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BOOK SYMPOSIUM

Politics as *Realitätsprinzip* in the debate on constitutions and fragmented orders: remarks 'On constitutions and fragmented orders'

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Abstract

The promise of constitutionalisation is, according to Kratochwil, the existential comfort that comes from having a coherent framework for judgement and action. This apparent epistemological confidence comes at the price of parting with a realistic assessment of the concrete situation, and it conceals that politics operate across all levels all the time. This paper critiques this vision and points beyond the idea of exhaustive frameworks. Figuring out contextually appropriate configurations of constitutionalisation and fragmentation allows for greater agency and pluralism. A more fundamental tension in Kratochwil's work remains, however, his falling back on the abstract to articulate the experiential.

Keywords: Constitutionalisation; context; fragmentation; subversion; theory

Re-introductions

It takes a brave reader to venture into the labyrinthine depths of Friedrich Kratochwil's oeuvre. In *The Status of Law*, Kratochwil articulates a sophisticated and typically erudite theory of practice in relation to law but he continues to construct his thinking via a mode of expression that is demanding to the uninitiated. His ornate conceptual vocabulary, as intellectually beguiling as it may be, is apt to mislead, tending to engender debates over misunderstood details rather than conceptual and political fundamentals. It is for this reason that the commentary offered below takes the form of an explication of Kratochwil's arguments, teasing out certain points and relating them to insights from psychoanalytic theory. Such strategy offers a means of extending Kratochwil's most crucial ideas while better reconciling the fundamental tension that, as I see it, underlies his work: that between idealistic abstraction and experiential concreteness.

In the Introduction, Kratochwil reiterates the task which animates much of his scholarship, namely that of figuring out strategies of 'de-paradoxification' in the pursuit of critical pragmatism in International Law and International Relations (IR). The meaning and structure of the troubling paradox is hence key for grasping

Kratochwil's conception of practice. Or, colloquially but here fittingly, for 'getting real', without however becoming a realist in the restrictive sense of IR theory. Crucial to 'getting real' is the recognition and integration of the fact that distinguishing between 'truth' vs. 'falsity', as a logical first step prior to action, is a debilitating condition.[1] In legal reasoning, social theorising, and political decision-making 'something more is "going on"'. This 'more' concerns acting in particular contexts and making contingently appropriate judgements, rather than applying an *a priori* general framework as a procedure that allegedly delivers adequate judgement regardless of the context. In this casuistic pragmatism, theory is not a salvation but neither is the reliance on 'facts' which are but artefacts of context. Theories here are enactments of the quest for certainty and the pursuit of hierarchy, not accurate descriptions or prescriptions. This is a dangerous proposition for contemporary slayers of fake news but also for normative activists, and it is one which has traditionally brought charges of moral relativism on Kratochwil's project. The ontological anti-foundationalism that underpins this project triggers the 'Cartesian anxiety'[2] among universalists, sectarians, and authoritarians alike. But what foundationalists see as relativism, anti-foundationalists interpret as the call of duty to act responsibly when there is no dependable procedure to make the right choice. And the meaning of what makes for the right choice is both contested and variable.

Still, choices must be made and decisions taken, even if they strictly speaking do not follow a reliable method. Once we are free from the illusion of and urge to control socially unfolding outcomes, however, politics manifests itself as contestation over contextual projects. Such politics constitutes reality to be engaged in rather than fantasised about. Acting in recognition of indeterminacy while figuring out a contingently appropriate judgement is the modus operandi of the critical pragmatist. The search for 'the truth', or ideal theory that guarantees the appropriateness of judgement is, in contrast, a symptom of denial, a 'flight from reality'.[3] Kratochwil deflects from reassurances of any kind. He wants to rattle our world. Not by insistence that 'anything goes', however. He draws us into the language game of law which is not about a complete interpretive arbitrariness but about a learned skill informed by the past. That skill is not about accumulating foundational knowledge but about knowing 'how' to act. In order to move in such a direction, we first need to upset neat dichotomies that misconstrue the process of knowing 'how'. Kratochwil's abstract language may obscure his relentless pursuit to unsettle idealistic, or quasi-divine and binary assumptions about reality, a struggle well-captured by his continuous abhorrence of the 'view from nowhere'.[4] If he has been on any mission however, which he may heartily deny, it is to expose the Cartesian anxiety in the way we (do not) engage social reality. Politics remains the currency of such engagement. Theory, method, or constitutional provision instantiate politics, rather than being a shield from it, and thus involve complicity for which responsibility should be taken. Meditation 3 problematises the dichotomy between

[1]Kratochwil 2014, 24–25.
[2]Term coined by Bernstein 1983.
[3]Shapiro 2005.
[4]Term coined by Nagel 1989.

