



Chapter 3

Institutional Frameworks

Institutional Frameworks

Chapter 3

- 42 **Introduction – Max Harris**
- 43 **Addressing the Critical Funding Gap at the UN Human Rights Office**
- 44 **Why Should Anyone Care About The UN? The UN Forum 2014**
- 45 **The South African Public Protector’s Remedial Powers: A Need for Clarity**
- 46 **Human Rights in the UK Media: Representation and Reality**
- 47 **The Handbook of Human Rights in Northern Ireland: Where Are We Now?**
- 48 **Building Institutions for the Long-Term: the Need for Normative Transparency**
- 49 **The Missing Human Rights Impact Assessment of European Union Free Trade Agreements**
- 50 **Third Conference of States Parties to the American Convention on Human Rights: Another Brick on the Wall (or is it another brick off?)**
- 51 **The Challenges for Judicial Appointments in India**
- 52 **The Mexican Human Rights Constitutional Amendment and Impunity: Victims in a Labyrinth**

Institutional Frameworks

Chapter 3

Introduction

By Max Harris

Lawyers can be inattentive to the social and political context of law. In law, it is so often text that matters – the words of judgments, the phrasing in legislation – and a focus on such text can lead to neglect of the background to that text, or ignorance of the consequences of adopting a particular textual formulation. The posts collected in this chapter aim to redress that tendency in the law to marginalize context. The posts address the subject of “institutional frameworks”: that is, the structures governing organizations or positions that have a degree of permanence on the legal landscape. Analysis in these posts of institutional frameworks helps to remind us of the importance of policy design and politics for human rights protection. And it reveals the value of constantly reviewing institutions, to ensure that they advance the cause of human rights.

The posts in this chapter fall into two groupings. The first set draws attention to human rights institutions that serve noble purposes, but require greater support of some form. Vincent Ploton’s forceful article (‘Addressing the Critical Funding Gap at the UN Human Rights Office’ p 43) discusses the United Nations Office of the High Commissioner for Human Rights (OHCHR). He talks about the important efforts being made to publicise the OCHCR’s impact, but notes that weak outreach capacity and over-reliance on lawyers within the OCHCR may be hindering these efforts. Ploton also urges the OHCHR to push for reform of the major UN treaty bodies. Shanelle van der Berg’s similarly cogent piece (‘The South African Public Protector’s Remedial Powers: A Need for Clarity’ p 45) examines the South African Public Protector, an institution set up by the South African Constitution akin to what is known as an ‘ombudsman’ in many jurisdictions. Van der Berg describes the Public Protector as “critically important” in tackling “maladministration and corruption”, but raises concern about a recent judgment, *Democratic Alliance v South African Broadcasting Corporation*. Both the judgment and the government’s response to it threaten to weaken the Public Protector’s constitutional function, according to van der Berg. Natasha Holcroft-Emmess’s summary of the 2014 United Nations Forum (‘Why Should Anyone Care About The UN? The UN Forum 2014’ p 44) raises similar issues to those discussed by Ploton, although Holcroft-Emmess writes about the UN as a whole, as opposed to the OHCHR. She observes that there are good reasons to care about global issues – including the fact that there are transnational problems that require transnational solutions – but that the UN Forum indicated a lack of interest from the British public in foreign affairs or aid. Holcroft-Emmess also provides perceptive commentary on what was said at the Forum about the universality of the UN, nuclear disarmament, the responsibility to protect doctrine, and development. Michelle Farrell’s post (‘Human Rights in the UK Media: Representation and Reality’ p 46) reports from another significant conference, a one-day seminar on human rights in the UK media at the University of Liverpool. Farrell highlights the important role that the media plays as an institution in framing human rights issues. However, the conference suggested that the media in the UK can be inaccurate and misleading on human rights issues, according to Farrell. The entire seminar, said Farrell, showed the need for better public debate about human rights. Finally, within this grouping, Brice Dickson’s post (‘The Handbook of Human Rights in Northern Ireland: Where Are We Now?’ p 47) refers in a complimentary way to the Northern Irish NGO, the Committee on the Administration of Justice, and its new 2015 handbook on human rights. Dickson points out that while the handbook might need to be expanded in future, it provides a valuable resource which underscores success stories (such as the police’s compliance with human rights) as well as ongoing challenges (including social and economic rights, and discrimination). Overall, the common theme in these articles is that certain human rights institutions have been established with important goals – but that we need to be vigilant to ensure that these institutions get the publicity and resourcing they deserve.

