Human Rights Integration IAP

ABSTRACTS TRACK 1

INTERNATIONAL CONFERENCE

THE GLOBAL CHALLENGE OF HUMAN RIGHTS INTEGRATION:
TOWARDS A USERS' PERSPECTIVE

TRACK 1 - THEORIZING FRAGMENTATION AND INTEGRATION IN HUMAN RIGHTS LAW

Track leader: Barbara Oomen, University College Roosevelt

Panel session no. 1: Theorizing human rights in today's world

Wednesday 9 December, 13.30 – 15.00

Chair: Pieter Ippel, University College Roosevelt
Venue: Refter

Some reflections on torture and human rights
Natalina Stamile, University of Catanzaro

In the current theoretical-philosophical and juridical debate, the issue of the use of force seems to emerge with increasingly intensity. It seems that the recent terrorist events and attacks - considering the 9/11 attacks in the United States or the 2004 terrorist attacks in Madrid and the 2005 attacks in London or the 2015 in Paris - have had a crucial impact on the progressive and alarming decline and relegation of those democratic and constitutionalism positions which characterized the previous legal, political and social reflections and elaborations. Therefore, we began to discuss and to recall the hypothetical, and at least questionable, merits of a preventive war with the inevitable consequence of reformulating the concept of right itself. Before the Twin Towers attack, laws seems to reject its coercive, cruel and violent aspect, in contrast with what appears nowadays. So, currently and at least in some cases, law seems to be dominated by its factual aspects to the detriment of the normative dimension which could be defined as discursive and/or argumentative, that is to say relevant to rules, principles and values. In other words, especially in international relations but also in the way of conceiving the national law, it seems that what we are witnessing is the transformation of the law concept as synonymous with force. Behind this alteration we could identify the theoretical and philosophical positions, first of all the political decisiveness or the Schmittian State of Exception. These opinions are based on the affirmation of the executive power supremacy over the judiciary one, so it seems to recall the thesis about the legitimization to use force in order to achieve a state of peace. The intend of this research is to highlight some of the obvious and serious risks of these theories. Special attention is given to the arguments against the use of torture, formulated after stating and criticizing the various opinions in support of the legitimization of torture. The results obtained from the research will be then applied to the specific European sphere. In fact, the European Union seems to embody a moderate legal model, a mild legislation and a non-aggressive policy and should always have an increasingly and important role in the protection and guarantee of fundamental and human rights.
So this research, in contrast with "imperativistic" theories, aims to support the reaffirmation of "mild" laws and to avoid the possibility the adoption of practices such as torture, categorically contrary to human dignity.

The right to exist is the reason for the affirmation of *ubuntu* as a human right

Mogobe Bernard Ramose, University of South Africa

The United Nations Universal Declaration of Human Rights (UDHR) appears to have inadvertently stimulated multiple geopolitical responses. The responses have either expressly or implicitly modified the UDHR by presenting their own conceptualisation and interpretation of human rights. In this process the genetic conceptualisation of human rights; understanding them in generational terms is rather well established. It is complemented by a questionable vertical hierarchisation of human rights. These two aspects of the conceptualisation of human rights continue to enjoy prominence in the discourses on human rights. A crucial complement to this conceptualisation of human rights is that human rights must be conceived holistically. The thesis defended in this essay is that there is no philosophical ground to preclude the continual unfoldment of multiple and perhaps even divergent conceptions of human rights. This by itself is a challenge to the discourse on human rights from only one – *unius versum* – version or perspective. This challenge constitutes the ground for the integral part of my thesis, namely, that the right to exist is the reason for the affirmation of *ubuntu* as a human right. *Ubuntu* will question the holistic conceptualisation of human rights from the perspective of *bongwe-bojotlhe*, that is, one-ness:whole-ness. *Ubuntu* is the philosophical conceptualisation, organisation, interpretation and evaluation of life and human conduct by the Bantu-speaking peoples of Africa.

