

HUMAN RIGHTS MAINSTREAMING AS A PROJECT OF POWER

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This short essay is a comment on the proposal by human rights activists and lawyers, made in various international and domestic contexts for "mainstreaming" human rights into an aspect of the regular business of government. The comment draws on a paper by Professor Christopher McCrudden as well as on my own previous writings on human rights and "fragmentation" of international law.¹ The main point will be that the call for "mainstreaming" should be understood as a project for seizing institutional power that is profoundly ambivalent in its political significance. There is no reason to be either "for" or "against" mainstreaming without a clear sense of what priorities it is intended to support and how it is expected to affect the allocation of resources between different human groups.

1. The Modesty of Post-Modern Human Rights

Human rights entered into the rhetoric of political and legal speech in the secular West in reaction to disillusionment with the "rule of law" as the principle of legitimate government. Disillusionment followed the deformalisation and bureaucratisation of the law that arose from the effort to ensure law's responsiveness to the increasing complexity of late modern society. As post-liberal ideas of economic and technological governance permeated the ethos of the welfare state what seemed needed were no longer general and uniform rules - rules that would be both over-inclusive and under-inclusive when applied in particular situations - but flexible and informal standards that would allow the solution of what were seen as "management problems" by best available scientific and technical expertise.² Although this phenomenon has been known since Max Weber's discussion of the failure of formal law in the conditions of industrial modernity, awareness of its significance for the rule of law emerged only gradually and did not receive international prominence until 1960's or 1970's.

But deformalisation and bureaucratisation - inevitable as they may seem in view of the problems with formal rules - creates two types of danger.³ On the one hand, they remove political power from the

¹ Christopher McCrudden, 'Mainstreaming Human Rights', University of Michigan School of Law, Public Law & Legal Theory Research Papers, No. 47.

² For the narrative about the demise of legal formalism in post-liberal society, see e.g. Roberto Mangabeira Unger, *Law in Modern Society. Toward a Criticism of Modern Society* (London, The Free Press, 1976), especially p. 192-223.

³ It is a paradox that the dangers of deformalisation have been frequently discussed by scholars of the political left who have thus been drawn to support legal formality and the ideas of the Rule of Law against what they have often interpreted as the "Weimar experience" of the dissolution of law by an anti-

legislators - political parties, parliaments, States - to the institutions whose task it is to *apply* the law. In domestic life "regulators" and managers of all kinds, scientific and economic experts and professional negotiators come to play a key role in the determination of the way broadly formulated legislative "policies" or balancing standards are to be applied. In the international field, treaties transform from sets of behavioural directives to "frameworks" that provide for procedures for further negotiation or the application or broad standards of reasonableness laid out in them. This means that what a treaty will mean in practice, when it counts, will be decided by the relevant treaty-institution, often a technical or economic expert body or a group of specialists and bureaucrats in a national government or international organization. The latter's view of what might constitute a just "balance" or be the "best" practice will determine the rights and obligations of the treaty partners.

On the other hand, as deformalisation will seek to ensure that the applicable rule will be a result of the calculation of "all the relevant factors", it fails to articulate stable commitments or expectations.⁴ Although this will affect the situation of all the groups affected by the treaty, it will be particularly important for the most vulnerable groups, those whose interests are not well (if at all) represented in the administrative bodies to whose discretion the law refers. In other words, the kind of management of flexible standards involved in deformalisation may itself come to seem "part of the problem" and will lead to the emergence of novel claims for absolute, non-negotiable rules that would limit the discretion of law-appliers.

The emergence of human rights law (as well as the recent "fight against impunity") gives expression to the search for absolutes in a world whose complexity has created the danger of unfettered relativism and bureaucratic abuse. They suggest that there must be some limit to administrative weighing of costs and benefits, that some normative requirements must be held as so self-evidently "good" or some forms of behaviour so intrinsically "evil" that they may not be submitted to instrumental calculations.⁵ Even if it is

formal legal theory supporting a corporatist take-over of the State and, ultimately, fascism. The account by Unger in the note 2 above belongs to that tradition. For a general discussion, see William E. Scheuerman, *Between the Norm and the Exception. The Frankfurt School and the Rule of Law* (MIT Press 1995) and Roger Cotterell, *Law's Community. Legal Theory in Sociological Perspective* (Oxford, Clarendon, 1995), especially p. 160-177. The presumed linkage of legal anti-formalism and fascism is also debated in the essays in Christopher Joerges & Navraj Ghaleigh, *Darker Legacies of law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford, Hart, 2003).

