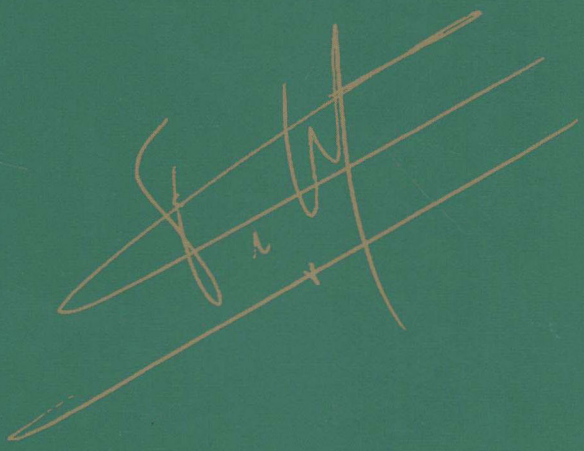
Ida Lintel, Antoine Buyse and
Brianne McGonigle Leyh (eds.)

Defending Human Rights: Tools for Social Justice

Volume in honour of Fried van Hoof at the occassion of his valedictory lecture and the 30th anniversary of the Netherlands Institute of Human Rights



intersentia

SIM

DEFENDING HUMAN RIGHTS: TOOLS FOR SOCIAL JUSTICE

Volume in honour of Fried van Hoof on the occasion of his valedictory lecture and the 30th anniversary of the Netherlands Institute of Human Rights

Edited by

Ida LINTEL
Antoine BUYSE
Brianne McGONIGLE LEYH

intersentia
Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 517 530
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Defending Human Rights: Tools for Social Justice. Volume in honour of Fried van Hoof on the occasion of his valedictory lecture and the 30th anniversary of the Netherlands Institute of Human Rights
Ida Lintel, Antoine Buyse and Brianne McGonigle Leyh (eds.)

ISBN 978-1-78068-082-8
D/2012/7849/168
NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD

This book is the result of two remarkable events: the celebration of the 30th anniversary of the Netherlands Institute of Human Rights [Studie- en Informatiecentrum Mensenrechten] (SIM) and the valedictory lecture of professor Fried van Hoof, one of the pioneers of SIM. Both events took place on 16 March 2012. Preceding Fried's lecture which was entitled 'The European Court deserves a fair trial', a seminar was held on 'Comparative regional systems: tools for social justice?'. The seminar and the lecture focused on the role of regional human rights systems in general, and the recent criticism on the European Court of Human Rights in particular. The idea behind the seminar was that the value of regional human rights institutions should be assessed from the perspective of their contribution to social justice. The regional human rights instruments and institutions were never considered as goals as such, but have always been regarded as tools to increase social justice.

The cases submitted to regional human rights institutions are often based on individual stories that reflect gross or systematic injustice. Such cases deal with, *inter alia*, the exclusion of specific groups from adequate education, the impunity of those who commit enforced disappearances, and the accountability of transnational corporations for violations of rights of indigenous peoples. Human rights organisations, interest groups and national human rights institutes often support or, if possible, even initiate these complaints with the approval of the victims in order to achieve justice for a particular group. Such actions are aimed at increasing the access to justice and participation of the groups concerned in their struggle for justice. The case-law of all regional human rights systems includes cases with a collective character, often reflecting specific problems occurring in a particular region.

Regional human rights systems do not yet cover all geographical areas. In particular, institutions in the Asia-Pacific and Arab regions are either in a very early stage of development or completely absent. The question is, therefore, not only what the existing systems are contributing to social justice, but also what lessons may be learned for the (further) development, consolidation and expansion of (new) institutions in the 'missing' regions. That question was discussed during the seminar from a regional perspective. Attention was, however, also given to the existence and role of universal mechanisms, most notably to the various human rights treaty bodies of the United Nations. These treaty bodies usually have a broad mandate of which the examination of state

reports is the main element. Gradually more and more treaty bodies are also involved in the examination of individual complaints, but certainly not to the same extent as regional human rights courts. In that light, the seminar also extensively discussed recent proposals to establish a World Court of Human Rights.

