

Law Meets Sociology in Human Rights

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This paper discusses the merits of a multidisciplinary approach to human rights. Since 1945, the building of a global legal architecture, including norms and institutions at various levels of regulation, constituted tremendous progress for human rights. However, lack of compliance, individualization of human rights claims, and formality have made laws ineffective in protecting wider human population. Multidisciplinarity in human rights mainly emerged as a remedy of an exclusively legal approach. Being realistic and empirical, multidisciplinary efforts help expand the definition of human rights to increase its effectiveness for populations or cultures under threat as well as large groups of people.

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Knowledge through discipline

In order to master knowledge, science uses divisions in disciplines. A discipline thus allows singling out certain types of evidence, while other aspects of the object of study can be left aside because they are not relevant within the disciplinary framework, and should be dealt with elsewhere, and by others. Reality is complex, but the disciplinary lens allows us to make sense of it, and to act on specific problems: “Disciplinary boundaries are of utility in advancing knowledge, because ‘each discipline throws light on a set of variables precisely because other factors are assumed to be external’” (Bank and Lehmkuhl 2004).¹

Depending on the problem, society turns to a different professional who has specific expertise to offer. There is no general expectation that each expert knows the other expert’s field, even if all experts share the same study object. Experts in one category may confer with experts in the other category, but they mainly talk among themselves. Disciplines create “communities of competency,”² that share a specific set of goals, concepts, skills and methodologies. Vick points out (2004, pp. 163-93) that distinctions between areas of knowledge are essentially a social construction — strengthened by disciplinary education as a prerequisite for entry into a professional career. Once boundaries are settled, disciplines evolve their own modes of discourse. New information needs are processed through a set of pre-existing cognitive structures. Disciplines also maintain order and control; they are a power structure through which decisions on inclusion or exclusion are made. Disciplines exercise discipline, and are essentially self-regenerating.

Communities of competency thrive at universities. In the words of Canadian political philosopher Ralston Saul, a university is:

A place in which civilization’s knowledge is divided up into exclusive territories. The principal occupation of the academic community is to invent dialects sufficiently hermetic to prevent knowledge from passing between territories. By maintaining a constant flow of written material among the specialists of each group they are able to assert the acceptable technique of communication intended to prevent communications. This in

¹ MPI Collective Goods Preprint No. 2000/15, on October 16, 2000. Available at SSRN: <http://ssrn.com/abstract=267704> or DOI: 10.2139/ssrn.267704.

² The concept is borrowed from Thomas Reese (1995, pp. 544-49).

turn establishes a standard which allows them to dismiss those who seek to communicate through generally accessible language as dilettantes, deformeders or populizers. (Saul 1994, p. 301)

At the same time academics tend to celebrate individualism. Talk about duties owed to the faculty and collective research is met with disgruntled appeals to academic freedom. As Cervantes once remarked in a completely different context: “It’s one thing to praise discipline, and another to submit to it.” So inevitably the insistence on disciplinary divisions creates a counter-reaction, most visibly through the setting up of educational programs (particularly at the bachelor level) that defy disciplinary boundaries, and refer back — at least rhetorically — to historical ideas of unity and synthesis of knowledge.

But the push to move beyond disciplinary boundaries is not limited to the field of education. It also extends to research. In her classic book on *Interdisciplinarity*, Klein offers the following list of objectives that interdisciplinarity seeks to achieve:

Educators, researchers, and practitioners have all turned to interdisciplinary work in order to accomplish a range of objectives:

- to answer complex questions;
- to address broad issues;
- to explore disciplinary and professional relations;
- to solve problems that are beyond the scope of any one discipline;
- to achieve unity of knowledge, whether on a limited or grand scale. (Klein 1990, p. 11)

In theory, a clear distinction can be drawn between *interdisciplinarity* and *multidisciplinarity*. Multidisciplinarity refers to the sum total of knowledge derived from different disciplines on a given subject. As a minimum, multidisciplinary work requires “the mutual awareness of other (sub) disciplines’ ontologies, epistemological assumptions and methodologies as indispensable preconditions for reaping the benefits of cooperation across disciplinary boundaries” (Bank and Lehmkuhl 2004).³

Integration is key to an interdisciplinary approach. This may consist of the use of a methodology that somehow escapes disciplinary limitations, and catches reality more fully, or of the development of a grand theory on a

³ MPI Collective Goods Preprint No. 2000/15, p. 2.

specific issue that is disconnected from any specific discipline, but is based on an amalgam of methods and findings. Real research ventures, educational programs, or strategies may defy easy classification under either label.