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constitutionalisation and fragmentation, and thus tackles existential comfort and anxiety that this dichotomy embodies.

Constitutionalisation and fragmentation

Theories of fragmentation and constitutionalisation are presented as antagonistic accounts of the global legal order. Constitutionalisation posits that nascent constitutional principles foster the global legal order while the increasing complexity of the global legal order is a threat to its coherence.[5] Within such parameters, the emergence of autonomous dispute resolutions, that is fragmentation, threatens to divest constitutional law from its prospective ordering function.[6] It therefore engenders an anxiety of uncertainty in much the way that anti-foundational theorising does. To follow Kratochwil's reasoning, constitutionalisation is driven by the wish to create perfectly coherent frameworks to guarantee an unequivocally right judgement. But such epistemological relief comes at a price of parting with a realistic assessment of the concrete situation. The analogy with the Freudian resistance to *Realitätsprinzip*, originally conceived as the ability to invest in long-term satisfaction instead of indulging in instant gratification, intuitively captures this condition of knowledge production.[7] While constitutionalisation (and, more broadly, theory) seems to be the triumph of reason over passion, it rather enacts the instant gratification of cognitive relief of a semblance of order. What appears rational, that is, a drive towards a constitutional framework, manifests as an enactment of the pleasure principle to minimise tension, soothe existential anxiety, and thus sap political energies. The imagery of fragmentation as utter chaos paralysing the capacity to act belongs to the same process. The fear is that unless there is a dependable foundation, a clarity of means and a neat division of labour, action cannot be undertaken or have an effect. But the argument in favour of constitutionalisation against the genuine dilemma of fragmentation can offer a solution only by displacing this very dilemma.[8] We can surely 'solve' a problem but only by getting into another, replacing one illusion by another. In other words, the wish for constitutionalisation displaces the anxiety of uncertainty manifested in the fear of fragmentation. Rather than forge an illusionary or imposed edifice of a solution, however, we should work through contradictions and dissatisfactions inherent in doing politics as engagement with instead of denial of reality.

The notion of coherent and pre-established international law resembles the ideal theory that resolves the meaning of political action by conceptual fiat. Both are made possible by the premise of ontological duality: Constitutional law is prior while 'normal' law needs to be tested against it. Proper theory is an *a priori* model against which propositions about reality get tested. Kratochwil rebuffs both. His alternative involves systematicity of inquiry which starts in the identification of the problem *in situ*, necessarily in 'the midst of things', and proceeds with the application of contextually appropriate tools, thus making possible contextually

[5]Murray and O'Donaghue 2017, 225–26.
[6]Kratochwil 2014, 94.
[7]Freud 1991.
[8]Kratochwil 2014, 84.

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appropriate judgements. This hermeneutical stance implodes the quest for a single objective point of view from which things appear as they 'are'; it questions the rationale of building ideal models in search of applications, or the ideal of consistency based on logic as a 'neutral' and therefore 'compelling' criterion.[9] The 'order of being', the categories of the mind, and the 'scientific' method do not, from within such position, provide an unproblematic and transhistorically valid frame of reference.[10] Theorising and legal reasoning are better seen as models of ordinary language communication which rely on field-dependent criteria for deliberation and assessment. In an Aristotelian vein, Kratochwil depicts these processes through the image of the legs of a chair which support the seat together, rather than the links of a chain that need to be independent and equivocal in strength.[11] Even singly inconclusive arguments can provide a viable justification if they 'work' in conjunction (ibid). In this respect, a political process and its institutional design, as non-foundational as they of course are, appear a more reliable source of viability, and vitality, than logic or coherence. The judicial practice is a good example thereof as it consists of making a political choice of symbolic frames. 'The capturing of the symbol by the lawyer is tantamount to capturing the decision itself', as Kratochwil persuasively cites Cohen.[12] The significance of practice becomes clearer in this context: practicing law and practicing theory are competent performances. Learning how to perform competently occurs in community socialisation in which the judge (and the theorist) is made. The exercise of judiciary duties is a type of social practice subject to exigencies of politics. International interaction of judges across multiple litigation fora makes them transnational political figures but also both derives from and creates tangible constitutionalist effects. The fragmentation vs. constitutionalisation dichotomy collapses in practice.

