

**THE PRACTICE OF HUMAN RIGHTS
TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL**

*Mark Goodale and Sally Engle Merry, eds.
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The volume first began as a panel at the 2005 American Anthropological Association meetings and became the product of conference and ongoing conversations among the editors and authors. It presents a substantial overview of human rights practice, written by professors of anthropology and law. It is composed of eight essays which focus on specific issues involving human rights in Bolivia, Nepal, Colombia, Swaziland and Mexico. The contributors of the book intend to add new ways of conceptualizing the practice of human rights as a key transnational discourse. They drew four themes to “create a space for collaborative dialogue and critique that is not dependent on the range of entrenched theoretical or institutional paradigm.” The four themes are: violence, power, vulnerability and ambivalence.

In the lengthy introduction of the work, the concept of *human rights* is defined, analyzed and dissected, subject to different studies. How complex can human rights be? *‘These rights are, literally the rights one has because one is a human being’* according to Jack Donnelly. The restricted view takes human rights as the body of international law that emerged in the wake of the 1948 Universal Declaration of Human Rights and follow-on instruments. At the other end of the spectrum, human rights are treated as one among several consequential transnational discourses.

Mark Goodale argues that the contemporary idea of human rights is articulated through a form of reasoning that is both rational and essentially deductive: part Descartes and part Thomas Aquinas. In human rights, there are several unproven first principles actually: common humanness as a moral quality (rather than simply a biological fact); the assertion that this essential

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humanness entails a particular normative framework; and that this normative framework is expressed through rights.

On Violence

Daniel Goldstein elaborated in the chapter entitled “*Human Rights as Culprit, Human Rights as Victim: Rights and Security in the State of Exception*” how human rights discourses were deployed by political and social movements as part of various national campaigns against poverty, domestic abuse, the neglect of children, and so on. But in Cochabamba, the most serious problems cannot be managed through the laws provided by Bolivia, which were linked to human rights, such as sexual abuse of children, corruption of public officials, etc. So the residents developed an alternative discourse, one linked to “citizen security” within the language of human rights to create what Goldstein describes as a “right to security.” *Human rights have shifted from a guarantor of protection for the poor and vulnerable to an obstacle to their protection in the minds of the many poor.*

Right to security as to the people in Cochabamba is an intricate “human right” which demands tougher and vengeful police presence in their communities. If the police are unable or unwilling to impose this right to security, community vigilantes take over their role. In Latin America, political candidates focus on “get tough on crime” platforms that promise to circumvent the due process rights of the accused. Zero tolerance justifies a strong police response even to relatively minor crimes in order to dissuade the evolution of major ones. Though studies show that this is not a realistic approach to crime control, it has become a powerful instrument for states attempting to project an image of efficacy in the fight against crime. It also appeals to many citizens within these societies who are willing to accept harsh penalties and violent police practice in exchange for enhanced security.

Italian philosopher Giorgio Agamben states that at the heart of every democratic state operating under the rule of law, there exists the “state of exception,” a provision whereby the state is empowered to act outside the constraints of law, permitting the state to adopt extreme measures in its own defense.

But analyzing the scenario at a deeper level, it is evident that relating security with this system of retribution and punishment becomes ineffective in achieving greater security and it even contributes to a never ending cycle of violence and fear.

On Vulnerability

Sally Engle Merry stated in the introductory essay for this part that “Vulnerability is central to human rights activism and intervention. In identifying which individuals are understood as victims of human rights violation, those who are selected are typically those who are in one way or another helpless, poor, powerless, unable to make choices for themselves and forced to endure forms of pain and suffering.”

What is the effect of emphasizing vulnerability of human rights victims? Merry further elaborates that human rights victims receive more attention and concern along with an extensive investigation by human rights groups and even the state, while an ordinary crime victim receives far less attention and the offense may earn much less response from the state or other associations. In many situations, being a human rights abuse victim entails presenting one’s self as suffering, powerless and vulnerable.

Jean Jackson’s chapter on the complex junctures of human rights, law and indigenusness in Colombia shows how vulnerability takes on various implications for diverse social actors within wider political and legal struggles. “Vulnerable indigenous populations in rural Colombia, in their effort to find and maintain stability in a situation of tremendous violence and government neglect, enlist particular traditions and authorize particular actors to carry out actions that without doubt challenge the transcultural scaffolding of the human rights regime.”

Ambivalence

Not all human rights are equal before the law. There are two tiers namely: 1.) *jus cogens* norms and 2.) treaty rights and customary obligations *erga omnes*.

Jus cogens norms are norms of international law that are binding on nations even if they do not agree with them and any international agreement that would violate them would be void (Vienna Convention of the Law on Treaties, 1155 UNTS 331, 347, Art. 64). *Erga Omnes* norms are also of universal character and are binding upon all states. However, any *jus cogens* violation is a violation of the law of the nations, while on the other hand, *erga omnes* norms are not peremptory norms which prevail over all other rules of customary law.

In his article, John Dale explores the problem on ambivalence through an analysis of the use of the Alien Tort Claims Act (ATCA) by activists involved in the Transnational Free Burma movement in the case of *Doe v. Unocal Corp.*, 963 F Supp 880. The distinction between the two tiers of human rights were also emphasized because the issue involves a violation of *jus cogens* norm.