⁴ It becomes incapable of expressing "truth". For a critique of deformalisation, procerudlisation and instrumentalisation of law, see also Jean-Marc Ferry, *De la civilisation* (Paris, Cerf, 2001), p. 129-141.

⁵ The latter question has emerged with great force in the debates about the permissibility of torture in the "fight against terrorism". The stakes are well

true that in normal situations, "politics" may intervene through the "discretion" that public officials should have when deciding on the most "equitable" or "cost-effective" solution, this must be limited by rules that express values or interests that seem particularly important.⁶ "[T]heir natural place must be outside politics, yet constraining politics".⁷

Human rights law emerged in the 1960's and 1970s to empower groups and interests that were now well-represented in the bureaucratic or administrative bodies whose task it was to balance conflicting objectives that stood behind legislation. It gave expression to concerns such as: "indigenous groups should not be forced to leave their homes only because it might be cost-effective to set up an industrial area in the place where they live. They have a *right* to live there", or "the police may not torture crime suspects however efficient that might be in view of the objectives of criminal policy. Torture is just plain wrong". Human rights emerged, in the familiar image, as trump cards in the hands of right-holders; their point was to override whatever considerations of economic efficiency or administrative policy might say.

As soon as rights were conceived in this way, they began to seem extremely valuable as instruments for any group to buttress its benefits. To dress a claim (a claim for resources, for example, or a claim for inviolability immunity, concern etc.) in the form of a "right" was to put it in its strongest available terms. To have a "right" was to have the upper hand against administrators and managers. Hence, it became very important to have an authoritative list of rights - now conceived as the intransgressible limits of administrative managerialism. But where would such a list come from? The rhetoric of natural rights suggested that a list did exist but provided no access to it - that is to say, no access independent from taking a stand on issues of political conflict. It was hard not to dismiss natural law as pre-modern myth. Besides, it seemed to have frankly un-democratic implications. For it suggested that human communities were bound by values that preceded them; values in regard to which they had no choice but which they had an obligation to respect at the outset.

laid out in Jeremy Waldron, 'Torture and Positive Law. Jurisprudence for the White House' 105 Colum. L. Rev. (2005), p. 1681.

⁶ The effort to "take rights seriously", writes one liberal reformer, "is therefore anti-consequentialist in the sense that it regards the protection of rights as placing constraints on efforts to maximise the achievement of even the most worthy goals", Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations of International Law* (Oxford University Press, 2004), p. 75.

⁷ Basak Cali & Saladin Meckled-Garcia, 'Human Rights Legalized', in Saladin Meckled-Garcia & Basak Cali, *The Legalization of Human Rights. Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London, Routledge, 2006), p. 4.

In practice, there was no way to exclude the beneficiaries of any policies from dressing the benefit that this policy (labour policy, welfare policy, criminal policy, environmental policy etc.) in terms of their "human rights". Hence the proliferation of rights in liberal societies. The absence of a litmus test concerning which of the claimed rights were "genuine" and which reflected just the (egoistic) interests of the claimants, led to social conflict being increasingly represented in terms of conflicts of rights, or the need to decide between rights and exceptions to rights, as well as to determine what implications particular rights ought to have in practice.⁸

To resolve such conflicts, Western societies had recourse to legislatures to determine (by bills of rights) what actually were those "rights" that authorities ought to respect. However much human rights as an ideologue might remain the religion of secular modernity, human rights as *legal rights*, as rights possessing the hardness they were supposed to have, became dependent on legislative and administrative action, just like other aspects of the rule of law.

But this meant that just like other parts of the rule of law, human rights too, became a policy. As such, it had no self-evident applicability, no special power among the various policies that called for a hearing in the relevant administrative bodies. Human rights became just one vocabulary among others: the vocabulary of economic efficiency, the vocabulary of "security", the vocabulary of nationalism, free market, social welfare etc.

