migration and asylum, religion, freedom of speech, media, children's rights, labour rights, gender based violence and equality and non-discrimination. We showcase our special series of expert posts on the refugee crisis in Europe, the legacies of Professor Sir Bob Hepple and Justice Antonin Scalia, and the impact of Brexit on labour rights. Each chapter is prefaced with an analysis by a leading expert in the field, highlighting the thematic connections and contextualising their significance.

As ever, our blogs are characterised by their consistently high quality. Our skilful editors carefully select, review and edit each contribution to ensure the highest scholarly standards of analysis of human rights law. The strict limit of 700 words means that authors must focus on refining their arguments and making their points quickly and incisively. Particularly important to us has been the accessibility of the OxHRH Blog for audiences with their own local, national and international perspectives, equipped with varying interests and expertise. It has also been a very democratic space. Our contributors range from the most senior in the field – professors, senior counsel and judges, UN special rapporteurs – to those at the beginning of their careers, including graduate students.

This year's Anthology is novel in its layout. As usual, all Blog post titles, authors and dates of publication are collected and displayed in each chapter. But this year, readers who wish to read a particular post in full are directed, by hyperlinks, to the post on our newly upgraded OxHRH website. In this way, we hope to ensure the Anthology can easily be downloaded, 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 into chapters will also encourage you to bounce freely 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, this year's OxHRH editorial team has done another great job in seizing the opportunity that the Anthology provides. Particular thanks go to our very talented managing editor, Richard Martin, who combines his 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 Areff, 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 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.

Considerable thanks and appreciation must also be expressed to the editorial team involved in the Blog and its activities over the course of the last year: Laura Hilly (former Deputy Director, Managing Editor 2012-2015), who has been so central to the vision and success of the OxHRH since its inception, Richard Martin (Managing Editor 2015-2016), Kira Allmann (Communications Manager, 2015), Heather McRobie (Editor, 2015), Arushi Garg (Editor, 2015), Victoria Miyandazi (Editor, 2015-16) and Seham Areff (Editor, 2015-16). We have been very lucky to have Professor Anne Lofaso join us as an OxHRH Associate. My particularly warm thanks also go to the rest of our OxHRH team, Deputy Director Meghan Campbell and our Administrator Zoe Davis Heaney.

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 claim 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 (Sebastian Ko) and South East Asia (Marija Jovanovic), South Africa (Piet Olivier) and East Africa (Duncan Okubasu), India (Gaurav Mukherjee), Canada (Ravi Amarnath) and Ireland (Eilis O'Keeffe).

We owe an enormous amount to Gullan & Gullan, the South African brand-based communication agency, and 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 too 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 to you the third edition of the Oxford Human Rights Hub's 'Global Perspectives on Human Rights'.

*Sandra Fredman
Rhodes Professor of Law, Oxford University
Director of the Oxford Human Rights Hub*

OXHRH EDITORIAL
TEAM 2014 – 2015

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Laura Hilly (2012 – 2015)

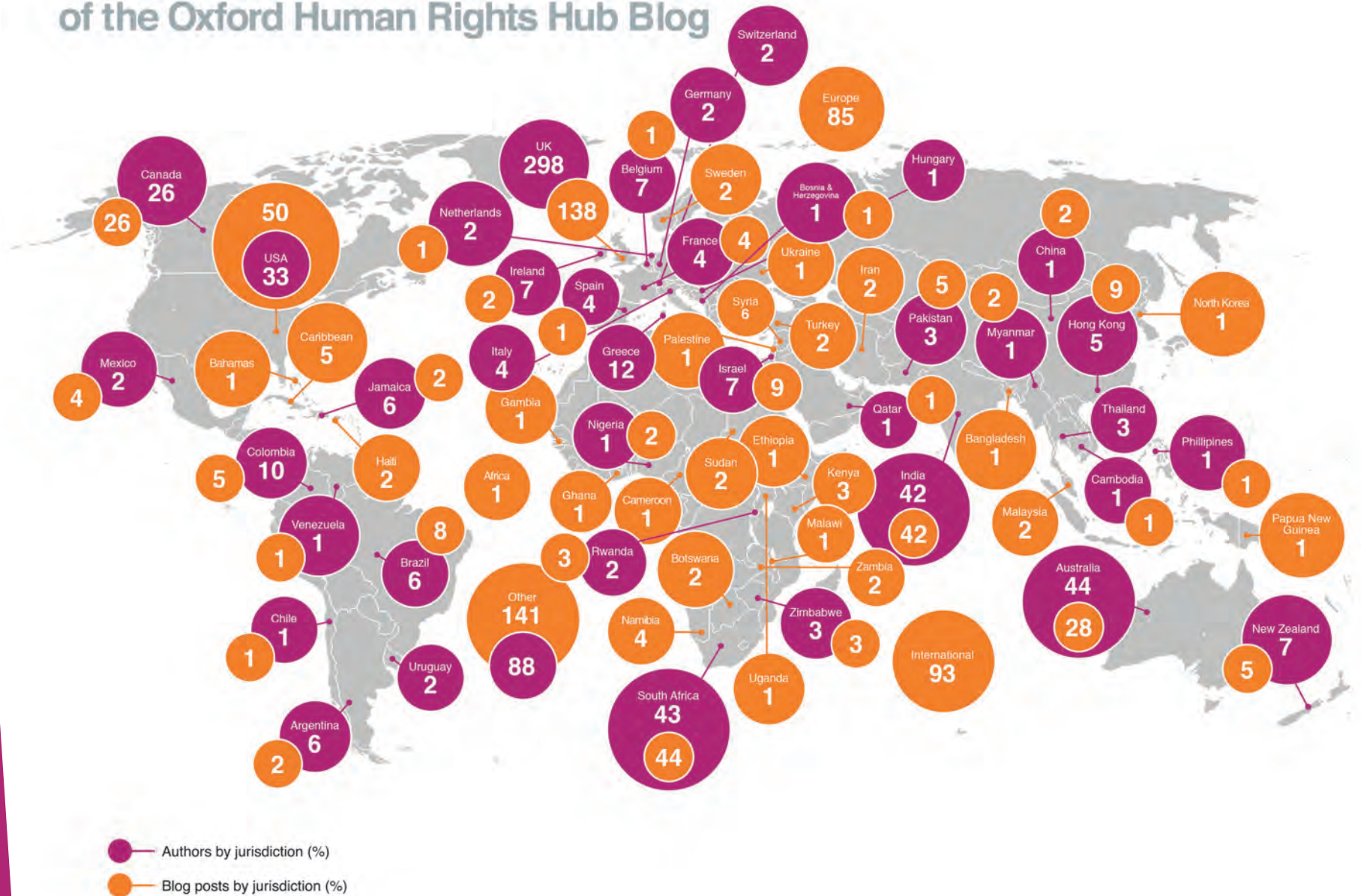
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Seham Areff (2015-2016)
Richard Martin (2015)
Arushi Garg (2015)
Heather McRobie (2015)

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- Thiago Amparo (Brazil)
- C. Ignacio de Casas (Latin America)
- Sebastian Ko (East Asia)
- Marija Jovanovic (Balkans, South East Asia)
- Piet Olivier (South Africa)
- Gaurav Mukherjee (India)
- Duncan Okubasu (East Africa)
- Ravi Amarnath (Canada)
- Eilis O'Keeffe (Ireland)

Global reach of the Oxford Human Rights Hub Blog



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 tirades 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, deeply disturbing accounts of systemic abuse of children by staff at Australia's off-shore detention camps for asylum 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 few, admittedly Western, examples hint at some of the immediate challenges that those of us committed to human rights law research, practice and advocacy face in making our work relevant and impactful beyond lecture halls, courts or clinics. That is to say, there is a pressing need to continue to convince wider audiences – critics, sceptics, those who are apathetic – that evidenced arguments and rights-respecting policies do matter. While institutional and professional demands often require 'experts' to speak primarily to their academic peers in law reviews, conference papers and book chapters, in the world of fast-paced, online resources, the opportunity to engage in the wider dissemination and explanation of our work has never been greater. The OxHRH Blog was born out of a belief that there was a need, and appetite, for a dynamic, accessible forum for those keen to share the latest developments in human rights law wherever in the world they were taking place, with a public audience. Rooted in legal analysis, and reaching across the world through our contributors, readers and the topics being discussed, the Blog has now proven to be a space which is valued for its consistently high quality entries from many jurisdictions.

The same interest in, and commitment to, human rights issues that fostered the creation and growth of the Blog has encouraged us to produce this third edition of the OxHRH anthology, *Global Perspectives on Human Rights*. It showcases 280 original posts contributed to the OxHRH Blog from March 2015 to May 2016, structured around 16 central topics which form the chapters. Building on the success of earlier versions of the anthology published in

2014 and 2015, this year's edition remains consistent with our original keenness for it to be something more than just a collection of posts. It is an extension of the OxHRH's aim to make connections between developing themes and trends in human rights law as they emerge on an eclectic global stage and to foster accessible and informed debate among a range of audiences. Our ambition has been to offer our readers and contributors, as well as those who are new to the OxHRH Blog, another forum to reflect upon the ideas and curiosities, concerns and aspirations raised over the last year.

