



**UiO** : **Faculty of Law**

University of Oslo

Master Programme on Human Rights Law  
National University of Vietnam

CAL 6001 Philosophy, History and Politics of Human Rights

*Lecture 4, November 13, 2015: Interdisciplinary perspectives  
on human rights: law, policies and civic action*



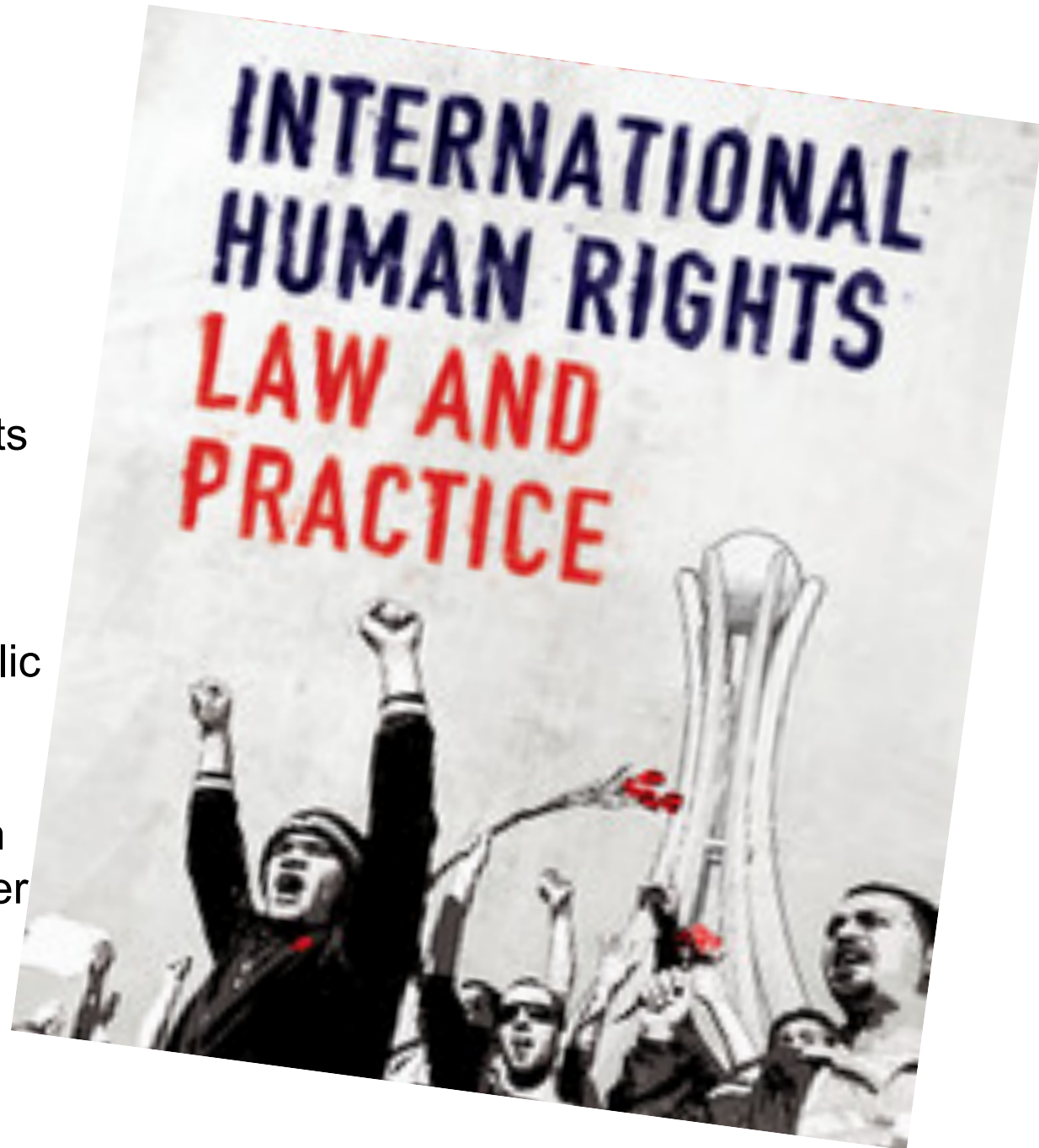
*Prof Bård A. Andreassen*

*Norwegian Centre of Human Rights, University of Oslo*

## Teaching goal

This lecture

- 1 Reflects on human rights as law, and its limits,
- 2 Addresses on how human rights are part of politics, public policies
- 3 Discusses a research project on human rights, power and social movements



## Outline

- Human rights as law and beyond law
  - HRL
  - Interdisciplinarity
  - Mixed methods
- Policies of human rights
- Power (politics), human rights mobilisation by social movement

# Human Rights Law

1. Human rights as international law
  - Legally binding conventions
  - Implemented in national legislation
  - Transformation if incorporation
  
2. Enforcement mechanisms - strong in LA and Europe
  - Regional HR courts
  - International supervisory system. The quasi-legal nature of human rights bodies
  - human right as trumps – precedence - in national courts
  
3. Remedies and compensation
  
4. HR Case law

## 1. Human rights as international law

Legally binding conventions

Implemented in national legislation; transformation or incorporation

Definition:

“International **human rights law** is the body of international **law** designed to promote and protect **human rights** at the international, regional, and domestic levels”

Example: The ICCPR obligates countries that have ratified the treaty to protect and preserve human rights

The Covenant compels governments to take

- administrative
- judicial,
- legislative

in order to protect the rights enshrined in the treaty and

- to provide an effective remedy

## The Hohfeldian conception of a right

Human rights rights as *claim rights*  
(Hohfeld): person A has a legitimate  
claim towards person B or, in the case  
of human rights, towards the state

*Hohfeld argued that right  
and duty are correlative  
concepts, i.e. the one must  
always be matched by the  
other. If A has a right  
against B, this is equivalent  
to B having a duty to honor  
A's right*

