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# Critical Introduction to Human Rights Law

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## Introduction

The key to understanding human rights law critically and contextually lies, counterintuitively, outside the confines of the legal paradigm itself. That which we recognise as human rights law in the conventional sense of the term is primarily the ordered and structured layer, readily visible but covering a multitude of conceptual issues, ideological struggles, political interests, philosophical debates and histories of control and resistance. Although the contestation never really diminishes from the practice of human rights law itself, it is nonetheless difficult to understand the discourse of human rights in depth unless we recognise that human rights law is born of and situated in a 'terrain of contestation'.<sup>1</sup>

Recognising human rights as a contested terrain takes us beyond the identification of legal rights and a discussion on their sources and enforcement; rather, we are compelled to equally acknowledge that human rights discourse is chequered with clashes between notions of humanity and in/sub-humanity; between ideas of duties and rights, entitlements and obligations; it is a space where subjectivities of various kinds have been and are created, and destroyed, made dominant or hidden away across the abyssal divide.<sup>2</sup> This serves as the main insight that the current introductory chapter seeks to convey, and we will return to this point again later in the course of the discussion. In order to provide a critical overview of the field, the text that follows is divided into three subsections: the first will provide a brief overview of what is meant by human rights law; the second section will return to the idea of contestation, and the final section will highlight some other key conceptual issues affecting human rights, which will then be followed by a conclusion.

## A glance at Human Rights Law

Far from being a monolithic positivist legal structure, Human Rights Law operates in a space of 'interlegality', whose multiple layers were laid down across different times,

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<sup>1</sup> Balakrishnan Rajagopal, "The International Human Rights Movement Today," *Maryland Journal of International Law* 24, no. 1 (2009), 56.

<sup>2</sup> See José-Manuel Barreto, "Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice," *Indiana Journal of Global Legal Studies* 21, no. 2 (2014).

moved by various forces, and generated to fulfil a multitude of needs.<sup>3</sup> It exists as an amalgamation of domestic, international and regional legal frameworks, which overlap in terms of some values, language and modes of enforcement, but also diverge by way of responding to contextual considerations.

One of the more recognisable manifestations of human rights law is within the international realm. International Human Rights Law encompasses a range of instruments which are aimed at protecting human rights within particular geographical or legal jurisdictions, or which are geared towards safeguarding specific groups of people or targeting particular wrongs. The most notable among these instruments is the International Bill of Rights, a label collectively used to refer to the Universal Declaration of Human Rights (UDHR),<sup>4</sup> and the two associated international treaties - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>5</sup> Prepared in the aftermath of WWII and the holocaust, the UDHR is considered by commentators to represent a near-universal consensus of the different countries of the world at the time (although excluding the colonies and protectorates). It lists a multitude of civil, political, social and economic rights and its preamble claims the (re)assertion of inherent human dignity and equality. While it is a non-binding instrument, the UDHR takes its status from the universal values it is claimed to encompass which is why some scholars even consider it to be part of customary international law.<sup>6</sup>

The initial intent behind the UDHR was that it would eventually lead to a binding legal instrument as key charter of fundamental rights for the entire world. However, as soon as the world emerged from the WWII, it delved into Cold War politics which meant that any notion of a universal and harmonised system of human rights law fell prey to ideological and economic interests.<sup>7</sup> What this led to were two separate covenants, ICCPR and ICESCR, which came into operation a quarter of a century after the UDHR. ICCPR focuses on civil and political rights, such as the right to vote, the privacy of individuals, and so on – rights that we individuals can claim by virtue of their

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<sup>3</sup> Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, ed. William Twining and Christopher McCrudden, Law in Context, (London: Butterworths LexisNexis, 2002), 428-38.

<sup>4</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

<sup>5</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>6</sup> Ed Bates, "International Human Rights Law: History," in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 30-32. On Customary International Law, also see B. S. Chimni, "Customary International Law: A Third World Perspective," *American Journal of International Law* 112, no. 1 (2018).

<sup>7</sup> For an historical overview of international human rights law, see Micheline Ishay, *The History of Human Rights: From Ancient times to the Globalization era* (Berkeley: University of California Press, 2004). Especially, see the section on 'The World Wars: The Institutionalisation of International Rights and the Right to Self-Determination' (pp. 174-243)

participation in the civic life and political affairs of a state –while the ICESCR focuses on rights to education, healthcare, etc. With different caveats, these two covenants are legally binding on the countries that have signed and ratified them – at this point in time, there is a near universal coverage for ICCPR and ICESCR (although with some notable absences).

International Human Rights Law also includes a multitude of human rights frameworks focussing on addressing either particular categories of wrongs or protecting specific groups of people. By way of example, the former category includes the Convention against Torture and the Convention against Genocide,<sup>8</sup> while the latter includes Convention on Discrimination against Women (CEDAW) and the Child Rights Convention.<sup>9</sup> These instruments are binding on the countries that have accepted their obligations through signature and ratification of international treaties or their protocols, and the states' performance against human rights benchmarks are periodically monitored and reported on by specific monitoring bodies and various other means.