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 law 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 organising in some logical way this rich and diverse body of work and enable common themes to emerge. We also hope they will highlight similar human rights law themes that are truly global and which, through comparative dialogue based on our own countries and regions, we might all learn more about how to approach these issues.

The anthology's global comparative perspective is demonstrated well both within and across chapters. Posts on equality and non-discrimination (Chapter 7), for example, highlight the international legal victories and ongoing challenges for the LGBT community over the last year, as well as the efforts to protect reproductive rights of women in a range of countries from Kenya and Namibia, to Uruguay and Ireland. Other chapters chart important new developments on data protection and privacy laws across

Europe (Chapter 6), the right to education in India and South Africa (Chapter 12) 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 of the OxHRH Blog, whose commentary, analysis and insights ensure it continues to offer a high quality, diverse and dynamic forum for human rights researchers, practitioners and policy-makers from around the world. Many thanks also to Professor Sandra Fredman QC, Founder and Director of the OxHRH. Her daily involvement with the Blog, commitment to the highest of standards and ongoing support for the editorial team have made the OxHRH the success 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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CHAPTER COMMENTATORS

Access to Justice - Helen Mountfield

Constitutions Institutions and Nation Building - Paul Yowell

Conflict, Security and Transitional Justice - Helen McDermott

Migration and Asylum - Guy Goodwin-Gill

Criminal Justice - Jon Yorke

Media, Privacy and Communications - Nicole Stremlau

Equality and Non-Discrimination - Luke Boso

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 Lofaso

Business Resources Environment and Development - Daniel Leader

Legacies in Human Rights Practice - Anne Lofaso

Trajectories of change in international human rights - Jaakko Kuosmanen



CHAPTER 1

ACCESS TO JUSTICE

Helen Mountfield

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

As I write (July 2016), 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 the 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 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 claims. 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 access to court documents as a manifestation of the open justice principle is an illustration of how the technical details of the judicial process can affect access to justice in practice. Catherine Briddick'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-denied 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 righting of an even older wrong as a result of the *Mau Mau* litigation.

Finally, Julia Salasky's piece on *CrowdJustice* 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. Whoever or whatever 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 ”**

HIGHLIGHTS

UNISON v Lord Chancellor: The Statistics of Tribunal Fees in the Court of Appeal
Michael Ford | 8th September 2015

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Grayling's Enhance Court Fees: how to pay lip-service to Magna Carta
Mathias Cheung | 19th March 2015

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Access to Justice: A Facet of Gender Equality
Meghan Campbell | 19th August 2015

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Public Access to Court Documents as a Manifestation of Open Justice
Helen Taylor | 11th June 2015

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The Legality of the Detained Appeal Process: Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors [2015]
Catherine Briddick | 18th June 2015

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ACCESS TO JUSTICE

UNISON v Lord Chancellor: The Statistics of Tribunal Fees in the Court of Appeal
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First-Tier Tribunal (Immigration and Asylum Chamber) & Ors [2015]
Catherine Briddick | 18th June 2015

ACCESS TO JUSTICE

"You Have the Right to an Attorney that We Approve of": Right to
Counsel under Iran's New Criminal Procedure
Mohammad Nayyeri | 14th July 2015

The Hillsborough 96 and the Struggle for Truth and Justice
Peris Jones | 13th May 2016

The Mau Mau Litigation – Justice at Last
Daniel Leader | 3rd November 2015

CrowdJustice: Looking Forward for Human Rights and Public Interest Cases
Julia Salasky | 9th June 2015



CHAPTER 2

CONSTITUTIONS, INSTITUTIONS AND NATION BUILDING

Paul Yowell

Associate Professor, Faculty of Law, University of Oxford; Fellow in Law, Oriel College

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 Fraize reports, the Chinese government carried out mass arrests of lawyers associated with the ‘rights defence movement’ in early 2016, and the National People’s Congress has enacted legislation granting substantial new powers in several domains to a National Security Commission led by President Xi Jinping. Beijing’s executive authority is also being extended in Hong Kong, with a new law requiring candidates for the Hong Kong Chief Executive post to first gain the approval of a nominating committee appointed by the Chinese government. Matthias Cheung argues that this undermines the democratic rights guaranteed by Hong Kong’s Basic Law as it fosters the dangerous ‘illusion of democracy’ created when people only cast votes for officially vetted and approved candidates. Cheung sees Hong Kong’s tradition of the rule of law and separation of powers as generally under threat from the Chinese government, and his arguments are worth pondering by those concerned for the future of freedom and human rights. China may displace the United States as the world’s leading economic and military power before the century’s end. Will the future be swayed by Beijing or by Hong Kong—by a vision of the people as market participants or as democratic citizens?

Projected by the UN to overtake China as the world’s most populous country by 2022, India has achieved a constitutional democracy and general commitment to the rule of law and judicial independence. India’s powerful Supreme Court has been praised for restraining excesses 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 appoints. 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 in both houses approved a constitutional amendment to limit the powers of the Justices in the collegium. In a decision late 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 particularities of national histories and the legacies of individual leaders mean that there is no universal package of solutions or techniques to achieve reform. In several countries the challenge is to build up, in the aftermath of colonialism, a set of institutions—including independent courts—in which people can have confidence and trust in (see, for example, Michael Rhimes and Lim Li Ann’s posts on Namibia and Ghana). Dominic Burbidge traces consequences of ethnic division and separation in Kenya, and the ways in which the government has tried to address this through a special kind of devolution. Two posts by Alex Wilks illustrate well how constructing a constitutional

democracy and a culture of human rights requires commitment to painstaking detail on a broad basis (in Timor Leste) and, sometimes, the heroic choices of individuals, such as the Venezuelan judge who was imprisoned and tortured after she released a political prisoner.

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 at a crossroads 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 Dimelow and Alison Young, and Tobias Lock and Kanstantsin 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. In announcing her leadership bid, 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 UNKNOWNNS, WILL PLAY A LARGE ROLE IN THEM.”

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 remarking—as Mark Twain did of his premature obituary—that reports of her death have been greatly exaggerated.

CONSTITUTIONS, INSTITUTIONS AND NATION BUILDING

Indigenous Recognition, Human Rights, and the Purpose of the Australian Constitution
Murray Wesson | 20th April 2015

The History of Human Rights Society in Singapore 1965-2015
LIM Li Ann | 21st April 2016

Hong Kong's Constitutional Crossroads:
to Pocket or Not to Pocket?
Mathias Cheung | 6th May 2015

A Supreme Court at the Centre of a Deeply Divided Society
Hayley J. Hooper | 15th July 2015

The Execution of Justice in Venezuela
Alex Wilks | 5th August 2015

Growing Pains in Timor Leste
Alex Wilks | 25th August 2015

GENERAL

Rule of Law in Hong Kong's Brave New World
Mathias Cheung | 2nd November 2015

The Chinese Human Rights Roundup
Tasha Frazie | 11th November 2015

An Overview of Developments in the Process of Judicial Appointments in India
Mythili Vijay Kumar Thallam | 27th November 2015

Increased Transparency or More "Caixa Dois"? The Brazilian Supreme Court Says No to Corporate Donations to Electoral Campaigns
Adriano Camargo and Lucia Berro | 16th December 2015

SAJAP: Facilitating Justice in Namibia
Michael Rhimes | 10th February 2016

CONSTITUTIONS, INSTITUTIONS AND NATION BUILDING

THE HUMAN RIGHTS ACT 1998

Why we need to start saying I'm Alright with Human Rights
Sanchita Hosali | 26th March 2015

ConstitutionUK – What Role for Human Rights in a New Constitution?
Conor Gearty and Daniel Regan | 19th April 2015

Britain's Human Rights Agenda –
Bringing Rights into the Home
Mathias Cheung | 25th April 2015

The Legal Implications of a Repeal of the Human Rights Act 1998
and Withdrawal from the European Convention on Human Rights
Tobias Lock and Kanstantsin Dzehtsiarou | 15th May 2015

The Future of the HRA 1998 Under the Conservative Party
Stephen Dimelow and Alison Young | 19th May 2015

The Future of Human Rights in the UK
Meghan Campbell | 31st May 2015

Queensland Parliament Lights Up the Night for Human Rights
Benedict Coyne | 5th October 2015

The Role of Parliaments in the Protection and Realisation
of the Rule of Law and Human Rights
Brian Chang | 7th October 2015

Dominic Grieve on the Human Rights Act: St Hugh's College, Oxford –
13 November 2015
Ian McDonald | 24th November 2015

Sir Keir Starmer's Blackstone Lecture:
"Human Rights: Can Britain go it Alone? And Should We?"
Shama Abbasi | 2nd December 2015

A judicial 'Plan B'? Dinah Rose QC on the Common Law in a post-UK
Human Rights Act world
Ian McDonald | 4th December 2015

Towards Tangible Rights In Ghana: With Painful Steps And Slow
Maame Mensa-Bonsu | 12th January 2016

The Dawn of Devolved Government in Kenya
Dominic Burbidge | 13th January 2016

Report: 'Constitutional Change in New Zealand (and a Bill of Rights for Britain?)'
Mikolaj Barczentewicz | 25th February 2016



CHAPTER 3

CONFLICT, SECURITY, AND TRANSITIONAL JUSTICE

Dr Helen McDermott

Helen McDermott is a Post-Doctoral Research Fellow in law and armed conflict on the Oxford Martin School Programme on Human Rights for Future Generations, Law Faculty, University of Oxford.

