New human rights issues understanding their contentious rise

La problemática de los nuevos derechos humanos comprender su surgimiento conflictivo

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LA PROBLEMÁTICA DE LOS NUEVOS DERECHOS HUMANOS
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Resumen:

¿Por qué ciertos problemas son vistos como temas de derechos humanos, y otros no? Este artículo se enfoca en las estrategias políticas por medio de las cuales grupos marginalizados transforman antiguos reclamos domésticos en reclamos por derechos humanos con reconocimiento internacional. Remarcando los papeles de interacción de los grupos locales vulnerados, guardianes poderosos en las organizaciones internacionales de derechos humanos, y oponentes estatales y de la sociedad civil, el artículo desarrolla un modelo de cuatro etapas para el desarrollo de nuevos derechos humanos. El artículo también desafía teorías constructivistas sobre la formación del desarrollo de reglamentos internacionales.

Palabras clave: ONG, derechos humanos, redes transnacionales de defensa, constructivismo, teoría de relaciones internacionales.

Abstract

Why are certain problems recognized as human rights issues, while others are not? This article focuses on the political strategies through which marginalized groups transform long standing domestic grievances into internationally-recognized human rights claims. Highlighting the interacting roles of aggrieved local groups, powerful gatekeepers in international human rights organizations, and state and civil society opponents, the article develops a four-stage model for the development of new human rights. The article also challenges constructivist theories about the formation of international norms development.

Keywords: NGOs, human rights, transnational advocacy networks, constructivism, international relations theory.

Introduction

Why are certain problems recognized as human rights issues, while others are not?[1] How do historically marginalized groups transform long standing domestic grievances into internationally-recognized human rights claims? Asking these questions has direct, practical implications for aggrieved groups around the world, raises important policy questions for the human rights movement, and opens new avenues of theoretical inquiry for scholars. In today's world, human rights have become a pervasive global concept. There are numerous human rights conventions and growing numbers of nongovernmental organizations (NGOs) with significant staffs and resources devoted to human rights issues. Among states and international organizations reporting about and monitoring of human rights problems

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1   Much of the argument presented in this article appears in the introduction to Bob 2009.

is increasingly common. And the world media frequently covers rights issues.

In some cases, such international activism has sparked formation of transnational advocacy networks (TANs), which, in Keck and Sikkink's influential metaphor, may have a "boomerang" effect, pressuring or encouraging the aggrieved group's home state to make improvements (1998). Of course, portraying problems as human rights violations, attracting international actors to the cause, and creating new human rights norms in no way guarantee resolution of difficult problems. Indeed, in some cases, it is possible that internationalizing a domestic conflict as a rights issue may backfire, hurting a group's chances of achieving its goals at home. Nonetheless, in recent years, many groups that believe they are repressed, abused, or neglected have sought to portray their plights as human rights abuses. Some have succeeded in galvanizing the human rights movement, while others have failed. Meanwhile, for a variety of other issues, where those affected may not have the knowledge or capacity to view themselves as victims of human rights abuse, outside "champions" sometimes take up their causes. Children are one example of such a group, with the rights of children developed primarily by adults. Yet here too, the success with which these champions have turned the underlying problems into major rights issues varies tremendously. Are there practical steps that aggrieved groups or their champions can take to improve their chances of gaining support from the human rights movement?

Asking why key actors in the movement adopt some issues but neglect others also raises troubling questions about the ways that decisions are made, resources allocated, and particular issues selected for highlighting at particular times. Many important issues have had difficulty breaking into the human rights movement—or still remain largely outside it. South Asia's Dalits (Untouchables), whose plight was long slighted by international human rights gatekeepers, comprise 160 million Indians and another 90 million people in the subcontinent, other Asian countries, and the South Asian Diaspora (Bob 2009). The physically and mentally disabled are another huge population worldwide who suffer from abuse and neglect in many countries, yet whose situation has only recently begun to attract a response from major NGOs (Lord 2009). While other examples might be given, the point should be clear: There are numerous, major issues that might be taken up by the human rights community, by individual NGOs, or broader transnational advocacy networks (TANs)—but that remain ignored or neglected for decades. Even among rights that have won formal endorsement through international conventions, there are sharp variations in international resources devoted to them—this in a context in which the human rights movement and major NGOs have explicitly declared all rights "universal, indivisible[,]… interdependent, and interrelated" (UN 1993). What is the basis for this variation? Does selection of issues follow a rational pattern? What, if anything, can be done to improve the process by which major human rights actors take up new issues?

Finally, these issues challenge existing theory in comparative politics, international relations, and human rights. For the most part, research has focused on how activists use well-recognized human rights standards to change policy

within states. Risse, Ropp, and Sikkink's The Power of Human Rights (1999), for instance, provides a wealth of case studies in which populations suffering violations of civil and political rights tap transnational advocacy networks. In these cases, victims face a difficult but well-defined set of tasks: alerting the world to violations of widely-acknowledged human rights standards; and getting key NGOs, states, and international organizations to take action. Most cases in which victims succeed at these tasks are marked by certain common features. First, the perpetrators of violations (and targets of activism) are states. Second, the violations are primarily of civil and political rights, usually involving death, torture, or discrimination (Keck and Sikkink 1998, 27). Third, there is typically a short and clear causal chain between the perpetrator and the violation (Keck and Sikkink 1998). There are important lessons to be gleaned from this scholarship (Grinberg 2009). But this essay highlights a more fundamental and logically prior set of issues: How do aggrieved groups establish new human rights norms or energize existing but largely moribund ones? Why do some activists succeed in this difficult task, while others fail? With regard to the former groups, what explains the timing of success? And what do these findings suggest about the human rights movement, transnational activism, and theories of global politics more broadly?

