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INTRODUCTION

LOCATING RIGHTS, ENVISIONING LAW BETWEEN THE GLOBAL AND THE LOCAL

Mark Goodale

In January 2002 Fiji presented its first ever country report to the United Nations committee charged with monitoring compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). One of the most controversial sections of the report addressed the use of the practice of *bulubulu*, or village reconciliation, in cases of rape. During the public presentation of the report in New York City by Fiji's Assistant Minister for Women, the nuances of *bulubulu* as a sociolegal practice in postcolonial Fiji were obscured within what quickly became complicated layers of political miscommunication, the imperatives of a surging Fijian nationalism, and, as always, the politicization of culture. On the one hand, the CEDAW committee, though staffed by members from a range of different countries, was required by its UN mandate to fulfill a fairly simple task: to decide whether individual countries were taking the requirements of CEDAW seriously, as measured by national self-assessments of violence against women and official responses to this violence. But, on the other hand, because CEDAW expresses both the conceptual and practical constraints of universal human rights discourse, the UN committee was prevented from considering the social contexts within which *bulubulu* functions in Fiji. To open up the possibility that CEDAW's requirements for defining, preventing, and redressing violence against women were contingent upon their correspondence with circumstance, tradition, or instrumental efficacy would be to deracinate CEDAW, to destroy its potential as one key component in a still-emergent international human rights system. As Sally Engle

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Merry explains, in her multinational study of CEDAW practices, "it is of course impossible to understand the complexities of the operation of a particular custom when a committee is dealing with eight different countries in two weeks. One cannot expect committee members to spend a month reading the anthropological literature and two weeks interviewing Fijians in order to determine the meaning of a custom" (2006: 118).

Similarly, Maya Unnithan-Kumar (2003) has written about the ways in which national discourses of women's health and development in India have been transformed over the last fifteen years by human rights activism, which has led to a shift in the way issues of fertility control and health planning are articulated and understood. After the 1994 UN International Conference on Population and Development, family planning programs in India, which had been directed toward reducing or controlling childbirths as part of earlier health and economic policies, were deemphasized in favor of a policy of contraceptive choice, which reflected the fact that "the enjoyment of sexuality" (2003: 187) had been singled out as a human right at the 1994 UN meeting in Cairo. Yet even though Indian feminists were successful in shifting the terms of the debate over reproductive health and sexuality from the "problem of childbirth" to reproductive choice as a human right, the Indian government was faced with the challenge of reconciling preexisting material, political, and cultural realities with the new discourse of "consumer choice," as Unnithan-Kumar (2003: 188) revealingly describes the way human rights language reinscribed the question of women's sexuality through the metaphor of the market.

And finally, since 1999 Bolivia has been shaken by a series of social movements that have toppled two elected presidents and have put the entire foundation of Bolivia's neoliberal restructuring in jeopardy. A key dimension to these waves of social upheavals has been the reframing of a set of very old social grievances by the nation's indigenous majority as rights claims within one of several human rights frameworks. The opposition political party with the most support by the loose coalition of indigenous groups has been the *Movimimento al Socialismo* (MAS) party (Movement Towards Socialist Party), led by Evo Morales, the leading voice of Bolivia's coca growers. Although Morales is typically described as leftist or left-leaning by the international media, in fact his party employs a hybrid rhetoric that combines old-line Marxist (or neo-Marxist) categories and imagery with an

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entirely different – and much more recent – language of human rights in order to locate Bolivian struggles over natural resources, land, and political representation within broader regional and transnational indigenous rights movements (Goodale 2006c, 2008). This normative hybridity creates awkward moments for MAS: the vision of a more equal and just Bolivia, in which indigenous people control – by force, if necessary – a greater share of the nation's wealth, coexists uneasily with a vision of Bolivia as a nation of human rights-bearing modern subjects, who demand legal and political institutions that will enforce the different international human rights provisions that have been adopted within national law.

