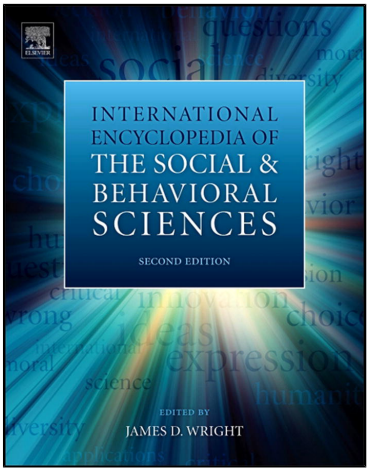

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Human Rights: Legal Aspects

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Abstract

Human rights can be viewed from legal and sociolegal perspectives. From a legal perspective, human rights are the rights derived from the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and other human rights instruments; they are enforced on both international and domestic levels. Sociolegal perspectives, embedded within the disciplines of history, sociology, anthropology, and international relations, instruct that human rights are not constrained only by law; they have their own history, sociology, social life, and transnational activist networks. The issue may be posed whether the field of human rights has moved beyond a topic of interdisciplinary research to become a distinct discipline.

Introduction

An article entitled 'Human Rights: Legal and Sociolegal Perspectives' must designate its subject matter. For this purpose, the term 'human rights' is used here to identify primarily universal or international human rights rather than rights within nation-states. Thus, by human rights, this article understands the international human rights regime rather than national ones. The two remits overlap but are distinct (Henkin, 1979). International human rights are often identified and given legal weightage by a series of international human rights treaties and declarations adopted by the United Nations (UN) (or other international organizations) in the two decades following the end of the Second World War beginning with the Universal Declaration of Human Rights (Sieghart, 1983).

It is also necessary to be clear about the perspectives from which this subject will be approached. The article is written from both the legal and the sociolegal perspective. It thus surveys a range of perspectives including but not limited to those within the discipline of law. Other articles in this encyclopedia address matters of legal doctrine related to human rights (see cross-references above).

Human rights almost need no introduction in an encyclopedic work, as their significance is widely understood. As the pioneering American law professor Louis Henkin wrote, we live in 'the age of rights' (Henkin, 1990): Many if not most of the significant issues of our day are framed in and resolved within a human rights frame of reference (Sarat and Kearns, 2001: p. 2). With significant variations across the diverse societies of the globe, this has been the case, broadly speaking, since the end of the Second World War (Minow, 2002). Further, much of the modernizing and progressive energy of social-change advocates intending to make the world a better place is often expressed in human rights terms. Indeed, this has been the case with the drive to ensure equality within and among nations, as well as with the drive to end poverty, as we have begun to recognize a human right to development (Alston, 1988). Indeed, as the world continues to globalize yet does so in new ways, the doctrine of human rights as distinct from national or constitutional rights takes on new significance. New constitutions and innovative doctrines in international law draw their social significance and legitimacy partially but increasingly from human rights.

A work of survey must start and end its mapping somewhere. In its main body, this article will first detail a legal perspective on human rights. This presentation of significant human rights instruments, institutions, and legal issues is largely internal to the human rights field and to the legal discipline. Second, the article turns to a survey of four sociolegal (interdisciplinary) perspectives on human rights, addressing works from history, sociology, anthropology, and international relations. The article concludes with a brief reflection on the development of human rights as a perspective (an intellectual discipline) in its own right.

Human Rights: A Legal Perspective

Within the discipline of law, there are a myriad of approaches to human rights. The aim here is to identify the key conceptual distinctions made, and institutions resourced, in order to provide a legal perspective on human rights.

One should start with the legal delineation and source of universal human rights. Popular usage conflates as human rights several fields of law that are often kept conceptually distinct within the discipline of law: international human rights law, international criminal law (Slye and Van Schaak, 2009; Van Schaak and Slye, 2010), international humanitarian law (Sassioli et al., 1999), and international refugee law (Goodwin Gill and McAdam, 1996; Hathaway, 2005). In practice, however, specific human rights issues may be addressed from legal perspectives based in more than one of these fields. Moreover, emerging issues (e.g., the development of international criminal tribunals and the field of transitional justice) often arise at the intersection of one or more of these fields.