The second set of posts makes the case more radically for the reform of specific human rights-related institutions. Peter Lawrence describes a conference at the Oxford Martin School (‘Building Institutions for the Long-Term: the Need for Normative Transparency’ p 48) that suggested different ways in which institutions can be more oriented towards the long-term. The conference indicated that there might be value in creating positions with a mandate to consider the interests of future generations. Lawrence argues that such positions need to have some teeth if they are to be influential, but cannot be so powerful that they are never introduced. Giovanni Gruni (‘The Missing Human Rights Impact Assessment of European Union Free Trade Agreements’ p 49) calls for significant change in how human rights are considered in the context of free trade agreements. Human rights are regularly implicated in trade issues, says Gruni, and human rights impact assessments (described by the United Nations Human Rights Council in a recent report) could monitor the extent of violations. Ignacio de Casas (‘Third Conference of States Parties to the American Convention on Human Rights: Another Brick on the Wall (or is it another brick off?)’ p 50) records efforts by Ecuador to reform the Inter-American System for the Protection of Human Rights at a meeting of the States Parties in January 2014. De Casas says that while Ecuador faced some resistance, the meeting was not a “complete loss” for Ecuador and showcased the country’s “remarkable perseverance”. Arghya Sengupta (p 51) discusses new legislation on judicial appointments in India, a constitutional challenge to one aspect of judicial appointments, and recent cases on appointment. Sengupta says that the Court has a responsibility to “clarify the contours of judicial independence and accountability”, and argues that an upcoming case could well be a landmark reform in this area. Ernesto Castillo-Sanchez (‘The Mexican Human Rights Constitutional Amendment and Impunity: Victims in a Labyrinth’ p 52) also looks at a constitutional amendment, this time in Mexico. He outlines the way that this amendment attempts to end forced disappearances in Mexico, and relays the poignant story of a mother, Maria, who lost her son, Christian, in 2010. In all of these posts, there is a message that human rights institutions are in a state of flux – and that these institutions must be capable of being reformed if they are to serve the needs of victims in the twenty-first century.

The posts in this chapter move from the local to the global, across courts and NGOs and educational institutions, and, ultimately, communicate the importance of institutional context for the understanding of human rights law as a whole.

Institutional Frameworks

Chapter 3

Max Harris is an Examination Fellow at All Souls College, Oxford. He is an Associate Director of the Oxford Human Rights Hub, a researcher for Free Speech Debate, and a member of the New Economy Organisers Network.

Addressing the Critical Funding Gap at the UN Human Rights Office

By Vincent Ploton | 6th December 2014

High Commissioner Zeid Al Hussein is right to point to the shockingly low proportion of the UN budget which is allocated to his office. But he also needs to implement some major reforms to embrace a larger funding base.



The funding situation of the UN human rights office is at an all time low. The High Commissioner is right to bang on the UN table on lack of resources. But there are also serious risks in overemphasizing the resource problem without proposing solutions. And these are plentiful. Two of those that seem most critical to me are addressed below. This is by no means a comprehensive list, but these 2 factors certainly make up for a good rationale of the current critical funding situation at the Office of the High Commissioner for Human Rights (OHCHR).

- **Improve the global perception of the office**

Extraordinary problems call for radical solutions. After 20 years of existence, what is the global perception index of the UN human rights office? The OHCHR is still too often at best mistaken for the High Commissioner for Refugees. Over recent years, the office has had limited exposure in the world media. The OHCHR's weak outreach capacity is incommensurate with its tangible ability to deliver on the ground. Clearly, the overwhelming representation of lawyers and legal practitioners within the office and associated bodies is hindering its capacity to reach out to people with simple and powerful messages. Of course, this is not just an OHCHR-specific problem. A 2013 survey revealed that only 22% of the young believe the UN is effective. Yet their opinion would probably be very different if they could only see what the UN does for them. People need to feel and see the difference that the UN, and particularly the OHCHR, is making for them.

The current acting Director of the UN in Geneva, Michael Moller, seems to have gotten that point. By putting forward slogans such as "#GenevaMeans" or "Geneva Impact" and by insisting on the global impact of the UN, he is contributing to prove his affirmation that "Everything that is done in Geneva has a direct impact on every person on this planet, in any 24 hour period". Slogans of that sort are certainly exaggerated, but they serve the purpose to demonstrate the relevance of the UN to the lives of ordinary people, not some privileged elite in New York or Geneva.

Institutional Frameworks

Chapter 3

- **The need to reform treaty bodies**

It was previously argued that the recent reform of treaty bodies lacked ambition. These UN human rights bodies have been chronically under-resourced, or at least so they are claiming. The previous Chair of the “Group of Chairs” of treaty bodies, Claudio Grossman, has repeatedly emphasized the lack of adequate financial resources allocated to his own institution, the Committee against Torture, as well as other treaty bodies. And I am convinced that the more treaty bodies will continue to complain about the lack of resources without proposing meaningful reforms, the more they will be facing a wall.

The chronic under-resourcing of treaty bodies calls for a major reshuffle of the system. Here again, the starting point is quite simple: what is the proportion of rights holders or even victims aware of the treaty bodies around the world? Clearly not enough. But more serious than that is our incapacity to come up with clear evidence, data and figures on the level of implementation of the recommendations formulated by these bodies.

I am certainly not suggesting to get rid of the ten main international human rights treaties and the many excellent recommendations that stem out of the treaty body system to improve the protection of human rights. But the multiplication of TBs, the emergence of new powerful mechanisms such as the Universal Periodic Review, and the increasing number of States parties to these treaties globally, calls for a radical shift.

In just three months in office, Zeid Al Hussein has demonstrated his capacity to speak his mind, and a determination to put up a good fight for the cause. These early signs of charisma will be multiplied by an ability to propose meaningful solutions to the underlying issues behind the Office’s current major funding problems.

Vincent Ploton has been working in different humanitarian and human rights organisations for the past ten years. He is currently the Head of External Relations at the Centre for Civil and Political Rights.