Even multidisciplinary brings many risks. Most scholars only engage in multidisciplinary work after completing a disciplinary training. In practice, multidisciplinary then means opening up to insights from disciplines that one is almost inevitably less familiar with. Klabbers notes that interdisciplinarity “often presumes a flat, one-dimensional vision of the discipline-to-relate-with” (2005, p. 37). This happens for instance when for the sake of expediency international relations theory is reduced to a single school of thought, such as realism, or to a significant author within that school (say Morgenthau or Huntington).

A similar problem arises when concepts are borrowed from another discipline without the rigor that the discipline itself requires. A relevant example is the widespread use of the notion of “generations” of human rights in legal and political science oriented research. Civil and political rights are referred to as the first generation of human rights. Economic, social and cultural rights are the second generation. Collective rights constitute the third. The term ‘generation’ is borrowed from history — the implication is that the historical development of human rights went through three subsequent phases. Historians however point out that during previous centuries this linear development of human rights never happened (compare Freeman 2002, p. 39). Talk about generations of human rights became popular during the cold war period because it served the agendas of different geo-political groups. Perceiving of civil and political rights as the first generation, allowed stressing their importance. Ironically, during the Cold War period itself, the different categories of human rights did develop at a different pace at the international level, precisely because the ideological divisions between East and West, and North and South had an impact. Generations talk declined again after the Cold War, when the UN at the 1993 World Conference on human rights officially proclaimed the equal importance of all human rights. An appeal to multidisciplinary may serve an agenda that would be more difficult to achieve if disciplinary rigor applied.

The remainder of this text will discuss the merits of a multidisciplinary approach to human rights. The starting point, however, will be law. There are two arguments for doing so. An objective argument is that after 1945, law became the dominant human rights discipline, for reasons set out below. Multidisciplinary in human rights mainly emerged as a critique of an

exclusively legal approach. It therefore makes sense to first explain what that legal approach consists of. Subjectively, my own training is as a lawyer. Law, — and in particular international law —, determines my perspective on multidisciplinary.⁴

It may be useful to briefly offer a flat one-dimensional view of law as a discipline before moving into the area of human rights. Dictionaries define law as a collection of rules of general application that govern the relationships between human beings and can be enforced by an authority. Lawyers mainly work with text (where the law can be found). Methodologically, the essence of the discipline is to use “particular interpretive tools and critical techniques in order to systemize and evaluate legal rules and generate recommendations as to what legal rules should be” (Vick 2004, p. 165). Interpretation is of particular importance because although laws are generally applicable, they need to be applied to specific instances of infinite variety.

The legalisation of human rights as progress

The inclusion of references to human rights in the UN Charter and the subsequent adoption by the United Nations of the Universal Declaration of Human Rights (UDHR) in December 1948 served as the starting point of the legalisation of human rights at the international level. Human rights violations became an issue of legitimate international concern, to which, if the violations were sufficiently serious, the defence of domestic sovereignty was of no avail.

The Universal Declaration has had, in the words of Richard Falk, “an extraordinary cumulative impact on the role of human rights in international political life” (Falk 2000, p. 53). The adoption of the UDHR boosted the idea that human rights were of universal validity, and the text still enjoys wide support in both governmental and civil society circles. The Universal Declaration has acted as a “persuasive, liberating force for individuals and groups” (Alves 2000, p. 500) even in contexts unforeseen by the drafters of the text (such as decolonization).

In law, the Universal Declaration was a non-binding resolution of the UN General Assembly, but it set the direction for the standard setting and monitoring activities of the United Nations in the field of human rights.

⁴ The choice for ‘multidisciplinary’ rather than ‘interdisciplinary’ in the title of this piece reflects this limitation.

International human rights law developed out of the UDHR. The United Nations currently identifies seven core international human rights treaties that are binding on the States that become a party to them.⁵ With the exception of the Migrant Workers' Convention, the treaties have been widely ratified. Non-ratifying States are still bound by human rights law to the extent that human rights have become part of customary international law. Both the International Court of Justice and the international criminal tribunals have asserted in their case law that (a number of) human rights achieved the status of international customary law (See Oraá Oraá 2006, pp. 123-27). The normative development of international human rights law still continues, — the International Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006, and the International Convention on the Protection of all Persons from Enforced Disappearance was adopted on 6 February 2007 —, but it can safely be said that a comprehensive body of international human rights law now exists that entails binding obligations for all States.

