

**The History of Human Rights Formation
(or How to Study a Concept that Does Not Yet Exist)**

Christopher N.J. Roberts
Associate Professor
University of Minnesota Law School
cnr@umn.edu

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ABSTRACT

Human rights are typically studied from intellectual approaches rooted in political science, international relations, the law, and/or philosophy. While these approaches have provided a wealth of indispensable knowledge about the history of human rights, they often conceive of human rights in a way that dislocates them from their social moorings. This paper outlines a new interdisciplinary framework for the historical study of human rights that focuses on these social elements that are commonly relegated to the penumbra of other such approaches. So instead of looking at the human rights formation process in terms of the development of legal doctrine, moral ideas, or political institutions, this approach views human rights as basic statements of human relationships that emerge from struggle.

Contrary to the standard histories of the 1948 Universal Declaration of Human Rights that assume consensus and the triumph of human rights during the post-WWII period, this new approach uncovers an underexplored side of this history. It shows that there were in fact numerous reservations against the human rights concept that are often overlooked by human rights scholars. Because the concept promised (or threatened) to create new categories of rights holders, imperial powers such as Great Britain and influential professional organizations such as the American Bar Association and the American Medical Association expressed serious reservations about international human rights treaties. Interestingly, during the same period progressive thinkers like Hannah Arendt and Gandhi—each for their own reasons—also rejected basic aspects of the new human rights concept. In addition to uncovering a formerly unknown history of opposition and resistance against human rights in the late 1940s, this approach also provides a new angle for addressing the many well-known deficits and shortcomings within contemporary human rights method, theory and practice.

The Universal Declaration of Human Rights (UDHR) is ground zero of the modern international system of human rights. It was adopted in the waning moments of December 10, 1948 as the members of the United Nations cast the vote of 48 in favor with no states opposing. The UN representative from Paraguay said it would be “a beacon in the history of mankind” that would shine light on the path to happiness.¹ Eleanor Roosevelt, who spoke on behalf of the US delegation, suggested that UDHR could one day be akin to the Magna Carta or the French Declaration of the Rights of Man.² In recent years, scholars and historians have unearthed a wealth of knowledge about the people, events, and processes that created this foundational document that opened the door for the hundreds of human rights treaties, charters, laws, governmental bodies, public and private organizations, groups and individuals that now make up what is known as the modern international human rights regime. Today, the UDHR, along with its two Covenants—the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—are collectively known as the International Bill of Human Rights and represent the foundation of the modern international system of human rights. Existing work has led to the development of a standard account of the mid-century emergence of international human rights. In this narrative, the rise of human rights in the late 1940s represents a revolutionary “break from the past,” as the concept triumphed over the horrors of World War II, and oppressive forms of political rule such as authoritarianism and colonialism. Thus, by creating the UDHR the world enshrined a new set of

¹ UN Doc. A/PV.182, pg. 901. [need to get original Spanish text for accurate translation??]

² Roosevelt, Eleanor. 1948. “General Assembly Adopts Declaration of Human Rights,” 19 Dep’t State Bulletin, at pg. 751. (Also cited in Lauterpacht, H. 1948. “The Universal Declaration of Human Rights,” in the *British Yearbook of International Law*, Vol. 25, pgs. 354-81, at 354-55).

universal, moral principles in law, and ushered in the modern era of international law (see e.g. Glendon 2001; Lauren 2003; Borgwardt 2005; Anderson 2003).

