Working Paper 7

Putting Law in its Place
An interdisciplinary evaluation of national amnesty laws
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1. Introduction: the legalisation of human rights

The idea of the legalisation of human rights makes three assumptions: 1) human rights are ‘prior’ to law; 2) they have been ‘legalised’; and 3) the legalisation of human rights is problematic. These assumptions are correct, but they require clarification if the problems raised by the legalisation of human rights are to become clear.

It is commonplace to distinguish human rights from legal rights. Every person accused of a crime has the right to a fair trial. Every person accused of a crime in England has the right to trial by jury under certain conditions. The first is a human right. The second is a right granted by English law: there is no human right to trial by jury. Human rights are therefore conceptually distinct from legal rights, but human rights may be ‘legalised’ in two main ways: 1) by being recognised in international law; and 2) by being specified in national law.

There are at least three reasons to legalise human rights. The first is that human rights are thereby entrusted to persons (usually judges) who have been specially trained and recruited to understand and protect them. The second is that human-rights principles are often vaguely worded, and courts of law can make their meaning more precise when such precision is required. The third is to confer on them a certain kind of objectivity that moral and political discourses are thought to lack. This enables campaigners to appeal to established law rather than to contentious moral and political principles, but we shall see that this apparent objectivity is also problematic.

Philosophers may nevertheless hold that this begs some difficult questions. Why should we believe that there are human rights? If there are human rights, which rights are there? How are these rights related to each other and to other values? Are
any human rights absolute or may they all be overridden in certain circumstances? There may be legal answers to these questions, but such answers only give rise to the further question as to whether or not the law is what it ought to be.

Another set of questions concerns the relations between human rights and democracy. Western political philosophy has traditionally been concerned with the problem of the rightful distribution of power. The legalisation of human rights is not neutral among different solutions to this problem, since it allocates power to lawyers, especially judges, over an important range of human interests, conflicts and controversies. It takes human rights out of politics, including democratic politics. This makes human rights problematic for advocates of democracy (Dahl 1989; Waldron 1993). To the argument that human rights are too important to be left to democratic politics, they respond that they are too important to be left to democratically unaccountable lawyers. International human-rights law appears even less democratic than national human-rights laws, because it is more remote from democratic accountability.

Human-rights law is primarily judgemental: it tells us whether or not human rights have been respected or violated. It cannot explain variations in respect for human rights in different times and places. The large gap between human-rights ideals and the realities of human-rights violations is perhaps the most striking feature of the human-rights field. Explaining this gap is a primary task of human-rights studies. Human-rights law is, however, not designed for this task. Human-rights lawyers often make assumptions about how human rights can best be protected, but these assumptions are typically not based on systematic evidence. The social sciences are designed to explain why things are as they are, and thus it seems that the legalisation
of human rights needs to be supplemented by a social science of human rights (Freeman 2002b).

2. **What are human rights?**

If the legalisation of human rights is problematic, what precisely has been so legalised? The Universal Declaration of Human Rights is usually regarded as the most authoritative statement of human rights, but it lists human rights and does not define them. Some listed rights are less controversial than others. The prohibition of slavery, for example, is relatively uncontroversial, whereas the right to holidays with pay is more controversial. The Declaration offers us, however, no clear criteria for distinguishing human rights from other sorts of rights and from other values.

Jack Donnelly defines human rights as follows: ‘Human rights are, literally, the rights that one has simply because one is a human being’ (Donnelly 2003: 10). This is a semantically plausible definition, and is widely favoured. Its application to the Declaration is, however, problematic. Article 21, for example, says that everyone has the right to take part in the government of his country, but children do not have this right. One has the right to take part in the government of his country, not ‘simply because one is a human being’, but because one is a citizen. The literal definition of human rights requires considerable explanation to make sense of the rights in the Declaration.

Some lawyers seek to solve the problem of defining human rights by appeal to the philosophy of legal positivism. Human rights, according to legal positivism, are what human-rights law says they are. This solution is implausible, however, because the concept of human rights is positioned in the tradition of natural-law philosophy that holds human rights to be prior to positive law. Natural-law philosophy may be problematic, but legal positivism is not a strong rival, for law is better seen as a means
to protect human rights than as their source. Legal positivism is refuted by the meaningfulness of asking whether the law is what it ought to be.

It is, therefore, difficult to know what pre-legal human rights are. This is because the concept seeks to identify a set of important values, and this is bound to be a controversial task. The definition of human rights cannot be independent of a justificatory theory. Several such theories are now available (Finnis 1980; Gewirth 1982; Perry 1998). Since each is controversial, the very meaning of ‘the legalisation of human rights’ must be controversial. However, although avoiding controversy is not possible, replacing confused and unsystematic thinking with clear and systematic thought is possible. We can begin this task by revisiting the political theory of John Locke, since it offers a classic theory of human rights and law. The critique of Locke may, therefore, be a good way to begin thinking systematically about law and human rights.

