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## The social construction of human rights

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world.

(Eleanor Roosevelt, United Nations, New York, 1958)

The contemporary production of human rights is exuberant ... [H]uman rights enunciations proliferate ... [N]ot merely do they reach out to 'discrete' and 'insular' minorities, they also extend to wholly new, hitherto unthought of justice constituencies.

(Baxi 2008: 46–7)

In 1972 Amnesty International organised a worldwide campaign to end torture. The organisation published reports on how torture remained a widespread practice in many states, and gathered one million signatures from eighty-five countries on a petition to present at the UN. Politicians, diplomats and military leaders denied that torture was going on in their states. However, the UN Convention Against Torture became international law in 1987, committing states that had signed and ratified it to outlawing torture for ever (Clark 2001; Kelly 2013).

In 2007, after decades of campaigning by grassroots organisations, supported by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and a Working Group on Indigenous Populations set up inside the UN, the Declaration of the Rights of Indigenous Peoples was finally signed and ratified by most countries in the world (with the notable exceptions of the United States, Canada and Australia). It is unclear as yet what difference international recognition of the Rights of Indigenous Peoples will make to people's lives (Morgan 2011). Nevertheless, the transnational grassroots organisation

Via Campesina is following the lead of indigenous peoples' movements in proposing a declaration of the rights of peasants to protect rural ways of life (see pp. 106–10).

In 2003 a campaign was organised by Amnesty International and Human Rights Watch to put pressure on an Islamic court in Nigeria that was hearing the appeal of a woman named Amina Lawal. She had been convicted for adultery, solely on the word of the alleged father of the child she had conceived, and she faced death by stoning as punishment. Her suffering gained a good deal of media publicity especially in North America and Europe. But a small local organisation called Baobab asked for people outside Nigeria to stop sending protest letters because they misrepresented the facts of the case and angered local politicians, religious leaders and judges. The transnational campaign was undermining Baobab's authority. The court reversed Lawal's conviction (Tripp 2006: 298–9).

In 2014, as I write, there are people who have crossed European borders without authorisation who are being detained in inadequate, prison-like facilities. They cannot be immediately returned to the countries of which they are citizens because ongoing human rights violations would make it too dangerous for them to live there. Their imprisonment would seem to be a clear violation of human rights that are supposed to protect individuals against arbitrary detention (Article 5 of the European Convention on Human Rights, Article 9 of the International Convention on Civil and Political Rights). Nevertheless, what is self-evidently a violation of human rights has been legal since the European Court of Human Rights decided in 2008 (*Saadi v. UK*) that states can detain 'asylum-seekers' for up to eighteen months without guaranteed legal representation and with only a very tenuous right to appeal (Webber 2012: 136).

These stories, complex as they are, do no more than hint at the immense diversity and scope of human rights today. Human rights demands are supported by a range of different actors: grassroots movements as well as huge international non-governmental organisations (INGOs); politicians, lawyers and judges in national states; experts and bureaucrats in inter-governmental organisations (IGOs). These actors are often at odds with each other in defining and defending particular justifications of what human rights are and should be. Human rights mobilise millions of supporters across borders, inspiring passion and hope. And they operate at and between all the different scales

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involved in globalisation: local, national, international, transnational. These scales are not 'nested', rising in a hierarchy from 'local' to a more inclusive and progressive 'global'. The scales of human rights have different significance for different actors. For some the corridors of the UN are 'local'; for some the 'national' is represented in a capital city that is several days' journey away; for some 'international' is a source of hope; for others, of fear. The stories also give some indication of the complexities of trying to achieve human rights in different contexts. Whilst in the Amina Lawal case transnational support for upholding her human rights appears to have been a liability, it was essential to winning international recognition of human rights to end torture and to respect for indigenous peoples' rights. At the same time, these examples also lead us to question the value of international human rights law as such. Is torture ended? Are indigenous peoples living in peace on their ancestral lands? The European system of human rights, for example, is highly developed, but it apparently allows violations of the right to freedom from arbitrary detention – a right that is generally fundamental at the UN.