Why Should Anyone Care About The UN? The UN Forum 2014

By Natasha Holcroft-Emmess | 15th July 2014

The UN Forum 2014, orchestrated by the United Nations Association-UK on 28 June 2014, was the largest public event on the United Nations in recent decades. UN representatives explained to the public how the international organisation attempts to grapple with the most formidable challenges of our time.



The first debate asked: why should anyone care about the UN? Empirical data provided by YouGov has recently indicated that the UK public is not engaged with foreign affairs: many considered foreign aid ineffective or a luxury that we simply cannot afford. A lack of efficient communication about the benefits of the UN’s work added to this general indifference.

But why should we care? Here’s one reason: global problems affect everyone locally to some extent. Floods on the other side of the world mean crops fail, and the price of everything goes up. People flee oppression in their own state and immigration rises elsewhere. People are too busy lamenting the symptoms and forget to look at the cause. These are transnational issues, requiring a transnational response.

Institutional Frameworks

Chapter 3

Another trend revealed that the general public believes UK spending on foreign aid is too great, especially during a period of austerity. Many thought we spend too much, but few knew the statistics. The UK recently hit the Millennium Development Goal of spending 0.7% of the Gross National Income on foreign aid. But this achievement was kept quiet, lest it fuel the anger of introspective backbench politicians. We need to stop thinking about international aid as a luxury or a moral choice, but as a legal duty on wealthy countries and a good investment in the world's future.

The puzzle of human rights universality was also briefly addressed. Some consider the UN's global goals to be unattainable in the face of such diversity in norms and customs around the world. The argument that human rights standards do and ought to differ geographically, however tempting and easy it would be to accept, should not be our approach. The value which the UN brings to the problem of achieving universality is the collective global weight which it can lend to address a particular problem. Take a few examples: child marriage, child soldiers, forced labour – the UN is uniquely placed to set minimum international standards of human rights.

The three other debates varied in focus. One asked whether nuclear weapons keep us safe, or whether the catastrophic consequences of detonation around the world justify nuclear disarmament. There is no doubt that these weapons have the potential to decimate the planet. But the only real hope for disarmament is for the most powerful countries to disband their nuclear weapons programmes. Another debate asked whether the responsibility to protect (R2P) is an appropriate means of response to humanitarian crises. All international uses of force, even those for ostensibly humanitarian purposes, must be viewed with deep suspicion and only ever justified in circumstances of the utmost necessity. The value of the R2P is that it is narrowly constructed and ought to remain so. It is submitted that the Permanent Members' (P5) power of veto is also nowadays difficult to justify, and the P5 ought to reserve its application to the most fundamental questions of military intervention.

The final debate asked whether our approach to development is flawed. The majority of those present believed that the goal of addressing global poverty ought to be granted the highest priority. It must be borne in mind that by our inaction we condemn millions of people around the world to malnutrition, disease and death. We can remedy these dire straits by supporting the work of the UN and its associates, the World Health Organisation and UNICEF. They provide famine relief, refugee aid and respond to health epidemics, most recently the Ebola virus outbreak in Africa. We are the first generation which could see an end to global poverty. It is a choice we make to allow it to continue, and that fact is difficult to live with. It may not feel like the UN has an impact on your daily life, but it certainly has a part to play in your future, and the future of our planet. Let us reconsider our localised way of thinking and unite again in the common cause of enhancing conditions for all within our international community.

Natasha Holcroft-Emmess is a London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

The South African Public Protector's Remedial Powers: A Need for Clarity

By Shanelle van der Berg | 14th November 2014

The South African Public Protector is a critically important constitutional institution. The Public Protector is tasked, along with other Chapter Nine institutions, with strengthening constitutional democracy in South Africa. Indeed, the Supreme Court of Appeal has recognised that the Public Protector often constitutes a "last defence" against maladministration and corruption. Where irregular spending, corruption or maladministration is permitted to continue unchecked, such public conduct holds obvious implications for the realisation of the human rights enshrined in the South African Constitution's Bill of Rights. For example, where the President spends R246 million on purported security upgrades to his private residence, and the Public Protector confirms such expenditure to be a "misappropriation of public funds", the question immediately arises as to whether such funds could have been better spent on realising resource-intensive rights such as the right of access to adequate housing, access to sufficient food and water or basic education.

The status of the remedial powers of the Public Protector is thus of crucial importance. If government is free to disregard the Public Protector's findings and persist in irregular or even downright corrupt conduct, the ability of the Public Protector to safeguard constitutional democracy and facilitate the realisation of the rights on which our democracy is built, becomes severely hampered. The government's response to a recent Western Cape High Court judgment holding that the Public Protector's findings are not binding or enforceable, is therefore particularly worrisome. In the recent case of *Democratic Alliance v South African Broadcasting Corporation Case No. 12497/2014*, the High Court held that the institution of the Public Protector differs from that of a court of law in that unlike a court order, a finding by the Public Protector is not binding on persons or organs of State. The Court hastened to add that were government to simply ignore the findings of the Public Protector, it would flout the constitutional imperative enshrined in section 181(3) of the Constitution, which directs that "other organs of state, through legislative and other measures, must assist and protect [Chapter Nine] institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". Relying on English law pertaining to the remedial powers of an ombudsman, the Court held that an organ of State which chooses to reject the Public Protector's remedial directions must have cogent reasons for doing so. The Court clarified that the process by which such decision is reached, as well as the decision not to accept the Public Protector's remedial directions, must be rational.

