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Ombudspersons for Future Generations: A proposal for Rio+20

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Bringing intergenerational justice into the heart of policy-making

Introduction

The UN Conference on Sustainable Development, better known as Rio+20 taking place in June 2012, presents a unique, groundbreaking opportunity to recognise challenges ahead and renew our efforts to meet them. Since the Earth Summit in Rio twenty years ago, numerous events and processes on sustainable development have followed. Despite good intentions we have not yet grasped innovative, equitable and ambitious solutions which fully incorporate the long term view throughout our governance systems in order to safeguard the planet for future generations.

The proposal for an international Ombudsperson or High Commissioner for Future Generations is included in the first draft of the Zero Draft, "The Future We Want". The proposal has broad support and interest is growing. Many Governments and UN institutions are considering the need for this role, and the potential it can offer. At the end of January, the Elders announced their support to the proposal, as one of three endorsements to existing recommendations for Rio. In this article we explore why this institution at the international, regional and national levels is relevant as a solution for Rio, the nature of its role and mandate and what we should learn from similar institutions elsewhere.

While wishing to avoid too much attention to terminology at this point, it is important to briefly touch upon the language used, especially since the Zero Draft offers both terms 'Ombudsperson' and 'High Commissioner'. The term 'Ombudsman' originates from Old Norse and refers to an independent official or institution acting as a representative of public interests with regard to implementation flaws in the structure and work of governmental administrations. The term 'Ombudsperson' is often interpreted within the confines of dispute and is less familiar in the UN context.

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The World Bank (WB) Inspection Panel and the Compliance Advisor Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency present in essence an 'ombudsman' function in relation to projects supported by those WB agencies. The UN system is already home to a High Commissioner for Refugees and a High Commissioner for Human Rights, both of which can provide helpful experience to draw upon. However both of these offices are far larger than anticipated for the office of High Commissioner for Future Generations.

Rationale for Ombudspersons for Future Generations

As Judge C.G. Weeramantry (former vice-president of the International Court of Justice) explains in his statement to the World Future Council¹, a priority objective of any legal system claiming to be developed is the protection of those who are unable to protect themselves. If this amounts to an entire population, the duty becomes imperative. While the time frame of those wielding economic or political power is extremely short, little thought is given to the long term impact of decisions made. Similarly, lawyers and judges attend to the practical nature of presenting those immediately before them. The valid assumption arises that the law should be made more responsive *"to the obvious need for protection of our children's children against the rapaciousness and unconcern which we have so long permitted to continue without adequate preventive measures from our legal systems."*

Governments and delegates attending the Rio Summit in 1992 were already familiar with the 1987 Brundtland Report, 'Our Common Future' and well versed in its definition of sustainable development as: *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs"*. Many argue that we have yet to fully grasp this original meaning of sustainable development, in its truest form, to emphasise our commitment to equity with future generations.

Edith Brown Weiss, a leading legal scholar on international environmental law, argues *"The theory of intergenerational equity states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations. As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves."*²

Yet, how do we determine and apply our role as 'trustees' or as 'beneficiaries' given that existing systems and structures do not yet have those checks and balances in place? Since electoral cycles and business models of reporting increasingly define decision-making, we have witnessed a pattern of short term gains taking precedence over future and long term interests. Furthermore, how do we avoid any real conflict with respecting intergenerational equity and meeting the critical needs of those living now? Edith Brown Weiss argues that the solutions to achieve intragenerational equity are often consistent with advancing intergenerational equity. Improving the prosperity of the lives of all, to bring dignity and sufficiency today is a pertinent precondition to protecting the opportunities of future generations.

Despite our best endeavours, we have yet to truly acknowledge that the three pillars of sustainable development: economic, social and environmental motivations are

1 <http://www.futurejustice.org/assets/Message-from-Judge-C-G-Weeramantry.pdf>

2 Edith Brown Weiss, In Fairness to Future Generations and Sustainable Development, 1992



not detached from one another, or to be traded against one another, but are in fact mutually supportive and interdependent. Within our reach are innovative solutions which can enhance all three disciplines. The 2011 Synthesis report compiled by the UN Secretary General³ sets out that as long as sustainable development remains separated from core policy formulation and economic thinking, and as long as gaps in implementation are not secured, sustainability challenges will not be met. Every slice of our lives follows its own structural logic with very few connections to the other subsystems. An important element to resolve our sustainable development conflicts is therefore, the bridging of these social spheres with the help of a new kind of creative, multidisciplinary institution.

"Good governance at the local, national and international levels is perhaps the single most important factor in promoting development and advancing the cause of peace";
Kofi Annan, former Secretary General of the UN.