Are we sacrificing the natural law that binds our conscience? The dangers of fragmenting international human rights in favour of Economic Development and Cultural Relativism

Shannon Revel, Barristers Chambers, Rownhams House

This Paper will start with the basic notion advocated by St Thomas Aquinas and John Finnis, outlining that human laws derive their legal quality and power to bind conscience from natural law. Thus, international treaties such as the International Covenant on Civil and Political Rights are codified for reference; their binding nature comes from a source much larger than man, state or *pacta sunt servanda*. The international standards of civilisation have been clearly delineated by John Finnis (based primarily upon his interpretation of Aquinas) as nine basic requirements of practical reasonableness:

i. Pursuit of good;
ii. coherent plan of life;
iii. no arbitrary preferences among values;
iv. no arbitrary preferences among persons;
v. detachment and commitment;
vi. Efficiency within reason;
vii. Respect for every basic value in every basic act;
viii. the common good;
ix. following one's conscience.

These values underpin the positive laws in the international system, including human rights treaties. Such delineation creates a coherent framework whereby the importance of human rights and their legal force is not chastely due to the 'formal' source from which they derive, but the natural and logical forces that were already existent when crystallised in the form of an internationally binding instrument. Thus, the natural position of human rights is one of universality and equality there among, with basic goods and methodological requirements combined to create universal and unchanging principles of natural law. In the crystallisation of these unchanging principles, "it [was] for the draftsmen to specify into which of these costumes and relationships" the principles fell when drafting. A new 'costume' emerging in modern society is vernacularisation.

Our need to meet economic goals and reach out to all communities requires a modern approach through vernacularisation. This threatens to deny universal rights of their interrelated and indivisible nature. Leaders in authority at the local level become the puppet masters, potentially misapplying the concept of vernacularisation to their own selfish interests. Translators too morph vernacularisation into a potential threat to our natural and equal principles, adding a layer of subjectivity and potential interpretation into the flow of information. The whole concept shifts our basic tenet and teaches us to believe that it is right and okay for human rights to apply on an unequal terrain. Through vernacularisation, the doors are open for human rights to be sacrificed on the altar of cultural relativism and economic development.

Human Rights at the Epistemic Intersection of the General and the Particular

Dimitrios Tsarapatsanis, University of Sheffield

The aim of the paper is to explore the possibility of epistemic collaboration between institutions in the interpretation (and not just the implementation) of human rights. Taking its cue from the well-known distinction between so-called ‘abstract’ and ‘concrete’ judicial review of legislation, it argues against the idea that, when it comes to deciding human rights issues, different institutions (whether domestic – legislatures, the executive and courts – or international/transnational) are fungible. Instead, the paper proposes the view that different institutional agents deciding in good faith typically bring different epistemic perspectives to the interpretation of human rights, thus making the interpretive task one of epistemic collaboration. The main model discussed is to do with an epistemic relationship between two (ideal) perspectives: on the one hand, that of legislation, which concerns itself with the level of abstraction and generality, giving rise to rules concerning classes of individuals and, on the other hand, that of adjudication, which is to do with the application of the rules attending to the moral particulars of the case at hand. It then cashes out this abstract idea out in terms of the relationship between the creation of default rules (general directives issued by legislatures) and case-by-case discovery of potential defeaters to these rules by courts. The upshot is that the fashionable idea of 'institutional dialogue' becomes much more tractable.