This essay seeks preliminary answers to these questions by proposing a framework for understanding the emergence of "new" human rights norms, particularly in a Western and especially an American context. Although the broad principles outlined below may well apply beyond these contexts, the framework is specifically developed with them in mind. Nor does this essay seek to "prove" the argument; the larger book from which this essay is derived presents case studies illustrating it but leaves to others the task of testing the framework.[3] By "new rights," I mean those omitted from the Universal Declaration of Human Rights (UDHR) and other major human rights instruments, as well as others which may already be subjects of international law but which have been given few resources and little attention until recently (Chong 2009). By "emergence" or construction, therefore, I mean that rights and rights bearers receive significant new resources, support, and attention from key international actors.

Before proceeding, it is worth discussing one possible objection to this approach. Skeptics might argue that there are few if any rights not already covered by one or another human rights convention or instrument. In this view, there is no such thing as a "new" human right since the field has been so thoroughly covered by dozens of international conventions and declarations. It is of course true that the UDHR and other major human rights instruments are written in expansive language that arguably covers a wide swathe of grievances. Nonetheless, it is also true that many of the rights detailed in these instruments have attracted little attention and few resources from key human rights NGOs or international organizations. In these

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2   Bob 2009.

cases, of course, the fact that "rights" are already codified is helpful to those seeking their vindication; barring an argument that the right has fallen into legal desuetude, claimants may refer to the right and potentially revive it. Yet this is not necessarily a simple matter when it comes to actual implementation and the attraction of significant attention and resources to the right. Beyond such submerged rights, there are also many "wrongs" which have not even been codified in international law—or attracted major interest from key international actors. Finally, as new identities and issues emerge, it seems likely that there will be further expansion of "new" rights claims in future years.

I argue that the construction of new rights involves four phases. First, politicized groups frame long-felt grievances as normative or rights claims. Why and how they do so has received little scholarly attention. Second, they seek to place new rights on the international agenda, chiefly by convincing gatekeepers in major international human rights organizations to "adopt" and promote them. This seldom-examined stage is important since a handful of NGOs exercise significant power in certifying new rights as worthy of international action. Third, NGOs and transnational advocacy groups promote new norms to states and key international bodies. Finally, whether or not formally enacted, new norms require implementation in domestic settings.

This essay focuses on the first three stages of the process, particularly on stages two and three. The intent is not to "prove" the argument with a systematic empirical test. Rather, I aim both to propose new approaches to the study of emerging human rights norms and to critique existing views, particularly constructivism. To do so, I draw on theories of social movements and transnational relations to develop insights about the political construction of new rights. This essay seeks to illuminate the following questions:

- With respect to the first stage of the process: What propels the reformulation of grievances into rights claims? From the perspective of victimized groups, what are the attractions and drawbacks of framing problems as violations of rights?
- Concerning the second stage of the process: How do aggrieved groups and their champions attempt to promote rights claims to NGOs and other important international "gatekeepers?" Why do some campaigns for new rights succeed and others fail? Under what circumstances do human rights NGOs opt to expand their missions? What are the factors they weigh in deciding to do so? In particular, what is the relationship between the organizational interests of NGOs and the needs of various disaffected populations?
- Finally, with respect to the third stage of the process: Why do states and interstate organizations adopt rights promoted by NGOs and TANs? What role do *opponents* of new rights play in the process? Does constructivist theory provide an adequate basis for understanding state adoption of new rights?

1. Key Actors in the Emergence of New Norms

Three sets of actors are of crucial importance to the emergence of new human rights norms: (1) new rights claimants at the domestic level; (2) rights "gatekeepers" among NGOs

and intellectuals at the transnational level; and (3) states and interstate organizations at the international level.[3] While the third set of actors requires little discussion here, the first two merit further examination. Dominant approaches have tended to view the two sets of actors as unitary, part of loosely formed "transnational advocacy networks" (TANs), in Keck and Sikkink's terminology. It is true that Keck and Sikkink's "boomerang model" assumes that local groups appeal to the international level, seeking aid in their domestic struggles. It is also true that Keck and Sikkink (1998) admit that "for every voice that is amplified [by transnational networks], many others are ignored." Yet the authors focus on fully-formed TANs that are acting to achieve new rights or vindicate existing ones. While they note tensions in TANs, they do not examine them in detail. Risse and Sikkink (1999) similarly start with local repressed groups seeking to trigger a "spiral" of human rights activity that changes state practices with regard to already-recognized human rights issues. But, while they acknowledge a differentiation between local claimants and transnational NGOs throughout the process, Risse, Ropp and Sikkink also highlight the cohesiveness of that bond as against a primary "target," the state violator.

Notwithstanding the literature's elision of differences between rights claimants and NGOs/TANs, it is important to differentiate them in understanding the development of new rights. By "claimants," I mean individuals and groups suffering grievances within their home states. Because our focus is the development of new norms, these aggrieved parties face problems outside the mainstream of contemporary human rights concerns.[4] Included within this definition are parties seeking both group rights and individual rights for their members. While many claimants to new rights act autonomously, often they also attract "entrepreneurs" or "champions," who are not part of the aggrieved group but who support its cause because of deeply-held moral beliefs or other reasons. Typically, these outsiders have better access than claimants themselves to rights gatekeepers and states.