Armed conflict and repressive regimes pose serious threats to international peace and security. Mass atrocities, displacement of people, the expansion of terrorism, arms production and proliferation, organised crime, environmental damage, poverty, and lack of development are but some of the destabilising effects that can flow from conflict. The posts in this chapter provide valuable insights into a number of these challenges and, in so doing, offer constructive approaches to addressing the negative impact conflict has on societies and on international security. A common thread running through these contributions is the recognition of the importance of state and institutional cooperation in supporting positive political and social change, and the development of transparent systems where the rule of law, democracy, and human rights protection is guaranteed.

“EVERY DAY, THOUSANDS OF PEOPLE ARE KILLED, INJURED OR FORCED TO FLEE THEIR HOMES BECAUSE OF VIOLENCE AND CONFLICT INVOLVING WEAPONS.”

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-contentious debate over the parallel application of these two legal frameworks.

In Yemen, it is estimated that over 6,000 people have been killed in a bombing campaign that has created a humanitarian catastrophe. In a two-part post, Shreeppriya Gopalakrishnan discusses the role of UK in fuelling this crisis by selling arms to Saudi Arabia despite its mounting record of international humanitarian law violations. It is hoped that the upcoming judicial review of UK arms exports to Saudi Arabia will expose the ‘special

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-backed efforts to reach a political 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, natural 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. Seham Areff highlights the power of perception in the context 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. Aimee Ongeso 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 transitioning states. Nowhere is this more visible than Venezuela; an issue addressed in the posts by Alex Wilks and Francisco Alfonzo. The Venezuelan Supreme Court’s recent annulment of the amnesty law seeking to liberate 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 also present in Sri Lanka. In another post, Alex Wilks sets out the catalogue of challenges that face the Sirisena Government and its prospects for achieving a lasting peace. What can be drawn from the situation in Venezuela, Sri Lanka, 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 adopted the 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 reduction, 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.

HIGHLIGHTS

The UK and Saudi Arabia: Human Rights and the Perils of Petrodollar Morality – Part I
Shreeppriya Gopalakrishnan | 9th May 2016

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Venezuela’s Battle for the Rule of Law
Alex Wilks | 1st March 2016

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Menaal Safi Munshey | 23rd January 2016

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CONFLICT, SECURITY, AND TRANSITIONAL JUSTICE

A Comment on the Report Clearing the Fog of Law
Eirik Bjorge | 15th April 2015

The Reach of the ECHR: A Reply to Eirik Bjorge
Richard Ekins | 17th April 2015

The UK and Saudi Arabia: Human Rights and the Perils of
Petrodollar Morality – Part I
Shreeppriya Gopalakrishnan | 9th May 2016

The UK and Saudi Arabia: Human Rights and the
Perils of Petrodollar Morality – Part II
Shreeppriya Gopalakrishnan | 11th May 2016

Geneva (III), Politicking and Possibility for Syria's Invisible 43%
Sarah M. Field | 17th February 2016

Including Water Security on the UN Security Council Agenda
Richard Lappin | 9th December 2015

Ebola and Understanding Health Crises as Threats to International Security
Richard Lappin | 28th January 2016

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The Power of Perception: The ICC and Africa
Seham Areff | 20th November 2015

Local Politics of International Justice in Kenya: How the ICC let the
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Aimee Ongeso and Alex Dyzenhaus | 4th May 2016

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Alex Wilks | 1st March 2016

Amnesty Law in Venezuela
Francisco Alfonso | 9th March 2016

Sri Lanka's Second Chance to Achieve Lasting Peace
Alex Wilks | 23rd March 2015

Resilience and Security in Cities: Lessons from Karachi and Medellín
Menaal Safi Munshey | 23rd January 2016



CHAPTER 4

MIGRATION AND ASYLUM

Guy Goodwin-Gill

Professor Guy S Goodwin-Gill is an Emeritus Fellow at All Souls College, Oxford.

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 21.3 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.

“THESE NUMBERS ALONE OUGHT TO SEND A POWERFUL MESSAGE, ABOUT THE NECESSITY FOR PROTECTION AND SOLUTIONS FOR THE DISPLACED; ABOUT LONG-TERM, LARGE-SCALE INVESTMENT IN EDUCATION AND LIVELIHOOD OPPORTUNITIES IN THE DEVELOPING WORLD; AND ABOUT THE INEVITABILITY OF IRREGULAR, DISORDERLY MOVEMENTS BETWEEN STATES IF NOTHING IS DONE ABOUT CAUSES.

We had much the same information thirty years ago. Unfortunately, the causes remain and — as this chapter shows — state responses focus primarily 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 Kanad Bagchi, Francesco Maini, Saipira Furstenburg, and Cathryn Costello and Mariagiulia Giuffrè). 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 circumstance 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 proven itself unable or unwilling 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 confirms the critical value of the family in the processes of integration, adaptation, re-qualification 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 will 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 conditions of asylum and undertake at least a measure of resettlement, or face and be responsible for the consequences.

MIGRATION AND ASYLUM

Saving Lives in the Mediterranean: One More Missed Opportunity
Francesco Maiani | 4th May 2015

Drowning Refugees, Migrants, and Shame at Sea: The EU's Response: Part I
Cathryn Costello and Mariagiulia Giuffrè | 27th April 2015

Drowning refugees, migrants, and shame at sea:
The EU response: Part II
Cathryn Costello and Mariagiulia Giuffrè | 27th April 2015

Europe and the Mediterranean
Guy Goodwin Gill | 26th April 2015

Are the EU Commission's Latest Proposals Sufficient to Solve the Refugee Crisis?
Kanad Bagchi | 23rd September 2015

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Has the Council of the EU's Decision on Relocation of Refugees Given Adequate Effect to the Commission's Proposals?
Kanad Bagchi | 2nd October 2015

The European Union's Search for Unity as the Refugee Crisis Continues
Saipira Furstenberg | 22nd September 2015

The Mass Flight of Syrian Refugees: What are the Legal Obligations of States?
Hélène Lambert | 21st September 2015

Dispatch From the Balkans: Guarantees of Safe Passage and Access to Asylum Are Crucial, Not Border Fortifications
Stacy Topouzova | 4th March 2016

MIGRATION AND ASYLUM

Hungary's Actions: Past the Borderline of International Law
Brid 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 | 25th September 2015

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

MIGRATION AND ASYLUM

Can a State Refuse Migrant Family Allowances
Due to Irregular Reunification?
Nikolaos Sitaropoulos | 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 | 15th March 2016

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





CHAPTER 5

CRIMINAL JUSTICE

Jon Yorke

Jon Yorke is Professor of Human Rights, School of Law, Birmingham City University.

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 curtail 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 Sharmila Chanu for not accepting the Stree 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 presents the human rights response to the question of severe restrictions on family visitation, the important role of the European Committee for the Prevention of Torture in providing prison assessment, 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. Amrutanshu 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 ironic 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, Mulawo 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 shootings of African Americans 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 Samtani assesses the human rights implications for moral policing concerning indecent exposure in hotels and other lodgings in Mumbai. The repugnance of torture and the failure of Mexico's legal 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.

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

Gaughran 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

GENERAL

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

DEATH PENALTY

Law Commission of India Recommends Abolition of the Death Penalty:
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Amrutanshu Dash | 16th September 2015

The Death Penalty Lives on in Zambia Despite the Country's
Constitutional Reform
Mulawo Mwaba | 10th September 2015

India, the Land of Ironies: A Constitutional
Democracy's Dance with the Death Penalty
Amrutanshu Dash | 6th August 2015

Glossip v Gross: Taking Up Justice Breyer's Call to Question the Death Penalty
Jon Yorke | 30th July 2015

The Mandatory Death Penalty and Narratives of the Common Law
Joe Middleton | 28th July 2015

Glossip v. Gross: SCOTUS Affirmation of Underdeveloped Science for
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Asia Bibi's "Unfair Trial"
Reema Omer | 10th August 2015

UN Human Rights Council Adopts Belgian Resolution on Capital Punishment
Elise Maes | 10th 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: Bare v Independent Broad-based Anti-Corruption Commission
Jack Maxwell | 12th December 2015

SENTENCING

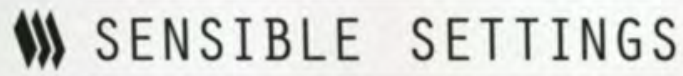
USE OF FORCE

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

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CHAPTER 6

MEDIA, PRIVACY AND COMMUNICATIONS

Nicole Stremlau

Dr Nicole Stremlau is Head of the Programme in Comparative Media Law and Policy at the University of Oxford's Centre for Socio-Legal Studies.

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 Asghar condemns the new law for allowing the government unrestricted powers to search and seize any information that they believe is required for a criminal investigation, and the requirement that any "person who is in possession of decryption information... grant him access to such information", further eroding protections against self-incrimination. Similar concerns were expressed by Sakshi Aravind in her article examining the new anti-terrorism law passed by China in late 2015. This law also gives the government broad powers to access personal data and forces Internet Service Providers to provide encryption codes to the government. As Aravind notes, a group of United Nations Human Rights experts have been highly critical of the UK's Draft Investigatory Powers Bill, which despite recent revisions, has still been criticised for its potential chilling effects on free speech and the powers it provides for police to hack into computers and smart phones. Likewise justified by the UK government as an essential part of national security and terrorism prevention, many of the concerns are similar and pertinent to China's

new terrorism law.