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To study human rights we must try to take account of all these complexities. There is no doubt that this is very difficult, and much of the literature on human rights is polarised in ways that over-simplify. Much has been written, generally by political theorists, that is vehemently critical of human rights. Critics argue that human rights are depoliticising, individualising: they are enabling the world to be made secure for neo-liberal global elites rather than ending the suffering of ordinary people.<sup>1</sup> But human rights are not only used in justifications of military adventures on the part of the US-led 'coalition of the willing', and nor does using the language of human rights necessarily involve submission to neo-liberalism. Human rights *also* represent a language within which a variety of claims for justice are articulated *against* imperialism and neo-liberalism. In this respect human rights seem to offer a language to enable the taming of globalisation, to make the world more people-centred and peaceful, enhancing rather than restricting freedom, equality and trans-border solidarity.<sup>2</sup> But then it would equally be a mistake to focus *only* on *these* possibilities. The

tendency (which no doubt comes to us as a legacy of the Enlightenment) to treat human rights as future-oriented, as if they are tending, eventually but inevitably, towards a progressive end is just as inadequate as over-generalising critique. We need a research programme that is able to address *both* the progressive *and* the problematic dimensions of human rights.

Similarly over-simplified are analyses that oppose good uses of human rights 'from below' (claimed by popular movements, in civil society), from bad uses of human rights 'from above' (made by international elites, in formal organisations).<sup>3</sup> 'Bottom up' and 'top down' can be useful as a rough and ready way of distinguishing where human rights claims are coming from, and defining human rights at the grass-roots level is crucial to realising rights (as we shall see in this book). But there is no sense in claiming a right unless there is a corresponding duty to uphold that right. Claiming a right almost invariably involves altering what *elites* do – as well as, very often, re-ordering 'common sense' in everyday life. It is, therefore, impossible in practice to separate out 'pure' ethical uses of human rights from the power plays and structured inequalities that exist at every scale at which those claims are addressed.

Finally, if over-simplification is a risk in studying human rights, so too is analysis that is too complex and too vague with respect to the significance of particular actors, organisations and structures. It is IR scholars who have developed the term 'global governance'. Thomas Weiss defines it very generally as 'the sum of the informal and formal values, norms, procedures and institutions that help all actors – states, IGOs, civil society, transnational corporations (TNCs), and individuals – to identify, understand, and address trans-boundary problems' (Weiss 2013: 2). From a more Foucauldian perspective, Janet Halley argues that 'global governance' enables analyses of power as fragmented and dispersed, alerts us to the way in which uses of human rights continually call the distinction between politics and law into question, and calls attention to how human rights demands address both state and non-state forms of authority (Halley 2006: 341). These are valuable insights. But what Foucauldian approaches to 'global governance' tend to neglect is the wide range of human rights claims, and the detail of the *variable* outcomes for those who claim them. Human rights claims do not only involve expert forms of knowledge and the unfolding of ever-wider and ever-tighter rational-legal administration. Although

realising ideals of human rights does generally mean greater (or at least different) regulation of how (at least some) people act, peoples' thinking and behaviour is *always* regulated by norms – informally through social interaction if not through law. In practice, although uses of human rights may, on occasion, be undemocratic or unjust, they do not always and necessarily work to close down freedom and the possibility of more radical alternatives.

Human rights are moral claims to justice. They are not the same as legal rights. This is easily overlooked because it is so often codifications in international law that frame how human rights are understood. Human rights are almost always associated with law, at least symbolically. As we see from the stories with which I opened this chapter, however, law can be an *obstacle* to achieving human rights. To claim a right is to make a moral claim: when a person has rights they should be treated more fairly, more kindly, with more respect. It is the universality of rights – the moral conviction that just because we are human beings you and I have certain rights – that enables them to be claimed in such a wide range of ways by different actors, and in different parts of the world. It is because there is an irreducibly moral component of human rights that they can be claimed where *no* legal rights are codified – even if changes in the law are almost invariably called for as part of human rights advocacy (Sen 2007).

Being open-minded about the possibilities of human rights need not, however, mean being blindly or stupidly idealistic. It *is* possible to work against the moralising tendency within which some studies of human rights are framed – the tendency to see them as *inherently* valuable because they are beyond politics (Ignatieff 2003). Human rights are irreducibly moral, but they are also irreducibly *political*. What is politics? We can distinguish between 'politics' and 'the political' – or, as Monika Krause suggests, between politics with a small 'p' and politics with a capital 'P' (Krause 2014: 77). 'Politics' with a capital 'P' is the lobbying, debating, party politics and policy-making that takes place in and around official government organisations situated in the capitals of the world: the politics of legislatures, bureaucrats, administrators and diplomats. It is concerned above all with the *regulation* of what people do by law and public policy and it always involves negotiation, strategy and compromise. In contrast, politics with a small 'p' concerns much more fundamental questions about the very constitution of 'the social': who and what 'we' are as a society; what is

known and how; what is valued; who is to be included or excluded from consideration. Human rights are political in both senses. Human rights claims are made in 'Politics': they are claims for justice that aim to rearrange what is already accepted and normal through organisations that formally regulate how we live. But human rights claims also engage 'politics', disrupting and re-ordering taken-for-granted common sense, transforming what is accepted as normal, what counts as fair and good. In fact, studying human rights makes it clear that, at least in this case, there is no absolute separation between politics and Politics: lobbying, debating in governments and bureaucracies, and making public policy also involve the 'big questions' about who 'we' are and what we understand to be the boundaries and the ultimate values of our society.