Developments at the international level coincided with the legalisation of human rights at the regional level (in the context of regional intergovernmental organisations, such as the Council of Europe, the Organisation of American States and the African Union) and at the domestic level (human rights were included in numerous domestic constitutions and in national legislation).

The building of a global legal architecture, including norms and institutions at various levels of regulation, constituted tremendous progress for human rights. As Donnelly points out, today still the demands of most human rights advocates and victims typically involve direct or indirect

⁵ The core international human rights treaties are:

International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965 (173 States parties);

International Covenant on Civil and Political Rights, December 16, 1966 (160 States parties);

International Covenant on Economic, Social and Cultural Rights, December 16, 1966 (155 States parties);

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), December 18, 1979 (185 States parties);

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984 (144 States parties);

Convention on the Rights of the Child, November 20, 1989 (193 States parties);

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, December 18, 1990 (35 States parties).

Status of ratification on December 6, 2006, except CEDAW status of ratification on November 2, 2006, and Migrant Workers' Convention status of ratification on January 25, 2007.

appeals for effective legal protection or redress (Donnelly 2006, p. 77). Law brought enforceability to human rights in many parts of the world. Individuals who felt their rights were violated could stand up for themselves in court instead of having to rely on benevolence. Those entrusted with providing protection became accountable.

The process of legalisation of human rights also established law as the dominant discipline in human rights. Many lawyers perceived of legalisation as the final phase in the development of human rights. Legalisation perfected human rights. They moved from the realm of ideas to the world of practical solutions. As codification and confidence progressed, the argument emerged that only legal rights could qualify as human rights. Human rights that could not be enforced through law were not rights at all; they were mere claims. Lawyers taking this line were at least implicitly declaring other disciplines irrelevant, or at best of secondary importance to human rights. In Donnelly's words:

Law interacts with but it is also distinct from both morality and politics (...) Legal norms ordinarily trump not only mere preferences but appeals to social utility (...) It is thus of immense practical importance that virtually all states have accepted human rights as a matter of positive international legal right. (Donnelly 2006, p. 69)

The essence of the legal art of human rights consists of the application of human rights law to a specific case. A human rights lawyer confronted with an individual complaint alleging a violation (usually by the State), goes through a number of steps in order to assess whether the law was violated in the specific instance. Nowak describes the process as follows (2003, p. 57):

Scope of application – does the measure that is complained of involve a human right as defined in the applicable law?

Interference – does the measure interfere with a human right?

Justification – are there grounds for justifying interference, and if there are, has the proportionality principle been respected (does the measure not go too far even if the aim of the restriction was legitimate)? Without justification (lawful restriction), an interference amounts to a violation.

Perhaps a further step could still be added:

Reparation – if a violation is established, was a remedy provided to the

victim resulting in adequate reparation of the damage?

Usually the person in charge is a judge. Judges play an essential role in human rights law, because human rights norms tend to be formulated in general terms, and in case of a conflict between parties on how a norm should be interpreted in a specific case, the judge will have the final say. The application of the proportionality principle in particular involves a degree of personal assessment. The profile of the judge clearly matters. Ideally, judges have been trained in human rights law, and are therefore able to successfully resolve difficult problems involving different moral standpoints, that would not easily be solved through politics (compare Meckled-García and Çali 2006, p. 3). On the other hand, the political or societal context may also influence the judge. Context may explain why judges give divergent interpretations to the same international treaty in different domestic legal orders.⁶ In any case, as Freeman points out (Freeman 2006, p. 49), giving a key role to judges is not a politically neutral choice, and the ideal judge that human rights law has in mind, may not materialise in reality.⁷

Perspectives on human rights law from other disciplines

Explaining the limits of the law

(1) Lack of compliance

Lack of compliance is a major problem in human rights law. There is a gap between the norms that are proclaimed and their actual implementation.

The legal discipline can offer a partial explanation of why this is so. Human rights norms can be evaluated. Their weaknesses can be discovered. Recommendations can be formulated as to how wording can be improved. Any student of human rights law will establish very quickly that international human rights treaties include norms that are imprecise or conditional, and that international monitoring mechanisms provide few remedies. There is no legal reason why these flaws could not be remedied. Dispute settlement

⁶ Bank and Lehmkuhl offer the example of the diverse interpretations by national courts of the 'refugee' definition in the 1951 Geneva Convention relating to the Status of Refugees, and particularly the issue of whether persons persecuted by private actors come within the scope of the definition. See Bank and Lehmkuhl (2004, pp. 3-4).