This also reflects a growing trend of countries using terrorism legislation to restrict media organisations, social media, and civil society. An analysis of the Ethiopian Anti-Terrorism Proclamation, for example, bears a striking resemblance to the UK's Terrorism Act of 2006, so much so that in a July 2014 interview with BBC News, Ethiopian Prime Minister Hailemariam Desalegn defended the law from the criticism that it was being used to stifle free speech by arguing, "If you compare the British terrorist law and that of ours, it's almost similar".

“ WHILE IMPLEMENTATION AND THE SPIRIT IN WHICH THESE LAWS ARE IMPLEMENTED IN THE UK IS SUBSTANTIALLY DIFFERENT THAN IN THE CHINA, PAKISTAN OR ETHIOPIA, THE INCREASING SIMILARITY AND USE OF LAWS TO EMPOWER GOVERNMENTS TO HAVE ACCESS TO PERSONAL COMMUNICATIONS AND PUNISH DISSENT IS OF SERIOUS CONCERN.

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 approach of making news (and non-profit) portals liable for user-generated comments. While the Hungarian court had found the two portals liable for publishing defamatory comments that were made by users towards another company, the ECtHR reaffirmed its broader argument, as outlined in the case of *Delfi AS vs Estonia*, that failure to recognize that the internet can turn 'readers' into 'speakers' through portals that allow for comments or blogs, threatens the potential of the internet for widening democratic debate and participation. If news portals are responsible for user-generated content then the incentive for censure to reduce

the threat of liability (particularly for platforms already struggling financially) would be high.

The Right to Be Forgotten (RTBF) was also at the forefront of media law debates in Europe throughout the year as questions regarding the operationalisation and scope of the right were tested. Claire Overman and Andrew Wheelhouse explored the RTBF in several posts and highlighted some of the challenges in implementing it, particularly given the global nature of the internet and search engines. Such challenges included, for example, whether it was adequate for a company such as Google to de-index or de-list material from a local version of the search engine from where the request took place, as Google's Advisory Board argued, or whether as Article 29's Working Party's guidance suggested, that de-listing needed to occur across all domains (including .com). Overman and Wheelhouse also highlighted one of the most significant challenges to the RTBF that European courts are grappling with, namely the extent to which it is possible, or desirable, to curb the publication of material that has been de-listed, which then has the effect of essentially re-listing much of the original personal data. As the authors note, cases in the UK and the Netherlands, which came to opposite conclusions, suggest that the right to republish material will depend on the nature of the story. Furthermore, despite the dire predications when the RTBF was first enacted, social media companies appear to be coping with the de-listing requests. While it has put a significant burden on the search engines to examine and evaluate each URL that is requested to be removed, at least at a national and (to some extent) a continent-wide level it appears feasible. However, as Overman and Wheelhouse remind us, specific terms resonate differently in different contexts, and there are varying cultural approaches to freedom of expression, which will make the increasing globalisation of this right challenging.

HIGHLIGHTS

The Draft Investigatory Powers Bill: A (Somewhat) Different Balance Between Privacy and Security
Andrew Wheelhouse | 25th November 2015

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Couderc and Hachette Filipacchi Associés v. France: A New "Respect" for Private Life?
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Endangering Democracy: Concerns Over Raising Surveillance in China
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Online Speech in Hungary before the Strasbourg Court: Freeing the Low
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MEDIA, PRIVACY AND COMMUNICATIONS

MEDIA, PRIVACY AND COMMUNICATIONS

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Defending Privacy on a Global Scale: The Task of the Century
Aldo Macedo | 19th December 2015

Endangering Democracy: Concerns Over Raising
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Tentative Reform of State Surveillance Powers in the UK
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The Draft Investigatory Powers Bill: A (Somewhat) Different
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The Safe Harbour Decision May be a Reaction Against the
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A New Regime for Data Protection in Europe
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The Right to be Forgotten: European Reactions (Part 1)
Claire Overman and Andrew Wheelhouse | 20th January 2016

The Right to be Forgotten: Grappling with Practicalities (Part 2)
Claire Overman and Andrew Wheelhouse | 21st January 2016



CHAPTER 7

EQUALITY AND NON-DISCRIMINATION

Luke A. Boso

Luke Boso is a Visiting Professor at the University of San Francisco School of Law, where he teaches Constitutional Law and Criminal Law among other courses. He researches and writes about discrimination, LGBT issues, and masculinities—particularly in the context of marginalised subgroups and intersectional identities.

When oppressed groups and individuals mobilise for change, an end goal is often—if not always—equality. Equality is enshrined 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, *Obergefell v. Hodges* is a monumental development for equality law. In *Obergefell*, 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. It also acknowledged 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 untold implications for future legal battles. *Obergefell* presents 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.

Obergefell 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 analysing 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—perhaps, for example, out of respect for constituents' sincerely held religious beliefs. Instead, the Court focused on same-sex marriage bans' impact. In the Court's words, same-sex marriage bans have “the effect of teaching that gays and lesbians are unequal in important respects.”

“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 that a policy has on a particular group could further a robust vision of substantive equality that goes beyond formal equal treatment. Racial justice advocates would be a primary beneficiary from such a development. Notably, they could more successfully challenge a variety of criminal justice laws, including those involving the death penalty, sentencing, and searches and

seizures. *Obergefell* also offers insights about effective strategies for achieving equality. Daniel J. Hoppe and Matthew Tyler explain that courts have historically withdrawn some issues from public controversy—particularly minority rights—to avoid the tyranny of the majority. The LGBTQ community has been largely successful in petitioning courts for redress, while its 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). There 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 populist backlash and regressive legislation. As Olivia-Faith Dobbie 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 their 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 couples' home because of unnamed concerns about the child's best interests. Or, as I argue here, consider North Carolina's now-infamous 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 crux of 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 show 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 objectors because the burden on the individual who suffers discrimination in housing, employment, public accommodations, or in the delivery of services is heavier than the burden 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. Unfounded 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 Danish Sheikh writes, the Indian Supreme Court criminalised same-sex sodomy in part because of ignorance about the actual experiences of LGBTQ people.

In *Obergefell*, 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.

EQUALITY AND NON-DISCRIMINATION

Disability Defence to Possession can Rarely be Decided
Summarily: Akerman-Livinstone v Aster Communities Ltd
Sue Bright | 21st April 2015

Our Primordial Attachments- The Roadmap for Linguistic Diversity and New
Strategies in Language Rights in Europe
Kartik Tripathi | 28th October 2015

Twenty Years on, Inclusion Remains a Distant Dream for India's Disabled
Rahul Bajaj | 29th October 2015

Irish Government Abandons Plans to Reduce Elitism in Schools
Ben Mitchell | 14th December 2015

Griffiths v Department of Work and Pensions:
Adjusting Reasonable Adjustments
Michael Ford | 7th January 2016

Minorities suffer as the Supreme Court supports 'suspicionless' stop searches
Televi Davi | 15th January 2016

GENERAL

MINORITY RIGHTS

Caste Discrimination under UK law: Chandhok v Tirkey
Michael Ford | 25th May 2015

US Disparate Impact Law: A View From Across the Pond
Tarunabh Khaitan | 1st July 2015

Entering the No-Go Zone – Social Security and Discrimination in the UK Supreme Court
Steve Broach | 17th July 2015

High Court in Belfast Finds the Northern Irish Executive Failed its Statutory Duty to
Adopt a 'Strategy' to Tackle Poverty Based on 'Objective Need'
Richard Martin | 28th August 2015

The (Patel) Quest for Reservation
Akhil Kang | 14th September 2015

Iran's Citizenship Law: Political Considerations or Recognition
of Inherent Human Rights?
Bahareh Davis | 8th October 2015

EQUALITY AND NON-DISCRIMINATION

Supreme Court of Namibia Finds HIV Positive Women Sterilised Without Informed Consent
Claire Palmer | 17th March 2015

Kenyan High Court Declares Law Criminalizing HIV Transmission Unconstitutional
Annabel Raw | 23rd April 2015

Abortion As A Human Right: Should the Law in Northern Ireland Be Reformed?
Paul Ostwald | 21st May 2015

Menstrual Hygiene – the Bloody Road to Substantive Equality
Inga Winkler and Virginia Roaf | 26th May 2015

Abortion Law in Ireland: A Model for Change
Fiona de Londras | 8th July 2015

Grand Chamber of the ECtHR to Review Limitations on Choice of Birthplace for Women
Barbara Havelkova and Yulia Ioffe | 10th July 2015

Conscientious Objection or Conscious Oppression?: The Uphill Battle to Access Abortion Services in Uruguay
Lucia Berro Pizzarossa | 11th September 2015

The High Court of Delhi on Pregnancy and Sex Discrimination
Gautam Bhatia | 4th November 2015

SEXUAL REPRODUCTIVE RIGHTS

Regulating Assisted Reproductive Technologies in India
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China's Two-Child Policy: An Assault on Human Rights
Stephanie Tai | 19th January 2016

State-sponsored virginity: South Africa's Maidens' Bursary Scheme
Melanie Smuts | 11th February 2016