3. Theory

Locke held that men were naturally free, subject to the law of nature, which obliged everyone not to harm another in his life, health, liberty or possessions. The ground of this obligation was that all men were the ‘workmanship’ of God, and consequently ‘made to last’ during his pleasure.¹ The obligation not to harm others, Locke assumed, entailed the right of everyone not to be harmed. Locke thus introduced the concept of rights almost casually in a discussion of our obligations to God and consequent obligations to each other (Locke [1689] 1970: II, §§ 4, 6). Natural rights were thus derived from our relations to God, and not from convention or positive law. Natural rights were the rights that we had because God had created us, and created us

¹ Waldron (2002: 53) disputes this reading on the ground that the lower animals are also the workmanship of God. It is nevertheless what Locke says in The Second Treatise of Government, § 6.
as beings of a certain kind, that is, as vulnerable to being harmed in our life, health, liberty or possessions. Obviously, this ground of natural rights is too contentious to convince many people today.

To ensure that the law of nature was observed, Locke continued, and to restrain men from invading the rights of others, everyone had the right to punish violators of the law. This condition, however, had the disadvantage that each might be judge in their own case, and thus partial to themselves. Each therefore surrendered their natural right to judge and to punish to a political community that would protect the natural rights of all by means of laws made and executed by those authorised to do so (Locke [1689] 1970: II, §§7, 11, 87, 127, 131). Locke held, therefore, that the protection of natural rights required the rule of law, but he was largely silent about the role of the judiciary. His theory calls for the legalisation of natural rights, but not necessarily their judicialisation (Waldron 1999: 85-7; 2002: 132-4). Natural rights entailed the freedom necessary to lead a life of dignity according to the law of nature. Positive law was the means to protect these rights, but the form of this law was a matter of political judgement, and not of first principles.

Locke provided a theory of the ground and content of natural rights, and of the role of law in protecting them. Each of these elements is contentious, but Locke raised systematically the problems that a convincing theory of human rights and law would have to solve.

4. Law

Locke’s theory proposed natural rights and the rule of law as solutions to the problem of tyrannical government. The United Nations proposed similar solutions to similar problems after the Second World War. The Universal Declaration of Human Rights was originally intended not to be legally binding, and was therefore not, technically,
an example of the ‘legalisation’ of human rights (Morsink 1999: 331). It declares, however, that, in order to avoid rebellion against tyranny, human rights should be protected by the rule of law. The General Assembly proclaimed the Declaration ‘as a common standard of achievement’ for all peoples, and that ‘every individual and every organ in society’ should strive ‘by progressive measures, national and international’ to secure their universal observance (Brownlie 1992: 21-2). It is not clear whether or not these measures entail ‘legalisation’, but presumably they could entail both legal and non-legal means.

Whatever its legal status, the Universal Declaration is undoubtedly ‘legalistic’. It was based on a comparative study of national constitutions by a Canadian law professor, John Humphrey. Having been derived from national laws, it became the source of numerous international legal instruments. As an authoritative international declaration of human rights, it influenced several national constitutions and court decisions, and has been a standard used in the campaigns of human-rights NGOs (Morsink 1999: x, xi-xii, 20).

In order to achieve universal credibility in a philosophically diverse world, the Universal Declaration said little about its own philosophical foundations beyond gesturing towards its natural-rights heritage and its vaguely Kantian reference to human dignity. The cost of this attempt to universalise the concept of human rights was to alienate it from Western philosophy and social science. Natural law was generally in decline by this time. The concept of human rights was consequently controversial in philosophy, and was largely ignored by the social sciences under the influence of scientific positivism. This left the discourse of human rights mainly to lawyers. International law was one of the few academic disciplines that was still comfortable with natural-law philosophy. International law is not generally familiar,
however, with those disciplines of theory, method and epistemology that are foundational for social science. As a result, the study of human rights was vulnerable to a combination of natural-law idealism and narrow, text-oriented legalism. Political science was, at this time, ‘realist’ (in the Machiavellian sense) rather than idealist, and ‘behaviourist’ rather than legalistic. Human rights became ‘legalised’, therefore, not only by being written into laws, but also by becoming the near-monopoly of legal science.

5. Academia

Before the 1970s nearly all academic work on human rights was done by international lawyers. In a two-volume bibliography on international human rights published by the University of Notre Dame Law School in 1976 virtually all the entries had been written by legal scholars, and most of the articles had been published in law journals. A study conducted by UNESCO identified ten academic periodicals devoted exclusively to international human rights: nine were predominantly legal in approach. UNESCO also carried out a search of other journals that dealt with human rights at least occasionally during the period 1972-86. The search found that the disciplines, other than law, that contributed to the academic study of human rights were pedagogy, psychology, psychiatry, and philosophy. The report concluded that there was a striking lack of contribution from other social sciences, such as political science, sociology, economics, and anthropology.

