Teaching Human Rights

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Teaching & Learning Manual

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Edited by Tracey Varnava and Ann Priestley

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Foreword

The UK Centre for Legal Education (formerly the National Centre for Legal Education) was established to support best practice in learning, teaching and assessment in law. As part of its work the UK Centre for Legal Education continues to update the series of NCLE teaching and learning manuals, of which *Teaching human rights* is now in its second edition. This manual will be a valuable resource for teachers wishing to rethink, refresh or develop their courses, and we hope that it will be widely used. In keeping with the objectives of the series this manual is full of practical advice and commentary while being sensitive to the differing teaching environments and styles that constitute the delivery of legal education in the UK.

About the authors

Noel Whitty is a lecturer in law at the Law Department, Keele University. His teaching interests are public law, civil liberties law, and health care law. He is co-editor of *Feminist perspectives on public law* (Cavendish, 1999) and co-author of *Civil liberties law: the Human Rights Act era* (Butterworths, 2001).

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Preface

Legal educational aims and human rights

The aims of legal education are controversial and heavily debated. However, in line with several recent statements, for example the Quality Assurance Agency's law benchmark statement (2000) and the first report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (1996), the following aspirations may provide a possible starting point:

- core knowledge
- contextual knowledge
- legal values
- intellectual integrity and independence of mind
- professional skills

The purpose of this manual is to demonstrate how human rights law can be used to address each of these key aspects of legal education in diverse and stimulating ways. The **Human Rights Act 1998** gives the manual's goals especial relevance and impetus. Throughout this manual we will argue that the study of human rights law and practice can:

- provide students with core knowledge of legal documents
- internationalise legal education
- provide a conceptual framework for assessing competing political and legal claims
- encourage the development of ethical and political values
- cultivate communication and problem solving skills

<table>
<tr><th>core knowledge</th><th>contextual knowledge</th><th>legal values</th></tr>
<tr><td colspan="3">international law element</td></tr>
<tr><td colspan="3">universal minimum moral/legal standards</td></tr>
<tr><td colspan="3">application of international standard in domestic legal system</td></tr>
<tr><td>● European Convention on Human Rights</td><td colspan="2">● comparative law contact with different national legal systems</td></tr>
<tr><td colspan="2">● use of diverse law and non-law sources (for example law reports, country reports, witness statements, NGO reports, websites)</td><td rowspan="2">● respect for persons
● standards for practice, for example independence of lawyers and judiciary
● respect for diversity
● founding principles of law and society</td></tr>
<tr><td></td><td>● relationship between law and social change</td></tr>
</table>

<table>
<tr><th>intellectual integrity and independence of mind</th><th>professional skills</th></tr>
<tr><td>● many moral, legal and jurisprudential dilemmas to grapple with:
◆ rights discourse
◆ issues, for example death penalty, self-determination, abortion
◆ gender aspects
◆ cultural relativism
◆ group rights v individual rights
◆ civil and political v social and economic</td><td>● group work
● legal reasoning
● integration of law and context</td></tr>
<tr><td colspan="2">● skills and practice in negotiation (for example as NGOs, international organisations, or between countries)
● skills of representation (for example moots, European Court of Human Rights cases)</td></tr>
</table>

Using this manual

Each section of the manual provides examples of how human rights materials may be used in specific subject areas, the variety of teaching objectives open to the human rights teacher, commentaries on learning experiences, sample class exercises, assessment topics and teaching methods. It is organised as follows:

Overview and introduction

Section 1 provides an overview of the manual and introduces two broad approaches to teaching human rights:

- integrating human rights topics across the law curriculum
- teaching a human rights course

Subsequent sections explore these broad approaches in more detail and are designed to provide detailed guidance on teaching human rights from a range of different perspectives and at different levels of the law curriculum.

Integrating human rights across the law curriculum

In section 2 Susan Millns discusses teaching human rights as part of a first year constitutional and administrative law course.

In section 3 Noel Whitty illustrates how one particular aspect of human rights, the right to life, can be integrated across the law curriculum. He also demonstrates how different teaching approaches can be adapted or improved using human rights case studies.

Teaching a human rights course

In section 4 Doris Buss describes learning and teaching issues in the delivery of an international human rights course.

Finally in section 5 Wade Mansell sets out a series of fundamental premises that he argues should underpin the teaching of human rights.

References

- Lord Chancellor's Advisory Committee on Legal Education and Conduct (1996) *First report on legal education and training* (London: The Committee)
- Quality Assurance Agency (2000) *Law benchmark statement* (Gloucester: Quality Assurance Agency)

1

Overview and introduction to teaching human rights

Noel Whitty, Law Department, Keele University
Christine Bell, School of Law, University of Ulster

This section seeks to provide an overview of the role of, and possible places for, human rights education within the undergraduate law degree. It is designed to set the subsequent sections of the manual in context by addressing some of the more general aspects of teaching human rights as part of the law curriculum.

Traditionally, human rights teaching in UK law schools has been on the margins of the law curriculum. It is usually delivered in one or both of the following ways:

- **situating examples from human rights law in a range of individual courses**
- **providing a dedicated civil liberties/human rights course**

The **Human Rights Act 1998** (which fully came into force throughout the UK in October 2000) was predicted to have a dramatic effect on this pattern of human rights teaching. All aspects of legal education and practice were expected to be challenged and, in some contexts, transformed by the creation of a human rights culture in the UK. Recent evidence, however, suggests that much remains to be done:

> ***The Human Rights Act 1998 (HRA) is the biggest constitutional and legal change for decades.*** *But how well prepared were the UK law schools who produce many of our lawyers? While judges received an extensive training, law teachers' professional bodies such as the Society of Public Teachers of Law and the Socio-Legal Studies Association appeared to produce no literature nor run workshops on the impact of the Act on the LLB syllabus… Discrete, named courses on human rights are offered in most law schools although they are compulsory in only two institutions. Just over half the law schools have a syllabus revision committee that issues recommendations regarding the HRA to faculty members.*
>
> *The danger with this* ***piecemeal approach*** *is that staff, particularly in private law subjects, may consider the HRA to be of little or no relevance to their course, or, indeed, to their own research. If teachers believe that public law covers the HRA, then why should they bother to duplicate the work? Such a position is dangerously inaccurate. For example, no course on evidence that covers the right to silence should exclude Murray v UK, Condron v UK, or Averill v UK. Article 6 of the European Convention on Human Rights (ECHR) remains relevant throughout the course. In tort, Articles 2 and 6 need consideration along with Osman v UK. In commercial law Wilson v First County Trust Ltd threatens the very essence of the Consumer Credit Act 1974, and in company law Saunders v UK successfully raised the issue of self-incrimination within the wider context of disqualification of company directors.* ***Frankly, it is not possible to avoid the HRA and maintain one's integrity as a competent law teacher****.*
>
> ***Law teachers must also expand jurisprudential thinking to include the civil law process of addressing principles rather than focusing on facts, issues, precedents and procedure. The HRA and the ECHR require us to think along the lines of principle.*** *It would be gratifying to be able to stop saying to students "it might be unjust but that is the law".*
>
> (Thomas 2001: our emphasis)

Integrative approach

In light of these comments we explain below how to begin integrating human rights law into some typical undergraduate courses, regardless of the availability of a general human rights course in the curriculum. Courses used as examples are:

- property law
- criminal law, evidence
- health care law
- family law
- jurisprudence

The following two sections give a more detailed examination of integrating human rights into the curriculum.

Stand alone courses

In this section we also look at the provision of a specific human rights course in the law curriculum and the variety of teaching approaches available to the human rights teacher. The following topics are considered:

- teaching a general human rights course
- getting started
- designing and developing a human rights course
- the rights approach
- the institutions approach
- the combined approach

The integrative approach

Not all law schools will provide specific human rights modules nor will all students select such optional courses, but there are many opportunities to introduce human rights materials across the undergraduate curriculum. This section describes how to start integrating human rights law into different subject areas without the need to create additional courses. The benefits will be two-fold:

- **furthering educational aims**
- **exposing students to interesting and stimulating human rights materials**

Many core and optional modules can benefit from, and indeed in some cases require, some human rights content. **The diverse range of case law decided under the Human Rights Act 1998 in its first years of operation clearly demonstrates the need to rethink traditional subject categories and teaching approaches**. The most obvious example is a (first year) constitutional and administrative/public law course, which increasingly includes aspects of human rights law (for example case law from the European Court of Human Rights, evolving judicial review standards, the 'horizontal effect' debate, new definitions of parliamentary sovereignty). This topic is covered in detail in the second section of the manual. However, less obvious subject areas can also be rethought and presented afresh using human rights perspectives.

Property law

Example: Aboriginal land rights

Although perhaps not immediately obvious, there are several applications of human rights law that can be used in the teaching of property courses. Students could be asked to consider the many international self-determination disputes surrounding the ownership and control of territory. Specifically, the human rights materials on Aboriginal land rights in Australia could be integrated into discussion of the **concept of property**. More broadly, one could consider how international finance and property interests impact on the extent of protection of economic, social and cultural rights of developing countries/disadvantaged groups (see **section 5** for examples of this approach). Most obviously, there have been several cases under the **Human Rights Act 1998** that directly impinge on aspects of property law.

Sample materials on property

- *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1
- *Aboriginal land claims* – judgments available from AustLII <http://www.austlii.edu.au>
- Bottomley A (1996) 'Figures in a landscape: feminist perspectives on law, land and landscape' in Bottomley A (ed) *Feminist perspectives on the foundational subjects of law* 109 (London: Cavendish)
- Gray K (1991) 'Property in thin air' 50 *Cambridge Law Journal* 252
- Hyde A (1997) *Bodies of law* (Princeton: Princeton University Press)
- Nedelsky J (1990) *Private property and the limits of American constitutionalism* (Chicago: Chicago University Press)
- Penner J E (1997) *The idea of property in law* (Oxford: OUP)
- Rotherham C (1998) 'Conceptions of property in common law discourse' 18 *Legal Studies* 43

Class objectives

To demonstrate to students that:

- land rights are about questions of wealth and power
- property law may not benefit all groups of people equally
- courts have the option of recognising a right to equality/cultural diversity when interpreting the principles of property law

Class exercise

Ask students to describe what counts as a property right. Is it based on ownership or control or usage of land? How does a person acquire this property right (length of occupancy, exclusion of others, payment)? Introduce the Aboriginal history of Australia into the debate: Aborigines were the undisputed owners and occupiers of land until 1788 when a new legal regime was imposed by British colonialists. Does the native title of Aborigines to their land survive? Write the responses of students out on an OHP.

Introduce the *Mabo* judgment to the discussion. (Students can access High Court judgments from AustLII if Australian law reports are not available.) Ask students to debate why the High Court recognised native title. Why did the conventional rules of land law not apply? Is it possible to understand the reasoning without knowledge of the history of colonisation and the Aboriginal claims for social justice? What does this tell us about how judges discuss land law in other contexts?

Guidelines for discussion

The general aim here is to demonstrate how the High Court's adoption of a human rights perspective impacted on the traditional common law definitions of property law. As O'Donnell and Johnstone argue, asking students to critically examine the socio-legal aspects of Aboriginal land claims demonstrates:

- the diversity of relationships to place and hence the diversity of possible forms of ownership of land
- that the appropriation of indigenous land is the basis of Australian settler society, while the meanings ascribed to that land have been contested for over 200 years
- the fragile co-existence of different cultural groups and the complexity of cross-cultural encounters both on the ground and in the courts

(Adapted from O'Donnell and Johnstone 1997)

Impact of the Human Rights Act

Consider whether the following HRA cases affect the traditional understandings of property. Does the use of the Human Rights Act 1998 (Article 8 right to a home and Article 1 of the First Protocol on enjoyment of property) make more explicit the power relations within property relationships? Does the concept of public interest alter depending on the type of property in question? Is there a limit on the extent of a corporation's human rights?

- *Marcic v Thames Water Utilities Ltd* (2001) 3 All ER 698 (failure to repair sewers near to the claimant's home constituted an interference with rights under HRA)

- *Parochial Church Council of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2001] EWCA Civ 713 (liability of lay owners of what was once the glebe land of a rectory to defray the unmet cost of repairs to the chancel of the parish church was contrary to the owners' rights under the HRA as arbitrary taxation)
- *R v Dimsey* [2001] UKHL 46 (imposition of tax under Income and Corporation Taxes Act 1988 on offshore companies compatible with the HRA)
- *St Brice v Southwark London Borough Council* [2001] EWCA Civ 1138 (issuing of warrant of possession did not infringe a tenant's rights under the HRA)
- *Wilson v First County Trust* (2001) 3 All ER 229 (s.127(3) of Consumer Credit Act 1974 was incompatible with the rights guaranteed by Protocol 1 Art.1 and
- Art.6 ECHR as the absolute bar to enforcement of a regulated agreement that did not contain the terms prescribed by s. 61 of the Act was a disproportionate restriction on the rights of a lender)

Criminal law, evidence

In these subject areas, reference to human rights law is not just a 'nice spin' or a piece of interesting lateral thinking; **it is an essential part of teaching the subject properly**. Yet the traditional criminal law/evidence textbook approach often places little emphasis on the human rights principles/values that are the foundation of a criminal justice system in a democracy. Adopting a human rights perspective in the teaching of these subjects helps students to **see beyond the doctrinal categories and technical rules**, as well as making the subject **relevant to real life experiences**.

Example: right to a fair trial

Significantly, the most common type of application to the ECHR system in Strasbourg has been under Article 6 dealing with the right to a fair trial. Key decisions of the European Court of Human Rights (for example *Murray v United Kingdom*; *Venables and Thompson v United Kingdom*; *Rowe and Davies v United Kingdom*) are clearly relevant to different aspects of UK domestic law; for example the right to silence, access to a lawyer, cross-examination, disclosure etc.

Sample materials on Article 6 and cross-examination

- Youth Justice and Criminal Evidence Act 1999, section 41

- *CR v United Kingdom* (1995) 21 EHRR 363 (re marital rape)
- *R v A* [2001] UKHL 25; [2001] 3 All ER 1 (HL)
- *R v Darrach* [2000] 2 SCR 443 (Canadian Supreme Court re cross-examination)
- *R v Ewanchuk* [1999] 1 SCR 330 (Canadian Supreme Court re consent)
- *R v Seaboyer* [1991] 2 SCR 577 (Canadian Supreme Court re cross-examination)

- Ashworth A (1999) 'Article 6 and the fairness of trials' *Criminal Law Review* 261
- Kibble N (2000) 'The sexual history provisions: charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?' *Criminal Law Review* 274
- Lacey N and Wells C (1998) *Reconstructing criminal law* (London: Butterworths) 1-90
- Temkin J (2000) 'Prosecution and defending rape: perspectives from the rape' 27 *Journal of Law and Society* 219
- Temkin J (1999) 'Reporting rape in London: a qualitative study' 38 *Howard Journal* 17
- Whitty N, Murphy, T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths) 163-214

Class objectives

By focusing on cross-examination, to illustrate:

- the need to contextualise the right to a fair trial and move beyond descriptive accounts of legal rules and ECHR case law
- the complex relationships and processes that constitute the criminal justice system (police, lawyers, courts, media etc)
- the ordinary and extraordinary aspects of criminal prosecutions that eventually result in a rape trial
- the need for an expanded conception of fair trial which incorporates respect for privacy and equality rights
- the extent to which feminist law reforms can challenge gendered assumptions about the autonomy of women and sexuality

Class exercise

Ask students to read Article 6 of the European Convention on Human Rights. Do they think that the English legal system complies with it in light of the history of rape trials (currently over 90% acquittal rate)? Are they aware of the attitudes of prosecution and defence barristers towards certain complainants in rape cases? In light of the readings by Temkin, ask students to list the categories of information they think are 'relevant' and 'irrelevant' for defence cross-examination purposes in rape trials. Are these absolute categories, or should a) the trial judge and b) Parliament be able to specify the limits of cross-examination? What do they think is the purpose of cross-examination? Are all judges 'impartial umpires' in rape trials? How important is this one statutory provision in the overall criminal prosecution/trial?

Why do they think that Parliament enacted section 41 of the 1999 Act? Ask students to read the majority and minority opinions of the House of Lords in *Re A.* Is Lord Hope correct in stating that Parliament, on the basis of empirical research and lobbying, is better placed to legislate in this area? Or is the majority correct in stating that the Human Rights Act 1998/Article 6 of the ECHR require the fairness of the rape trial to be determined by the trial judge? Did the majority consider the complainant's right to a fair trial?

> *Our focus on the rape trial illustrated both the ordinary and extraordinary aspects of criminal prosecutions that eventually result in jury trial. We highlighted the substantial risks that legislative reforms, designed to address the failure of the legal system to respond to the incidence of sexual violence, are vulnerable to a civil liberties tradition that emphasises the priority of the defendant's right to a fair trial.*
>
> (Whitty, Murphy and Livingstone 2001)

Guidelines for discussion

The focus of the discussion should be directed towards:

- highlighting how the right to a fair trial needs to be contextualised
- illustrating how the ECHR case law can be interpreted within the traditional parameters of criminal law and evidence doctrine (and noting the new adjudicatory role of the courts under section 3 of the HRA 1998)
- highlighting the contingent nature of the relationship between courts and Parliament (and the executive)
- demonstrating the difficulties of using human rights norms to positively transform some criminal justice practices and debates

Example: health care rights

Health care law

Human rights perspectives are transforming the traditional approach to teaching health care law. Issues such as life, death, autonomy, consent, parenthood and confidentiality are now articulated in the language of rights. Moreover, the **patient is increasingly viewed as a rights holder** rather than the subject of a paternalistic doctor/patient relationship. Traditionally issues of medical law have been classed into legal categories such as tort (negligence), family (surrogacy), criminal (abortion), administrative law (NHS resources) etc. However, the influence of international and national human rights norms have steadily transformed the nature of health care law and how it is taught in law schools. This influence is likely to grow, as the **Human Rights Act 1998** provides increasing opportunities to individuals and groups to demand health services and to challenge medical power. More broadly, human rights principles are starting to impact on the education and training of health care professionals, and on the ethical reviews conducted by government commissions and professional regulatory bodies in the health care field.

Sample materials on health care law and human rights

- *Re A (Children) (Conjoined Twins: Medical Treatment*) [2001] 4 All ER 961 (CA)
- *R v Director of Public Prosecutions, ex p Diane Pretty* [2001] EWHC Admin 788 (re assisted suicide)
- *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850 (CA) (re closure of nursing home)
- *R v Secretary of State for the Home Department, ex p Mellor* (2001) 3 WLR 533 (CA) (re refusal of facilities for artificial insemination to prisoner)
- *R v Secretary of State for the Home Department, ex p P and Q* (2001) 2 FLR 383 (CA) (re policy on mother and baby units in prisons)

- Lord Irvine (1999) 'The patient, the doctor, the lawyers and the judge: rights and duties' 7 *Medical Law Review* 255
- Leary V (1994) 'The right to health in international human rights law' 1(4) *Health and Human Rights* 24
- McHale J and Fox M (1997) *Health care law: text and materials* (London: Sweet & Maxwell)
- Sheldon S and Thomson M (eds) (1998) *Feminist perspectives on health care law* (London: Cavendish)
- Toebes, BCA (1999) *The right to health as a human right in international law* (Antwerp: Intersentia)

Class exercise

See **section 3** for information on the different ways of teaching the right to life in a health care context and for a case study on abortion.

Example: concept of family

Family law

Family law courses provide many opportunities for the introduction of human rights materials. For example, **children's rights** can be set in an overall framework of international obligations under the UN Convention on the Rights of the Child. International human rights law also promotes very traditional concepts of **the family** and **marriage**. This can be contrasted with the **rights strategies** of single women and lesbian and gay couples to redefine family life and its related rights (for example pension, health, travel, adoption, parenthood). In addition to general international standards relating to family life, other treaties also impact on this area of law; for example, the UN Convention on the Elimination of All Forms of Discrimination Against Women.

Sample materials on family law and human rights

- *Grant* v *South West Trains Ltd* Case C-249/96 [1998] ECR I-621

- Boyd S (1999) 'Family, law and sexuality: feminist engagements' 8 *Social and Legal Studies* 369
- Collier R (1995) *Masculinity, law and the family* (London: Routledge) 47-86
- Herman D (1994) *Rights of passage: struggles for lesbian and gay legal equality* (Toronto: University of Toronto Press)
- Stychin C F (2000) '*Grant*-ing rights: the politics of rights, sexuality and European Union' 51 *Northern Ireland Legal Quarterly* 281
- Wintemute R (2000) 'Lesbian and gay inequality 2000: the potential of the Human Rights Act 1998 and the need for an Equality Act 2002' *European Human Rights Law Review* 603

Class exercise

See **section 4** for information on teaching students about women's human rights strategies, and lesbian and gay legal strategies.

Jurisprudence

Example: concepts of justice

Human rights law can be fruitfully used to illustrate many aspects of **legal theory** courses; for example questions of legal interpretation, concepts of justice, the nature of rights and liberal theory, communitarianism, natural law, law and economics. Given that students are often uncomfortable dealing with jurisprudence at the abstract level **human rights examples** can be a useful way of providing a context for these debates. Furthermore, **critical legal theory** generally – feminist, race and queer legal theory, in particular – have generated a large literature on the benefits, and limits, of **rights discourse** which can usefully be linked to examples from the human rights field.

Sample materials

- *R* v *R* [1991] 4 All ER 481

- Fox M and Bell C (1999) *Learning legal skills* (London: Blackstone Press)
- McColgan A (2000) *Women under the law: the false promise of human rights* (London: Longman)
- Phillips A (1999) *Which equalities matter?* (Cambridge: Polity)
- Richardson J and Sandland R (2000) *Feminist perspectives on law and theory* (London: Cavendish)
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths) 377-434
- Williams P (1991) *The alchemy of race and rights* (Cambridge: Harvard University Press) 98-130
- *Women's Caucus for Gender Justice* <http://www.iccwomen.org>
- *Women's Human Rights Resources* <http://www.law-lib.utoronto.ca/diana>

Class objectives

The aim of the following exercise is encourage students to consider concepts of justice or fairness. The majority of students will instinctively focus on **procedural/formal justice**; a just result is where 'like' cases are treated 'alike'. This links with the concept of legal **precedent**; a court generally follows its earlier decisions unless there are persuasive reasons to do otherwise.

The contrasting perspective involves the concept of **substantive justice**; the focus is not on the procedural rules but the end result. For example, the low number of female judges is no longer due to a formal rule preventing women applying but to broader social factors. Therefore in order to achieve equal treatment certain groups may ask for different (positive/affirmative) treatment.

Class exercise

Tell students that they are to imagine themselves as qualified lawyers and to read the following before giving advice to the president and government of Atlantis:

> In 3001, after 100 years of fighting, the civil war in Atlantis is finally resolved. One of the aims of the new government is to be respected worldwide for the way in which its legal system promotes justice. In order to achieve this aim, the government trawls the legal systems of the world for examples that it might copy or amend. It decides to adopt in the Atlantis Constitution:
>
> 1 an English-style doctrine of precedent
> 2 a United States-style constitutional provision against discrimination which reads: *Article I: All shall be entitled to the equal protection of the law*
>
> One year on, in 3002, the government of Atlantis begins to feel that everything has gone awry. Two judgments of their final court of appeal, the Supreme Court, have caused an outrage with citizens demanding that they not be followed in future cases.
>
> *In* Atlantis v A*, the supreme court, in interpreting the meaning of section 1 of the Sexual Offences Ordinance which defined rape as 'unlawful sexual intercourse with a woman without her consent', held that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent as, by marriage, a wife submits herself irrevocably to sexual intercourse in all circumstances.*
>
> In *B v B* the Supreme Court held that Article I of the Atlantis Constitution prohibited discrimination in favour of people of colour, a previously disadvantaged group in Atlantis.
>
> *Recently, there have been frequent violent demonstrations on the lawn in front of the president's residence, the Blue House, by anti-abortion protesters who believe that foetal rights are not being sufficiently protected under Article I.*
>
> Spurred on by the extensive media coverage which these anti-abortion protesters are receiving, animal rights groups plan to demonstrate against what they see as the current lack of justice for animals under Article I.
>
> The president is reported to be furious. The government is in despair. They call you in. They demand that you figure out what is causing all the trouble. Are their laws unjust or unfair?

Guidelines for discussion

Ask students to consider whether past discrimination on the grounds of sex or race justifies special treatment now. What does treating 'like with like' mean? When should courts overrule their earlier decisions? Most students will argue that *A* v *A* should be overruled, but what if the Supreme Court insists on following precedent? Also, is government in a better position than the courts to reform the law on rape so that women and others are treated justly?

Usually a majority of students will agree with the decision in *B* v *B*. Generate a discussion as to why equality is defined as formal rather than substantive justice. If patterns of sex or race discrimination continue – even where anti-discrimination law exists – is this not a bad reflection on a liberal concept of justice? Or can a legal system only ever be partially effective in preventing people from discriminating on grounds such as sex, race, religion and sexual orientation?

Other issues raised by the problem are the definition of 'all' in Article I; would it be a just outcome to recognise the embryo/foetus as deserving legal protection? What would this mean for women's rights? Should the definition of 'all' also include/exclude an intelligent animal such as a dolphin or chimpanzee?

Do students think that there is too much talk about rights in Atlantis? Ask students if they have taken account of Atlantis' troubled history and the youthful nature of its democracy in reaching their decisions.

(Adapted from Therese Murphy, *Idea of law* course, School of Law, University of Nottingham)

Teaching a stand alone human rights course

This section deals with the teaching of a general human rights course. It raises some preliminary points about how to get started and describes three main approaches to devising a human rights course. More specific details on teaching optional human rights courses are addressed in **sections 3, 4 and 5**.

Getting started

A number of general issues need to be considered before deciding on the design of a general human rights course. These include:

- Will students be coming to the course with some **background knowledge** of the European Court of Human Rights and the impact of the ECHR on domestic law? Hopefully the **Human Rights Act 1998** will have been introduced in various contexts from the very first semester of the law degree. Will students have studied any public international law? More generally, consider the background of the class.
- What are the law teacher's **legal education goals** for this course? See **section 3** for a discussion of the merits of black letter, socio-legal and critical teaching approaches and of how human rights teaching can achieve different legal educational goals.
- What are the **aims** of the course? To provide a comprehensive account of certain human rights systems (the United Nations, the Council of Europe), or an overview of human rights law (including a selection of institutions and rights)? Or is the aim to focus in detail on particular contexts (for example women's rights, refugee rights)?
- How can the law teacher create the **best teaching environment** to achieve these educational aims? See **section 3** for some teaching hints.
- What are the **best teaching formats** available: one hour lecture, two hour seminar, student presentations, role playing, independent reading, moot court? Is it possible/desirable to invite guest speakers with specialist/activist knowledge? Are visits to courts, non-governmental organisations (NGOs), prisons, refugee centres etc possible?
- Are there **international students**/students with **fieldwork** or travel experience in the class who may be interested in presenting reports on specific human rights issues in other countries? Can students have the option of writing a dissertation/coursework on a topic of their own choosing?
- Does the law library provide **sufficient materials**? If good student access to the Internet is available, there is a large volume of human rights material available online (international treaties, court reports, UN documents, NGO reports on human rights situations and abuses, human rights mailing lists, etc). For example, search under country name or human rights topic in:
    - Amnesty International <http://www.amnesty.org>
    - Beagle <http://www.beagle.org.uk>
    - Council of Europe <http://www.coe.int>
    - Human Rights Watch <http://www.hrw.org>
    - International Committee of the Red Cross <http://www.icrc.org>
    - International Labour Organisation <http://www.ilo.org>
    - UNHCR Refworld <http://www.unhcr.ch/research/rsd.htm>
    - United Nations <http://www.un.org>
    - University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts>
    - Womens Human Rights Net <http://www.whrnet.org>

- What **books**, if any, should be prescribed? Depending on the aims and format of the course, a textbook, cases and material collection, library references or photocopies may be recommended. Does the law library stock relevant journals? What **online human rights journals** are available?

- Is there an opportunity to use **video** as a teaching tool? See **section 3** for a discussion of its educational uses.

Designing and developing a human rights course

The teacher of a specific human rights course has a basic problem to overcome: how best to engage with the subject. There are two main approaches in use: a) to present information on the **institutions** protecting different rights and the mechanisms for enforcing them or b) to teach human rights law by exploring the different **rights** protected and the jurisprudence of the international institutions in relation to them. Starting with either one has problems, as the following discussion (based to some extent on caricatures) illustrates.

The institutions approach

Many academics teaching human rights law, and many students coming to the field, have not just an academic or abstract legal interest in the area, but a commitment to using human rights law to achieve social change. Students may be members of groups such as Amnesty International or Greenpeace and have preconceptions about what they will be studying.

Unfortunately, study of the international and regional institutions designed to protect rights and administer the human rights treaties often eclipses the pressing and gripping problem of human rights abuses – torture, disappearances, the prisoner of conscience etc. Students are faced with a myriad of **bureaucratic and complex institutions** that seem to be diffuse and ineffective when compared with domestic legislative responses to legal problems. Thus, studying only the human rights institutions can quickly become boring and class interest dissipates.