But there is another side to this story of founding that is typically overlooked. Although human rights today might seem like the only appropriate response to the Holocaust and World War II, in the following years the concept was anything but self-evident. There were a multitude of serious reservations that are often overlooked by human rights scholars. The apparent unity and support for the non-binding Universal Declaration of Human Rights (UDHR) quickly gave way when attention turned towards drafting a binding Covenant. Because the human rights concept promised (or *threatened*) to create new categories of right holders, imperial powers such as Great Britain and influential political factions in the United States resisted this universal and inclusive discourse. Interestingly, during the same period, prominent professional organizations such as the American Bar Association and the American Medical Association, as well as progressive thinkers like Hannah Arendt and Mohandas Gandhi—each for their own reasons—also rejected key aspects of the new human rights concept. Conflict split the text of the Covenant into two documents and stalled its entry into force for more than a generation.³

This paper examines the epistemological and methodological reasons why this side of the history has been overlooked and sets forth an analytic framework for better understanding and studying human rights. The answer—at least in part—is related to the various difficulties associated with studying rights, as well as the various blind spots associated with the most common approaches for doing so.

³ Christopher NJ Roberts (Forthcoming 2013) *The Contentious History of the International Bill of Human Rights*, Cambridge Univ. Press; Christopher NJ Roberts (Forthcoming 2012) “Dynamics of Health Care Reform: Bitter Pills Old and New,” *Vanderbilt Journal of Transnational Law*; Christopher NJ Roberts (Forthcoming 2012) “The Sociology of Law,” in *The Handbook of Sociology and Human Rights*, edited by David L. Brunnsma, Keri E. Iyall Smith, and Brian K. Gran. Paradigm Publishers.

What is a Human Right? ...and Where do They Come From?

The multitude of distinct forms that rights manifest makes them an extremely complicated topic of inquiry—particularly in the context of a social scientific analysis where specificity and precision is essential. The great difficulty is that the same term invokes a multiplicity of guises—an incredible array of disparate definitions and an intractable range of conflicting foundational sources. For instance, a right can be a concept that has no legal bearing—a moral or normative statement about something that ought to be. Conversely, it can refer to positive law as it is written in constitutions and treaties. Codified rights can be unenforceable (as in the Universal Declaration of Human Rights), or they can be deemed enforceable (as in the International Covenant on Civil and Political Rights). Categorically, a right can be civil, political, cultural, socioeconomic, or human. Rights can be conceived as belonging to an individual, a group, a ruler, a corporate entity, or an animal. They can be associated with tangible private and public property or intangible intellectual property. As conceived, rights also have numerous sources. They can be considered God-given, or arise in the state of nature. Rights can accrue by virtue of one’s humanity, through one’s citizenship, via common law, statutory law, custom, treaty, birth, race, gender, religion, sovereign edict, an act of parliament, a UN General Assembly resolution, or a social revolution...the list goes on and on.⁴

The term “rights” can be thought of as a “free-floating” or “empty” signifier—a concept that is constantly deployed, yet vague, highly variable, and stripped of context and specified meaning. But even when flanked by additional signifiers it can remain just as nebulous. For example, when the phrase “*human* rights” is invoked, it is entirely unclear whether it refers to the

⁴ For similar discussions see Goodale, M. 2007. “Locating Rights, Envisioning Law Between the Global and the Local (Introduction),” in *The Practice of Human Rights: Tracking Law Between the Global and the Local*, ed. M. Goodale and S. E. Merry. Cambridge: Cambridge University Press; Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385–425.

natural rights associated with medieval ecclesiasticism, the eighteenth century French “rights of man and citizen,” the fundamental right of citizenship Hannah Arendt discusses in the context of European statelessness, or the rights that exist within the modern post-war international human rights regime. Indeed, the “multiplicity” problem is not necessarily solved by adding descriptors to the base term. Since rights can stand for so many things, as Bobbio warns, great care should be taken to demarcate the parameters of their usage.⁵

In addition to the vagueness, multiplicity, uncertainty, tensions and contradictions, there is a final obstacle confronting the rights researcher: rights are not real. That is, rights are non-empirical, conceptual entities. No one has ever seen a right, heard a right, or smelled a right. This does not in any way reduce their causal strength, downgrade their normative standing, or limit their reach, for they are very real at the conceptual level. Their existence, however, can be inferred at the empirical level through various indicators. So from a research perspective, it is extremely important at the outset to define not only the particular form of rights under investigation, but to identify where to look for the visible indicators of their existence. For example, does one find evidence of rights formation in the text of judicial opinions, the backrooms of the UN drafting conferences, or dissidents gathering in Eastern European cafes?