Several surveys of the teaching of human rights in universities have shown that the legal perspective has been overwhelmingly dominant. A survey conducted in the USA in 1980 found that, while 39 per cent of the responding law schools offered courses primarily concerned with human rights, only 4.9 per cent of political science departments did so. In 1986 Jack Donnelly noted that the bulk of the scholarly
literature was legal, and the vast bulk of that legal literature was either descriptive or
involved technical formal analysis of legal instruments, rules, and procedures.
Respondents to a survey distributed mainly to members of the Human Rights
Research Committee of the International Political Science Association in 1988 by
Kathleen Pritchard reported that the subject of human rights was taught primarily in
law schools. They expressed dissatisfaction with this situation. Law and legal
positivism were too narrow in their approach to the topic, they believed, and such
courses addressed inadequately issues of social justice, economic welfare and cultural
difference. Pritchard concluded that the contribution of political science had been
disappointing. Political scientists had done most work on human rights and foreign
policy, but political scientists knew about more than foreign policy: they knew about
development, stability, participation, bureaucracy, interest groups, power
relationships, judicial behaviour, popular movements, militarism, public opinion, and
ideology. Political scientists were trained in techniques of comparative and policy
analysis. Their concerns, interests, methods and knowledge extended well beyond
those of legal scholars (Donnelly 1986: 639; Pritchard 1989).

The increased influence of human-rights discourse since the end of the Cold War
has attracted the attention of scholars from disciplines other than law (Wilson 1997,
2001; Woodiwiss 1998; Risse, Ropp and Sikkink 1999). This impulse, though
stronger than before, is still weak. Human-rights talk is ubiquitous, but human-rights
study is still predominantly legalistic. The human sciences should have more to
contribute to our understanding of the condition of those human beings whose rights
pervade the world’s political discourse.

6. Politics
International human-rights law sometimes seems to be ‘above’ politics in a realm of objective validity. This is illusory. All law is political in that it reflects the distribution of power in society, and its interpretation and application have differential impacts on the life-chances of those who are subject to it. From Locke to the United Nations, the concept of human rights has been political in these ways. The Universal Declaration may seem very legalistic, but it was constructed by a political process of contestation, compromise, and voting, and many votes – including that on the final text - were not unanimous. Its implementation is obviously affected by political interests and struggles. Texts such as the Vienna Declaration may seem to place human rights in the domain of ‘consensus’, but that text has the same political characteristics as the Declaration of 1948.

It would be easy to say simply that there are valid legal and political approaches to human rights, if it was not common for legal analysis to conceal the political problems. For example, Morsink illustrates what he calls the ‘extraordinary success’ of the Universal Declaration by the fact that it is cited in the Preamble to the Haitian Constitution of 1987 (Morsink 1999: xi-xii). Political scientists might think that this conceals the dire state of human rights in Haiti, which require a political and economic analysis (Dailey 2003a; 2003b).

The concept of human rights is ideological in the sense that it can be used as a political instrument, and for diverse ends. It was used for and against the US-led invasion of Iraq in 2003. Historically, political struggles have been fought in the name of rights, but the aim of these struggles has been, in part, the Lockean aim of establishing rights in law (Foweraker and Landman 1997). In this perspective, law is not the origin of rights, as it is, in different ways, in the philosophies of natural law and legal positivism, but, rather, politics is the origin of law, and consequently of
rights (Hunt 1990). In contemporary international politics, the concept of human rights is used, not only as a source of law, but also to legitimate and delegitimate governments politically.

The social-scientific approach to human rights gives rise to an important ambiguity about the ‘source’ of human rights. Social scientists see the ‘source’ of human rights in political struggle (Foweraker and Landman 1997; Tilly 1998). Donnelly, as a political theorist, finds the source of human rights in ‘man’s moral nature’ (Donnelly 2003: 14-16). The ambiguity is whether the category of ‘source’ is explanatory or justificatory. Clearly, if human rights are to justify political action, they must be supported by justifying reasons. Such reasons cannot be derived from human-rights law alone, since no law is self-justifying. Indeed, the concept of human rights has been developed historically partly to criticise unjust laws.

In a pioneering work of political science, Richard Claude argued that human rights could not be understood by the analysis only of law and legal processes. Social scientists should investigate the social forces underlying the development of legal human-rights regimes by historical and comparative methods. The ‘classical’ model of human-rights development, derived from the histories of England, the USA and France, suggested an economic basis for the institutionalisation of human-rights law in the emergence of capitalist economies, although the Protestant religion played a role in creating the concept of the private individual. The threats to property rights and religious freedom from a predatory and intolerant state generated demands for the rule of law. The industrial revolution of the nineteenth century generated claims for economic and social rights, as well as equality of citizenship. The implementation of these rights required, not only certain laws, but also a supportive economy and a competent state. The liberal-democratic, legal-bureaucratic, welfare state became the
delivery system for human rights. This development took place gradually over a long period; increased expectations for relatively rapid economic development in the contemporary world might lead to more authoritarian solutions that could be very problematic for human rights. Claude argued that the estrangement of law from the social sciences created an impediment to a policy-oriented, comparative approach that might identify constraints on the implementation of human rights. The comparative study of human rights would also have to find solutions to difficult questions in the philosophy of the social sciences concerning the choice between causal and hermeneutical, and between motivational and structural explanations (Claude 1976a; 1976b; 1976c).