In 1990, Unocal Oil Corporation entered into an agreement with the Myanmar government to build the Yadana project, a natural gas pipeline. The military junta of Myanmar forced the local villagers to work for Unocal under appalling conditions. The peasants were compelled to work at gunpoint, soldiers raped tortured and even murdered some laborers. In 1996, some peasants from Burma sued the Unocal Corporation in a United States Court . The case was entitled, *Doe v. Unocal*, wherein the statute Alien Tort Claims Act (ATCA) was first used to hold a transnational corporation liable in a US court, not just state actors or individuals, for commission of human rights abuses committed outside the United States. The suit illustrates how movement activists created a transnational legal space to apply the ATCA. ATCA is not a human rights law per se but it allows for civil suits for violations of the laws of nations. Unocal however settled the suit before issues such as whether a corporation such as Unocal should be held liable for a *jus cogens* violation suffered by the peasants in Burma were settled or whether it applies not only to state actors but also to non-state actors, could be litigated by the court.

Dale defines transnational legal space as “legal mechanisms that present opportunities for making crimes or torts committed in one state actionable in the legal system of another state. This space may include international fora.” In this case, the peasants moved to sue Unocal in a transnational legal space because they have no opportunity to enforce their rights in Myanmar.

In 2004, the US Supreme Court held in the case of *Sosa v. Alvarez-Machain* that only a human rights violation of the highest and most agreed upon magnitude qualifies for consideration under ATCA. The institutionalization of *jus cogens* presupposes that some laws are inherent and inalienable, reflecting the notion that there are ultimately fundamental moral choices, and thus that there are non-economic boundaries which market participants should not be permitted to transgress. ATCA confers jurisdiction only in a US federal court and does not create substantive rights. This ambiguity of the statute however is cured when combined with *jus cogens*. ATCA also authorizes plaintiffs to base their substantive claims on international law norms.

The struggle over ATCA illustrates the ambivalence and discursive dilemmas of foreign policy conservatives who have appropriated the language of international human rights for their own purposes.

Power

Law would always work following the dynamics of power, up, down or even sideways.

According to Mark Goodale power infuses human rights practice in the way individuals connote, or gesture toward certain essential aspects of human rights without actually invoking specific human rights themselves. But power also infuses human rights practice in another way: when actors refer to, or, in certain cases actually invoke, specific human rights.

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This book will make you think and reflect about human rights practice. Classic liberal notion of natural rights was that certain rights were vested in human beings by virtue of the fact that they are human and these can be asserted even prior to the recognition of the state of such rights. It seemed so simple. But now, there is a shift from moral or natural rights to legal rights. Rights exist and can be appealed to only when they are established in positive law. Various legislations have been enacted in different countries but why is it so that human rights can still be so complicated to comprehend? It is as dynamic as life itself. Human rights settle in with so many situations, more than we can think of or imagine.

This work also shows how different cultures and different circumstances have been intertwined with human rights and laws. Social actors do not think alike and react differently when faced with a human rights dilemma.

Richard Ashby Wilson states that “[h]uman rights law does not play out the same way everywhere and we need to comprehend why translation between the international law and local cultural norms is often a partial, unpredictable and haphazard process.”

He also commented that legalization refers to the way which moral claims become positivized in law, be it that of the nation-state or an international body. There has been a long-term trend for human rights activists to seek formal legal recognition of certain liberties, immunities and privileges, a strategy which Goodale terms “the legal positivism of human rights instrumentalists” Human rights organizations seek to make an ever widening set of claims, “justiciable.” The main thrust of their work is to create new international conventions that positivize certain norms and standards so they have legal sanction. Human rights activists perceive that in the rough and tumble of national and international politics such articulations must be enforceable in a court of law if they are to endure.

Enactment of laws to give teeth to human rights and make them enforceable in courts of law is ideal but “the legalization of rights is mystifying insofar as it raises false expectations that the state can solve social and economic problems, and normalizing, insofar as it employs the legal/bureaucratic system but does not challenge it.”

The Commission of Human Rights in the Philippines (CHRP), is a constitutionally created office as provided for in Section 17, Article XIII of the 1987 Philippine Constitution. As such, CHRP plays several roles in the protection and promotion of human rights in the country – an advisor, a monitor, a fact-finder, an educator, an advocate and an investigator, among others.¹ But the CHRP cannot prosecute human rights violators. The CHRP can only to recommend the government to take necessary steps for the further protection of human rights. The power to make human rights enforceable in the courts of law is still lodged with the Congress.

Despite the creation of CHRP, the Filipinos have also dealt with fate no different from the people in the countries enumerated in the book albeit in dissimilar cases, such as extrajudicial killings and the government’s declaration of *State of Emergency*, *State of Rebellion*, or *Martial law* despite many legal experts’ pointing out that these declarations lack legal and factual basis. The Congress enacted the Human Security Act of 2007 to protect the people against terrorism, and yet who is to protect the people when they are oppressed by the government officials themselves, through the violation of fundamental human rights? The Supreme Court of the Philippines, in an effort to promote a person’s right to life, liberty, and security when such right has been violated or is threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity, promulgated the Rule on Writ of *Amparo* last 2007. Maybe the government effort to enforce human rights is there, but the problem is that, with so much human rights violations taking place left and right, the laws and the rules can never be enough. Enforcing human rights is a continuing process just like how dynamic life is. It is yet to be seen how the concept of human rights and its enforcement can still change throughout the years.

1. http://www.ohchr.org/english/bodies/.../ngos/CHRP_Philippines_CMW10.doc (last accessed 21 December 2009).