In this regard, much of the heavy-lifting associated with defining such terms is accomplished through the use of an analytic frame—a shortcut for defining the operative concepts and relevant empirics. In doing so, it provides structure and establishes the parameters of a particular research endeavor. Importantly, in studies of rights it is a way of specifying the particular conceptual guise of rights that is under investigation and the relevant empirical phenomena to be investigated. All analytic frames must at some level identify at least two things: The definition and source of the right(s) under investigation. In most basic terms, it answers the questions:

⁵ Bobbio, Norberto. 1996. *The Age of Rights*.

What is a right? and *Where do rights come from?* In this way the rights universe can be partitioned and narrowed into various spheres of relevance so that specific (and therefore comparable) guises of rights can be isolated and studied from particular angles. In short, it provides a basic orientation for studying rights that instills a degree of analytic clarity to an inherently nebulous subject.

The most commonly used orientations or analytic frameworks for approaching human rights are the disciplinary approaches of political science and international relations, philosophy, and law.⁶ It is along the parameters of one (or more) of these three distinct “paths” that most researchers examine the post-War development of modern international human rights.⁷ Importantly, the manner in which the human rights concept is typically defined in each orientation leads to a distinct type of engagement with the historical record, which in turn, highlights certain elements while downplaying (or entirely shielding from view) others. For example, viewing human rights as a function of law would likely point a researcher towards focusing on legal institutions, doctrine, treaties and so forth. A philosophical approach might lead to a focus on the moral ideas and natural principles within the UDHR. While an understanding of human rights that prioritized state action, might highlight the political and diplomatic aspects of this history. Such studies that have adopted these approaches have produced a wealth of knowledge. But it is also true that such perspectives and accounts often conceive of human rights in a way that dislocates them from their social moorings, thereby shielding from view key aspects of the history.⁸

⁶ Evans, Tony. 1996. *US Hegemony and the Project of Universal Human Rights*; Waltz, S. 2002. "Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights." *Third World Quarterly* 23 (3):437-48.

⁷ Waltz (2002:438).

⁸ In this regard, Anthony Woodiwiss underscores the importance of an approach that “refuses to separate rights from social life.” See Woodiwiss, Anthony. 2003. *Making Human Rights Work Globally*, at 7.

A New Analytic Framework for Studying Human Rights

So what would an appropriate analytic framework for studying human rights look like? It would be one in which *a priori* conceptions of human rights did not obscure or prevent empirical engagement with any of the conceptions of rights that were at stake. It would be able to focus on the nature of the competing conceptions of human rights, the associated struggles, and their influence on human rights creation. And finally it would be able to acknowledge—at both an empirical and theoretical level—the social aspects of human rights.

Proposition #1

There are three basic elements to the analytic framework I propose for better understanding and studying the human rights formation process. First, this analytic framework begins with the basic proposition: *every legally enforceable right relies upon a corresponding legal duty*. If there is no duty holder there is no legal right. If there is a legal right, there must be a legal duty bearer to honor that right. As the legal scholar Wesley Hohfeld famously showed nearly 100 years ago, the interdependence of these legal concepts is a legal fact as inescapable as a basic arithmetic equation; it is the nature of this *relationship* that determines the strength, quality, guarantee of the right in question.⁹ This basic legal fact applies every bit as much to domestic constitutional rights as it does to international human rights. Nevertheless, the essential “duties” portion of the equation continues to be overlooked, misunderstood, or elided altogether in contemporary theory and practice surrounding rights and/or human rights just as it was in

⁹ Hohfeld, Wesley Newcomb. 1913. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (1):16-59.

Hohfeld's time.¹⁰ It is important to note that duties and rights are not solely juridical categories, but they also translate just as easily into *social* categories.