## Example – excerpts from Article 2 of the ICCPR

1. Each **State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant**, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant **undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures** as may be necessary to give effect to the rights recognized in the present Covenant

Each State Party to  
the present  
Covenant (ICCPR)  
undertakes:

- a. To ensure that any person whose rights or freedoms as herein recognized are violated **shall have an effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b. To ensure that any **person claiming such a remedy** shall have his right thereto **determined by competent judicial, administrative or legislative authorities**, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c. To ensure that the competent authorities shall **enforce such remedies when granted**



## 2. Enforcement mechanisms - strong in LA and Europe - Human right as trumps

1. On legal enforcement – requirement – rule of law, and law enforcement institutions
  - Legalisation
  - Judicialisation as an issue, in particular regarding economic and social human rights
2. On international enforcement – hard and soft law institutions:
  - European and LA systems
  - HR Committees under different covenants (more on this later)
3. Compliance often restricted by lack of political support, or weak administrative institutions

### 3. Remedies

#### **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

Adopted and proclaimed by  
General Assembly resolution  
60/147 of 16 December 2005

## VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms

## 4. On case law

- The increasing availability from national courts and international human rights courts
- Databases for searches

Human rights Law Center

<http://hrlc.org.au/caselaw/>

European Court of HR:

[http://www.coe.int/t/dg3/children/caselaw/CaseLawChild\\_en.asp](http://www.coe.int/t/dg3/children/caselaw/CaseLawChild_en.asp)

### Dismissal of the applicant's appeal on points of law for formal reasons which were attributable to the prosecutor deprived him of access to a tribunal

In today's Chamber judgment<sup>1</sup> in the case of [Henrioud v. France](#) (application no. 21444/11) the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and

No violation of Article 8 (right to private life) of the Convention.

The case concerned the applicant's inability to secure the return of his children to Switzerland, who had been taken to France by their mother.