Panel session no. 2: Legal pluralism and theorizing human rights

Thursday 10 December, 11.30 – 13.00

Chair: Barbara Oomen
Venue: Rector Vermeylen (second floor)

Human rights and the concept of translation

Karl Hanson, University of Geneva

This paper aims to engage with the challenges posed by the twin processes of fragmentation and integration of human rights law by exploring the theoretical potential of the concept 'translation'.
It will situate the translation concept as part of a broader framework that has been developed for reconceptualising children's rights in international development (Hanson & Nieuwenhuys, 2013). This conceptual framework builds on three key-notions: living rights, social justice and translations. Living rights allow for focusing on the lived experiences in which rights take shape. The notion of social justice helps capture the broader shared normative beliefs that make rights appear legitimate and beyond question for those who struggle to get them recognized. These struggles result in what we call translations to designate the complex flux between different beliefs and perspectives on rights.
To analyse the potential of the concept 'translation' for theorizing fragmentation and integration in human rights law, we propose to make a distinction between (1) what is being translated, for instance a particular legal provision or human rights principle, (2) the translator or the person who performs the translation, and (3) the act of translating itself.
First, translations differ depending on the human rights ideas, discourses, provisions or fundamental principles that are being translated. The stakes are indeed not the same when translating established human rights principles to a specific local context or when translating particular claims from a grass-root social movement to international governmental entities. Second, a particular role is played by the translators who translate human rights discourses and practices both from the field of international law and international organizations to specific situations as well as from the specific local grievances to transnational actors (Merry, 2006). Translators not only speak both human rights and vernacular languages but are also capable to navigate between the two systems of meanings. Third, to understand complex translation processes, also the act of translating itself needs to be investigated (Yanow, 2004). Translation involves more than the mere 'transfer' of one human rights idea into another context but implies an active stance of re-producing and change (Freeman, 2009) which takes place at the 'interstitial spaces' (Law, 2009), between various actors, governance levels and discourses.
Overall, we think that the concept of translation, as a theoretical construct, can further the analysis of fragmentation and integration in human rights law. Also, it can foster reflexivity and make the active re-production of meaning in human rights law more explicit and open to debate.

Analysis of "Rule of Law" Assessment Tools : A view from the Third World

Siddharth Peter de Souza, Von Humboldt Foundation/Max Planck Foundation

The proposed Sustainable Development Goals (SDGs) signify the beginning of a new global development framework that aims to build on the Millennium Development Goals, while maintaining an agenda that is global, aspirational and cognizant of different national realities, priorities and capacities for development.
In Goal 16 of the SDGs as envisioned currently, there is mention of justice and inclusive institutions which have now assumed a new centrality in understanding sustainable development. The inclusion of this goal has been subject to much debate and opposition both from countries in the west and developing countries. Many countries are also pushing for a more ambitious agenda by arguing that "Access to Justice" is only one component of the broader "Rule of Law". Others however, have

argued that the conception of the “Rule of Law” needs to move beyond a State centric position.
For numerous people living around the world, interfaces with justice involve interacting with multiple legal systems that have different norms, rules and criteria for legitimacy. The existence of legal pluralism as matter of ordinary practice has been a challenge for development practitioners for many years and this has lead to a recent change in focus from an institutional top- down approach to justice reform to a greater emphasis on the legal empowerment of the poor.
Keeping this changing focus in mind, it is important to analyze whether the ‘Access to Justice’ as envisaged in Goal 16 is also cognizant of different legal systems and whether debates on the inclusiveness of such pluri-national and hybrid societies are discussed and quantified with appropriate indicators or whether these continue to exist beyond the scope of a framework for development.
Fundamental to this study will be understanding the normative basis for “ Access to Justice” extrapolated within the proposed Goal. This would include examining firstly whether such a conceptualization is given a maximalist or minimalist interpretation when determining the quality of the legal system. Secondly, whether certain assumptions regarding the role of the State and State institutions have been made and thereby a global standard that may not be transferable to other legal systems. Thirdly, whether this goal is constructed around an individual or a community and whether there is universality rather than a particularity in the conception of human rights.
This article will therefore scrutinize whether the incorporation of “Access to Justice” reflects a global consciousness or whether it imposes a western jurisprudential discourse.

