

# Introduction

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This issue of *Erasmus Law Review* (ELR) is historic as it forms the first issue completely ‘on submissions’, and thus with a rich variety of topics across legal sub-disciplines (religious freedom, access to justice, voting patterns in an international court, the role of retribution in sentencing and same-sex marriage), some focused on a particular country (Canada, Malawi), others more concerned with jurisprudence of international courts (the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Human Rights Committee). The open call for submissions has attracted submissions from several external scholars, not only from within the Netherlands (Leiden: Xuechan Ma and Shuai Guo) but also from a range of other countries, more particularly South Africa (Gumboh), Switzerland (Bretschert) and Canada (Piché). In addition, ELR’s issue on submissions offers a publication avenue for promising PhD students from within Erasmus School of Law (Shahid).

*Catherine Piche* notes that Canada’s complex system of courts seeks to serve Canadians in line with the traditional objectives of civil justice, principally accessibility, efficiency, fairness, efficacy, proportionality and equality. While the Canadian court system is generally considered to work well, a staggering access to justice problem has been noted by researchers due to the increasing disillusionment of people about the ability of the system to effect a fair and timely resolution to a civil justice problem. Piche critically discusses the range of reforms of procedural law and civil justice that have been made throughout Canada, with a specific focus on the provincial systems of Ontario and Quebec. In this discussion she highlights the tension between the objectives of judicial efficiency on the one hand and prioritised private modes of dispute resolution and informal justice on the other. In the end, she identifies an altogether different medium to improve access to justice, namely an increased, streamlined and systematic use of technology. *Fabienne Bretschert* identifies ‘different degrees of protection’ for religious minorities in two respects. Firstly, an empirical legal analysis of the decisions of two international courts in complaints about restrictions to the manifestation of religious beliefs of new religious minorities reveals divergent interpretations and applications. Bretschert’s paper finds that the conflicting decisions of

the ECtHR and the Human Rights Committee are part of a broader divergence: while the former leaves it largely to the states how to deal with religious diversity brought by new minorities, the latter functions as a protector of new religious minorities against states’ undue interferences. Secondly, and zooming in on the case law of the ECtHR, a quantitative analysis of the relevant case law shows that the Court is much less likely to find a violation of the right to freedom of religion in cases brought by new religious minorities as opposed to old religious minorities. Nevertheless, Bretschert notes shifts in the jurisprudence of the ECtHR that point towards a more generous protection of religious manifestations also in the public sphere.

*Xuechan Ma* and *Shuai Guo* discuss the empirical study that they conducted in relation to the voting patterns of judges of the ICJ in cases adjudicated over the period 2005–2016. The Statute of the ICJ stipulates that judges shall exercise their powers impartially. However, Xuechan Ma and Shuai Guo question the feasibility and practicability of this impartiality, and examine whether the judges are biased. They build in this respect on an earlier study conducted by Posner and de Figueiredo for cases adjudicated by the ICJ between 1946 and 2004. The authors have conducted a regression analysis in relation to four variables, more particularly nationality, language, democracy and wealth. Like Posner and de Figueiredo, they found strong evidence that judges favour their home state (nationality) and also states that speak the same majority language as their home state (language). Unlike the earlier study, Xuechan Ma and Shuai Guo conclude that the influence exerted by democracy and wealth alignments is no longer significant. They link the latter difference to major changes in the world since the new millennium, seemingly confirming Samuel Huntington’s prediction that the great divisions among humankind and the dominating source of conflict will no longer be primarily ideological or economic but rather cultural.

*Esther Gumboh* critically appraises the role of retribution in Malawian sentencing jurisprudence. She notes that the theory of retribution is a central tenet in this jurisprudence and that Courts give expression to retribution in various ways. Retribution has permeated courts’ consideration of certain sentencing factors, such as the seriousness of the offence, family obligations and public opinion. The most conspicuous way in which retribution enters sentencing though is through the recognition of the principle of proportionality as the most important principle in sentencing. This proportionality principle is furthermore in line with the ultimate objective to arrive

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at a sentence that is just and fair in relation to the crime and the offender.

*Masuma Shahid* focuses on the case law of the ECtHR in relation to the right to same-sex marriage and conducts a consensus-based analysis in this respect. Her article fits in the burgeoning literature on European consensus and the role this consensus plays in the Court's quest to maintain its legitimacy towards the Contracting States (inter alia Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) and Panos Kapotas and Vassilis Tsevelekos (eds), *Building Consensus on European Consensus*, to be published by Cambridge University Press in 2018). Shahid aims to trace the developments over time in the Court's jurisprudence on same-sex marriage, while exploring the parallel with the global trend of legalisation of same-sex marriage. Confirming the link between the ECtHR's consensus-based reasoning and the Court's quest to maintain its legitimacy, Shahid identifies possible alternative approaches to reach the latter goal.

We hope that you will enjoy reading this collection of articles, covering a rich variety of topics, straddling various fields of law and adopting a range of different methods.