International human rights law scholars tend to distinguish between international instruments under the auspices of the UN, on the one hand, and regional instruments of international law on the other. The Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted by the UN General Assembly in 1979, is an example of the former, as is the African Charter on Human and Peoples' Rights, agreed to by the Organization of African Unity in 1986. Other regions adopting regional instruments include Europe (the European Convention for the Protection of Human Rights

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and Fundamental Freedoms) and the Americas (the American Convention on Human Rights).

A further distinction within international human rights law is that between civil and political rights on the one hand and socioeconomic rights on the other. This distinction builds on the existence of three separate UN human rights instruments: the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Economic, Social and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966). Recent scholarship contests this distinction and stresses the historical and conceptual indivisibility and interrelatedness of all forms of human rights (Kabasakal Arat, 2006; Whelan and Donnelly, 2007).

From a legal perspective, human rights occasion what one might call the ideal of legal compliance with human rights. In this ideal, human rights are identified and agreed to by the UN (or a regional body of states) in the form of human rights treaties. These legally binding treaties are then enforced in three possible ways: through actions among the states themselves, through actions of agencies of the international community of states, or through domestic actions of the states ratifying and incorporating those treaties. In this ideal, the specific mode of enforcement does not assume any great significance but the fact of compliance – of adherence to human rights – does matter.

Given this ideal of legal compliance with human rights, one might identify two broad levels of formal enforcement of human rights: the international level, understood to include the community of states as well as institutions such as international courts and tribunals, and the domestic level, understood to include constitutions as well as domestic institutions such as courts and human rights commissions. Some human rights legal scholars are of the opinion that the impact of human rights treaties has been more significant through their use at the national level than through the supervisory measures they provide for, such as state reporting and individual complaints, at international levels (Heyns and Viljoen, 2001). Indeed, international human rights legal scholars have paid careful attention to whether international human rights treaties make a difference (Hathaway, 2002; Goodman and Jinks, 2003, 2004; Halliday and Schmidt, 2004).

At the international level, states can and do pressure each other regarding compliance with international human rights law. For instance, the signing of the Helsinki Final Act of 1975 established human rights as a norm ostensibly binding on all states of Europe. Following 1975, states could legitimately call each other to account on human rights issues, citing the Final Act (Thomas, 1999). More recently, over the past two decades, states have established a number of independent international tribunals with powers and procedures akin to those of domestic courts (see e.g., http://jura.ku.dk/icourts/icourt-finder/). States may have established these institutions in order to increase their own credibility in a number of multilateral settings (Helfer and Slaughter, 2005, 1997).

At the domestic level, the primary institutions seen to be implementing human rights law are domestic constitutions, courts, and human rights commissions. Thus some human rights scholars and organizations have examined the impact of the evolution of the international human rights regime on national bills of rights, arguing that the development of the regime has transformed many of the debates around domestic bills of rights (Alston, 1999). Others have argued for the articulation of a common law basis for international human rights law in order to bypass the question of the status of human rights law as 'incorporated' or 'unincorporated' (see below) in English courts (Hunt, 1997), while still others have argued that the initial performance of most African human rights commissions has been disappointing (Human Rights Watch, 2001).

Along with attention to these two levels of formal enforcement, human rights legal scholars also pay attention to questions of culture (including the issue of cultural relativism) (An'Naim, 1995) and of civil society organizing and advocating for human rights concerns (Welch, 1995).