Between the wider international realm and national human rights frameworks, there lies a tier of regional human rights frameworks. These include the African Charter and the American Convention,<sup>10</sup> as well as the European Convention on Human Rights (ECHR).<sup>11</sup> While these instruments are more or less structured along a similar core of civil and political rights, there are differences between them in terms of their approach towards collective values, duties, individualism and so on. The African Charter and the American Convention, and their associated courts, have faced significant difficulties historically with regards to legitimacy and operationalisation, although they are gradually gaining more acceptance. The ECHR is by far the most effective human rights regime that operates at a regional level, and while it initially focussed mainly on civil and political rights, its remit has gradually expanded through additional protocols and jurisprudence of the European Court of Human Rights. The ECHR operates under the aegis of the Council of Europe and has a separate yet complementary status with regards to the European Union's rights framework. Within the EU, the Charter of Fundamental Rights (EU CFR) is also a key instrument that is applicable on member countries during the application of European Law (this latter regime is likely UK after

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<sup>8</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>10</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); American Convention on Human Rights, "Pact of San Jose", Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>11</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)

the Brexit transition).<sup>12</sup> One significance of the EU CFR lies in the fact that it conceptualises rights differently from most other human rights instruments – rather than dividing rights along the lines of the international bill of rights, it divides them into different categories that brings civil and political rights together with economic and social rights.<sup>13</sup> This is an important step towards the wider trend within the human rights discourse towards the acknowledgement of indivisibility of rights.

Away from the international realm, one of the most important manifestations of human rights law is within the national and sub-national legal frameworks that operate at the level of state and local normative orders. This is the space where we find constitutional documents, bills of rights, and charters guaranteeing basic rights for citizens, and these instruments govern the everyday realities for us. The constitutions of many countries enshrine some sort of fundamental rights frameworks within their constitutions, which are then materialised and actualised through a variety of legislations, courts and institutions within different jurisdictions. In the US, fundamental rights (such as the infamous right to bear arms) are included in the first set of amendments within the constitution; in places such as Bangladesh, India, Kenya, Pakistan and Sri Lanka, their shared colonial history suggests that their constitutional documents depict a similar approach towards human rights. It should be emphasised, however, that the ambit of these rights increasingly differs based on individual legal regimes and developments in common law and jurisprudence (the expansion of the right to life in India to safeguard socio-economic rights is a key example). These domestic frameworks, however, do not operate in a vacuum and constantly interact with international and regional regimes, often complementing but at times clashing with each other. In the UK, the Human Rights Act 1998 is an apt example of this move between domestic and international regimes.<sup>14</sup> In the absence of a written constitution and an effective Bill of Rights, the HRA 1998 creates channels for the application of ECHR within UK's domestic legal framework.

## Situating Human Rights Law

If international and domestic human rights law can be charted out with such clarity, why is it important to acknowledge the notions of contestation, contextuality and breadth associated with the human rights discourse? This is because the legal manifestation of human rights does not have the capacity to tell us about the struggles

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<sup>12</sup> For a general introduction to European human rights regimes, see Eleanor Spaventa, "Fundamental Rights in the European Union," in *European Union Law*, ed. Catherine Barnard and Steve Peers (Oxford: Oxford University Press, 2017).

<sup>13</sup> Charter of Fundamental Rights of the European Union (published 18 December 2000, entered into force 1 December 2009), 2012/C 326/02.

<sup>14</sup> Human Rights Act 1998 (UK)

that allowed us to reach this point and which continue to inform the practice of law at every juncture. A purely legalistic approach underplays the fact that human rights paradigm and legal instruments are inherently based on struggle, resistance and contestations.<sup>15</sup>

For instance, the mainstream ideas of human rights hold that human rights started life either in one of many ancient religions, or in ancient Greece where the interplay between natural law, justice and law began to be understood.<sup>16</sup> From there it jumped a few centuries, borrowing the notion of individuality and brotherhood from Christianity, which was honed by the European Renaissance and the Enlightenment. This movement is then said to have converged in the contemporary human rights law regime. The classic legal story of human rights, similarly, begins with the Magna Carta, and travels through the English Bill of Rights, the American Declaration, the French Declaration, leading up to the holocaust which cast a shadow over the world so dark that the countries of the world had to come together and not only create the United Nations, but also the UDHR as the main global human rights charter, followed by numerous other instruments since then.

These versions would be acceptable if it were not for the significant jumps over centuries, the concealment of historical and conceptual contradictions and the veiling of the voices of the excluded and marginalised from such human rights narratives. These accounts do not highlight, for instance, why the Declaration of the Rights of Man and Citizen in France was followed by a suppression of women's rights, which were voiced in the form of the Declaration of the Rights of Women.<sup>17</sup> These narratives do not speak about why the claims of Equality and Fraternity were followed by curbing of slave rebellions, or how the claims of inherent human dignity could be reconciled with slavery and colonialism. These versions do not focus on why, if the English Bill of Rights was the precursor of human rights for all, did it coincide with the horrendous persecution of Catholics. They do not question why, even at the time of writing the UDHR, did the world turn away from the colonised territories and mandate lands. The claims of rights went hand in hand with the denial of rights; the claims of equal and inherent humanity was never too removed from the denial of humanity to a vast number of people. Law, generally, and human rights law in particular may not always be able to depict these contestations, but it is important to note that they are never distant from the practice of law itself.

