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EDITORIAL

The Fusion of International and Domestic Law in a Globalised World

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Keywords: death penalty; capital cases; discrimination litigation; standard of proof; fair trial and equality protection; postconflict justice and transition; Islamic law; *Shari'a*; international humanitarian law; international human rights law; extremism, political violence, Islamism; freedom of expression; terrorism, extremism, counter-terrorism, counter-extremism; Article 19 International Covenant on Civil and Political Rights; Abuse of rights; Directive 2004/38; Court of Justice of the European Union; *Marshall Islands Cases*; ICJ; Electronic waste; sustainable development; WTO, GATT, TBT Agreement

I. Introduction

It is my great pleasure to introduce the 85th issue of the Utrecht Journal of International and European Law (UJIEL) filled with thought-provoking, original and timely contributions. One of the themes that links the articles from many different legal fields, and which is something the readers might find particularly interesting, is the issue of the developed/developing states' divide. This General Issue highlights the universal nature of some of the struggles (for instance terrorism or environmental problems) and helps us realise that to be effective the legal solutions must be similarly universal and not solely Western law-focused. The authors in turn develop innovative legal solutions on how to tackle such problems as discrimination, extremism and many others.

The first two articles show us how domestic law can be improved with the aid of international law and *vice versa*. Gregor Maučec shows that the domestic standard of proof with regards to discrimination in death penalty cases could be improved with the aid of EU guidelines and decisions of the international treaty bodies. The authors of the second article show how Islamic legal norms could aid the legal systems in contemporary conflict settings. Articles three and four discuss the very important issue of restriction of rights. The fifth article proposes how developing countries could legally resolve the issue of the import of electronic waste by developed countries, by using international law.

II. Articles

Gregor Maučec outlines the main problems and concerns with proving discrimination in capital cases. In his article entitled 'Proving Unlawful Discrimination in Capital Cases: In Quest of an Adequate Standard of Proof' the author shows that some death penalty jurisdictions pursue inappropriate standards of proof when it comes to proving discrimination in capital cases. Deciding capital cases where the defendant's life is at stake should meet much higher non-discrimination standards than the current *status quo*. Since capital punishment is irrevocable, it requires a greater degree of scrutiny than other punishments.[1] Gregor Maučec looks into both national case law and international instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the European Convention on Human Rights (ECHR), in search of 'the minimum core content' of the evidentiary standard for proving discrimination in death penalty cases.[2] Gregor Maučec suggests that the legal standard for proving discrimination should draw its

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[1] Gregor Maučec, 'Proving Unlawful Discrimination in Capital Cases: In Quest of an Adequate Standard of Proof' (2017) 33(85) Utrecht Journal of International and European Law, 5–37.

[2] ibid.

guidelines from the EU anti-discrimination directives and that death penalty jurisdictions need to take into account the jurisprudence of the international courts and the recommendations of the human rights treaty bodies.

In their article entitled 'Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition' Corri Zoli, M Cherif Bassiouni and Hamid Khan explore the issue of why Islamic legal norms are not used as a resource for guidance in contemporary conflicts. The authors identify several areas in which Islamic law may offer helpful principles. Respect for human life, dignity and personal integrity are, for example, fundamental components of Islamic law.[3] Similarly, in international humanitarian law non-combatant immunity, protection of civilians, and prohibition against torture form core components of Islamic law.[4] Some *shari'a* crimes are prohibited as 'war crimes' under the Rome Statute of the International Criminal Court.[5] The authors then go on to outline shortcomings of the institutional structures at the state and international levels, which prevent the implementation of Islamic legal norms in post-conflict settings. *Shari'a* could provide an intellectual basis to counter 'politicised, extremist, and instrumentalist uses of Islamic law' to justify the use of violence.[6]

In the very contemporary article entitled 'Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR' Amy Shepherd discusses the compliance of laws restricting the freedom of expression with Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR). 'Extremism has been at the forefront of global and domestic political agendas since 9/11'.[7] Amy Shepherd explains why enacting increasing numbers of domestic laws impacting on fundamental rights has serious implications for the Rule of Law.[8] The lack of consensus on the definition of 'extremism' is another argument against limiting the freedom of expression on 'extremism' grounds. The author presents arguments against restricting the freedom of expression on the grounds of necessity or in order to respect the rights of others. Whilst Amy Shepherd does not argue that extremism legislation can never satisfy the high standards of international human rights law, she does provide a list of requirements, which need to be satisfied for domestic extremism legislation to be lawful.[9] Extremist ideologies may cause harm to society but this does not mean that those professing such views do not have a legal right to express themselves.[10]

In his article entitled 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive' Tamás Szabados explores the issue of the restriction on free movement and residence on the grounds of abuse of rights. The author looks into both the jurisdiction of the Luxembourg Court as well as domestic cases in search of interpretations of Article 35 of Directive 2004/38/EC. The CJEU has only had to address Article 35 in a few cases, and often only marginally.[11] There are, however, numerous abuse of rights cases decided by national courts independently, without requests for a preliminary ruling from the CJEU. Tamás Szabados suggests that national judicial practice has overtaken the CJEU and has on many occasions applied Article 35 in an innovative way. The author argues that national judicial practice enriches the development of EU law.[12] Tamás Szabados envisages that the domestic courts' rulings might have a broader impact on the case law of other Member States or even on the jurisprudence of the CJEU.

In his article entitled 'Trade Measures for Regulating Transboundary Movement of Electronic Waste' Gideon Emcee Christian deals with the issue of the export of used electrical and electronics equipment from the EU to developing countries resulting in adverse impact on human health and the environment. The author highlights the need for a regulatory regime in developing countries to complement the prohibitive regime in the major e-waste source countries.[13] Gideon Emcee Christian proposes trade measures modelled

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[3] Corri Zoli, M Cherif Bassiouni and Hamid Khan, 'Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition' (2017) 33(85) Utrecht Journal of International and European Law, 38–61.

[4] ibid.

[5] ibid.

[6] ibid.

[7] Amy Shepherd, 'Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR' (2017) 33(85) Utrecht Journal of International and European Law, 62–83.

[8] ibid.

[9] ibid.

[10] ibid.

[11] Tamás Szabados, 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive' (2017) 33(85) Utrecht Journal of International and European Law, 84–102.

[12] ibid.

[13] Gideon Emcee Christian, 'Trade Measures for Regulating Transboundary Movement of Electronic Waste' (2017) 33(85) Utrecht Journal of International and European Law, 103–127.

on WTO rules, which could be adopted by developing countries in order to address these problems. The author then examines these proposed measures in light of WTO rules and jurisprudence.

III. Case note

In their case note entitled 'The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?' Meenakshi Ramkumar and Aishwarya Singh explore the *Marshall Islands Cases* before the International Court of Justice. The authors argue that the ICJ has failed to foster nuclear disarmament within the international community.[14] Meenakshi Ramkumar and Aishwarya Singh examine the awareness test developed by the ICJ and its politico-legal effects in the development of international law.[15] The authors argue that the test 'has rendered the enforcement of nuclear disarmament obligations arduous'.[16] The authors concede that international law still remains a tool of resistance in the hands of weaker states, as evidenced by Marshall Islands' decision to use litigation as a strategy to bring light to the issue of nuclear disarmament.[17]

Competing Interests

The author is the Editor-in-Chief of the Utrecht Journal of International and European Law.

[14] Meenakshi Ramkumar and Aishwarya Singh, 'The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?' (2017) 33(85) Utrecht Journal of International and European Law, 128–134.

[15] ibid.

[16] ibid.

[17] ibid.

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