The subject of the seminar is closely related to the work of Fried van Hoof. He is not only an expert on the European Convention on Human Rights, but also in the fields of economic, social and cultural rights and of corporate social responsibility. By combining his academic work with that of a practising lawyer he has always shown both an impressive knowledge and expertise, and at the same time a strong commitment to social justice. As a member of the staff of Pieter van Dijk, then professor of international law at Utrecht University Faculty of Law, Fried van Hoof participated in the work of SIM since its establishment in 1981. Over the past 30 years he made major contributions to the reputation of SIM both within the Netherlands and globally. Together with Pieter van Dijk, and later joined by others, he was the author of the still authoritative handbook on the European Convention on Human Rights. He has a solid reputation as an inspiring teacher, with both students and professionals from all regions of the world. The combination of his teaching skills and his experience as a practising human rights lawyer increased the impact of his courses. His inspiration is also highly visible in the students who requested him to supervise their (master's) theses or their doctoral research. As a very precise and critical, but always constructive, supervisor he made immense contributions to the quality of the work he oversaw.

This volume includes the contributions presented during the seminar of 16 March 2012 and the contributions of some of Fried van Hoof's Ph.D graduates on related subjects. Together, they shed light on the challenges that human rights institutions face in aiming to achieve social justice in today's world. They also constitute a homage to Fried van Hoof, and, in line with his role in the human rights debate over a long period of time, an invitation to human rights scholars and practitioners around the world to constantly and critically assess the possible contribution of regional and international human rights instruments and institutions to the achievement of social justice for all.

Cees Flinterman, Jenny Goldschmidt and Leo Zwaak

CONTENTS

SOCIAL JUSTICE IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: AN APPROACH

Pedro NIKKEN

1. INTRODUCTION

Several fundamental treaties of the Inter-American System express that social justice is a goal to be achieved by the American States. The Organization of American States (OAS) Charter refers to 'the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man' (Preamble). The Charter also states, as one of the principles of the Organization, that 'social justice and social security are bases of lasting peace' (Article 3-j). In the same direction, in the preambles of the American Convention on Human Rights (ACHR), the Protocol of San Salvador (PSS) and the Inter-American Convention on Forced Disappearance of Persons, the States Parties reaffirm 'their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man'. The Inter-American Democratic Charter, in turn, asserts that 'the values and principles of liberty, equality, and social justice that are intrinsic to democracy' (Preamble). This is reiterated as a component of the promotion of democratic culture in Article 27.

These expressions have not had any significant effect on the jurisprudence of the Inter-American Commission of Human Rights ('the Commission') and the Inter-American Court of Human Rights ('the Court'), none of whose decisions are explicitly based on the principle of social justice as such.[1] However, it would be simplistic to say that the issue of social justice has not been considered conceptually in the Inter-American System of Human Rights (IASHR) as a component of the protection and promotion of human rights. A substantive

[1] The mentions I have found have no relevance for the substantial reasoning of the decision, as in *Baena Ricardo*: I/A Court HR, *Case of Baena Ricardo et al. (270 Workers) vs. Panama).* Judgment of 2 February 2001. Series C No. 72, para. 105.

analysis of the Inter-American jurisprudence shows that the issue of social justice is considered on the basis of international human rights law.

'Social justice', both when considered grammatically and as a concept, has no unequivocal meaning. Social justice can be related to a society organised fairly, which implies that its members can live and interact in a manner consistent with the dignity of the human person. From this angle, social justice is an issue of human rights in a *positive* sense. First, because it implies that the State should be organised to protect, respect, satisfy and ensure all human rights. Secondly, because it requires that everyone has not only virtual but actual access to individual and social goods which are contained in human rights, in particular life, liberty, security, justice, participation in public affairs, work and a decent standard of living, which includes minimum levels of education, health and so on. Thirdly, because it implies that the State is organised to protect and defend every person suffering from violations of human rights. In this sense, social justice is more than an equitable distribution of wealth and a matter of public policy and spending. It is an issue of human dignity and human rights.

From another perspective, understood in a *negative* sense, social justice can also enter into the framework of human rights analysis. Social injustice, as a situation of exclusion, of critical poverty and of deprivation of fundamental social goods, usually involves violations of human rights, which can be of the utmost gravity. It is possible to find several cases in which the Commission and the Court have analyzed serious cases of social injustice that have harmed vulnerable victims, on the basis of regional human rights instruments.

Consequently, I will first go into the guarantee of human rights as a structural component of social justice and, secondly, I shall deal with social injustice as a component of violations of human rights.