More recently, Foweraker and Landman have studied the role of social movements in the production and implementation of legal rights. Social movements, they argue, transform practical demands into rights. Such movements may win concessions from states in the form of legal rights, or they may provoke rights-violating reactions. Social movements also play a significant role in converting legal rights into practice. Foweraker and Landman show, by comparative, empirical analysis, that social movements partly explain the rule of the law of rights (Foweraker and Landman 1997).

Risse, Ropp and Sikkink add an international dimension to this kind of analysis. They investigated the incorporation of international legal human-rights norms into national law and practice by a comparative causal model. States, they say, respond to pressures to conform with international human-rights norms from a mixture of instrumental and moral motives. The interests of state elites in maintaining their power and local cultures may be sources of resistance to human-rights pressures. The politics of human rights is the struggle for liberal identity, and the difficulty of
this struggle varies with local culture. States have an interest in having a good reputation in the international community, and, particularly since the end of the Cold War, this has provided an incentive to move towards conformity with international human-rights standards. The authors combine regime theory in international relations with the political science of social movements and governmental strategies. They conclude that the implementation of international human-rights law is limited by the interests of both ‘pressuring’ and ‘target’ states, but that NGOs make a contribution to the implementation of human-rights law, and that successful human-rights politics consists in part in transforming international into national law. The incorporation of international human-rights law in national law and practice is most likely when the ‘boomerang effect’ strengthens the hand of national NGOs and social movements by external pressure by both states and NGOs (Risse, Ropp and Sikkink 1999).

The critique of human-rights law by social science questions the autonomy and the idealism of law. Beyond law lies social reality that shapes what the law says, how it is implemented, and who, as a consequences, gets what, why, when and how. The point of human rights is not to make human-rights law but to protect certain interests of actual people in their actual lives. The analysis of human rights requires, therefore, the social-scientific analysis of social and political forces that shape and either facilitate or hinder the implementation of human-rights law.

7. Anthropology

Within the social-scientific discourse of human rights there is an unresolved question. Claude mentioned the choice between causal and hermeneutic approaches to social explanation. Risse, Ropp and Sikkink offered a causal model within which questions of culture and identity were to be accommodated. Of all the social sciences,
anthropology is best equipped to investigate questions of cultural difference and their relevance to human rights.

Academic anthropology, like the cultures that it studies, is heterogeneous (Freeman 2002a). Anthropologists have, however, been attracted to cultural relativism because they are professionally committed to the study of cultural difference, and have come to be suspicious of the ‘imperialistic’ imposition of particular cultural priorities, such as those of human rights. Recently, Richard Wilson has reformulated such arguments in terms of the post-modernist critique of ‘essentialism’ and of its application to critical legal studies. This calls into question the universalist concept of the ‘human’ that is presupposed by human rights. Cultural relativism has, however, ignored the extent to which cultural groups have learned and adopted the language of human rights because they have experienced state violence and social marginalisation (Wilson 1997a: 8-10). Nevertheless, the relations of human-rights discourse to formal legal institutions have to be discovered, not assumed. The concept of human rights may be reworked and transformed in different contexts.2

Wilson complains that human-rights reports strip events of actors’ consciousness and social contexts. The discourses of legal positivism and socio-political realism, favoured by governments and NGOs, misrepresent the subjective experiences of the victims of human-rights violations, and are consequently morally questionable features of a highly moralistic discourse. Anthropologists can and should restore the richness of subjectivities, and chart the complex field of social relations, values and emotions that legal-institutional human rights often exclude. In this perspective, rights are not only instrumental mechanisms, but also expressive of tensions about ethnic, national and religious identities. Apparent disputes about rights may conceal

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2 See also Wilson 2001.
opposing affirmations of identity: we are who we are because we have our conceptions of rights, and not yours. The contextualisation of human-rights discourse may also reveal its class character: access to the world of human-rights defenders is not distributed equally across social classes. The truth-regime of law treats all persons as equal, even though, in relation to social power, they are not.³

The contradiction between human-rights universalism and particular human-rights experiences produces, Wilson says, a kind of human-rights schizophrenia in which human-rights activists experience the complexities and uncertainties of actual situations, while human-rights texts speak the language of clarity and certainty. The mission of anthropology is to balance the technical-legal discourse of human-rights reporting by putting the human back into human rights (Wilson 1997a; 1997b).