However, the institutions approach can be very effective in some contexts, for example at postgraduate level, where students have some knowledge of international law and perhaps experience of working for NGOs.

Sample course outline

- human rights: history and philosophy
- the foundations of international law (law of treaties etc)
- making of human rights law
- United Nations: mechanisms
- United Nations: treaty organs
- regional systems: Asia and Africa
- regional systems: Europe and America
- NGOs and fact finding
- domestic protections of human rights

Sample reading list: United Nations and human rights materials

- Alston P (ed) (1992) *The United Nations and human rights: a critical appraisal* (Oxford: OUP)
- O'Flaherty (1994) 'The reporting obligation under Article 40 of the ICCPR: lessons to be learned from consideration by the Human Rights Committee of Ireland's First Report' *Human Rights Quarterly* 515-539
- Rodley N (1992) 'United Nations non-treaty procedures for dealing with human rights violations' in Hannum H (ed) *Guide to international human rights practice* (Philadelphia: University of Pennsylvania Press) 60-85
- Steiner H and Alston P (2000) *International human rights in context: law, politics and morals* (Oxford: OUP) 592-778

Useful manuals (also provide information on UN structure and operation)

- International Service for Human Rights (1992) *The UN Commission on Human Rights, its Subcommission and related procedures: an orientation manual* (Geneva:
- International Service for Human Rights) <http://www.ishr.ch>
- Winter J (1996) *Human wrongs, human rights: a guide to the human rights machinery of the United Nations* (London: British Irish Rights Watch) <http://www.birw.org>
- Women's Rights Project (1997) *Women's human rights step by step: a practical guide to using international human rights law and mechanisms to defend women's human rights* (New York: Human Rights Watch) <http://www.hrw.org>

Class exercise

Assess the general strengths and weaknesses of the different UN institutions and processes directed at enforcing human rights norms. Ask students to rank what they consider the most 'effective' UN response. Divide the class into two groups and repeat the exercise using the case studies of a) disappearances and b) violence against women. Does the order of ranking change? If so, what are the reasons? What possible reforms would improve the effectiveness of the UN regime in these particular studies?

The rights approach

An alternative teaching approach is to consider the **textual provisions of human rights treaties** (usually relating to civil and political rights) and how they might address the human rights violations experienced by individuals and groups. This is a common approach in the teaching of the European Convention of Human Rights, where teachers literally follow the article by article format (right to life, right not to be tortured etc). However, in the absence of any knowledge of human rights institutions students can end up examining a mishmash of jurisprudence from different systems with little ability to imagine how a 'victim' might access different institutions.

Problems with the rights approach can be further exacerbated by the absence of reference to **wider historical, political or social contexts** in which individual rights have developed and are given effect (for example, the reluctance of the police to prosecute gender violence, the legality of corporal punishment of children). This leaves the student further confused as to the 'gap' between the rhetoric of human rights and their legal protection.

Sample course outline

- right to life
- freedom from torture or inhuman or degrading treatment
- freedom from slavery, servitude or forced labour
- right to liberty
- right to fair trial
- right to privacy and family life
- freedom of religion
- freedom of expression, assembly and association
- right to an effective national remedy
- freedom from discrimination

Sample reading list: Is there a universal right not to be tortured?

- *Aksoy v Turkey* (1997) 23 EHRR 553
- *Soering v United Kingdom* (1989) 11 EHRR 439, 464-78
- *Tomasi v France* (1992) 15 EHRR 1

- Copelon R (2000) 'Gender crimes as war crimes: integrating crimes against women into international criminal law' 46 *McGill Law Journal* 217
- Copelon R (1994) 'Recognising the egregious in the everyday: domestic violence as torture' 25 *Columbia Human Rights Review* 291-305
- Duffy P (1983) 'Article 3 of the European Convention on Human Rights' 32 *International Comparative Legal Quarterly* 316

- Lee Y (1997) 'Violence against women: reflections on the past and strategies for the future: an NGO perspective' 19 *Adelaide Law Review* 45
- Rodley N (1999) *The treatment of prisoners under international law* (Oxford: OUP)
- Twining W (1973) 'Bentham on torture' 24 *Northern Ireland Legal Quarterly* 307-320

Class discussion

The aim is to address whether there is a universal right not to be tortured. Students will find the Bentham reading interesting as it discusses arguments for limited recourse to torture which appear to contradict the non-derogable right in Article 3 of the European Convention on Human Rights. Examination of case law also indicates a judicial sliding scale – from some abuse, to cruel, inhuman and degrading treatment, to torture – which arguably does not reflect the reality of abusive practices.

Ask students whether the concept of cruel, inhuman and degrading treatment has a subjective element to its definition. Does it depend on the psychological make-up of the victim? Can they distinguish between inhuman treatment and torture? Is physical or psychological abuse worse?

Introduce the Copelon readings into the discussion. Why does it cause surprise to compare gender violence with torture? Should it make a difference that a private individual rather than a police officer is engaged in the violence, or that it is happening in the private sphere (for example the home)? Why have the courts been reluctant to address the gender aspects of torture?

The combined approach

As noted earlier the above descriptions of the institutions and the rights approaches are to some extent caricatures. Most teachers will integrate some institutions and some rights materials in their courses. However, there is often a tendency to emphasise the detail on one particular institution or right (perhaps because it is a research interest of the teacher) rather than to **integrate the two perspectives in an educationally effective way**. This section draws from Steiner and Alston's *International human rights in context* (OUP, 2000) to provide an example of a 'combined' approach which retains student interest while also placing human rights law into a broader political and social context.

However, even the combined approach may have its limitations. The tendency may be to reduce feminist engagement or developing world critiques to mere additions to the traditional structure of international human rights law. The **more fundamental challenges to, and reconfigurations of, key debates within international human rights law and practice may be marginalised or ignored**. See **sections 4 and 5** for further information on addressing some of these concerns.

Sample course outline

- human rights issues and discourse
- background to the human rights movement
- civil and political rights
- economic and social rights
- rights, duties and cultural relativism
- conflicting traditions and rights
- need for international institutions
- United Nations system
- treaty organs: the International Covenant of Civil and Political Rights (ICCPR) Human Rights Committee
- regional arrangements
- civil society: human rights NGOs
- state protection
- violator states

- prosecutions and truth commissions
- self-determination and autonomy regimes
- globalisation, development and human rights

Course objectives

To demonstrate the inter-relationships between:

- individual experiences of human rights violations
- groups of individuals lobbying against violations
- human rights NGOs
- domestic governments
- international human rights responses through treaties
- enforcement mechanisms

Sample seminar 1: Introducing human rights with global snapshots

The first chapter of Steiner and Alston's *International human rights in context* provides a very useful beginning to a human rights course. It contains many different 'global snapshots' – short descriptions of a political/human rights situation in a country – which can be used to introduce students to the diversity of human rights problems in the world. The aim is to generate debate and reflection about the role of human rights law (as well as to comment on the selectivity and content of media representations). Some edited examples are:

Amnesty finds 'widespread pattern' of US rights violations
New York Times 5 October 1998

Amnesty International, in its first campaign directed at any western nation, intends to publish a harsh report on the United States on Tuesday, saying American police forces and criminal and legal systems have a 'persistent and widespread pattern of human rights violations'…The report is part of a growing effort among human rights organizations to seek 'balance' in reporting by looking at industrialized as well as developing nations. The Clinton administration has encouraged that trend more than its predecessors, welcoming monitors from the United Nations Human Rights Commission in the face of sharp criticism from some members of Congress…

Without responses from American officials, [the report] concludes with this statement:

"Across the country thousands of people are subjected to sustained and deliberate brutality at the hands of police officers. Cruel, degrading and sometimes life threatening methods of constraint continue to be a feature of the US criminal justice system."

Kenyan tradition confronted: a beaten wife goes to court
New York Times 31 October 31 1997

Agnes Siyiankoi says her husband used a wooden club the last time he beat her. She had to be carried to the hospital. Ms Siyiankoi, a 30-year-old Masai, says she suffered 13 years of abuse before deciding to defy tradition and take her husband to court. The case is a rare in a country where wife beating is prevalent and even condoned.

Using gifts as bait, Peru sterilises poor women
New York Times 15 February 1998

For Magna Morales and Bernadina Alva, peasant Andean women who could barely afford to feed their families, it was a troubling offer but one they found hard to refuse. Shortly before Christmas, government health workers promised gifts of food and clothing if they underwent a sterilization procedure called tubal ligation.

Another method of introducing similar issues in the class is to take a week's newspapers and ask groups of students to choose stories with human rights implications that they would like to talk about.

Guidelines for discussion

Steiner and Alston set the following questions for students to consider when reading the reports above:

- What is the source of the rules or standards under which governmental, intergovernmental and non-governmental organisations evaluate and criticise a state?
- What different roles do these types of organisations seem to play?
- How would you identify the alleged human rights violation in each story? Are you clear in each story that (if the reported facts are true) there has been a violation of human rights?
- Are (international) human rights violations committed only by states, or are non-governmental forces and individuals also accused of such violations? Do all the stories involve governments as the direct violators of rights?
- What steps if any seem to be taken to influence or force a state to end violations?'

(Extracted from Steiner and Alston 2000)

Sample seminar 2: NGOs and human rights

Tell students that they are to imagine working for a human rights NGO in Northern Ireland. Their task is to consider how best to work for the protection of human rights in the following case study scenarios. In each case, they are required to write a 'human rights memo' for the head of the NGO answering these questions:

- what human rights are at stake?
- what mechanisms would you consider using?
- how would you access those mechanisms?
- how would this fit in with broader strategic aims and local action?

Case study 1
You receive allegations of abuse of suspects detained in two police stations. The allegations are not continuous but are persistent. Patterns of allegations emerge; sometimes, unconnected detainees allege physical maltreatment (for example beatings); at times, allegations of psychological and sexually harassing abuse are made (for example threats to the detainee and their family). The police respond that these allegations are fabricated so that detainees can both slander the police's reputation and justify to paramilitary groups the fact that they give confessions without incurring their wrath.

Case study 2
The annual Orange Order marches are about to take place. Residents in the Nationalist areas of Lower Ormeau and Garvaghy Road have suggested that you should monitor the marches and the residents' counter protests. The official Parades Commission is due to make proposals for further legislation and have invited you to submit a report on the human rights perspectives of marching in Northern Ireland. While you are involved in this work there is a standoff between police and the Orange Order at Drumcree. Two outcomes are now possible: a) the police will eventually permit the march and will use physical force (batoning and plastic bullets) to remove Nationalist protesters or b) the police will prevent the march and will use physical force to restrain Loyalist protesters. In both outcomes there will be injuries to police and protesters.

Case study 3
Government statistics show that despite "the strongest anti-discrimination regime in the United Kingdom and arguably Europe", Catholics in Northern Ireland remain worse off than Protestants on all socio-economic indicators. In relation to employment, statistics indicate that since the 1970s Catholic males are more than twice as likely to be unemployed than Protestant males.

Guidelines for discussion

The first case study should focus on the international human rights standards prohibiting torture and cruel, inhuman and degrading treatment (for example

Article 7 of the ICCPR, Article 3 of the ECHR). Discussion should also be focused on the issue of fact finding, and to what extent this is necessary and feasible (for example where the police refuse access). What is the role of medical personnel here if they are allowed access? Is the UK government complying with Article 2 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 which states: "Each State Party shall take effective legislative, administrative or other measures to prevent acts of torture in any territory under its jurisdiction." Would audio and video recording of all interviews address this problem?

The second case study raises a number of issues for discussion. Ask students to assess the importance of the freedom of religion, expression and association rights. In the event of a conflict, how should they weighed? What is the best mechanism for resolving such disputes? Discussion should also focus on the issue of state involvement through policing. Should/can the state be neutral (especially in light of the history of Northern Ireland)? How important is involvement of local groups in the decision-making process? Is the use of international human rights standards essential here? Ask students how they would feel in their role as NGO monitor communicating or mediating between both sides.

The third case study is designed to raise student awareness of the importance of economic, social and cultural rights as well as civil and political rights. Groups may suffer discrimination on a number of grounds and in a number of contexts, and this raises the difficulties of enforcement of so called 'second generation' rights. Why has the anti-discrimination legislation not impacted more effectively in relation to employment? What is the scope of the government's positive obligations to remedy discrimination?

Generate a discussion as to why schools/housing/the workplace in a) Northern Ireland and b) Great Britain are segregated on religious, class, gender etc lines. What does this indicate about the effectiveness of legal mechanisms alone altering people's attitudes and behaviour? Should human rights materials be introduced into the primary and secondary school curricula?

Sample reading

- Cohen S (2001) *States of denial: knowing about atrocities and suffering* (Cambridge: Polity)
- Cohen S (1996) 'Government responses to human rights reports: claims, denials and counterclaims' *Human Rights Quarterly* 517
- McCrudden C (1999) 'Mainstreaming equality in the governance of Northern Ireland' 22 *Fordham International Law Journal* 1696
- McEvoy K (2000) 'Law, struggle and political transformation in Northern Ireland' 27 *Journal of Law and Society* 542
- Orientlicher (1990) 'Bearing witness: the art and science of human rights fact finding' 3 *Harvard Human Rights Journal* 83
- Walker C and Fitzpatrick B (1999) 'Holding centres in Northern Ireland, the Independent Commissioner and the rights of detainees' *European Human Rights Law Review* 27
- Weisbrodt D and McCarthy J (1982) 'Fact finding by non-governmental organisations' in Ramcharan (ed) *International law and fact finding in the field of human rights* 186-230
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths) chaps 2, 3 and 8

References

- O'Donnell A and Johnstone R (1997) *Developing a cross-cultural law curriculum* (London: Cavendish)
- Steiner H and Alston P (2000) *International human rights in context: law, politics and morals* (Oxford: OUP)
- Thomas P (2001) 'Schools fail rights test' *The Times* 16 October
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths)

2

Teaching human rights in first year courses on constitutional and administrative law/public law

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Course design: initial challenges and possible responses

This section provides examples of how human rights issues may be introduced into the teaching of the first year curriculum, part of which is habitually composed of a module or modules in public law or constitutional and administrative law.

When designing the content of such a module the course convenor will need to bear in mind several considerations which are likely to influence the material substance of the module, together with the learning/teaching strategies and assessment methods adopted. Specifically, the course convenor may face the following five challenges:

1. the constraints of time and space which operate in the teaching of a foundational first year subject
2. the varied background knowledge of first year students, some of whom will be quite familiar with historical, political and current affairs, while others will not be so aware
3. the attendance of a large number of students
4. the characteristics of the body of teaching staff
5. the compulsory nature of the module

The nature of the challenges and suggested responses to them are as follows:

Time and space constraints

Challenge: the areas of law which may potentially fall within the remit of the term public law are tremendous. Any teacher is required to be selective with regard to the material which has to be covered in order to give the student a sufficient understanding of the subject, and that which may be left aside to be taken up by students in optional courses later on in their degree programme, should they desire to do so. A particular task facing any course director is to avoid the banal generalisation of issues, while retaining their accessibility and comprehension in a relatively short amount of time.

Solution: a proposed course structure, designed to address this challenge and to represent a typical two unit, two semester or year long module in public law, is set out below.

Varied background knowledge

Challenge: a level of instruction has to be found which, while it does not leave students who have little prior knowledge of historical, political and current affairs struggling to comprehend, is nonetheless sufficiently stimulating and challenging for those students whose knowledge base in these areas is more extensive.

Solution: in order to address this difficulty it may be worthwhile to find out in the initial seminar session the background of each student (including for example their

previous educational experiences, any interest in current affairs, and any political motivations). This information can then be taken into account by the seminar leader when directing discussion and questions during the year. It may be found that with the increased media coverage of human rights issues at national, European and international levels students are in fact more familiar with these issues than with other aspects of the public law curriculum.

A large student body

Challenge: as it is one of the foundational subjects public law will attract the attendance of many students. This will probably mean large groups of students in seminars and tutorials, which will affect the way in which material is presented, discussed and examined.

Solution: this issue will be dealt with here by a particular consideration of the diversity of seminar exercises and assessment methods available to tutors. For example, some of the exercises suggested in this section are designed as groupwork assignments. These might then be appropriate for peer review and assessment. The exercises are also intended to foster more student-centred learning approaches, emphasising teamwork, communication, research skills and decision making as well as the acquisition and challenging of knowledge.

A variable body of teaching staff

Challenge: given the probability of a large number of seminar groups, a number of different tutors are likely to be required to lead the seminars, some of whom may be part time and therefore relatively inaccessible to the student body.

Solution: the course convenor will need to ensure that a degree of harmony is achieved in the seminar materials used by each seminar leader (by the distribution of a suggested reading list and sample seminar questions) and in the coverage of the topics under discussion. Where part time tutors are employed provision may need be made for them (or an alternative, designated full time member of staff) to be contacted by students who are experiencing difficulties with the course.

A compulsory module

Challenge: a particular challenge may derive from the fact that public law, because it provides one of the foundations of our legal system, is likely to be designated a compulsory module. The question of retaining student interest and motivation in the face of compulsion (and in some cases disaffection) will require some attention.

Solution: fortunately, students tend to view the human rights component of public law as one of the most interesting, accessible and relevant aspects of the course. In this respect, the teaching and learning methods adopted in this section – notably the idea of integrating human rights questions into the whole of the public law module, rather than confining them to one specific section – have as their aim to retain attention in areas which may otherwise have the effect of turning off students whose interest in public law is more passing than passionate.

Formulating the content of the curriculum

It has been noted above that conventionally the issue of human rights/civil liberties is addressed as part of (or as an addendum to) an introductory course on public law or constitutional and administrative law. This pattern is mirrored in the traditional textbooks on public law, which tend to devote a short and discrete section to human rights (or to one or two examples of such rights) after having set out the main principles of constitutional law.

A typical syllabus for a 24 week (ie two semester or year long) public law course might look as follows:

Traditional syllabus for a public law course

Semester 1	
Weeks 1-2	The nature of a constitution and does the UK have one?
Weeks 3-4	Fundamental principles: the separation of powers, the rule of law and parliamentary sovereignty
Weeks 5-6	The relationship between UK law and European law
Weeks 7-8	Constitutional conventions
Weeks 9-10	The Crown and the royal prerogative
Weeks 11-12	Government and ministers
Semester 2	
Weeks 13-14	Parliament
Weeks 15-16	**Human rights**
Week 17	Police powers
Weeks 18-19	Administrative process: tribunals and the ombudsman
Weeks 20-23	Judicial review of administrative action
Week 24	Crown proceedings

In the above curriculum, by devoting a discrete two week block to the topic of human rights it may appear that the issue is relatively marginalised and abstracted from its theoretical, political and institutional context. This type of approach often fails to do justice to the importance of the subject matter and fails to demonstrate the ways in which discussion of human rights poses a fundamental challenge to traditional public law theory.

Of course, such a challenge to traditional ways of thinking about public law is not only to be made at the specific level of human rights. Challenge to tradition needs to operate at all levels. As Morison and Livingstone (1995) write in the preface to their critique of traditional constitutional thought in Great Britain and Northern Ireland:

> *In a country without a written constitution a consensus of writing about the constitution can become the constitution. The traditional thinking must be challenged in order to clear a space for new approaches.*

This could not be truer than in the context of human rights law. Agreement as to what traditionally constitutes the relationship between human rights and public law has set up a framework that is now being opened to challenge. This is particularly so in the light of the enactment of the Human Rights Act 1998, with its wide reaching implications for both public and private law doctrine and its aim of mainstreaming human rights within the context of a changed legal culture. The space opened up in the wake of this challenge to the historic consensus provides all public law module convenors with the perfect opportunity to develop the way in which human rights questions might be introduced into the module.

With this in mind the following suggested syllabus attempts to challenge the marginalisation of human rights within the first year curriculum by taking the human rights part of the public law course out of its designated two week slot. Instead the syllabus engages in a mainstreaming exercise, involving thinking through ways in which human rights may be conceptualised as an integral and essential part of public law and thereby contextualised within public life and public law doctrine. This is with the aim of reviewing the traditional concepts around which the teaching of public law revolves (such as the separation of powers, the rule of law, parliamentary sovereignty, the impact of EU law, judicial review) and their relationship with issues of human rights.

In this way it is sought to demonstrate how human rights concerns consistently impact upon, and are affected by, the concepts and doctrines of public law with which students become familiar during their first year of legal studies. It will also become apparent that the very notion of public law is not self evident, resulting in the problematisation of the demarcation between public and private spheres and

showing that what might be thought initially to be private and personal activity may nevertheless be reconceptualised as public and political (and vice versa).

The revised syllabus for a 24 week long course might look as follows:

Semester 1	
Weeks 1-2	**The nature of a constitution and does the UK have one?**
Weeks 3-5	Fundamental principles: the separation of powers, the rule of law and parliamentary sovereignty
Weeks 6-8	**The relationship between UK law and European law**
Weeks 9-10	Constitutional conventions
Weeks 11-12	The Crown and the royal prerogative
Semester 2	
Weeks 13-14	Government and ministers
Weeks 15-16	Parliament
Week 17	Police powers
Weeks 18-19	Administrative process: tribunals and the ombudsman
Weeks 20-23	**Judicial review of administrative action**
Week 24	Crown proceedings

(Suggested exercises and materials are provided below for the topics highlighted in bold.)

Note that the two weeks which in the first sample curriculum had been devoted to the human rights part of the course have been distributed to those areas where more time may now be needed for the introduction of human rights questions within the context of the topic of public law under discussion. In the example above this extra time has been attributed to the areas of the course dealing with fundamental principles and the relationship between UK law and European law. This is rather a notional exercise, with other areas presenting equally good claims for further attention (particularly the first topic on the nature of a constitution and the area of judicial review of administrative action) and will largely depend on the teaching interests and discretion of the module convenor.

Learning, teaching and assessment methods

The learning, teaching and assessment methods suggested here aim to present a range of techniques which course convenors may consider adopting when thinking about the insertion of human rights questions into public law teaching. Where possible the methods proposed seek to respond to the challenges highlighted at the outset of this section of the manual. The basic premise which has been adopted in devising the suggested class exercises is that the public law course would be delivered by way of lectures (one or two hours per week) and seminars (one hour per fortnight), for which the students would be expected to spend around 10 hours doing private reading and study. In all cases it is suggested that students be provided (well in advance of the date of the seminar) with a list of basic reading materials for the session, together with a list of further reading, a clear indication of the topics under discussion and the exercises to be undertaken during the seminar. The exercises would typically be appropriate for groups of between eight and twenty students.

Examples for learning, teaching and assessment methods will be given for four topics in the suggested revised syllabus above. These topics are characterised by two themes as regards the human rights issues that will be addressed. The first key theme is ‘locating rights’, that is identifying the derivation and textual legal base for human rights protection. This theme relates to weeks 1-2 (the nature of a constitution and does the UK have one?) and weeks 6-8 (the relationship between UK law and European law). The second major theme is ‘enforcing rights’, that is locating the institutional source of human rights protection and the legal mechanisms in place for guaranteeing respect for human rights. This theme relates

to weeks 3-5 (fundamental principles: the separation of powers, the rule of law and parliamentary sovereignty) and weeks 20-23 (judicial review of administrative action).

Note that the examples given are in no respect to be taken as definitive or prescriptive. They have been selected simply to provide illustrations of particular approaches, and in order to suggest a range of learning and teaching strategies together with a number of assessment methods. Other examples from different parts of the syllabus could equally well have been chosen in order to demonstrate the points made, and in this respect course convenors are encouraged to be experimental and creative in their syllabus design. The exercises can be redesigned as coursework assessments and can be mixed and matched to suit the module structure and the stages at which students approach a particular topic in the course of their first year of legal education.

Weeks 1-2: The nature of a constitution and does the UK have one?

One of the usual starting points in any course on public law is the notion of 'the constitution'. This is usually addressed within the context of a discussion of the various characteristics of a constitution, such as its written or unwritten nature, its authority in the hierarchy of legal norms and its susceptibility to revision. Within this context the issue of human rights clearly has a role to play, although this is often not fully realised at first by students. It is suggested, therefore, that human rights might be introduced into the debate as one of the key building blocks of any constitution regardless of its other characteristics. Discussion might then focus upon:

- the knowledge and awareness amongst the student body and/or wider public which human rights issues generate as a result of their introduction into debate on constitutional arrangements and constitutional reform
- the location of human rights within various constitutions (of both written and unwritten variety) in order to ascertain the degree of protection offered in the UK when compared with that available elsewhere
- the difficulties of articulating which rights are best included or excluded from a charter of rights

The aim of the following three exercises is to address the question of whether adequate protection of human rights is possible in the UK, given the recent incorporation of the European Convention on Human Rights (ECHR) into domestic law via the Human Rights Act 1998 and the continued absence of an original and modern written catalogue of rights. This begs the question of whether the presence of a specific written text devoted to human rights guarantees is more effective than case law and piecemeal legislation in securing the protection of rights and promoting knowledge and awareness of human rights violations.

Exercise 1: group exercise to ascertain public knowledge of, and attitudes to, human rights protection in the UK

This first exercise is introductory and general in nature. It is designed to set the scene, that is to give a societal context to the bill of rights debate, rather than being of a particularly technical or legal nature.

1. Divide the students into small groups of four or five. Different views exist as to whether it is a good idea to let friends work together or rather to mix up the members of the seminar group. The former has the advantage that students will probably work well together given their closer contact. The latter, however, might be preferred because it forces integration between members of the seminar group and permits a degree of intervention on the part of the tutor in the make-up of the subgroups to create balance in terms of the various skills and needs of the students.

2. Ask the students to design a questionnaire in order to test public awareness of, and to interpret public attitudes towards, the protection of human rights in the UK. Students might be encouraged to focus upon questions such as to what extent the public is aware of the introduction of the Human Rights Act and its implications, and whether those people who are aware of it consider it an improvement on the previous position and think the rights guaranteed under the ECHR adequate in this day and age. It might also be considered whether or not the introduction of a new and free standing bill of rights (either within the context of a new written constitution or within our current constitutional arrangements) might enhance awareness (should this be found to be wanting) and whether or not it might increase public confidence in human rights protection (should this be found to be desirable).

3. Encourage the students to formulate their own questionnaires bearing in mind the following types of issues:

    - their sample of respondents (ie what is their age, sex, ethnic background, sexual orientation and might this affect their findings?)
    - their sample of questions (ie should they seek simple yes/no answers or try to elicit more detailed responses?)

4. Students should then present their work in a format which provides:

    - an analysis of the data generated (ie are any patterns ascertainable with regard to responses, bearing in mind the categories of people surveyed?)
    - their conclusions as to the desirability of heightening awareness of human rights texts and possible measures which may increase public confidence in the protection of rights

Exercise 2: locating human rights within different constitutions

In order to generate debate as to the sort of rights which it might be desirable to protect (for example merely civil and political rights, or social and economic rights, or third generation rights such as those pertaining to the environment and new technologies), students should be asked to review the provisions of various constitutions in order to see which rights are most often protected and which are not, which rights are protected but subjected to specific restrictions and which rights appear unexpectedly to generate protection.

A sample of constitutions might include those of the US, Germany, France and Ireland. These can then be compared with the source of protection of similar rights in the UK (via analysis of common law decisions, legislation and the rights guaranteed under the ECHR). For example, most constitutions contain a provision that guarantees equality. In the UK however there is no one legal principle that acts as an equality guarantee. One has to look instead to legislation such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 and then, pursuant to the Human Rights Act, to Article 14 of the ECHR, which sets out the principle of non-discrimination (but which is not yet free standing and can only be used in conjunction with an alleged violation of one or more of the substantive rights guaranteed under the Convention).

Ask the students to assess:

- which provisions (conventional, constitutional or statutory) in their view appear to most promote equal rights
- whether or not the UK appears to be deficient in this regard when compared with other western liberal democracies

Exercise 3: drafting a bill of rights

As a follow-up to the second exercise, and in order to increase student awareness of the hazards and skills involved in drafting human rights instruments, the third proposed exercise involves requiring students to try to draft their own bill of rights.

For example, ask the students to reflect upon, and then commit to paper, a provision protecting freedom of expression. This exercise requires the students to think particularly about the breadth of the initial construction of the right in question and subsequently the limitations which they would impose upon it (notably in this day and age given the very diverse ways and forms in which ideas and opinions may be expressed).

As an aid and starting point, students might be provided with examples taken from:

- the first amendment to the US Constitution (1791)
- Article 40(6) of the Irish Constitution (1937)
- Article 5 of the German Basic Law (1949)
- Article 10 of the European Convention on Human Rights (1953)
- Article 11 of the EU Charter of Fundamental Rights (2000)

Encourage the students, when drafting their own provision, to think about the following points:

- the historical moment at which drafting takes place
- the suitability of the constitutional guarantees outlined above to deal with specific forms of expression (such as pornography, sexuality, flag burning, hate speech, election propaganda) and the media employed to convey that expression (such as the spoken or written word, images and new information technologies)
- the extent of restrictions placed upon the guarantees (such as on grounds of public policy, security, morality and the protection of the rights of others)
- the overall importance of freedom of expression relative to other fundamental rights such as privacy (in this respect see, for example, Section 12 of the Human Rights Act 1998)

Assessment

Given that the nature of each of these three exercises is introductory and that all could be undertaken during the first couple of weeks of the course it is not proposed that any formal assessment take place.