Good governance is recognised in transparency and accountability of decision-making procedures and the operation of the administrative system. Yet, monitoring and enforcement of agreed sustainable development strategies at all governance levels remain weak and there are few tools by which governments are held to account on meeting these commitments. Without full representation of their needs for a liveable and healthy environment, citizens often miss an adequate voice or a legitimate means by which to question or present their concerns. Central legal tools of public participation, including Principle 10 of the Rio Declaration, offer excellent means for access and public participation in environmental decision-making. Questions remain however, for participation in those decisions which go beyond the environment, and for those who are not able to be present. This is where an Ombudsperson for Future Generations can complement, by bringing the broader intergenerational justice perspective into decision making outside just the confines of the environment.

Political Recognition and Experience of Representing Future Generations

Looking to better represent, or include future generations in present day decision making is often interpreted by some as a romantic notion that we can ill afford. However, this is not a new, idealistic concept. The concept of intergenerational equity can be traced back to traditional civilisations, for example the Native American Indian practice of always considering the impact of present decisions on the seventh generation. Many communities and traditional cultures have experience of using a moral authority, or incorporating a conscience keeper into their decision-making to ensure the consideration of past, present and future and the protection of our environment is always taken into account. It is also enshrined in numerous international treaties and UN instruments dating back to 1946 with the International Convention for the Regulation of Whaling⁴, which mentions 'safeguarding for future generations'. However, it has yet to be seriously applied.

At the Earth Summit of 1992, it was the Government of Malta which formally tabled the resolution for "a guardian for future generations". While it did not make the final declaration, Malta has introduced a recommendation for its own National Guardian for Future Generations as part of its current domestic Sustainable Development Bill.

3 Synthesis Report on best practices and lessons learned, paragraph 103, 21st January 2011.

4 <http://iwcoffice.org/commission/convention.htm>



In an attempt to bring intergenerational equity into legislation and policy making, several countries have established specific national institutions with this as their targeted mandate. Their interventions are also often based upon the complaints and concerns from stakeholders, including NGOs, local communities and individuals. What are termed Ombudspersons or Parliamentary Commissioner for Future Generations are institutions working at the national level which work at the heart of the state system, yet independent from administrative power and not motivated therefore by short term electoral cycles. They pursue an official and active advocacy role for long term interests and have proved to function as an effective mechanism providing checks and balances for present and future interests.

These institutions have frequent and broad exchanges with many organisations and communities of the present generation. For example, in Hungary, the Parliamentary Commissioner for Future Generations can directly raise concerns about the long term impact of certain projects or policy proposals. The Hungarian Commissioner was established after a grassroots initiative by the Civil Society Organisation Védegylet (Protect the Future)⁵, and subsequently, the institution enjoys enormous support from several hundreds of Hungarian and foreign NGOs, churches and professional organisations. The Hungarian Parliament established the Parliamentary Commissioner for Future Generations in 2007, tasked 'to ensure the protection of the fundamental right to a healthy environment'. The Commissioner examines individual decisions and monitors policy developments and legislative proposals to ensure that they will not pose a threat to the environment or harm the interests of future generations. He conducts investigations upon complaints or *ex officio*, can have access to all governmental documents, and his mandate includes the right to review the normative actions of municipality councils, first of all in spatial planning issues. He receives petitions from those concerned that their right to a healthy environment has been or is in danger of being violated. He must investigate proper petitions and make recommendations to the relevant public body and he can investigate violations on his own initiative. The Commissioner has said he carries out strategic development and research, covering the duty of representing the rights of future generations. The role is directly linked to defending the interests of future generations on the same level as the rights of people today – the Commissioner places future generations at the heart of the advocacy and investigative procedures⁶.

The new Hungarian constitution of 2011, offers a detailed description of natural resources that should be protected in the interests of future generations, including the waters, lands, forests, genetic heritage and cultural heritage of the country. However, from the beginning of this year, the position of the Commissioner has been downgraded to a deputy Ombudsperson, to huge dismay from National Civil Society and the global community. It is important to reflect upon the fact that international recognition and political support from other regional and global institutions would help to build pressure against such decisions in the future.

The decision to establish a Sustainable Futures Commissioner in Wales⁷ was taken in 2011, by the Welsh Assembly, largely as a consequence of the UK Government's decision to withdraw funding for the UK's Sustainable Development Commission. The key roles of the Commissioner have been defined as: to provide leadership and authority to the Assembly Government's vision for sustainable development in Wales, involve stakeholders, provide advice to the Assembly Government on long term

⁵ Gosseries/Javor 2008

⁶ <http://jno.hu/en/>

⁷ <http://www.cynnalcymru.com/commissioner>



policies and approaches and promote sustainable development throughout Welsh politics. The Commissioner is currently helping to steer a Sustainable Development Bill through the Welsh Assembly, and making sure relevant stakeholders are involved to help inform this process.