Proposition #2

Over the past century or so a small, scattered assortment of sociologists, political scientists, theorists, international relations and legal scholars have at various moments suggested that rights are most fundamentally *social* or *human relationships*.¹¹ These thinkers very rarely cite one another, and this admittedly vague proposition that is generally offered as a passing observation about the nature of rights has yet to find a significant place in their contemporary study. So second, within this framework, it becomes a basic definition: ***human rights are statements of social or human relationships.***

Within such an understanding, the juridical relationship between duties and rights can also be conceived in terms of the associative dimensions that exist within rights claims and that identify a claimant's location vis-à-vis other individuals, institutions, ideas, and/or groups that act as duty holder. Here, what began as a legal fact now becomes a social fact. And within this empirical context, a right is understood not as "thing" an individual possesses, or as doctrine, or a

¹⁰ [Cite Pound, Corbin, and Gandhi??Holmes, Oliver Wendell. 1881. *The Common Law*, Boston, MA: Little Brown and Company, at 219-220. Oliver Wendell Holmes argued in *The Common Law*.

¹¹ Lefort, Claude. 1986. "Politics and Human Rights." In *The Political Forms of Modern Society*. Cambridge: Polity Press; Ginsburg, Morris. 1942. "The Individualist Basis of International Law and Morals: The Presidential Address." *Proceedings of the Aristotelian Society* 43:i-xxvi; Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton: Princeton University Press; Carr, E.H. 1948. "The Rights of Man." In *Human Rights: Comments and Interpretations*, ed. United Nations Educational Scientific and Cultural Organization. Paris: UNESCO; Lien, Arnold J. 1948. "A Fragment of Thoughts Concerning the Nature and the Fulfillment of Human Rights." In *Human Rights: Comments and Interpretations*, ed. United Nations Educational Scientific and Cultural Organization. Paris: UNESCO; Wright, Quincy. 1948. "Relationship Between Different Categories of Human Right." In *Human Rights: Comments and Interpretations*, ed. United Nations Educational Scientific and Cultural Organization. Paris: UNESCO; Ginsberg, Morris. 1942. "The Individualist Basis of International Law and Morals: The Presidential Address." *Proceedings of the Aristotelian Society* 43:i-xxvi; Hobhouse LT. 1922. *The Elements of Social Justice*. London: G. Allen & Unwin, at pg. 33. [Gindberg also cites T. H. Green, *Principles of Political Obligation*??]; Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of 'Buried Bodies' of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385-425.

fundamental Truth, but rather in terms of how it defines that “individual’s position in a fluid network of social relations” and institutional configurations.¹² Since it is the nature and quality of the linkages between duties and rights that determines the nature of the guarantees of the rights an individual can count on, it is the associative dimension—i.e. the interspace between social entities (a gap of sorts)—that becomes the object of study. Indeed, when “position” and “social interaction” become the focus, much more can be gleaned about what human rights are, how they operate, and where they exist than any individual characteristics such as “dignity” or one’s own “humanity,” for example.

While it is generally presumed that everyone possesses human rights by virtue of their own humanity or inherent dignity, the social positions that are most amenable for establishing a strong connection between an individual and those duty-bound entities are typically a limited resource. Certain relational configurations are better than others for translating rights principles to practice. For example, a member of an ethnic majority might be better positioned to call upon certain rights than a member of an ethnic minority. A US citizen might be less able to realize certain socioeconomic rights than a citizen of the European Union. In this sense, an individual’s position within a broader community—i.e. their membership—becomes a precondition for having meaningful rights. As Arendt suggested, the protective capacity of rights exists not within the right, the law, or the individual, but is rather a function of membership within a community that will come to one’s aid to see the right carried out in practice. Within this context, the relational notion of rights that is the centerpiece of my framework becomes a foundation for various modes of *political* inquiry surrounding membership, thereby expanding its potential for establishing interdisciplinary connections.