The question of prohibition of torture is an apt example in this regard. In the last two decades, mainly because of terrorism and war on terror, the issues around legitimacy

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<sup>15</sup> Costas Douzinas, *The Radical Philosophy of Rights* (London: Routledge, 2019), 169.

<sup>16</sup> Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011), 6-10.

<sup>17</sup> Ishay, *The History of Human Rights: From Ancient times to the Globalization era*, 328.

of incarceration and torture come up in the general discourse repeatedly. There are those who hold the position that torture is prohibited by virtue of the Torture Convention and customary international law. However, there are also those who hold the position that torture may be permissible for the wider good of the society. These positions can also be traced to case law from different countries as well as to the jurisprudence of the European Court of Human Rights. However, what gets left out of the picture is the political, conceptual, historical and sociological terrain of these approaches. It is important to acknowledge this key human rights issue goes back a few centuries, and the arguments can find their roots within legal and political philosophy, especially in the ideas of deontology and utilitarianism. It is therefore necessary to appreciate that the right not to be tortured is often tied up with the history and politics of domination, power and curbing of political dissent.<sup>18</sup>

### The politics of human rights

As mentioned above, understanding the contested terrain of human rights becomes important when we acknowledge how the conceptual, political and historical forces feed into the structures of human rights law. For instance, the demarcation between civil and political rights on the one hand and economic, social and cultural rights on the other may be historical accidents rooted in the Cold War, but they have become increasingly normalised within the field. They are either categorised as positive or negative rights, or (along with a third set of rights, which includes solidarity rights such as the right to self-determination) are labelled as the 3 generations of rights. But while these labels are often used within the mainstream human rights discourse, it is increasingly acknowledged that these delineations are unhelpful. For instance, positive and negative rights are said to correlate to positive and negative duties: security of person was historically considered to be a negative right, which meant that the only obligation on the state (and any other duty bearers) was to refrain from harming an individual. The right to education, on the other hand, was considered a positive right which required the state as the main duty bearer to take positive measures to enable education provision for the citizens. However, we now recognise that even ensuring the security of person requires the state to take significant positive measures. The idea of generations of rights is equally problematic as it implies a progressive sequence within the rights regime, either with regards to importance or immediacy. The wider human rights discourse and the human rights instruments are increasingly moving away from this division between positive/negative rights or generations of rights, with the EU CFR, mentioned above, being a key example of a modified approach towards the indivisibility of rights.

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<sup>18</sup> The Pinochet case being a prime example in this regard. *Regina v. Bartle and Commissioner of Police, Ex parte Pinochet*, U.K. House of Lords, 2 W.L.R. 827, 38 LLM. 581 (1999).

Another key difficulty emerges from the practice of international law itself. As international law does not flow from or is enforced by an overarching authority, there is no one sovereign authority or a global state (yet) that could come up with human rights standards or impose it on all the actors. Human rights law therefore depends on the inter-relationship of states and the various domestic and international organisations. This is primarily where power disparities between states (the power of the permanent five members of the UN Security Council for instance) creep in. This also means that situations in which sovereign authorities prove unable or unwilling to safeguard their citizens or other individuals, the protection of human rights falls victim to political, ideological and nationalistic considerations.

Regardless of the claims of inviolability and universality of human rights, the enforcement and protection of rights depends on societies, actors and particularly the states. When states prove unable or unwilling to protect rights, or societies and individual actors refuse to accept their duties, then the foundational ideas of human rights have to be reconsidered. It is all the more necessary today as the forces of populism, exclusion and regression gain momentum. The accountability of the powerful actors, ideas of socio-economic equality, notions of social justice, the regulation and accountability of transnational actors and corporations – these issues are inherently linked with the assumption of duties to fulfil and protect human rights. Many of these are political rather than purely legal or conceptual issues, and a refusal to engage with these issues means that the human rights paradigm begins to lose its legitimacy and its moral authority amongst the people. It is precisely because of this that Baxi calls for a turn to the ‘politics for human rights’ rather than a politics of human rights, which means re-evaluating the paradigm, its role and the interests of actors, and bringing marginalised and excluded voices to the centre of the human rights discourse and interpret the world from their perspective.<sup>19</sup>

## Conclusion

This brief and critical introduction to Human Rights Law attempted to introduce the reader to two facets. One aspect is the international, regional and domestic human rights regimes and to highlight how they exist as different spatial and temporal layers within the wider legal framework. The second aspect was to show that any critical and contextual understanding has to step outside the bounds of human rights law in order to return to it in a more informed fashion. Human Rights law lies in the middle of a terrain of contestation laid out by societal, conceptual, historical and political issues, and it takes root from various strands and trends. The notion of human rights, therefore, is one of constant struggle, and to understand human rights law contextually and critically requires an understanding of that which moves it.

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<sup>19</sup> Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2006), 80-81.