⁷ For a sobering global survey of the conditions in which judges work, see Oxner (2003, pp. 307-76).

bodies in international trade law, for instance, routinely impose legally binding decisions and sanctions in case of non-compliance.

Nevertheless, other disciplines than law offer deeper explanations of why compliance problems arise at a particular regulatory level. They identify factors from outside the legal sphere:

... while the lawyer looks at the letter and system of the law and therefore at the visible outcome, the political scientist looks at the processes which led there instead, the politics lying behind it, and how things work in practice, reflecting a large variety of influential factors ...⁸ (Bank and Lehmkuhl 2004, p. 6)

A real understanding of compliance problems in international human rights requires building on insights from international relations theory, for the simple reason that international human rights law is a product of the international relations between States. It is a principle of international law that States can only be bound by their own consent, and thus cannot be forced to ratify international human rights treaties. But it is international relations theory that explains why States undertake international commitments or refuse to do so, why other States insist on compliance or not, and whether States are vulnerable to such pressure or not. Those factors are essential in understanding the selectivity of the UN's political human rights bodies, or the weaknesses of the wording and the monitoring mechanisms in the treaties:

“There is a continuous attempt to balance the interests identified by human rights claims with the interests of political community, the State and nation. That continuous attempt is characteristic of international human rights law. It is also the source of discrepancy between human rights ideals and international human rights law.” (Meckled-García and Çali 2006, p. 25)

Insights from international relations theory are essential in order to assess objectively what the international human rights regime can and cannot achieve — not in order to “sell out to the realists” (Klabbers 2005, p. 41) —, but in order to devise a human rights strategy that uses the different regulatory levels as effectively as possible.

Sociology is traditionally concerned with understanding similarities and

⁸ MPI Collective Goods Preprint No. 2000/15, p. 6.

differences in the way societies develop. These are made clear through cross-cultural comparison, and by identifying variables that impact on and explain social action. Human rights gradually became sufficiently significant to be studied as a variable: an external (part of the international environment that influences how societies develop) or internal (a value supported by domestic social groups) factor that influenced social action at the domestic level.

When sociologists turn to human rights as such as a study object, their interest is in the social construction of rights, i.e. they will point out that human rights are historically situated and contextually bound:

“... Rights are neither self-generated nor self-enforcing, but rather summarize, make concrete, and depend for much of any protective effectiveness they may possess on the nature of wider sets of social relations and developments within them.” (Woodiwiss 2006)

Sociologists are therefore also able to offer explanations of why human rights compliance varies in different societies. In her study on abuse of personal integrity rights in three societies (Cuba, El Salvador and Nicaragua), Gomez describes her methodology as “comparative-historical sociology.” This involves the use of analytical historic narrative allowing her to sequence and order historical events, which can be studied for their causal significance. The comparative component aims at defining the limitations of theory generalization and establishing an empirical basis for policy-making (Gomez 2003, pp. 85-88). Gomez identifies both internal and external factors that explain shifts in degree and types of abuse over time. The external factors included geo-political shifts, external support of abusive regimes, external threats, international peace initiatives and international normative criticism. The internal factors included internal threats and pressures, sudden and undemocratic regime changes and State fragmentation (Gomez 2003, pp. 184-91). Although law is relevant in framing some of these factors (laws can facilitate international criticism, formally protect territorial integrity and democracy etc.), the significance of law is not highlighted. Rather than law, the key concept used in the study to explain change in behaviour is ‘pressure’ that is “conceptualised as operating on a continuum which ranges from ‘threat’ to ‘support’” (Gomez 2003, pp. 92), and can be internal as well as external.

Another more recent sociological contribution focuses on the effectiveness of global human rights campaigns by transnational advocacy

networks.⁹ Interestingly, the scope of this research may well extend beyond how such networks impact on *domestic* society, and focus instead on the *global* “society,” i.e. on how social interaction takes place at the international level. As a consequence of globalisation, global social spaces have now become a valid object of sociological or anthropological research.¹⁰ Studies on how civil society campaigns influence international standard setting or the creation of new international institutions (e.g. see Greedy [2004]) are a good example of this type of research.

O’Byrne makes a conscious effort to analyse various human rights problems, such as genocide, from a multidisciplinary perspective (O’Byrne 2003). No doubt a valid starting point for a study on genocide is the legal definition contained in the 1948 UN Genocide Convention:¹¹

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Clearly, the legal prohibition of genocide did not prevent the occurrence of a number of genocides after the Second World War, even if States ratifying the Convention were under a legal obligation to prevent genocide.¹² A legal critique of the Convention may show that the international definition omits social and political groups as victims of genocide — the mass killings perpetrated by the Khmer Rouge in Cambodia were ideologically driven — and that a monitoring mechanism is completely absent.¹³ But as O’Byrne

⁹ A term coined by Keck and Sikkink (1998).