Deeply intertwined – at least from a legal perspective – with the enforcement process are a number of issues and questions of doctrinal law. For example: (1) what rules govern the interpretation of international human rights treaties? (2) is a particular human rights instrument a treaty (and thus binding at international law) or not? (3) has the treaty been ratified by sufficient numbers of states to have entered into force? (4) has a particular state ratified the treaty and, if so, when? (5) did a particular state make any reservations (excluding or modifying its effect) to a human rights treaty? (6) what is the domestic legal effect of the human rights instrument? (7) has the state temporarily derogated from or suspended the human rights instrument? and (8) has the potential enforcement of a human rights matter exhausted domestic remedies? (Martin et al., 1997). Much of human rights law, from the point of view of its practitioners is taken up in addressing and resolving these doctrinal legal questions.

Human Rights: Four Sociolegal Perspectives

Consistent with their claimed universal nature, human rights have overlapped with nearly every discipline and significant community of practice. For instance, political scientists have long been interested in the dynamics and power of human rights, and scholars of human rights have often been its powerful practitioners and politicians. An example of the latter is Michael Ignatieff, serving as the Leader of the Official Opposition in Canada for several years. Broadly speaking, disciplines can offer both internal and external perspectives on human rights. The four disciplines surveyed below – history, sociology, anthropology, and international relations/politics – arguably go a step beyond and offer a perspective that may be constitutive of the discipline of human rights itself.

History and Human Rights

As a relatively recent development, historians have begun to explore the histories of human rights. For instance, a timely and recent cultural and intellectual history of human rights traces the roots of the concept to the rejection of the practice of torture as a means for finding the truth (Hunt, 2007). In a different vein, Moyn has argued that in the 1970s "the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before" (2010: p. 1). First, other histories narrow their focus and probe the origins of human

rights within a particular national jurisdiction, such as in South Africa (Dubow, 2012). The study of human rights takes such scholars into a particular specialist area of law – human rights – but human rights arguably presents no greater methodological challenge than the one faced by historians of business studying the development of the railroad industry in the nineteenth century. For historians, the entire field of social activity is available as data and evidence. Still, these histories of human rights have been influenced by two hallmarks of a sociolegal perspective: first the attention to the 'gap' between the law 'on the books' and the law 'on the ground' and, second, the attention to the variety of ways in which law and the variety of interpretations of law interrelate and influence each other.

Sociology and Human Rights

While the recent attention to human rights within sociology has picked up from the mid-2000s, there has been earlier attention. One strand of such attention draws upon the key normative concerns of the discipline. Turner, for instance, made an argument for a sociology of human rights that would serve as a substitute for national citizenships, which he saw as inherently limited (Turner, 1993). Sociologists have continued to work within this universalizing moral and normative vein (Soysal, 1994; Turner, 2010; Friesen, 2011a). Friesen has argued that "A human rights approach offers an opportunity to unite apparently disparate concentrations of the discipline – such as race, class, gender, sexual orientation – into a larger framework which analyzes equality and fairness on a *human* scale" (Friesen, 2011b). The sociological perspective can also bring two important correctives to practitioners of all types working in the field of human rights: a certain degree of reflexivity about the use of human rights tools as well as a way to exhibit "a reliance on legal institutions that remains aware of their limits and their own direction" (Hagan and Levi, 2007: p. 373).

Anthropology and Human Rights

Anthropologists have recently realized that they have much to offer to the field of human rights. Anthropologists emphasize what Richard Wilson terms 'fully documenting the social life of rights,' by which he means "the social forms that coalesce in and around formal rights practices and formulations, and which are usually hidden in the penumbra of the official political process" (Wilson, 2006: p. 78). For instance, one anthropological strand of productive research has been concerned with human rights and the police (Hornberger, 2011, 2010). Anthropologists have also offered the insight that human rights thinking itself originates within a specific culture that has often resided within and been symbiotic with American institutions, including notably American law schools (Riles, 2006).