At this point, the call for "mainstreaming" emerged as an apparently modest strategy to replace that of seeking to provide rights with a "trumping" power. "All right", it seems to suggest, "it may be true that a human rights policy is only a policy among others. And that it does not 'automatically' trump alternative policies of, say, economic efficiency, security or whatever. But at least the administrators called upon to 'balance the stakes' or apply the 'best available standards' should take it into account in their decision-making activity". Or, in the words of the Race relations (Amendment) Act 2000, any administrative body should:

"in carrying out its functions, have due regard to the need to [take rights into account]"⁹

Human rights lawyers and activists adopted a strategy that appeared to be more modest than their initial "trumping" claim. Now it was admitted that human rights were only a policy among others - though of course, a particularly important policy - and

⁸ For this, see my 'The Effect of Rights in Political Culture', in Philip Alston, *The European Union and Human Rights* (Oxford University Press, 1999) p. 99-116

⁹ McCrudden, at fn 23.

the task was to seek to ensure that due concern was given to it throughout the administration as decisions on applicable policies and, in particular, the attribution of resources were being made.

2. The Emptiness of Mainstreaming

But there was more. For it is one thing to say that administrators ought to "take account of" human rights concerns and another thing to identify what in particular cases count as such. At this point, problems emerge in the human rights vocabulary itself.

As pointed out above, there are no authoritative lists of pre-legislative rights. This is why political actors are always able to dress their claims in rights-language. As every significant rights-claim involves the imposition of a burden on some other person, then the latter may likewise invoke his or her preference to be free from such burden in rights-terms. An ownership right for example, may conflict with many kinds of collective or economic rights but also such "first generation rights" as the right of freedom of speech. May protesters against genetically manipulated foodstuffs enter the localities in which such foodstuffs are being sold? One highly publicised rights-conflict was decided by the South African Constitutional Court in 2002 in connection with the country's HIV/AIDS crisis as the Court held that South Africa must either require pharmaceutical companies to sell products at determined prices or to issue licences for domestic production. In this case, the "right of pregnant women and their new-born children" trumped over what were expressed in terms of the human rights of the persons who benefit from the medicines produced through the research activities that were financed present drug prices. As is well-known, this led eventually to a negotiated settlement on the basis of the Doha Declaration of November 2001 and the Cancun TRIPS Council decisions in August 2003. Each right was thoroughly negotiable, and negotiated in a thoroughly political process.¹⁰

Perhaps more familiar is the conflict over freedom-rights and security-rights that is played out before the whole world under the banner of "fight against terrorism". Traditionally, rights of security and right to personal freedom were both recognised and submitted to a "balancing test". Has there been a rights-violation when a person loses his or her job owing to secret information received by the employer from public authorities? According to the

¹⁰ The pharmaceutical companies have consistently - and probably not wrongly - argued that effective public health programs require strict protection of intellectual property to medicine. In this regard the TRIPS agreement contributes to the availability of medicines. See Haochen Sun, 'The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health', 15 EJIL (2004), p. 135, 145.

European Court of Human Rights, the matter needs (again) to be assessed taking all relevant circumstances into account.

"The Court recognises that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life."¹¹

The conflict between freedom-rights and security-rights is only one incident in the larger and pervasive set of problems about reconciling individual with collective interests. One example, almost at random, comes from the case-law of the European Court of Human Rights, the 1999 case, *Chassagnou and others v. France*. The applicants were small French farm-owners whose lands had been included by communal decrees within the territory of local hunting associations. The farmers opposed hunting in their lands and appealed to Strasbourg for a declaration that the decree authorizing hunting was an interference in their right of property. The Court said:

"...[A]n interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of fundamental rights... There must be a reasonable relationship of proportionality between the means employed and the aim pursued".¹²

In other words, the permissibility of municipal interference in the "fundamental rights" of certain French land-owners was conditioned by what the Court understood to constitute a "fair balance" between the rights and "the demands of the general interest of the community".¹³ The solution is found by returning precisely to the kind of bureaucratic calculation against which rights were conceived in the first place. And that will entail the same questions as any "balancing": how are the considerations that enter the balance chosen? How do qualitative concerns compare with quantitative ones? And so on.

The fact that rights are both unlimited and (thus inevitably) conflictual renders the call for administrative bodies to "take rights into account" empty. If every policy consideration that an administrative organ needs to take into account may be framed as a

¹¹ ECHR, *Leander v. Sweden*, A.116 (1987) (para 59), <http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/104.txt>.