Let's Talk about Sex Education and Human Rights
Meghan Campbell | 19th February 2016

Abortion in Texas: Does Casey Still Have Content?
Carol Sanger | 17th March 2016

Bureaucratising Sexual Rights in Brazil
Thiago Amparo | 7th April 2016

Judging Abortion in Northern Ireland: Facing the Challenges, Taking the Opportunities
Kathryn McNeilly | 9th April 2016

Inter-American Court Judgment Against Costa Rica on In Vitro Fertilisation (IVF): A Challenge to the Court's Enforcement Authority
Ligia De Jesus Castaldi and Maria Ines Franck | 28th April 2016

Conscientious Objection or Oppression: That is the Question
Pedro Montano | 17th May 2016

EQUALITY AND NON-DISCRIMINATION

GENDER

The Family Agenda: Promoting Traditional Values in the Human Rights Council
Frances Raday | 8th January 2015

Je Suis Margot Wallstrom
Milena Sterio | 30th March 2015

To Tackle Poverty Effectively, See it Through the Lens of Gender
Fran Bennett | 3rd April 2015

Argentinian Supreme Court Rules Women's Hands Can Be Used for More than "Demonstrating their Culinary Skills"
Blakeley Decktor | 5th May 2015

United Kingdom, Time for you to Vote for Gender Equality
Blakeley Decktor | 28th May 2015

2015 Gender Justice Uncovered Award Winners
Blakeley Decktor | 17th June 2015

Single Mothers, Absent Fathers and the Best Interests of the Child: Drawing a Fine Balance in the ABC Case
Sidharth Luthra and Viraj Gandhi | 16th July 2015

Small Steps in the Journey Towards Gender Equality on the South African Bench
Tabeth Masengu | 21st July 2015

Southall Black Sisters: Dissent to Speak Power to Truth, Hope to Counter Hate and Violence
Pragna Patel | 22nd July 2015

Recent Developments in the UN Human Rights Council: Traditional Values and Women's Right to Equality in the Family
Frances Raday | 2nd September 2015

Will There be Any Women in Fifty Years Time, Lord Sumption?
Smita Shah | 30th November 2015

EU Gender Action Plan 2016-2020: Transforming the Lives of Girls and Women through EU External Relations
Luigi Lonardo and Nora Jaber | 22nd January 2016

Bombay High Court makes Right to Clean Toilets a Fundamental Right for Women in India
Karuna Maharaj | 8th February 2016

UNHRC Working Group on discrimination against women in law and in practice country mission to the United States
Frances Raday | 8th March 2016

Gender Pay Gap Reporting: Will Transparency Lead to Change?
Sally Brett | 2nd April 2016

India's High Court upholds right of women to enter religious places
Radhika Agarwal and Devika Agarwal | 6th April 2016

New Zealand on the Verge of Implementing Pay Equity
Ian McPherson | 26th April 2016

EQUALITY AND NON-DISCRIMINATION

LGBTI

The US Constitutional Status of Same-Sex Marriage –
An Issue that Can No Longer be Avoided
Karl Laird | 27th April 2015

Ireland's Marriage Equality Referendum
Fiona de Londras | 22nd May 2015

Let Them Buy (Gay) Cake: Anti-Discrimination in Northern Irish Courts
Karl Laird | 27th May 2015

Lee v Ashers Bakery: Cake Now or Cake Later?
Olivia-Faith Dobbie | 2nd June 2015

Conscience Wars and Complicity Claims
Douglas NeJaime and Reva Siegel | 16th June 2015

US Supreme Court Requires Recognition of Marriage Equality
Max Harris | 26th June 2015

The Beginning Rather Than the End: Obergefell v Hodges and the
Continuing Struggle for LGBT Equality
Karl Laird | 29th June 2015

Empathy, Craft and other Lessons to Learn from the US
Same-Sex Marriage Decision
Danish Sheikh | 6th July 2015

Will Obergefell Stifle Growing Support for LGBTQ Rights?
Daniel J Hoppe and Matthew Tyler | 7th July 2015

Constitutional Reasoning About Same-Sex Marriage
Nicholas Bamforth | 23rd July 2015

Visa to Europe: The Convertible Currency of Human Rights in Ukraine
Dimitrina Petrova | 30th October 2015

Same-Sex Foster Parents Face Discrimination from U.S. State Court Judge
Rachel Wechsler | 21st November 2015

Advocating Legal Reform: The UK Transgender Equality Inquiry
Peter Dunne | 7th December 2015

Animus and Unequal Dignity: The Purpose and Effect of North Carolina's
New Anti-LGBT Law
Luke A. Boso | 14th April 2016



CHAPTER 8

GENDER-BASED VIOLENCE

Fiona de Londras

Professor Fiona de Londras is Professor of Global Legal Studies at the University of Birmingham and is an Associate of the Oxford Human Rights Hub.

Over the course of the past year, posts on the Oxford Human Rights Hub blog have shown both the expanse and the complexity of gender based violence, as well as exposing the potential and limitations of law to respond to such violence.

Implementation failures are a recurring theme across these contributions: it is not enough for there simply to be law in place to address gender based violence, law must be implemented by authorities in ways that appreciate and work to address the pervasiveness of gender stereotyping. The negative impact of gender stereotyping notwithstanding legal standards are highlighted by Teresa Fernandez Paredes and Maria Lacayo, who argue that combating these impacts in the context of trafficking for sexual exploitation requires its recognition as a form of gender based violence under the ECHR, while Liz Curran, Tania Sordo Ruz, and Meghan Campbell note the importance of effective government programmes to address endemic violence against women.

The Canadian example discussed by Campbell also illustrates the importance — from a human rights perspective — of designing programmes in a manner that recognises and attempts to mitigate the impact of long-standing breakdown in trust between state authorities and affected groups (in this case, Aboriginal women). However, such programmes and other state sponsored responses to violence against women can only be effective where the policing authorities in question operate in a manner that puts the welfare of victims first. As demonstrated by Pratishki Baxi, this is all too often not the case in India where in some recent cases police have used victims of reported rapes as a 'lure' for the accused but failed to police the meeting between victim and assailants effectively, resulting in the victim once again being raped by her assailants. For Baxi, this illustrates the extent to which policing has the capacity to be a "pornographic practice", further emphasizing the

importance of designing and implementing policing in a rights-conscious and rights-compliant way.

“WOMEN WHO HAVE EXPERIENCED GENDER-BASED VIOLENCE, OF COURSE, INTERACT WITH THE STATE IN A VARIETY OF WAYS, ALL OF WHICH ARE ALSO SHAPED (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 Menaal Safi Munshey 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) or by their broader cultural context (of endemic discrimination and gender inequality) can impact on law's capacity to properly address women's lived experiences of gender-based 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 Ndeunyema) 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 in, but also the obligation to effectively investigate these crimes and to provide an appropriate remedy. As illustrated by Viviana Waisman and Juan Pablo Perez Leon Acevedo 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 Nicola Sturgeon's policy agenda regarding gender-based violence in Scotland, rights-aware and committed leadership is necessary.

HIGHLIGHTS

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

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CEDAW Inquiry into Grave Violence Against Aboriginal Women in Canada
Meghan Campbell | 24th March 2015

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An important step forward for victims of sexual violence in Colombia
Viviana Waisman | 7th March 2016

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Telling the Whole Truth: Post-Assault Contact in Sexual Violence Cases
Karen Busby | 4th April 2016

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Violence against Women in Pakistan – Between Law and Reality
Menaal Safi Munshey | 24th April 2015

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GENDER-BASED VIOLENCE

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

Hopeful Developments in Family Violence in Australia
Liz Curran | 6th November 2015

Spain's Commitment to International Human Rights Law: 26 Murdered Children Isn't Regrettable, It's Terrifying
Tania Sordo Ruz | 12th August 2015

CEDAW Inquiry into Grave Violence Against Aboriginal Women in Canada
Meghan 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

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 Acevedo | 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

GENDER-BASED VIOLENCE





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 regarding 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 is arguably beyond its competence as a secular rather than a religious court. The question of who defines the content of religious belief or practice is raised again in Ashleigh Pinto and Taweez Senghera’s post which also considers the issue of religious dress. The post concerns a decision of the Supreme Court to uphold clothing guidelines introduced for exams which included a restriction on Muslim religious attire. Pinto and Senghera draw particular attention to the way in which the judgment was premised on an assumption that religious dress is not an essential element of faith,

again a factual judgment which is arguably beyond the competence of a secular court.

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.