One concept key to human rights that can be emphasized from the discipline of anthropology is what Mark Goodale, working with an ethnographic and critical approach to human rights, has termed 'betweenness.' Goodale and Merry describe "the locations where human rights discourse emerges in practice as 'between' the global and the local" (Goodale, 2007: p. 22; Goodale and Merry, 2007). For them, "betweenness is meant to express the ways in which human rights discourse unfolds ambiguously, without a clear spatial referent, in part through transnational networks, but also, equally important, through the projection of the moral and legal imagination by social actors whose precise locations … within these networks are (for them) practically irrelevant" (Goodale and Merry, 2007).

International Relations/Politics and Human Rights

International relations/politics has taken on the study of human rights as one of its core topics of research. Perhaps the classic theme in this field is to ask the question whether the norms of international human rights have had any effect on domestic governments (e.g., Risse et al., 1999). The answer, by and large, is often positive although usually not determinative or conclusive. An additional theme is to examine the working of the human rights movement. Here, one work that has achieved great prominence and influence is Keck and Sikkink (1998). Keck and Sikkink introduce network analysis to the study of human rights activists and work with the concept of transnational activist networks. In their view, human rights networks are "vehicles for communicative and political exchange, with the potential for mutual transformation of participants" (1998: p. 214).

Conclusion: A Reflection on Human Rights as a Distinct Discipline

This section asks the question whether the field of human rights is, or is becoming its own discipline, in the sense of an intellectual school of thought (which often bear a parallel to institutional developments in centers of knowledge production such as universities).

There is clearly a tradition of human rights scholarship that spans both a significant time period and a range of perspectives. For instance, one can track the development from the formative and field building work of Jack Donnelly (2013) to the more critical approach of Makau wa Mutua (1996, 2001, 2002). The former was deeply committed to the universal impulse of the human rights field and the latter, while departing from and using that assumption as a starting point, is nonetheless fundamentally critical of earlier work.

Moreover, approaches based within the human rights field have shown their power to reveal insights. For instance, one approach that might be understood to be located within a distinct human rights field is that of Martha Minow. She studied a range of responses to human rights violations, genocide, and other instances of mass violence. In her view, law can provide a repertoire of such responses (1998). This focus has led Minow to identify an institutional characteristic of responses to human rights violations that can be understood to run parallel to the betweenness concept identified at the heart of human rights practice by Goodale and Merry. In Minow's view (2002: p. 59), "[t]he advocates of human rights have generated innovative institutions and practices, yet the successive and multiple nature of these innovations can contribute to the sense that human rights are merely ideal aspirations and, in practice,

insecure. Yet this tradition of institutional innovation may be the most significant legacy of the human rights movement."

Furthermore, analyses based within the human rights field have had significant impact in the world of the academe as well as in the policy world. For instance, as influential a thinker as the philosopher and economist (not to mention his being a winner of the Nobel Prize) Amartya Sen has worked extensively within the field of human rights (1997, 2004). This impact has also been in the form of new knowledge creation. The field of transitional justice saw great growth as a specialized and potentially distinct field of practice and knowledge in the 1990s and 2000s. However, transitional justice seems not to have achieved status on its own as a discipline. Instead, the growth of the transitional justice field (which may best be understood to be included within that of human rights) seems rather to indicate the depth and diversity of topics within the human rights discipline.

An alternative to seeing human rights as a distinct discipline is to see it as an interdisciplinary field of study. Here a parallel to sociolegal studies itself may be illustrative. Sociolegal scholars have also asked whether their corner of the academy is a distinct discipline. By and large, the answer has been in the negative. It would seem that human rights rather than sociolegal studies has a better claim to (and chance for) distinct academic discipline status. Indeed, if the study of human rights is not a distinct field, then human rights is at least a topic for interdisciplinary work (Freeman, 2011). This article thus far might be seen as an example of an interdisciplinary approach toward a new and significant research topic. Work such as the recent history of human rights (Moyn, 2010) demonstrates a step toward such a development.

See also: Civil Liberties and Human Rights; Human Rights, Anthropology of; Human Rights, History of; International Law and Treaties; Torture: Legal Perspectives.

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