The Court found that the applicant had been deprived of his right of access to a tribunal because the Court of Cassation had been excessively formalistic in declaring his appeal on points of law inadmissible on the ground of non-compliance with a formal condition attributable to the public prosecutor with the Court of Appeal.

The Court further found that the applicant had not provided the Court of Appeal with the requisite information for contesting his tacit acceptance of the failure to return his children.

#### Principal facts

The applicant, Jean Michel Henrioud, is a Swiss national who was born in 1966 and lives in Auviernier (Switzerland).

Mr Henrioud's wife left the matrimonial home with her children to settle in France despite an injunction prohibiting her from leaving Swiss territory delivered by the President of the Boudry civil court. Subsequently, the President of the civil court withdrew the injunction on the ground that Mr Henrioud's wife had not been apprised of it until after her departure.

Mr Henrioud appealed against that decision with the Civil Court of Cassation of Neuchâtel Cantonal Court, alleging a violation of the Hague Convention on the Civil Aspects of International Child Abduction. He also submitted a request to the Federal Justice Office for the return of his children, which was forwarded to the French authorities. The Prosecutor with the Bordeaux Regional Court summoned the mother to appear with a view to a finding that the children were being held unlawfully in France so that he could order their immediate return to their father's home. The court rejected this request because the mother had not been aware of the order prohibiting her from leaving Swiss territory at the time of her departure, and also because the order had subsequently been cancelled.

The prosecutor appealed against that judgment. Mr Henrioud lodged an application to be joined to proceedings with the Court of Appeal, requesting the immediate return of his children. He did not, however, mention his appeal against the decision to cancel the order prohibiting the mother from

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dgh/monitoring/execution](http://www.coe.int/t/dgh/monitoring/execution).

## Beyond law in human rights studies

- The limits of law
- Interdisciplinarity
- And mixed methods

Why is a legal approach to human rights not enough? Why should we emphasize that human rights are LEGAL as well as MORAL entitlements? (Meckled-Garcia and Cali, Woodwiss)

Two main replies:

1. There are many NON-LEGAL ways that human rights can be respected, protected and fulfilled
2. Human rights are not just a matter of the relationship between the state and the individual. It concerns other relationships as well

## GROUP WORK

### GROUP 1

There are many NON-LEGAL ways that human rights can be respected, protected and fulfilled? Discuss and give five examples

### GROUP 2

Human rights are not just a matter of the relationship between the state and the individual. It concerns other relationships as well. Discuss and give four examples

## Woodwiss' perspective

- Human rights not just law – a matter of power, social structures and politics
  - Local, national, international
- The pursuit of the “good” (HR) can lead to “evil” (examples?)
- Legal enforcement of human rights norms must be supported by social routines of everyday life
- Human rights are socially constructed (a negotiated package of norms) and must permeate social life to be effective
- Human rights put constraints on states but also give power to states (a double edged sword)
- Human rights reduce inequality, but does not eradicate it: it is a minimal standard (schooling, health etc.).
- Compatible with systems of production based in inequality (capitalism, cf. Marx' critique of HR)
- The shortcoming of state protection in today's world – people rely on other sources and social hierarchies for livelihood and other support

# Policies of human rights

## Henry Shue. *Basic Rights* (1980)

Societal threats and dangers explain human right

- A right: “a rationally justified demand for social guarantees against standard threats”
- A standard threat is a threat against **basic** rights, that is, rights that we need to have in order to enjoy other rights
- Shue considers key human rights to security and rights to be basic subsistence rights: civil and social rights
- Basic rights protected by *social guarantees*, for instance: laws, a judiciary, schools

## Human rights are part of politics, public policies

- Administrative duties
- HR protected through public policies and budget allocation; example South Africa, child rights budget
- National plans of action
- National institutions for human rights
  - Ombudsmen institutions
- Plans of action for various issues
  - Plan of Action in general and on specific issues
    - Example: business' responsibilities;
    - Plan of action for human rights protection
  - National institution for human rights



## International Covenant on Economic, social and cultural rights

### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

# Human rights are part of public policies

**Fifth session (1990)**

**General comment No. 3: The nature of States parties' obligations art. 2, para. 1, of the Covenant)**

Contained in document E/1991/23.