HIGHLIGHTS

Jamaican Marijuana Reform, Rastas and Rights
Dionne Jackson Miller | 18th March 2015

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S.A.S v France: Controlling Identities in European Liberal Democracies
Jill Marshall | 10th April 2015

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The Indian Supreme Court and the Missing Connection between Faith and Dress
Ashleigh Pinto and Talweez Senghera | 9th September 2015

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Gypsies by Birth not by Definition
Shay Clipson | 10th May 2016

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‘Absolute Neutrality’ or ‘True Neutrality’? Atheism, Religion and the Supreme Court of Canada
Ravi Amarnath | 1st June 2015

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FREEDOM OF RELIGION

RELIGION

A Veiled Attempt at Conformity? Recent Cases Test the Bounds of Canada's Commitment to Multiculturalism
Ravi Amarnath | 13th March 2015

Jamaican Marijuana Reform, Rastas and Rights
Dionne Jackson Miller | 18th March 2015

S.A.S v France: Controlling Identities in European Liberal Democracies
Jill Marshall | 10th April 2015

Religion in the classroom: Loyola High School versus the Supreme Court of Canada
Varun Kesar | 11th May 2015

Does Islamic Law Deny a Right to Vote?
Ayesha Malik | 14th May 2015

'Absolute Neutrality' or 'True Neutrality'? Atheism, Religion and the Supreme Court of Canada
Ravi Amarnath | 1st June 2015

Santhara: Jains' Right to Exit with Dignity
Kriti Sharma | 7th September 2015

The Indian Supreme Court and the Missing Connection between Faith and Dress
Ashleigh Pinto and Talweez Senghera | 9th September 2015

Gypsies by Birth not by Definition
Shay Clipson | 10th May 2016



CHAPTER 10

FREEDOM OF SPEECH

Charlotte Garden

Charlotte Garden is an associate professor at Seattle University School of Law.

Recent events around the world have highlighted a long-standing 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-delicate 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 Aasia Bibi was sentenced to death in 2010. This sentence—the first imposed on a Christian woman in Pakistan's history—was based on a disagreement 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 law's role in 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.” Gehan Gunatilleke's entry puts a finer point on these dangers, drawing from the case of Sri Lanka. He criticises a 2015 government proposal for new hate speech laws—purportedly designed to protect Muslims from violence—as a possible stalking 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 impermissibly vague and overbroad the statute's restrictions on content that was, for example, “grossly offensive” or “annoying and inconvenient.” In addition to lucidly explaining the decision, Bhatia notes that one result of the Court's decision is 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 reasons for their blocking orders. Claire Overman 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 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 for the prosecution of their critics and detractors. Finally, Devarshi 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.”

HIGHLIGHTS

Free Speech Under the Indian Information Technology Act: The Supreme Court's Recent Judgment

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Criminalising Dissent in Indian University Spaces: Implications of the JNU Incident on Free Speech and Sedition Laws
Devarshi Mukhopadhyay | 20th April 2016

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



CHAPTER 11

CHILDREN'S RIGHTS

John Eekelaar

John Eekelaar is Emeritus Fellow, Pembroke College, Oxford

The interplay between children's rights and general human rights norms emerges from the blogs posted this year. The first, from Charlotte Kelly, reported the "strange case" of 16 year-old Yamos Lee who was imprisoned in Singapore for four weeks for uploading an obscene drawing and wounding religious feelings in a context clearly aimed at the political establishment. Of course there is room for dispute over the scope that Singapore allows for freedom of expression, but should children be given greater freedom than adults to mock their elders? (The structure of Articles 19 of the ICCPR and 37 of the UNCRC regarding freedom of expression and the permitted qualifications to it, are similar). That would be a turnaround for traditional (one might say "old-fashioned") values! But as Charlotte Kelly points out, the penalty imposed is questionable.

Even more questionable is the movement in Brazil to lower the age of criminal responsibility for certain offences from 18 to 16, so that those convicted will enter the adult penal system, discussed by Thiago Amparo. This is another example of wanting to treat children like adults. But the reasons for treating children differently from adults in penal policy, spelled out clearly in General Comment 10 (2007) of the Committee on the Rights of the Child, can be found in other CRC rights, including the best interests principle (article 3) and the right to development (article 6). It seems that these rights were recognised in the 1990 Child and Adolescent Statute, which, as Amparo notes, the attempt to lower the age would "dismantle".

This story shows how difficult, but important, it is to secure the rights of unpopular individuals. Perhaps that is why there has been more success in judicial initiatives to secure schooling for out-of-school children in the Indian state of Karnataka described by Jayna Kothari and Gaurav Mukherjee. But there the court initiated a dialogue and brought about implementation of rights already set out in the Indian Constitution and primary legislation.

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 Eleni Butti. 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 reparation, outside such a 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 policymakers 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 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.

HIGHLIGHTS

The strange case of Amos Yee: whither free speech and children's rights in Singapore?
Charlotte Kelly | 1st February 2016

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Damaged and Disregarded: Children's Interests in the Benefit Cap Decision
Darryl Hutcheon | 13th April 2015



CHAPTER 12

SOCIO ECONOMIC RIGHTS

Jason Brickhill

Jason Brickhill (LLB (Cape Town) MSt (Oxon)) is a DPhil Candidate, University of Oxford; Honorary Research Associate, University of Cape Town; Member of the Johannesburg Bar and former Director of the Constitutional Litigation Unit, Legal Resources Centre (South Africa).

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 exemplar, 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 Mugafuli. Although Tanzania does not formally recognise extensive socio-economic rights, the government of President Mugafuli 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 parliamentary opening to buy hospital beds. Okubasu contrasts Tanzania with Zimbabwe, whose amended constitution contains far-reaching socio-economic rights

that exist only on paper. 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 *Abbotsford (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 comments on the successful litigation regarding the provision of scholar transport to learners who are forced to walk long distances to attend schools in parts of rural South Africa. Faranaaz Veriava traces the high-profile success of

litigation to secure textbooks for learners in another poor, predominantly rural province. Reporting on a conference on litigating the right to education that was held in India in 2015, Lucy Maxwell places these South African litigation successes in their global context. She locates them in the ICESCR and the work of the Special Rapporteur on Education in giving content to the right to education on the international plane, as well as the Sustainable Development Goals relating to education.

“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 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.

HIGHLIGHTS

Long Walk to Education – Scholar Transport Now an Element of the Right to Basic Education in South Africa

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Recent Developments in the Australian Health Policy Further Undermine the Right to Health
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Textbook Provision for Learners in South Africa: Supreme Court of Appeal Judgment in the BEFA Case
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CHAPTER 13

LABOUR RIGHTS

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 Keeley Fellow at Wadham College and a visiting scholar at the Oxford Law Faculty.

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 U.S. won that right much earlier.

Our blog posts suggest that repression lurks about the world of rights. Last's 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 at least twenty employees from a single "establishment." 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 protection of workers at multi-firm establishments, and shows the CJEU's willingness to obscure the EU's social face in light of recent member-state austerity measures. Cian Ó Concubhair's post demonstrates that repression is not the sole child of the judiciary. The Trade Union Bill 2015, which Parliament recently passed into law, contains several regressive measures that make trade union

membership more difficult and more burdensome. My own post illustrates how the executive branch is also a culprit. There, the US Labor Board refused to even address the question whether college athletes are statutory employees entitled to bargain collectively.

The ultimate repression – murdering workers for protesting poor working conditions – is not a thing of the past. Three blogs analysed the Marikana Report on the state "massacre of 34 people and the injury of many more" where "police opened fire with R5 semi-automatic rifles" on 3,000 miners who "laid down their tools to embark on an unprotected strike to reinforce their demands on the mine's owners," observed Judge Dennis Davis. South African lawyer Jason Brickhill distilled the Report to several significant findings, much of which debunk the police story of self-defence. In a follow-up post, Brickhill showed that gaps in the Report leave the miners and their families with little recourse.

Exploitation. In today's global economy workers remain vulnerable. Several posts expose employer exploitation of these vulnerabilities.

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 to work 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. Fadzai Madzingira'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. The week after the judgment issued, employers "terminat[ed] . . . more than 6000 jobs". Madzingira further noted that the Zimbabwe Constitution Court refused to pass on the case.

Exploitation is not limited to countries with high poverty rates. As Alex Toft's post shows, labour exploitation haunts workers throughout the EU "despite the existence of a legislative framework that prohibits certain forms of exploitation." Other blogs support this observation. Virginia

Mantouvalou explains that the 2012 Overseas Domestic Worker (ODW) visa, which "ties workers to the employer with whom they entered the country" create significant vulnerability, which an unscrupulous employer could readily exploit. A Report, written by barrister James Ewins, a modern slavery and human trafficking expert, recommended granting ODW visa workers "a right to change employer . . . if seriously abused." Dierdre McCann discussed the extent to which fragmentation in the Spanish security maintenance industry, where technicians daily travel to several customers, has resulted in employers circumventing the Working Time Directive (2003/88/EC) by refusing to pay for time spent travelling to and from the first and last security job of each working day. Although the CJEU prohibited this practice as inconsistent with the WTD, it found that such time could be remunerated at a lower rate.

Additional blogs deal with exploitation associated with zero-hours contracts (ZHC). Mark Freedland and Jeremiah Prassl 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 discourage[s] the low-value actions associated with zero-hours workers' claims". In a follow-up post, Freedland and Prassl debunk the race-to-the-bottom mentality shared by ZHC proponents. In happy contrast, Pamela Nuttall reported that New Zealand's Parliament rejected ZHC.

Disappointment. The Labour Rights posts reveal a world where properly enforced international labour standards would usefully promote worker voice and improve employment conditions. The EU and the ECHR have served those functions for the UK since 1973. Alan Bogg probes 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 dependent on EU law and the extent to which those 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. By contrast, British casual workers outside the EU would be "walking on a very flexible tightrope and without much of a safety net."