Institutional Frameworks

Chapter 3

Significantly, the Court pointed out that a decision to reject the Public Protector's remedial directions is itself capable of being subjected to judicial review.

The parliamentary committee (now consisting solely of ANC party members) established to investigate President Zuma's upgrades to his residence in Nkandla was quick to use the judgment for justifying its decision to absolve the President from any wrong-doing, despite the Public Protector's explicit findings to the contrary. Given the Public Protector's comprehensive report on the matter, the rationality of the committee's decision is dubious. Meanwhile, the Public Protector intends to take the judgment on review, citing the Court's over-reliance on the powers of an ombudsman in the UK as one reason for disagreeing with the court's judgment. Whatever the outcome of the review proceedings may be, there is an urgent need to clarify the remedial powers of the Public Protector in a manner which will promote the effectiveness of this crucial democratic institution. Government's continued refusal to respond to the Public Protector's findings, or to support the role that the institution plays, has the potential to imperil the foundations on which South Africa's constitutional democracy is based.

Shanelle van der Berg is a member of the Socio-economic Rights and Administrative Justice Research Project at Stellenbosch University, Faculty of Law. She is also the OxHRH Blog's Regional Correspondent for South Africa.



Human Rights in the UK Media: Representation and Reality

By Michelle Farrell | 16th October 2014

On 19 September 2014, the Human Rights and International Law Unit of the School of Law and Social Justice at the University of Liverpool hosted a one day seminar – part funded by the Modern Law Review – exploring the representation of human rights in the media in the UK.

The seminar brought together constitutional and international law scholars, media and communications scholars, journalists, legal practitioners and civil society actors for what became an informative, often provocative, frequently entertaining and certainly challenging discussion.

Beyond developing the debate and exchanging knowledge, the seminar was envisaged as an opportunity to think about the gap between European and UK legal and political institutions and human rights as experienced by communities and individuals. The media which arguably bridges this gap, playing no small part in both denigrating human rights and in uncritically celebrating human rights, seemed an intuitive starting point for getting to grips with public perceptions of human rights.

This seminar was certainly timely. With the Conservatives' "plans" for the Human Rights Act and the European Court now unveiled, the scene is set for much legal wrangling and political contestation over the future of human rights in the UK. The media will play a significant part in displaying, portraying and developing these discussions.

Reporting on rights

David Mead, Professor of UK Human Rights Law at the University of East Anglia, delivered the keynote speech. Asking the enticing question, 'do we learn more about the media than about human rights from tabloid coverage of human rights?', Mead set the ball rolling on the theme of print media (particularly, Daily Mail) misrepresentation of human rights cases and issues. Drawing on empirical data and media theory, Mead provoked us to think about the language and techniques of inaccurate and misleading reporting. This line of inquiry was also taken up by Adam Wagner, editor of the UK Human Rights Blog. Wagner encouraged us to

Institutional Frameworks

Chapter 3

consider the political backdrop to this media reporting and to take into account, in trying to understand why the 'media [is] doing such a bad job', both the practical realities and challenges of contemporary media and the ideological tenor of media outlets. Drawing on similar themes, Owen Bowcott, legal affairs correspondent at the Guardian, and Susana Sampaio Dias, a media and journalism specialist at University of Portsmouth, imbued the discussion with the strong sense that, in order to understand media representation, we do need to understand the constraints and challenges of media reporting.

Public perception of rights

Rights are assumedly codified in the interest of individuals. Yet there is a chasm in the relationship between the rights-enforcing institutions – the Strasbourg Court, for example – and the particular localities, communities or individuals that rights allegedly safeguard or empower. Do human rights make a difference in the UK? Are human rights viewed as relevant by individuals at the local level? What is public opinion and what influences this opinion? These questions were taken up by a number of the speakers; in particular, Nicky Hawkins, Communications Director at Equally Ours spoke of her organisation's work to disseminate positive messages about rights.

Scepticism about rights

It became an underlying theme of the seminar that the contest over the HRA and the European Court – this media war – masks a deeper unease and uncertainty about rights. A number of speakers (Colm O' Cinneide and Mike Gordon in particular) raised the issue of a marked failure to really engage with rights scepticism. As O' Cinneide suggested, supporters of rights fail to fully engage or challenge the arguments put forward by critics, some of which arguably have merit. Gordon's presentation provoked the collective's thinking on whether the pervasiveness of rights-talk in the media and beyond has quashed alternative avenues for apprehension, leaving, for example, little room for democratic scepticism of rights. These are key themes that ought to dominate the upcoming and now inevitable debates. A rich political discussion about the factual impact and desirability of human rights in the UK is needed.

To be continued

With the battle over rights already in full swing, it seems that an informed political debate about the effects, the utility and the benefits, if any, of rights is needed. However, the debate on the future of UK human rights law seems to be largely cornered in the academic, political and judicial institutions. What does get through is mediated in a press that, in some sections, is entirely disdainful or misrepresentative of rights and, in other sections, is often celebratory and rarely critical of rights. This seminar was productive in opening up new ways of talking and thinking about rights, and how the media understands and portrays them, beyond the 'good or pro rights v bad or anti rights' stalemate.

Dr Michelle Farrell is a lecturer in law in the School of Law and Social Justice at the University of Liverpool.