# Research project

*Human Rights, Power and Civic Action:  
Comparative Analyses of Struggles for Rights  
in Developing Societies*

By Bård A. Andreassen & Gordon Crawford (eds.)  
Routledge 2013, *Research in Human Rights Series*

# Background

- The missing dimension of power in the human rights and development literature
- Much emphasis on ‘empowerment’, but not on power as an obstacle to securing rights
- Statement: Need for understanding how “deeply embedded power relations and structural (are) barriers to securing rights” in development (Pettit and Wheeler 2005: 5)

## Project aims

To understand the interrelationship between **forms** and **uses** of power and **the impact** (positive/negative) on human rights

**Academic:** Introduce power analysis into human rights research

**Practical:** Develop insights and lessons for human rights advocacy

# Objectives

- To examine **HR/power/civic action** in differing socio-political contexts
- To identify obstacles and constraints on securing rights for people living in poverty
- To explore whether rights promoters have **challenged** and **altered** power structures
- To contribute to debates about the relationship between CPR and ESCR, and between **governance** and human rights

# Research Questions

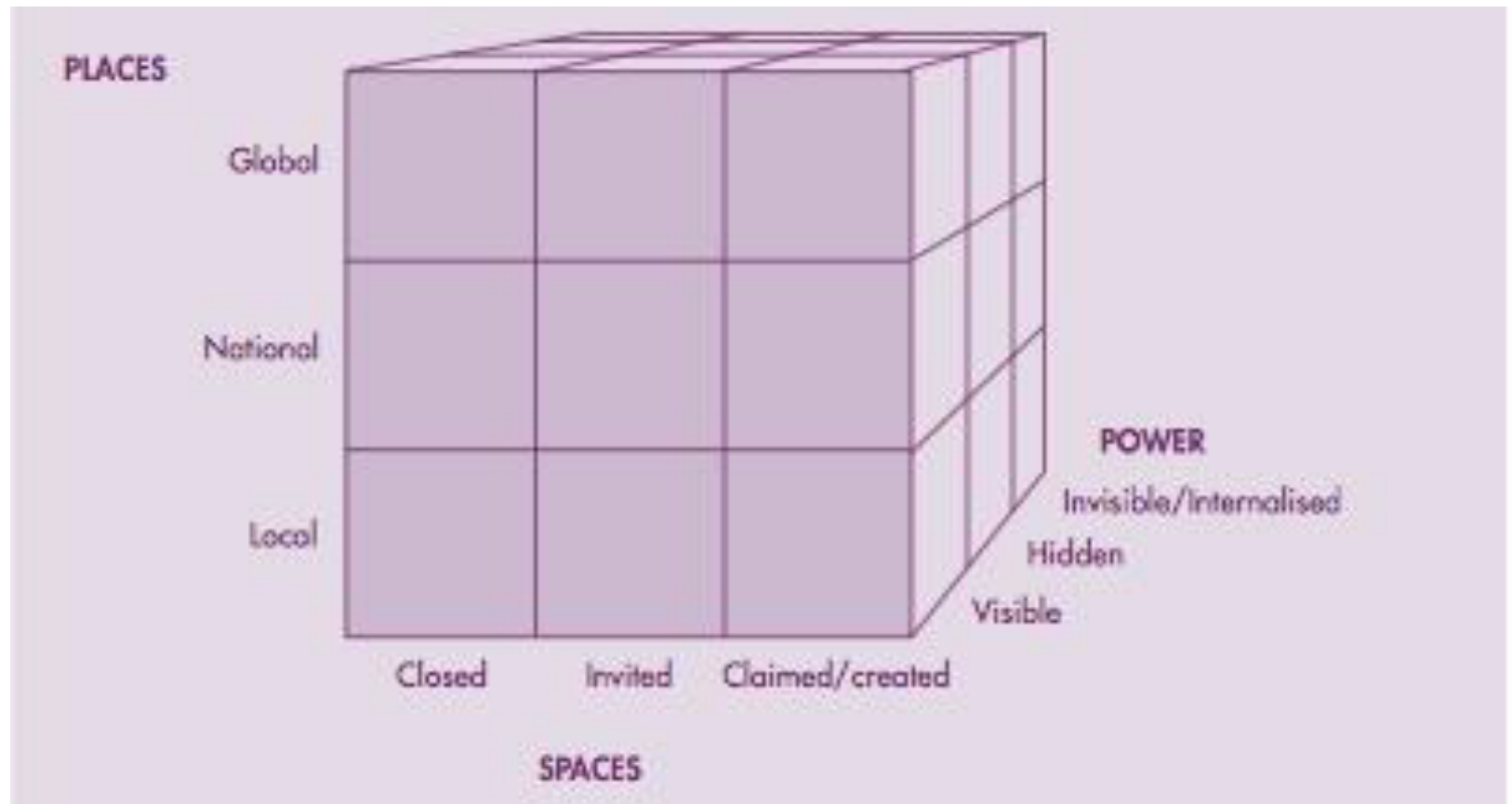
- In what ways have *struggles for human rights* in contexts of poverty been *constrained* by power relations and structural inequalities?
- In seeking to secure rights, how and to what extent have non-governmental human rights promoters been able to build *countervailing power* and *challenge power structures* at both local and national levels?
- To what extent have rights-promoting organisations been successful in *transforming power structures* and *securing rights*, especially for vulnerable groups and people living in poverty?