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

GENERAL

Good News at Last from Downunder on “Zero Hours” Contracts?
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Zero Hours – Zero Solutions
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Fabiana Di Lorenzo | 4th June 2015

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Zero-Tolerance for Severe Forms of Labour Exploitation in the UK
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Politics and Legality: The UK’s Trade Union Bill 2015
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The Marikana Report: Some Justice, Part of the Truth and
Many Unanswered Questions (Part II)
Jason Brickhill | 27th July 2015

The Marikana Report: Some Justice, Part of the Truth and
Many Unanswered Questions (Part I)
Jason Brickhill | 24th July 2015

USDAW v Ethel Austin in the ECJ
Michael Ford | 12th May 2015

‘Zero-hours Contracts’: Zero Problem, or Zero Choice?
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Brexit and Worker Rights
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Working time and Brexit: Bad Karma?
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BREXIT

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



CHAPTER 14

BUSINESS, RESOURCES, ENVIROMENT AND DEVELOPMENT

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 appalling 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 those whose rights have been violated. Ruggie's "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 Carrillo-Santarelli. The case concerned adverse corporate impacts on the environment and human rights of indigenous peoples. In its decision, the Court relied on the Guiding

Principles and was emphatic that both state and non-state actors can commit human rights violations and that there was an obligation on states to prevent, punish and redress violations committed by private corporations.

Indeed, the UN Human Rights Council has gone further and, in 2014, called for a binding treaty on business and human rights, a move which has generally been rejected by Western Governments. Bellinda Chinowawa's post is critical of the idea of the Treaty and expresses the concern that treaties "[d]o not result in necessarily better behaviour by those they are meant to regulate..." and that such a treaty would be logistically impossible to implement. In her view, it is better to foster "local level interventions" instead and not leave it to "bureaucrats in Geneva".

The issue of conflict minerals remains of critical importance. Fabiana Di Lorenzo's post explains that the Jade industry is worth nearly half of Myanmar's GDP and that the industry fuels conflict between the Government and the Kachin Independence Organisation. Civil society has repeatedly urged government to improve existing regulations on conflict minerals. This has resulted in the Dodd-Frank Act 2010 in the United States which seeks to prevent the entry of conflict minerals from the Great Lakes region of Africa. The EU Parliament has recently voted in favour of similar legislation requiring companies in the mineral trade to exercise due diligence with regard to conflict minerals. However, these steps in regulating mineral supply chains are currently limited to the Great Lakes region of Africa and to certain minerals. Di Lorenzo argues that the measures need to be expanded to cover a wider geographical remit and more minerals, including Jade.

The problem of Blood Diamonds which fuel conflict in many countries also remains unresolved despite the significant steps taken by the voluntary Kimberly Process Certification Scheme, as discussed by Nazreen Shaik-Peremanov. Compliance with the Kimberly scheme is patchy among key African stakeholder countries and, in the author's view, partnership between the African Union and the European Union is now critical to ensure the scheme does not further lose credibility.

The issues of human trafficking, slavery and forced labour in supply chains are increasingly the subject of policy debates within Government and concern in Boardrooms across the globe. Fabiana Di Lorenzo's post reports that the Thai fishing industry is plagued by human trafficking and forced labour and yet UK supermarkets such as Morrisons, Tesco and Iceland all purchase from Thai fishing companies. The Modern Slavery Act 2015 is an attempt by the British Government to address these issues and requires UK retailers to prepare a human trafficking statement and to provide evidence of slave-free supply chains and the due diligence process.

One concerted attempt to obtain remedy against corporations which have been responsible for various abuses abroad has been via the use of international tort litigation. Anneloes Hoff explains that the Dutch court has ruled that Royal Dutch Shell (as the parent company) could be sued in the Dutch courts for pollution caused to Nigerian farmers by its Nigerian subsidiary. The ruling represents an important precedent that parent companies can be liable for the activities of their subsidiaries abroad and builds on precedents from the English Courts which similarly held that a parent company can be liable for the acts and omissions of a subsidiary, provided it exercised sufficient control and supervision over that subsidiary (see for example *Chandler v. Cape plc* and *Lubbe v. Cape plc*). Such cases represent an important contribution to the attempt to obtain remedy for developing world litigants whose rights have been abused by multinational enterprises.

The post by Lucia Berro and Caroline Leao on the collapse of the Fundao dam in Brazil in 2015 provides a stark reminder of the damage which can be caused by corporate negligence. In this case, 40 billion litres of tailings from the dam destroyed the local town, killing 15 people and polluting 663km of river. Shockingly, there is still a lack of information as to the extent of the damage to the local environment and the health impacts on workers and residents. It is concerning that even in a fast developing country like Brazil there are serious concerns that justice will not be done.

Climate change is also increasingly the subject of legal challenge. Anneloes Hoff's second post discusses the ground-breaking judgment of the Dutch District Court which ruled in favour of 900 Dutch citizens and ordered the Dutch Government to reduce its greenhouse gas emissions by at least 25% by 2020 and that the current, lesser, government targets were unlawful. The Dutch Government is appealing the decision.

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 its 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. Ruggie has proposed a widely endorsed 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 of the most egregious aspects of corporate misconduct. However, progress is slow and access to remedy remains almost 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.”

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The Seafood Industry and Its Sustainability Challenge – Why the Government of Thailand and Global Retailers Will Work Towards Sustainability and Human Rights
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CHAPTER 15

LEGACIES IN HUMAN RIGHTS

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 Keeley 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 (1934 – 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 1962. The following year, Hepple 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 trial. 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 “cast[ing] his lot with the oppressed and the dispossessed.” Skweyiya dedicated his legal career to the public interest before being elevated to the bench; “[a]s 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 Inspecting Judge 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 devising 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 Telecommunications Policy, where he helped shape the Cable TV industry: two years later he was appointed Assistant Attorney General for the Office of Legal Counsel. While at OLC, in 1976, he argued his only case before the U.S. Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*. Primarily while the democrats were in power, Scalia taught law at the University of Chicago.



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. Valena Beety 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 willingly broke down 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 Boso reminds us that Scalia equated “same-sex sexual intimacy with ‘bigamy, adultery, adult incest, bestiality, and obscenity.’” Joshua Weishart 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, Valarie Blake reminds us that Scalia was willing to “turn a blind eye to the wider human matters” when it came to healthcare.



“THE FIRST THREE MEN HAD A GREAT DEAL IN COMMON. ALL WERE SOUTH AFRICAN LAWYERS DISTINGUISHED FOR THEIR ANTI-APARTHEID ACTIVISM.”

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, Scalia authored the “momentous” church-state opinion of the late twentieth century, *Employment Division v. Smith* (1990), which held that “the First Amendment is not violated when ‘neutrally and generally applicable laws’ burden 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.

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Bram Fischer: Dissent and Challenge From Within
Justice Edwin Cameron | 23rd June 2015

Professor Sir Bob Hepple's Contribution to Comparative
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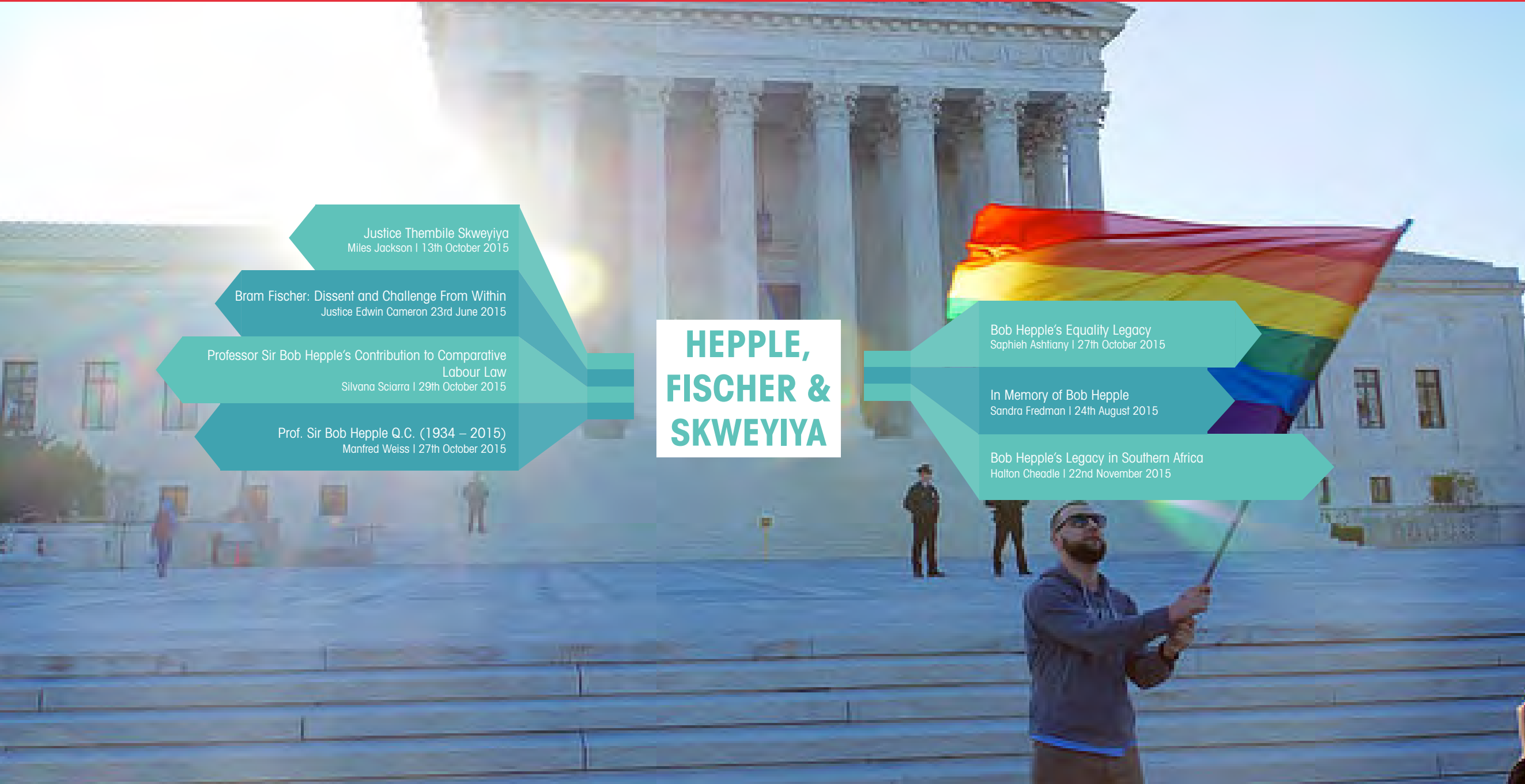
Prof. Sir Bob Hepple Q.C. (1934 – 2015)
Manfred Weiss | 27th October 2015

