International
Theory

BOOK SYMPOSIUM

Unsettling times for human rights: remarks on 'The politics of rights'

Jennifer M. Welsh

Research Chair in Global Governance and Security, McGill University, Montreal, Canada
Corresponding author. E-mail: Jennifer.Welsh@mcgill.ca

Abstract

This commentary focuses on Kratochwil's observation about the gap between the pervasiveness of human rights language and its susceptibility to perverse effects and abuse. After demonstrating that Kratochwil shares much of the contemporary skepticism about the alleged foundations and legitimacy of human rights, the comment elaborates on his claims that human rights were and are particularistic and that 'rights talk' produces unintended consequences for the individuals whose autonomy was meant to flourish. He questions but ultimately does not answer whether the broader anthropocentric ethos that underpins Western societies, and legal systems, may one day be superseded by 'non-rightist' approaches.

The central aim of Friedrich Kratochwil's *The Status of Law in World Society* is to examine how legal concepts are used and why particular legal discourses and practices are pervasive in our time. Yet certain passages of his introduction to the book hint at another, (even) more constructive purpose: to help us understand our contemporary 'predicament'.[1] For him, the essence of that predicament is a gap between the ubiquity of law and legal discourse – its dominance of 'the vocabulary for contemporary politics' – and its perverse effects and abuse. If law has been so triumphant, he asks, 'why is it that we do not seem to have realized the "progressive" promise we so ardently hoped for'?[2]

Kratochwil's opening question seems particularly well suited to an analysis of human rights. The legal and normative expansion of support for human rights, and the wide adoption of human rights language by states and other actors, has been one of the most notable features of the last half-century. 'Rights talk', he writes, has become the 'virtually exclusive source of legitimization' for political

---

[1]Kratochwil 2014, 25.
[2]Ibid., 1.

systems and a focal point for transnational mobilization.[3] Nevertheless, contemporary scholars, policy-makers, and activists are now pointing to a series of trends that are undermining the human rights advances that have characterized the past four to five decades. On an almost daily basis, we are confronted with claims and laments that human rights are 'on the ropes'.

The most visible manifestation of the alleged human rights 'crisis' can be found in the policies of the Trump administration in the United States, which vigorously pursued restrictions on immigration from particular countries and openly mused about the effectiveness and legitimacy of torture. In an address to State Department diplomats and staff early in his tenure as Secretary of State, Rex Tillerson claimed that the pursuit of US interests under the banner of 'America First' might mean decoupling foreign policy from values such as human rights – particularly if national security were at stake.[4]

In reality, however, Trump's rise intensified, rather than created, the pushback against human rights. The contemporary international order has been experiencing a more profound structural shift, which gives increased power to autocratic leaders such as Xi Jinping in China and Vladimir Putin in Russia, both of whom have openly challenged human rights. Turkey's President Erdogan continues to suppress dissent and chips away at the independence of the judiciary. These deeper forces, it has been suggested, are challenging post-Westphalian visions of a shared global order and 'giving way to an era of resurgent sovereignty'.[5] In Western democracies, nationalist-populist figures, who co-opt the grievances of those facing a relative decline in economic fortune and social status, portray human rights, in the words of Human Rights Watch Executive Director Kenneth Roth, 'as an impediment to their conception of the majority will'. In the populist discourse, rights seem only to protect asylum-seekers or terrorist suspects. The values of human rights have difficulty competing with these tropes, as they ultimately depend on the ability to see connections rather than barriers. Given that they require us to 'recognize the importance of treating others the way we would want to be treated … they are especially vulnerable to the demagogue's exclusionary appeal'.[6]

In the scholarly literature, there has also been a prominent strain of critical commentary, or what Kathryn Sikkink refers to as 'pessimism', about both the legitimacy and the effectiveness of human rights law, institutions, and movements.[7] In their edited volume *Human Rights Futures*, Hopgood, Snyder, and Vinjamuri demonstrate that while empirical studies seem to reach a consensus that there is a set of 'facilitating conditions' for the fulfilment and protection of rights (most notably the absence of armed conflict and the presence of a democratic government), there is notable disagreement over what the available data show about human rights outcomes in general and the effect of particular interventions (by non-governmental organizations and others) to improve upon those outcomes. The editors also suggest that 'human rights as they are understood in western