2. THE GUARANTEE OF HUMAN RIGHTS AS A STRUCTURAL COMPONENT OF SOCIAL JUSTICE

In its first judgment on the merits of a contentious case, the Inter-American Court highlighted that the obligation 'to ensure the free and full exercise of human rights' (Article 1(1) ACHR), includes the States Parties' duty 'to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[2] This kind of "humanitarian structure" matches with the requirements of social justice. In a similar way, in its fifth

[2] I/A Court HR, *Case of Velasquez Rodriguez.* Merits. Judgment of 29 July 1988. (Series C No. 4), at para. 166.

advisory opinion, the Court delineated a concept of 'general welfare' (*bien común* in Spanish) suitable for the achievement of social justice:

> Within the framework of the Convention, it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual as an imperative of the general welfare.[3]

Such statements are general, that is referring to all human rights however, they should be read within the context of a treaty on civil and political rights, in this case the American Convention. Nevertheless, in its *Report on Progress Indicators in the Area of Economic, Social and Cultural Rights*, the Commission included a similar approach to the economic, social and cultural rights protected by the Protocol of San Salvador, defining as 'structural indicators' the ones seeking 'to evaluate how the State's institutional apparatus and legal system are organized to perform the obligations under the Protocol'.[4]

A State structured and organised to perform the commitments it has assumed on civil and political rights under the ACHR, and on economic, social and cultural rights under the PSS, is also a State, at least in theory, structured and organised to achieve social justice.

These general considerations have specific manifestations in the analysis of various rights connected with social justice, according to the jurisprudence of the Commission and of the Court. From a different perspective, social justice is also a component of some of the reparations ordered by the Court.

2.1. SOCIAL JUSTICE AS A COMPONENT OF HUMAN RIGHTS

2.1.1. Right to Life

The Court has found that the right to life includes, 'not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a

---

3 I/A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of 13 November 1985. (Series A No. 5), at para. 66.

4 I/ACHR, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights.* OEA/Ser.L/V/II.132 Doc. 14 revs. 1. 19 July 2008; para. 30.

dignified existence'.[5] In this connection, 'the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority'.[6]

2.1.2. Rights to Non-discrimination and Equal Treatment

The Commission and the Court have often invoked principles of non-discrimination (Article 1(1) ACHR) and of equal treatment (Article 25 ACHR) as a tool to protect vulnerable persons or groups. This touches upon the realisation of social justice. Discrimination is not only a legal matter, but also a *de facto* situation that should be eradicated from any law or practice. According to the Court, 'the States must abstain from taking measures that are, in any way, directly or indirectly designed to create *de jure* or *de facto* situations of discrimination'.[7] Moreover, the States must 'adopt positive measures to reverse or change discriminatory situations that exist in their societies and that prejudice a specific group of people'.[8]

Even more clearly, the Commission has affirmed that the States are under the obligation to prevent 'discriminatory practices or structural discriminatory situations, even when those practices and situations are attributable to private persons'.[9] Furthermore, the Commission has also indicated that the general obligations under Article 1(1) of ACHR,

> [...] necessarily require the State to ensure conditions whereby the rights of vulnerable and marginalized groups within its society, such as those disadvantaged by the effects of poverty, are protected. The broad principles of non-discrimination and equality reflected in Articles 1 and 24 of the Convention require action to address inequalities in internal distribution and opportunity.[10]

---

5 I/A Court HR, *Case of Villagran Morales et al. (The Street Children Case).* Merits. Judgment of 19 November 1999 (Series C No. 63), at para. 144.

6 I/A Court HR, *Case of Yakye Axa Indigenous Community vs. Paraguay.* Merits, Reparations, and Costs. Judgment of 17 June 17 2005. (Series C No. 125), at para. 162.

7 I/A Court HR, *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of 17 September 2003, at para. 103. Also, I/A Court HR, *Case of the Xákmok Kásek Indigenous Community. vs. Paraguay.* Merits, Reparations and Costs. Judgment of 24 August 2010. (Series C No. 214), at para.271; I/A Court HR, *Case of Fernandez Ortega et al. vs. Mexico.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 30 August 2011 (Series C No. 215), at para. 208; I/A Court I/A Court HR, *Rosendo Cantú et al. vs. Mexico.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 31 August 2010. (Series C No. 216), at para. 184.

8 *Juridical Condition and Rights of Undocumented Migrants, supra* note 7 at para. 104; *Case of the Xákmok Kásek Indigenous Community. vs. Paraguay, supra* note 7 at para. 271.

9 I/ACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II, Doc. 68, 20 January 2007, para. 107.

10 I/ACHR, *Report on the Situation of Human Rights in Ecuador.* (OEA/Ser.L/V/II.96 Doc. 10 revs. 1). 24 April 1997. Chap. II.B.