The first body to oversee the implementation of environmental policy goals in New Zealand was appointed during the country's environmental reforms in the 1980s. The Parliamentary Commissioner for the Environment (PCE)⁸ was set up under the 1986 Environmental Act with a five year mandate, with authority to investigate 'the effectiveness of environmental planning and management carried out by public authorities', reviewing 'the system of agencies and processes established by the Government to manage the allocation, use and preservation of natural and physical resources'. Finally, if requested by the House of Representatives, the Commissioner had the authority to hold enquiries into matters with significant environmental impact⁹. The Commissioner from 1997-2007, placed great emphasis on the need for broader sustainability education. Today, there are proposals to change the Parliamentary Commissioner for the Environment into the Office for Sustainable Development.

Some twenty or so national constitutions make explicit reference to the rights of future generations¹⁰. For example, protecting the rights of future generations was cited as one of the reasons for the creation of a Charter of Fundamental Rights and Freedoms in the Czech Republic¹¹. The rights of future generations are recognised under the Ecuadorean Constitution as guaranteed principles for the State's protection of the environment: *'The constitution recognises the following environmental principles: The State guarantees a sustainable model of environmentally balanced development, respectful of cultural diversity, to conserve biodiversity and the natural regeneration capacity of ecosystems, and to ensure the satisfaction of the needs of present and future generations'*¹².

Other similar initiatives include parliamentary committees, for example in Germany, which has installed a parliamentary committee for the analysis of legislative proposals before they are presented for voting. The parameters and findings of such analysis would be relevant to the Rio+20 negotiations. Finland currently enjoys, as did Israel previously, parliamentary committees for future generations.

Role and Functions at the National Level

Taking into account existing governance frameworks and legal architecture, there can of course be no uniform approach, nor identical institutions from one country to the next. Similar institutions which are already in place should be reformed or strengthened as necessary. A number of entry points are available to best ensure the needs of future generations are represented in the executive, legislature and the judiciary.

8 <http://www.pce.parliament.nz/>

9 Environment Acts 1986-1996 legislation.knowledgebasket.co.nz/gpacts/reprint/text/1996/an/015.html

10 National Policies & International Instruments to Protect the Rights of Future Generations, A Legal Research Paper, World Future Council & CISDL

11 Charter of Fundamental Rights and Freedoms of the Czech Republic preamble ('The Federal Assembly, (....) recalling its share of responsibility towards future generations for the fate of life on earth, (....) has enacted this Charter of fundamental rights and freedom').

12 Ecuador Constitution art 395



As we have seen in the case of Hungary, the institution was established by the Parliament and reports annually to the Parliament. The budget is also debated and voted on by the Parliament. The Ombudsperson can only be established by virtue of the highest law or executive available at the level concerned.

However, for this institution to be effective, attention must be given to a core set of principles upon which it must be based. These principles are drawn from our understanding of existing good practice. It should address the requirements of the separation of powers. This means it should be independent of government, while working at its heart, with its function to increase political accountability, thus reducing the risk of political and economic costs for present and future generations.

We define six criteria in order to achieve successful impact:

- Independent
- Proficient, in terms of having a multidisciplinary staff
- Transparent
- Legitimate by democratic standards
- With full access to all relevant information
- Widely accessible to external assessments and citizens concerns

Independence does not mean isolation: the institution of an Ombudsperson for Future Generations is an agent of change, the performance of its duties being parallel and complimentary to the three powers (legislative, executive and judiciary). As such, the work and mission of the Ombudsperson would be integrated into the process of decision-making at all-levels. It is the Ombudsperson for Future Generations' independence that should shine upon the decision-making processes, not its authority. In the more contextual frame of politics, independence means the institution would be a political during the execution of its work. For instance, the Ombudsperson will be expected to be explicit about any past affiliations, support, or other link to any political party; and will have to demonstrate that they have willingly given those up prior to taking the office. The multidisciplinary staff working for the institution would be expected to do the same.

We identify a number of roles for this institution:

- be responsive to citizens, thus increasing trust in policy implementation and government accountability and combating high levels of political apathy
- provide space to share and inform others of analytical evidence and research
- facilitate coherence between separate pillars of government
- hold government departments and private actors accountable
- balance short-term interests with the long-term interests of society as a whole

Role and Functions at the International Level

Since this would be a new role without precedent, its mandate and operating guidelines require careful discussion. We would expect an intergovernmental high level committee of experts established after Rio to prepare a series of options on the mandate, modalities and functions of this institution. Their recommendations would inform and determine a final General Assembly Resolution on the institution's mandate.