Among human rights "gatekeepers," I include both major human rights NGOs such as Amnesty International and Human Rights Watch, as well as human rights intellectuals. Gatekeeper NGOs are particularly important. They have resources and personnel which they devote to documenting particular cases of abuse as well as campaigning on broad human rights issues. They have reputations for credibility and clout, earned through years of work in human rights. Just as important, gatekeepers have the resources and capacity to project information widely. Typically they enjoy access to other NGOs, journalists, and government officials. Even if gatekeepers do not communicate concerns directly to other network members, their choices have powerful effects. As "external authorities" on rights issues,

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3   The different "levels" mentioned here are heuristic devices meant to indicate the location at which the three actors' most typically operate. Clearly, each of the actors operates as well at other levels.

4   With respect to well-established human rights norms, parallel questions may also be asked: Of the many who suffer violations of well-accepted human rights, which groups gain international support—and which remain isolated (Bob 2005)?

their "certifying" a particular set of issues can be a major boost for local claimants, providing "validation of actors, their performances, and their claims" (McAdam, Tarrow and Tilly 2001, 145).

By human rights intellectuals, I mean primarily scholars and other commentators. Their influence on human rights practice is weaker and more indirect than that of the major NGOs. Nonetheless, they can play an important role. Their most common if least dynamic role is simply describing the current landscape of human rights practice. In addition, however, certain commentators can help create the conceptual framework for human rights work. Of course, their writings are at best only influential. They have no formal authority over NGOs. Yet their ability to step back from the day-to-day hurly-burly of human rights work is valuable to many NGOs. In addition, they play a role in creating justifications and rationales for decisions by states and interstate organizations to accept (or reject) certain rights claims.

Finally, the terms state and interstate organization (IO) need no definition. It is important to underline, however, that, while their primary role in the process is authoritative decision-making that may transform rights claims into new international law, states and IOs also in some cases act as champions for new norms. For instance, the role of states and international organizations in development of the Landmines Treaty and the Rome Treaty establishing the International Criminal Court was extensive—and by no means confined simply to final voting for the treaties. This suggests a broader point: our categorization of three main sets of actors is to some extent artificial. Nonetheless,

at least as a heuristic device in understanding the process of rights development, this categorization is useful.

In addition, however, to understand the process more fully, one must also take cognizance of groups that oppose new rights claims. Such claims often evoke strong disagreement and objection. Putting this in sociological terms, if one can talk about "movements" for new rights, one must also examine the "countermovements" that typically rise in opposition to them (Meyer and Staggenborg 1996). In discussing this opposition, the scholarly literature on the development of new rights has focused on states that reject new rights claims. These are of course crucial to the final promulgation of new rights and therefore to implementation. But the literature has tended to overlook counter-NGOs and counter-TANs that often form at the level of domestic and global civil society. In recent years, prominent and well-funded countermobilizations have evoked their own norms—for instance, the right to life and property rights—in opposing the emergence of new human rights. Global campaigns—for the International Criminal Court, controls on greenhouse gases, family planning, and many other issues—have also galvanized coalitions opposing goals trumpeted by the world's largest NGOs. As discussed below, these actors too should be taken into account in any analysis of new rights emergence.

2. The Process of Rights Emergence

This section argues that new human rights emerge in much the same way as other forms of policy. While this hypothesis may run counter to

the belief that human rights are more fundamental than "ordinary" policy, it jibes nicely with a view of human rights as politics (Ignatieff 2001). The stylized process I discuss below is based loosely on a policymaking model proposed by John Kingdon (1995). The model is derived from study of the United States, but in modified form can be extended to human rights policymaking at the international level. Roughly following Kingdon's view, there are numerous human needs, grievances, and problems, most of which go largely unnoticed most of the time. As an initial matter, these must be reframed as claims to rights. Typically the aggrieved group itself engages in this reconceptualization (or, where the group is unable to do so itself, an outside champion may do so). By itself, however, such reformulation has little impact. As a second step, the claim needs to enter the international "issue agenda," by which I mean that it is "adopted" by key international gatekeepers, usually major human rights NGOs. With adoption, the right gains greater resources, dissemination, and media exposure—it becomes a recognizable issue on the international scene. As a third step, new norms must rise to the "decision agenda," where they are either adopted as international law or rejected by states. Finally, even if adopted into international law, they must be implemented on the domestic level.

Before discussing this model in detail, an important caveat is in order: it would be going too far to claim that this model describes the way in which all new human rights norms emerge. In reality, the process is far more complex and multi-directional than portrayed here. In some cases, NGOs or states, rather than aggrieved populations or their champions, may play initiating roles in the formulation of new rights. The former may then search for victims who come to exemplify problems the NGOs deem important.[5] In all cases, there is likely to be constant interaction between the different levels and actors. As a result, isolating particular stages is problematic. Nonetheless, with these cautions in mind, I argue that this model is helpful in providing analytic clarity to a much messier reality.

a. From Grievance to Rights Claim

The first stage involves the formulation of new rights claims. Perhaps the most common method by which this occurs is that aggrieved groups themselves frame their needs in this way. Despite the pervasiveness of rights language in the world today, I assume that this framing is a political project and that there is nothing "natural" about it (Glendon 1991). Thus, the first stage typically involves a victim group's gaining consciousness both of its grievances and their injustice and of the international human rights regime as a fertile ground in which to lodge claims. In today's world, it is unlikely that aggrieved groups will be unaware of the rhetoric of rights, although this may be the case for highly deprived, isolated, or repressed populations.