The Court has inferred a particular consequence of such principles in the field of application of the rule of exhaustion of domestic remedies before bringing a petition before the IASHR. When the person seeking international protection cannot afford either the necessary legal counsel or the costs of the proceedings required to exhaust domestic remedies, 'that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law'.[11] So, a person in situation of indigence 'is not required to exhaust such remedies'.[12]

2.1.3. Access to Justice

The access to justice is a crucial component of social justice (and of justice itself). The Court has stated that the right of access to justice arises from Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the ACHR.[13] The Court has also outlined that:

> [...] the power of access to justice must ensure, within a reasonable period of time, the right of the alleged victims or their next of kin that everything possible be done to know the truth of what happened and that the possible responsible parties be punished.[14]

The Commission meanwhile concluded that '[t]his right presupposes that there is a judicial system that covers as much as possible of the national territory, in accordance with the population census'.[15] The Commission indeed has adopted 'a broad concept of access to justice, which includes a review of the legal and actual possibilities of access to appeal and protection mechanisms in administrative and judicial proceedings'.[16] Moreover, the Commission has interpreted, in accordance with contemporary human rights law, that

---

11 I/A Court H.R., *Exceptions to the exhaustion of domestic remedies (art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights).* Advisory Opinion OC-11/90 of 10 August 1990. (Series A No. 11), para. 22.

12 *Ibid.*, at para. 42.1.

13 I/A Court HR, *Case of Barrios Altos vs. Peru.* Merits. Judgment of 14 March 2001 (Series C No. 75), para. 48.

14 I/A Court HR, *Case of the Miguel Castro Prison vs. Peru.* Judgment of 25 November 2006 (Series C No. 160), para. 382, I/A Court HR, *Case of Vargas Areco vs. Paraguay.* Judgment of 26 September 2006. (Series C No. 155), para. 101; I/A Court HR, *Case of the Ituango Massacres vs. Colombia.* Judgment of 1
July 2006 (Series C No. 148), para. 289; I/A Court HR, *Case of the Pueblo Bello Massacre vs. Colombia.* Judgment of 31 January 2006 (Series C No. 140), para. 171.

15 I/ACHR, *Access to Justice and Social Inclusion: The road towards strengthening democracy in Bolivia.* OEA/Ser.L/V/II. Doc. 34. 28 June 2007, para. 68.

16 I/ACHR, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, para. 66. Also, I/ACHR, "Access to Justice for Women Victims of Violence in the Americas", paras. 5–6.

> [...] States have not only a negative obligation -not to prevent access to those remedies- but also, fundamentally, a positive obligation to organize their institutional apparatus so that everyone can access those remedies. To that end, states are required to remove any regulatory, social, or economic obstacles that might prevent or limit the possibility of access to justice.[17]

2.2. SOCIAL JUSTICE AS A COMPONENT OF REPARATIONS

Several of the Court's decisions on reparations to violations of human rights have included components of social justice in benefit of a community, even when individuals who belong to this community have not been parties to the case before the Court. I have identified some examples of such decisions.

First, cases in which the victims were members of a community or vulnerable group and the reparations ordered by the Court were directly related to social justice, in the fields of education, health and so on, to the benefit of such a community or group as a whole. In this context the Court has ordered, for example, the establishment of a scholarship[18] or the building of a school,[19] a dispensary[20] or a new health care centre.[21]

Secondly, cases in which the victim is a community as such, particularly an indigenous community, and the reparations ordered by the Court included components of social justice in favour of the entire community, such as works or services of collective interest;[22] the establishment of a community development fund in the lands for different social purposes, like educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure.[23]

Finally, there are also several cases in which the Court has found that the collective property of indigenous communities on their ancestral lands has been

---

17 *Ibid.*, at para. 68.

18 I/A Court HR, *Case of Myrna Mack Chang vs. Guatemala*. Merits, Reparations and Costs. Judgment of 25 November 2003 (Series C No. 101), paras. 285 and 301 (11).

19 I/A Court HR, *Case of Aloeboetoe et al. vs. Suriname*. Reparations and Costs. Judgment of 10 September 1993 (Series C No. 15), paras. 96 and 116(5).

20 *Ibid.*

21 *Case of Rosendo Cantu*, *supra* note 7, paras. 260 and 295 (21).

22 I/A Court HR, *Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*. Merits, Reparations and Costs. Judgment of 31 August 2001 (Series C No. 79), paras. 167 and 173(6).

23 *Case of the Indigenous Community Yakye Axa vs. Paraguay*, *supra* note 6 at paras. 205 and 242(9); I/A Court HR, *Sawhoyamaxa Indigenous Community vs. Paraguay*. Merits, Reparations and Costs. Judgment of 29 March 2006 (Series C No 146), at paras. 224 and 248(7); I/A Court HR, *Case of the Saramaka People vs. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 28 November, 2007 (Series C No. 172), at paras. 201 and 214(13); *Case of the Xákmok Kásek Indigenous Community*, *supra* note 7 at paras. 323 and 337(28).