Most clearly, we would expect a High Commissioner or Ombudsperson for Future Generations to allow space and attention within the United Nations work and



programmes to deliver global governance for the long-term¹³. A High Commissioner for Future Generations should not be simply 'to promote sustainable development', but rather to promote and protect the interests of present and future generations, in harmony with the Brundtland Commission definition of sustainable development. Through identification of policy gaps or omissions and providing early warning signals to system faults, the institution would seek to address and remove conditions that encourage inequity and social exclusion. In that sense, the High Commissioner would act as an advocate for the interests of future generations across the UN organs and affiliated agencies, with other key global level institutions and working with Member States.

An early priority for the institution should be to lead the process of a co-ordinated UN wide strategy for protection of the interests and needs of future generations, via a General Assembly Resolution. The development of this strategy would help to explore how the interests of future generations could be better defined and distilled. As we have seen, the concept of inter-generational equity is a part of numerous UN instruments and has yet to be fully embodied. The proposed strategy should be expected therefore to ensure these mechanisms are working to best effect. The institution would work in full co-operation with the Secretary General and in consultation with UN Member States and civil society to develop such a strategy. To support this process the GA Resolution would call on all UN bodies to consider how their own procedures address future generations.

A proactive role is required with an institution which is able to scrutinize proposed projects, investigating and examining their potential impact upon future generations. The role would also provide the key initiative for monitoring the UN, its related specialized agencies and the MEA secretariats, so that an integrated approach to issues is taken at the highest level of decision making, policies, programmes and multi lateral agreements. With an evolving role, the Ombudsperson could receive and consider complaints received from Civil Society related to system faults or failures in UN policy which would sit within a formulated UN Strategy for Future Generations.

It is important that the High Commissioner, as an inspiring figure and personality provides political space to explore the scope and practical implementation of intergenerational equity. In this regard, we would consider the office to have a strong role in nurturing learning and understanding of the challenges faced by the global community, in relation to future generations and sustainability and help to collectively identify the solutions and innovative responses to them. This would encourage greater accountability by Member States, to agree and implement policies which look to the long term and in so doing, promote the interests of future generations. This doesn't mean that future generations would be considered at the expense of present generations. Rather the institution would consider the areas where it is possible to meet the needs of the present and the future.

The office of High Commissioner or Ombudsperson for Future Generations should work in close co-operation with and remain accessible to Civil Society, local communities and the public. The office would be ready to encourage and facilitate their full participation and engagement in the related issues, as key actors and drivers in implementation and to consider any of their formal submissions to the UN.

13 Some of these thoughts are taken from a joint paper from the World Future Council, The Mandate of a UN High Commissioner for Future Generations 2012, <http://www.futurejustice.org/assets/UN-High-Commissioner-for-FGs-mandate2-April.pdf>



Finally, we would expect that the institution, on request from governments or civil society groups, would help to facilitate international policy through to national implementation, through co-ordination with relevant national bodies, for example national Ombudspersons for Future Generations where they exist. It may be possible for the Ombudsperson to provide support, where appropriate to establish national, regional or local Ombudspersons for Future Generations. The smooth facilitation from international to national is not working as it should. The High Commissioner could help identify bottlenecks to implementation, good practice and innovative policies.

Annual reporting to the General Assembly on their activities would be one of the key functions, helping to inform on progress made and pointing to the challenges still to be met. Since the institution works in the interests of future generations and broader intergenerational justice, its scope would reach beyond the remit of the Commission on Sustainable Development and the UN Environment Programme even taking into account the proposed reform for both institutions. There would of course be clear synergies and interlinkages. A number of options are available on where this body could be housed, including within the Secretary General Unit, however it is important that it would not be seen as a personal initiative of any particular Secretary General. As we have remarked at the national level, an independent office within the United Nations is critical.

Resourcing

Current policy incoherence, the general zig zag of our policy making pathway, expost rejections and corrections often lead to unintended negative consequences and high economic costs in redressing these. Integrated thinking and long-term horizons can help avoid these, often even in the short term. A small office (10 people) with a multi disciplinary staff working in co-operation with existing institutions, agencies and stakeholders is a small cost compared to the savings that would be made by more efficient policy-making. From consideration of existing examples, an annual budget of US\$ 2-3 million would be sufficient.

Next Steps

Rio+20 should agree a time bound process leading to the creation of this institution. In essence, a high-level intergovernmental committee of experts would be established to include governments and representatives of all nine Major Groups to prepare a series of options on the mandate, modalities and functions. The proposal should be delivered to the UN General Assembly no later than at the termination of the next General Assembly session beginning in September 2012.

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