The Handbook of Human Rights in Northern Ireland: Where Are We Now?

By Brice Dickson | 27th January 2015

Northern Ireland's most prominent human rights NGO is the Committee on the Administration of Justice. Founded in 1981, it has played a significant role in ensuring that human rights and equality are central to the way forward in Northern Ireland. One of the techniques it has used to do that is providing basic information about relevant laws. This manifested itself most significantly in the publication of a 'Handbook' in 1990, the foreword to which was written by Lord Scarman. Three more editions followed in 1993, 1997 and 2003. Now, in 2015, a new version of the book has been produced, entitled *Human Rights in Northern Ireland: The CAJ Handbook*, published by Hart and with a foreword by Lord Lester of Herne Hill QC.

I have been privileged to edit or co-edit every incarnation of this book during the last 25 years. Reflecting on the latest version two points strike me. First, the book is as much about social and economic rights as it is about civil and political rights. This is because issues such as education, employment, mental health, housing, social security and the environment impinge much more on most people's lives than do police powers, prisoners' rights, free speech or freedom of association. Even in Northern Ireland, where disputes over flags, parades, inquests and prosecutions still hit the headlines, more bread-and-butter issues are what cause people real personal concern.

The second reality is that discrimination is just as big a worry as it has traditionally been in Northern Ireland. But the focus of that worry has shifted. While there is still far too much discrimination based on religious belief, there has been a huge rise in discrimination based on race, sexual orientation and age. Women's rights are still under-protected too, not least in the realm of reproduction. The new CAJ Handbook therefore devotes six of its 26 chapters to the law relating to equality and discrimination. Having once led the pack in these fields, Northern Ireland now lags behind other parts of the United Kingdom as well as the other part of Ireland. The Equality Act 2010 has no application outside England, Wales and Scotland.

There are good news stories in Northern Ireland too. The police service is one of the most human rights compliant in these islands, or anywhere in Europe, partly because of the completely independent Office of the Police Ombudsman (which investigates

Institutional Frameworks

Chapter 3

complaints), the Criminal Justice Inspectorate (which examines police efficiency in the same way as it looks at every other agency within the criminal justice system) and the Policing Board (which ensures police accountability). A glance at the Policing Board's annual human rights reports, the latest of which is to be released on 20 February, demonstrates just how thorough that accountability has been.

The Stormont House Agreement, reached by local politicians and the British and Irish governments just before Christmas, has the potential to ensure that problems associated with dealing with the past (in particular the hundreds of unresolved killings which occurred during the Troubles between 1968 and 1998), the disputes over flags and marches, and the need for more integrated schooling and housing, are once and for all put to bed. A set of new quangos is to be established and more money is to be made available. Perhaps most importantly, a timetable has been set, against which progress is to be monitored.

Mercifully the threat from dissident republicans, while still significant, seems to be being managed quite successfully. There are still emergency powers, including juryless courts, but the safeguards in place are greater than ever before. The recent annual review of some of the emergency powers by David Seymour strikes a more optimistic note than of late.

Going forward, the rights issues that matter most to people in Northern Ireland are likely to be those relating to surveillance, welfare and living standards. The new CAJ Handbook will no doubt be widely consulted in those areas. Its 650 pages may need to be expanded even further in a few years' time.

Brice Dickson is Professor of International and Comparative Law at Queen's University Belfast, a former Chair of the CAJ and a former Chief Commissioner of the Northern Ireland Human Rights Commission

Building Institutions for the Long-Term: the Need for Normative Transparency

By Peter Lawrence | 5th December 2014

The Oxford Martin Programme on human rights for future generations brought together politicians, philosophers, and NGOs in its conference on 'How can institutional mechanism safeguard for tomorrow, today?' on 21 October 2014. The following comprises some impressions from a participant in this conference.



Simon Caney emphasised that the drivers of short-term policy —making were varied, with some incentive structures easier to modify than others. He proposed three criteria for evaluating institutional proposals aimed at promoting long-term policy-making: effectiveness, political feasibility and moral legitimacy. He then explored some specific institutional proposals, some of which

Institutional Frameworks

Chapter 3

included “mainstreaming” of long-term thinking, for example, through the incorporation of long-term thinking into audit systems. Such systems have the advantage of being less vulnerable to political whims.

Other participants at the conference addressed specific institutional reforms:

- Juliana Bidanure explored whether the introduction of youth quotas into parliaments would increase the likelihood of meeting the demands of intergenerational justice. She noted that while there is mixed evidence in terms of whether young people are more or less inclined to care about the future than older persons, there are nevertheless instrumental reasons for supporting youth quotas in Parliament.
- Joerg Tremmel argued that the time had come for a new type of Constitution involving a fourth branch which represented the interests of future generations. He was cautious about such a branch having an overly prescriptive role owing to disputes about what policy best represents future generations’ interests.
- Peter Davies, Wales’ Commissioner for Sustainable Futures introduced a practitioner’s perspective drawing on his heavy involvement in current processes to reform Welsh lawmaking including new reporting requirements that would require political parties in the lead up to elections to have their policies tested in terms of long-term impacts.
- Oresk Tynkkynen – the youngest ever member of the Finnish Parliament – shared insights into the workings of the Finnish Parliamentary Committee for the Future over its 25 year life. While the Committee lacks teeth in terms of its capacity to override legislative proposals, Tynkkynen emphasised the educative role that it played in relation to policy makers. This includes its role as an “incubator” for future prime ministers, given that over the last 25 years all Finnish PMs had spent some time working for the committee.
- Peter Lawrence argued that democratic legitimacy criteria should be used for evaluating international proposals for factoring in the interests of future generations, including a UN Commissioner for future generations. He argued that, in spite of the fractured nature of international society, the ‘demos’ (public) could be extended into the future by relying on an interest-based notion of representation.
- Catherine Pearce from the World Future Council gave a convincing argument as to why a UN Commissioner for future generations was required. She emphasised the role of moral leadership that would be entailed in such a position. Her presentation stimulated an interesting debate into the question of strategy, in terms of how best to shake citizens out of complacency to take an interest in future generations. During the debate it was suggested that innovative communication methods could help bring alive the rather abstract questions of future generations.