However, students may appreciate a preliminary evaluation of their performance. This might take the form of peer assessment, by asking other members of the seminar group to comment upon the clarity of oral presentations of the results of the exercises (ie the findings of the survey in exercise 1, the correct identification of the location of human rights in national constitutions in exercise 2 and the draft bill of rights resulting from exercise 3). The seminar leader might then offer a view as to his or her agreement with the assessment of the peer group and offer suggestions for improvement (for example in the structure of argument or in the interpretation of data) where appropriate.

Weeks 6-8: The relationship between UK law and European law

This second set of exercises addresses the inter-relationship between the UK's membership of European institutions and the protection of human rights.

The aim is to encourage students to reflect upon the human rights implications of the UK's adhesion to the European Union and the Council of Europe, with a particular focus upon the effects of EU law and the repercussions of incorporation of the ECHR into domestic law.

While the context which is used here is that of sex discrimination and the rights of sexual minorities, the exercise presumes and draws upon students' acquired knowledge of the impact upon UK law of EU law (both in the form of rights conferred by Community law and those contained in the EU's Charter of Fundamental Rights) and the ECHR. It thus demands familiarity with constitutional questions about sovereignty, direct effect, enforceability, incorporation into domestic law and remedies.

Exercise 4: problem question on the relationship between EU law, the ECHR and UK law

The exercise suggested here is a hypothetical problem question. It can be tackled by students on an individual basis. Alternatively a seminar group might be divided into two teams, each side being charged with presenting one side of the argument and representing one party to the action. In this way the students can engage in a moot as to the eventual outcome. This should encourage teamwork, as well as oral communication skills, advocacy skills and the ability to respond to questioning.

The problem has been split into two parts. The first deals primarily with the relationship between EU law and UK law and the second with that between the ECHR and UK law. Each part can therefore be used independently if these two issues are taught at separate stages of the public law course. However, given the inter-relationship between EU law and the legal protection of the rights guaranteed under the ECHR, it will become apparent that there is a degree of overlap between the two sets of facts which go to make up the hypothetical situation and that the two aspects can be dealt with simultaneously. Also, given the fact of incorporation of the ECHR into domestic UK law, debate may be generated as to the similarity (or lack of it) of the relationship between UK law and Convention rights and between domestic law and European Community Law since its incorporation into the national legal system as a result of the European Communities Act 1972. It is suggested, therefore, that the two component parts of the problem question might be more usefully tackled together. This approach should also go towards enhancing the students' ability to see the issues surrounding sex discrimination in as broad a light as possible and avoid their pigeonholing them as ones relevant to *either* EU law *or* the ECHR.

Question

Jo, a female soldier, is seen by a fellow colleague kissing Sam while out one night. The colleague is horrified, thinking that Sam looks aged 16 and female. She informs the army authorities. Jo is subsequently dismissed from service. Suppose hypothetically that the EU, using the legal base provided by Article 13 of the EC Treaty (which permits the Community to "take appropriate action to combat discrimination based upon…sexual orientation") has issued Directive 97/123 introducing the principle of non-discrimination on the grounds of sexual orientation. The Directive provides that the principle must be implemented in the area *inter alia* of employment within a period of three years, but the UK has failed to take the necessary steps towards doing so.

It subsequently transpires that Sam is in fact a female to male transsexual, aged 25. Jo and Sam want to marry and start a family by using techniques of assisted conception. They are told by the relevant public authorities that neither activity is open to them.

1. advise Jo and Sam as to whether their rights under the ECHR and under EU law have been violated
2. advise the UK government on its position

As a starting point it is suggested that students be advised to consult a selection of the following materials by way of background reading to the problem.

European texts

- European Convention on Human Rights, especially Articles 8, 12, 14
- EC Treaty (consolidated version), especially Article 13
- Treaty on European Union (consolidated version), especially Articles 6 and 7
- EU Charter of Fundamental Rights, especially Articles 1, 7, 9, 20, 21, 35

UK legislation

- European Communities Act 1972
- Human Rights Act 1998
- Sex Discrimination Act 1975

Cases: European Court of Human Rights

- *B* v *France* (1993) 16 EHRR 1
- *Cossey* v *United Kingdom* (1991) 13 EHRR 622
- *Dudgeon* v *United Kingdom* (1981) 4 EHRR 149
- *Lustig-Prean and Beckett* v *United Kingdom* (1999) 29 EHRR 548
- *Marckx* v *Belgium* (1979-80) 2 EHRR 330
- *Modinos* v *Cyprus* (1993) 16 EHRR 485
- *Norris* v *Ireland* (1991) 13 EHRR 186
- *Rees* v *United Kingdom* (1986) 9 EHRR 56
- *Salguerio da Silva Mouta* v *Portugal* (2001) 31 EHRR 1055
- *Sheffield and Horsham* v *United Kingdom* (1999) 27 EHRR 163
- *Smith and Grady* v *United Kingdom* (1999) 29 EHRR 493
- *Van Oosterwijk* v *Belgium* (1981) 3 EHRR 248
- *X, Y and Z* v *United Kingdom* (1997) 24 EHRR 143

Cases: European Court of Justice

- *Brasserie du Pêcheur SA* v *Federal Republic of Germany*, *R* v *Secretary of State for Transport, ex parte Factortame Lt. And Others* Joined Cases C-46/93 and C-48/93 [1996] ECR I-1131
- *Foster* v *British Gas* Case C-188/89 [1990] ECR I-3313
- *Francovich* v *Italian Republic* Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357
- *Grant* v *South-West Trains Ltd* Case C-249/96 [1998] ECR I-621
- *Society for the Protection of Unborn Children* v *Grogan et al* Case C-159/90 [1991] ECR I-4685
- *Internationale Handelsgesellshaft GmbH* v *Einfuhr – und Vorratsstelle für Getreide und Futtermittel* Case C-11/70 [1970] ECR 1125
- *Marleasing SA* v *La Commercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135
- *Marshall* v *Southampton and South West Hampshire Area Health Authority (Teaching)* Case C-152/84 [1986] ECR 723
- *Officier van Justitie* v *Kolpinghuis Nijmegen* Case C-80/86 [1987] ECR 3969
- *P* v *S and Cornwall County Council* Case C-13/94[1996] 2 CMLR 247
- *Pubblico Ministerio* v *Ratti* Case C-148/78 [1979] ECR 1629
- *Van Duyn* v *Home Office* Case C-41/47 [1974] ECR 1337
- *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* Case C-26/62 [1963] ECR 1
- *Von Colson and Kamann* v *Land Nordrhein-Westfalen* Case 14/83 [1984] ECR 1891

Cases: UK

- *Duke* v *GEC Reliance Ltd* [1988] AC 618
- *Finnegan* v *Clowney Youth Training Program Ltd* [1990] 2 AC 407
- *Litster* v *Forth Dry Dock & Engineering Co. Ltd* [1990] 1 AC 546

- *MacDonald* v *Ministry of Defence* [2000] IRLR 748
- *Pearce* v *Mayfield Secondary School* [2000] IRLR 548
- *Pickstone* v *Freemans plc* [1989] AC 66
- *R* v *Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 WLR 806
- *R* v *Ministry of Defence, ex parte Smith* [1996] 2 WLR 305
- *Secretary of State for Defence* v *MacDonald* [2001] IRLR 431
- *Smith* v *Gardner Merchant Ltd* [1998] IRLR 510
- *Webb* v *EMO Air Cargo (UK) Ltd (No. 2)* [1995] 1 WLR 1454

Case notes and related articles

- Bell M (2001) 'Mainstreaming equality norms into European Union asylum law' 26 *European Law Review* 20-34
- Biggs H (1997) 'Madonna minus child or: Wanted: dead or alive!: the right to have a dead partner's child' 5 *Feminist Legal Studies* 225-234
- Fredman S, McCrudden C and Freedland M (2000) 'An EU charter of fundamental rights' *Public Law* 178-186
- Hervey T (1998) 'Buy baby: the European Union and regulation of human reproduction', 18 *Oxford Journal of Legal Studies* 207-233
- Lord Lester (2001) Equality and United Kingdom law: past, present and future' *Public Law* 77-96
- Millns S (1992) 'Transsexuality and the European Convention on Human Rights' *Public Law* 559-566
- Millns S (2001) 'Reproductive rights and human rights' 54 *Parliamentary Affairs* 475-494
- Moon G (2000) 'The draft discrimination protocol to the European Convention on Human Rights: a progress report' *European Human Rights Law Review* 49-53
- More G (1999) 'The principle of equal treatment: from market unifier to fundamental right?' in Craig P and de Búrca G (eds), *The evolution of EU law* (Oxford: OUP) 517-553
- Morgan D and Lee, RG (1997) 'In the name of the father? *Ex parte Blood*: dealing with novelty and anomaly' 60 *Modern Law Review* 840-856
- O'Learey S (1992) 'The Court of Justice as a reluctant constitutional adjudicator' 17 *European Law Review* 138-157
- Phelan DR (1992) 'Right to life of the unborn v promotion of trade in services' 55 *Modern Law Review* 670-689
- Skidmore P (1997) 'Sex, gender and comparators in employment discrimination' 26 *Industrial Law Journal* 51-61
- Wintermute R (2000) 'Lesbian and gay inequality: the potential of the Human Rights Act 1998 and the need for an Equality Act 2000' 6 *European Human Rights Law Review* 603-626

In their response to the hypothetical problem question students can be encouraged to look at two facets of the issues raised. On the one hand, they are obviously required to be conversant with the plurality of legal relationships which exist between UK, EU and ECHR laws and to answer the constitutional questions raised by these relationships (such as supremacy, direct effect and remedies). On the other hand, students should also be encouraged to reflect more widely upon the impact which European legal measures currently have upon domestic law within the context of human rights (and here more specifically within the context of the rights of sexual minorities) and the impact which they might go on to have in the future.

This demands that consideration be given to the *nature* of the rights protected at a European level, ie the fact that those contained within the ECHR are predominantly civil and political (here the right to respect for private and family life and the right to marry and found a family), whereas those guaranteed under EU law are predominantly social and economic (such as the right to equal treatment and the right to receive services in another member state) and are conditional upon the claimant's citizenship of the European Union. The universality and fundamental nature of rights protection might then be questioned with the potential of the EU's Charter of Fundamental Rights to act as a bridge between *economic* rights and *fundamental* rights being explored.

Assessment

As a problem question

Assessment of this exercise as it stands (in the format of a problem question) could take one of two forms:

- Students might be assessed on the basis of their oral presentation (where the exercise has been undertaken as a moot in class). In this case the seminar leader should look for evidence of strength in the identification and analysis of relevant issues, in the structure of argument, the fluency and clarity of the presentation and the ability to respond to challenging questions.

- Alternatively students might be required to hand in a written account of their response, in which case the tutor should assess the work on the basis of similar criteria as regards the identification of issues and the structure of argument, together with an appreciation of the clarity and precision of the written presentation of the answer.

As an essay question

Alternatively, tutors may consider assessing the students' ability to develop the wider aspects of the question by offering an assessment or piece of coursework in the form of an essay, which allows the student to analyse in a critical fashion the impact of the development of European human rights law upon domestic human rights provision.

It will need to be acknowledged that the depth to which students are able to delve into these issues will be largely dependent upon the time available, and may have to wait until the topics are revisited in more specialised courses on EU law and human rights/civil liberties. Nevertheless, the following is suggested as a possible essay topic:

1. To what extent have European legal norms affected the rights of sexual minorities in the UK?

AND

2. To what extent might developments in this area be envisaged given the effects of a) The Human Rights Act 1998 b) Protocol no. 12 to the ECHR c) Article 13 of the EC Treaty and d) The EU's Charter of Fundamental Rights?

Weeks 3-5: Fundamental principles: the separation of powers, the rule of law and parliamentary sovereignty

Enforcing rights

The second substantive part of this section moves to consider the ways in which human rights are enforced. This involves scrutiny of the relationship between enforcement mechanisms and public law scholarship, and primarily involves consideration being given to the various roles of the legislature and the judiciary in the protection of human rights. It also necessitates that some thought be given to conceptions of democracy and the rule of law (which students will be encountering at this stage in the public law course). It will furthermore demand examination of the politics of the judiciary in the protection of rights and the conscience of parliament in the handling of human rights questions.

Exercise 5: designing a model for enforcement of human rights

The suggested exercise in this section is a practical one. Building on the position established under the Human Rights Act 1998 with regard to the protection of fundamental rights in the UK, ask the students, either individually or in groups of three or four, to design a new and improved model for the enforcement of rights.

Inform the students that the purpose of the exercise is to enable them to reflect upon the nature of the relationship between the institutions involved in the enforcement of rights and that they should bear in mind the following concerns:

- How are human rights presently enforced in the UK? (This question relates back to the material discussed above on locating rights.)
- To what extent have the roles of parliament and the judiciary in the protection of human rights changed since enactment of the Human Rights Act 1998? (See in particular Sections 3-10 of the Act.)
- Are these roles now more respectful of a) the rule of law and b) democratic politics than before the Human Rights Act?
- Is the proposed 'declaration of incompatibility', which is at the disposition of the judiciary, an effective means by which to secure fundamental rights?
- Why did the government adopt this method of enforcement?
- To what extent might the establishment of a new Human Rights Commission enhance the objective of protecting fundamental rights? (See paras. 3.8-3.12 of the government's 1997 white paper, *Rights brought home: the human rights bill.*)
- Is the present situation adequate or deficient in protecting rights? Ask the students to give reasons for their response.
- Would the protection of all or some human rights be ameliorated by the enactment of a new and more modern bill of rights (as opposed, or in addition, to incorporation of the ECHR)?
- Is the effect of a bill of rights legal or political?

Encourage the students, in drafting their own enforcement mechanism, to think about the balance of power that is desirable between parliament and the judiciary in the enforcement of rights. Should legislative supremacy be paramount? Or should the judiciary have the power to strike down legislation, which, in judicial opinion, violates a fundamental right or freedom? If the judiciary is given increased powers, what kind of checks and balances might need to be introduced to safeguard the democratic process (for example, might a new system for the selection of the judiciary need to be devised in order to ensure that judges are representative of those whose rights they are charged with upholding)?

Assessment

The students should be asked to provide a written account of their suggested model, together with an explanation of how the model would work and the rationale for its adoption.

Marks should be awarded on the basis of:

- the depth of reading and knowledge which is displayed in the answer
- the understanding and analysis of the nature of the problem posed
- the construction of the argument used to defend the position adopted
- the organisation and presentation of the material together with appropriate footnotes and a full bibliography

Weeks 20-23: Judicial review of administrative action

Enforcing rights

The final part of this section examines the balance of power between the state and citizens exercised through judicial review actions. The principles of judicial review are central to any study of administrative law, and this section presumes that students will be familiar with the conditions and grounds for review. The principles can then be harnessed to human rights questions by looking at the specific contexts in which review applications may be brought.

The example that will be used here is that of the use of public space by local authorities and attempts to ban the use of such space in the context of sporting competitions, political meetings and hunting. Judicial decisions in this controversial area (which has heavy overtones of public policy) can be analysed for their impact upon the rights of those involved. The substantive aim of the exercise is to enable students to reflect upon the relationships between individual rights and community interests, between public and private activity and the broader issue of the interaction between law, public policy and morality. The pedagogical aim is to enable students to develop both their research and writing skills while pursuing a more theoretical development and critical appreciation of the legal and policy issues involved in this type of judicial review action.

Exercise 6: reflection upon human rights and public policy

The exercise that is suggested in this section is more traditional in its form, requiring students to engage in seminar discussion in the area of law, human rights and public policy. This discussion will then be followed up by formal assessment by way of an essay question.

Instruct the students that the exercise is designed to assess both their specific legal knowledge of the judicial review process and also their ability to place this knowledge in a political, social and cultural context. They should haveregard to the wider issues which are so crucial to the human rights debate and which form an important aspect of the process of mainstreaming fundamental rights in the post Human Rights Act era. The students should also be informed that they will be required to demonstrate evidence of both research and writing skills in the assessment process.

By way of introduction to the seminar topic, direct the students to read the following decisions and articles:

- *Verrall* v *Great Yarmouth Borough Council* (CA) [1980] 1 All ER 839
- *Wheeler* v *Leicester City Council* (CA) [1985] 2 All ER 151
- *Wheeler* v *Leicester City Council* (HL) [1985] 2 All ER 1106
- *R* v *Somerset County Council, ex parte Fewings* (DC) [1995] 1 All ER 513
- *R* v *Somerset County Council, ex parte Fewings* (CA) [1995] 3 All ER 20
- *R* v *DPP, ex parte Kebilene* (HL) [1999] 3 WLR 972

- Allan TRS (1985) 'Rugby recreation grounds and race relations' 48 *Modern Law Review* 448-452
- Allan, TRS (1986) 'Racial harmony, public policy and freedom of speech' 49 *Modern Law Review* 121-124
- Fenwick H and Phillipson G (2000) 'Public protest, the Human Rights Act and judicial responses to political expression' *Public Law* 627-650
- Hutchinson A and Jones M (1988) 'Wheeler-dealing: an essay on law, politics and speech' 15 *Journal of Law and Society* 263-278
- Thomas R (1996) 'Stag hunting, irrelevant considerations and judicial review' 3 *Web Journal of Current Legal Issues*
- Turpin C (1985) 'Race relations, rugby football and the law' 44 *Cambridge Law Journal* 333-336

Next ask the students to reflect, and be ready to engage in seminar discussion, upon the following questions:

- To what extent do the judges involved in the *Wheeler* decision differ in their approaches to the legal and factual questions that arise?
- To what extent do the judges involved in the *Fewings* decision differ in their approaches?
- Did the councils involved in the two actions actually do anything wrong?
- Was Browne-Wilkinson LJ (in the Court of Appeal in *Wheeler*) correct to construct the issue in terms of the overriding constitutional principle of the right to free speech?
  - Whose speech is at issue (ie the club's or the council's)?
  - What does 'speech' mean (ie does it include the right to remain silent)?
  - Are all speakers heard equally (ie was the minority view adequately represented and, indeed, who was the minority in this case)?

- Was Lord Templeman (in the House of Lords decision in *Wheeler*) correct to draw an analogy with the laws in Nazi Germany?
- Would a different decision have been reached had the *Wheeler* case been about a refusal to allow a women's hockey team to play rather than a men's rugby team?
- How should the courts weigh the balance between racial equality and individual liberty? Has the answer to this question changed since enactment of the Human Rights Act 1998?
- To what extent were moral issues taken into consideration in the *Fewings* decision?
- To what extent is the *Fewings* decision respectful of democratic politics?
- How should the courts deal with matters of political protest?
- Did the judges act politically in *Wheeler* and in *Fewings*? Could they have acted otherwise?

Assessment

The chosen method of assessment for this exercise is an essay question to follow on from the seminar discussion. This will enable the students to draw from the seminar proceedings and their own reflections upon the subject matter in putting together a coherent piece of work which goes beyond the technical legal specifics of judicial review actions and demands reflection upon the wider context in which such actions are pursued.

Suggested titles:

1. Evaluate the role of public policy considerations in the adjudication upon fundamental rights in decisions involving the use of public space by public authorities.

OR

2. To what extent does judicial review of decisions by public authorities on the use of public space render the individual's freedom of speech and conscience "a freedom to speak and act only as the judges think right" (*per* Browne-Wilkinson LJ in *Wheeler* v *Leicester City Council* (CA) [1985] 2 All ER 151, at 157)?

OR

3. In the light of the decisions in *Wheeler* and *Fewings* and the subsequent enactment of the Human Rights Act 1998, assess critically the extent to which the following statement may be applied specifically to acts of political protest:

   [T]he impact of the Human Rights Act on public protest will be principally determined not by the mechanics of the Act nor the Strasbourg jurisprudence it introduces, but by the prevailing and established judicial attitude to public protest, and the extent to which the judiciary are prepared to move away from it, by giving practical effect to the core values underlying the Convention.

   (Fenwick and Phillipson 2000 at 650)

The students should be assessed in accordance with the criteria outlined above under exercise 5, with in addition to regard being had to the legal arguments presented, particular emphasis being placed upon the range of reading undertaken, the student's analysis of that reading and his or her critical perception of the wider significance of the issues discussed.

Useful resources and selected bibliography

Constitutional and administrative law/public law (general)

- Allen M and Thompson B (2000) *Cases and materials on constitutional and administrative law* (6th edition) (London: Blackstone)
- Barnett H (2000) *Constitutional and administrative law* (3rd edition) (London: Cavendish)
- Bradley AW and Ewing KD (2001) *Constitutional and administrative law* (13th edition) (London: Longman)
- Craig PP (1990) *Public law and democracy in the United Kingdom and the United States of America* (Oxford: Clarendon)
- Loveland I (2000) *Constitutional law: a critical introduction* (2nd edition) (London: Butterworths)
- McEldowney JF (1997) *Public law* (2nd edition) (London: Sweet & Maxwell)
- Morison J and Livingstone S (1995) *Reshaping public power: Northern Ireland and the British constitutional crisis* (London: Sweet & Maxwell)
- Thompson B (1997) *Textbook on constitutional and administrative law* (3rd edition) (London: Blackstone)

Human rights and civil liberties

- Bailey SH, Harris DJ and Ormerod D (2001) *Civil liberties cases and materials* (5th edition) (London: Butterworths)
- Ewing KD and Gearty CA (1990) *Freedom under Thatcher: civil liberties in modern Britain* (Oxford: Clarendon)
- Feldman D (2001) *Civil liberties and human rights* (2nd edition) (Oxford: OUP)
- Fenwick H (1998) *Civil liberties* (2nd edition) (London: Cavendish)
- Hunt M (1998) *Using human rights law in English courts* (Oxford: Hart)
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths)

Bill of rights debate

- Adjei C (1995) 'Human rights theory and the bill of rights debate' 58 *Modern Law Review* 17-36
- Allan J (1996) 'Bills of rights and judicial power: a liberal's quandary' 16 *Oxford Journal of Legal Studies* 337-352
- Beyleveld D (1995) 'The concept of a human right and incorporation of the European Convention on Human Rights' *Public Law* 577-598
- Bingham TH (1993) 'The European Convention on Human Rights: time to incorporate' 109 *Law Quarterly Review* 390-400
- Griffith JAG (1979) 'The political constitution' 42 *Modern Law Review* 1-21
- Institute for Public Policy Research (1991) *The constitution of the United Kingdom* (London: IPPR)
- Klug F and Starmer K (1997) 'Incorporation through the back door?' *Public Law* 223-233
- Laws J (1993) 'Is the high court the guardian of fundamental constitutional rights?' *Public Law* 59-79
- Lester A (1984) 'Fundamental rights: the United Kingdom isolated' *Public Law* 46-72
- Liberty (1991) *A people's charter: Liberty's bill of rights* (London: Liberty)
- Zander M (1997) *A bill of rights?* (4th edition) (London: Sweet & Maxwell)

Human Rights Act 1998

- Bennion F (2000) 'What interpretation is "possible" under Section 3(1) of the Human Rights Act 1998?' *Public Law* 77-91
- Clements L and Young J (1999) 'Human rights: changing the culture' 26 *Journal of Law and Society* 1-5
- Ewing KD (1998) 'The Human Rights Act and parliamentary democracy' 62 *Modern Law Review* 79-99
- Ewing KD (1999) 'Social rights and constitutional law' *Public Law* 104-123
- Feldman D (1999) 'The Human Rights Act 1998 and constitutional principles' 19 *Legal Studies* 165-206

- Feldman D (1998) 'Remedies for violations of convention rights under the Human Rights Act' 6 *European Human Rights Law Review* 691-711
- Home Office (1997) *Rights brought home: the human rights bill* (Cm 3782) (London: The Stationery Office)
- Hunt M (1998) 'The "horizontal effect" of the Human Rights Act' *Public Law* 423-443
- Hunt M (1999) 'The Human Rights Act and legal culture: the judiciary and the legal profession' 26 *Journal of Law and Society* 86-102
- Klug F (2000) *Values for a godless age: the story of the UK's new bill of rights* (London: Penguin)
- Lord Irving (1998) 'The development of human rights in Britain under an incoporated convention on human rights' *Public Law* 221-236
- Lord Lester (2000) 'Human rights and the British constitution' in Jowell J and Oliver D (eds) *The changing constitution* (4th edition) (Oxford: Clarendon) 89-110
- Loveland I (1999) 'Incorporating the European Convention on Human Rights into UK law' 52 *Parliamentary Affairs* 113-127
- Oliver D (2000) 'The frontiers of the state: public authorities and public functions under the Human Rights Act' *Public Law* 476-493
- Phillipson G (1999) 'The Human Rights Act, "Horizontal effect" and the common law: a bang or a whimper?' 62 *Modern Law Review* 824-849
- Wadham J (1997) 'Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law' *Public Law* 75-79
- Wadham J and Mountfield H (1999) *Blackstone's guide to the Human Rights Act 1998* (London: Blackstone)

Judicial review

- Bailey SH, Jones BL and Mowbray AR (1997) *Cases and materials on administrative law* (3rd edition) (London: Sweet & Maxwell)
- Craig, PP (1999) *Administrative law* (4th edition) (London: Sweet & Maxwell)
- Cane P (1996) *An introduction to administrative law* (3rd edition) (Oxford: Clarendon)
- Lord Woolf, Jowell J and Le Sueur A (1999) *De Smith, Woolf and Jowell's principles of judicial review* (London: Sweet & Maxwell)
- Wade W and Forsyth C (2000) *Administrative law* (8th edition) (Oxford: OUP)

European Union law

- Alston P and Weiler JHH (1999) 'An "ever closer union" in need of a human rights policy: the European Union and human rights' in Alston P (ed) *The EU and human rights* 3-66 (Oxford: OUP)
- Coppell J and O'Neill A (1994) 'The European Court of Justice: taking rights seriously' *CMLR* 669-692
- Craig P and De Búrca G (1998) *EC law: text, cases and materials* (2nd edition) (Oxford: Clarendon)
- O'Keeffe D and Twomey PM (eds) (1994) *Legal issues of the Maastricht Treaty* (London: Wiley Chancery)
- O'Keeffe D and Twomey PM (eds) (1999) *Legal issues of the Amsterdam Treaty* (Oxford:Hart)
- Weatherill S (1995) *Law and integration in the European Union* (Oxford: Clarendon Press)
- Ward I (1996) *A critical introduction to European Law* (London: Butterworths)

European Convention on Human Rights

- Harris DJ, O'Boyle M and Warbrick C (2001) *Law of the European Convention on Human Rights* (2nd edition) (London: Butterworths)
- Janis M, Kay R and Bradley A (2000) *European human rights law: text and materials* (2nd edition) (Oxford: Clarendon)
- Van Dijk P and van Hoof, GJH (1998) *Theory and practice of the European Convention on human rights* (3rd edition) (London: Kluwer Law International)

Websites

- European Court of Justice <http://europa.eu.int/cj/en>
- European Court of Human Rights <http://www.echr.coe.int>
- Lawlinks <http://library.ukc.ac.uk/library/lawlinks/general.htm>

3

Unpacking the right to life

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This section focuses on teaching the right to life in the law curriculum. It discusses:

- **where to introduce right to life materials**
- how these materials further **legal educational aims**
- the choice of **teaching approaches** available
- how to create the **best teaching environment**
- **using video** as a teaching tool
- three right to life **case studies**

Where to introduce the right to life into the law curriculum

Discussion of the right to life could be introduced in any number of subject areas of the law curriculum. In many instances the **Human Rights Act 1998** will be directly relevant. Typical first year core courses provide the opportunity to deal with topics involving the right to life:

- **public law** (Article 2, European Convention on Human Rights, Human Rights Act 1998)
- **criminal law** (murder, defence of necessity)
- **tort** (wrongful life actions, negligence of prison authorities)
- **administrative law** (judicial review of allocation of health care resources)

In second and third years the following optional courses/subject areas provide the opportunity to discuss contrasting perspectives on the right to life:

- **health care law** (reproductive technology, euthanasia, assisted suicide)
- **European Union law** (freedom to avail of medical services)
- **feminist legal theory** (violence, 'sanctity of life')
- **jurisprudence** (resolution of rights conflicts)
- **international law** (genocide, famine, health rights)
- **civil liberties** (death penalty, security forces, prisoner suicides)
- **law and society** (pro/anti-abortion/death penalty social movements)

The extent to which a human rights perspective is integrated into the teaching of these courses in law schools will depend on a number of factors. For example, the following general influences would impact on the human rights content of the range of courses listed above:

- research/intellectual/political interests of individual teachers
- historical absence of a human rights basis to UK public law
- reluctance/apathy with respect to integrating the **Human Rights Act 1998** into the curriculum
- approach of the dominant textbooks in the subject area (a very influential factor)
- degree of internationalisation of academic scholarship in the area (may be more likely to encourage comparative rights analysis)
- existence of relevant international human rights norms
- tendency to stereotype only certain areas of the curriculum (such as abortion) as requiring a rights analysis due to their 'political' nature

While some law teachers will have considerable experience of human rights literature and teaching others may have little or none because of a combination of the above factors. The **Human Rights Act 1998** has the potential to transform legal

education in the UK. However as Lord Justice Sedley has argued, "degree courses, which judges had assumed would be in the forefront of the culture change, are responding unevenly and sometimes inadequately to the new needs" (see (2000) 32 Socio-Legal Newsletter). Both **imagination** and **new skills** are now required:

> *The challenge is to recognise the value of both the deductive and inductive approaches to our changing legal system: to think in terms of principles and not simply of issues, facts, precedent and procedure. The educational challenge is real and immediate. The need to prepare our graduates for a practice radically affected by the new legislation is urgent. It would be gratifying to be able to stop saying to students "it might be unjust but that is the law". The HRA might make that statement redundant, but only if lawyers – practitioners and academics alike – have the imagination and skills to make it so. It is a function of all law schools to ensure that this happens.*
>
> (Thomas 2001)

Lecturers who *are* eager to embrace the Human Rights Act 1998 may face difficulties outside their control. For example, teaching loads may be very high and preparation time limited, other colleagues may be resistant to altering their settled teaching approaches (a particular problem if joint marking of work is to occur or there is a hierarchical relationship between the course's teachers), the purchase of additional library materials may be curtailed and the availability of IT resources may be limited.