Wilson’s important insight is that human-rights law is a cultural practice among others, and its moral priority should not be assumed. The argument is nonetheless open to three objections. The first is that it employs an oversimplified anthropology of human-rights activists, who may understand intuitively, what Wilson does not deny, that their project requires a combination of legalism and empathy. The second is that it employs the category of victim of human-rights violation, while questioning the legal discourse on which that category depends. The third is that neither the truth-value nor the moral value of victims’ subjective experiences is self-justifying, and they should be treated respectfully, but not uncritically.⁴

Ann-Belinda Preis, like Wilson, criticises the discourse of international human-rights law as a monological command issued from the global centre. The periphery is

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³ Wilson 2001 repeats some of these themes, but also develops a conception of the proper role of human-rights law in the context of post-apartheid South Africa.
⁴ In a response to an earlier presentation of this argument, Wilson emphasised that he does not deny the third claim. In Wilson 2001 he offers a rich and complex account of different discourses related to human rights in a study of the South African Truth and Reconciliation Commission. This allocates an important place to international human-rights law in the reconstruction of South Africa after apartheid.
talking back, and may have its own account of human rights. It is, therefore, necessary not simply to translate international human-rights discourse into the different cultural discourses of the world, but to engage in dialogical struggle with the problems of particular contexts (Preis 1996). This is a salutary response to the elitist tone that the discourse of international human-rights law sometimes adopts. However, it describes the situation we are in anthropologically without providing evaluative criteria by which it ought to be judged. The dialogical solution requires a theory of the fair terms of dialogue, or it will be yet another disguise for the effects of power.

8. National amnesty laws

To investigate these problems more concretely, I shall present a case study of torture as one of the least abstract human-rights violations, and the related question of national amnesty laws as an important contemporary human-rights controversy that raises legal, political and anthropological issues. The law and politics of torture are of special interest, because torture violates the integrity of the body and the mind in a direct and radical way, and because it involves the state’s claim to the legitimate monopoly of violence. Insofar as human rights are supposed to regulate the conduct of the state towards the individual, the willingness of a state to implement the international human-rights laws against torture raises crucial practical questions of human rights and the rule of law.

The absolute prohibition of torture by Article 5 of the Universal Declaration was uncontroversial in 1948, and it has been frequently confirmed in various instruments of international law. The UN General Assembly adopted a Convention against Torture in 1984. In the following year the UN appointed a special rapporteur on torture, and the Inter-American Convention to Prevent and Punish Torture was
adopted. In 1987 the European Convention for the Prevention of Torture followed. The UN and the European conventions established special committees to monitor their implementation. The Vienna World Conference of 1993 emphasised that torture was ‘one of the most atrocious violations against human dignity’ and freedom from torture was a right ‘which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts’ (United Nations General Assembly 1993: 22). On 22 October 2003 134 states had ratified the UN Convention Against Torture. Torture is nevertheless still practised, systematically or occasionally, in many countries (Sottas 1998: 63, 82-3). Amnesty International received reports of torture in more than 150 countries in the period 1997-2000, and found it to be widespread in more than 70 (Amnesty International 2001: 8). Many states that have ratified the Convention practise or tolerate the use of torture (Genefke 1998: 252). There is thus an ‘implementation crisis’ in the international law against torture (Kooijmans 1993: 16-17).

Amnesty International, in its report on *Torture in the Eighties*, claimed that torture could be stopped. The international legal framework for its abolition existed, as did the investigative methods to verify it and expose it. What was lacking was the political will of governments to stop torturing people. ‘It is as simple and as difficult as that’ (Amnesty International 1984: 4). The evidence suggests that it is more difficult than simple. Amnesty’s campaigns against torture appear to have had limited impact. Erik Prokosch, while admitting that it is impossible to determine the amount of torture in the world reliably, estimated, on the basis of Amnesty reports, that the number of countries in which torture was a serious problem remained approximately the same in the period 1970-1994. He suggested that the problem was
not simply one of political will, but rather one of political structures: torture was associated with authoritarian regimes and armed conflict (Prokosch 1996: 31-4).

To locate the solution to the problem of torture in ‘political will’ is to ignore the question of why that will is so often lacking. Political science teaches us that states are likely to use extreme methods when they believe that they face extreme threats (Gurr 1986). Even states generally committed to the rule of law are likely to act extra-legally if and when they believe that this is necessary to protect vital state interests (Peters 1985: 6-7, 27, 65, 82). Authoritarian regimes use torture to suppress opposition and to rule by fear; parties to armed conflict use it for similar reasons; and even democracies use it in the fight against crime (Genefke 1998: 252; Peters 1985: 108, 112, 114). Peters points out the irony that the increasing power of the modern state has not reduced its perception of its own vulnerability, and its belief that it needs to use harsh, and sometimes illegal, methods to meet the threat of its enemies. State ideologies may place the interest of the state and/or ‘the revolution’ above the value of the rule of law, but democracies, too, have used torture. France notoriously used it in colonial Algeria, and gave rise to the ideology of Massuisme – named after the French general in Algeria – in which torturers are represented as honourable servants of the state in times of extreme crisis (Peters 1985: 116, 126-8, 133, 137, 140, 177). Democratic governments have also assisted the use of torture by their allies in the attempt to suppress political enemies or dangerous criminals. Tomaševski has argued that, since such threats as terrorism and the drugs trade are transnational, the emphasis of international law on state responsibility for implementing the prohibition of torture is ineffective, since the pressures to use torture are transnational (Tomaševski 1998).