¹² Judgement of 29 April 1999, ECHR Reports 1999-

¹³ ECHR: *Chassagnou et al. v. France*, 29 April 1999 (para 75).

human rights consideration, and if - as human rights organs repeatedly stress - this will require "striking a balance", then "mainstreaming" calls upon administrative bodies to do what they would in any case be committed to doing. For "balancing" itself cannot be framed in terms of rights-application because its very point is to determine the applicability (and thus the limit) of particular rights in particular circumstances. Or in other words, rights-conflicts cannot be resolved by reference to "rights" - only by reference to some policy or assessment of value that enables the determination of the normative power of particular rights vis-a-vis each other. But if this is true, then the call for "mainstreaming" has no special meaning whatsoever. It merely calls for reasonable and intelligent adjustment of the conflicting considerations - something that the administrative body was surely expected to do anyway.

The same matter may be expressed in a different way. Human rights now appear not only as one policy among others. It becomes impossible to distinguish a "human rights policy" from other policies because each of the latter is able to claim that the benefits it produces - for example the private wealth created by economic policy or the safe normality buttressed by a security policy - should be understood in terms of the "rights" of its beneficiaries. In one recent instance, a policy of imperial coercion represented itself as a human rights measure. In the case concerning the 10-month detention by an Iraqi-British dual citizen, the Court faced with the claim that the detention had been made in violation of the person's human rights, responded in the following way:

"The Security Council, charged as it is with primary responsibility for maintaining international peace and security, has itself determined that a multinational force is required. Its objective is to restore such security as will provide effective protection for human rights for those within Iraq. Those who choose to assist the Security Council in that purpose are authorised to take those steps, which include detention, necessary for its achievement".¹⁴

At this point, "human rights" have completely lost their specificity. Anything can a "human rights" claim. And everything will depend on the sovereign, that is to say, the administrative or bureaucratic decision-maker - precisely the situation that human rights were invented to deal with.

3. Mainstreaming as a Project of Hegemony

¹⁴The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence, Judgment of 12 August 2005, Case No. CO/3673/2005, [2005] EWHC 1809 (Admin), para. 104.

But if human rights mainstreaming cannot be conceived in terms of advancing some determinate preferences in the bureaucratic governance of modern societies, it does have cultural and institutional effects, it does empower some groups and seek to disempower other groups. This is brought out in McCrudden's turn to the relationships between what he calls "epistemic communities" and to the way in which mainstreaming "requires considerable cultural change in public bodies".¹⁵ Instead of thinking about mainstreaming as the advancement of particular political objectives, this invites us to shift focus to how it seeks to empower particular types of expertise, systems of knowledge and value, particular institutional preferences and biases. McCrudden himself speaks in sociological terms as the effort "to ensure that a human rights culture is inculcated in British public authorities".¹⁶ For if "human rights" cannot be identified in terms of any particular class of normative claims, it can (usually quite easily) be associated with particular expert groups, professional leanings and institutions, that is to say, particular cultural leanings, on a par with those that can be associated, for example, with the leanings typical to "football fans" or "investment bankers", or "left liberals".

From this perspective, the meaning of "mainstreaming" is about seeking to ensure that the social and professional group loosely identified as "human rights experts" is empowered to influence administrative policies, to check that other expert and interest groups carry out their work in accordance with the particular preferences of human rights experts and so on. How this could be done is discussed at some length in McCrudden's paper. There might be "impact assessments", where the human rights experts would be appointed as assessors to ensure that the outcomes of administrative policy. There might be participatory systems that provide human rights experts a role (and thus influence) in policy-making at different levels of governance. Or there might be commissions or task forces composed of human rights experts or Ombudsmen with a supervisory role that other administrative agencies would need to consult regularly in their policy-making activity.

Now much of this might be understood in terms of routine administrative co-ordination between different experts and interest groups. Which groups ought to be appointed to deal with which issues? The suggestion to empower human rights expert groups raises at least three sets of interrelated questions:

a) The biases of rights expertise

¹⁵ McCrudden, Section on "Public Servants..."

¹⁶ Ibid. at note 6.

If the call to mainstreaming is about seeking to ensure that professionals associated with human rights expertise ought to be empowered, then it could be translated into the suggestion that administrative decision-making should be streamlined with the normal preferences of human rights professionals. Is this is a useful proposal?