---

[3]Ibid., 201.
[4]Borger 2017.
[5]Strangio 2017.
[6]Roth 2017.
[7]Sikkink 2017.

capitals have often been poorly integrated in struggles for freedom and equality in the South', and point to the intensification of a so-called backlash, where those constituencies opposed to the advancement of human rights engage in both open confrontation and more subtle forms of resistance.[8]

Two of the most vocal critics of the contemporary human rights movement, Stephen Hopgood and Samuel Moyn, mount a deeper challenge. Echoing Kratochwil's call to examine the 'silent assumptions' that underlie narratives of progress and 'emergence', Hopgood contests the idea of human rights as a transhistorical or universal phenomenon, claiming that they were essentially 'discovered' (roughly 200 years ago) in the context of the Western Enlightenment belief in the rational and self-governing individual.[9] Today, Hopgood argues, human rights can be seen as an artefact of a post-colonial world dominated by Western liberal states, who now find their relative power declining given the rise of non-liberal states and revitalized nationalism. Moreover, while the ideology that supported human rights after the Second World War was closely aligned with the broad needs and interests of middle classes in the West, in the 21st century these classes are facing new economic and social pressures at home, and their counterparts in other parts of the world do not necessarily see the 'utility of human rights as a legitimating ideology'.[10] For his part, Moyn depicts the advocacy for human rights as a mistaken path taken by unambitious liberals: the freedoms they promise, he contends, have deflected liberalism from more profound progress toward economic and social justice.[11] His notion of 'too-thin liberalism' thus questions both the mainstream account of the conditions required for rights to flourish and the narrow range of political and social outcomes sought by the human rights movement.

Kratochwil's seventh meditation, 'The politics of rights', adopts this more critical approach to human rights by casting doubt on their alleged foundational and transcendental nature.[12] But his conceptual and political analysis extends beyond the task of 'unmasking' rights talk, and how it can 'camouflage' ulterior motives or interests – a favorite sport of many contemporary skeptics.[13] Given his Wittgensteinean understanding of what rights are, and how they mediate social relations, his diagnosis cuts much deeper in two crucial ways: the first is his 'archaeological' approach to examining historical episodes and sources in making the case for human rights as particularist rather than universal; and the second is his deftness in uncovering the practices that have been authorized or demanded in societies underpinned by a commitment to human rights. In keeping with the broader method of the book, this meditation is described as an 'interrogation of the *discourse* on rights', and a demonstration of how 'rights talk' has produced unintended consequences – including the empowerment of actors who no longer have clear accountability (such as jurists – or what he calls 'juristocrats' – and human rights 'experts') and the simultaneous disempowerment of the individuals

---

[8]Hopgood et al. 2018.
[9]Kratochwil 2014, 11.
[10]Hopgood 2018.
[11]Moyn 2018.
[12]Kratochwil 2014, 200.
[13]Ibid., 223.

whose autonomy was meant to flourish.[14] Ultimately, and unlike the analysts described above, Kratochwil claims that his reflections amount to neither an affirmation nor a rejection of human rights, but rather a sort of 'cruel to be kind' diagnostic that recognizes the ubiquity of rights language and practices while also seeking to identify some initial steps for overcoming the paradoxes to which they have given rise. Refreshingly, he feels no burning desire, let alone obligation, to determine the 'correct' notion of rights that would command wide respect, but rather accepts that such debates do not have to end. Indeed, he insists that we should not want them to.[15]