Kelman emphasises the policy process that gives rise to torture, and the authority structure within which this policy is carried out. State authorities justify the use of
torture primarily as protection of the state against internal and external threats to its security as this is defined by the state ideology. Torturers are agents of the state in the implementation of this policy. The targets of torture are those defined as enemies of the state: as such they are excluded from the rights of citizenship and the ‘universe of obligation’, that is, from the protection of normal moral rules. This justification by the state leads to the authorisation of the torturers. The professionalisation of the role of torturer leads to the routinisation of torture. Authorisation, routinisation and the dehumanisation of the victims reduce or eliminate the torturer’s sense of moral responsibility. The participation of medical professionals in the torture process increases its legitimacy. The complicity of the legal system, whether by acts of commission or omission, further strengthens the legitimacy of torture. The torture process is also often ritualised, and accompanied by its own legitimating discourse, involving euphemisms and cruel humour. Although torture is institutionalised in this way, torturers may be to some extent self-selected and perform their roles with differing degrees of commitment. The structure of torture, however, explains how perpetrators can be ordinary people and not sadists. The well-known obedience experiments of Stanley Milgram suggest that attitudes to authority may be as important as the propensity to aggression or compassion (Kelman 1993).

Lawyers and activists commonly see the problem of torture and other gross human-rights violations in terms of the rule of law, crime and punishment, and the impunity of violators (Amnesty International 2001). In the growing literature on transitions from authoritarian regimes to democracy, social scientists have presented a more complex picture. For example, Roniger and Sznajder, in their study of the legacy of human-rights violations in the Southern Cone (Argentina, Chile, and Uruguay) argue that the individual and collective traumas caused by repression lie beyond the formal
principles of international human-rights law. Some deep features of the conflicts that give rise to gross human-rights violations, they maintain, are highly resistant to legal, or indeed any other, remedies. They believe that it is important to understand how international human-rights principles are actually incorporated into national cultures, struggles and institutions. In some countries of the Southern Cone, for example, human rights were recognised both by constitutional provisions and by submission to international legal obligations, and yet they did not form part of the communitarian and authoritarian discourses of either the left or the right. The Cold War produced a discourse of national security opposed to that of human rights. There was violence of the Left and excessively violent response by the state. The USA provided external support for repression of leftists. In Argentina, Chile and Uruguay the military represented themselves as the guardians of the nation-state with the mission to eliminate its enemies. The military ‘contextualised’ the concept of human rights in defence of its supposed need to repress enemies of the state.

On the redemocratisation of Argentina in 1983 President Alfonsin ordered the prosecution of some former junta members, that sent some of them to prison, and set up a national commission of inquiry, that sought to describe the institutional apparatus of repression and give a voice to the suffering of the victims. The military rejected these moves on the ground that they failed to take account of the fact that the military had been defending the nation against its enemies, while human-rights activists criticised them because they failed to bring the full force of the law to bear on human-rights violators. The new democratic government consequently lost legitimacy both with the military and with human-rights activists. In response to military unrest, President Alfonsin limited further prosecutions. He argued that this was necessary to bring about national reconciliation, build democracy, and thus affirm the rule of law,
but it was opposed by human-rights advocates, and thus did little to reduce social divisions. These issues were overtaken by economic crisis; in 1989 Carlos Menem was elected to replace Alfonsín; and Menem suspended trials and issued pardons, while establishing civilian control over the military. It is doubtful whether this policy of impunity achieved reconciliation, but the issue was buried by the ensuing economic crisis.

In Uruguay the military demanded complete impunity as the price of transition to democracy. President Sanguinetti backed an impunity law that was opposed by human-rights groups. The issue was put to a referendum, in which the voters ratified the law by 57 to 43 per cent. Democracy thus endorsed impunity.

Military rule ended in Chile when Pinochet lost a plebiscite in 1988, but the military dominated the transition to democracy. In 1978 the junta had issued an amnesty for acts committed during the period 1973-78. The political leaders of the new democracy faced a military aggressively committed to impunity, and a legislature and judiciary unwilling to abrogate the amnesty. President Aylwin set up the National Commission of Truth and Reconciliation, with the aim of obtaining ‘all the truth and as much justice as possible’. He presented the Commission’s report to the nation as a means to national reconciliation. The later Pinochet case in London showed that reconciliation had not occurred in Chile. The two most senior officers of the DINA (the security police) were imprisoned for their part in the assassination of Orlando Letelier, a former Foreign Minister, in Washington, D.C., in 1976, as this had been excluded from the 1978 Amnesty Law. The transition to democracy in Chile led, therefore, to some truth about human-rights violations, little reconciliation, and not much justice.
In Argentina, Uruguay and Chile, the political will to prosecute human-rights violators was weak or lacking because of fear of the military, divisions among the people, and the belief that priority should be given to reconciliation, stability, building democracy and the rule of law in future. The legal notion of crime and punishment appeared backward-looking and destabilising. Roniger and Sznajder doubt whether reconciliation was achieved, but they find the cause, not in the failure to enforce the rule of law, but in the persistence of conflicting narratives of the past. The discourse of human rights was sufficiently ‘thin’ to legitimise the new democracies, but not ‘thick’ enough to achieve genuine national unity. Impunity for human-rights crimes impairs the legitimacy of the new democracies, but the rule of law turned out to be a weak instrument in the transition from military dictatorship to democracy (Roniger and Sznajder 1999).