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5   In a different context, Stone (2001) has highlighted the fact that policy entrepreneurs often develop preferred solutions first, then go out in search of problems to which those solutions may be attached.

Assuming that an aggrieved group is aware of the international human rights environment, one might expect that it would invariably frame its claims in rights terms. But in fact aggrieved groups will only do so if they see advantages to reframing in rights terms. Often these advantages are concrete and material. Per Keck and Sikkink's boomerang model, framing a claim as an internationally-cognizable right may bring significant new support to the group—and pressure on its opponent. In addition, there are more abstract advantages to reframing grievances as rights. Given the receptive international climate to rights claims, reformulation may create a presumption of sympathy that can make the achievement of substantive goals more achievable. Finally, for international audiences the invocation of a right can signal the worthiness of a claim—even if the underlying grievance is complex and ambiguous. In that sense, some rights claims conceal hard-edged political agendas (Neier 1989).

Before proceeding, it should also be noted that all aggrieved groups do not see advantages to asserting rights claims. In some cases, a turn to the international human rights regime may not be seen as appropriate or advantageous. Autarkic beliefs or nationalist ideologies may argue against such framing. Other groups may find adequate resources and allies within their home states and find a turn to the international unnecessary. Some of India's smaller ethnic groups have vindicated their "group rights"—carving their own states out of existing ones—by amassing support at the national rather than the international level. Eschewing international human rights may also be a strategic decision in a domestic climate that may stigmatize or repress international intervention. Finally, even in domestic contexts that may be receptive to international claims, weak groups with few resources may decide that a rights strategy is unlikely to be effective or is too costly for the group to pursue (Baer and Brysk 2009). Because questions of effectiveness or cost are seldom clear-cut and because asserting rights claims often benefits certain segments of a group, the decision whether to assert a rights claim may be sharply contested within the aggrieved group. Disabled peoples organizations have faced substantial internal conflict over this issue, for instance (Lord 2009).

Notwithstanding these exceptions, in many cases groups will perceive advantages to making new rights claims. It might be asked, however, why such groups do not simply describe their grievances as existing, well-accepted rights, rather than seeking "new" rights. There are a number of reasons for this. For one, it is often the case that solutions to the problems these groups face are quite specific—and often quite different from those that existing rights were meant to address. Thus, aggrieved groups may believe that they require their "own" set of rights because more general rights provide insufficient guidance about solutions. The quest for Dalit rights, with its focus on remedies for caste-based discrimination, is one example (Bob 2009). One recurrent characteristic is that such aggrieved groups seek affirmative actions by a state, society, or corporation. That is, victims demand not simply that targets desist from offensive or violative behavior but also and more importantly that they provide additional resources to help the victims (Chong 2009).

There is another reason as well that aggrieved groups may seek distinct rights and rights conventions. Many have broad political agendas at home and sometimes abroad. For their specific plight to be recognized as a human rights issue can create a powerful psychological boost for the group. It legitimates not only their rights but also their identities, making it possible for groups to see themselves as discrete political actors. This facilitates group organizing at the local level and group power in domestic political arenas. Such recognition also has important impacts at the international level. When such groups are recognized by powerful gatekeepers or in international conventions, new resources may flow to them. Foundations, NGOs, and other transnational actors, aware for the first time of an issue or group, will be more likely to support the group.

Before moving to the next stage of the process, it is worth noting two points. First, in some cases, rights "champions," who themselves are not part of the aggrieved group, may formulate a rights claim for it. For instance, adults acted as champions for the rights of children generally and, more recently, for rights specific to children of wartime rape (Carpenter 2009). Yet this point is less important than it appears. Any "champion" for a cause faces much the same problem as an indigenous rights entrepreneur—interesting NGO gatekeepers and states. And a key analytic question is how a rights entrepreneur, whether indigenous or external, wins NGO support.

Second, and more importantly, it is worth reiterating that the reformulation of a grievance into a rights claim has little impact by itself. While it may be the case that rights act as "trumps" in certain national contexts having well-developed legal systems capable of strong enforcement, the trumps analogy carries much less weight in an international context where there is no effective judicial system or legal enforcement mechanism. Given these facts, for rights claims to have any possibility of changing social reality requires that they be widely recognized, not simply proclaimed by the group promoting them—something which may occur through subsequent stages in this process.

b. The NGO Issue Agenda

The second stage in construction of a human rights norm is its emergence on the international "issue agenda." While this stage is difficult to pinpoint, I define it here to mean that a proposed right is embraced by an international gatekeeper, usually a major human rights NGO or international organization. Given NGOs' limited resources, their adoption of any particular rights claim is uncertain and contingent. Yet, without a gatekeeper's decision to take on a cause as a rights issue, it is unlikely that a proposed new right will gather the momentum and resources to move to the next stage. For this reason, it is important to focus on this crucial but understudied second stage of the rights emergence process.