Furthering legal educational aims using human rights case studies

This section highlights why human rights materials should be introduced across the law curriculum. Legal educational aims can be achieved in a variety of ways, but human rights case studies are particularly suited to the task.

The **Human Rights Act 1998** will operate as a partial stimulus to reconsider the traditional content of law courses; indeed, it is unlikely that a law teacher will be able to avoid dealing with some aspect of the growing human rights culture. However, innovative law teachers should also **emphasise the relevance of human rights law for furthering legal educational aims generally:**

- introducing the right to life will **provide core knowledge** of legal instruments (for example bills of rights and international human rights treaties)
- students will **learn to contextualise** new knowledge to previous knowledge (for example incorporating international human rights norms into the appropriate justifications for police use of firearms)
- rights discourse provides a **conceptual framework** for assessing competing political and legal claims (for example women's' access to abortion)
- human rights litigation has the potential to make visible the claims of marginalised groups and can **challenge doctrinal categories** by acknowledging different life experiences (for example see *D v United Kingdom* (1997) 24 EHRR 423)
- human rights teaching can **expose the subjective and politically-contingent nature of law** (for example the emergence of a foetal rights movement)
- it **internationalises legal education** through reference to international norms/case law (for example through consideration of European Convention on Human Rights (ECHR), Canadian Supreme Court decisions)
- it encourages the **development of ethical and political values** (by asking students to problematise their ethical/political positions on terrorism, abortion, the death penalty etc)
- it can aid the development of **communication skills** by requiring students to engage with potentially emotive subjects (for example a discussion of rationing of life saving medical treatment in the National Health Service)

Teaching approaches

It is generally recognised that three main teaching approaches are used in law schools; **black letter**, **socio-legal** and **critical**. It needs to be emphasised at the outset however that these labels are more useful as shorthand than as total definitions of teaching styles. There are necessary overlaps between all three approaches, and many lecturers use a combination of approaches in their teaching.

As the following materials on the right to life are designed to be adapted for teaching in a variety of styles some general points on each approach are necessary. However, the overall point is that **whatever the teaching approach the use of human rights materials can further legal educational aims**.

Black letter teaching approach

A **black letter** (or textbook) approach is commonly understood as a learning/teaching experience that is focused on the acquisition of legal doctrine and associated skills applications. Students are provided with lists of legal instruments and cases, and the primary objective is to 'learn the law'. Little emphasis is placed on challenging or thinking about the doctrinal categories or assumptions upon which the legal system is based. While elements of the black letter approach are essential for providing all students with core legal knowledge (and meeting some of the other legal educational aims), broader critical awareness of the nature of law, legal culture and society will be absent if this is the only approach used.

Suggested reading

- Banks NKS (1999) 'Pedagogy and ideology: teaching law as if it matters' 19 *Legal Studies* 445
- Bottomley A (ed) (forthcoming 2002) *Feminist perspectives on the foundational subjects of law* (2nd ed) (London: Cavendish)
- Hutchinson AC (2001) 'Casaubon's ghosts: the haunting of legal scholarship' 21 *Legal Studies* 65
- Ireland P and Laleng P (eds) (1998) *Critical lawyers handbook II* (London: Pluto)
- Twining W (1994) *Blackstone's tower: the English law school* (London: Sweet & Maxwell)

Example A

Consider the use of lethal force by police officers or security service personnel

The topic of killing will usually be covered in first year criminal law courses under murder/manslaughter headings. The typical black letter approach concentrates on the wording of the relevant statutes and on a close literal analysis of judicial reasoning in a series of cases. The actual 'facts' of the cases may be considered only marginal to assessing the 'law'; that is, were the requisite elements of the offence present?

References to historical, political, social or cultural factors, which would illustrate why the police or security services use firearms in this context, or how the courts have traditionally legitimised state force, or any consideration of the victim's perspective, will probably be absent. In the black letter tradition criticism of the law is limited; for example, there may be appeals for 'reform' of the relevant statute, overruling a judicial precedent or altering procedural rules, but the doctrinal core of criminal law will remain intact (see Lacey N and Wells C (1998) *Reconstructing criminal law* (London: Butterworths) 1-90).

The teacher's aim in introducing a human rights analysis into a teaching scenario on lethal force is to **minimise the limitations of the black letter method and to broaden the student learning experience**. The **Human Rights Act 1998** has led to some recognition amongst the senior judiciary of the limitations of traditional legal methodology:

Moral attitudes which have previously been the actual, but unarticulated, reasoning lying behind judicial decisions will become the very stuff of decisions on [ECHR] points...[and the] silent true reason for a decision will have to become the stated ratio decidendi.

(Lord Browne-Wilkinson (1998) 'The impact on judicial reasoning' in Markesinis BS (ed) *The impact of the Human Rights Bill on English law* (Oxford: Clarendon) 21-23 at p22)

The aim of a human rights approach here is provide students with:

- essential core knowledge of rights documents alien to the UK legal tradition (the ECHR, the Canadian Charter of Rights) and be exposed to a new legal discourse of human rights
- an accessible conceptual framework for weighing the competing rights/interests of individual and state (which the 'definitions' of murder/manslaughter do not offer)
- a rights analysis to empathise with the 'victim' (or the 'terrorist,' the 'mugger') and develop more reasoned political and ethical stances
- a greater incentive to communicate in a class discussion

Socio-legal teaching approach

The second main teaching style is the **socio-legal** approach. In general terms, this approach attempts to put 'law in context'; expecting students to 'know' legal doctrines in the absence of any appreciation of historical, political or social contexts is viewed as inadequate. The aim of the law teacher is to draw upon interdisciplinary materials (historical records, philosophical concepts, sociology studies, empirical evidence, newspaper reports etc), in order to illustrate how law is created, developed and applied. Instead of law being represented as apolitical and rational, its subjective and contextual nature is explored.

Human rights related materials are a particularly rich source for socio-legal teaching (see for example Steiner and Alston's *International human rights in context: law, politics, morals* (OUP, 2000). While acknowledging the importance of legal texts, the emphasis in human rights teaching should also be on materials from for example politics, international relations, public health, economic theory or environmental studies. Without reference to interdisciplinary sources the student may lack the necessary tools to explain the apparent inconsistencies and political compromises – an inevitable source of disillusionment for idealistic students – inherent in human rights recognition and enforcement.

In relation to right to life contexts students examining issues from a socio-legal perspective might be asked to:

- examine the language of official government human rights reports submitted to institutional actors other than courts (the UN Human Rights Committee, the Committee on the Elimination of Discrimination Against Women)
- analyse the voting record of governments on right to life issues at the United Nations and assess the political alliances
- collect and compare how the media report death penalty, terrorist or abortion stories
- trace the development of the Vatican's role in the international anti-abortion movement
- choose different non-governmental organizations (NGOs) working in the area and assess their documents and strategies (Amnesty International, Human Rights Watch, Planned Parenthood)
- watch a video that shows police/army use of firearms (for example, Clint Eastwood in *Dirty Harry* or *In the line of fire*) and then discuss whether the action depicted is typical/reactionary/justified/'lawful'

The overall **aim of the socio-legal approach is to stimulate and broaden the student's contextual awareness of law and legal institutions**. By illustrating the

broad political nature of (human rights) law, the student is better able to assess the origin, operation and limits of legal norms and 'make connections' between law and other social and political forces (for example, the Cold War, the anti-apartheid movement, nationalist movements, World Bank loans, feminist movements, media culture etc).

Suggested reading

- Davies M (1994) *Asking the law question* (London: Sweet & Maxwell)
- Thomas P (ed) (1997) *Socio-legal studies* (Aldershot: Dartmouth)

Example B

Using the same example A above, the law teacher adopting a socio-legal approach would seek to broaden students' understanding by introducing a range of materials to put the use of lethal force by state agents, and the role of the legal process in regulating it, in context.

For example, if the case concerned a member of the armed forces discharging a firearm at a roadblock in Northern Ireland and the victim was a passenger in a car driven by joyriders, materials on Anglo-Irish history, government anti-terrorist strategies and empirical evidence on the use of plastic bullets would be important reading for a fuller understanding of the operation of the legal system.

While the black letter approach gives students the impression that the lawyer's only concern is with 'objective' facts and rules (for example, was *mens rea* present?), the socio-legal approach highlights the range of variables (historical period, political trends, policing levels, economic resources, media coverage etc) that determine whether and how law is created, interpreted and enforced.

Critical teaching approach

The third main teaching style is the **critical** approach. This builds upon the socio-legal approach and overlaps with it in many respects. However, many use the critical label to identify an explicitly theoretical approach to analysing law and teaching subject areas. The aim is to challenge the assumptions that underpin traditional doctrines (for example the 'reasonable man', or the definitions of 'obscenity' or 'discrimination' or 'privacy', or the public/private divide) and to provide alternative perspectives.

Critical approaches generally seek to **'deconstruct' the meaning and operation of law** and to expose the historical inaccuracies, the concealment of inequalities and the ideological importance of law to powerful groups in society (see for example the contents of the journals *Social and Legal Studies*, *Journal of Law and Society*, *Feminist Legal Studies* and *Harvard Civil Liberties-Civil Rights Law Review*). Drawing theoretical concepts from sociology, history, political theory, cultural studies, literary studies etc critical law teachers seek to create a more egalitarian, pluralist and culturally aware law curriculum. One of the most influential critical movements in law schools in recent years is feminist perspectives on law (see for example Charlesworth and Chinkin's *The boundaries of international law: a feminist analysis* (Manchester University Press, 2000).

> *The focus here, broadly speaking, is on law as a specially structured oppressive means by which to control and constrain social and political relationships, and that 'legal argument' cannot and ought not to be separated from political argument.* ***The examination of law in this context thus entails analysing and deconstructing law to recognise its internal viewpoint and theorising strategies for challenging its hegemony****. At the very least, we might engage our students in critically examining how the judgments they read in their casebooks are shaped and influenced by tactical decisions made by the lawyers and judges involved. Students rarely see legal arguments in their raw form; the overwhelming majority of cases they read are appellate decisions in which the facts have been shaped and developed many times over by lawyers and judges*

who chose which facts to emphasise and which ones to ignore. ***Students need to know that the law as it is set out in the cases and texts exists, even at what appears to be the most basic 'factual' level, in a very particular form that reflects deliberate manipulation.***

(Banks 1999)

A critical teaching approach requires that human rights law has to be subjected to the same critique as criminal law or any other area of law. But the fact that the discourse of human rights openly acknowledges the existence of differences/inequalities between individuals – and states that one of its aim is to empower historically-disadvantaged groups – means that **human rights materials can provide students with an entry point into critical theory**.

In relation to the right to life context, students on a critically oriented course could be asked to:

- read materials which question the increasing usage of 'rights talk' and assess why only certain rights are recognised (for example, why 'sanctity of life' tends not to be interpreted so as to protect choices about dying, such as assisted suicide)
- assess the benefits and losses for women in resorting to human rights litigation (for example seeking the right to abortion)
- explore the impact of particular legal constructions of the body (for example, does health care law view women as possessing a right to property in their bodies or a right to autonomy?)

Suggested reading

- Bakan J (1997) *Just words: constitutional rights and social wrongs* (Toronto: Toronto University Press)
- Boyd S (ed) (1997) *Challenging the public/private divide: feminism, law and public policy* (Toronto: Toronto University Press)
- Hyde A (1997) *Bodies of law* (Princeton: Princeton University Press)
- O'Donnell A and Johnstone R (1997) *Developing a cross-cultural law curriculum* (London: Cavendish)
- Smart C (1989) *Feminism and the power of law* (London: Routledge)
- Stychin CF (1998) 'Body talk: rethinking autonomy, commodification and the embodied legal self' in Sheldon S and Thomson M (eds) (1998) *Feminist perspectives on health care law* 211-236 (London: Cavendish)
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* 298-302 (London: Butterworths)

Example C

Using the same example A above, the law teacher adopting a critical approach would aim to theorise different aspects of the operation of the criminal law in this context. The sheer range of critical perspectives open to the teacher here is precisely what critical legal theory is all about.

For example, one perspective might examine the social construction of violence: why does society's definition of violence change over time and place (public executions, gender violence, use of CS gas)? What is the relationship between criminal regulation and other forms of social control (parental, educational, medical)? A feminist perspective would raise questions about the gendered nature of violence, in terms of criminal law definitions (for example sexual offences), non-intervention by police in 'domestic' settings (assault), and the preponderance of male murderers. Another perspective might examine the construction of masculinity and the culture of violence that exists in police and army environments. The law teacher could also introduce a critique of the language used by judges; why were certain words used ('terrorist'), why were certain facts left out in the judge's summary (the description of the bullet wounds in the coroner's report)?

Creating the best teaching environment

In the materials that follow the teacher is free to use whatever teaching approach (or combination of approaches) is most suited to her or him. The objective is to **be reflexive** in the sense that the teacher is **self-critical about the content and style of her/his teaching** and aware of student reactions.

As outlined earlier, many variables can influence how subjects are taught. Further, it is important not to underestimate the relationship between the characteristics of individual teaching styles and student learning experiences; an enthusiastic, friendly, audible and interactive 'black letter' lecture on the right to life – while arguably not as intellectually challenging as other styles – will be enjoyed and appreciated by students. Moreover, the **choice of teaching materials** (handouts, articles, video clips) may be as influential as the teaching style (provided that students are encouraged to use the materials and understand how to do so).

A few general pointers are provided here to help **create the best teaching and learning environment** for the right to life case studies:

- demonstrate **enthusiasm and empathy** with students
- acknowledge that all viewpoints are welcome and open for discussion and challenge. While students will often express prejudiced views, the teacher has the responsibility to ensure that the classroom remains **a non-threatening/offensive environment.**
- be sensitive to the fact that some students may not want to discuss personal experiences/views related to the topic of the course
- recognise the **diversity of the student body** and that some may feel like 'outsiders' on the grounds of gender, race, sexual orientation, class, religion, parental status etc
- **avoid stereotypes** in class discussion and assessment exercises (for example male barristers, black suspects, rape victim seeking an abortion etc)
- admit that the content of courses is **subjective** (even the 'core syllabus' will be taught with different emphases by individual teachers) and that you are open to suggestions as to additional perspectives
- reassure students that a **legal education** is not aimed exclusively towards producing legal practitioners. 'Political' and 'theoretical' perspectives should not be represented as alternatives to 'real law'.
- provide a **map** of the points of the lecture/seminar, either on an OHP or by handout. The advantage of a clear handout is that students can follow the oral presentation and take away a record of the content.
- select materials and pitch teaching at a level appropriate to the **experience and ability** of the class
- placing course outlines and other materials on departmental webpages encourages students to gain **IT skills.** It can also personalise the learning experience (as students can edit and save the materials on a floppy disk) and it encourages exploration of links to other human rights related resources.
- set up an **e-mail list** for the class and encourage exchange of questions and views on the course
- be **sensitive** to the mood of the class. Rephrase points/questions if sense of confusion, deflect questions/comments to avoid embarrassing an individual student. Summarise main points and questions. Ask for feedback.
- try to **integrate student responses/experiences** into the core of your teaching. A 'conversation' between teacher and students can transfer the same (and arguably more) knowledge as reading from lecture notes. Students often remember the content of class debates long after the lecture has ended; **active rather than passive learning** should be the aim.

Video as a teaching tool

Video clips are a very useful **teaching tool**, particularly suited to human rights teaching. If videos are not available, or their use is not feasible, encouraging students to read **film reviews**, which can serve the same function. There are many sources of film and video reviews, but film websites are especially good as they allow students to search for titles and reviews, for example

- *All Movie Guide* <http://allmovie.com>
- *Sight and Sound* <http://www.bfi.org.uk/sightandsound>
- *University of Maryland Women's Studies Film Reviews* <http://www.inform.umd.edu/EdRes/Topic/WomensStudies/FilmReviews

If course materials are on placed on departmental webpages, links to the specific reviews can easily be included (for example include a link to *Dead man walking* (1995) in death penalty materials, to *In the name of the father* (1993) or *Michael Collins* (1997) in terrorism materials, to *The handmaid's tale* (1990) in abortion materials).

Video can stimulate student interest

The first advantage in using video is its potential to **stimulate interest and debate** in a class. Especially in early morning/late evening/large group teaching, the playing of video clips – from films, documentaries, soap operas, news programmes – captures the attention and imagination of students. Even if only marginal to the direction of the discussion, the change in teaching format will be welcome; to begin a class, to break up a lecture or to initiate class debate. Most law teachers find that students (particularly first years) will immediately respond to images, but will be much more reluctant to express opinions on the prescribed reading.

Students are often embarrassed or intimidated at the prospect of speaking in group settings, so a general discussion on the content of a video can instill confidence (for example, how are judges/lawyers represented in *North Square*?, why do police interviews in *NYPD Blue* always subvert the suspect's due process rights?, summarise the views of the participants in a *Heart of the matter* debate on foetal screening, what is your reaction to the execution in *Dead man walking*?). The aim of the teacher will be to **incorporate the responses to the video extracts into the content of the lecture/seminar**. By shifting between legal texts (the law report, the textbook etc) and the video, students are encouraged **to participate in the learning process** while also reflecting on the **social and political contexts** in which law operates (the court, the police station, the hospital, the home).

Video can introduce alternative perspectives

Secondly, the use of video allows for perspectives/images traditionally absent from the law curriculum and class discussion to be included. Although the law student body is increasingly diverse, the **dominant voices** heard in class may be representative of privileged groups in society. Video can also be used to **challenge assumptions** about different aspects of the legal system and society (for example racism, prostitution, policing, sexual harassment etc).

On the other hand, the teacher needs to be aware that excessive use of clips may encourage a superficial or one dimensional understanding and fracture class debate. The content of contemporary news reporting and documentaries often tends towards superficiality and sensationalism, and mainstream films often replicate stereotypical characters and actions. Making students aware of these factors should also be part of the educational process about law, the media and popular culture. Students may also need to be reminded that their **arguments must be informed** and **supported by the course materials/additional research**.

It is most important that audiovisual equipment (and the videocassette itself) is checked in advance of the class in order to avoid disruption of one's well planned teaching format. Also, always prepare fallback materials such as OHP summaries.

Right to life case studies

This final section contains three right to life case studies:

Case study 1 **General overviews of the right to life**
Case study 2 **Use of lethal force: terrorism and the death penalty**
Case study 3 **Abortion**

Each case study has a similar format; a listing of teaching aims and objectives, followed by sample materials, exercises and assessment suggestions.

Choosing a case study

The choice of case study will depend on **the subject area** in question, the **level of ability of the class** and the **educational aims** of the teacher.

For example, in a typical human rights course there is a tendency for the right to life to be taught first, because teachers (and textbooks) often adopt an article by article approach to the Human Rights Act/European Convention on Human Rights. In this format students are offered a general overview of the meaning of the right to life and then examples from relevant case law. No real attempt is made to distinguish the relevant different contexts (abortion, death penalty, lethal force etc); all tend to be treated merely as 'illustrative' of the right to life provision. By contrast, if teaching a criminal law or health care law course the main initial focus may be on the concepts of murder or abortion, and the right to life references will be introduced afterwards (if mentioned at all).

Teaching, therefore, can either start with case study 1 (the general overviews) and illustrate points with reference to case studies 2 (lethal force) and 3 (abortion); **or** focus on one case study (2 or 3) in depth and refer back to case study 1 when appropriate.

As these case studies are designed to illustrate **different teaching approaches, aims and learning experiences**, the references for further reading are provided in the bibliography.

Black letter teaching approach

Case study 1: General overviews of the right to life

Two examples of teaching the right to life are given here; one using the black letter approach and one using a socio-legal and critical approach.

Aim

Provide students with knowledge of the right to life provisions in international human rights treaties, with particular reference to the Article 2 Convention right in the Human Rights Act 1998.

Objectives

- introduce main **judicial interpretations** of the right to life
- make students aware of the **contentious nature** of right to life provisions
- demonstrate the **'human rights approach'** of the ECHR in contrast to traditional common law and statutory interpretation techniques
- comment on the different textbook approaches to the right to life

Sample materials

- Article 2, European Convention on Human Rights (ECHR)
- Article 6(1), International Covenant of Civil and Political Rights (ICCPR)

Exercise

Ask groups of students to read from the following sources on the right to life (Article 2 of the ECHR). (Remember that if in a criminal law or health care course, students may be reading about human rights treaties and their interpretation and enforcement for the first time.)

- Feldman D (1993) *Civil liberties and human rights in England and Wales* 91-125 (Oxford: Clarendon)
- Grosz S, Beatson J and Duffy P (1999) *Human rights: the 1998 Act and the European Convention* (London: Sweet & Maxwell)
- Lester A and Pannick D (eds) (1999) *Human rights: law and practice* (London: Butterworths)
- Mowbray A (2001) *Cases and materials on the European Convention on Human Rights* (London: Butterworths)
- Starmer K (1999) *European human rights law* (London: Legal Action Group)

Discussion

Use two cases, *Re A (Children) (Conjoined Twins: Medical Treatment) (No 1)* [2001] 2 WLR 480 (CA) and *R v Director of Public Prosecutions, ex p Diane Pretty* [2001] EWHC Admin 788, as the basis for discussion of the right to life.

First, contrast the following two general commentaries on the *Re A* decision:

> *These are questions of law, not of morals or ethics. Exceptionally, the court allowed the Archbishop of Westminster and the Pro-Life Alliance, who opposed the operation, to make written submissions. The vital issue for the doctors, however, was not what the Archbishop or anyone else might think about the ethics or morality of what should be done, but what the law, and particularly the criminal law, would say. That question was one which could be decided only by a court.*
>
> (Tausz D and Smith JC (2001) *Criminal Law Review* 400,401)
>
> *No human rights lawyer could have scripted the scene better as a backdrop to the introduction of the Human Rights Act in [the UK]. The Court of Appeal was faced with a conjoined twins case on the eve of the adoption of the European Convention on Human Rights into domestic law. It involved, inter alia, the right to life; protection from torture, inhuman and degrading treatment and punishment; the right to privacy and family life; and the right to freedom of religion. The case involved competing morals and values effectively pitting the interests of the parents against the medical establishment; the interests of the Roman Catholic Church against the state, and indeed the interests of one sister against her identical conjoined twin. Few cases encapsulate so definitively the broad array of issues which courts must assess in this new rights era. Few cases depict so aptly the complex series of conflicting societal values and competing individual needs within contemporary society. Few cases demonstrate so well the need for judicial exploration of rights issues in [the UK] … But for the most part there is very little discussion of human rights, per se.*
>
> (Black-Branch JL (2001) 'Being over nothingness: the right to life under the Human Rights Act' *European Law Review* (26 Supp Human Rights Survey) 22-28)

Why did the Court of Appeal not adopt human rights based reasoning to determine the outcome of the case? If they had done so, what would have been the result in terms of **approach** and **outcome**? Was Ward LJ correct in stating: "I cannot believe that the court in Strasbourg would reach any other conclusion for solving the dilemma than we have done"?

Should the right to life in Article 2(1) not have been construed to offer legal protection to both twins? If so, what would have been the **express and/or implied limitations** on the right to life of Mary? Read the text of Article 2 and ask the following questions:

a) Is the word 'intentionally' in Article 2(1) relevant in this unusual fact situation?
b) Are the words 'in defence of any person from unlawful violence' in Article 2(2)(a) relevant?
c) Does ECHR case law provide support for the argument that there may be implied limitation on the right to life (cf *McCann v UK* (1996) 21 EHRR 97, para 148)?

What is your response to Black-Branch's criticism of the Court of Appeal's approach and its preference for **utilitarian arguments** over **human rights based reasoning** (at 38-40)?:

> *When two lives are competing, as in the twins case, there is a stalemate … With a stalemate, neither party should be given advantage or priority over the other. It is not for the court to serve as the arbiter and decide whether one life should be saved for the other, nor for it to decide which life is worth more than the other. It is for the court to recognise the deadlock and call it a draw…As in the game of chess where the players arrive at a stalemate one cannot alter the result by favouring one player over the other…[The court] selects a 'lesser of the two evils' approach instead of maintaining the status quo and allowing Mary her right to life which happens to coincide with the wishes of the parents…An aim of human rights legislation is to question 'survival of the fittest' arguments.*

Why do **criminal law commentaries** (see Tausz and Smith (2001) *Criminal Law Review* 400,405) tend to reduce the 'result' of the *Re A* case to statements of **legal doctrine** (such as the following)?:

> *Where A is, as the defendant knows, doomed to die in the near future but even the short continuation of his life will inevitably kill B as well, it is lawful to kill A, however free of fault he may be.*

Does the Court of Appeal in the *Diane Pretty* case give greater weight to the values underpinning Article 2 than it did in *Re A*? How would you distinguish the following paragraph (by Tuckey LJ) from the comments in *Re A* about the right to life of the conjoined twins?

> *The [Diane Pretty] case concerns the conflict between two of the fundamental rights possessed by all human beings: the right to life and the right to decide what will and will not be done with one's own body. English law gives greater priority to the first, as does the European Convention. English law curtails a person's right to bodily autonomy in the interests of protecting that person's life even against her own wishes. Thus deliberate killing, even with consent and in the most pitiable of circumstances, is murder; the mandatory penalty is life imprisonment. Killing in consequence of a suicide pact in which one dies and the other survives is manslaughter; the maximum penalty is life imprisonment. Helping a person to take her own life is the offence with which we are concerned; the maximum penalty is 14 years imprisonment.*

Assessment

At this level assessment usually takes the form of specific examination questions or coursework designed to assess the student's core knowledge of the right to life provision, or the broader operation of the ECHR human rights system. For example:

- Discuss the protection of the right to life in international human rights law Is the right to life the 'most fundamental' right?
- Discuss the lawful violations of the right to life. Illustrate your answer using examples.
- What are the differences between Article 2 of the ECHR and Article 6 of the ICCPR?

Socio-legal and critical teaching approach

The second example in this case study uses the socio-legal and critical approach.

Aims

- encourage a **critical awareness** of different aspects of the right to life, human rights generally, and other relevant social and political contexts
- demonstrate the importance of **explicitly theorising** human rights law through the use of feminist legal theory

Objectives

- question the 'fundamental' status of the right to life in human rights law and scholarship
- illustrate that a **'court-oriented' focus** gives a partial picture of human rights law

- highlight the **political reality** that violations of the right to life occur in many different contexts on a worldwide basis
- recognise the **gendered nature** of human rights law
- demonstrate the relationship between **human rights activism** and **legal strategies**

Exercise 1

Ask students **why is the right to life characterised as the most fundamental** to the whole edifice of human rights protection? It is described as "the most basic human right of all" (Harris D, O'Boyle M and Warbrick C (1995) *Law of the European Convention on Human Rights* (London: Butterworths) 37). Or, the right to life "must surely rank as the most basic and fundamental of all human rights" (Joseph S (1995) 'The right to life' in Harris D and Joseph S (eds) *The International Covenant on Civil and Political Rights and United Kingdom law* (Oxford: Clarendon) 155).

Questions can be asked generally of the class and then answered by the teacher if no response; more often than not a student will respond if the question is phrased in an interesting way. Avoid asking detailed and precise questions initially, as it is unlikely to generate a wider debate.