A False Fragmentation: Defensive relativism and regional human rights organisations

Frederick Cowell, University of London

Regional human rights organisations have proliferated over the last two decades and now most regions in the world have their own human rights organisation. In some cases this has represented an opportunity for the protection of human rights in a manner that reflects regional human rights priorities. For example the African Commission on Human and Peoples Rights has issued decisions both protecting civil and political rights and decisions protecting collective rights designed to safeguard communal interests. Crucially what regional human rights regimes can achieve that international human rights law often can’t, is a genuine sense of ownership over the content and form of human rights. In one sense therefore the fragmentation of human rights from the international into the regional arena represents an attempt to enhance the human rights protection.
Yet there exist organisations that claim to protect human rights in manner that is compatible with an alternate cultural conception of rights which are little more than bodies using the language of human rights to justify state power. Two examples of this are the Association of South East Asian Nations Human Rights Committee and the proposed Arab Court of Human Rights. Both organisations have been independently criticised for not offering any form of meaningful rights protection. This paper argues that in order to properly appreciate the fragmentation of international human rights law to regional organisations, it is necessary to understand the concept of defensive relativism in organisation design. Defensive relativism is a form of state practiced cultural relativism. It is not a genuine representation of alternate moral traditions or an alternate system of rights protection but rather an argument that state sponsored cultural exceptionalism provides a basis for ignoring human rights.
When defensive relativism is enshrined into the legal structure of regional organisations there is the appearance of a divergent form of human rights protection which is little more than a veneer for states to justify practices that limit human rights. This paper outlines a theory of defensive relativism situating it within general debates about the fragmentation of international human rights law. What makes defensive relativism important as an analytical framework in the debate about fragmentation is that it enables a distinction to be drawn between alternate systems for the protection of rights and the use of cultural exceptionalism to human rights as a disguise for state power.

Integrating Human Rights with Local Norms: Ebola, Burial Practices and the Right to Health in West Africa

Julie Fraser & Henrike Prudon, Utrecht University

While international rights are intended to apply universally to all humans, rather than being culturally neutral or objective, their interpretation is culturally dependent and implementation contextually defined. As such, other norms may be relevant for human rights enjoyment in practice, including customary law, religion, and other social and cultural norms. Scholars have advocated approaches to human rights that include local norms in programs for effective implementation. This is often done both from a normative perspective (emphasizing the value of diversity and cultural rights) and from a practical one (legitimacy and efficacy). The application of these approaches has implications for the fragmentation of human rights as they endeavour to mediate between rights and potential competitors, i.e. local norms, while attempting to ensure the enjoyment of universal rights. This paper examines such approaches to human rights interpretation and implementation and explores their application.

The paper considers, *inter alia*, the critical pragmatic engagement advocated by Nyamu-Musembi (2000); the capabilities approach applied by George (2008); and finally the receptor approach by Zwart (2012). The three approaches are applied in a case study addressing the question of how cultural and religious practices regarding death and burial can assist or detract from health promotion in West Africa, with a focus on the recent Ebola outbreak. Data on these practices will be gathered from ethnographic research in the area. As these approaches aim to integrate local norms with universal human rights, their application in a case study enables a critical assessment of whether the coexistence and interaction of different normative orders may help to more effectively implement human rights standards in a given context. Further, comparing the various approaches facilitates the identification of the constitutive elements of a practically useful contextual approach. The paper concludes by comparing the insights gained from the various approaches and their potential for further integration of the human rights project.

Panel session no. 3: The usefulness of human rights in addressing today's societal problems

Thursday 10 December, 16.30 – 18.00

Chair: Barbara Oomen
Venue: Rector Vermeylen (second floor)

Human Rights, Identity and the Legal Regulation of Dress

Jill Marshall, University of Leicester

In our so-called secular and enlightened age of liberation and individuality, law, particularly anti-discrimination or equalities and human rights law, is supposed to protect our fundamental freedoms in a liberal democratic system. Such freedoms include rights to religious and other forms of expression set out in Articles 8 to 10 of the European Convention on Human Rights. These allow elements of who we are - including our religious beliefs - to be visible to others. However, these rights are restricted and qualified by the rights and freedoms of these others and often through arguably paternalistic interpretations of equalities. In this paper, these issues are critically explored to explore how such interpretations can lead to exclusion, lack of recognition and silencing of those whose dress is restricted. Will such interpretations lead to the shutting down of debate and unduly restrict who we are allowed to be?