What makes these three vignettes from the recent research on human rights practices so revealing is both what they tell us, and don't tell us. They demonstrate that the human rights regimes that have emerged over the last fifteen years increasingly coexist with alternative, and at times competing, normative frameworks that have also been given new impetus since the end of the Cold War. Eleanor Roosevelt, the chair of the inaugural United Nations Commission on Human Rights, had hoped that a "curious grapevine" would eventually carry the idea of human rights into every corner of the world, so that the dizzying – and regressive – diversity of rule-systems would be replaced by the exalted normative framework expressed through the 1948 Universal Declaration of Human Rights. In fact, the curious grapevine of non-state and transnational actors did emerge in the way Roosevelt anticipated, but the resulting networks have been conduits for normativities in addition to human rights. Ideas, institutional practices, and policies justified through a range of distinct frameworks and assumptions – social justice, economic redistribution, human capabilities, citizen security, religious law, neo-laissez faire economics, and so on – come together at the same time within the transnational spaces through which the endemic social problems of our times are increasingly addressed. Yet even though the humanitarian goals of different international or transnational actors – the eradication of poverty, the elimination of discrimination against women, the protection of indigenous populations against exploitation by multinational corporations – might be fairly straightforward in principle, the emergence of different means through which these goals are met has created a transnational normative pluralism whose full effects and meanings are still unclear. Even so, there has been at least one effect that is clear: human rights have become decentered and their status

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remains as "unsettled" as ever, as Sarat and Kearns (2002) have rightly argued.

These excerpts from the recent study of human rights also show that the *practice* of human rights is more complicated than previously thought. This complexity is partly the result of the challenges associated with conducting empirical research on dynamic and, at times, illusive transnational processes. But, even more important, the study of human rights suggests that the "practice" that is being documented and analyzed has the potential to transform the framework through which the idea of human rights itself is understood. This is because the recent research on human rights, much of it carried out by anthropologists and others committed to the techniques of ethnography, suggests an alternative to the dominant modes of inquiry within which human rights has been conceptualized over the last fifty years. To study the practice of human rights is, in part, to make an argument for a different philosophy of human rights, what we can loosely describe as an *anthropological* philosophy of human rights.

And, perhaps most consequentially, these three windows into contemporary human rights practices illustrate the poverty of theory through which transnational processes have been conceptualized, explained, and located in time and space. The emergence of contemporary human rights regimes over the last fifteen years quickly strained the capacity of existing social theoretical frameworks to explain different problems: how human rights relate to other transnational normativities; the relationship between the epistemology of human rights practices and the social ontologies in which they are necessarily embedded; the disjuncture between the universalism which anchors the idea of human rights conceptually, and the more modest scales in which social actors across the range envision human rights as part of preexisting legal and ethical configurations; the relationship between human rights regimes and other transnational assemblages that structure relations of – especially economic – production; the impact of human rights discourse on alignments of political, economic, and other forms of power, alignments which predated the rise of the international human rights system in 1948 and which are motivated by an entirely different set of ideological and practical imperatives; and so on. The social theoretical literature that has emerged over the last fifteen years as a response to problems that are related to these has proven to be, while not exactly an orrery of errors (with apologies to E. P. Thompson), at the very least a problematic source of analytical

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guidance for those interested in making conceptual sense out of human rights practice and drawing out the broader implications for the study of transnational processes more generally. The mountain of writings that examines the nuances of "globalization," the relationship between the global and the local, the emergence of new world orders or new sovereignties, the withering away of culture and the rise of global ethnoscapes, even the more promising move to envision transnational processes through network analysis, all fail, in one way or another, to capture the social and conceptual complexities documented by the recent study of human rights practices.

