From the Utopianism of Human Rights to the Primacy of the Political

Abstracts

'Theory's betrayal of legality, is there no law after Auschwitz? An historical reconstruction that considers if juristic posturing colludes with negative political agendas'.
Dr Lorie Charlesworth

This paper will consider the implications of the dominance of certain categories of legal theory in historical reconstructions of German war crimes trials post World War II. Suggested responses to the deliberately provocative title will be contextualised within this writer's research findings to date concerning the investigation and prosecution of 'minor' Allied war crimes trials. It is noticeable that currently doctrinal, historical and theoretical analysis privileges two areas of study. These are firstly, that aspects of Allied war crimes prosecutions are considered 'unlawful' and secondly, discussions that consider if law in Nazi Germany existed in a 'state of exception'. Fraser has challenged aspects of the latter; however, theory appears more concerned with protecting the integrity of a 'pure idea' of law than recognising the legal significance of culturally affirmed trangressive, taboo-breaking, politically sanctioned behaviour within Nazi Germany and its occupied territories. In addition, theory has neglected alternative co-existing cultural norms revealed in the actions of Allied soldiers prosecuting Germans and others for appalling breaches of legal and human rights.

At this point it will be clear that the writer is privileging the personal/individual over the legal/theoretical. My research explores what Allied soldiers, victims and perpetrators did, what explanations they gave, how their actions reveal cultural and political norms concerning 'justice'. This paper suggests that decency, understood as a personal sense of justice within shared cultural and political values, serves as a stronger if less elegant technical framework to counter the tendency of legal theory to devalue the human. On the other hand, and this is very dispiriting, German behaviour between 1933 and 1945 suggests that human rights within Nation States will remain forever vulnerable to historically contingent, political and social influences; often with the active collusion of lawyers, judges and legal academics. As a consequence it appears that citizens and others cannot even rely upon national legal systems to protect their human rights. A further question arises: does legal theory, as it did under Nazi rule, collude in this by failing to acknowledge and privilege human cultural values, such as decency and fairness, as a defence against perverse political pressures that lead inevitably to the corruption of legal process and law itself?

Dignity and the Accursed: Reconnecting Human Rights and Atrocity
Stephen Riley (Sheffield Hallam University)

Human rights have undoubtedly been severed from utopia, from radical natural law promising solidarity and freedom. Less frequently noted is human rights' severance

from dystopia, law's encoding of egregious violence without reference to human rights. This paper considers the extent to which violation and transgression have been isolated from human rights discourse, and it seeks to reconnect human rights and atrocity via the notion of dignity.

Ernst Bloch's account of dignity as an 'upright carriage' - the absence of submission or affliction - concretises the otherwise opaque notion of dignity. However, this is problematised by postmodern political theory and political theology wherein Bloch's 'upright carriage' betrays the vacuity of dignity. Tellingly, Agamben invokes the *Muselmänner* - those with bent backs - to demonstrate that all 'ethics of dignity' were dissolved in the bare life of Auschwitz.

While such criticism is persuasive, dignity is crucial in articulation of violation: dignity denotes what is 'observed in the breach' in violence and degradation. Given that violation better reveals dignity than its reification, dignity's foundational role in human rights theory can be understood as a prohibition rather than a value. Drawing upon the work of Georges Bataille and his discussion of dignity and the 'accursed', this paper stresses a foundational link between human rights and transgression. It concludes that both Bataille's 'accursed' and Bloch's 'upright carriage' defy critique by contemporary political theology.

The UN's return to the civilizing mission?

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Whereas the occupation of Iraq is commonly described perjoratively as an imperial or colonial enterprise, complex UN peace operations which also involve economic, social and political transformation are understood as humanitarian 'state-building' missions. This paper interrogates the underlying ideas concerning the legitimacy of international law and organizations that underpin this normative distinction, and argues that the distinction itself is exaggerated and misleading. It will be argued that contemporary multilateral interventions are best understood as the latest, internationalized manifestation of the activity of trusteeship that can be traced back to the colonial era. This reconception of complex peace operations helps us understand why such operations are so unaccountable, requires us to revisit the contemporary significance of the self-determination entitlement, and underscores the need to move beyond the Manichean treatment of states as essentially imperial and 'political', and international organizations as essentially humanitarian and above politics.