The wish to control

Klabbers provides a compelling description of the seduction of constitutionalisation.[13] In its promise of a stable and legitimate framework for interaction, constitutionalisation is hoped to confront fragmentation and bestow political legitimacy by supplying control mechanisms based on the rule of law. This gives international lawyers some semblance of operating within a 'real' legal regime.[14] The proliferation of international courts and the competition between them poses a non-trivial threat to such visions.[15] And yet the comfort of constitutionalisation only prevails under the condition of controlling politics through law. Constitutionalisation is thought to elevate law above politics, but, through relegating politics to a 'lower' level not yet 'regulated' by law, it may also mean the

[9]Kratochwil 2016, 284.

[10]Onuf 1989, 43; on consistent constructivist inquiry that relies on the notion of the hermeneutical circle, see Lynch 2014.

[11]Wisdom 1945, 194, as cited by Kratochwil 2014, 85.

[12]Cohen 1963, 335, as cited by Kratochwil 2014, 82.

[13]Klabbers 2004.

[14]Ibid., 32–49.

[15]Kratochwil 2014, 93–97.

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intensification of politics.[16] The neat imagery of levels conceals the fact that politics operate across levels and at every level all the time. This could be a conceptual interpretation of what Kratochwil's use of 'in the midst' shall mean.[17]

The 'in the midst' position helps realise but also put to productive work the underlying paradox of constitutionalisation, that is, the fact that overcoming politics by insisting on adhering to certain fixed values is itself intensely political.[18] The will to fix reveals the fixed as inherently prone to fragmentation. While Klabbers and Kratochwil see politics as inevitable in international life and thus call for integrating rather than resolving the paradox, they differ in how they want to go about it. Klabbers opts for a Habermasian take in his avowal of disagreement and joint discussion of ways of living together based on procedures which guarantee the minority view.[19] Kratochwil goes Bourdieusian in his depiction of law as a field of struggle and contestation conditioned, however, by the unity yielded by habitus.[20] As Traisbach shows, the quest for unity of law is not only about securing coherence and efficiency.[21] It is also about establishing and safeguarding a hierarchy of expertise and constructing competence over decision-making. This unsettles the view of law as part of the traditional contractual paradigm and visualises transnational interaction of judges as power-ridden intertwinement of constitutionalisation and fragmentation dynamics. Murray and O'Donoghue illustrate such dynamics through an analogy with the historical case of the UK's fragmented court regimes.[22] The productive interaction between courts has led to the evolution, incremental, and non-linear as it may be, of normative judicial constitutionalism and the emergence of constitutionalising principles even in the absence of a formal effort to create a 'global constitution'. This effect arguably creates a framework 'good enough'. Anything more would hold to the illusion that clarity and coherence produce warranted judgement. And illusion, as we know, is motivated by a wish-fulfilment that clouds a realistic judgement of the situation.[23]

A Bourdieusian interpretation of the dialectics of constitutionalisation and fragmentation offers a particular take on the politics of courts as a transnational field. As much as lawyers compete, the social space of their interaction is conditioned upon and reproduces the homogeneity which only appears as antagonism. The continuous confrontation among courts as actors is possible because they have the same 'sense of the game' and of what is at stake. Such commonality overwrites superficial contradictions. It has the potential to produce a regime of truth for adjudication. Here comes a warning against suppressing politics from a different angle: in the frantic wish for neat and exhaustive frameworks for action we fail to notice the deeper structure of unifying constitutional effects that mark the global legal order. Such effects both enable and steer conversation across multiple fora for litigation, and across what appears to be fragmentation. They thus constrict the

[16]Onuf 1995.
[17]Thanks to Nicholas Onuf for a discussion on this.
[18]Klabbers 2004, 54.
[19]Ibid., 55.
[20]Kratochwil 2014, 90.
[21]Traisbach 2021, 534.
[22]Murray and O'Donoghue 2017.
[23]Freud 1928, 31.

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repertoire and parameters of action. The task is hardly to constitutionalise more tidily, comprehensively, and thus rigidly in this context. Figuring out contextually appropriate configurations of constitutionalisation and fragmentation affords instead a dose of agency and pluralism. But this comes with the conundrum of how to strike a balance between the role of law in taming power, on the one hand, and the prevention of 'the rule by law' when the judiciary subordinates to the executive or monopolises the public sphere, on the other. Here politics connects with the contextual boundedness of the meaning of the rule of law.