There is nothing automatic about key human rights NGOs' embracing a "local" grievance as an international norm. Despite reputations as moral actors in international politics, even major, well-funded NGOs cannot accept every claim made by every group. Instead, these NGO gatekeepers screen and frequently

reject new rights claims. There is ample evidence of this screening process. For instance, in deciding several years ago to open a campaign against female genital mutilation (FGM), Amnesty International underwent a prolonged period of questioning, even soul-searching, about moving from its long standing focus on social and political rights, to a right with a heavily cultural component (AI 1997). More recently, Amnesty's decision to emphasize economic and social rights generated similar controversy (Hopgood 2006). Similarly, in discussing its involvement in particular issues, Human Rights Watch recently stated:

"There are many serious human rights violations that Human Rights Watch simply lacks the capacity to address. Other factors affecting the focus of our work … include the severity of abuses, access to the country and the availability of information about it, the susceptibility of abusive forces to outside influence, the importance of addressing certain thematic concerns, and the need to maintain a balance in the work of Human Rights Watch across various political divides" (2001).

The upshot is that many rights claimants and champions do not win the support of NGOs.

On what factors do NGOs' adoption decisions hinge? Sometimes it is simply a question of their having too few resources and too many causes. More importantly, however, these decisions often hinge on the match between a new norm or rights claim and an NGOs' substantive, cultural, tactical, and organizational characteristics (Bob 2005). If a proposed new right does not "fit," it may be rejected. Notably, decisions about "fit" are often highly contested. NGOs are not monolithic entities. While often relatively small, these organizations are composed of individuals with roles and interests that may in some cases conflict with one another. Moreover, NGO missions are often vague and expansive. As a result, a new rights claimant may win individual supporters within an NGO, but be unable to convince the organization as a whole to take a stand on an issue. The result may be long periods of internal NGO contestation, involving repeated interactions between the NGO and the new rights claimant. Differences between NGO management and NGO line personnel are endemic, even if little noted by scholars (Bob 2005). Managers are motivated primarily by the NGOs long-term organizational interests; they often have a stake in maintaining an NGOs pre-existing organizational trajectory; and typically they have only minimal contact with new rights claimants. Yet because most NGOs are not internally democratic entities, managers decide such major issues as agenda expansion and allocation of significant resources to new causes. By contrast, NGO line personnel typically have the most contacts with new rights claimants and may become committed to their causes. Typically, however, they have only indirect influence on major decisions about an NGOs' agenda expansion. Hopgood (2006) has documented such contestation within Amnesty International, and Mertus (2009), Chong (2009), and Carpenter (2009) provide additional examples of it with respect to gay rights, subsistence economic rights, and the rights of children of wartime rape, respectively.

Beyond intra-NGO contestation over adopting new rights issues, a broader issue is also at stake. Human rights intellectuals have repeatedly flagged the alleged danger of rights "proliferation," "inflation," or "profusion." Philip Alston (1984, 607) has noted "serious concern" about new rights being "conjured up … 'as if by magic.'" More recently, commentators have criticized the tendency to "define anything desirable as a right (Ignatieff 2001, 90). Among the concerns are that rights proliferation impugns the "integrity and credibility" of the human rights tradition (Alston 1984, 609); erodes the legitimacy of "core" human rights (Ignatieff 2001, 90); "cheapens" the purpose of human rights; and reduces the possibility of intercultural agreement to rights (Schulz 2001, 15). Historically, economic and social rights have suffered from these kinds of critiques (Chong 2009).

In the wake of these concerns, some have sought to formulate standards for new rights. For instance, Jacobs (1978, 166) suggested three criteria: that the right must be fundamental, that it must be universally recognized and guaranteed to everyone, and that it must be capable of formulation in such a way as to "give rise to legal obligations on the part of the state, rather than merely setting a standard" Others have sought to create hierarchies of rights, or to confine rights to a narrow set of "negative liberties" (Ignatieff 2001). Yet as Alston (1984) predicted, criteria or standards of rights are never deployed in an objective, technical way; rather the acceptance of a new right is fundamentally a political issue.

For new rights claimants and their champions, this intellectual prejudice may seem of little relevance. Yet it underlines the broader point that even human rights NGOs may be less receptive to new rights than might otherwise be expected. As such, it also suggests that those making new rights claims must compete with one another for scarce attention and resources even among a seemingly receptive set of NGOs often portrayed as moral actors in world politics.[6]

c. The State Decision Agenda

The third stage of the norms adoption process involves reception and possible acceptance of a new norm by states and other authoritative decision-makers. Placing this in the language of policy analysts, this involves placement of a new norm on the "decision agenda." This stage of the process has been analyzed more than the other two stages. Constructivist scholars in particular have devoted considerable analysis and debate to the question of how new human rights norms are adopted by states and international organizations. Their research has shown that "norms entrepreneurs" particularly among NGOs and transnational advocacy networks, play a crucial role. Yet much of the constructivist literature neglects political contention. Such contention is inherent to the process by which entrepreneurs convince powerful states and international organizations to change their conceptions of existing norms or adopt new ones.

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6   For a broader argument about market-like competition for NGO support among local-level social movements, see Bob 2005.

Two aspects of contention are of particular note. First, while most scholarship has focused on the movements and groups that promote new norms, these mobilizations are often opposed by states as well as private actors. For instance, "conservative" NGOs, think-tanks, and advocacy networks frequently oppose new international norms—even if scholars have spent little time analyzing this (Buss and Herman 2003). Thus, there has been significant state and private countermobilization to the International Criminal Court, the Kyoto Protocol, international population and gender policy, and many other issues. Similar opposition has also surrounded the development of specifically human rights norms. As discussed below, these countermobilizations suggest that constructivist accounts of new norm emergence require expansion. A second aspect of contention occurs within states and international organizations, among bureaucrats and decision-makers who take different views of emerging rights norms. While traditional approaches to international relations view states as unitary actors, there is ample justification for viewing states in more disaggregated ways, especially with regard to their acceptance of new rights claims. For instance, Keck and Sikkink (1998, 9) suggest that TANs are composed of "parts of regional and international intergovernmental organizations [and] parts of the executive and/or parliamentary branches of governments." While they spend little time expanding this point, its implications are important for our purposes because they suggest the possibility of intra-network contention. Anne Marie Slaughter's recent book on transgo-vernmental networks (2004) further underlines this possibility. Although Slaughter is most interested in linkages among bureaucracies in different states, her points may be broadened. One implication is that there may be significant contention within states and international organizations, between bureaucracies or individual bureaucrats with varying sympathy for rights claims. Jeremy Youde (2009) documents such contention within the World Health Organization and the UN over rights claims relating to patients suffering from HIV/AIDS.