"Let the constitution protect you! Hold your hands up!": Subjectivity construction and the deprivation of rights in two novels on the Mexican *Dirty War*

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Guerra en el paraíso (War in Paradise) by Carlos Montemayor and *El amante de Janis Joplin* (The Lover of Janis Joplin) by Élmer Mendoza address the Dirty War in Mexico, which lasted approximately from the early until the late mid-1970s. My analysis of the two novels takes two lines of enquiry. One, into the way in which the idea of human rights comes into play in them; and two, into how subjectivity is constructed through literature in a situation in which people are deprived of human rights.

Human Rights are problematized in both novels through different angles. Montemayor brings out the interconnection between civil rights, political human rights, and poverty in the rural areas of the state of Guerrero. Mendoza focuses on a middle class family who believed that they have rights as citizens and humans, and who have to come to terms with not only being denied those rights but also the legal recourses to claim them, when one of their children turns out to be a member of the *guerrilla*.

I will argue that both novels attempt to create an alternative space in which imaginaries of citizenship and of the interplay between subjectivity and citizenship can be constructed when the legal and political order fail to provide such imaginaries or even such a space. In both novels human rights are seen as the guarantors of the peaceful exercise of citizenship, and since the State cannot guarantee them, other forms of exercising citizenship are sought by the protagonists.

Between Universalism and Particularism: Theorising the Northern Ireland Bill of Rights Process

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This paper will explore the extent to which the legal theories of Dworkin and Habermas serve as useful theoretical constructs to illuminate the tension between universalism and particularism inherent in any attempt to agree a specific bill of fundamental rights, especially if the community is very diverse or consists of constituencies divided along cultural lines. The paper will focus at an empirical level on the Northern Ireland Bill of Rights process, drawing in particular upon the experiences of one of the contributors as legal advisor to the Northern Ireland Bill of Rights Forum. It is submitted that Dworkin's distinction between rules and principles can be used to highlight the discursive and argumentative dimension of the intricacies of fundamental rights jurisdiction in "contested communities" such as Northern Ireland. Furthermore, the dichotomy of fit and justification which underpins Dworkin's rights theory neatly explains the tension between a particular, specific historical and culturally embedded, interpretation of fundamental rights, and the universalist aspiration which transcends the specific realisation of fundamental rights in a particular context. It will further be argued that Habermas' system of rights, as does his "ideal speech situation", aptly captures the tension between universalist

aspiration and particularist realisation. Whereas the discourse itself is structured along agreed universalist lines, the concrete outcomes are contingent on specific particularist circumstances. The potential transformation of Habermas' system of rights into a concrete post-constitutional Bill of Rights will then be explored in the light of recent developments in the Northern Ireland Bill of Rights process.

West Papua: The Forgotten Genocide
Carmela Baranowska

This paper will argue against the grain of the conference proceedings, raising the little-known genocide in West Papua, Indonesia's easternmost province and Australia's closest neighbour. It will move towards a discussion of responsibilities, opening up and freeing the discussion between the primacy of the political and legal discourse.

During World War Two Jan Karski, the messenger of the Polish government in exile, collected eyewitness accounts of the liquidation of the Warsaw Ghetto and the extermination camps. His shocking, almost-apocalyptic narratives ultimately fell on the deaf ears of Roosevelt, Churchill and Stalin. The evidence of war crimes and genocide was irrefutable; however, the will to act did not exist.

Why do I mention Karski? I also believe that human rights abuses leading to genocide are currently taking place in West Papua. The Indonesian military's counter insurgency strategy is now firmly based in the cities, towns and hamlets and its enemy is not the traditional guerrilla but prominent members of the community. During the Vietnam War the US military's Phoenix Program aimed to "neutralise" the opposition by kidnapping and then killing them. This is happening again in West Papua.

This paper will take recent eyewitness testimonies as a starting point to discuss the role of institutions in the continuing genocide – including European and international "think-tanks", the academy, the media - and ourselves as individuals.

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Religious Liberty as a Debased Enlightenment Ideal: a Universalist Norm Reconstructed in the Image of Political and Social Power Relations
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The constitutions of liberal democracies invariably contain strong commitments to religious freedom as a human right. These are couched in universalist Enlightenment language, emphasising individual autonomy over conscience, and legitimate boundaries of rationalised state power. The terms and rhetoric of this core commitment appear similar in constitutional democracies: religious freedom requires

that religious belief be placed beyond the competence of the state, leaving individuals as free as possible in terms of religious choice and observance.