Ask the class to rank human rights in terms of their importance. Is the right to life at the top of the list? Do they think that there is a universal consensus as to the primary status of the right to life in the hierarchy of rights? The **general assumption tends to be that the right to life is highly valued and protected in law**. Students need to be **encouraged to challenge claims that there is a universal hierarchy of rights and that one right is more 'fundamental' than another**. As an exercise, ask students to compare the country entries in Amnesty International's (or the US State Department's) human rights index according to different criteria (rights violated, numbers affected, scale of oppression etc).

But if is such a fundamental right **why is right to life literature relatively scarce?** Ask students to count the number of pages in human rights texts devoted to an elaboration of this right. For example, Harris, O'Boyle and Warbrick's *Law of the European Convention on Human Rights* (Butterworths, 2000) devotes 17 pages to the right to life in comparison to 34 pages on torture/inhuman treatment, 110 pages on fair trial, 53 pages on privacy and 44 pages on freedom of expression. Why is this? Also, in comparison with the literature on other individual rights, journals contain few articles on the right to life. Ask students to do a search of the number of articles under each heading.

Highlight how **mainstream human rights scholarship often reflects the amount of cases that have come before courts** ('court oriented') and judicial exposition of the right to life has often been rudimentary. The general point is that the 'most fundamental' human right has not generated a scholarship that lives up to this characterisation. Often, students find classes on the right to life boring and predictable – in contrast with classes on privacy, equality, or freedom of expression – and this has a lot to do with the mainstream literature in the area.

Ask students to comment on the **political reality** that violations of the right to life occur in so many different contexts on a worldwide basis. What is their reaction to the following examples; **famine, genocide, disappearances, terrorism, death of women due to denial of abortion and coercive population control programmes**. Why do so few human rights texts discuss these contexts when they discuss the right to life?

The general teaching objective here is to point out the gap between the **rhetoric** of an alleged basic right and its **actual political and legal value.** Why is the gap such a wide one? This point often gives rise to student confusion (and disillusionment), but is usually not addressed in the literature or classroom.

> *The operation of a public/private distinction at a gendered level is most clear in the definition of civil and political rights, particularly those concerned with protection of the individual from violence. The construction of these norms obscures the most pervasive harms done to women. One example of this is*

often considered the most important of all human rights, the right to life contained in article 6 of the ICCPR and in regional human rights treaties. The right is primarily concerned with the arbitrary deprivation of life through public action. Protection from arbitrary deprivation of life or liberty through public actions, important as it is, does not, however, address the ways in which being a woman is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life…Although the empirical evidence of violence against women is overwhelming and undisputed, it has not been adequately reflected in the development of human rights law.

(Charlesworth H and Chinkin C (2000) *The boundaries of international law: a feminist analysis* 233-234 (Manchester: Manchester University Press))

Exercise 2

Introduce the distinction between **civil and political** rights and **economic, social and cultural** rights. Is it acceptable that the right to life (a civil and political right) is not legally relevant in relation to for example famine, as economic and social factors are considered to be implicated? When should states be absolved from binding obligations to protect certain ('fundamental') rights due to the lack of available resources? What if the right to health is denied for reasons other than lack of resources (for example to promote 'religious' or 'cultural' values)? Or where western financial institutions have imposed 'economic restructuring' programmes on developing countries?

Suggested reading

- Askin KD and Koenig DM (1999-2001) *Women and international human rights law* (3 vols) (New York: Transnational Publishers)
- Chinkin C and Wright S (1993) 'The hunger trap: women, food and development' 14 *Michigan Journal of International Law* 262
- Craven M (1995) *The international covenant on economic, social and cultural rights* (Oxford: Clarendon)
- Otto D (1996) 'Holding up half the sky, but for whose benefit? A critical analysis of the fourth world conference on women' 6 *Australian Feminist Law Journal* 7
- Toebes BCA (1999) *The right to health as a human right in international law* (Antwerp: Intersentia)

Exercise 3

Ask students to **estimate the number of women who die annually due to the denial of abortion facilities.** (The answer is approximately 200,000.) Why are women denied abortion? In the main, because of political and religious objections. Why is this fact not viewed as even raising questions about the interpretation of the right to life (of women)? The teaching objective here is to get students to **recognise the gendered nature of human rights law** and the marginalisation (and often exclusion) of women's interests from the dominant discourse; the right to life is considered to be implicated in some contexts but not in others. The teaching objective for the class should be to **reveal the political choices that have been made as to the scope of human rights law** and whose interests are protected/ignored by such choices.

Suggested reading

- Coliver S (ed) (1995) *The right to know: human rights and access to reproductive health information* (Philadelphia: University of Pennsylvania Press)

Exercise 4

Ask students to browse the websites of the following NGOs and find materials on each topic. One teaching objective here is to emphasise the relationship between the contents of law reports, human rights journals and textbooks (that is, the focus of **academic research**) and **actual human rights practice**. Numerous NGOs are involved in investigating, monitoring, lobbying and providing practical support as a result of violations of the right to life worldwide.

- *American Civil Liberties Union* – gun control <http://www.aclu.org>
- *Amnesty International* – death penalty, disappearances <http://www.amnesty.org>
- *Campaign for Nuclear Disarmament (CND)* – nuclear weapons <http://www.cnduk.org>
- *Committee on Administration of Justice* – use of lethal force in Northern Ireland <http://www.caj.org.uk>
- *Greenpeace* – anti-nuclear facilities <http://www.greenpeace.org.uk>
- *Inquest* – death in custody <http://www.gn.apc.org/inquest>
- *International Planned Parenthood Federation* – abortion deaths <http://www.ippf.org>
- *National Right to Life* – anti-abortion <http#;//www.nrlc.org>
- *Oregon Death with Dignity Act* <http://www.ohd.hr.state.or.us>
- *Save the Children Fund* – campaign against land mines <www.oneworld.org/scf>
- *UNICEF* <http://unicef.org>
- *Violence Against Women* <http://www.ojp.usdoj.gov/vawo>
- *WHO* – health care <http://who.org>

Ask students what they think is the aim of human rights law. Should NGOs be focused on legal strategies or broader political campaigns? The teaching objective here is to highlight how deaths, or risk of death, in some contexts may, or may not, involve the infringement of domestic law or international human rights standards. Yet, from the perspective of human rights activists and relief agencies, that issue may not always be of central importance. **Many NGOs may be motivated as much by changing political, social and economic practices and attitudes as by upholding and reforming human rights law.** In some contexts, attempts to invoke law will be viewed as ineffective or counter-productive.

Suggested reading

- Lee Y (1997) 'Violence against women: reflections on the past and strategies for the future: an NGO perspective' 19 *Adelaide Law Review* 45
- Engle Merry S (1997) 'Global human rights and local social movements in a legally plural world' 12 *Canadian Journal of Law and Society* 247

Exercise 5

Objective

The teaching objective here is to **critique the standard definitional parameters** of the right to life. Use the example of the exclusion of animals from human rights law to ground the discussion.

Ask individual students to give one characteristic of 'animals' and of 'persons'. Write out a list on the board or the OHP. What preconceptions are revealed about the concept of life? Do any **moral** or **legal** rights attach to animals? If whales share 'human' characteristics such as high intelligence and communication skills, should/could their killing be prevented by recognising a legal right to life? Read aloud the description of whales in D'Amato and Chopra (below), or place an extract on the OHP to generate discussion. The teacher could adopt a pro-animal rights perspective and encourage students to challenge it, or divide the class into two and ask for competing arguments as to 'the right to life' of the whale.

Suggested reading

- Cavalierie P and Singer P (eds) (1993) *The great ape project: equity beyond humanity* (London: Fourth Estate)
- D'Amato A and Chopra S (1991) 'Whales: their emerging right to life' 85 *American Journal of International Law* 21-62

Using video as a teaching tool for the right to life

Video clips can provide a stimulating and entertaining introduction into this debate about the parameters of the right to life. The teacher could choose a video such as *Greystoke: the legend of Tarzan* (1984), *Planet of the apes* (1968/2001) or *Babe* (1995) and watch it before the class in order to select the best clips. Showing

a complete film to a class is not feasible in terms of available time nor necessarily educationally useful (unless, perhaps, the course is focused more broadly on law and film, or law and literature).

The clip can either be played at the start of the class in a 'dramatic' way (lower lights and turn up volume), and students will gradually realise its significance to the forthcoming discussion. Alternatively, after the discussion has started and a majority class view has been established (for example "animals should not have rights because not intelligent"), introduce an 'alternative' perspective to the debate (for example, "dolphins are more intelligent than newborn babies"). A nature documentary could obviously be used here with content that is more directly relevant to the topic (for example demonstrating animal research findings), but often students enjoy making lateral connections between law and mainstream films.

Assessment

Examples of exam or coursework questions here are:

- Discuss the use of right to life discourse for ideological/political purposes by one or more NGOs.
- Discuss the civil and political/economic, social and cultural divide in human rights law using the right to life as a case study.
- "The right to life is expendable in order to further the economic and geopolitical interests of governments." Discuss.
- "The right to life is one of the worst examples of human speciesism." Discuss.

Case study 2: use of lethal force: terrorism and the death penalty

Terrorism

Aim

Introduce a case study on the use of lethal force by state actors to draw out some characteristics and contradictions of right to life discourse.

Objectives

- rethink assumptions about the value of the right to life in the light of the **political and legal responses to terrorism**
- generate class debate on topical and interesting factual circumstances
- highlight how national courts **legitimise the use of force** by the state and the role of international courts in setting **human rights norms**
- assess the **strategic value** of human rights law for NGOs in 'emergency' situations
- Explore the extent to which the political and legal condoning of violence is explained by **gender differences**

Exercise 1

Ask students to read *Farrell* v *Secretary of State for Defence* [1980] 1 All ER 1667 and *R* v *Clegg* [1995] 1 All ER 334. What are the **legal rules** regulating soldiers' use of firearms? How have judges (explicitly or implicitly) taken into account the Northern Ireland conflict? What do **criminal law texts** say about the role of the security forces?

Introduce Waddington P (1990) '"Overkill" or "minimum force"?' *Criminal Law Review* 695 into the discussion. **Should police officers/soldiers always shoot to kill or only wound?** How would the legal test alter? Ask students to consider the same facts using a human rights perspective. **When should a suspected 'terrorist' lose their state guarantee of a right to life?**

Place the following extract on an OHP and ask for reactions:

> *Soldiers' statements given to courts were therefore prepared in consultation with [British] army legal officers on a routine basis. The need to satisfy the court that the amount of force used had been reasonable and necessary,*

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resulted during the 1980s in statements which sounded remarkably similar from one incident to another [in Northern Ireland], despite the obvious confusion that surrounded some of the deaths ... Senior army officers understand the culture of the soldier who wants to open fire immediately if he sees a suspected terrorist during an operation...But they also appreciate the need to control the use of force and to avoid publicly embarrassing ministers.

(Urban M (1992) *Big boys' rules: the SAS and the secret struggle against the IRA* 75-76 (London: Faber and Faber))

Encourage students to see the political contexts in which (even) human rights law operates. Why do judges not acknowledge this culture in their discussions of state actors? Is the role of the courts to **support the executive** in times of crisis or act as **independent arbiter** and defender of human rights values? See generally Ní Aolaín F (2000) *The politics of force: conflict management and state violence in Northern Ireland* (Belfast: Blackstaff).

Exercise 2

Split the class into groups in order to read one of the following sources on Northern Ireland and Argentina. Compare the role of the courts in each jurisdiction. How was the right to life weighed by the judiciary? If national courts do limit their role in monitoring the use of lethal force by armed forces, **ask students whether they see a distinction between judges acting out of self-preservation** (for example the death threats to judges in Argentina in the 1970s) or **giving political legitimacy to the actions of the executive** (for example the House of Lords judgments in relation to the Northern Ireland conflict).

Suggested reading

- Alexander G (1984) 'The illusory protection of human rights by national courts during periods of emergency' 5 *Human Rights Law Journal* 1
- Livingstone S (1994) 'The House of Lords and Northern Ireland' 57 *Modern Law Review* 333
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* 103-162 (London: Butterworths)

Exercise 3

Ask students to read *McCann, Farrell and Savage* v *United Kingdom* (1995) 21 EHRR 97. **Why did the European Court of Human Rights engage in a much more detailed examination of the facts** than national courts usually do in such circumstances? Is it significant that the court decision was by ten votes to nine?

The teaching objective here is to demonstrate one advantage of **international** human rights systems over national ones, the level of independent scrutiny of controversial state actions such as shootings, failing to take proper care in planning security operations and failure to conduct an effective investigation into any deaths caused. See for example *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491, *Yasa v Turkey* (1998) 28 EHRR 408 and *Jordan and Kelly v United Kingdom* (2001) 31 EHRR 6.

Ask students to predict how the UK courts might respond to 'national security' contexts involving the use of lethal force in any future challenges under the Human Rights Act 1998.

See the investigation into the shooting of 13 civilians in (London) Derry in 1972 at the *Bloody Sunday Inquiry* website <http://www.bloody-sunday-inquiry.org.uk>

Using video and autobiographies as a teaching tool to critique Northern Ireland related terrorism and state responses

The use of **video** or **autobiography** in this teaching scenario is very effective. **Start the class with clips from *In the name of the father* (1993) in order to illustrate how false labelling of 'terrorists' may occur**. Alternatively, read from an autobiography of a wrongfully convicted person. Ask students whether

'terrorist offences' (for example, the Guildford Four were convicted for pub bombings) require extraordinary state responses and criminal penalties. Usually some students will answer in the affirmative, generating an interesting debate about the necessary limitations on anti-terrorist powers, the role of the courts as guardians of human rights, the tendency of juries to believe prosecution evidence, the role of the media and the reasons for the series of miscarriages of justice in 'terrorist' cases. The teaching objective here is to **highlight how the concept of terrorism can be used to lower human rights standards, even in relation to the right to life**.

Suggested reading

- Conlon G (1990) *Proved innocent: the story of Gerry Conlon of the Guildford Four* (London: Hamish Hamilton)
- Hillyard P (1993) *Suspect community: people's experience of the Prevention of Terrorism Acts in Britain* (London: Pluto)

Exercise 4

There are several different **feminist perspectives** that one could introduce on terrorism and violations of the right to life. Using material from Morgan R (1990) *The demon lover: on the sexuality of terrorism* (New York: Norton), students could explore the **masculinist culture of the terrorist** and the extent to which heterosexuality is represented and constituted by violent actions (killing, raping, torturing). Using video clips of the female terrorist in *The crying game* provides an opening into this literature (for example, does she represent traditionally male/female characteristics?). Students can be encouraged to **explore the extent to which the political and legal condoning of violence is explained by gender differences**.

Another perspective on the right to life could examine the topic of **violence against women**. Ask students to categorise sexual offences; do they involve sex or violence or both? Ask students whether 'domestic' violence is as serious as violence that occurs in public spaces. This can lead to a discussion of the public/private distinction within human rights law. The **right to life provision is only concerned with the arbitrary deprivation of life in the public sphere**; violence is not a *general* human rights concern, but only where state responsibility can be proven. Is the state not responsible for the ineffectiveness of the criminal justice system in light of the statistics on male-female violence? Yet, would the extension of legal regulation into the private sphere (the family, the home) afford any greater protection to women at risk considering the influence of other social factors? The complexity of this debate **provides students with a good insight into the historical limitations of (human rights) law on issues of gender, as well as illustrating the potential of feminist law reforms**.

> *As has been the case throughout history, women are regularly forced into prostitution, raped and subjected to other forms of sexual abuse in armed conflict…The aftermath of armed conflict also often has particularly deleterious consequences for women…The most pervasive type of violence against women reported in all regions of the world is abuse by a husband or partner.*
>
> (Charlesworth H and Chinkin C (2000) *The boundaries of international law: a feminist analysis* 11-12 (Manchester: Manchester University Press))

Note the recognition by the House of Lords of **state tolerated violence** against Pakistani women in the refugee law case *Islam v Secretary of State for the Home Department* [1999] 2 All ER 545.

See also the discussion of the right to life under Article 2 of the ECHR – as a result of **death threats by members of the public** against two former child defendants – in *Venables and Thompson v News Group Newspapers* (2001) 1 All ER 908.

Suggested reading

- Copelon R (2000) 'Gender crimes as war crimes: integrating crimes against women into international criminal law' 46 *McGill Law Journal* 217
- Lacey N and Wells C (1998) *Reconstructing criminal law* (London: Butterworths)

Assessment

Examples of exam or essay questions are:

- "The judicial response to human rights violations in terrorist contexts is a negative one." Discuss.
- "The use of lethal force by armed forces is more influenced by social and political factors than legal constraints." Discuss.
- "The prevalence of state sponsored assassination illustrates the hypocrisy of right to life discourse." Discuss.
- Discuss the public/private dichotomy in human rights law using the right to life as a case study.

The death penalty

Aim

Focus on the death penalty in the United States in order to demonstrate the historical and political specificity of the protection of the right to life.

Objectives

- highlight the **'normalisation' of capital punishment** in the US legal system
- demonstrate the significance of changing political compositions in the **US Supreme Court**
- question the absence of critical commentary of the US position in mainstream human rights texts and within the United Nations
- highlight the **role of the media** in influencing public opinion on the status of the right to life

Exercise 1

The general objective here is to force students to reassess the nature of the right to life in light of populist death penalty politics.

Ask students whether they agree with the following statement of the European Court of Human Rights. **Why has Europe gradually established a norm that the death penalty violates the right to life provision?**

> *This "virtual consensus in western European legal systems that the death penalty is, under certain circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention.*
>
> (*Soering v United Kingdom* (1989) 11 EHRR 439)

The **Human Rights Act 1998** now gives effect to the Sixth Protocol in UK law. But note the Caribbean death penalty cases decided by the Privy Council in London (for example *Re Commissioner of Prisons* [1999] 1 WLR 1709 and *Lewis v Attorney General of Jamaica* (2000) 3 WLR 1785) and general extradition cases to the USA (for example *St John v USA and Governor of HM Prison Brixton* [2001] EWHC Admin 543).

Exercise 2

Ask groups of students to read and compare the two decisions of the US Supreme Court declaring the death penalty to be unconstitutional in 1972 (*Furman* v *Georgia* 408 US 238 (1972)) and then constitutional in 1976 (*Gregg* v *Georgia* 428 US 153 (1976)). The decisions are quite detailed, so sharing the task between students is more effective. Discussion can either take place in the lecture/seminar or in tutorial settings. The teaching aim here is to **make students aware of the contingent nature of human rights guarantees and the reasons for shifts in legal doctrine over time**. Does the Supreme Court follow majority opinion in society or influence it? Ask students whether they find the casual and emotionless tone of death penalty judgments in the US Supreme Court remarkable.

As some law students will be pro-death penalty (and international students will have lived under many different legal regimes), the expression of such views should be encouraged by the teacher even where the majority view of the class is

anti-death penalty. The debate can then shift to the appropriate 'safeguards' under a death penalty regime. Ask students what are the acceptable risks of wrongful conviction (0%, 1% etc)? Is the evidence of racist patterns of sentencing in capital cases not an insurmountable factor?

Suggested teaching tools

Clips from any of the following videos vividly illustrate some of the legal, political and emotional aspects of the death penalty; *The asphalt jungle* (1950), *Spartacus* (1950), *To kill a mocking bird* (1962), *Dance with a stranger* (1985), *Executioner's song* (1982) and *Dead man walking* (1995). Students could also be referred to the *Picturing Justice* website, which discusses representations of law and justice in film and television <http://www.usfca.edu/pj>

The video *Dead man walking* is an effective teaching tool, as it (controversially) contrasts the detail of the convict's crimes with the detail of the execution procedure. If played at the start of the class students are forced emotionally and intellectually to weigh up both perspectives on the death penalty before the introduction of the human rights materials. However, it can also serve as a focus for debate about representations of the execution process; should human rights lawyers refuse to attend executions when invited as observers?

The text by Bedau H (1997) *The death penalty in America* (Oxford: OUP) contains a very comprehensive account of some of the main arguments and research surrounding the death penalty. The sections are short and concise and provide excellent material for class exercises and debates (for example, should executions be televised?)

Assessment

- "The use of the death penalty in the US highlights a main weakness in the international human rights system." Discuss.
- Why have human rights NGOs in the US been relatively ineffective in their campaigns to abolish the death penalty?
- What are the main factors that explain the abolition of the death penalty in the United Kingdom?
- Critique the representations of the death penalty in a film or television drama of your choice.

Case study 3: abortion

Aim

Use a case study on abortion to highlight the **politically contingent** nature of right to life discourse and to address the limitations of mainstream human rights scholarship on abortion.

Objectives

- avoid debate becoming mired in **philosophical detail** about the definition of personhood
- focus attention towards the **social, political and legal consequences** of creating a concept of foetal rights
- highlight how the development of **reproductive technologies** has raised challenges for human rights law
- contextualise the autonomy of the **medical profession** in controlling access to abortion
- assess the use of **right to life discourses** by the anti-abortion movement
- demonstrate the relevance of **feminist legal theory** to human rights law
- highlight the difficulties of devising pro-abortion **human rights strategies**
- explore **media representations** of pro- and anti-abortion campaigns

Exercise 1

Human rights texts typically acknowledge abortion case law, recommend students to read mainstream liberal philosophers (such as Ronald Dworkin) and tend to

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ignore the vast amount of literature (mostly feminist) critiquing the impact of foetal rights discourse in a range of contexts (reproductive health, sex education programmes, litigation etc). **The teaching objective here is to introduce students to the topic from an alternative (human rights) perspective**.

Ask students to comment on the following extract. Does this analysis best represent who is 'responsible' for deciding whether the right to life includes the embryo/foetus?

> *The task of properly classifying a foetus in **law** and in **science** are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. In short, this court's task is a legal one. **Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature**.*
>
> (*Tremblay v Daigle* [1989] 2 SCR 530, 533 (Canadian Supreme Court))

Ask students their opinions as to **why there is so little attention paid to the range of women's rights** (privacy, liberty, life, equality, health) that are implicated when access to abortion is restricted or limited.

Suggested reading

- Fegan EV (1999) '"Subjects" of regulation/resistance? Postmodern feminism and agency in abortion decision making' 7 *Feminist Legal Studies* 241
- Fletcher R (1998) '"Pro-life" absolutes, feminist challenges: the fundamentalist narrative of Irish abortion law 1986-1992' 36 *Osgoode Hall Law Journal* 1
- Shaffer M (1994) 'Foetal rights and the regulation of abortion' 39 *McGill Law Journal* 58
- Smart C (1989) *Feminism and the power of law* (London: Routledge)

Exercise 2

Divide students into several groups and ask each to read one of the following cases:

- *R* v *Bourne* [1939] 3 All ER 615
- *Roe* v *Wade* (1973) 410 US 113
- *Paton* v *British Pregnancy Advisory Service* [1978] 2 All ER 987
- *Paton v United Kingdom* (1980) 3 EHRR 408
- *Society for the Protection of the Unborn Child* v *Grogan* [1991] ECR I-4733
- *Attorney General* v *X* [1992] 2 CMLR 277
- *Open Door Counselling and Dublin Well Woman Centre* v *Ireland* (1993) 15 EHRR 244

Set this series of questions:

- How did judges describe the woman/girl involved?
- How was abortion defined?
- Were the references to the medical profession complimentary or deferential?
- How was pre-natal life described?
- Was a rights based reasoning adopted?
- Was the right to life at the top of a hierarchy or one of several competing rights?
- What was the influence of NGOs in the case?

The teacher should keep a record of the main answers (on an OHP) in order to return to them at a later stage when students have been exposed to more comparative and critical material on the right to life.

Exercise 3

Why did the institutions in these cases – the English High Court, the US Supreme Court, the (former) European Commission on Human Rights, the European Court of Justice, the Irish Supreme Court and the European Court of Human Rights – give **such different interpretations to the right to life**? Does this indicate a lack of consensus? An attempt by courts to deflect the issue back to legislatures? The

teaching aim here is to encourage students to **recognise the range of legal, political and social factors that impact upon the abortion debate and the contextual nature of the right to life** in different jurisdictions.

Suggested reading

- Fox M and Murphy T (1992) 'Irish abortion: seeking refuge in a jurisprudence of doubt and delegation' 19 *Journal of Law and Society* 454
- McColgan A (2000) *Women under the law: the false promise of human rights* (London: Longman)
- Whitty N (1993) 'Law and the regulation of reproduction in Ireland: 1922-92' 43 *University of Toronto Law Journal* 851

Exercise 4

The teaching objective here is to **highlight to students the complex interaction between human rights law and social movements**. At the United Nations level, the evolution of the boundaries of the right to life has been heavily influenced by the anti-abortion agenda of the Vatican and associated groups. The documents produced by the Cairo Conference on Population and Development 1994 and the Beijing Conference on Women 1995 have been the target of a concerted anti-abortion campaign. Also, at the national level, many countries have witnessed legal challenges on a variety of grounds to women exercising rights of access to abortion. Is this an inevitable characteristic of human rights language? Do courts treat all NGOs in the same manner?

Suggested reading

- Alston P (1990) 'The unborn child and abortion under the draft convention on the rights of the child' 12 *Human Rights Quarterly* 156
- Buss D (2000) 'Racing populations, sexing environments: the challenges of a feminist politics in international law' 20 *Legal Studies* 463
- Buss D (1998) 'Robes, relics and rights: the Vatican and the Beijing Conference on Women' 7 *Social and Legal Studies* 339

Exercise 5

A more **critical approach** to the abortion/right to life debate might focus on different historical, social and political contexts. One objective would be to demonstrate to students how **foetal rights rhetoric masks deeper ideological battles** around state control of women's reproductive capacities. The teacher would place anti-abortion policies on a historical continuum of legal and social regulation of women (for example religious, educational, medical) in order to expose the **gendered nature of society**.

Suggested reading

- Fegan E (1996) '"Fathers" foetuses and abortion decision making' 5 *Social and Legal Studies* 75
- Hartouni V (1997) *Cultural conceptions: on reproductive technologies and the remaking of life* (Minneapolis: University of Minnesota Press)
- Petchesky R (1990) *Abortion and women's choice: the state, sexuality and reproductive freedom* (Boston: Northeastern University Press)

Exercise 6

The teaching objective here is to ask students to **compare the different legal traditions** in the US and the UK in relation to abortion. This would illustrate how two legal systems respond in very distinctive ways to pro/anti-abortion movements; the United States representing the most **'rights oriented'**, while the British model is centred on **medical professional control in a state funded health service**. In light of the **Human Rights Act 1998**, students could try and assess the likely similarities and differences in future abortion regulation in the UK. Is it a danger that human rights lawyers might look to US case law for human rights precedents, rather than to the European or Commonwealth jurisdictions?

Suggested reading

- Gibson S (1990) 'Continental drift: the question of context in feminist jurisprudence' 1 *Law and Critique* 173

Exercise 7

The introduction of a right to life case study into a health care course would encourage a **debate on the role and vested interests of the medical profession** in controlling/denying access to abortion. Students could be asked to consider the implications of the following quote. **Should human rights law be used as part of a feminist strategy to gain more control over abortion provision?** Why has lobbying of Parliament to liberalise the terms of the Abortion Act 1967 failed to date?

> *[T]he shift from a model of law based on criminal prohibition to a decentred network of medical control has (re)cast abortion as a narrow medical matter.. [A]bortion has become established as a matter for medicine rather than politics. It has been seen that this depoliticisation is real to the extent that important decisions regarding the provision of abortion has been shifted out of the public arena and left in the hands of medical professionals.*
>
> (Sheldon S (1997) *Beyond control: medical power and abortion law* 147 (London: Pluto)

- *R v Secretary of State for Health, ex p Wagstaff* (2001) 1 WLR 292 (re the need for an inquiry to be held in public in relation to the murder of patients by Dr Harold Shipman)
- Sheldon S and Thomson M (eds) (1998) *Feminist perspectives on health care law* (London: Cavendish)
- Lord Woolf (2001) 'Are the courts excessively deferential to the medical profession?' 9 *Medical Law Review* 1

Using video as a teaching tool to critique abortion law

The use of **video** to illustrate aspects of the abortion debate can be a highly political act as the graphic content of (the anti-abortion) *The silent scream* demonstrates. As many commentators have highlighted, the **tendency to adopt a 'foetal centric' view** in most representations of abortion renders the woman's interests and emotions irrelevant. However, **with appropriate forewarning and class preparation**, a combination of video extracts can be used to illustrate the different ways in which the abortion debate is constructed. The teacher's aim should be to **make students aware of the complexities of the debate (as listed above) while also providing a forum for the exchange of personal views**.

Due to the contentious nature of the topic, the teacher needs to be especially conscious of the possible strength of student reactions and to avoid causing any offence or upset. The teacher should also **be conscious of the language used** in the class and recognise that her/his continuous references to the 'unborn child' or 'baby' may well inhibit students who hold different perspectives and foreclose debate.

Asking the class a few days in advance of the lecture how they feel about showing video clips on the abortion debate is a good idea. The main point here is to **remain sensitive to student reactions** and this applies in any teaching setting regardless of the topic.