In this book, then, I develop the political sociology of human rights to analyse the range of actors involved in making human rights claims, the types of action in which they are engaged, and the organisations through which claims are addressed. I introduce a framework for studying human rights as they are embedded in structures that give us some idea of the *difficulties* of successfully making claims for human rights, as well as the promise they seem to hold for a fairer and more peaceful world. This enables us to avoid pre-judging human rights as *either* the tools of the powerful *or* of the powerless; or as *necessarily* creating new forms of power and inequality that are as just as bad as those that already existed. As *ideas* human rights are indeterminate. Human rights claims are made in ways that are quite contradictory. One group's rights may clash with those of another group – and groups themselves are fluid and only contingently unified in alliances and in relation to 'outsiders' or enemies. And human rights are always open to being re-articulated in different ways. It is only in *practice*, in the ways in which they are put to use, that human rights take on definite, relatively fixed, forms. It is the inherently indeterminate and contestable nature of human rights that makes them so interesting and so challenging to study.

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Given their complexity, it is not surprising that human rights are of interest to people working in different academic disciplines. In the

social sciences, each discipline, with its own history, concepts, debates and methodologies, brings distinctive tools to the study of human rights. Despite the differences, however, there is consensus on one point amongst those who study them: human rights are socially constructed.

In IR, 'social constructivism' is opposed to 'realism', the dominant perspective in the discipline. For realists, states only comply with international norms where it is in their rational self-interest to do so – to enhance their security or wealth – or where they are forced to comply by stronger states. Social constructivists in IR have shown how the processes by which human rights are constructed involve *persuasion*, and not just reason or force. In IR, 'social constructivists' have been especially important in bringing the work of NGOs into focus. Under the right conditions, they argue, persuasion by NGOs can shame elites into working to end torture and murder in which they are involved – either by giving orders or by their active participation. Once valuing human rights becomes part of the *identity* of elites, they will work actively to *prevent* human rights abuses.<sup>4</sup> According to social constructivists in IR, respect for human rights can become routinised as normal in ways that constrain and guide behaviour, putting an end to abuses even in the worst cases.

There is crossover of social constructivist theories from IR to international legal studies.<sup>5</sup> In international legal studies it is common to make a distinction between 'soft' and 'hard' law. 'Hard' or 'black letter' law involves specific and precise rules, and their interpretation and implementation is delegated to a court. 'Soft' law is non-binding: although it may on occasion be referred to in courts (on its way to becoming 'hard' law), it involves norms, accepted ways of doing things that have an influence on behaviour but that are not (yet) considered as law (Abbot and Snidal 2001). For social constructivists in legal studies, 'soft' and 'hard law' is not different in kind, but only in degree. Both are developed and maintained by becoming norms of accepted behaviour. Harold Koh – an international lawyer who was an advisor to the Clinton administration – suggests that even 'soft' law can become effective where norms are debated, interpreted and eventually *internalised*: not violating human rights can become as taken for granted as observing the law that requires us to do up our seat belts when we get into a car. In his words, when it works, observing the law becomes an 'internalized normative form of behavior': part of a person's dispositions, their identity (Koh 1999). For international legal scholars, then,

as for 'social constructivists' in IR, norms influence behaviour *even when they are not backed by force*. Members of elites can be persuaded to observe human rights because they like to think of themselves as decent people. We may doubt that law ever works so well: don't people disregard it if they think they can get away with it? And we may be sceptical about Koh's confidence in the progress of human rights law in particular. Indeed, Koh himself admits that the *failures* of international human rights law are far more spectacular than its successes. But for him what is important is that international law *can* be effective *because* it is socially constructed: human rights circulate in international and domestic legal systems in ways that can come to be taken-for-granted as 'how things are' because law itself is only successful when it is part of routinised social practices.