¹⁰ For an interesting example of such an approach see Engle Merry’s analysis of global human rights negotiations (Merry 2006, pp. 36-71).

¹¹ See Article 2, Convention on Prevention and Punishment of the Crime of Genocide, December 9, 1948.

¹² See Article 8, Convention on Prevention and Punishment of the Crime of Genocide, December 9, 1948.

¹³ The Statute of the International Criminal Court was adopted in 1998, forty years after the Genocide Convention.

points out, an explanation of why genocide occurs requires going beyond the defects of the Convention. The genealogy of genocides needs to be traced over time. An insight into theories of human nature is necessary in order to understand the psychology of perpetrators. A study of the nature of societies will explain under what conditions they develop a capacity for genocide (O'Byrne 2003, pp. 299-336). These conditions include scarcity and unequal distribution of resources, with groups rivaling to achieve control, and thus point to the usefulness of a political economy¹⁴ analysis. It also follows that only a multidisciplinary strategy is able to address the prevention of genocide in a meaningful way.

(2) The limited impact of litigation

The preferred strategy for establishing violations and ensuring reparation in human rights law is the litigation of individual claims. Assessments of violations depend on an analysis of the specificities of the individual case under review. Not only are human rights formulated as individual rights, access to procedures both at the domestic and at the international level that provide remedies are open primarily to individual claimants, even if the purpose of the complaint is to highlight the plight of a community or a structural cause of violations (such as gender discrimination or poverty). The individualisation of human rights claims does not facilitate dealing with group matters.

Clearly the impact of litigating cases on the human rights situation in the society at large varies. Legal victories in human rights cases may be of symbolic value, and of immediate practical use only to the individual claimant. The impact on society as a whole depends on politics and social action, not on the judgement as such. Some have argued that establishing accountability for individual human rights violations can even be counterproductive from a human rights point of view, because a focus on individual violations may create the false impression that structural causes underlying the violations are addressed, and impede real action. Mamdani thus developed the argument that it is less important for the future of human rights in post-genocide Rwanda to hold perpetrators of human rights violations accountable than to transform the racist and hierarchical structure of the Rwandan government and society (Mamdani 2001, pp. 270-76).

¹⁴ Political economy focuses on the interaction between the market and the state, both at domestic and international levels.

(3) Legalisation as closure

Another critique of the legalisation of human rights is that it reduces the content of human rights to their legal definition. Although it is clearly advantageous to the victim that she is able to argue human rights in law, care should be taken not to define human rights in terms of their legal content only.

Both the United Nations Charter and the Universal Declaration of Human Rights avoid taking position on the philosophical origin of human rights. The large majority of those involved in drafting the texts agreed on a common understanding of human rights, but their philosophical justifications varied. The preamble of the UN Charter acknowledges that the source of human rights lies outside international law by *reaffirming* faith in fundamental human rights, rather than simply providing for them. Similarly, the Universal Declaration's preamble refers to the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." On the one hand, it is important that the documents recognise that law is not the source of human rights, because this allows further normative development in human rights. By failing to identify the source of human rights, however, the documents give no direction to this process, leaving the field wide open to power politics.

Freeman thus perceives of the Universal Declaration and the subsequent legalisation of human rights as an attempted point of closure of the debate on the philosophical justification of human rights. Ignoring the philosophical origin of human rights is a problem, however, 'because if the concept of human right has no philosophical justification, then its claim to have moral force is unfounded' (Freeman 2002, p. 42).

In reality, as codification progressed, the earlier norms set the direction. Proposals on new (aspects of) human rights had to fit within the confines of existing legal norms, and within the confines of existing legal techniques. There is no philosophical reason why only States (and not corporations, for instance) should have human rights obligations, but in current international law technically only States can ratify treaties containing legal obligations — which explains why the whole international protection system is based on the State as the duty holder, even if in practice many other actors may abuse human rights.