I came away from this Conference more convinced than ever of the need to make explicit the normative underpinnings behind institutional proposals which factor-in future generations’ interests. Being clear about such normative underpinnings can help in building political support for reforms. ‘Mainstreaming’- style institutional reform (such as accounting methods) can only be a positive.

Introducing new institutions with a specific mandate to represent the interests of future generations is justified given the tendency for their interests to be marginalised. Such mechanisms, however, face a dilemma. If they lack teeth, they may have less direct effect, but be more inclined to survive changes in political fortunes. If they have teeth, they may run the risk of never being introduced. The workshop provided an excellent example of the value of interdisciplinary research and debate around a vital contemporary issue.

Dr Peter Lawrence is a Senior Lecturer at the Faculty of Law, Tasmania, and author of Justice for Future Generations, Climate Change and International Law (Edward Elgar 2014).

The Missing Human Rights Impact Assessment of European Union Free Trade Agreements

By Giovanni Gruni | 21st August 2014

The European Union is pursuing a proactive policy to conclude free trade agreements with numerous countries around the world. The policy includes major trade partners of the EU such as the United States and Canada as well as emerging economies and developing countries in the Caribbean and sub-Saharan Africa.

These free trade agreements regulate many areas which can interfere with the free movement of goods and services between the countries involved. Notably, the new generation of free trade agreements does not only include limits on the use of trade barriers such as tariffs but also extensive regulation of “non-tariff” barriers: legislation or other red tape that can hinder international trade between countries. Accordingly, the agreements which the European Union is negotiating include subjects such as trade in goods and services, intellectual property rights, investment protection, sanitary and phytosanitary measures, agriculture, subsidies and public procurement.

Over the last two decades research has demonstrated a correlation between some of these trade-related norms included in free trade agreements and the realisation of human rights. For instance, the inclusion of intellectual property rights in a free trade

Institutional Frameworks

Chapter 3

agreement can interact with the right to health by influencing access to medicine. Supranational protection of intellectual property and norms on tariffs, export restrictions, subsidies and sanitary and phytosanitary measures are also relevant to the right to adequate food. The right to health is then called into question when a free trade agreement attempts to liberalise health care services, especially when the countries involved have a public system of health care such as the UK's NHS. In addition, certain agreements might include a clause allowing private companies to sue States in order to protect their investments, an instrument which also has human rights implications. This is the case of the trade deals between the EU and the US and the EU and Canada.

For these reasons the conclusion of a free trade agreement requires a careful assessment of its impact on human rights, and the United Nations Human Rights Council recently published a Report on how such assessment might be carried out. Other guidelines on this human rights impact assessment have been developed by scholars and international organisations. However, in European Union law, the procedure to negotiate and conclude free trade agreements does not require a human rights impact assessment at any stage. Since external trade is now an exclusive competence of the European Union, negotiations are carried out mainly by the European Commission, the Council of Ministers and the European Parliament, which provides its consensus at the end of the process. In this procedure, the relationship between the free trade agreement and human rights law lacks an institutionalized method of assessment highlighting the trade clauses relevant to the realisation of fundamental rights. In particular, within the European Commission negotiations are mainly carried out by the Directorate General for trade: the Directorate Generals specialising in human rights and development cooperation have no role, or a marginal one, in the process.

A human rights assessment of free trade agreements would provide several benefits. First, it would clarify areas of negotiation which are particularly sensitive for human rights, so that negotiators can take them into account. Second, since the free trade agreements would be binding and enforceable, the assessment would avoid later potential conflicts between international trade law and human rights. This is particularly important since the ex post dispute settlement mechanisms enforcing free trade agreements only take trade law, and not human rights law, into account. Third, the assessment could provide an institutional mechanism for the Directorate Generals of the Commission specialising in human rights law to contribute to the negotiation of the free trade agreement. The process would become more coherent, and allow the European Commission to develop valuable know-how on the interactions between international trade law and human rights. Finally, the assessment could be the occasion for obliging human rights groups and civil society to express their opinions in a structured and legal manner, identifying exactly the trade clauses that might be problematic for human rights protection.

Overall, a human rights assessment of free trade agreements has the potential to be beneficial to the negotiation process, bridging the gap between international human rights law and international trade law. At the same time, the assessment would increase the legitimacy of the free trade agreement smoothing the ratification process and reducing the oppositions to the trade deal present in civil society.