This paper will illustrate how this ostensibly universal ideal has been revealed as hugely malleable and politicised in its application within liberal democracies, with its contours adjusted to internalise domestic realities of political and social power relations. Jurisdictions such as France and the United States have long assumed the necessity for religious liberty of the confessional neutrality of the public sphere and of public education in particular. However, claims in other liberal democracies, such as the Republic of Ireland, that religious freedom requires extensive 'accommodation' of religion in the public sphere, may be interpreted as an appropriation of the language of religious freedom in the interests of dominant religious groups. In such states, the universalist ideal is bounded and pared down by a historical and political reality of religious domination, thus producing a debased and politicised rhetoric of religious liberty. This paper will therefore explore how discourse on religious freedom is strikingly susceptible to political appropriation in the particular context of public education, scrutinising judicial and political statements for the framing of religious liberty in terms of political *rapports de force*.

Reclaiming Human Rights in Enforcement Mechanisms for People with Disabilities –from Political Question to Universal Norm

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International human rights law implies a universal norm which is argued to give rise to a right to advocacy for people with disabilities, an enforcement mechanism whereby a non-legal representative is appointed to an individual who would otherwise be incapable of asserting her human rights. This norm is derived from the internationally recognised principle of human dignity, the right to an effective remedy, individual autonomy, socio-economic rights, and the particular rights accorded to people with disabilities.

In the domestic legal system, this norm requires the introduction of a legislative right to independent statutory advocacy service where advocates assist with rights-enforcement but do not make substituted decisions for persons who have not been formally deemed to lack decision-making capacity. However, several political constraints have hampered the implementation of such a norm, particularly in the Irish context. These include the delay of the service due to the recent economic downturn, the conflict of interests in funding arrangements, the inability of advocates to identify vulnerable individuals in institutions and severe resource limitations which reduce the availability of statutory advocates.

This paper will address the reforms necessary to overcome such political limitations and secure compliance with universal norms in the Irish advocacy system. It will question whether the economic nature of these political limits threatens the very idea of the universality of this norm – that is, whether this ostensibly universal norm is inherently political in nature by virtue of these limitations.

European Court of Human Rights and the politics of truth

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Recent articles about ECHR interpretation show that it is seen, as best, as a successful exercise in legitimating the political agenda of European Court of Human Rights (ECtHR), continuously on the move for the search of the universal[1]. For others following a deconstructivist approach, "*[t]here is nothing that renders human rights normatively less contentious than many other contested moral or political concepts*"[2].

There ends the claim of a human rights court to provide a moral compass for society. In the specific context of the ECtHR, heralded as one the main achievements in terms of implementation of a human rights based legal protection, it questions what kind of politics is available to the Court and what kind of politics the Court does actually follow. A study of the values that the Court uses as foundational for its decisions, namely the triptych rule of law, human rights and democracy, shows that, at its core, the Court does not take any consistent approach to its politics, which are, in the main, liberal. If these politics are nothing more than the common conceptions of the time, if the legal politics of the Court are just the embedding of legal, Western, liberal preferences, and as such a hegemonic discourse[3], then the Court will continue its slow dying dance, overloaded by individual complaints and eclipsed by a lack of relevance, compared to the EU institutions.

However, the critical legal approach, contending that interpretation is fundamentally indeterminate, also reaffirms that the legal medium does, in certain cases, render certain arguments inoperative[4]. I shall contend, that following the politics of truth advocated by Alain BADIOU[5], the Court could try to reinstate itself in a historical truth procedure, differentiating itself from the principally economic led European construction, thus reclaiming a different legitimacy that would differ from being just a glossing over the economic liberalism of the EU, thereby reclaiming a ground for its decisions, which would not only by a 'gentle' hegemony.

Such a program could be on the lines of fidelity, not just to the memories of the development of totalitarianism, from within the confines of Western liberalism as was advocated by some of the 'fathers' of the ECHR[6], but rather a continuous promotion of inclusions against the institutional mechanisms of exclusions, a constant act of reaffirmation of our humanity.