¹² Somers & Roberts (2008).

Proposition #3

Third, historical research into the development of the modern human rights system shows that there is always a contest or struggle for any given human right. There are others who share a similar orientation, supporting the idea that rights emerge from struggle. Within the parameters of the present framework, however, the idea of “rights struggles” has a very specific meaning.¹³ They are not simply battles over the words and phrases that appear within a human rights text—they are struggles over the relationships between groups and individuals; between the social collectivity and the state; the individual and state, but most fundamentally, the individual and the rest of society. Within this analytic framework *human rights are statements of social relationships that emerge from struggle*. This basic definition that identifies the nature and source of human rights carries with it important methodological consequences for the analysis of human rights texts and ideas.

Under this approach, the role of opposition comes to the fore. As mentioned above, researchers have often documented the work of human rights supporters without fully identifying the impact of the substantial resistance and opposition *against* various aspects of the emerging human rights concept (any struggle, debate, or controversy, of course, requires at least two sides). Indeed when the focus shifts towards the *struggles* over competing notions of human rights, one finds no shortage of serious objections to the concept in the historical record.

Methods

¹³ Bobbio, Norberto. 1996. *The Age of Rights*; Tilly, Charles. 1998. "Where Do Rights Come From?" In *Democracy, Revolution and History*, ed. T. Skocpol; Moore, B. 1966. *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*. Boston: Beacon Press.

If it is assumed that human rights are outcomes of struggles over relational configurations, the researcher must trace such struggles as they progress not merely as drafting or legislative histories, but as social and political action that is often far removed from such formal processes, but nevertheless can determine the outcomes. So in contrast to a standard doctrinal or historical approach, for example, that might begin with the texts and concepts we have today and look back to history to see how they came to be, this approach commences the analysis *before* the document under consideration was created and *prior* to the development of the concept to identify the nature and the impact of the various conflicting social and political forces from which human rights emerge. Importantly, this “*prospective*” approach is sensitive to the elements that do *not* become incorporated into positive law. Indeed, when examining human rights law and concept formation, the negative elements (i.e. items that do not appear in legal texts because they were actively removed, prevented from being included, or were never even considered as valid to begin with) can exert just as much influence on outcomes as the items that actually appear in the text.¹⁴

When studying the development of the International Bill of Human Rights—the foundation of the modern international system of human rights,¹⁵ this approach identifies numerous alternate conceptions of human rights that were under consideration during the 1940s and 1950s, though never adopted (and today remain virtually unknown). It uncovers a series of unexpected reservations and objections against the emergent notion of human rights during this period. And it shows that much of this opposition—through the process of struggle—was actually a

¹⁴ Scheppele, Kim Lane. 2003. "Aspirational and Aversive Constitutionalism: The Case for Studying Cross National Influence Through Negative Models." *International Journal of Constitutional Law* 1 (2):296-324. Though Scheppele's discussion is oriented towards national constitutions rather than international human rights instruments, I will borrow the substance of her approach and apply it to the latter.

¹⁵ The International Bill of Human Rights consists of the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Note: Until 1952 there was only a single Covenant, at which time it was split into the two aforementioned Covenants.

constitutive force in the development of the modern human rights concept that today is taken for granted. Many of the gaps, the divisions and the faultlines that today separate people from their rights were worked into the concept through a series of bitter struggles that have largely been overlooked by historians and human rights scholars. But when studying human rights as doctrine, politics, or moral ideas, much of this history remains out of view.

Conclusion

As with all research programs, this framework is not in any way a final statement. Nor is it the only possible analytic approach. It is one amongst many possible others. This approach represents a particularized orientation for studying rights that other scholars can hopefully use for their own research while contributing their own insights, helping to refine it along the way. Human rights formation is an ongoing process—as new issues emerge and the parameters of existing social relationships inevitably shift, so too must the various social meanings of the human rights concept, as well as the various ways of studying it.