# Qualitative methodology

- **Organisational studies** in 6 countries: i.e. in-depth case studies of selected rights-promoting organisations within distinct country contexts
- **Country selection**: differing political contexts with regard to political regime and degrees of democratisation, and thus varying ‘opportunity structures’ for civic action
- Adopted ‘**power cube**’ as analytical tool



# Gaventa's power cube



# Giddens's and structuration

- Social structures exist, but produced, reproduced, challenged and transformed by human agents
- Therefore continuous cycle or dialectic in which actors influence structures and structures shape actions – social/political interaction- power exchange
- **Structuration** as a bridge between structure and agency

# Research starting point

- Undertake power analysis to gain critical insight into how power structures limit claims for human rights. Yet agency remains central.
- Awareness of coercive power potentially leads to social action to challenge and transform such power structures, thereby enhancing prospects for realising rights
- What did we find regarding power constraints?

# Visible power

Widespread as explicit or implicit state action, including failure to reform customary practices

## Examples

- Opposition to Domestic Violence Bill in Ghana, esp. from Women's Minister.
- Resistance to lobbying for land reform in Kenya – both from government / regime and hidden power of clientelist networks – ie nested power
- In China, ZLAS – women's rights organisation – had to negotiate with the visible power of the party-State and the All China Women's Federation, a mass social organisation.
- Increasing role of visible corporate power

# Hidden power

Pulling strings behind the scenes, agenda setting

Examples:

- In Ghana, WACAM up against hidden power of mining TNCs. Used financial resources to influence local power structures (local governments, chiefs, community leaders) and gain their support.
- White farm-owners in post-apartheid South Africa were able to secure the collusion of local officials in a conflict with farm workers
- Hidden power of patriarchy in several case studies
- ‘Hiddenness’ vs. transparency – a basic issue in a human rights critique of governance

## Invisible power

Harder to perceive; concerns attitudes, life views, behavioral norms, often embedded in social traditions and customs

Examples:

- Ghana – Bill on Domestic Violence (2003-2009)
- Patriarchal structures, socialization of inequality, found across the cases
- China: ‘Stigmatizing the weak’, e.g. migrant workers, and their ‘internalization of prejudice’, undermining their self-esteem and capacity to mobilize for rights
- Patterns of invisible power – hard to change and also how to strike a balance between critiquing repressive practices without undermining the legitimacy of the entire culture?