Is the crime of human trafficking a human rights violation?

Julia Muraszkiewicz, Vrije Universiteit Brussel

Human trafficking is lucrative crime, often trans border, affecting every country in the world. In the course of this crime victims are subjected heinous experiences, that degrade, humiliate and impact physiological and psychological well-being. Consequently the crime has been described as a grave violation of human rights.[1] However, there are those that question the legal nature of trafficking in human beings, and whether it really is a violation of human rights.[2] Piotrowicz fiercely questions what human rights obligations are breached in the course of human trafficking, when there has been no failure by State and the act was committed solely by private actors? Primarily basing his argument on the notion that human rights violations can only occur if the State or State authority fail to act, Piotrowicz notes that human trafficking is more a matter for criminal law, as in the case of murder or theft. If human trafficking was a human rights violation this would lead to legal responsibility of the non state action under international law and therefore to individual remedies against the perpetrator under human rights law.

There are problems with this arguments as there is substantial reference to human rights in the various international instruments that deal with human trafficking: the Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings states that human trafficking is 'a violation of human rights and an offence to the dignity and the integrity of the human being.' Moreover in wider literature there is discussion if human rights could be horizontal.[3] The paper shows further challenges to Piotrowicz's argument, also taking note of the State responsibility and often failure to prevent human trafficking. Taking stock of the various arguments, international legislation on human trafficking as well as case law this paper seeks to then conclude whether human trafficking is indeed a human rights violation.

Paradoxies of Development-Rights Trade-Offs (Cases of Kerala, Costa Rica and Hungary)

Gábor Szabó, University of Pecs

According to the develoment-rights-trade-off theory, the infringement of CPR and ESC rights are necessary, and justifiable or even desirable, to achieve rapid economic development. Is there another way than sacrificing these rights to economic development? What the development itself means?

I try adopt my arguments to the context of Wallerstein's world system theory and Sen's theory of justice. In my paper I will emphasize, that the capistalist development strategies from the begining in the centre (18th century) to the first decades of 21th century (for the peripheries) are the same in several aspects.

The basic need approach has to face with profound challanges, since the inherent paternalism of that is confusing charity with development assistance. We have to make clear distinction between the pro-poor growth and the hope of „trickle-down" growth. The most important factors of that task are inherent in governance issues, capacity building, levels of participation. We also have to be careful with the exclusive idea of economic growth. The best way to avoid the development-rights-trade offs is to pave the way for mobilization, promoting empowerment of people, enchancing the responsivness of the decision makers.

Many scholars have evaluated the „strong state" as the essential actor for securing the ESC rights.

[1] Nam, J. 'The case of the missing case: examining the civil right of actions for human trafficking victims', *Columbia Law Review*, 107:1655-1696, 2007.

[2] Piotrowicz , R., 'The legal nature of trafficking in human beings', *International Human Rights Law Review 4*, 2009, 175-203.

[3] S. McInerney, 'The European Convention on Human Rights and the Evolution of Fundamental Rights in the Private Domain,' in C. Harding and C.L.L. Lim (eds), *Renegotiating Westphalia* (The Hague, Martinus Nijhoff 1999) p.277 at pp. 307-315