HEPPLE, FISCHER & SKWEYIYA

Bob Hepple's Equality Legacy
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JUSTICE ANTONIN SCALIA

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Antonin Scalia's Voting Rights Legacy: Weakening the Franchise for Minorities
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Blog: Scalia's Influence on the Religion Clauses: Part II
John E. Taylor | 31st March 2016

Justice Scalia's Influence on the Religion Clauses Part I:
Free Exercise Law
John E. Taylor | 12th March 2016

CHAPTER 16

TRAJECTORIES OF CHANGE IN INTERNATIONAL HUMAN RIGHTS

Jaakko Kuosmanen

Dr Jaakko Kuosmanen is the Coordinator of the Oxford Martin School Programme on Human Rights for Future Generations and a James Martin Research Fellow at Oxford's Law Faculty. Jaakko received his PhD at the University of Edinburgh, and he has previously worked for the Council of Europe.

The world is undergoing various changes to which human rights also need to adapt. Globalisation, rising inequality, austerity policies, and the increasing influences of non-state actors have challenged in various ways the state-based human rights framework that emerged during the 20th Century. This chapter's Blog posts all examine — in one way or another — the role of human rights in this new and complex landscape.

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 MDGs have proved, promises are more easily made than kept. On SDGs, many 'question marks' still remain, and on many issues solutions have been left for future discussions and reports.

Developments have also occurred in national fora. In a further post, I discuss the Well-Being of Future Generations (Wales) Act, which was a move by the Welsh parliament to legally enshrine future-oriented development goals. The Act aims to strengthen existing governance arrangements for improving the well-being of Wales, and to ensure that present needs are met without compromising the ability of future generations to meet their own needs. The Act sets a range of goals, which — if realised — will improve the well-being of Wales in a sustainable manner. The Act also demands that each public body takes all reasonable

steps to realise these goals, makes public statements, and submits annual reports on the progress.

Louise Arimatsu's post focuses on a long-awaited opinion in the case of N.M & Others against the United Nations Interim Administration Mission in Kosovo (UNMIK). The opinion criticises the UNMIK's role in housing displaced Roma, Ashkali and Egyptian families. It also concludes that for over a decade, the United Nations (UN) failed to take meaningful steps to relocate families from a toxic wasteland contaminated by lead, despite overwhelming scientific and medical evidence on the risks posed to those living in these camps.

Noam Schimmel's piece considers the international human rights law responsibilities of Non-Governmental Organisations (NGOs). Schimmel points out that 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. Edbrooke argues that the UN system as it currently exists does not realise the universal ambitions of the UDHR in the modern world, as it does not effectively hold non-state actors who exercise 'effective control' accountable for human rights violations. He concludes, however, that the UN does have the capacity to make a positive change, and argues that this should be at the top of the next Secretary General's agenda.

Nikolaos Sitaropoulos focuses on states' considerations of the UN Human Rights Committee's views, using France as a case example. He emphasises that even though the Committee's views are not binding judgments, they still have a legal consequence: the states parties have an obligation to take the views into consideration in 'good faith'. Paul Scott discusses the UK Supreme Court case

R (SG & Ors) v Secretary of State for Work and Pensions. The case involves the coalition government's 'benefit cap' policy, which limits the benefits claimants in a non-working households can receive. In his piece Scott highlights that while the benefit cap was decided to be lawful as a matter of domestic law, it was considered by a majority of the judges to be incompatible with obligations arising from the UN Convention on the Rights of the Child. Although this does not have direct domestic legal implications to the policy, it nevertheless raises questions about its compatibility with human rights.

Marc Limon, Nazila 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 united international response and policy framework to address religious intolerance has never been greater, the political process at the UN is 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 Plans 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 the EU is facing. It emphasises — among other things — the local ownership of human rights, the adoption of comprehensive approaches to human rights in conflicts and crises, and effectiveness and results.

All the posts in this chapter highlight the need for continued building of the human rights framework. There is a constant need to revisit the existing framework, as it should be responsive to human needs and be able to tackle the challenges posed by 21st century life. Plenty of work remains to be done. Yet, there is room for hope, as many of the blog posts suggest. The human rights framework is adaptable, and its final form ultimately depends on what we make of it.

HIGHLIGHTS

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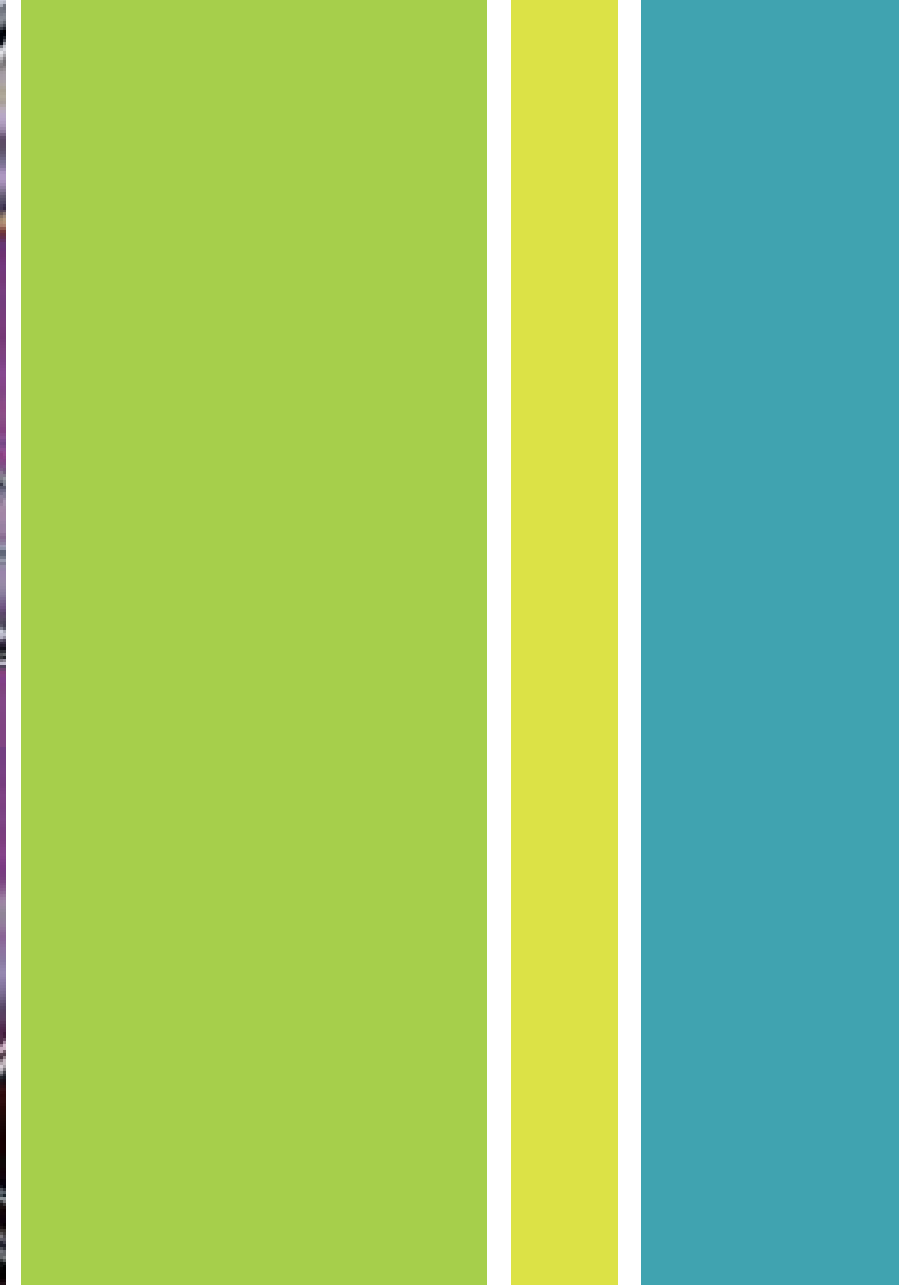
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