This volume represents a different response to this social and conceptual complexity. Through the eight chapters and four critical commentaries, the volume is intended to speak innovatively to key problems in both human rights studies and the broader study of transnational processes. Although each of the authors, in one form or another, draws from anthropological forms of knowledge in order to develop one or more of book's main themes, the volume is not directed toward theoretical debates within any one academic discipline. The book is essentially interdisciplinary and expresses what I have described elsewhere (Goodale 2006a) as an ecumenical approach to the meanings and practices associated with human rights. Besides anthropology (Goldstein, Jackson, Merry, Nader, Speed, Wastell, Wilson), the authors come to the project from professional bases in conflict studies (Goodale), religious studies (Leve), sociology (Dale), international studies (Warren), and international law (Rajagopal). This ecumenism is critical for the study and analysis of human rights, whose claims are projected across the broadest of analytical and phenomenological boundaries, but whose meanings are constituted most importantly by a range of social actors – cosmopolitan elites, government bureaucrats, peasant and other organic intellectuals, transnational nongovernmental organizations (NGOs) and their national collaborators – within the disarticulated practices of everyday life.

THE DIFFERENT MEANINGS OF HUMAN RIGHTS

Before moving on to describe the book's main themes in more detail, it is necessary to consider the question of what human rights are and to locate this volume in relation to the different approaches to this question, which entail, as will be seen, much more than semantic or

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academic distinctions.[1] These different orientations to the problem of human rights as a normative category can be usefully placed on a spectrum of degrees of expansiveness. At one end of the spectrum, the restricted one, are the different variations of the view that "human rights" refers to the body of international law that emerged in the wake of the 1948 Universal Declaration of Human Rights and follow-on instruments. These different variations all express a broadly *legal* understanding of human rights. Although the legal approach to human rights is itself fragmentary and internally diverse – for example, some argue that human rights must be enforceable in order to be considered human rights, while others avoid the problem of enforceability – there are some important commonalities: the idea of human rights must be legislated, legally recognized, and codified before it can be taken seriously as part of the law of nations. The political scientist Alison Brysk, in the introduction to her edited volume *Globalization and Human Rights*, expresses the legal approach to human rights:

> Human rights are a set of universal claims to safeguard human dignity from illegitimate coercion, typically enacted by state agents. These norms are codified in a widely endorsed set of international undertakings: the "International Bill of Human Rights" (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Social and Economic Rights); phenomenon-specific treaties on war crimes (Geneva Conventions), genocide, and torture; and protections for vulnerable groups such as the UN Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women [*sic*].[2]
> (Brysk 2002: 3).

[1] It is actually quite surprising how rarely studies of human rights take the time to explain how, in fact, "human rights" is being used. Within the voluminous human rights literature it is much more common that the intended meaning of human rights is kept implicit, or allowed to emerge in context without formally addressing this issue analytically. While a contextual strategy has much to recommend it – in particular, it suggests that the answer to the question "what is human rights?" is itself contextual – it is also possible that in taking the meaning of human rights for granted, when it is in fact highly contested, a certain opacity has crept into the literature. Different analyses or arguments come to be marked by the disciplinary orientations from which they emerge, when what is desired is an approach to this most encompassing of topics that transcends (or unifies) the many different academic and political traditions.

[2] Both the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women, and the Committee on the Elimination of Discrimination Against Women, which is authorized in Article 17 of the Convention to monitor compliance by "States parties," are at various times referred to with the acronym CEDAW, even though this usage was originally meant to refer to the Convention.

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A somewhat more expansive orientation to the problem of what human rights are moves away from international legal instruments and texts to consider the ways in which the *concept* of human rights – which is also expressed through instruments like the Universal Declaration, but not, on this view, circumscribed by them – is itself normative. This is very much an analytical normativity, one that describes the ways in which the concept of human rights in itself establishes particular rules for behavior and prohibits others. Jack Donnelley, for example, who is a ubiquitous presence in human rights studies, occupies this middle location on the spectrum of degrees of expansiveness. As he explains (2003: 10), "[h]uman rights are, literally, the rights that one has simply because one is a human being" (i.e., completely apart from any recognition of these rights in positive international law). Having articulated the concept of human rights as clearly and axiomatically as possibly, Donnelly then goes on to deduce what are, in effect, logical corollaries to this first principle:

> Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). They are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves nor how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo sapiens* "human beings," and thus holders of human rights.
> (2003: 10; emphases in original)