The study of human rights is now quite well established in anthropology. This is quite a turnaround. In 1999 the American Anthropological Association confirmed its *suspicion* of human rights, declaring that '[it] founds its approach on anthropological principles of respect for concrete human differences, both collective and individual, rather than the abstract legal uniformity of Western tradition'. The focus of anthropologists was on the diversity of cultures. Since then, both 'culture' and 'human rights' have come to be understood as pluralist and dynamic, opening up a rich field of study.<sup>6</sup> For anthropologists today, human rights are not timeless, grounded in self-evident reason, nor bounded by 'culture', inherently 'Western'. Sally Engle Merry's concept of 'vernacularization', developed through her fieldwork on women's organisations resisting domestic violence, is an influential example of how anthropologists study human rights as constructed. Merry shows how human rights can be adapted to specific, local demands for justice, and at the same time – where they refer to international law that specifies rights as individual freedoms and to bodily integrity and equality – they can retain their critical force within local communities. Human rights can be local, specific *and* global, universal. They can be constructed so that they are valued in very different local contexts, whilst they enable criticisms of *other* local understandings that sanction and support inequality and violence (Merry 2006; see pp. 125–31).

It is often noted that the discipline of sociology came late to the study of human rights. Interestingly, the debate over social construction between Bryan Turner and Malcolm Waters in the journal *Sociology*

in the mid-1990s is very commonly referred to as the beginning of the study of human rights in contemporary sociology.<sup>7</sup> Turner argued that human rights need to be grounded, they must be treated as *more than* social constructions otherwise sociologists will continue to study them only as instruments of power, as positive law, or as particular to Western culture. For Turner, understanding human rights as socially constructed is one of the reasons they have been *neglected* in classical sociology (Turner 1993). Turner argues that as embodied creatures, we are inherently fragile and we need each other, but the institutions we create to reduce our vulnerability and attain security are always flawed. We should therefore understand rights as necessary: they are what people call on to protect them from institutions and from each other. In response to Turner, Waters argues that human rights cannot be seen as universal because they vary so much at different times and places. Human rights can only, therefore, be studied as social constructions (Waters 1996). Turner is correct that it is the rights of vulnerable people – the marginalised and impoverished – that are most likely to be abused. But in general it is Waters' argument that has won favour with contemporary sociologists (even if Waters actually smuggles in a realist notion of 'interests' that is not much remarked on today). We tend to be in agreement with our colleagues in other disciplines that human rights are socially constructed. Sociologists today, however, are at the same time willing to understand human rights as having effects *as if they were moral universals*; as if we must respect rights because it is the right thing to do – at least in some cases. The explosion of human rights talk since the end of the Cold War suggests that people do not need human rights to be grounded in something that is 'extra-social' in order to experience their appeal. And as sociologists we can study how human rights are socially constructed without reducing them to instruments of power or the determinants of sectional interests.

### ***Social constructions of human rights: the constraints of structures***

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All these variants of social constructionism share a key insight. To show that something is 'socially constructed' is to show that it is not inevitable or natural *but that it has effects that make it seem as if it is*. What is common to the study of human rights across disciplines

is the understanding that human rights do not rest on firm foundations, on God-given reason, 'Western' culture or human nature. What human rights are at any given time and place is contingent, historical – but they can be established to regulate what we understand and what we do.

If it is clear what 'construction' brings to the study of human rights, what is not so clear is what '*social*' adds to 'construction'. How are constructions '*social*'? And does the fact that we talk about '*social* construction' mean that sociologists have a special contribution to make to the study of human rights?

Sociologists are now beginning to study human rights – though to date we have not made as much impact as those working in IR, international legal studies and anthropology. It seems to me that because '*social*' is our business, sociology does have a special contribution to make to understanding human rights. It is true that use of '*social*' is everywhere in the social (!) sciences, to the point of becoming almost meaningless. As William Sewell notes, it is practically impossible for sociologists to answer the question 'What is "the social"?' without tautology; without using '*social*' in the answer (Sewell 2005: 319). But what '*the social*' conveys in all versions of '*social* construction' is the idea of *stability* (Latour 2005: 1). Everything may be constructed, but only *some* constructions become established, enduring across time and space. Constructions become '*social*' when they become taken-for-granted context, the 'built environment' in Sewell's apt phrase, into which we are all born and in which we live (Sewell 2005: 362). It is one of the main tasks of sociologists to bring into view the unremarked background, the enduring '*social*' of the '*social* construction' of human rights, *as well as* the foreground, the possibilities of exciting new ways of doing human rights that we read and hear about now almost on a daily basis.

'Structure' is another necessary (and over-used) concept in the social sciences. It is a way of differentiating '*the social*'. Constructions are frames (or '*meanings*'): ways of categorising reality through which people learn to understand events, situations, processes, persons in certain ways.<sup>8</sup> Structures are sequences of frames that shape how we think and what we do through *repetition*. Sociologists talk about structures of capitalism, gender and sexuality, colonialism, racism – when we analyse regular patterns in the frames that guide action. But as these examples suggest, structures are more than *just ideas*: they organise