There is a gap here between international human-rights law and political practice. The Convention Against Torture obliges a state party to extradite suspected torturers or to submit cases to the competent authorities for the purpose of prosecution. There is some disagreement among commentators as to whether the prosecuting authorities may decline to prosecute on the grounds that prosecution would be against the national interest. If national amnesty laws make it legally impossible to carry out the state’s obligations, there may be an obligation to punish offenders in other ways (e.g., by dismissal) and to provide information and compensation to the victims (Méndez 1997: 260, 263; Scharf 1996: 46-7). The Human Rights Committee has held that the granting of amnesties for acts of torture is incompatible with states’ duty to investigate such acts, and ensure that they are not repeated. The Inter-American Court and Commission of Human Rights have held that the amnesties granted by Argentina and Uruguay are incompatible with the American Convention on Human
Rights. The UN Committee Against Torture has observed that Argentina’s amnesty laws were incompatible with the spirit and purpose of the Convention (Roht-Arriaza 1995a: 27-8). Treaties, of course, oblige only those states that have ratified them, unless similar obligations can be found in customary international law. This is, however, uncertain. The Vienna Declaration expressed concern about impunity, reaffirmed the duty of states to prosecute perpetrators, and affirmed that states should abrogate legislation providing impunity (Roht-Arriaza 1995b: 40-5). Nevertheless, international human-rights law does not explicitly prohibit national amnesty laws, and the UN has supported amnesties in El Salvador, South Africa, Cambodia and Haiti (Roht-Arriaza 1995c: 299; Scharf 1996: 41).

Ben Chigara argues that national amnesty laws themselves violate human rights. Such laws hope to create stable democracies, but no government has the authority to trade human rights for the hope of stability and democracy. Such laws are motivated by the fear that, if they do not pardon past crimes, the criminals will commit further crimes. Democracies do not, however, normally pardon crimes because the criminals would otherwise become recidivists. Amnesties undermine international human-rights law and culture, although they do not render states immune from scrutiny by international law, which, Chigara claims, presumes that all grave human-rights violations must have a judicial and not a political resolution. International human-rights law and culture should take priority over ‘local contingencies’ in the resolution of alleged breaches of human rights. The pursuit of democracy requires respect for the rule of law and equality before the law, and national amnesty laws protect criminals, punish victims, endorse inequality before the law, and thereby create resentment and disillusion with the law and a sense of injustice (Chigara 2002).
In contrast, José Zalaquett has defended the human-rights policy of the Aylwin government in Chile. Governments have the obligation not to violate human rights, but may lack the power to comply fully with the duty to dispense justice for past crimes. Human-rights lawyers and activists sometimes hold up the Nuremberg trials as a model for all post-authoritarian justice. Nuremberg, however, followed total military victory by the allies, whereas recent democratic transitions have seen different ‘correlations of forces’. Zalaquett invoked Max Weber’s argument that governments must practise an ‘ethic of responsibility’ and act with prudence. The Chilean government had taken measures to establish the truth about past human-rights violations, to provide reparations to their victims, and to prevent their recurrence in future. This showed a decent respect for human rights, international law and justice in difficult political conditions, and aimed to heal the wounds of the past and build peace for the future. The ethic of responsibility has the courage to live with real-life restrictions and to forego facile righteousness (Zalaquett 1992; 1993).

This debate exposes two conflicts within the human-rights discourse: 1) that between the legal requirement that crime be punished and political judgements about the good of society from a democratic and human-rights point of view; 2) that between the right of the victims to justice and the right of society to peace. Neither prosecutions nor amnesties guarantee peace or the future protection of human rights. The questions are those of rights in conflict (justice v. peace) and the conflict of authority between international norms and national judgements. They illustrate the tension between democracy and human rights, for the former may suggest that nations should make their own decisions in difficult circumstances, while the latter raises the concern that democratic majorities may neglect the rights of minorities.

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5 Victims of torture who survived were not compensated. There is a consensus among commentators
The demand for judicial solutions may be unrealisable where the judiciary has been complicit with the previous regime, is corrupt and/or inefficient, and/or where resources for investigation, prosecution and fair trials are not available. New democracies have other options, including truth commissions, non-judicial punishment, compensation, and institutional reform. International law can strengthen the hand of fragile democratic governments, and the outlawing of national amnesty laws, at least those that were imposed undemocratically, might contribute to this end (Roht-Arriaza 1995c). The Pinochet case showed that the tension between international and national, and that between legal and political solutions remains unresolved.