The choice of possible **video** clips is wide, encompassing films, documentaries, dramas, soap operas, studio discussions and news reports. Regardless of the teaching approach or aims, it should not be difficult to find a suitable clip if one is needed. For example, the film *Roe* v *Wade* (1989) provides a background account to the historic US litigation. A good video to use in association with the cited feminist materials is *The handmaid's tale* (1990), which depicts a future where the state exerts total political/medical control over women's reproductive capacity. An illuminating account of the conditions in which some women sought termination of pregnancy in pre-Abortion Act 1967 Britain is *Saturday night and Sunday morning* (1961). Many news programmes and documentaries have reported the violent tactics of some sections of the anti-abortion movement in the US, including its death threats against 'anti-life' doctors and clinics. Finally, there have been various soap opera representations of the decision to have an abortion (as in *Brookside*, *Eastenders* etc).

Assessment

Examples of essay or exam questions here are:

- Discuss the concept of the right to life, drawing on feminist legal theory.
- Compare and contrast the response of two national supreme courts to anti-abortion arguments.
- Assess how the UK courts should respond to pro- OR anti-abortion litigation under the Human Rights Act 1998.
- "The debate over women's access to abortion demonstrates the inter-relationship between medical and legal power." Discuss.

Useful resources and select bibliography

Perspectives on legal education

- Ansley F (1991) 'Race and the core curriculum in legal education' 79 *California Law Review* 1511
- Austin A (1998) *The empire strikes back: outsiders and the struggle over legal education* (New York: New York University Press)
- Banks NKS (1999) 'Pedagogy and ideology: teaching law as if it matters' 19 *Legal Studies* 445
- Cain P (1998) 'Teaching feminist legal theory at Texas: listening to difference and exploring connections' 38 *Journal of Legal Education* 165
- Chesterman M and Weisbrot D (1987) 'Legal scholarship in Australia' 50 *Modern Law Review* 709
- Farmer L (1995) 'Bringing Cinderella to the ball: teaching criminal law in context' 58 *Modern Law Review* 756
- Graycar R and Morgan J (1996) 'Legal categories, women's lives and the law curriculum, or Making gender examinable' 18 *Sydney Law Review* 431
- Hocking B (1992) 'Feminist jurisprudence: the new legal education' 18 *Melbourne University Law Review* 727
- Hutchinson AC (2001) 'Casaubon's ghosts: the haunting of legal scholarship' 21 *Legal Studies* 65
- Johnstone R and Loughin G (1997) *Designing print materials for flexible teaching and learning in law* (London: Cavendish)
- Mullender R (1997) 'Law, undergraduates and the tutorial' 3 *Web Journal of Current Legal Issues*
- Petersen C (1994) 'Living dangerously: speaking lesbian, teaching law' 7 *Canadian Journal of Women and the Law* 318
- Thornton M (1996) *Dissonance and distrust: women in the legal profession* 73-79 (Oxford: OUP)
- Williams P (1997) *The rooster's egg* (Cambridge: Harvard University Press)

General critiques of rights

- Bakan J (1997) *Just words: constitutional rights and social wrongs* (Toronto: Toronto University Press)
- Bakan J and Smith M (1995) 'Rights, nationalism and social movements in Canadian constitutional politics' 4 *Social and Legal Studies* 367
- Harlow C and Rawlings R (1997) *Law and administration* 91-127, 575-604 (London: Butterworths)
- Herman D (1993) 'Beyond the rights debate' 2 *Social and Legal Studies* 25
- Herman D (1994) 'The good, the bad and the smugly: sexual orientation and perspectives on the charter' 14 *Oxford Journal of Legal Studies* 589
- Howe A (1994) 'White western feminism meets international law: challenges/complicity, erasures/encounters' 4 *Australian Feminist Law Journal* 63
- Hutchinson A (1995) *Waiting for Coraf: a critique of law and rights* (Toronto: Toronto University Press)

- Kingdom E (1991) *What's wrong with rights* (Edinburgh: Edinburgh University Press)
- Mirza Q (1999) 'Patricia Williams: inflecting critical race theory' 7 *Feminist Legal Studies* 111
- Schnedier E (1986) 'The dialectics of rights and politics: perspectives from the women's movement' in Bartlett KT and Kennedy R (eds) *Feminist legal theory: readings in law and gender* (Boulder: Westview) 318-332
- Sedley S (1995) 'Human rights: a twenty first century agenda' *Public Law* 386
- Stychin C (1998) *A nation by rights* (Philadelphia: Temple University Press)
- Williams P (1991) *The alchemy of race and rights* (Cambridge: Harvard University Press)
- Whitty N, Murphy T and Livingstone S (2001) *Civil liberties law: the Human Rights Act era* (London: Butterworths)

Overviews of the right to life

- *Airedale NHS Trust* v *Bland* [1993] 1 All ER 52 (HL)
- *D* v *United Kingdom* (1997) 24 EHRR 423
- *A National Health Service Trust* v *D* (2000) 2 FLR 677
- *A National Health Service Trust* v *H* (2001) 2 FLR 501
- *R* v *Cambridge Health Authority, ex p B* [1995] 2 All ER 137 (CA)

- British Medical Association (2001) *Withholding and withdrawing life prolonging medical treatment: guidance for decision making* (London: BMA)
- Dinstein Y (1981) 'The right to life, physical integrity and liberty' in Henkin L (ed) *The international bill of human rights* (New York: Columbia University Press)
- Grosz S, Beatson J and Duffy P (1999) *Human rights: the 1998 Act and the European Convention* (London: Sweet & Maxwell)
- James R and Longley D (1995) 'Judicial review and tragic choices' *Public Law* 367
- Lester A and Pannick D (1999) *Human rights: law and practice* (London: Butterworths)
- McGoldrick D (1991) *The human rights committee* (Oxford: Clarendon)
- Ní Aolaín A (2001) 'The evolving jurisprudence of the European Convention Concerning the Right to Life' 19 *Netherlands Human Rights Quarterly* 21
- Opsahl T (1993) 'The right to life' in Macdonald R, Matscher F and Petzold H (eds) *The European system for the protection of human rights* (Dordrecht: Kluwer Academic)
- Ramcharan B (ed) (1985) *The right to life in international law* (Dordrecht: Kluwer Academic)
- Starmer K (1999) *European human rights law* (London: Legal Action Group)

Critical perspectives on the right to life

- Biggs H (1996) 'Euthanasia and death with dignity: still poised on the fulcrum of homicide' *Criminal Law Review* 17
- Cameron D and Frazer E (1987) *The lust to kill* (Cambridge: Polity)
- Duden B (1993) *Disembodying women: perspectives on pregnancy and the unborn* (Cambridge: Harvard University Press)
- Dworkin R (1994) *Life's dominion: an argument about abortion, euthanasia and individual freedom* (London: Vintage)
- Foster P (1995) *Women and the health care industry: an unhealthy relationship?* (Oxford: OUP)
- Jackson E (2000) 'Abortion, autonomy and prenatal diagnosis' 9 *Social and Legal Studies* 467
- Lee R and Morgan D (1994) *Death rites: law and ethics at the end of life* (London: Routledge)
- Newdick C (1997) *Who shall we treat?* (Oxford: OUP)
- Shivji IG (1999) 'Constructing a new rights regime: promises, problems and prospects' 8 *Social and Legal Studies* 253

- Singer P (1995) *Animal Liberation* (London: Pimlico)
- Young A (1993) 'Decapitation or feticide: the fetal laws of the universal subject' 4 *Women: A Cultural Review* 288-294
- Whitty N (1998) '"In a perfect world": feminism and resource allocation in health care' in Sheldon S and Thomson M (eds) *Feminist perspectives on health care* 135-153 (London: Cavendish)

Terrorism

- *Andronicou and Constantinou* v *Cyprus* (1997) 25 EHRR 491
- *Tennessee* v *Garner* 471 US 1 (1985) (US Supreme Court)

- Amnesty International (1988) *Northern Ireland: killings by security forces and 'supergrass' trials* (London: Amnesty International)
- Curtis L (1984) *Ireland and the propaganda war* (London: Pluto)
- Ellison G and Smyth J (2000) *The crowned harp: policing Northern Ireland* (London: Pluto)
- Fenwick H (2000) *Civil rights* (London: Longman)
- Haysom N. (1987) 'License to kill: the South African police and the use of deadly force' 3 *South African Journal of Human Rights* 3-27
- Jennings A (1988) 'Shoot to kill: the final courts of justice' in Jennings A (ed) *Justice under fire* 104-130 (London: Pluto)
- Klug F, Starmer K and Weir S (1996) *The three pillars of liberty: political rights and freedoms in the United Kingdom* 240-245 (London: Routledge)
- Lustgarten L and Leigh I (1994) *In from the cold: national security and parliamentary democracy* (Oxford: Clarendon)
- Rogers J (1998) 'Home Office's review of the law on the use of lethal force' 18 *Legal Studies* 486
- Tweedie J and Ward T (1989) 'The Gibraltar shootings and the politics of inquests' *Journal of Law and Society* 464
- United Nations (1994) *Basic principles on the use of force and firearms by law enforcement officials* (New York: United Nations)
- Ward J (1993) *Ambushed: my story* (London: Vermilion)

Death penalty

- *Ng* v *Canada* (1993) 1 IHRR 161 (HRC)

- Ballinger A (2000) *Dead woman walking: executed women in England and Wales 1900-1955* (Aldershot: Ashgate)
- Hudson P (2000) 'Does the death row phenomenon violate a prisoner's human rights under international law?' 11 *European Journal of International Law* 833
- Human Rights Watch (2001) *Beyond reason: the death penalty and offenders with mental retardation* (New York: Human Rights Watch)
- Hood R (1996) *The death penalty: a worldwide perspective* (Oxford: Clarendon).
- Kennedy L (1971) *10 Rillington Place* (London: Panther)
- Rodley N (1999) *The treatment of prisoners under international law* (Oxford: Clarendon)
- Sarat A (1995) 'Violence, representation and responsibility in capital trials: the view from the jury' 70 *Indiana Law Journal* 1103
- Sarat A (2001) *The killing state: capital punishment in law, politics and culture* (Oxford: OUP)
- UN Commission on Human Rights (1997) *Extrajudicial, summary or arbitrary executions: United States* (Report of the Special Rapporteur) (New York: United Nations)
- Weisberg R (1983) 'Deregulating death' *Supreme Court Review* 305

Abortion

- *Winnipeg Child and Family Services (Northwest Area)* v *G.(D.F.)* [1997] 3 SCR 925

- Clarke L (1989) 'Abortion: a rights issue?' in Lee R and Morgan D (eds) *Birthrights: law and ethics at the beginnings of life* (London: Routledge)
- Eriksson MK (2000) *Reproductive freedom: in the context of international human rights and humanitarian law* (Zoetemeer: Martinus Nijhoff)
- Farquhar D (1996) *The other machine: discourse and reproductive technologies* (London: Routledge)
- Franklin S (1997) *Embodied progress: a cultural account of assisted conception* (London: Routledge)
- Grant I (1989) 'Forced obstetrical intervention: a charter analysis' 39 *University of Toronto Law Journal* 217
- Greschner D (1990) 'Abortion and democracy for women: a critique of *Tremblay* v *Daigle*' 35 *McGill Law Journal* 633
- Hartouni V (1997) *Cultural conceptions: on reproductive technologies and the remaking of life* (Minneapolis: University of Minnesota Press)
- Johnsen D (1986) 'The creation of fetal rights: conflicts with women's constitutional rights to liberty, privacy and equal protection' 95 *Yale Law Journal* 599
- MacKinnon C (1991) 'Reflections on sex equality under law' 100 *Yale Law Journal* 1281
- Morgan D and Lee R (2001) *Human fertilisation and embryology: regulating the reproductive revolution* (London: Blackstone)
- Shelton D (1981) 'Abortion and the right to life in the inter-American system: the case of "baby boy"' 2 *Human Rights Law Journal* 309
- Thomson M (1998) *Reproducing narrative: gender, reproduction and law* (Aldershot: Ashgate)
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4

Teaching an international human rights course

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Structuring an international human rights course that reflects the dynamic nature of the subject matter and the diverse interests of the students requires some thought about the objective of the course and its place in the overall curriculum. International human rights courses sit somewhat uncomfortably in a traditional law programme. First, as a component of international law human rights law is subject to criticisms that it is not 'real law' and that it has no place in a core law curriculum. Second, within the international legal academy human rights are seen as idiosyncratic; more political than legal. Consequently international human rights courses are often seen as marginal or interdisciplinary; a hybrid of international relations and law. The controversial nature of human rights courses has implications for where they are situated in the curriculum and the type of students they attract. International human rights courses are usually optional rather than required courses (although there are exceptions to this) and often attract law, politics and international relations students. The nature of the material covered in a human rights course is much better suited to a seminar or small group format. Human rights concepts, such as cultural relativism, and their application are often difficult for students to grasp, and discussion and small group work are better teaching tools than large group lectures. However, institutional resourcing concerns often mean that large group lectures are the only format allowed.

In the following materials I try to give suggestions on how to accommodate the challenging and interdisciplinary nature of human rights courses while maintaining a high degree of teaching effectiveness.

Formulating curriculum content

Why teach a course on international human rights?

Course description

The aims of courses on international human rights can be generalised as follows:

- provide students with a basic knowledge of the principal treaties, conventions, United Nations General Assembly Resolutions relating to international human rights
- introduce students to the enforcement and implementation measures of the various treaties and treaty monitoring bodies
- explore the relationship between international law and international human rights law
- explore the relationship between local/domestic law and international law
- introduce students to the implications of an asymmetrical world order in which countries are divided in terms of their access to economic, political, and cultural sovereignty
- provide students with the tools to examine human rights violations in their own countries
- encourage student skill development in the following areas:
    - critical thought and analysis
    - problem solving
    - working with primary legal sources, such as written instruments (treaties etc) and cases
    - abstract thinking (applying theory to specific situations)
    - reading and applying complex material
    - research and writing

How these various aims are met will depend on the design of the course and the way in which it is taught. Below I demonstrate how I have structured aspects of my course to achieve these objectives. Suggestions are also provided on adapting the curriculum to fit different courses and students.

Course components

As a general rule, an international human rights course will cover all or some of the following topics:

Rights instruments

- 'bill of rights'
- treaties and conventions
- regional arrangements

Institutions/actors

- committees/working groups for the various conventions
- monitoring and compliance
- non-governmental organisations (NGOs)

Application of international human rights law

- universality
- cultural relativism
- state obligation
- application in domestic legal systems

Challenges to human rights

- Third World perspectives, right to development
- women's rights: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Beijing Conference on Women
- rights critique

Humanitarian law/international criminal law

- war crimes tribunals: Rwanda, Yugoslavia
- International Criminal Court
- humanitarian intervention

New directions

- right to democracy
- gay and lesbian rights
- refugees
- right to the environment
- globalisation and human rights: trade, corporate responsibility, debt relief

The size and format of a human rights module will determine how these subjects are put together. For example, an upper year law seminar is ideal for exploring some of these areas in detail. In this type of course topics can be introduced through a lecture and then followed up with more intensive class discussion. In addition, more time can be spent exploring the difficult legal questions raised by these topics such as:

- domestic application of international human rights law
- processes and rules of treaty monitoring
- impact of soft law on international human rights law
- interdependence of rights
- relationship between international criminal law and human rights
- future trends in norm enforcement
- human rights and the rule of law

- impact of feminist theory and critical theory on fundamental principles of international human rights law

Alternatively, a seminar course composed of students from various disciplines may want to de-emphasise some of the legal issues raised above, and add more of a political dimension to the curriculum. This could be done through exploring:

- South/North debates around international human rights, particularly, the right to development and the universality/relativist debate
- the importance of the Cold War in shaping key international human rights documents, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)/International Covenant on Economic, Social and Cultural Rights (ICESCR), and the implications of the end of the Cold War for human rights
- the impact of non-governmental organisations (NGOs) on international human rights. This topic is well suited to case studies of particular NGOs such as Amnesty International or Human Rights Watch
- the political economy of human rights (ie the relationship between aspects of globalisation and human rights)

In addition, instructors can use in-class exercises as a way to emphasise certain issues and develop particular skills. A course taken primarily by advanced law students, for example, can use in-class exercises where students are required to solve problems by working through legal documents, such as treaties and reports of special rapporteurs. I suggest some exercises below, some of which can be adapted to emphasise legal or political issues depending on the make-up of the course and student population.

In structuring an international human rights course the following factors need to be considered:

1. While seminars allow students to pursue topics in depth, it is still important to make sure that students are exposed to an overview of the key international human rights topics. More advanced topics, such as some of the ones listed above, require students to make linkages between different human rights topics. The ability to do this is important in encouraging students to develop good critical and analytical skills.

2. It is important to place human rights law in its geopolitical context. Students have a tendency to think about human rights as gross violations that occur somewhere else, usually in the developing world. This assumption is clearly problematic, as it ignores structural factors that contribute to human rights abuses, and the West's involvement in perpetuating global inequality. Human rights lecturers will find a considerable amount of material on human rights violations in civilised countries such as the UK. For example, Amnesty International has information on human rights violations in the UK, and NGOs often produce unofficial and parallel country reports as part of the treaty monitoring process.

3. While understanding the political context is important, international human rights have a legal dimension. It is important to examine how this area of *law* functions to regulate behaviour in many different ways.

Teaching, learning and assessment methods

Moving beyond cases and materials

As a law course international human rights can be taught like other topics using primary legal sources. That is, teachers can address many of the topics discussed above relying exclusively on primary legal sources; cases, legal and quasi-legal instruments. The benefit of this approach is that it is effective in meeting some of

the objectives referred to above, namely making students familiar with the basic human rights instruments, introducing them to monitoring and compliance measures and developing problem solving skills.

The down side to this approach is that it fails to situate international human rights law in the context of a changing global order. That is, it fails to meet the rest of the aims of an international human rights course. A cases and materials approach will be more limited in encouraging student skill development, particularly in the area of critical and analytical thinking, abstract thought, and research skills that encourage creative use of multiple sources.

Law in context approach

Developing a 'law in context' approach

An alternative to the cases and materials approach is to explore international human rights 'in context'; looking at the different debates within human rights and the different contexts within which human rights law is applied and/or shaped. This approach encourages students to learn the 'nuts and bolts' of human rights law at the same time as applying this knowledge to the exploration of the role of human rights law in a global legal and social order.

Developing a law in context approach requires use of varied teaching and learning materials as well as a teaching approach that encourages students to explore different ideas, apply their knowledge to concrete examples and develop the capacity to bring theoretical insights to the practice of human rights. This is a tall order, and these objectives will likely be met in varying degrees. In this section I discuss some teaching approaches that may facilitate a law in context approach, and later I discuss appropriate learning resources.

Over the years I have tried various approaches to promote active student learning in the classroom, usually through small group, in-class exercises. These worked well to a point, but I found that excessive reliance on this strategy could deter student interest. In recent years, I have adopted a new approach, suggested by my colleague Ambreena Manji, to have students act as human rights rapporteurs, giving weekly 15 minute presentations on a given topic. I have combined these presentations with shorter lectures that integrate discussion periods and/or small group exercises. The benefits of this approach are that it encourages student 'ownership' of human rights topics, allows them to apply first hand the principles learned to a specific situation/problem and requires them to do library research at an early stage. A sample list of presentation topics is included later.

A further difficulty I have encountered is in the rapidly changing and expanding nature of human rights and the limits of a teaching term. Clearly, not all aspects of international human rights law can be covered thoroughly in a single course. I have introduced a few strategies to try to deal with this. For example, I try to combine specific topics with a more focused case study. In a lecture on refugee law I also included a case study on women refugees. Through this approach I introduce students to the broad principles and instruments associated with refugee law, but also look at the position of women refugees as a way to highlight weaknesses within refugee law and to reinforce themes developed in other parts of the course (ie women's rights). This, together with an expansive approach to the student presentations, has meant that a larger number of issues is discussed in class, with key concepts reinforced in different lectures and contexts.

In the following I have outlined three lecture topics and possible class approaches. Where relevant I have indicated how certain themes and developments can be pursued in more depth in an advanced human rights law seminar.

Lecture topic: **Enforcing human rights: international institutions**

Case study: **Lesbian and gay rights**

Time allotted: **2 hours**

I use this lecture to accomplish five main objectives:

- acquaint students with the different treaty and non-treaty procedures available for making human rights claims
- encourage students to become familiar with using human rights mechanisms in a particular context, in this case lesbian and gay rights
- introduce students to the tension between standard setting and enforcement in human rights
- encourage students to consider the multiple ways in which legal norms can be implemented, other than in a coercive context
- introduce students to groups of rights claimants who, arguably, have been marginalised within the international human rights system

Assigned reading

- United Nations High Commissioner for Human Rights (1970) *Procedure for dealing with communications relating to violations of human rights and fundamental freedoms* (Resolution 1503(XLVIII) of ECOSOC) <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument>
- United Nations High Commissioner for Human Rights (2000) *The revised 1503 procedure* <http://www.unhchr.ch/html/menu2/8/1503.htm>
- United Nations High Commissioner for Human Rights (1989) *Communications procedures* (fact sheet no 7) <http://www.unhchr.ch/html/menu6/2/fs7.htm>

- Amnesty International (1995) *Breaking the silence: human rights violations based on sexual orientation* (London: Amnesty International UK)
  or
- Amnesty International (2001) 'Crimes of hate: conspiracy of silence' *Amnesty* July/August 4, 6-7
- International Gay and Lesbian Human Rights Commission (2001) *Egypt: teenager sentenced in Cairo case* (Action Alert Update) (San Francisco: IGLHRC)
- Khaled Daward K (2001) '50 Egyptian gays in court for "formenting strife"' *Guardian* 18 July 2001
- Long S (2000) *Making the mountain move: an activist's guide to how international human rights mechanisms can work for you* (San Francisco: International Gay and Lesbian Human Rights Commission)
- Rodley N S (1992) 'United Nations non-treaty procedures for dealing with human rights violations' in Hannum H (ed) *Guide to international human rights practice* (2nd ed) (Philadelphia: University of Pennsylvania Press) 60-85
- Steiner H (2000) 'Individual claims in a world of massive violations: what role for the Human Rights Committee?' in Alston P and Crawford J (eds) *The future of UN human rights treaty monitoring* (Cambridge: Cambridge University Press) 15

Suggested questions to guide student reading

To compensate for the lecture format of this course I give students questions to guide their reading. These questions are pursued in my lectures and in some cases are related to in-class exercises. This approach provides a guide to students in reading the course materials and preparing for classes. I have tried to design questions that encourage students to think critically about the material. This is important in getting them to start developing critical thinking skills.

- What are the various methods available under the ICCPR and ICESCR to monitor and enforce compliance? Which method(s) do you think have the most impact and why?
- A campaign is currently underway to approve an additional protocol to CEDAW that would allow individual complaints. Do you think the UK should support and sign up to such a protocol?

- After reading Amnesty's *Breaking the silence* and the Action Alert Update for Egypt, in what ways do you think lesbian and gay men suffer human rights abuses? Do you think the existing human rights instruments can respond to those abuses?
- Assume that you are an advocate working at the International Gay and Lesbian Human Rights Commission. You have been asked to plan a strategy for using international human rights to secure greater human rights protection for sexual minorities and increase the international profile of lesbian and gay human rights issues. What strategy would you recommend and why?

Suggested class exercise

Time allotted: 30 minutes
Objectives: helps students develop a familiarity with the 'bill of rights', introduces students to reading international instruments, encourages students to think critically about the different levels on which human rights provisions can be interpreted
Skills emphasised: student facility with reading and interpreting human rights instruments, critical and analytical thinking

Using the case of Egypt have students work in groups of three to four to consider what, if any, international legal avenues they might use to bring about international action on the persecution of gay men in Egypt. In particular, students should consider if there is a complaints procedure open to them or some other avenue, such as the possibility of requesting further investigation or eliciting the involvement of a special rapporteur. Additional materials could be supplied to the students, such as Egypt's status on the various relevant conventions, the reporting schedule for Egypt at the relevant enforcement bodies and so on.

After working on the problem each student group will report back on their findings. Class discussion can be structured by asking further questions such as:

- *should* groups such as the International Gay and Lesbian Human Rights Commission bring a complaint?
- how will factors, such as time, resources and domestic impact, affect the answer to that question?

Upper year and seminar courses

This exercise can be expanded in more advanced classes by having groups draft possible documents to initiate complaints under treaty or non-treaty mechanisms. You can use either the Egypt case study discussed above or some other situation, identified by the lecturer or as part of the student's own research. For example, students can be asked to locate and download reports by UN human rights investigators in situations such as Guatemala and bring them to the class. The report is then considered in class as part of the human rights compliance process. The report can then be used as a basis for a hypothetical complaint. Give each group a flip chart or a flimsy on which to record their draft paragraphs. At the end of the exercise consider the work of one or two groups as an example and as a basis for class discussion.

Time allotted: 1 hour
Objectives: familiarity with complaint procedures, introduction to concrete human rights cases
Skills emphasised: analytical thinking, problem solving, groupwork, legal writing and Web-based research

Lecture topic: **Women and human rights**

Case study: **Reproductive rights**
Time allotted: **2 hours**

I use this lecture to accomplish four main objectives:

- introduce subject specific human rights treaties
- introduce students to the topic of women's rights
- consider reproductive rights as an example of the interdependence of rights
- give students a foundation on which to build an understanding about how human rights protection affects people differently

Commentary

Earlier in the course I introduced the idea that human rights guarantees are uneven; civil and political rights are often stronger than economic and social rights. In this lecture students explore the idea that human rights are not as accessible to some people as others. This insight is similar to teaching students the difference between formal and substantive equality. In this context, it is teaching students about the discriminatory effect of apparently neutral human rights protection and the particular vulnerability of some groups.

Optional reading

- Amnesty International (1995) *Human rights are women's rights* (London: Amnesty International UK)
- Bunch C (1990) 'Women's rights as human rights: toward a re-vision of human rights' 12 *Human Rights Quarterly* 486
- Bunting A (1993) 'Theorising women's cultural diversity in feminist international human rights strategies' 20 *Journal of Law and Society* 6
- Charlesworth H, Chinkin C and Wright S (1991) 'Feminist approaches to international law' 85 *American Journal of International Law* 613
- Copelon R (1994) 'Recognizing the egregious in the everyday: domestic violence as torture' 25 *Columbia Human Rights Law Review* 291
- Etienne M (1995) 'Addressing gender-based violence in an international context' 18 *Harvard Women's Law Journal* 139
- O'Hare U (1999) 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364-402
- Peters J and Wolper A (eds) (1995) *Women's rights, human rights: international feminist perspectives* (London: Routledge)
- UN Special Rapporteur on Violence Against Women [Radhika Coomarascramy] (1996)

Suggested questions to guide student reading

The above readings set out the overwhelming evidence of women's disadvantaged position throughout the world. Clearly, not all women are subject to the same forms of disadvantage, just as not all men experience the same advantages as other men. However, there appears to be a consistent and entrenched hierarchy of social relations in which an individual's gender, race, class, or physical ability subjects them to different human rights experiences. Within that hierarchy, gender is a fundamental characteristic that determines an individual's social and economic position. This has meant that many of the world's women are killed, starved, tortured, excluded or marginalised because they are women.

The article by O'Hare provides a good overview of the ways in which women's rights have not been considered in traditional approaches to human rights. Feminist scholars and activists have campaigned for a rethinking of international human rights norms to extend protection to women. As you read this article consider the following:

- in what ways does the *structure* of international law marginalise women?
- how does this marginalisation manifest itself in the area of international human rights?
- in what ways does a call for 'women's rights as human rights' challenge the 'universality' of international human rights?

As a result of lobbying by women the international community gradually, and some would say reluctantly, began to recognise the particular human rights abuses suffered by women. In 1995 Amnesty International published a report focusing on human rights violations experienced by women. This marked a significant advance for Amnesty, which had previously taken a very narrow view of what constituted human rights abuses for the purposes of its mandate. Amnesty has historically focused on prisoners of conscience, which it defined as people (usually men) who have been imprisoned for their views. As you read the Amnesty report consider the following:

- why and how have human rights abuses of women, such as the ones listed here, been ignored by the international community, including activist organisations like Amnesty?
- in what ways does an exclusive focus on civil and political rights result in a marginalisation of the human rights abuses experienced by women?
- in what ways does the social and economic marginalisation of women within various societies expose them to particular types of human rights abuses?

Since the early 1990s significant advances have been made in international recognition of women's human rights. The final reading for the class is a section of Radhika Commaraswamy's report on violence against women. This section of the report, on sexual and reproductive rights, reflects the efforts of feminist campaigners to include the particular abuses of women within the definition of human rights. As you read this report, consider the following:

- what specifically is meant by reproductive rights?
- list all of the provisions in the International Bill of Rights that describe reproductive rights
- what is CEDAW and where in CEDAW will you find the provisions relating to violence against women?

For some human rights activists securing women's reproductive rights is essential to women's full realisation of their human rights. Consider the following:

- in what ways is reproductive freedom essential to bodily integrity?
- can you find human rights guarantees for bodily integrity?
- do you agree that reproductive rights are essential to women's rights?