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[1] Edouard DUBOUT, « Interprétation téléologique et politique jurisprudentielle de la Cour européenne des droits de l'homme », *Revue Trimestrielle des Droits de l'Homme*, 2008, p. 418.

[2] Ibid. at 244.

[3] Martti KOSKENNIEMI, "International Law and Hegemony: A Reconfiguration", *Cambridge Review of International Affairs*, vol. 17, 2004, pp. 197-218.

[4] See Duncan KENNEDY, *A Critique of Adjudication*, Harvard University Press, 1997.

[5] Alain BADIOU, *L'éthique : Essai sur la conscience du mal*, Nous, 2003.

[6] See, Pierre-Henri TEITGEN, "Introduction to the European Convention on Human Rights", in *The European system for the protection of human rights*, R.St.J. Macdonald, F. MATSCHER, H. Petzold, (eds.), p. 3-14

Men Versus Man: The Politics of Avoiding Human Rights Obligations
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During the past half century states have churned out a multitude of treaties in an effort to prove their commitment to protecting human rights. Negotiators at these conventions argued fervently their governments' desire to protect human rights and they concluded these treaties with flourish and applause from human rights observers. Then the negotiators went home.

The time between concluding negotiations and ratification of a treaty instrument has proven to be the most lethal in the area of human rights. It is during this window that the domestic polity rears its head to introduce a wide-range of reservations which are detrimental to the party whom these agreements are designed to protect: man. What many states parties view as implicit human rights and minor concessions of sovereignty loom as obstacles to accession to treaties for the states which remain resolute in protecting their customs and independence. The lack of guidance with respect to reservations to human rights treaties has resulted in the proliferation of treaties which are effectively random webs of bilateral and multilateral agreements. Rarely do two countries have the same agreement in force between themselves and a third state party due to the commitments, or lack thereof, that are eventually finalised.

Empirical analysis of the status of state ratification of human rights treaties attests to the dominance of political power over the protection of man. This paper explores the conundrum of state fickleness over the protection of human rights wherever the sovereignty dogma is challenged.

Justice as Fairness: Rawls's Theory of Constructive Rationalism as an Alternative to the Language of Balance in Delayed Prosecutions for Child Sexual Abuse
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Delayed prosecutions for child sexual abuse present formidable challenges to the criminal justice system. In deciding whether or not to prohibit the trial on the grounds of delay, the court must uphold the fair trial rights of the accused, while also vindicating the community's right to have serious crime prosecuted, as well as recognising that delay in reporting is often an inherent feature of child sexual abuse. The paper examines this dilemma, in terms of the tensions between the idea of justice-as-truth and justice-as-fair procedures, and the implications of this conflict for our understanding of fair trial rights. In particular, it analyses the language of 'balance', where justice is conceived of as a zero sum game between the rights of the various parties. In this context, the paper examines the potential of Rawls' conception of justice as fairness as a way of closing the gap between the community's quest for the truth and the accused's due process rights. Particular emphasis is placed on the potential of Rawls' theory of constructive rationalism to liberate notions of due process and justice from their current essentialised and opposing positions, in order to expose the common goal of political legitimacy. In this way, it is hoped to move away from the destructive language of 'balance' towards a more nuanced understanding of the values at play in delayed prosecutions for child sexual abuse in particular, and in the operation of the wider criminal justice system in general.

Human Rights Legitimacy: The Challenge of Re-politicisation
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Human rights are defined as universal both in numerous international legal instruments and by their very nature; to be *human* rights, universality is essential. Such universality is the basis of human rights legitimacy, endowing them with a unique status and moral authority. Furthermore, the universal character of human rights also implies that they are apolitical as they represent collective rather than specific concerns. There consequently exists a mutually constitutive relationship between the universality, legitimacy and political neutrality of human rights.

This paper explores the implications of this relationship. It argues that there exists a tension within human rights between their theoretically depoliticised nature and the inescapable role that political considerations play in their construction and application. This tension is particularly illustrated by the 're-politicisation' of human rights in two main ways. Firstly, the paper considers how the unique status of human rights deriving from their universality means that they are co-opted politically, by both supporters and opponents, and used to legitimise politically-motivated actions. It then examines how challenges to the legitimacy of human rights utilise its supposed universality and political neutrality, and consequently how the depoliticised nature of human rights itself provides space for undermining it for particular political purposes.