Bearing these aspects of contention in mind, let us turn to the standard constructivist account of new norm emergence. Constructivists argue, contra liberal and realist accounts, that state action is influenced by norms and the normative entrepreneurs (usually NGOs) who promote them. In so holding, constructivists refute the claim that state interests alone, whether defined purely in military security terms or expanded to include economic interests, determine state policy and identity. As such, constructivists challenge realist and liberal accounts which privilege a "logic of consequences"—that states and political actors behave solely in ways that meet their interests. Most constructivists do not assert that these are mutually exclusive means of determining a state's policies, i.e., that a logic of consequences is absent from decision-making (Risse 2000, 4–5). But constructivists do claim that alternative logics help determine policies and, more fundamentally, a state's concept of its interests. Thus the logic of consequences operates within a broader framework of other logics that create or "constitute" state interests and identity in the first place.

To demonstrate the validity of their claims, constructivist scholars have argued that norm entrepreneurs have succeeded in altering state policies—against states' material interests—on such issues as South African apartheid, the use of landmines, and other human rights issues (Price 1998; Klotz 1995). In making their claims about the influence of norms, constructivists have cited "persuasion" as the primary mechanism leading states to accept new norms and have identified NGOs and transnational advocacy networks as primary agents of persuasion. How persuasion occurs, how NGOs exert influence, and whether in fact these are the primary vehicles of normative change among states remain open issues, however.[7]

Two primary logics of persuasion have been posited by constructivist scholars, a "logic of appropriateness" and a "logic of argument." Under a "logic of appropriateness," states, or more accurately state elites, act in ways that meet a commonly-agreed set of norms: states seek to "do the right thing." In constructivist terms, they are socialized into appropriate forms of behavior (rather than coerced or offered material incentives). In this view, certain norms have become so well accepted internationally, part of a baseline of legitimate state behavior continuously expanded by NGOs and progressive social movements, that most states accept them. In addition to the influence of ideas and worldviews, new norms are spread through the work of NGOs and advocacy networks who continuously educate, advise, and audit states on appropriate behaviors. Together these ideal and material forces create an "isomorphism" among states, one that is receptive to new human rights norms (Finnemore 1996; Klotz 1995).

While there is certainly some isomorphism among broad state structures and institutions, continuing differences among states over everything from the degree of social welfare provision, to the death penalty, to definitions of torture indicate that there is little consensus about "appropriate" action on many human rights issues. While certain egregious social policies such as apartheid or slavery may excite moral outrage and a consensus of opprobrium, many others are far more contested. For one thing, "good" norms frequently clash with one another, providing decision-makers (and audiences) with conflicting advice about "appropriate" behavior. In refugee policy, norms of sovereignty conflict with norms of human rights (Weiner 1998). Economic liberalism clashes with norms of social security; environmental principles butt against private property rights (Nelson 2009). In all of these clashes and more, "appropriateness" is difficult to determine because it is a matter of heated political controversy. In short, the term "appropriateness" may well be inappropriate to describe this process.

Moreover, liberalism is not the only "cultural value" in the world today. In numerous locales, different values confront one another, battling for visibility and support among persuadable populations and decision-makers. Even within a broad "liberal

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7   For purposes of this discussion, I focus on adoption of new human rights norms by individual states. In doing so, I assume that international legal conventions on these matters flow from state adoption.

consensus," however, similar if less fervid conflicts arise. Particular norms are invariably vague and general. The term "democracy," for instance, can have radically different meanings in different places (Schaffer 1998). Within the same cultural milieu, political opponents may espouse the "same" norm yet mean very different things by it. The environmental norm of "sustainable development," for instance, has become a favorite not just of activists but of corporations, states, and international organizations—all of whom intend something different in using it. In the labor rights area, the "core labor standards" norm not only means different things to the many entities that now wield it but has also been actively distorted by partisan proponents of these different interpretations (Payne 2001, 52).

To make matters worse, while norms are abstract, their implementation always involves concrete cases with multiple ramifications. As a result, even in the unlikely event that only a single normative stance is implicated and that it provides clear direction, the application of the norm in a particular area is invariably problematic. Consider, for instance, the norm of racial equality that in some accounts played a key role in galvanizing international action against South Africa. As actually applied in a host of societies from the U.S. to India to South Africa, this norm remains highly contested: Does racial equality require affirmative action? Does it demand equality of opportunity—or equality of results? International norms covering the use of force and nonintervention in a state's internal affairs suggest another problem. While inscribed in the United Nations Charter, these norms have been much breached, indicating an "unbridgeable attitudinal chasm among peoples of the world … preclud[ing] an effective rule of law" in this area (Glennon 2001, 7).