This approach to the question of what human rights are, which, as Donnelly acknowledges, could be described as "conceptual, analytic, or formal" (2003: 16),[3] is also concerned with the ways in which the normativity of the human rights concept configures or shapes – again analytically, not empirically – the *concept* of the individual (not particular individuals in any one place or time). Through human rights, "individuals [are constituted] as a particular kind of political subject" (2003: 16). By making the constitution – even in the abstract – of the political (and legal) subject a basic part of the definition of human rights, this midpoint approach moves well beyond the legal positivism of human rights instrumentalists and, at least theoretically, broadens the normative category "human rights" to include both the norms themselves and the subjects through which they are expressed.

[3] Elsewhere (2003: 17) Donnelly describes his approach to the question of human rights as "substantively thin" and argues that the "emptiness" of his conceptual orientation is "one of its greatest attractions."

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At the other end of the spectrum, the question of what human rights are is answered by treating human rights as one among several consequential transnational discourses.[4] Upendra Baxi expresses this mode well when he begins his important and wide-ranging critique of human rights by describing the object of this study as those "protean forms of social action assembled, by convention, under a portal named 'human rights.'" (2002: v). As can be imagined, the *discursive approach* to human rights is itself internally diverse. But, despite this diversity, there are several features that mark this orientation as the most expansive framework within which "human rights" is conceptualized, studied, and understood. First, the discursive approach to human rights radically decenters international human rights law. Legal instruments like the Universal Declaration, or legal arenas like the International Criminal Court (ICC), are seen as simply different nodes within the power/knowledge nexus through which human rights emerges in social practice. Second, the discursive orientation makes human rights normativity itself a key category for analysis. This does not mean that human rights is simply studied or analyzed *as* norms; rather, normativity is understood as the means through which the idea of human rights becomes discursive, the process that renders human rights into social knowledge that shapes social action. Third, the study of human rights as discourse reveals the ways in which actors embrace the idea of human rights in part because of its visionary capacity, the way it expresses both the normative and the aspirational. Finally, to conceptualize human rights as one among several key transnational discourses is to elevate social practice as both an analytical and methodological category. Despite the nod that the several strands of social or critical theory make toward practice, praxis, or agency within their broader studies of discourse, in fact the actual consideration of social practices more likely than not remains prospective, or merely categorical. In contrast, discursive approaches to human rights assume that social practice is, in part, constitutive of the idea of human rights itself, rather than simply the testing ground on which the idea of universal human

[4] "Discourse" is employed at this end of the spectrum with vaguely poststructuralist resonances to refer to the institutional, historical, political, and social formations through which knowledge (and power) is constituted in practice. The many dimensions of language are of course key parts of human rights discourse, especially since the *word* – as embodied most clearly by the text of the Universal Declaration – plays an essential role in expressing the idea of human rights; but the notion of human rights discourse goes well beyond language to include the full range of social knowledge regimes through which human rights emerges in social practice.

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encounters actual ethical or legal systems. As we will see, this assumption has far-reaching implications for the way the practice of human rights is studied and conceptualized.

Although the chapters and critical commentaries here do not express a unified response to the question of what human rights are,[5] it is accurate enough to say that the volume would fit quite comfortably somewhere on the expansiveness spectrum between the conceptual approach of Donnelly and the broadly discursive orientation of Baxi. Even though many international lawyers and human rights activists – in particular – would consider the open and critical discursive approach to human rights either hopelessly vague, or ethically questionable (or both),[6] there is no doubt that scholars of human rights practices have demonstrated the usefulness in understanding "human rights" beyond the narrow confines of international law. As will be seen throughout the chapters, perhaps the most important consequence to reconceptualizing human rights as discourse is the fact that the *idea* of human rights