In this alternative spirit, which focuses not on what rights are but on how rights claims came to be so powerful, the seventh meditation begins with the task of 'therapeutic redescription'.[16] Here Kratochwil-the-archaeologist traces the appearance and evolution of 'rights talk' by fastening human rights tightly to the particular *political* projects of the late 18th century – most notably the American and French Revolutions. In so doing, he persuasively argues that natural law (with its focus on 'what is right') and natural rights (with its assertion of a claim to 'have a right') are fundamentally different, and therefore the suggestion that human rights are a tradition, with ancient roots stretching back to the Stoics, cannot be sustained. He also identifies several ways in which the understanding of human rights as 'birthrights' – as something declared and later claimed, rather than granted through an authority or act of legislation – was absent in earlier revolutionary moments that frequently feature in the long histories of human rights (such as the Glorious Revolution in England), and certainly did not exhibit the egalitarian ethos it is associated with today. Even the protests against taxation without representation in the American colonies, we are reminded, were framed in terms of the 'rights of Englishmen' and only later in the language of natural rights.[17] Kratochwil also marshals strong evidence to contend that the American Bill of Rights was in fact focused 'more on the safeguards insuring the proper exercise of governmental powers than on an explication of natural rights'.[18] He sees the French Revolution, rather than the American one, as inaugurating the universal conceptualization of human rights that marks our modern discourse (despite, of course, the exclusion of women from the picture). He identifies the notion that rights are 'self-evident' and require no 'deep reflection' in the writings of Diderot, as well as in the fact that the Declaration of the Rights of Man and the Citizen extended rights to men of all religions and to colonial territories.

But the inexorable link between human rights and major modern revolutions also represents for Kratochwil one of the key paradoxes that drives his inquiry: natural rights are meant to be 'above' politics, and yet they also seem to be 'beholden to a specific form of revolutionary politics'.[19] When considering the key human rights documents of the post-1945 era, such as the Universal Declaration of Human Rights and the Convention on the Punishment and Prevention of Genocide,

---

[14]Ibid., 202 (emphasis added) and 203.
[15]Ibid., 211.
[16]Ibid., 203.
[17]Ibid., 217.
[18]Ibid., 218.
[19]Ibid., 211.

Kratochwil contends that they were divorced from the key political episodes that defined the early Cold War. As a result, one must take a different path to account for their universalist form. He does so by portraying the Declaration and Convention as a revolutionary type of moral exhortation – a reaction to the barbarism that characterized the Second World War. The rights that were enunciated stood abstractly on their own, as assertions, detached from any enforcement mechanisms or political program.[20] Kratochwil thus adopts Hannah Arendt's perspective that moral appeals to the existence of rights meant little at this point in history without particular political institutions, at the state level, that could guarantee the more fundamental 'right to have rights'.[21]

In questioning whether the 1940s – and the Holocaust in particular – were really so pivotal in the story of human rights 'progress', Kratochwil follows recent revisionist moves in the discipline of history both to emphasize the role of non-Western (rather than Western) actors in pushing for human rights developments in the 1960s, particularly within the UN system, and to focus on the pivotal importance of the 1970s as the key point of 'lift off' for the global human rights movement.[22] But unlike Moyn, who focuses on how human rights became narrowly defined as political and civil (downplaying notions of economic rights), Kratochwil notes an important decoupling of *human* rights from civil rights. This shift, he argues, was a fundamental move in efforts to delegitimize communism by transnational movements after the end of the Cold War.

Kratochwil concludes his meditation by spelling out what follows from his dismissal of the universalist claims of many human rights theorists and practitioners. One significant ramification is that, as Moyn has put it, rights cannot 'float freely': they cannot convey meaning or inspire action on their own, but depend upon certain preconditions.[23] But going further – and this is the implication of Kratochwil's argument that rights should not be conceived as an individual's 'possession' – rights structure a *societal* discourse and mediate social relations.[24] In a nod to his broader constructivist approach, he thus argues that human rights co-constitute agents and structures, subjects, and societies. 'Their validity', he writes, 'is not established by correspondence to some (eternal, a-historical) "truths" but by the coherence with other notions and decisions, considered to be right when vetted in accordance with certain argumentative practices and understandings'.[25]

Alas, this does not mean Kratochwil accepts that 'anything goes'. He is quick to try to pre-empt the charge that anti-foundationalism leads to complete relativism, or worse, nihilism. Instead, he follows Habermas' lead by claiming that each historical period will be marked by a 'dominant mode of justification', based on a broader moral insight or sensibility. Connecting this meditation to the larger theme of the book, he then sets out the contours of the particular worldview that characterizes our contemporary world society – one that 'enables law to sustain a discourse on

---

[20]Ibid., 212.
[21]Arendt 1976.
[22]Jensen 2016; Moyn 2010; Keys 2014.
[23]Moyn 2018, 282.
[24]Kratochwil 2014, 223.
[25]Ibid., 223.

rights'.[26] In brief, it is an 'anthropocentric' outlook where human beings are autonomous, rather than embedded in a larger whole, and where both the actions issuing from an agent, and the norms guiding her conduct, 'have *their source in the subject*'.[27] This conception of the self and the world, Kratochwil contends, leads naturally to a notion of freedom-as-self-determination. And it is proving to be less pervasive, and less persuasive, than human rights universalism would have us believe.