## General findings on power constraints

Confirmed the significance of dominant power as an impediment to human rights realisation and that, as a result, claims for rights have met with limited success

- Power constraints found in all political contexts
- Visible power – operates in more legitimate forms (state institutions, parliament) in open political systems, but tends to be exercised in more repressive ways in closed and authoritarian systems (Zimbabwe, China).
- Different forms often nested and reinforcing each other
- Visible power – more prevalent when used to defend rights related to elite interests (e.g. land)
- Hidden and invisible power – typically prevalent in constraining claims for women's rights

# Challenging power and building countervailing power

How did organizations challenge power?

Three dimensions:

- **Civic action strategies**
- **Spaces of engagement**
- **Forms of countervailing power**



## Strategies: Cooperation, confrontation, alliance-building

- **Cooperation** in all contexts
- **Pragmatism** – Zimbabwe & China – little scope for opposition
- More scope for success in open and democratic contexts
- **Confrontation** – mobilisation and public protests
  - Abhalali baseMjondolo (shack dwellers movement) in SA
  - WOZA in Zimbabwe
- **Alliances and networks** particularly for small groups (CBOs) who sought shelter among larger groups. WACAM in Ghana – local to national to international linkages and solidarity
  - “Host institutions”

## Spaces of engagement: closed, invited, created and claimed spaces

- Strategies depended partly on **political and social spaces** that organizations operate in: trying to prise open 'closed spaces' spurs more confrontation; engaging in invited and claimed spaces leads to cooperation; creating spaces is often related to networking and alliance building
- **Claimed spaces**: 'The Teaser' – Domestic Violence Coalition, Ghana
- **Invited spaces**: WACAM invited by Newmont Mining Ltd to be an observer on Resettlement Negotiation Committee and Responsible Mining Alliance. WACAM declined both invitations as wary of co-option

## Forms of countervailing power

- **Power to** – organization and mobilization of local people (e.g., Abahlali, South Africa against forced eviction)
- **Power with** – alliances
- **Power within** - individual capacity to act, enhanced self-esteem

## Transformation of power structures?

Some successes but limited:

- *Legislative changes*, e.g. Domestic Violence Act in Ghana
- *Changes in public policies*, e.g. KLA and land reform policy
- *Institutional changes*, e.g. Domestic Violence Secretariat and Victims of Domestic Violence Management Board in Ghana
- *Cultural changes*, e.g. greater awareness of women's rights in both autocratic (China, Zimbabwe) and democratic (Ghana, Kenya) contexts

# Qualifications

- Not all organizations sought transformative change, but rather supported victims of injustices or were issue-based
- Where organizational mobilization has contributed to some changes, exact impact and attribution are difficult to assess
- Changes have been limited, and power imbalances remain which continue to constrain HR advocacy

## Concluding thoughts

- Human rights-based approach – rise and decline? Another failed strategy? The normative debate
- Significance of coercive power as impediment to human rights realisation is confirmed
- If not addressed, then HRBA becomes ‘tamed’ and ‘depoliticised’
- Non-governmental rights promoters shown awareness and determination to challenge powerful interests
- Bringing power back in and recognising HR struggles as power struggles, i.e. re-politicisation of rights-based approaches

# The new trend?



# Disciplinary approaches to human rights research

- **Legal-administrative studies (law, PL, IPL, organisational disciplines)**
  - Codification of International HR, and their implementation (standards, procedures, bodies, interpretations)
- **Philosophical and anthropological studies**
  - Justification of HR standards; realisation of HR in different cultures (interpretation differences and issues)
- **Historical – sociological and social science studies**
  - Conditions for and obstacles to realisation and respect for human rights