A few less of them have realized, that the state' capacities are strongly embedded in external factors, and even less of them analyzed that a „strong state" could be the main enemy of the mobilization of people, especially of the marginalized groups. I hold, that to claim a strong state is ambigous without any other strict requirements.
In relation with the development-rights-trade-offs it seems to be useful to examine three totally different countries' position. *Kerala* is the „star" of the alter-globe theorists. While the whole India became a „triumph" of globalization without the majority of its population experiencing even a slight improvement in the quality of their lives, population of Kerala's main quality of life indicators reached far above the Indian average. In comparison with the „Asian tigers" Kerala failed to grow economically, while developed socially, and that was based on peasant and worker mobilization conducted within a social-democratic framework. Both the record of CPR and ESCR are much higher in *Costa Rica* than in anywhere else in Central America. On contrary, *Hungary* since 2010 have made backward steps both in the level of CPR and ESCR.

Can human rights bring social justice?

Eduardo Arenas Cátalan, Utrecht University

Addressing the issue of the challenges inherent to the adjudication of social rights, the Chilean legal philosopher Fernando Atria notes that legal relationships are essentially framed by means of the technique of legal rights (subjective rights). This notion entails that right holders exercise their rights at the expense of duty bearers. Historically, however, the distinctive nature of social rights originates in a republican and socialist view linked to the idea of solidarity. Rights here have a different meaning. They are aimed at building a universal and egalitarian standard, as their function is to serve a form of political community that is built over mutual bonds of fraternity among its members.
Defenders of a substantive homogeneity between both individual and social rights believe that by guaranteeing social rights in a subjective-rights-fashion, they can still enforce social rights' substantive content. However, subjective rights' structurally adversarial scheme hinders this goal. That is why under this model the 'solidarity-based' features are excluded, as the judge cannot specify at the expense of whom redistribution or the universal provision of a social service is to take place. This also explains why the only claims that attain justiciability in this process are features linked to equality before the law (non-discrimination and non-retrogression).
On the basis of these considerations, the author concludes that while it is true that as a political and ethical project human rights are indivisible and universal, the challenge of legal fragmentation may require more than simply sticking to individual rights. For a protection of social rights consistent with its historical origins, human rights law may require to open itself to instruments beyond equality before the law, namely, to restore the importance of social solidarity as a fundamental pillar of the human rights project.

The Extraterritoriality of the ICESCR and the Significance of Power: Jurisdiction in an Account of Human Rights

Lea Raible, University College London

Extraterritorial human rights obligations are a focal point of disagreement between universalism and particularism. Given that the extraterritorial application of human rights treaties bring to the fore such fundamental matters as the determination of duty-bearers and the normative force of state boundaries, this is not surprising. However, in this paper I want to take the enquiry a step back to demonstrate that the disagreement is in fact a conceptual one that goes to the heart of the question of what human rights are. It thus is very much about Yeat's "centre [that] cannot hold". I draw on political philosophy in order to elucidate this with regard to the ICESCR; the instrument that famously lacks a provision concerning jurisdiction or territory. I first demonstrate that due to the lack of a clarifying provision in the ICESCR a theory of human rights is necessary here and what it needs

to account for. Second, I present two contrasting views on what the underlying relationship between states and individuals presumed by international human rights is. One view, which is tied to a teleological account of human rights, locates this relationship between a state and an individual in factual power being exercised. The other approach adds a normative dimension by identifying the relevant connection as “de facto political and legal authority” and relies on an approach to human rights that emphasises democracy. In turn, I explain why both accounts fall short of the desiderata established at the outset and how these failures relate to the substantive account of human rights adopted. Lastly, I develop a view that meets the desiderata and builds on a conception of human rights that fits with economic and social rights. I argue that the concept of human rights presupposes that the underlying relationship we are looking for is a particular kind of power that states exercise over individuals. This kind of power is most aptly described as political power and is tied to public institutions that are at the same time virtually inescapable and both necessary and capable of guaranteeing an equal moral status of individuals. The advantage of such an argument is that it bridges the often-cited gap between universalism, represented by a teleological take on human rights, and particularism, such as an emphasis on democracy, by relying on an account that unites insights from both orthodox and political approaches to human rights.