The contextuality of the rule of law

Kratochwil starts Meditation 3 by discussing the historically changing meaning of law itself: from the custom of blood revenge via the traditional *nomos basileus* (law is king) to the contemporary part of parcel of the 'rule of law' argument. This semantic reconstruction is in line with the Wittgensteinian premise that the meaning of a concept is in its use.[24] Concepts are contingent on our social experience and social change. They cannot be fixed *per se*, and the concept of the rule of law is no exception. Making sense of the meaning of the rule of law needs to proceed by means of field-dependent, that is contextual, criteria.[25] The rule of law is then also poorly understood if viewed as a clearly structured corpus of rules and principles since context dependence of meaning surpasses formal agreement, or validity.[26] The latter is an insufficient clue for reaching useful conclusions about meaning.[27] Or, as Justice Holmes famously puts it, general principles do not decide concrete cases.[28] No canon of interpretive rules can close the gap between these two. More than one principle may apply in any case and they themselves may conflict. A constitution fixes things but some of the most pressing questions usually remain outside of the constitutional framework.[29] Cleansing our language from all points of view misses politics and thus divests of meanings, leaving us in a place in/from nowhere and thus incapable of meaningful action.[30]

If the task of a critical pragmatist is then to labour in 'the midst of things' in order to arrive at an appropriate judgement, rather than observe from 'the view from nowhere' to pass judgement, her take on multi-litigation and overlapping jurisdictions becomes less paradoxical, although hardly anxiety-free. She treats contradictions as an inexorable and formative experience to be interpreted within the changing 'meaning-in-use'. This is a position from which to continuously and usefully unsettle oneself and thus to 'stay real' while bracing with the ever-present urge towards wish-fulfilment. Getting real requires shedding what Martha Nussbaum after a Greek philosopher Zeno calls *catalepsis*, that is, 'a condition of certainty and confidence from which nothing can dislodge us'.[31] To be cataleptic is to believe

[24]Compare Wittgenstein 1958.
[25]Kratochwil 2006, 305.
[26]Kratochwil 2014, 77.
[27]Wiener 2008.
[28]Cited in Kratochwil 2014, 83.
[29]Ibid., 77.
[30]Kratochwil 2008; thanks to Hannes Peltonen for helping to clarify this part.
[31]Nussbaum 1992, 491.

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to have a firm grasp of reality. Yet, because reality is inherently slippery, either the firmness of such catalepsis or its conception of reality is false. Critical pragmatism exposes the ontological and normative escapism of catalepsis and calls for procedural and ethical responsibility in working out contextually appropriate solutions. In such endeavours nothing really 'goes' unless it sticks.

Subversions

Such 'sticking' remains, however, rather an uncanny and opaque achievement. Kratochwil has been criticised, also in this Symposium, for rattling our world and leaving us without a positive project. Or, as argued here by Onuf, for collapsing the ontological and epistemological and consequently ending up with the methodological as the only, and rather disappointing, approach towards making sense of action.[32] This criticism does not get to the core of the vulnerability of Kratochwil's argument. His determination to unsettle methodological rigidity reflects the critical pragmatist way of subverting what Lacan has called the discourse of the Master, that is, attempts at domination and mastery that represent the ego's delusion.[33] Subverting such discourse is about knowing how, which is a form of 'method+'. As such, it has a lot to do with methodology, but only if we see methodology as the art of (affectively) knowing how to engage and intervene in a contextually appropriate manner, stumbling, and falling along the way. Subversion can thus be thought of as an analytical technique, developed through experience and in acting, and therefore eluding formalisation and relatively purposefully unbothered with ontology and epistemology, as is Kratochwil's version of pragmatism. Known as a grand theorist of IR, he subverts that discipline by confronting the fantasy of theory and constitutionalisation and by refusing to operate with *a priori* criteria.

Here, however, lies my issue with Kratochwil, and ultimately with the feasibility of the critical pragmatist project in the world of anxious subjects. Can anxious subjects free themselves from either the existential wish for the comfort of 'the view from nowhere' or from the context that structures itself through the principle of 'the view from nowhere'? Renouncing cataleptic impressions may not be pragmatic. There seems to be a tad of not only frustration to be embraced but also of frustrated idealism in Kratochwil's demand to be, as I see it, heroic. And a predilection to fall back on the abstract to articulate the experiential, a predicament that has not found its de-paradoxification in Kratochwil's oeuvre, and one which often subverts his therapeutic endeavour.

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[32]Onuf 2021.

[33]Compare Lacan 2007.

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