Giovanni Gruni is a DPhil candidate at Faculty of Law of the University of Oxford and a participant in the Oxford Martin Program on the Future of Food. Since 2013 he is also Academic Assistant at the Department of Legal Studies of the College of Europe.

Third Conference of States Parties to the American Convention on Human Rights: Another Brick on the Wall (or is it another brick off?)

By Ignacio de Casas | 12th February 2014

On January 21st and 22nd 2014, the Third Conference of States Parties to the American Convention on Human Rights (ACHR) took place in Montevideo, Uruguay. Once again, Ecuador was working behind the scenes, pushing for reforms that it was unable to achieve months before through the "Process of Strengthening of the Inter-American System for the Protection of Human Rights." Days before the conference started, it was announced through the press that the meeting was going to decide a change of location for the Inter-American Commission on Human Rights' (IACHR) headquarters (now located in Washington, DC). Chancellor Patiño, from Ecuador, travelled to several countries throughout Latin America to lobby this issue. And he arrived in Montevideo with a true task force ready to push this and other topics at the conference. Here are the outcomes.

Ecuador's first agenda point, changing the seat of the IACHR, is an objective for which the government of President Correa has long battled. Its rationale is that the United States has an undue influence upon the organ due to its location, and since the United States is not a State Party to the Convention, this influence is completely out of order. But once again, as has happened in the previous conferences as well as within the Organization of American States (OAS), no consensus was reached on this issue.

During the second day of discussions in Montevideo, Ecuador moved forward with another issue: the reform of the IACHR's Rapporteur system. Although Ecuador has an important point here, there are many countries—as well as members of civil society—that suspect that Ecuador is lobbying this issue because of its declared war with the Special Rapporteur on Freedom of Expression. The issue was hotly contested, with Costa Rica leading the opposition to Ecuador's position. Proposals varied from eliminating the existing rapporteurships, to balancing the economic resources of the different rapporteurs, to raising the budget of the poorer rapporteurships while leaving the budget of the richer ones unchanged. It was eventually decided that a working group of States

Institutional Frameworks

Chapter 3

would be created to assess the issue and provide a proposal.



Finally, Ecuador tried to push one last issue: to institutionalize the Conference of States Parties to the ACHR. The countries of ALBA, led by Ecuador, have been trying to bring about major reforms to the Inter-American System on Human Rights. But most of them, being radical, had no support from OAS members. Consequently, Ecuador started this new forum, the Conference of States Parties to the ACHR, as a way to discuss the issues without the presence of outside voices, such as Canada or the United States (neither of whom has ratified the ACHR). By proposing a draft set of rules of procedure for the conference, Ecuador attempted to give some “institutionality” to this still informal meeting of States. Yet again, many countries opposed Ecuador’s position.

All in all, it was not a complete loss for Ecuador; the final Declaration of Montevideo also demonstrates what it accomplished. First, Ecuador managed to convene this third edition of the conference without the uncomfortable presence of the United States and Canada. Moreover, neither the IACHR nor civil society were invited. This shows that Ecuador was able to exclude almost every potential opponent to its proposals. Second, it also managed to schedule a fourth edition of the conference, which will take place in Haiti before the next OAS General Assembly.

Furthermore, although neither the IACHR’s headquarters nor the rapporteurships have been changed as of yet, the process is still open. And, as the Ambassador of Costa Rica stated, these goals will probably be achieved by Ecuador due to its remarkable perseverance.

Ignacio de Casas is a lawyer specializing in international human rights litigation. He frequently handles cases involving the Inter-American and United Nations systems of human rights protection. He is also the OxHRH Blog’s Regional Correspondent for Latin America.

The Challenges for Judicial Appointments in India

By Arghya Sengupta | 19th February 2015

In India, several significant developments have taken place in the last two months on how judges to the Supreme Court and High Courts will be appointed.

On 31st December 2014, the President assented to the 99th Constitution Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014. Taken together, these two pieces of legislation have established the National Judicial Appointments Commission (NJAC), which is vested with the power to appoint judges to the Supreme Court of India and the High Courts. The NJAC is comprised of the Chief Justice of India, two senior-most Justices of the Supreme Court, the Minister for Law

Institutional Frameworks

Chapter 3

and Justice, Government of India and two eminent persons selected by the Chief Justice of India, Prime Minister and Leader of Opposition in the Lok Sabha (Lower House of Parliament). Given that the sanctioned size of the judiciary in the Supreme Court of India is 31, including the Chief Justice of India, and over 900 that in the High Courts, the NJAC has considerable responsibility. Further, the NJAC, replaces the judicial collegium, a group of senior judges hitherto centrally responsible for all appointments, making its establishment politically controversial and raising issues of judicial independence and autonomy.

In fact, the new mechanism for appointments is not in force yet, despite the constitutional amendment having received presidential assent, owing to a constitutional challenge to its validity in the Supreme Court. In *Supreme Court Advocates-on-Record Association v. Union of India Writ. Petition Nos. 1303 of 1987*, filed in January 2015 before the Supreme Court, the petitioners have contended that the amendment violates the independence of the judiciary, which is part of the basic structure of the Constitution. The fact that the Chief Justice of India will no longer have primacy in appointments (as he does currently) is the key basis for such a claim. Moreover, the NJAC Act, 2014 has also been challenged on technical and substantive grounds. Technically, it has been contended that the Act is *non-est* because it was passed before the constitution amendment on which its validity depends, was passed. Substantively, it is claimed that the introduction of a super-majority (all decisions to be taken by five positive votes) denudes the primacy of the judiciary; at the same time, the non-specification of criteria for appointment suffers from the vice of excessive delegation. No date has been set for the hearing of the matter yet.