For Baxi, the adoption of the Universal Declaration was of great importance, because it meant recognition by the international community of those whose suffered abuse, regardless of where they were. He conceives of peoples and communities as the primary authors of human rights. Their

resistance to (abusive) power:

(...) at a second order level [is] translated into standards and norms adopted by a community of states. In the making of human rights it is the local that translates into global languages the reality of their aspiration for a just world. (Baxi 2002, p. 101)

At the same time the Universal Declaration was the starting point of a codification process based on negotiations among governments (who have legislative power in international law). The adoption of international norms created a distance between those experiencing abuse, and those deciding whether that abuse qualified as a human rights violation:

... when read sociologically, the coverage, content, inclusions and exclusions of rights texts tell us not only who is protected against what, but also the sort of people and the aspects of social relations that are especially valued (or not) by the governmental body responsible for constructing, approving and enforcing the regime. (Woodiwiss 2006, p. 33)

Governmental negotiations on human rights reflect the same power relations that determine the whole of international relations, and so outcomes will reflect the interest of hegemonic States. The search for broad coalitions also leads to an international human rights law that focuses on the lowest common denominator. The result is that human rights:

As they are now predominantly understood (...), are a kind of Esperanto, which can hardly become the everyday language of human dignity across the globe. (Sousa Santos 2006, p. 69)

In the increasingly complex UN human rights architecture, very little remained of the bottom-up process of rights discovery that Baxi celebrates, so much so that rediscovering peoples and communities as primary authors — a process I have described elsewhere as *localising* human rights (De Feyter 2007)¹⁵ — is now a major challenge for the global human rights system, at least if the local relevance of human rights to Everyman is to improve.

Poor communities may not recognise what they define as their primary

¹⁵ In print. Earlier version published as discussion paper in February 2006 at the Institute of Development Policy and Management, Antwerp. <http://www.ua.ac.be/dev>.

human rights needs in international human rights law as it stands today. They may prefer 'some other language of resistance' in their attempt to achieve human dignity:

[...] social movements pose a central challenge to international law in several areas. First, they seek to displace the liberal theory of international politics with a 'cultural politics' that seeks alternative visions of modernity and development by emphasizing rights to identity, territory and autonomy. Second, they show that the mainstream human-rights discourse is extremely limited which does not have the cognitive ability to 'see' much of the resistance of social movements. Engaging with the theory and practice of social movements is necessary to convert human-rights discourse from its narrow, state-centred, elitist basis to a grassroots-oriented practice of the subalterns. (Rajagopol 2003, p. 271)

So it would seem that from a social justice perspective, there are two possible options: either reinterpreting human rights so as to open them up to human rights needs as locally perceived (with local perceptions to be established on the basis of social science research), or accepting the limitations of the human rights discourse and invoking other concepts to achieve a dignified life for more people. Such other concepts could include notions like (global) justice, solidarity, equity¹⁶ and so on.

Nevertheless, some groups are able to connect local agendas even to current international human rights law. In a fascinating account on the struggle of the Ogoni to achieve participation in oil exploitation in Nigeria, Bob (2002, pp. 139-44) shows that the reframing by the Ogoni of their claims in terms of human rights and environmental policies was essential in raising international awareness about their plight. The original Ogoni agenda was

¹⁶ Note that even the European Union's draft Constitutional Treaty (October 29, 2004) offers a catalogue of values next to human rights on which its internal and external policies are based:

"Article I-2 The Union's values

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The 2006 World Bank Development Report advocates taking explicit account of *equity* in determining development priorities: public action should aim to expand the opportunities of those who, in the absence of policy interventions, have the least resources, voice, and capabilities. See World Bank (2005).

drafted in response to the domestic political context and focussed on achieving political autonomy in Nigeria. Internationally, this was not a popular cause. Only when Ogoni organisations started highlighting environmental abuses caused by a major transnational corporation, and the violence used by Nigerian security forces against Ogoni opponents, were they able to put the Ogoni issue on the international agenda, first of major non-governmental organisations, and subsequently of the international community as a whole.

Similarly, gender-based NGO's in India until the 1980s framed their activities in terms of 'social work' or 'economic development.' The same NGOs now use the language of 'violence against women' and 'human rights.' The change came about as a consequence of global networking; the use of human rights terminology enabled the groups to connect to UN organised conferences, coalitions working on women's rights, and international donor agencies. Singh (2001, pp. 120-27) points out that there is a risk in reframing local issues in this way — namely a loss of identity for the organisation and a loss of control: the change in vocabulary influences the development of the group's agenda, and may make it much more vulnerable to external influence (e.g. by donors that push their own preferences).