Suggested class exercise

Time allotted:	20-25 minutes
Objectives:	working with human rights instruments, applying theoretical critique to a particular document, familiarity with human rights language
Skills emphasised:	critical and analytical thinking, abstract thought, reading human rights instruments

Divide students into groups of three (or less) and ask them to review the Women's Convention. Assuming that the Convention is going to be reopened for redrafting, have students list five areas that they think should be subject to further debate. Then have students make a list of 3-5 items which are not in the Women's Convention and which they think ought to be included. Using a blank, overhead flimsy (or whiteboard) record the results.

Upper year or graduate students

The lecture outlined above is meant to be very general and rudimentary. For upper year or graduate students it is possible to explore aspects of this topic in more detail.

Suggested topics or themes are:

- The public/private divide and its centrality to feminist theory. How does the public/private divide function in international law to obscure power relations? What are the implications for human rights of feminist challenges of

public/private distinctions? What impact, for example, does this have on state responsibility?
- Other efforts to strengthen the human rights of women. For example, the Vienna Convention on Human Rights, the Convention on Violence against Women, the Beijing Conference on Women.
- Violence against women, particularly sex tourism, domestic violence, wartime violence.
- Different feminisms and challenges of feminist human rights groups/coalition efforts.

Further reading

- Buss D (1996) 'Going global: feminist theory, international law and the public/private divide' in Boyd SB (ed) *Challenging the public/private divide: feminism, law and public policy* (Toronto: University of Toronto Press)
- Charlesworth H (1994) 'What are "women's international human rights"?' in Cook R (ed) *Human rights of women: national and international perspectives* (Philadelphia: University of Pennsylvania Press)
- Engle K (1992) 'International human rights and feminism: when discourses meet' 13 *Michigan Journal of International Law* 517
- Engle K (1993) 'After the collapse of the public/private distinction: strategising women's rights' in Dallmeyer DG (ed) *Reconceiving reality: women and international law* 143 (Washington: American Society of International Law)
- Women's Rights Project (1995) *The Human Rights Watch global report on women's human rights* (New York: Human Rights Watch)

Lecture topic: 'Global' responses to human rights violations: international criminal law

Time allotted: 2 hours

I use this lecture to:

- introduce students to the expanding area of war crimes tribunals and international criminal law
- consider the overlap between human rights and humanitarian law
- encourage students to question the efficacy of 'criminalising' human rights
- consider judicial remedies in the context of other enforcement and compliance measures discussed earlier in the course

Optional reading

- Buss D (1998) 'Women at the border: rape and nationalism in international law' 6 *Feminist Legal Studies* 171-203
- Howland T and Calathes W (1998) 'The UN's international criminal tribunal: is it justice or jingoism for Rwanda? A call for transformation' 39 *Virginia Journal of International Law* 135-167

Suggested questions to guide student reading

Since the early 1990s international human rights law has moved into a new direction with the establishment of ad hoc tribunals in Rwanda and Yugoslavia. More recently, the agreement on the International Criminal Court is being lauded by many as representing a new era in enforcing human rights standards.

- What is the relationship between humanitarian law and human rights law? What is the historic relationship between these two areas?
- What do you think are the objectives of a war crimes tribunal, such as those for the former Yugoslavia or Rwanda? Do you think those objectives are being met?
- What are the principal differences between the means of enforcement outlined earlier in the course, and the use of trials to prosecute offenders of war crimes tribunals?

- The articles by Howland and Calathes, as well as Buss, raise some questions about the limits of this shift in human rights enforcement. Do you agree with their views? Why or why not?
- What do you think is meant by the reference to the 'structural' factors that encourage human rights violation? What role do you think tribunals will play in addressing these?

Suggested class exercise

Time allotted:	30 minutes
Objectives:	encourage students to question the efficacy of war crimes tribunals in enforcing human rights, stimulate student discussion, highlight the emotional aspects of the topic
Skills emphasised:	critical and analytical thinking, formulating and expressing an argument in a classroom setting

Show the video produced by the Coalition for the International Court. This video is about 30 seconds long and is meant as an advertisement to gain support for the new court. It contains some shocking imagery and has a powerful impact. I usually show the video and allow the resulting class silence to penetrate for a few minutes. Then show the video again, and ask for people's reaction. Class discussion can be structured by asking specific questions such as:

- In what ways do you think prosecuting war crimes is essential to peace?
- After the Second World War the phrase "never again" was used to justify international action on gross human rights violations. What phrase do you think we should use now?
- What do you think the objectives of the video are? Do you think they are fairly achieved?

Upper year or graduate students

The topic of international criminal law is growing rapidly, and advanced classes could focus more particularly on the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Class discussion could also consider the possible use of war crimes tribunals in other conflict situations, such as Sierra Leone. The use of war crimes tribunals could be contrasted with other types of reconciliation models such as truth commissions and reparations.

Assessment

The types of assessment used will depend on the course and the nature of the overall curriculum. In my course, students are assessed by a 100% research paper. In addition, students are required to work in a group to make a 15 minute presentation, which is unassessed. Sample essay questions and possible presentation topics are provided at the end of this section.

Where the size of the class allows more participation, assessments might include things like a structured debate, a negotiation session or a drafting exercise. The above suggested exercises could be adapted as an assessed piece of work by having students conduct research to prepare for the debate/negotiation session/drafting exercise, and then have the final event take place in a more structured environment (ie mooting room or video taped negotiation session).

Sample presentation topics

What is the Convention on Violence against Women? What does it do, when and how did it come about? Why is it needed?

What are NON–convention refugees and what are the particular human rights issues raised with the mass movement of refugees in various parts of the world?

Narmada Dam case (India) and the right to housing.

In what ways might some corporate activity entail human rights abuses?

What is the Draft Declaration on Indigenous Rights and what are the key elements of that declaration?

What are the human rights issues with international trade?

What are the international criminal law issues raised by the case of Afghanistan? (Consider the bombing of New York/Washington and the bombing of Afghanistan.)

In what ways has the work of the ICTY and ICTR addressed – or not – the issue of war crimes against women?

Sample research paper questions

1. Does the evolution of 'international criminal law', with its emphasis on war crimes, advance or hinder the progression of international human rights.
2. "International human rights law has been invigorated by the increased involvement of previously silenced groups, whose demands for new approaches to human rights are bringing much needed change to old concepts." Critically discuss with reference to *either* women's rights *or* the rights of lesbians and gay men.
3. In what ways are the values underlying the Refugee Convention incompatible with UK asylum law and policy?

Sample examination

I Short answer questions: answer two (allow 1 hour)

1. Explain the principal differences between the ICCPR and ICESCR.
2. What is meant by 'humanitarian law' and what is its significance to human rights law?
3. In what ways does the European Convention reflect the historical circumstances surrounding its adoption?

II Essay question: answer one (allow 1 hour)

1. In what ways might the activities of the World Trade Organisation be of concern to human rights lawyers and advocates?
2. "There is no such thing as a *universal* human right. Human rights reflect a community's values, which will vary in time and in place. To suggest otherwise is to ignore the real cultural differences that exist." Critically discuss with reference to either the right to freedom from torture or women's rights to reproductive autonomy.
3. "War crimes tribunals may be a way of enforcing law, but they can never be an effective instrument for the protection of human rights." Discuss.

Sample international human rights course online

The course outlined here is a third year law option open to students from several disciplines but taken primarily by law, Erasmus, and foreign exchange students in international relations. The course generally attracts 40-50 students and is taught by lecture only.

The course aims to:

- introduce students to the laws and institutions that structure international human rights
- explore the ways in which international attitudes towards, and conceptions of, human rights have evolved since the drafting of the Universal Declaration of Human Rights
- provide students with a critical understanding of international inequality and global change as a context within which to consider human rights guarantees

By the end of this course students should be able to:

- demonstrate a familiarity with the principal international human rights documents
- explain the various mechanisms by which international human rights violations are addressed and discuss the relative merits of different enforcement options
- identify and apply different critical perspectives on international human rights
- analyse international human rights in the context of South/North tensions

Week 1: Introduction: international human rights in overview
Case study: Death penalty and torture

Readings

- Ignatieff M (1999) 'Human rights: the midlife crisis' *New York Review of Books* 20 May
- Steiner H and Alston P (2000) *International human rights in context* (Oxford: OUP): 'Foundations of the system' 118-122, 'Economic and social rights' 256-262

Students should also read the actual provisions in the three human rights instruments discussed in the class:

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

Death penalty:

- 'It's a cruel thing to do, to put me to sleep' *The Guardian* 14 November 2000
- 'US death penalty bias' *The Guardian* 13 September 2000
- 'Corrupt police…' *The Independent* 13 June 2000
- 'Bush leads charge of the death brigade' *The Guardian* 20 January 2000
- 'UN inspects America's death row' *The Guardian* 1 October 1997

Torture:

- 'Action on Malaysia" *LGBT News* April 2000
- 'Israel admits security force practices torture' *The Independent* 11 February 2000
- Second periodic reports of States parties in 1996: Israel' 18 February 1997

Week 2: Enforcing human rights: international institutions
Case study: Gay and lesbian rights

Readings

- United Nations High Commissioner for Human Rights (1970) *Procedure for dealing with communications relating to violations of human rights and fundamental freedoms* (Resolution 1503(XLVIII) of ECOSOC) <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument>
- United Nations High Commissioner for Human Rights (2000) *The revised 1503 procedure* <http://www.unhchr.ch/html/menu2/8/1503.htm>
- United Nations High Commissioner for Human Rights (1989) *Communications procedures* (fact sheet no 7) <http://www.unhchr.ch/html/menu6/2/fs7.htm>

- Amnesty International (1995) *Breaking the silence: human rights violations based on sexual orientation* (London: Amnesty International UK)

or

- Amnesty International (2001) 'Crimes of hate: conspiracy of silence' *Amnesty* July/August 4, 6-7

- International Gay and Lesbian Human Rights Commission (2001) *Egypt: teenager sentenced in Cairo case* (Action Alert Update) (San Francisco: IGLHRC)
- Khaled Daward K (2001) '50 Egyptian gays in court for "formenting strife"' *Guardian* 18 July 2001
- Long S (1991) *Making the mountain move: an activist's guide to how international human rights mechanisms can work for you* (San Francisco: International Gay and Lesbian Human Rights Commission)
- Rodley N S (1992) 'United Nations non-treaty procedures for dealing with human rights violations' in Hannum H (ed) *Guide to international human rights practice* (2nd ed) (Philadelphia: University of Pennsylvania Press) 60-85
- Steiner H (2000) 'Individual claims in a world of massive violations: what role for the Human Rights Committee?' in Alston P and Crawford J (eds) *The future of UN human rights treaty monitoring* (Cambridge: Cambridge University Press) 15 (optional)

Week 3: Enforcing human rights: non-governmental organisations
Case study: Amnesty International

- Bahar S (1996) 'Human rights are women's right: Amnesty International and the family' (1996) 11 *Hypatia* 105-123
- Forsythe DP (2000) *Human rights in international relations* (Cambridge: Cambridge University Press) chapter 7
- Kovey W (1998) *NGOs and the Universal Declaration of Human Rights: 'a curious grapevine'* (London: Macmillan) chapter 7
- Steiner H and Alston P (2000) *International human rights in context* (Oxford: OUP) 938-949, 954-962
- Amnesty International UK (2000) 'Gay, Lesbian, Bisexual and Transgendered Network' *Amnesty* (excerpt)
- excerpts from *Amnesty,* anniversary issue, 19, 24-25, 26-7

Week 4: Women's human rights

Readings

- Amnesty International Pakistan: Violence against women in the name of honor
- Boland R (1997) *Promoting reproductive rights: a global mandate* 6-17
- O'Hare U (1999) 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364-402
- Packer C *The right to reproductive choice: a study in international law*
- Women in international law: research resources <http://www.lib.uchicago.edu/~llou/women.html>

- 'People's court indicts Japan's late emperor for war sex slaves' *The Guardian* 9 December 2000
- 'African women tricked into sex slavery in Spain' *The Guardian* 28 February 2000
- 'Child sex tour boss gets 16 years' *The Guardian* 12 October 1999
- 'Ukrainian "au pairs" forced into brothels' *The Guardian* 16 December 1997

Week 5: Refugees

Readings

- Crawley H (1997) *Women as asylum seekers: a legal handbook* chapter 1
- Razack S (1995) 'Domestic violence as gender persecution: policing the borders of nation, race and gender' (1995) 8 *Canadian Journal of Women and the Law* 45-85

- *Guardian Education* special supplement, 22 May 2001:
  'Sadiq's seven month journey'
  'The waiting game'
  'A ticket to heartbreak'
  'Behind the wire'
- 'New guidelines ease women's asylum claims' *The Guardian* 5 December 2000
- 'An A-Z of asylum seekers' *The Guardian* April 21 2000
- 'Are our politician's racist?' *The Guardian* April 19 2000
- They made it from a Romanian slum to the Kent countryside. But are they happy?' *The Observer* 13 December 1998

- 'Battered wife wins asylum ruling' *The Guardian* 26 October 1996

- Refugee Council (1999) 'Out of sight, out of mind' *InExile* February 4-5
- Refugee Council (2000) 'Disperse!' *InExile* October 9
- Refugee Council (2001) 'Nailing press myths about refugees' *Briefing* April
- Refugee Council ( )'What rights? Interview with Amena Mohamed' *InExile*

Recommended supplementary reading

- Chimni BS (1999) *International refugee law: a reader* (London: Sage)
- United Nations (2000) *The state of the world's refugees: 50 years of humanitarian action* (Oxford: OUP)

Week 6: Globalisation and human rights: part I

Readings

- Felice W (1999) 'The viability of the United Nations approach to economic and social human rights in a globalised economy' 75 *International Affairs* 585-598
- Report of the South Commission (1990) *The challenge to the South* (Oxford: OUP) 25-73
- UN Research Institute for Social Development (2000) *Visible hands: taking responsibility for social development: executive summary*
- Watkins K (1999) *The IMF: wrong diagnosis, wrong medicine* (World Bank/IMF fact sheet) (Oxford: Oxfam) 1, 9-22

- 'Drop the debt' (advert) *The Independent* 13 July 2001
- 'The charade of debt sustainability' *Financial Times* 26 September 2000
- 'World Bank schemes cost 2.6m their homes' *Financial Times* 26 September 2000
- 'Haiti in life and debt struggle' *The Guardian* 7 June 2000
- 'You think politicians don't matter? She knows better' *The Independent* 18 April 1997

Week 7: Globalisation and human rights: part II

Readings

- Amnesty International (1996) *Amnesty International Report 1996* (London: Amnesty International UK) Introduction: trading in terror 1-18
- Avery C (2000) *Business and human rights in a time of change* (Amnesty International UK) 65-72
- Foley C (2000) *Global trade, labour and human rights* (London: Amnesty International UK)
- Frankental P and House F (2000) *Human rights: is it any of your business?* (Amnesty International and Prince of Wales Business Leaders Forum) 38-61

- 'CocaCola sued over bottling plant "terror campaign"' *The Guardian* 17 September 2001
- 'Boom time for few signals misery and death for many' *The Guardian* 15 March 2001
- 'Oil firms stoke up Sudan war' *The Guardian* 15 March 2001
- 'Child labour scandal hits Adidas' *The Observer* 19 November 2000
- 'Ogoni Nine hanged as indifferent west failed to respond' *The Independent* 19 September 2000
- 'Shell to face US lawsuit for Sara-Wiwa execution' *The Independent* 19 September 2000
- 'Principled partnership with world business' *Financial Times* 6 September 2000

Recommended supplementary reading

- Amnesty International (1997) Made in Britain: how the UK makes torture and death its business (London: Amnesty International UK)

Week 8: 'Global' responses to human rights violations: part I: international criminal law

Reading

- Buss D (1998) 'Women at the border: rape and nationalism in international law' 6 *Feminist Legal Studies* 171-203

- Howland T and Calathes W (1998) 'The UN's international criminal tribunal: is it justice or jingoism for Rwanda? A call for transformation' 39 *Virginia Journal of International Law* 135-167
- Human Rights Watch (1998) 'Summary of the key provisions of the ICC statute' <http://www.hrw.org/campaigns/icc/docs/icc-statute.htm>
- Joyner C (1998) 'Redressing impunity for human rights violations: the Universal Declaration and the search for accountability' 26 *Denver Journal of International Law and Policy* 597-614
- 'Our shame over Srebrenica' *Independent* 12 July 2001
- 'Judging genocide' *Economist* 16 June 2001

Week 9: Global responses to human rights violations: part II

Readings

- House of Commons Select Committee on Foreign Affairs (2000) *Fourth Report session 1999-2000: Kosovo* (paragraphs 12-98, 124-145, 158-164)
- Orford A (1999) 'Muscular humanitarianism: reading the narratives of the new interventionism' 10 *European Journal of International Law* 679-683; 689-703

Useful resources

Texts

In the past I have used Steiner HJ and Alston P *International human rights in context* (Oxford: OUP), and the second edition of this volume (2000) is a good teaching text, although somewhat expensive and perhaps overwhelming for students. There are not many good human rights texts, and this is one of the few that attempts to examine international human rights law in its socio-political context. It is, however, a text for law courses and is quite strong on topics concerning human rights as part of international law. I have now moved to using a collection of articles, Web-based material and newspaper articles. This approach is much more time consuming, but has the advantage of being more current than a text, plus it gives students a specific grounding for some of the topics we discuss. I have found that newspaper articles catch student interest and encourage more ownership of the course and self-direction in research.

In addition, I encourage students to investigate human rights issues using the Web.

Internet sources

I recommend starting any Web-based research on human rights by using the two guides to research listed below. These guides provide useful information about the sources available to researchers (both electronic and more 'traditional' sources), and are also extremely comprehensive:

- American Society of International Law (ASIL): *Guide to electronic resources for international law*:
  - human rights <http://www.asil.org/resource/humrts1.htm>
  - international criminal/humanitarian <http://www.asil.org/resource/crim1.htm>
- Human Rights Program, University of Chicago: *Human rights: an interdisciplinary bibliography and research guide* <http://www.lib.uchicago.edu/~llou/humanrights.html>

Further sources

- Country reports on human rights practices (annual reports from the US Department of State to 1999) <http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html>
- *Human Rights Dialogue* (quarterly bulletin of the Human Rights Initiative of Carnegie Council on Ethics and International Affairs)

http://www.carnegiecouncil.org/publications/hrd.html
- Human Rights Internet <http://www.hri.ca>
- *International human rights law database* (searchable by subject, country, tribunals applying human rights etc) http://www.interights.org/icl
- *Project Diana: an online human rights archive* (human rights litigation, includes databases of briefs, opinions, complaints etc) <http://www.yale.edu/lawweb/avalon/diana>
- *Rights International research guide for international human rights lawyers* <http://www.wideopen.igc.org/ricenter/links.html>
- University of Minnesota Human Library <http://www.umn.edu/humanrts>
- European Court of Human Rights <http://www.echr.coe.int>
- United Nations <http://www.un.org>

Non-governmental organisations

- Amnesty International <http://www.amnesty.org>
- OneWorld <http://www.oneworld.net>
- Oxfam <http://www.oxfam.org.uk>
- Refugee Council <http://www.refugeecouncil.org.uk>

Fundamental human rights premises

Wade Mansell, Kent Law School, University of Kent at Canterbury

My experience of teaching law courses concerned with human rights left me persuaded of several facts:

1. Such courses attract highly motivated and well intentioned students who view with dismay and concern the many human rights abuses with which they are surrounded.
2. Such abuses are seen, initially at least, as springing simply from human perfidy.
3. It is essential to problematise the study of human rights, so that unthinking enthusiasm is replaced by a considered view of the structural causes of many human rights abuses. This necessitates consideration of the thesis that human rights in fact enjoy no sacrosanct quality in the realm of international relations, and that they are proclaimed or ignored in accordance with the interests of the government of the state proclaiming or ignoring.

There is a brief story which I think illustrates the point. A sociologist who had previously been a social worker was asked why he had made a career change. His reply was that having spent so much time fishing people out of the stream he decided to walk up-river to the bridge to discover who was pushing them in. This contribution is intended to view human rights from the bridge.

Teaching approach

The material that I have selected is intended to illustrate the phenomena that I consider to be the factual premises upon which a course concerned with the international protection of human rights must (or at least should) be based. Because this work is primarily directed to those teaching in the area of human rights, I have endeavoured to provide, briefly, sufficient material indicating how my premises may be evidenced and exemplified. In addition, after each premise I have provided a list of questions, which partially translate into interrogatories concerning the points I would wish to make, but which also provide open ended questions for discussion. My own method of lecturing is to provide for each lecture a list of 10-20 questions to which the lecture is addressed, in the hope that the need for note taking is replaced by time with which to consider what is being said. If the course is one accompanied by seminars, these always begin with a consideration of these questions. Although I have not distinguished particular questions, I hope that it will be obvious that some are suitable for either essay or examination questions. I have found it useful in seminars where a list of readings has been prepared to allocate to each student one reading for special responsibility and succinct summary.

As will be seen, my own views in this topic may be regarded as idiosyncratic. While the views are strongly held, I do not think that the object of teaching is coercion of opinion. My criterion for a successful course (or class) is that students should have identified their own ideological assumptions, which they can then test against information and arguments provided. It is essential that students are enabled to maintain tenable positions which understand and encompass opposing views. Invariably, the best examination papers are those which demonstrate not only an understanding of the material provided, but also reflection – allowing critical comment upon such material.

Because these are aims of my teaching the method of assessment is necessarily highly flexible. I prefer to try to ensure that students write essays, and indeed examination questions, on topics that have interested them sufficiently to ensure reflection. In my view, the choice of the particular topic is less important than the technique demonstrated in considering the problem.

The result of this is that within seminars I am constantly concerned to have participants make arguments that are then put to the test by other students. Because this area is so controversial and so political, it also lends itself well to some application of mooting principles, where two or four students can be asked to make opposing arguments. Experience suggests that students almost always learn more by being asked to argue points of view with which they disagree strongly.

First premise

A study of the discourse of human rights since the Second World War suggests that the rhetoric of human rights has been determined most clearly by the propaganda value it represented.

From an initial position of assumed moral superiority arising from and represented by the drafting and promulgating of the Universal Declaration of Human Rights, western states were forced to consistently argue their superiority in the face of concerted attack from both the so called 'second' (socialist) and 'third' (poor) worlds. These attacks came initially from two directions. Colonialism came to be vilified, as the proclaimed human right of self-determination gained prominence and dominance. If colonialism was not identified with the institutionalised racism found in apartheid regimes, it was nevertheless seen to very often carry within it the assertion of racial superiority of the governors over the governed. As the anti-colonialist movement grew in the 1950s and 1960s, so did suspicion grow of the proclaimed human rights, supposedly readily justiciable. These suspicions were fuelled by the so called socialist states insisting upon the centrality of economic rights, supposedly intended to ensure the security of individuals in their ability to acquire food and housing.

The demise of the USSR and an effective end to both colonialisation and the so called Cold War changed the rhetoric if not the need. As free market economics and the accompanying ideology gained ascendancy, so economic rights declined in so far as they were incompatible with the policies sanctioned and blessed by the international financial institutions. The African Charter on Human and Peoples' Rights – admittedly never very effective in protecting people from human rights abuses – has come to appear positively antediluvian. The collective community interest rhetoric it espoused is supposedly incompatible with economic well being and growth.

Thus what I am suggesting is that the way in which human rights are discussed in international fora is not objective, but almost always political in the sense that it is almost always related to economic ideology. This can also be illustrated by reference to the waning popularity of the proclaimed 'new international economic order', which had as its aim the securing of an international economic situation which would correct what were seen to be unjust imbalances between rich and poor states. If a new international economic order had been seen as the foundation upon which economic and social rights could be secured, by the 21st century it had become not only unfashionable, but bordering on the ludicrous in the face of economic programmes preached almost universally by the International Monetary Fund and the World Bank.

Suggested questions

1. How representative of world political ideologies was the Universal Declaration of Human Rights when it was drafted?
2. How can we explain the acceptance by many at the end of the Second World War of colonisation as unproblematic?
3. What did the Universal Declaration say of economic cultural and social rights? At whose behest were these rights included?
4. Why are so few aware of such proclaimed rights, and why have they received less recognition than civil and political rights?
5. Is justiciability of relevance to different sorts of human rights?
6. Is the concept of justiciability more relevant to 'rule of law' societies than others?
7. What was the western response to the anti-colonialist movement? Can one generalise?
8. Did anti-colonialism remain a prisoner of the colonial ideology in its acceptance of *uti possidetis* in its drive for self-determination?
9. Is it arguable (or simplistic) to state that the 'First World's' moral authority was gravely affected by the proclamation of economic rights?
10. Is it significant that General Assembly Resolutions concerning economic rights were simply ignored by wealthy states even when passed overwhelmingly?
11. Does the proposed International Criminal Court reinforce the perspective that the abuse of civil and political may lead to culpability, whereas economic, social and cultural rights may be ignored with impunity?

Second premise

The difference in the sorts of human rights different states proclaimed was dictated by the political (and/or theological) ideology of each state.

Liberal democratic states such as the United States and many countries within western Europe placed emphasis upon the civil and political rights exemplified in the European Convention on Human Rights. The social provisions found within the Universal Declaration were considered inappropriate for comparable protection or even recognition. Such states effectively either ignored collective rights (as in the case of the United States), or to a large extent merely paid them lip service (as is the case of the signatories of the European Social Charter). The view implicitly promulgated was that civil and political rights were legal and justiciable, while others were at best desirable, and at worst utopian or even counter productive because of their threat to the perceived productive free market economy.

Collectivist states, of course, attempted to counter these views by asserting the importance of distributive justice and the need to ensure the participation of individuals in the collective life of the state. Regrettably, though a level of security was provided for citizens by many states (a fact which has come to be accepted only since the dramatic decline in the living standards of the poorest people living in the former USSR), such were the feelings of insecurity of those governments that they would not trust the governed with the civil and political rights which were portrayed as incompatible with a 'socialist' property regime. The clearest example of this fundamental distrust was to be found in the German Democratic Republic.

Meanwhile with the rise (and the recent demise of some) of the so called Asian tiger economies a third perspective on human rights protection was developed. This suggested that the protection of individual civil liberties might be incompatible with the needs of development. Malaysia in particular took the view that the 'Asian tradition' led to positions on human rights that could not be reconciled even with the Universal Declaration. If these arguments seem manifestly specious to the cynical among us, and designed only to justify willful human rights abuses, this is less important (for a sense of comprehension of the human rights world) than the recognition that these arguments reflect a particular power structure with particular goals. This is a power structure dedicated to economic 'progress' (that is increased economic growth) both for its own sake and for the sake of national pride. (It is of

course ironic that this very ambition is itself evidence of continuing feelings of insecurity, if not inferiority). Whether or not such 'progress' is ever adversely affected by protecting such rights as those concerned with freedom of speech or freedom from arbitrary detention remains highly questionable.

More recently we have seen self-proclaimed Islamic states prepared to assert values in direct contravention of crucial aspects of the Universal Declaration. Not only have they rejected (sometimes implicitly, sometimes explicitly) the idea of equality between women and men, but they have also rejected any notion of freedom of religion. Apostasy may even be a capital crime. Finally, to Muslims the notion of any human rights ideas taking precedence over the content of the Koran, contested though that content may be, would be simply blasphemous.

Suggested questions

1. What problems do Islamic societies (or their rulers) have with such a document as the Universal Declaration?
2. Do such difficulties preclude giving effect to all or any of its provisions?
3. What is the authority of the Universal Declaration?
4. Why did Lenin consider that the institution of private property made a nonsense of the proclamation of what he saw as bourgeois rights?
5. Can states dedicated (in theory) to distributive justice grant protection to all individual rights?
6. Is the Universal Declaration compatible with the 'command' as opposed to the 'demand' economy?
7. Is distributive justice compatible with the rule of law?
8. Is there an 'Asian tradition' of human rights and of what might it consist?
9. Can this Asian tradition be held accountable in any sense for the sudden economic decline of some of the so called Asian economic tigers?
10. Does economic progress ever necessitate limitations on the recognition of human rights?
11. Is there an 'Islamic tradition' of human rights and of what might it consist?

Third premise

International institutions with power tend to reflect the interests of the powerful states.

This premise is nowhere better illustrated than in a consideration of the United Nations itself. When the United Nations Charter was adopted in San Francisco there were 50 (victorious) nations who were initial signatories. The number of members has now risen to some 189, while the Charter has remained almost entirely unaltered. The Charter was drafted as an attempt to replace the League of Nations with a new intergovernmental organisation that would avoid the defects that had become so apparent in the League. The purposes of the United Nations were set out in Article 1 in the Charter. Central and primary was the objective to maintain international peace and security and, to that end, to:

> *Take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*

The second purpose was to develop friendly relations between nations, based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace. The third aim was to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and to promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion; and finally to be a centre for harmonising the actions of nations in the attainment of the common ends.