Truth commissions are now seen by some as solutions to these dilemmas, but truth commissions are not necessarily alternatives to trials, and it is important to identify the merits and limits of each. Mark Osiel points out that human-rights trials are dramatisations of both historical truth and justice, but the criminal trial may not be suited to the writing of good history, and its attempt to write history may call into question its ability to do justice. The criminal trial focuses on the guilt or innocence of individuals, and thereby tends to suppress the wider context of the alleged crimes, but it also encourages the competing narratives of prosecution and defence, which may lead to an ambiguous moral pedagogy. Criminal trials privilege ‘truth’ as defined by legal procedures over the subjective experiences of victims, which may be questioned by hostile cross-examination. This may itself lead to distrust of the rule of law. It is doubtful, therefore, whether the criminal trial of alleged human-rights violators can perform all the tasks of reconstruction that new democracies require,

that this was (and is) a serious injustice.
and, by blurring the distinction between law and history, may do a disservice to both (Osiel 1997).

Priscilla Hayner suggests that truth commissions can do some things that trials cannot do so well: they can give a voice to the victims in a sympathetic environment; explain the context of the violations; make recommendations for reform; recommend reparations; and publicise the truth to a wider public. There is a tension between truth commissions and the anti-impunity principle, as the offer of impunity may provide an incentive for violators to tell the truth. Truth commissions also raise difficult questions of naming alleged violators in the absence of strict, fair-trial procedures. Actual truth commissions have varied greatly. Some have limited their truth-telling because of political pressures. Where they have given a relatively full account of the truth, their ability to achieve reconciliation is probably limited. Not all victims welcome the public retelling of painful truths, and there may be cultural variations in support for truth commissions. This approach to dealing with past violations, therefore, does some good, sometimes. Since there is no legal obligation to hold truth commissions, Hayner suggests that they should be guided by local cultures (Hayner 1998; 2002). This leaves the question of majority preference and minority rights unresolved.

International human-rights law is universal, and is consequently ill-suited to understand the nuances of particular situations. There is a danger that the rigid application of this law to the complex problems of post-authoritarian societies will be, not only undemocratic, but also imprudent. The language of amnesty and impunity may also be too simplistic. Although some actual amnesty laws have been flawed, Chigara’s view that all such laws violate the rights of the victims makes strong assumptions about what rights victims have, and how these ought to be balanced with
other legitimate considerations. The governments of new democracies have a range of options in addressing the past, doing justice, and building the future. Legal rigorism may be politically irresponsible, but governments have obligations both to victims and the political culture of the future. International human-rights law may be a useful guide and constraint in making difficult judgements in these situations, but the values of democracy and self-determination suggest a considerable ‘margin of appreciation’ in how they should be made.

9. Conclusion

The idea of the legalisation of human rights is problematic in two ways. The first is that it assumes that human rights are pre-legal. This assumption derives from natural-law philosophy, in which the concept of human rights has historically been located. Natural-law theory is, however, not now widely favoured by philosophers, but they have reached no consensus on the meaning of human rights. Since the concept of human rights is contested, there is likely to be contest about what the problems of legalising human rights are.

It is common now to derive the concept of human rights from international texts that are either legal or, as in the case of the Universal Declaration, legalistic. These texts list rather than define human rights, and do not provide clear criteria for distinguishing human rights from other kinds of rights and other values. This causes difficulties when the status of a putative human right is contested. Some listed human rights, such as the right not to be enslaved, are relatively uncontroversial, whereas others, such as the right to holidays with pay, are quite controversial.

Even if we could solve this problem, and reach some agreement on what human rights were, legalisation raises a second set of problems. This is not because it is bad policy to secure human rights by law: the Lockean argument that rights are secure
only if protected by law is generally sound. The problem is not that law is not necessary for the protection of human rights, but that it is not sufficient. The incorporation of human rights into law does not itself secure their protection, and may conceal the fact that human rights are persistently violated in practice. The legalisation of human rights has led to the domination of human-rights studies by legal scholars, and consequently we have an inadequate understanding of the gap between human-rights law and the realities of human-rights violations. This understanding must come from the social sciences.

Another objection to the legalisation of human rights is that it suppresses the ‘subjective experiences’ of the victims of human-rights violations. The discourse of human-rights law can be inaccessible to most humans whose rights it is intended to defend, and international human-rights law can be remote from democratic control by the people who have a stake in its implementation. There are strong reasons, therefore, for relating human-rights law to the lived experiences and understandings of ordinary people. This is, however, a question of balance, not of alternatives. If law is too technical and remote, subjective experience is not self-justifying. The relationship between law and experience has to be dialectical: each has to be disciplined by the other.

The recent controversy over national amnesty laws in the transition from authoritarianism to democracy throws light on these issues. Some lawyers and activists simply oppose such laws. However, although these laws have sometimes been unjustly imposed, the question of amnesty in the transition to democracy raises complex matters for political judgement, and, for this, law is not enough. International human-rights law can provide a valuable guide and constraint on the policy decisions of democratic politicians, but the obligations of these politicians are
broader and more complex than unreflective obedience to the letter of the law. The problem of increasing respect for human rights is not that human rights have been legalised, but that law has to be put in its place. For this we need a morally satisfactory political sociology of law. To this lawyers, philosophers and social scientists all have much to contribute.
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