Community organisations need to be strategic in the use they make of international human rights law, in order not to become irrelevant to issues that have important local, but little global relevance or appeal. On the other hand, if international human rights law is to become more inclusive in terms of the protection it offers, it needs to open up more to human rights needs as defined by local communities. From a methodological perspective, much can already be achieved by interpreting existing human rights norms in the light of data collected through social science methods on how these norms relate to the living conditions of the relevant communities and how the communities themselves perceive of them. The final section takes up this issue.

Opening up the law

Lawyers work with text. In international law, interpretation of text allows attributing meaning to a treaty provision in the context of a specific dispute. Treaty rules tend to be formulated in the abstract, as drafters wish that the treaty rules should be capable of general application. At the same time, the abstract, general nature of provisions opens the door for disputes about what a rule means in a specific circumstance that was perhaps not foreseen at all at

the time of drafting.

The law of treaties offers legal professionals rules on interpretation, but law is not the only discipline intent on detecting meaning. Semantics is the dominant science on discovering the meaning of expressions used in language or other systems of signs. When language refers to things and situations in the real world, natural sciences are also relevant. The continental shelf is a geographical phenomenon, and it makes sense that any legal interpretation of what that concept means takes into account the physical reality. Here, our main concern is whether the understanding or use of a term in society, or the impact of a treaty provision on society — as evidenced through the use of social science methodology — can usefully inform the interpretation of human rights treaties.

The Vienna Convention on the Law of Treaties¹⁷ includes a section on treaty interpretation that is frequently invoked in international litigation. International courts tend to use the section on interpretation as a frame of reference, without offering much clarification on what specific element of the provisions has been paramount to their findings, and without considering themselves limited to the methods explicitly spelled out in the Convention (cf. Gardiner 2003, p. 79). The Convention articles function as an aid to interpretation, rather than as a constraint.¹⁸

Articles 31 and 32 of the Vienna Convention on the Law of Treaties are relevant to our purposes.¹⁹ The provisions contain a mix of subjective and

¹⁷ Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, entry into force January 27, 1980. Official publication in the UN Treaty Series, vol. 1155, p. 331.

¹⁸ For a different argument, see Orakhelashvili, who argues that “interpretive methods are laid down in the Vienna Convention in a certain order of priority. Tribunals rarely have a free reign in applying them: they have to follow the sequence laid down in the Vienna Convention” (see Orakhelashvili 2003, p. 537). Orakhelashvili develops the argument to criticise the recent tendency of the European Court to interpret the Convention restrictively in cases dealing with the extraterritorial reach of the treaty. Clearly, there is a hierarchy between Article 31 and Article 32 of the Vienna Convention of the Law of Treaties (see also Linderfalk [2007, pp. 133-54]). Within Article 31, there is a huge amount of room for judicial discretion, and, as is argued below, judges also use interpretive methods not explicitly provided for in the Vienna Convention. As Ian Brownlie stated: “Jurists are in general cautious about formulating a code of ‘rules of interpretation’ since the ‘rules’ may become unwieldy instruments instead of the flexible aids which are required.” See Brownlie (2003, p. 602).

¹⁹ See *Vienna Convention on the Law of Treaties of May 23, 1969, Articles 31-32*:

Article 31 *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

objective elements. The subjective elements refer to the intentions of the drafters and parties of the treaty. States need to consent to be bound by treaty obligations, and such obligations should therefore be interpreted in a way that is consistent with the consent given. Hence, clarification of content may result from subsequent agreements made by the parties, subsequent State practice, evidence of the intention of the parties to give a special meaning to a term, and from the *travaux préparatoires*. At the same time, the Vienna Convention enables judges to take into account objective elements, and thus engage in more independent research that goes beyond investigating the intent of the parties. Courts can hold States to the ordinary meaning of the terms of a treaty. They can interpret a treaty in the light of philosophical foundations set out in the preambular paragraphs. They can determine what the object and purpose of the treaty is, and then construct individual provisions accordingly. Usually, courts tend to consider both the objective and the subjective elements,²⁰ but the weight given may differ on a case-by-case basis, depending on what is deemed to be an equitable outcome.

The court's degree of deference to State sovereignty also plays a role. Clearly, giving more weight to the subjective elements fits within a traditional approach to international law that stresses the sovereign freedom of States to engage or not to engage in commitments at the international level. In international human rights law, monitoring bodies have tended to stress the

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- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

²⁰ According to Ian Brownlie, the general rule on interpretation supported by the Convention is to give precedence to "the intention of the parties as expressed by the text." See I. Brownlie, *l.c.*

importance of the objective elements, even in ways not explicitly envisaged in the Vienna Convention. The Inter-American Court has explicitly stated that “In the case of human rights treaties (...) objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties.” The European Court of Human Rights has said on numerous occasions that the European Convention on Human Rights is a “living instrument which (...) must be interpreted in the light of present-day conditions”;²¹ and that the Convention should be interpreted in a manner which renders the rights not theoretical or illusory, but practical and effective.²² Such an *effective and evolutionary* approach to interpretation is not necessarily contradictory to the Vienna Convention,²³ as it could be deemed part of an ‘object and purpose’ test, but it may certainly lead to results not originally contemplated by the parties to the Convention.