The purposes have a grandeur and optimism entirely characteristic of modernism. Progress towards peace and prosperity for all was the goal, and many have suggested that, at least implicitly, a development model premised upon a unilinear conception of progress was being espoused (see Sachs 1992). Such world powers as there were, who had been finally victorious, were united in victory for long enough for a Charter to be drafted which was satisfactory to all. The so called Cold War began in earnest shortly afterwards, and much of the Charter became either redundant because it could not be given effect (as in the case of provision for armed forces in Chapter VII), or the subject of interminable debate (as for instance over the meaning of Article 2(7), which stated that nothing authorised the United Nations to intervene in matters "which are essentially within the domestic jurisdiction of any state"). At the same time international developments that had not been entirely anticipated led to emphasis upon some goals at the expense of others. Decolonisation, self-determination and the question of apartheid quickly became central concerns. As newly independent states became party to the multilateral Treaty regime which was the Charter, so too did issues of economic disparity and issues of development become prominent.

The United Nations Charter placed great emphasis upon the sovereign equality of all its members (Article 2(1)), and it was this which dictated that within the General Assembly democracy prevailed. Each state had one vote. But it did not prevail in that the power of the vote did not reflect the size of the constituency it represented. The result of this, which was not foreseen in 1945, has been a dramatic change in the balance of power within the General Assembly. Whereas in 1945 71 per cent of members were from the continents of Europe and America, by 1991 54 per cent of members were from Asia and Africa. No less noticeable was the increase in so called Third World countries – countries rather pejoratively and emotively described as underdeveloped, countries whose interests and preoccupations are very different from those of the majority of founder members. Needless to say, a paradox quickly became apparent; as the majority of states not sharing 'First World' priorities grew, so did the power and prestige (at least in the eyes of western governments) of the General Assembly decline. The result has been that General Assembly Resolutions, even those passed with fewer than ten votes in opposition (and sometimes as few as two), have been largely ignored by dissenting states; usually wealthy states for whom the implications of the resolution in question would be costly.

At the same time, in terms of the creation of international law, there has been a dispute as yet unresolved. Observing the Eurocentric nature of classical international law "because of the effective monopoly of political and economic power by the Western European states in the post-Westphalia era in international relations, and also because of the intellectual dominance of Western European jurists and text writers", one author goes on to state that:

> *This undoubted truth, together with the frequent nakedness of the response of classical international law to the self interest of the western European trading commercial powers involved, have been the prime grounds of attack upon its principles and rules in the post Second World War era.*
>
> (McWhinney 1992)

As to General Assembly resolutions his comments are directly pertinent too:

> *The Third World majority in the United Nations, and their supporting jurists, argued that the General Assembly resolutions – adopted, as they invariably were, by overwhelming majorities, with only a few western states holding out in the form of negative votes or abstention – effectively made new law. UN General Assembly resolutions would qualify, thereby, as new sources of international law, side by side with traditional or classical sources. As an abstract, a priori, legal issue, this debate over the new sources remains unsolved. Western and Soviet jurists have conceded, equally, that resolutions of the General Assembly, if adopted unanimously or at least with substantial*

> *intersystemic consensus – Western bloc, Soviet bloc and Third World [written before the demise of the Soviet Union] – may acquire normative legal quality in their own right. This has clearly become the case by now, with most of the General Assembly resolutions on decolonisation, and self-determination of peoples, sovereignty over natural resources, and nuclear and general disarmament, however intransigent the last ditch resistance of predominantly Western members may have been at the actual time of their adoption.*

This needs to be taken with discretion! Although partially true, the disintegration of old Yugoslavia, the failure of both the resolved new international economic order and the resolved 'human right to development' all suggest the continuing ability of the West generally, and the United States in particular, to deny the status of law to unwelcome resolutions. Certain it is that mere numerical superiority in terms of votes has brought little lawmaking power to the majority. Rather, power has moved decisively to the Security Council, where democracy takes second place to the acknowledgement of power – or at least power as it was perceived in 1946. The role of the General Assembly remains as defined in the Charter, to make recommendations to the Members or to the Security Council (Article 11(1)). Article 12 provides that while the Security Council is exercising "in respect of any dispute or situation the functions assigned to it" by the Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council requests it. The power to recommend rather than to decide is that of the General Assembly.

The Security Council, then, is where true power resides. Now comprised of 15 members (originally 11) it is the five permanent members who have quite disproportionate power. The five, chosen in 1946 (United States, China, the then Soviet Union (now replaced by Russia), France and the United Kingdom) do not all seem to justify this primacy, which gives to each the power to veto any Security Council resolution even when at least nine and even 14 of the other members are resolved. Since the disintegration of the Soviet Union the Security Council has become even more sympathetic to the interests of the West. One book states the present position with some accuracy when it observes:

> *With the Soviet Union no longer acting as a counterbalance to the United States, states such as India, Brazil, Nigeria and Egypt believe that they deserve greater say in the Council's decision making. The continued permanent membership of France and Great Britain, whose international influence has declined significantly since 1945, embitters Japan and Germany, whose influence is in no way commensurate with their funding of the organisation's activities. Countries like Canada that contribute troops routinely to all UN operations complain of being left out of decisions that affect their soldiers.*
>
> (Weiss, Forsythe and Cooke 1994)

So called Third World states, then, are confronted with ready access to the comparatively powerless General Assembly, and limited or no access to where power really resides. Even there power lies not with the most powerful or the most populous, but with the major victors in a war completed more than half a century earlier. While changes have been proposed both to broaden the permanent membership of the UN and to reduce the power of veto, such changes would, of course, necessitate a change in the Charter. This itself could be blocked by veto. Thus, change requires the acquiescence of all present permanent members.

For the first 45 years of the United Nations the Security Council was important because of the use of the veto, exercised primarily by the United States and the Soviet Union. Majority consensus in the General Assembly over decolonisation and apartheid led to no direct action, and when Portugal finally conceded independence to its African colonies as the General Assembly had urged, and when South Africa

(following 'Rhodesia') finally escaped apartheid, this was very much in spite of, rather than as a result of, Security Council action. And as discussed elsewhere, the constant support by veto of an Israel which has persistently flouted international law by the United States, together with Soviet vetoes, where it felt that domestic jurisdiction was threatened even if this defence was used to conceal massive human rights abuses, both led to widespread disillusionment with the Security Council. Peace keeping operations, when comparatively uncontroversial as for instance in Cyprus or Namibia, had proved useful, but were dependent upon the continuing consent of the host country.

Suggested questions

1. Do you agree that in the UN Charter the right to act was allocated to the Security Council while the right to talk was given to the General Assembly?
2. How can the allocation of permanent seats in the Security Council be justified except by examining the power status of states in 1948?
3. What is the significance of the allocation of seats in the International Court of Justice?
4. How might such an allocation be justified?
5. Does the distinction between General Assembly and Security Council merely acknowledge the distinction between formal sovereign equality and actual substantive inequality?
6. Do you agree that the present consensus in the Security Council is easily exaggerated?
7. Why was the United Nations able to exercise only limited influence over apartheid South Africa?
8. Are there obvious differences, reflected in Security Council activity, concerning the human right of self-determination of Kuwait when invaded by Iraq and the right of self-determination of Grenada when invaded by the United States?
9. Does the wraith of the Monroe doctrine find expression in United States activities not condemned in the Security Council?
10. Why do China and Russia continue to place such emphasis and reliance upon Article 2(7) of the UN Charter? Did Article 2(7) influence their position in the Security Council when considering humanitarian intervention in Kosovo?
11. What is the role of the Security Council in the protection of human rights? Is it being fulfilled?

Background reading for premises 1-3

The object of this set of readings is to suggest that there are different ways of considering human rights, both in international relations and international law. I have endeavoured to keep the readings as modern as possible. The aim is to provide accessible and seminal readings that question common assumptions. Noam Chomsky will be regarded by most lecturers (but not by me) as the least temperate in his cynicism of western ethical superiority. He excels at discovering and correlating unpalatable facts that particularly question the altruism of the United States. A much less cynical overview of international law (with much reference to human rights protection) but superbly lucid and eloquent, is Moynihan's *On the law of nations*, where he argues that United States foreign policy, not least with regard to intervention and infringements of rights of self-determination, should be within the parameters of international law. The oldest suggested reading, Desmond's *Persecution east and west*, remains on the list because the author made an unpopular but persuasive case arguing that human rights abuses in western democracies differed from, but were no less significant than, abuses in the totalitarian states.

Both Vincent and Miller provide useful analyses of human rights in international relations, and both help in a consideration of what, if anything, makes legal protection of human rights distinctive.

The Alston article is appropriate in emphasising the importance of rights that are not merely civil and political, while Charlesworth and Chinkin critically consider the objectivity of the foundations of international law. The relevance to human rights is crucial.

Either

- Chomsky N (1993) *Year 501: the conquest continues* (London: Verso) (especially chapters 4 and 5)
  or
- Chomsky N (1996) *Powers and prospects* (London: Pluto) (especially chapters 5-8)
  or
- Chomsky N (1994) *World orders, old and new* (London: Pluto)

- Alston P (1997) 'Making economic and social rights count: a strategy for the future' 68 *Political Quarterly* 188
- Charlesworth H and Chinkin C (2000) *The boundaries of international law: a feminist analysis* (Manchester: Manchester University Press)
- Christie K and Roy D (2001) *The politics of human rights in East Asia* (London: Pluto)
- Chomsky N (2000) *Rogue states: the rule of force in world affairs* (London: Pluto)
- Desmond C (1983) *Persecution east and west* (London: Penguin)
- Evans T (2001) *The politics of human rights* (London: Pluto)
- Evans T (1998) (ed) *Human rights fifty years on: a reappraisal* (Manchester: Manchester University Press)
- Miller L H (1990) *Global order: values and power in international order* (Boulder: Westview) (especially chapters 6,7and 9)
- Moynihan D (1990) *On the law of nations* (Cambridge: Harvard University Press)
- Vincent R J (1986) *Human rights and international relations* (Cambridge: Cambridge University Press)

Fourth premise

International financial institutions have, by their operation, made the protection of economic rights almost impossible for many poor states.

This premise is most easily illustrated by considering the real effects of the International Monetary Fund (IMF). These effects have become much more widespread since the end of the USSR and the victory (though in what terms remains questionable) of the demand economy over the command economy.

The international financial institutions of the World Bank and the International Monetary Fund, intended to prevent subsequent international economic recession and to promote development, were created in the immediate post war period outside of the United Nations. If the United Nations was to be the institution promoting friendly relations among nations upon the principle of sovereign equality, the World Bank and the International Monetary Fund were, even if their aims were no less utopian, founded upon what was seen as hard realism. That they were both to be based in Washington, the seat of US government, was not coincidental. That power within the institutions was not democratically apportioned upon the basis of sovereign equality but upon financial contribution was also crucial. Finally, the intended use of both institutions to counter totalitarian tendencies, particularly on the left, and even more particularly of communism, among states was not accidental.

Given these facts it is obvious that poor states, although they may come to, or have to, depend upon these institutions, in fact have little say in how they are run or on the principles upon which they operate. Equally importantly, because many poor states are governed by a political and wealthy elite, the interests of that state may well coincide with those of the greatest international financial institutions even if they are inimical to the interests of the populace as a whole.

In essence, the objective of the International Monetary Fund, as formed in 1944 by

a treaty entering into force in December 1945, was to avert any new economic recession of the kind that had been so devastating in the 1920s and 1930s. To this end, the Articles of Agreement provided that the Fund would:

1. facilitate the expansion and balanced growth of international trade, and would contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy
2. promote exchange stability to maintain orderly exchange agreements among its members, and to avoid competitive exchange depreciations
3. give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity

So innocuous, and indeed benign, do these objectives seem that it is at first surprising to discover the tragedies to which they have led, if not actually caused.

It is from this role of the Fund in correcting maladjustments *under adequate safeguards* that many of the complaints from the poor states stem. Since 1980 these 'adequate safeguards' have taken the form of 'structural adjustment lending', an innocuous phrase that has led to endless controversy and no little misery. There is little consensus on the effectiveness of the prescribed measures. The policies prescribed are imbued with a capitalism that eschews state intervention. Thus many of the past policies, which at least appeared to make life possible for the poorest section of the population – such as subsidised food, fuel, health care and transport – are anathema to the IMF requirements in granting loans to help indebted countries. Structural adjustment has as its goal just one central objective – the elimination of unsustainable indebtedness. The orthodoxy of the IMF is that this can be achieved only in the recognition of the superiority of the market over central economic planning. Evidence for this is, in the view of most cynics of structural adjustment (myself included), very difficult to discover. The so called Pacific tigers which are often held up as evidence in fact at least initially pursued state led development.

The bottom line, however, is that even were these structural adjustment policies shown to achieve their limited goal, many might think that the cost of implementation is simply unacceptably high, with the wrong people (the poorest) being effectively called upon to repay loans and deficits which have brought them no benefit whatsoever. Indeed, throughout Latin America and Sub Saharan Africa and in many states outside those regions, the period of profligate lending for doubtful purposes benefiting overwhelmingly the political elite led to crises where the very people who had seen no benefit were called upon to make the sacrifices to overcome both debt and deficit. The policies required in structural adjustment were no more and no less than a return to economic liberalism – a policy that had frequently been rejected in order to ensure a level of social cohesion and protection of the poorest.

Thus, when the peoples of the poor nations of the world look at the IMF they see an institution whose purpose is to resolve balance of payments difficulties instead concentrating its attention upon poor states and making demands of them which effectively ensure that they enforce economic policies which, while clearly not in the interests of their own poor, are just as clearly very much in the interests of those with power within the IMF. The forced opening of the economy to private investment, national or international, allows unrestricted flows of capital to or from states as the market and profit require.

Horror stories of the effect of structural adjustment are legion (see for example Simon, Van Spergen, Dixon and Narman 1995) and it is truly amazing given the number of states which have undertaken such programmes, whether apparently voluntarily or otherwise, that there is so little unequivocal evidence of their success.

A major problem they have yet to overcome is the structural bias against Third World exports (which is considered in the section on trade and law). Suffice it to say here that exporters of commodities and raw materials have been quite unable to ensure consistency in the prices received for export. While the IMF has for many years insisted upon an emphasis upon exports of often similar and sometimes identical products, prices have tended to fall – to the advantage, of course, of the importers.

One final point with regard to the IMF needs to be made. Until the end of the Cold War neither the IMF nor individual donors or lenders were able to – or even willing to – make political demands of the donee. What was seen as important was the stability of the region, and some dreadful governments undoubtedly received sustenance, not least for military aid. Mobutu's Zaire exemplified this as a receiver of western help, and Mengistu's Ethiopia as a receiver of Soviet help. IMF loans were made to appalling regimes without any improvement in government.

It might be thought, therefore, that the end of the Cold War would enable international financial pressure to lead to more humane government. In fact this has happened but has not been quite as successful as might have been anticipated for reasons that are not hard to find. The new orthodoxy is for structural adjustment on the basis of political (as well as economic) conditionality. But what is to be done when a state has elections that lead to governments with alternative ideas? The evidence of Nicaragua and Haiti (and in a different way Algeria) suggests that the powerful have very different lending criteria for governments of whose position they disapprove.

Suggested readings on financial institutions and human rights

All of the following pieces are intended to exemplify the role of the IMF and the World Bank in the abuse of economic and social rights. This may be partly achieved by a consideration of the question of control of the international financial institutions, and partly by consideration of attempts to assert rights concerned with trade and development. Structural adjustment, with its inevitable impoverishment of the already impoverished (the institutions doubt the inevitability), requires special attention. In its incontestable demands, structural adjustment can leave populations without democratic control of economic policies. For the IMF in particular there really is no other economic way, and should a government be elected which disagrees, the international financial consequences will be dire.

- Brown MB (1995) *Africa's choices: after thirty years of the World Bank* (London: Penguin) (especially 50-118)
- Griffith-Jones S (1992) 'The International Monetary Fund' in Hawkesworth and Kogan (eds) *Encyclopaedia of government and politics* (London: Routledge)
- Hancock G (1989) *Lords of poverty* (London: Macmillan)
- Killick T (1995) *IMF programmes in developing countries* (London: Routledge)
- Mansell W (1991) 'Legal aspects of international debt' 18 *Journal of Law and Society* 381
- Mansell W and Scott J (1994) 'Why bother about a right to development?' 21 *Journal of Law and Society* 171
- Okafor OC (1995) 'The status and affect of the right to development in contemporary international law: towards a south-north "entente"' 7 *African Journal of International and Comparative Law* 865
- Potter G (2000) *Deeper than debt: economic globalisation and the poor* (London: Latin America Bureau)
- Ryrie W (1995) *First World, Third World* (London: Macmillan)
- Skogly S (2001) *The human rights obligations of the World Bank and the International Monetary Fund* (London: Cavendish)
- Tomasevski K (1993) *Development aid and human rights revisited*
- De Vries B (1992) 'The World Bank' in Hawkesworth and Kogan (eds) *Encyclopaedia of government and politics* (London: Routledge)

Suggested questions

1. Why are international financial institutions of relevance in the international protection of human rights?
2. Is the right of economic self-determination compatible with the power of international financial institutions?
3. Is there any alternative to membership of such institutions?
4. What are structural adjustment policies?
5. Do structural adjustment policies elevate economic policy above democracy (in the sense that they remove alternative economic policies from political possibility)?
6. Do the international financial institutions necessarily insist upon growing disparities between rich and poor in the states they 'aid'?
7. What is human rights conditionality and should it be seen as compatible with sovereignty?
8. Discuss the experience of Cuba with international financial institutions in the light of the so called human right to development.
9. Why is it difficult to envisage a significantly different international financial regime?
10. Could international financial regimes ever be subject to democratic control?

The economic interests of wealthy states have led indirectly but regularly to human rights abuse whether, for instance, through the export of arms, the export of tobacco, the export of pesticides or the export of subsidised food.

Fifth premise

International trade policies have traditionally favoured 'developed' economies over 'underdeveloped'. Primary commodity export is much more vulnerable to fluctuating market prices than manufactured or processed exports. Fluctuating, and often declining, prices made the process of economic planning hazardous in the extreme, necessitating subsequent IMF intervention. Although the World Trade Organisation continually suggests that it is developing trade rules that will benefit the poor there is little evidence that progress is being made. Even in 2001 while the WTO was meeting in Doha Indian farmers were protesting vehemently because of their inability to compete with the subsidised farmers of the rich world. Few concessions have been offered with regard either to food or textile exports.

Suggested readings on trade

Trade policies are seldom perceived to affect the protection of human rights. This is regrettable. There is an obvious relationship between trade and income, and the terms of world trade will dictate economic policies and investment decisions. Poor countries have enjoyed little autonomy in determining either. In the words of the back cover of *The trade trap* (Coote 1996), we must consider:

> *How countries that depend on the export of primary commodities, like coffee or cotton, are caught in a trade trap; the more they produce, the lower the price falls on the international market. If they try to add value to their commodities by processing them they run into tariff barriers imposed by the rich industrial nations. To make matters worse they have to compete with subsidised exports dumped on the world market by rich surplus producing countries.*

Thus the argument to be made is that the old demands expressed in the new international economic order remain relevant if the poor states are ever to be in a position to grant economic security to their populations.

Some of the material evidencing this argument is complex and occasionally opaque. I have endeavoured to select material which, while it simplifies, does not trivialise.

- Brown M B (1993) *Fair trade: reform and realities in the international trading system* (London: Zed)
- Coote B (1996) *The trade trap: poverty and the global commodity markets* (Oxford: Oxfam)
- Cremona M (1996) 'Human rights and democracy clauses in the EC's trade agreements' in Emilou and O'Keeffe (eds) *The European Union and world trade law* (London: Wiley)
- Madeley J (2000) *Hungry for trade: how the poor pay for free trade* (London: Zed)
- Scott J (1996) 'Tragic triumph: agricultural trade, the Common Agricultural Policy and the Uruguay Round' in Emilou and O'Keeffe (eds) *The European Union and world trade law* (London: Wiley)
- Trebilcock and Howse (1999) *The regulation of international trade* (2nd ed) (London: Routledge)

Suggested questions

1. Why is primary commodity production so vulnerable to fluctuating market prices?
2. Why have primary producing countries been unable to fix prices?
3. What response does one give to the leader of a primary producing nation who once asked "What have we ever got out of GATT that we would not have got if we had got out of GATT?"?
4. Has the World Trade Organisation improved the plight of primary producers?
5. What has been the effect of the Common Agricultural Policy on agricultural production in poor states?
6. How has western agricultural science benefited poor agricultural economies?
7. Why is the export of tobacco and alcohol encouraged and the import of coca, opium and marijuana proscribed?
8. Is the arms trade of significance in human rights protection?
9. Do genetically modified crops threaten traditional production methods?
10. Why do gene patents threaten the right to development?

Sixth premise

The aftermath of colonialism continues to bedevil colonial peoples in their attempts to promote and secure self-determination.

This is both because of the principle of *uti possidetis* and because of international definitions of economic self-determination. The result of the former is that in many poor states ethnic conflict divides and harms, and the result of the latter is that if economic self-determination means no more than sovereignty over resources within state boundaries subject to 'adequate' compensation, then neo-colonialism may truly be said to have replaced colonialism. While the proposed Multilateral Agreement on Investment seems to have disappeared it may merely have transmogrified. If it ever enters into force in any form, the impotence of national government to control resources within states will be absolute.

Suggested readings on self-determination and *uti possidetis*

In the proposition of international law that when colonies became independent, state boundaries should, in the absence of agreement otherwise, simply confirm the colonial borders lies much of the difficulty of the human right of self-determination. Particularly but not exclusively in Africa, these colonial borders, often drafted without knowledge of inhabitants or even natural physical features, have led to the creation of nation states in which civil strife was almost inevitable.

Whether it is feasible or desirable to attempt reconsideration is less important than the realisation that the fact of *uti possidetis* complicates greatly the protection of human rights in many states. It complicates democracy by making political voting patterns often follow divisive tribal lines. When there is but one economic policy that the international financial community will permit this probability is aggravated. Ex-President Nyrere of Tanzania always recognised this in his reasoned attempts at explaining the need for one party states in Africa. Few other leaders were as honest.

Basil Davidson, any of whose books on Africa would grace such a reading list as this, is particularly important in a consideration of the significance of colonialism in the responsibility for the parlous plight of so many African states. Not only does he emphasise the problems posed by *uti possidetis* but he also considers the effect of colonial governing methods upon African decision making.

Cassese is most useful in his overview of the concept of self-determination. His discussion of with whom the right should or does lie highlights the difficulties in a crucial human rights area. With contemporary problems ranging from Bosnia to Chechnya to Kosovo to Macedonia to Quebec to Ulster the questions remain immanent.

- Cassese A (1995) *Self-determination of peoples: a legal reappraisal* (Cambridge: Cambridge University Press)
- Davidson B (1992) *The black man's burden: Africa and the curse of the nation state* (London: James Curry)
- McCorquodale R (1994) 'Self-determination: a human rights approach' (1994) 43 *International and Comparative Law Quarterly* 857
- Matua M (1995) 'Why redraw the map of Africa: a moral and legal inquiry' 16 *Michigan Journal of International Law* 1113
- Storey A (1998) 'Property in international law: need Cuba compensate US titleholders for nationalising their property?' 6 *Journal of Political Philosophy* 306

Suggested questions

1. Consider Dr Mahathir of Malaysia's view that the international financial world replicates conditions of colonialism.
2. Do the boundaries of ex-colonies receive a sanctity they do not deserve?
3. How were African colonial boundaries originally devised?
4. Should sovereignty in Africa be reconsidered?
5. Do the sacrosanct boundaries make genuine expressions of self-determination meaningless?
6. What problems bedevil the right of self-determination for a) West Irian b) East Timor (notwithstanding its achieved independence) c) the Falkland Islands/Malvinas and d) the Ogoni people?
7. Is there a right to reasonable compensation for nationalised property?
8. May a state still nationalise foreign owned property?
9. How would international investment protection affect sovereignty and the right of economic self-determination?
10. Is there any content left in the so called right to economic self-determination?

Seventh premise

Finally , regardless of proclaimed international standards on human rights, there are some states that may regularly, persistently and blatantly ignore world opinion if their strategic or emotional importance is exceptional.

While the two most obvious examples are Israel or Saudi Arabia, many other states have been defended or protected in the most doubtful of circumstances, whether Ethiopia under Mengistu, Kenya under Moi, Zaire under Mobutu, North Korea or Kampuchia (Cambodia). Here the example of Israel is used, but questions on other states are also suggested for class discussion.

Client state favouritism (immunity from human rights critique): the case of Israel

Since the Second World War many states have been able to flout human rights principles with impunity. When the flouting state is a powerful one, the international community has proved itself largely impotent. Whether the USSR, the USA or China, each has been able to ignore world opinion if the question of national self interest was thought relevant. Lesser states have sometimes achieved the same immunity through unprincipled support from powerful states. In the past such client state governments have wrought untold misery on their populations because their strategic importance was much greater (as perceived) than any interest of democracy or human equity.

No state better exemplifies the continuing ability of some client states to ignore considerations of human rights than Israel (not even Saudi Arabia!). Because of its links to the USA, Israel has been permitted to thwart the authority of the United Nations, certainly since 1967 but arguably since 1948. At the same time the United States has paid an enormous price for this support, alienating all Arab opinion and much of the 'non-aligned' world. While it is probably incorrect to suggest any direct link between Israeli policies tacitly supported by the United States and the suicide hijackings of 11 September 2001, that support did at least make the obtaining of help from Arab states for retaliation very difficult.

In a consideration of the part played by human rights discourse in international relations, the USA/Israel case is crucial. It remains a matter of wonder that the deplorable fate of the Palestinian people has remained so invisible to those in large part responsible for it. That it has is instructive for the politics of human rights.

Suggested readings

- Aburish S K (1997) *The brutal friendship: the West and the Arab elite* (London: Gollancz)
- Beit-Hallahmi B (1992) *Original sins: reflections on the history of zionism and Israel* (London: Pluto)
- Chomsky N (1999) *The fateful triangle: the United States, Israel and the Palestinians* (updated edition) (London: Pluto)
- Ciment J (1997) *Palestine/Israel: the long conflict* (New York: Facts On File)
- Curtis (1991) 'International law and the occupied territories' *Harvard International Law Journal* 191
- Falk R and Weston B (1992) 'The Israeli occupied territories, international law and the boundaries of scholarly discourse: a reply to Michael Curtis' *Harvard International Law Journal* 191
- Falk R and Weston B (1991) 'The relevance of international law to Palestinian rights in the West Bank and Gaza: in defence of the intifada' *Harvard International Law Journal* 129
- Franck T M (1995) *Fairness and international law and institutions* (Oxford: Clarendon)

- Fraser T G (1995) *The Arab-Israeli conflict* (London: Macmillan)
- McDowall D (1990) *Palestine and Israel: the uprising and beyond* (London: IB Taurus)
- Quigley J (1990) *Palestine and Israel: a challenge to justice* (Durham: Duke University)
- Reisman W (1997) 'The lessons of Qana' 22 *Yale Journal of International Law* 381
- Said E (1995) *Peace and its discontents* (London: Vintage)
- Shlaim A (2000) *The iron wall: Israel and the Arab world* (London: Allen Lane)
- Watson J (2000) *The Oslo Accords: international law and the Israeli-Palestinian peace agreements* (Oxford: OUP)

Suggested questions

1. Is there a correlation between a state that is able to ignore human rights protection without significant international opprobrium, and that state's economic or strategic importance?
2. In what ways has Saudi Arabia avoided international condemnation for its human rights record?
3. How and why has the United States protected Israel from condemnation for gross abuses of human rights?
4. Has the end of the Cold War brought a change in the abilities of the international community to condemn and sanction human rights abuses?
5. Why did genocide proceed unimpeded in Rwanda?
6. Is the Human Rights Committee selective in its criticisms?
7. What political and legal problems might have prevented intervention in Kosovo to protect human rights?
8. Why was intervention possible in Haiti to protect human rights? Was it desirable?
9. Why have the provisions in the European Convention on Human Rights providing for inter-state petition been used so sparingly?
10. Have the Turkish Kurds been helped by the European Convention on Human Rights?

It is these premises, then, upon which the suggested syllabus for a human rights course is based. Not every lecturer will think it desirable or appropriate to consider each and all of the topics suggested, but even if only some are chosen students will be forced to confront the ideological difficulties inherent in the concept of human rights. If my own 'hidden agenda' (calling for a radical rethink of economic orthodoxy and pleading for a reconsideration of the unfashionability of distributive justice) is all too apparent, it is because I feel strongly that 'First World' students must realise that economic superiority is neither natural, nor should come without obligation.

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- Sachs W (1992) *The development dictionary* (London: Pluto)
- Simon D, van Spergen W, Dixon C and Narman A (eds) (1995) *Structurally adjusted Africa* (London: Pluto)
- Weiss T, Forsythe D and Coate R (1994) *The United Nations and changing world politics* (Boulder: Westview)