In the end, therefore, Kratochwil's reflection on the contemporary 'crisis' of human rights is markedly different to that of other scholars who seek to combat the claims about a 'post-human rights world'. In her latest book, Kathryn Sikkink mounts a vigorous, data-driven defense of both the legitimacy and effectiveness of human rights, by showing that people around the world (read: not just in the West) have high levels of trust in human rights organizations and are inspired by human rights ideals, and that many human rights outcomes are improving, particularly in areas such as women's rights, the rights of sexual minorities and those with disabilities, infant mortality rates, and the use of the death penalty. Without distinguishing areas of improvement from areas of worsening, she insists, we cannot know what 'really works'.[28]

But if Sikkink's goal is to provide inspiration for continued human rights activism – this is her notion of human rights *politics* – Kratochwil's meditation on the 'politics of rights' has a different objective. It dares to ask whether human rights themselves, propelled and sustained by anthropocentrism, are part of the problem. He only briefly, and tantalizingly, offers up alternatives to that dominant Habermasian worldview – those that stress our embeddedness in nature, for example – but only muses as to whether these 'non-rightist' approaches will prove viable. To recall his warning in the introduction, and given in his characteristically blunt style, Kratochwil does not intend to provide a neat solution or synthesis, but only a better appreciation for 'our predicament'.

References

Arendt, Hannah. 1976. *The Origins of Totalitarianism*. New York: Harcourt Brace and Co.

Borger, Julian. 2017. "Rex Tillerson: 'America First' Means Divorcing Our Policy from Our Values." *The Guardian*, 4 May 2017. Available at https://www.theguardian.com/us-news/2017/may/03/rex-tillerson-america-first-speech-trump-policy. Accessed 1 July 2020.

Hopgood, Stephen. 2018. "Human Rights on the Road to Nowhere." In *Human Rights Futures*, edited by Stephen Hopgood, Jack Snyder and Leslie Vinjamuri, 283–310. Cambridge: Cambridge University Press.

Hopgood, Stephen, Jack Snyder, and Leslie Vinjamuri. 2018. "Introduction: Human Rights Past, Present, and Future." In *Human Rights Futures*, edited by Stephen Hopgood, Jack Snyder and Leslie Vinjamuri, 1–23. Cambridge: Cambridge University Press.

Jensen, Steven L. B. 2016. *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values*. New York: Cambridge University Press.

Keys, Barbara. 2014. *Reclaiming American Virtue: The Human Rights Revolution of the 1970s*. Cambridge, MA: Harvard University Press.

---

[26]Ibid., 224.

[27]Ibid., 227.

[28]Sikkink 2017, 1–14.

Kratochwil, Friedrich. 2014. *The Status of Law in World Society: Meditations on the Role and Rule of Law*. Cambridge: Cambridge University Press.

Moyn, Samuel. 2010. *The Last Utopia: Human Rights in History*. Cambridge, MA: Belknap-Harvard University Press.

Moyn, Samuel. 2018. "Human Rights and the Crisis of Liberalism." In *Human Rights Futures*, edited by Stephen Hopgood, Jack Snyder and Leslie Vinjamuri, 261–82. Cambridge: Cambridge University Press.

Roth, Kenneth. 2017. "We Are on the Verge of Darkness." *Foreign Policy*, 12 January 2017. Available at https://foreignpolicy.com/2017/01/12/we-are-on-the-verge-of-darkness-populism-human-rights-democracy/. Accessed 1 July 2020.

Sikkink, Kathryn. 2017. *Evidence for Hope: Making Human Rights Work in the 21st Century*. Princeton: Princeton University Press.

Strangio, Sebastian. 2017. "Welcome to the Post-Human Rights World." *Foreign Policy*, 7 March 2017. Available at https://foreignpolicy.com/2017/03/07/welcome-to-the-post-human-rights-world/. Accessed 1 July 2020.