Because human rights treaties confer rights on individuals, human rights bodies strive to interpret treaties in such a way that the protection offered to individuals is real. In order to check whether the protection offered is real, their investigation needs to go beyond the intention of the parties, *into reality*. At that point, social science methodology becomes relevant. Whether human rights safeguards are “practical and effective” cannot be determined on a legal basis only. Another way of making the same point, is to say that in human rights litigation, judges should not limit themselves to consider only law as a source of interpretive authority. Traditionally, The ‘ordinary’ meaning of a treaty provision in international law is the meaning as understood by the relative disciplinary community, i.e. the community of (international) lawyers (Vagts 1993, p. 484, 507-08). In human rights law, however, other interpretive communities²⁴ — using other assumptions to determine understanding —

²¹ European Court of Human Rights, *Tyrer v. UK*, judgement of April 23, 1978, par. 31.

²² E.g. see European Court of Human Rights, *Artico v. Italy*, judgement of May 13, 1980, par. 33.

²³ The section on interpretation in the Vienna Convention makes no explicit mention of either an effective or an evolutionary approach to interpretation. Antonio Cassese nevertheless argues that the authors of the Vienna Convention “set great store by the principle of “effectiveness” (...), a principle “plainly intended to expand the normative scope of treaties, to the detriment of the old principle whereby in case of doubt limitations of sovereignty were to be strictly interpreted.” See Cassese (2006, p. 179). See also, more cautiously, I. Brownlie (o.c., p. 606). An evolutionary approach stresses the need to take into account realities and attitudes prevailing when the dispute arises, rather than opinions expressed during the preparatory work of the treaty.

²⁴ Stanley Fish defines interpretive communities as “not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance

may be equally relevant for the purposes of constructing the meaning of a human rights provision, if the end-goal is to ensure effective protection.

Conclusion

Goodale reflects on anthropology's engagement with human rights since the American Anthropological Association in 1947 famously refused to endorse the idea of a universal declaration of human rights. He identifies two currents in the contemporary anthropology of human rights (Goodale 2006, pp. 3-4). According to the first school of thought, anthropologists should use their knowledge of specific cultural processes and meanings to reinforce specific projects for social change, to help prevent further encroachments against particular marginalized populations, or to do both. The role played by the anthropologists in the Awas Tingni case fits very well in this model. In Goodale's words, they argued for an expansion of the definition of human rights to increase its effectiveness for populations or cultures under threat.

The second current builds on the ethnographic tradition, and perceives of human rights as a problem that must be studied empirically. The aim is to develop a comparative database that explains how human rights actually function, what they mean for different social actors, and how they relate empirically (as opposed to conceptually) to other "transnational assemblages." The descriptive data produced through these studies could be used to make the implementation of human rights more effective, or not. Goodale argues that modern anthropology can thus tolerate or even encourage approaches that are either fundamentally critical of human rights regimes or politically and ethically committed to them (Goodale 2006, p. 5).

The functioning of human rights in a specific space at a specific time is dependent on a series of variables. Some are internal to the community under review. Others originate from the context (national, regional, global) in which the community operates. The variables are social, political, legal, economic ... They relate to belief systems, power relations, the strength of institutions, inequality, and so on. Different disciplines offer methodological

and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property." Fish continues: "Of course, if the same act were performed by members of another community (...), the resulting text would be different, and there would be disagreement; not, however, a disagreement that could be settled by the text because what would be in dispute would be the interpretive "angle" from which the text was to be seen (...). See Fish (1989, p. 141).

skills and substantive findings on the study of these variables. A full understanding of the functioning of human rights in a specific context can be achieved if the results of different disciplinary efforts are combined.

Such an analysis may show that human rights are not effective in a specific context. Arguably human rights are not effective when they fail to deliver protection to large groups of people, or to a group with a specific (economic or other) status. Inevitably, a human rights strategy that wishes to address lack of protection will need to address the same variables that impacted on human rights in the past. Inclusiveness of human rights protection thus requires the development of a multidisciplinary strategy.

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