In the face of these problems with determining "appropriateness," constructivists have in some cases moved from a purer form of the "logic of appropriateness" to one which smuggles instrumental reasoning back in. In this view, states adopt norms because they fear either loss of reputation among other states or sanctions by those states (or nonstate actors) that embrace the normative consensus (Klotz 1995, 20). Yet the reference to reputation and sanction in deciding policy assumes the existence of some reference group that judges and then acts on those judgments. (Similarly, the concept of a "consensus" among states itself masks underlying power relations.) Indeed, the key questions become not so much what is appropriate, but who says it is, how they got the right/power to say so, who listens and why?

The existence of organized and well-supported countermobilizations opposing the "progressive" rights espoused by NGOs and transnational advocacy networks highlights these problems with the "logic of appropriateness." Except in tightly controlled institutional settings, what is "appropriate" is seldom clear-cut. Rather it is highly contested. Groups with different ideas and interests vie with one another for ideological and material advantage, for changes in norms and policy, and for control over state "identities" and power.

The existence of contestation over norms also highlights a larger problem in the constructivist approach to

norm formation and adoption. Constructivist accounts tend to be unilinear: there is a single line of persuasion at work, involving a persuader and his object. In concrete terms, "progressive" NGOs and transnational advocacy networks push states (albeit sometimes recalcitrant states) toward "appropriate" norms, identities, and policies. But countermobilizations promote different norms or different interpretations of the same norm. Thus there are multiple lines of persuasion, norm promotion, and identity formation aimed at states and other international actors. Different norms and norm interpretations compete with one another. The relative power of competing movements and countermovements will play a major role in determining the norms adopted by states, and more importantly, how those norms are implemented in fact. In the end, norms will represent an amalgam of interpretations and approaches, both domestic and international.

In addition, while constructivists recognize the difficulties involved in persuading states and while most reject sociological institutionalism's overtly teleological approach, there is a tendency in the literature to view the process as unidirectional. In much of the literature, one senses belief in a strong current moving states and others in a "progressive" direction. The role of countermovements suggests that it is less teleology than conflict that drives normative change and that change may be both "progressive" and "regressive" on many issues (as attested to by recent Bush-administration retreats from seemingly settled norms against torture). This relates to another gap in the constructivist literature. One of the literature's ini-

tial strength's was its emphasis on the concept of "mutual constitution." By this, constructivists meant that state identities are not the simple product of a logic of consequences in an anarchic international society. Rather state interests are shaped through social interactions with states and nonstate actors in a normative context. Therefore, for instance, anarchy itself is "what states make of it." Yet in its zeal to demonstrate the influence of norms on states, constructivism has paid little attention to the other direction in this mutual constitution, the effect of states on norms or, more broadly, of states and countermobilizations on norms and norm entrepreneurs. This focus on a single direction of influence is perhaps understandable as a product of constructivism's academic mission—to call into question key precepts of dominant realist and liberal theories. But a more mature constructivist approach needs to take a truly "social" approach to international politics. Acknowledging the role of countermovements that oppose human rights norms offers one way of doing so.

Beyond issues of the direction and "directedness" of change, there is a more practical implication of the existence of opposition to new human rights norms. They necessarily alter the strategic calculations of NGOs in their efforts at normative and policy change. Much of the constructivist literature has downplayed strategic aspects of NGO activity. This is true in the simple relationship between NGO persuader and state: state reactions may force the persuader to recalibrate his approach and alter the norm sought (Price

2003; Checkel 1998). This strategic dynamic is even more the case when countermobilization occurs. As the sociological literature on counter-movements emphasizes, movement and countermovement react to each other at the same time that they interact with third parties and authorities (Meyer and Staggenborg 1996). As a result, while an NGO's strategies may be planned ab initio, they will inevitably change during ongoing interactions, in the face both of shifting counter-strategies and of state reactions. Overall then, recognizing the ubiquity of powerful countermovements, suggests that rather than a "logic of appropriateness," normative change must be seen as multi-linear, strategic, and non-teleological.

Can this strategic, multi-linear view be accommodated under the second constructivist logic, the "logic of arguing?" Proposed by Thomas Risse (2000) and based on Jurgen Habermas's Theory of Communicative Action (1984–87), the "logic of arguing" involves ongoing discursive interaction between norms promoters and states. Habermas's original conception of communicative action assumes mutual efforts to reach "shared understanding" or "truth" on an issue in a delimited arena marked by mutually agreed procedural rules covering participation, interaction, and decision-making. As such, communicative action is marked by consent, respect, and mutuality.

But an attempt to develop and implement norms cannot be analogized to a mutually agreed upon search for truth or even in many cases understanding. Rather, in most cases, it will involve conflict, often fierce, over interests and values. Battles over family planning and abortion epitomize these clashes. In the United States and other countries, even authoritative decisions by peak institutions have not "settled" this conflict. At the international level, this is even more so, with continuing skirmishes between proponents and opponents of new human rights norms—and no "truth" to find. Even on less value-laden questions, movements and countermovements clash repeatedly with little hope of establishing "truth" by argument alone. For example, continuing clashes over global warming between environmentalists and opponents (often corporate financed) indicate the difficulty of "arguing" to agreement. It is of course true that values change over time and that certain norms have swept the world. The importance of political contention in the emergence of new norms suggests, however, that they develop less through universal recognition of what is appropriate or through argumentation alone, but through an ongoing clash (and compromise) of interests.