[5] A perhaps minor point within human rights studies is the problem of whether one uses human rights in the singular or plural. The plural is much more common, at least for US-based writers and analysts, and for international agencies like the United Nations. This last is not surprising given the fact that the plural is most appropriate for those for whom "human rights" refers to the rights enumerated in international law (the legal approach), or those who argue that human rights are rights that all humans have simply by being human (the conceptual approach). But if by "human rights" one is referring to a consequential transnational *discourse*, then it is more grammatically correct to use the singular: "human rights is . . ." Thus controlling for grammatically slippage or error, one signals one's orientation to the question of what human rights are/is through the form of the verb "to be." The matter – to give this point, as I have said, perhaps more importance than it deserves – becomes more complicated in English as between the American and British idioms, because British scholars adopt the singular form of "to be" much more frequently, so it is difficult to know (without context) whether a British writer on human rights is signaling allegiance to the discursive approach, or merely respecting British language usage, when she writes "human rights is . . ."

[6] I was reminded recently just how unethical the discursive or critical approach to human rights is considered during a graduate seminar on "human rights in comparative perspective." One graduate student – from a former Soviet bloc country – finally lost all patience with the ongoing discussion of problems within contemporary human rights. The student chastised me for subjecting any part of human rights to critical scrutiny and accused me of possibly weakening a normative framework that was clearly fragile to begin with. In the student's quite emotional reaction, one detected a peculiar – if perfectly understandable – ethical syllogism at work. If the official ontology expressed through the Universal Declaration is accepted – and people do, in fact, *have* human rights in that way – then critical scrutiny that calls this ontology into question can only be a modern kind of scholasticism: the pursuit of abstract analysis for its own sake. But here's the difference: to engage in intellectual casuistry in the area of human rights is to potentially damage or confuse the only transcendent moral fact – that we all have human rights by virtue of a common human nature or humanness – and thus to indirectly play a role in ongoing or future violations of these human rights. This is why many human rights activists – in particular – have reacted with more than simple incredulity at the emergence of a critical human rights literature over the last fifteen years, the same period that has provided an opening for greater human rights protection and enforcement.

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is reinscribed back into all the many social practices in which it emerges. This inverts the dominant understanding, in which the idea of human rights refers to certain facts about human nature, and the normative implications of these facts, in a way that makes the practice of human rights of either secondary importance, or irrelevant. There are troubling implications to deriving the idea – or ideas – of human rights from human rights practice, including implications for the legitimacy of human rights, the epistemology through which they are known (and knowable), and their putative universality.[7] But, despite these complications, it makes no sense either to conceptually divide the idea (or philosophy) of human rights from the practice of human rights (and then exclude the latter from the category "human rights"), or to argue that one should only be concerned with the expression of the idea of human rights through international law, especially since at present international human rights law plays such a demonstrably small part in the total normative universe within which human rights is expressed and encountered.[8]

HUMAN RIGHTS BETWEEN THE GLOBAL AND THE LOCAL

The idea of human rights in its dominant register – the one expressed through instruments like the Universal Declaration – *assumes* the most global of facts: that all human beings are essentially the same, and that this essential sameness entails a set of rights, rights which might (or might not) be correctly enumerated in the main body of international human rights law. I underscore "assumes" because as a matter of philosophy – or perhaps logic – there is no question that to articulate the idea of human rights in

[7] I draw a distinction here between *universality* and *universalism*. The first refers to an assertion about – in this case – human rights ontology: that human rights are, in fact, universal, meaning coextensive with the fact of humanness itself. (Obviously universality in this sense does not only apply to human rights.) Universalism, however, is quite different. This *should be* used to refer to the range of social practices, legalities, political systems, and so on, that emerge *in relation to* universality. Universalism can be understood, in part, as the ideology of universality. Thus, as I have argued recently in a collection of essays on the anthropology of human rights (Goodale 2006b, 2007), the study of human rights practices is, in part, the study of *universalism*.

[8] To describe international human rights law in this way is to evaluate what can be said empirically: that human rights exerts a normative influence, provokes shifts in identity and consciousness, operates instrumentally by altering political configurations or calculations, and so on, apart from any connection to actual legal codes or instruments. Nevertheless, when present, human rights expressed through, or as, law assumes a different – and more specific – kind of influence (or power, see my chapter this volume) that can be as consequential as it is (so far) uncommon.

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