The filing of this constitutional challenge continues a trend of *Judges' Cases*, seminal litigation in the Supreme Court on how judges of the higher judiciary are to be appointed. Whereas in the *First Judges' Case* AIR 1982 SC 149, the Court had underlined the executive government's power to appoint judges, it was reversed in the *Second Judges' Case* Writ Petition (civil) 1303 of 1987 on the ground that executive appointment affects the independence of the judiciary. This led to the establishment of a judicial collegium, a group of senior most justices of the Supreme Court, without whose concurrence no appointment could be made. This was clarified in the *Third Judges' Case* AIR 1999 SC 1 which provided details of the procedure and practice pertaining to collegium appointments. For the last two decades when collegium appointments have been operational, the judiciary has been riddled with allegations of nepotism and cronyism in appointments. Further the system is entirely opaque with no transparency in decision-making and no scope of holding the collegium accountable. While the *raison d'être* of the collegium, protecting the judiciary from unwarranted executive interference, was served, several newer problems emerged, which, on balance, made the remedy arguably worse than, or as debilitating as, the disease. That it needed change is a platitude.

The ball is now firmly in the court of the Supreme Court. The case provides an ideal opportunity for the Court to clarify the contours of judicial independence and accountability, neither of which have been explicated sufficiently. At the same time, the court is placed in the awkward position of having to adjudicate on the extent of its own power of appointment. It is too early to tell how the case will play out; however, it can be said with some certainty that whichever way the decision unfolds, it will be a landmark in Indian judicial history.

Arghya Sengupta is Research Director, Vidhi Centre for Legal Policy, a New Delhi based legal policy think-tank. The author is grateful to Shubham Jain for his research assistance.

The Mexican Human Rights Constitutional Amendment and Impunity: Victims in a Labyrinth

By Ethel Nataly Castellanos-Morales and Camilo Ernesto Castillo-Sánchez | 26th July 2014

The human rights situation in Mexico has suffered a notorious deterioration in the past few years due to multiple factors (such as the weakness of the rule of law, the rise of organized crime, and high rates of petty crime). At the same time, Mexico has tried to modernize its constitutional system to protect human rights, in a similar way to other countries in Latin America. The most significant recent changes in Mexico are the *Reforma constitucional en materia de derechos humanos* (Human Rights Constitutional Amendment) and the new Amparo law (the writ of constitutional protection, and the most important procedure for protecting rights in the country).

These mechanisms have opened many possibilities for the protection of human rights but also entail many challenges, one of which is the fight against impunity with respect to serious violations of human rights. Individuals whose rights have been violated must confront a complex web of procedures and institutions which appear designed to favor impunity.

This is the case with forced disappearances. Maria Eugenia Padilla García, a Mexican woman, lost her son Christian – who was illegally arrested by the *Policía intermunicipal* (Inter Municipal Police) – in 2010. Maria began the search for her son immediately, knowing that his detention was groundless. Her son was never brought before a court, and Maria herself has had to surmount many obstacles.

The first obstacle was the attitude of local authorities. They tried to persuade her to abandon the search: in their words, she was risking both her and her son's life as the people involved in the disappearance were more powerful than the Mexican Government. This persuasion, or arguably intimidation, increased Maria's feelings of frustration and defenselessness. Additionally, the majority

Institutional Frameworks

Chapter 3

of government officials who did engage with Maria showed disrespect for her and her situation. In some cases they did not use the expression “forced disappearance”, preferring the expression “*levantón*” (a kidnapping associated with criminal activity). The use of this euphemism masks both the seriousness of the crime and the government’s accountability.

Maria has attempted to challenge the government’s inefficiency at various levels: before the local and the federal authorities; before the judiciary and the executive; before the *Policía Municipal* (municipal police) and even the President of Mexico’s office. Nevertheless, Maria has not found her son or justice for the perpetrators, even though some of them have been fully identified.

Maria is navigating a complex labyrinth; she has learned from bitter experience and has now suffered her son’s absence for four years. She has witnessed the authorities’ lack of interest, and their incompetence. Despite of these obstacles, Maria is still fighting to find Christian. This is her main goal; she still hopes to learn what happened, to find those responsible and to have the state judge and condemn them.

Have the Mexican Human Rights Constitutional Amendment and the new Amparo law brought changes in the human rights situation in this country? Maria’s case proves that to fulfill the *Reforma* and change the situation of human rights in Mexico, the government must consider that – like Maria – hundreds of people are trapped in this labyrinth, surrounded and attacked by an enormous and useless bureaucracy which only serves to turn the families of those who have disappeared into further victims. Could the *Reforma* and the new *Amparo* Law solve those problems? How? It is now the Mexican Government’s turn to speak.

Ethel Nataly Castellanos-Morales is a Ph. D. Candidate at the Instituto de Investigaciones Jurídicas-UNAM, México.

Camilo Ernesto Castillo-Sánchez is a Ph. D. Candidate at the Universidad del Rosario, Bogotá-Colombia.