In the "logic of arguing," one key tactic concerns "framing," portraying goals to resonate with those of third parties, thereby motivating them to act (Snow and Benford 1992). Framing is also a staple element of social movement research, used by scholars to explain the appeal and success of movements. Yet opponents of new human rights norms, as well as proponents, deploy frames and align themselves with well-accepted international and societal principles, creating a dense set of competing frames in any conflict (Finnemore and Sikkink 1998). At times, opponents even "hijack" proponents' frames, steering them in new and unexpected directions or loading them up with new meanings.

Often, as well, countermovements use frames that contrast sharply with those used by movements. Do these frames or the frames used by NGOs affect conflict outcomes, and if so how? Is it because one set of frames is more or less persuasive, important, or fundamental than the frames deployed by the other side? If this was the case, I would expect that frames would in themselves shift the attitudes of decision makers or powerful third parties. Alternatively, do frames simply activate audiences already-sympathetic or receptive to a particular viewpoint—in which case the visibility of conflict (and its frames) becomes the critical issue? In the latter case, frames would act more like flags for the sympathetic than arguments meant to persuade the undecided. Both sides in a controversy over new rights will unfurl their own frames, hoping thereby to rally their troops—but without any naïve expectation that the frame alone will win the battle. Rather, they will continue to fight the battle on other fronts, most importantly using political power and resources to win the day.

A more basic issue concerns how rules of participation and decision-making, the "meta-rules" of argumentation, are themselves established in the contention over new norms. In the "logic of arguing," this question is not considered. Yet it is crucial to any real-world process of decision-making or norm transmission. In some important situations—judicial trials, for instance—procedural rules are of course highly developed. But in cases of international norms transmission and national and international decision-making, the "rules" are far less clear. Questions have numerous dimensions and multiple institutions may have a say in them. Lobbying, pressure, and advocacy surround decision-making. The media and public opinion play a role. And certain actors may seek to change the venue in which authoritative decision-making on a new norm takes place, or may argue that participation by NGOs and other rights proponents is not permitted in particular international institutions. Continuing contention over the rules of participation themselves, rather than over the substance of the new norm, may therefore come to exercise crucial importance. Yet the "logic of arguing," with its assumption of pre-set rules, does not address this larger issue.

The upshot is that the real world of political conflict appears far removed from the rational, deliberative, respectful communication, "truth-seeking," and decision-making contemplated by the "logic of arguing." In some cases, proponents and opponents of new norms may share an interest in reaching resolution on an issue, or a decision-maker may be poised to accept a particular norm or policy. In these cases, agreements or temporary "cease-fires" may be reached among the contending players. In other cases, proponents and opponents may feel the need to accept, at least rhetorically, a single powerful norm. Yet this acceptance will mask a broad range of interpretations and actions, with both sides using the norm to cover widely varying implementation.

Conclusion

This essay argues that the emergence of new human rights issues is a complex, uncertain, and contentious process. Of course it is true that any group can claim a "right to X." But that is a far cry from saying that the claim will bear any weight. What is most important in this regard, of course, is

international and national adoption and implementation. But, as I have argued, there are crucial and little studied stages before this can be achieved.

Admittedly, the linear model of human rights development presented here is an ideal type. First, these "stages" may not in fact occur in sequence. Rather, given the diversity of local claimants, NGOs, states, and interstate organizations, the "stages" are likely to overlap and there are likely to be continuous interactions between all parties. Second, there is nothing necessary about the transition from one stage to another. In fact, there is a high potential for a norm to fail to "advance." Finally, notwithstanding this "bottom-up" model of rights emergence, for particularly repressed or legally "incompetent" groups, a "top down" model, led by rights champions or gatekeeper NGOs, may be more appropriate. Nonetheless some of the key processes discussed in this essay—calculation of the costs and benefits of transforming domestic needs into international rights claims; certification by human rights gatekeepers, particularly among key NGOs; and contentious interaction between proponents and opponents of new rights—are likely to be important in all cases of the emergence of new rights.

The latter point is particularly important for scholars in the constructivist school. Battles over new norms rage at every stage of the norms emergence process. At the earliest stages, countermovements espouse competing norms that may undercut the norms promoted by a movement. Alternatively, countermovements offer differing interpretations of nominally identical norms. At the implementation stage, countermovements aim to vitiate norms that have been adopted by states or international organizations. And contention over a norm's deployment in practice will often have greater impact than adoption of the norm itself. In sum, neglecting societal and transnational opposition fosters an incomplete view of norms development and policy change. In this respect, the various logics of persuasion proposed by constructivist scholars seem inadequate to address the contentious and wide-ranging political interactions that occur.

On a more practical level, this essay suggests that human rights intellectuals' concern over rights "proliferation" is misplaced. When it comes to animating rights through major international attention and resources, it is clear that a limited set of rights continues to dominate the international scene. For better or worse, the credibility and clout of NGO gatekeepers still makes a major difference in certification. Thus, "quality control" remains strong, even though nothing can stop any number of claimants from portraying their demands as rights. From the standpoint of needy local groups, on the other hand, this can create difficulties in projecting their cause and gaining support for their "rights." From their viewpoint, it may appear that self-appointed, Northern guardians jealously patrol a human rights "core," endorsing new causes and distributing scarce international resources on a competitive basis. This does not mean that new rights claims will fail. But it does suggest that their success is contingent and will hinge on thoroughly political processes at

all stages of the rights emergence process. Rights intellectuals, policing the human rights frontier, are players in this process. Ultimately, however, as Alston has stated, the emergence of new rights hinges on political, not technical considerations.

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