Conflict in Chechnya and the European Court of Human Rights: triumph of the legal or rather the primacy of the political?
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This paper investigates the relationship between international humanitarian law (IHL) and human rights law (HRL), and their invocation, that is based on political considerations rather than legal evaluation. As international law stands at the moment: IHL applies to armed conflicts, regardless of whether international or non-international in nature, even if separate and fewer rules apply to the latter. The matter complicates however further when a State refuses to accept that there is a non-international armed conflict, and still can derogate from some provisions of HRL under certain circumstances. The situation in Chechnya is one of such examples. Russia has never declared a state of emergency (thus has been bound by HRL in its entirety), it has also never accepted that it is anything more than an 'anti-terrorist operation', which has also been followed by the UN due to political pressures. It appears that in situation like this, it is more politics rather than law that dictates the rules. Undoubtedly, the European Court of Human Rights has played here a significant role in providing justice to victims. But has it been done enough or rather 'too little too late' for many? A further analysis can bring some answers as to whether HRL can be a substitute to IHL (or even replacement when the latter is not an option), or it rather remains complementary protection available to individuals that only masks the problem rather than solves it.

The Clash of Liberalism and Nationalism in the Contemporary Right of Self-determination

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The right of self-determination has always been defined by the interaction between the competing claims of the doctrines of liberalism and nationalism. This might explain why the right is simultaneously held up as the prerequisite for human rights and associated with some of the worst international conflicts and human rights abuses. This paper will look at two aspects of the current law of self-determination – contemporary provisions on territorial integrity and the division between internal and external self-determination. Both can be seen to represent attempts to use liberalism as a substitute for nationalism in self-determination. This paper will consider these strategies and how successful they have been.

Providing military and security assistance to authoritarian states: a human rights perspective

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One of the features of western foreign policy and defense diplomacy is a contradiction between support for democracy and human right and cooperation with authoritarian states. The responsibility of states not to render military assistance to repressive regimes has often been invoked in non-legal contexts. Is there an international legal obligation not to provide such assistance to authoritarian states? This question will be addressed in the light of main principles of international law and recent legal and political developments.

Securing Human Rights Beyond the Water Wars

Louise Selisny, Amnesty International

This paper will consider the challenges posed by environmental insecurity to an effective enfranchisement within the sphere of human rights. This paper will also go on to highlight some possible solutions to such challenges. The latter decades of the 20th Century precipitated global concern over environmental scarcity and the potential for a dramatic increase in disputes originating over natural resources such as fresh water and arable land. The conflict and tension caused by such disputes provides an ideal platform for human rights violations. As such, a distinct intersecting of the politics of the environment, security and human rights has evolved. This paper advocates the need for a shift in the traditional neo-realist security paradigm in order to respond appropriately to this intersection. It will be argued that such a shift will lay the foundation for increased international cooperation as well as a moral mandate for UN led humanitarian intervention. Further, it will be demonstrated that such cooperation and intervention provides the ideal response to environmental insecurity and the human rights violations it creates.

Human Rights talk in a Sovereignty Culture: Constitutionality for an unconstitutional state

Angus McDonald, Staffordshire University

As is known to all undergraduates of law, the UK constitution is anomalous, having no codified constitution, no entrenched, fundamental rights; instead relying upon the central doctrine of Parliamentary Sovereignty. Alongside the potentially opposing doctrine of rule of Law, and a certain nod in the direction of separation of powers, these constitutional doctrines seem to set up constitutional discourse in the UK primarily as a Sovereignty discourse.

Human Rights talk in this environment is seen as an alien transplant, fundamentally incompatible with the omnipotence of Parliamentary Sovereignty - hence the compromised nature of the Human Rights Act 1998, where the judiciary can identify incompatibility, but not declare invalidity.

However some commentators, including some members of the judiciary, are beginning to attempt a language which seeks to move beyond the binary oppositions implied in the polarity of sovereignty and constitution. We are hearing about hitherto unknown strange hybrids, such as "sovereignty within limits", and "Constitutional Statutes" having a different status than ordinary statutes. At the same time the judiciary are sending signals of a potential future willingness to challenge Parliamentary legislation they view as unconstitutional.

This paper will consider whether this grey area, middle ground compromise exists, and the extent to which it solves or creates problems.