There is no doubt that human rights professionals – what McCrudden calls the “epistemic community” of human rights experts – can be identified as a distinct social group with typical preferences and biases. These preferences and biases have been analysed by David Kennedy. Following him, problems associated with conceptualising political possibility in a human rights vocabulary may distort or limit the field of political possibility in various ways. For example, it may leave concerns that are not easy to articulate in “human rights” terms unarticulated. It may focus too intensively on governmental behaviour, individual entitlements, participation, statehood and the legal form in a way that will background problems of economic distribution or informal patterns peer control. Human rights may undermine political representation and the creation of collective utopias. They may highlight the position of lawyers and “litigation” at the cost of other types of knowledge and practice. And so on.¹⁷

Whether any actual human rights policy actually is problematic in such ways remains, of course, an question to be studied separately. The point to be made here is only that preferences or biases shared by human rights professionals are not automatically the “right” ones, and that any programme for human rights mainstreaming would need to develop an awareness about the problems that looking at the world through a human rights perspective may itself be “part of the problem”.

b) Commitment or co-option?

A second series of questions concerns the stability of the preferences and biases of human rights expertise. The more human rights experts participate in administrative management, the more they will encounter the difficulty of identifying special outcomes that would emerge from or accord with their self-description as “human rights professionals”. The emptiness of rights in view of the choices one needs to make in order to decide rights-conflicts or, for example, to attribute resources between groups of rights-claimants, will push human rights experts to take on increasingly detailed analyses of considerations of economic efficiency, security, administrative appropriateness, social causality and so on. In other words, the more human rights professionals seek to carry out their activity in a professionally competent way, the

¹⁷ See especially, David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press, 2004), p. 3-35.

more their activity will come resemble the activity of those other experts - economic experts, security experts, administrative coordinators and so on. In the end the question will emerge, whether there is (or *can be*) any distinct commitment to human that would not be a commitment to a particular theory of economic development, security, or administrative appropriateness. If the answer to the question is "no", the what reason is there to think that the preferences or biases of the experts would not, in time, turn to resemble or be indistinguishable from the biases and preferences of economic experts, security experts, or the typical leanings of administrative routine?

c) The virtues of critique and utopia

The preceding considerations tend to suggest some scepticism about human rights mainstreaming as a general, abstract project of administrative empowerment. It comes with risks: one may simply turn out to have the *wrong* preferences. Because one is not an expert in, say, technology or economics, one may not have been able to grasp the likely consequences of one's preferences. Those preferences, even if highly commendable in an abstract way, might do not translate into administrative policies that would be equally unobjectionable. Even when there is no doubt about the value of what it is one tries to achieve ("freedom", for example), this objective may be formulated in such general way, that it is impossible to draw any definite conclusions from it. On the contrary, drawing of contested or mistaken conclusions may in practice put to question the well-foundedness of that objective itself. It becomes labelled as "utopian", intrinsically unable to find a practical realisation in the world. It may even begin to appear as a hypocritical veil over something that anybody - including the expert - knows is high-sounding but inconsequential.

There are many dangers in seeking to transform human rights experts into mainstream administrators. It is hard to see how those dangers could be avoided without renouncing the project of "mainstreaming" altogether or at least taking a critical distance from its self-evident usefulness. There is certainly much to be said in favour of human rights staying *outside regular administrative procedures*, as critics and watchdogs, flagging the interests and preferences of those who are not regularly represented in administrative institutions. This aloofness protects human rights experts from the need to make the mundane choices that administrators have to make on a routine basis - choices that seem to call for a downsizing of one's preferences into pragmatic thumb-rules about how to deal with typical cases so as to guarantee the undisturbed pursuit of one's administrative tasks.

Human rights arose from revolution, not from a call for mainstreaming. The ethos of revolution not only happens to be

opposite to the ethos of mainstream, its identity is dependent on that opposition. If human rights cannot - as I have suggested here - be identified with any distinct projects of social policy or economic distribution, they can be identified with a professional sensibility, a set of biases and preferences. One cannot be a revolutionary and participate in the regular management of things and human beings without some cost to both of these projects. The more revolutionary one tries to be, the more difficult it is to occupy those administrative in which the main lines of policy are being set. The more influential one is as an administrative or regulatory agent, the less "revolutionary" one's policies can be. I do not think there is any easy way out of this predicament.¹⁸ To deal with it involves some capacity for critical reflection, engagement and distance, passion and coolness. This, I think, is what legal training ought to produce.

¹⁸ I have discussed this in my 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', in: *Collection of Essays by Legal Advisers of States, Legal Adviser of International Organizations and Practitioners in the field of International Law*, (United Nations, NY, 1999), 495-523