
Book Reviews

Friedrich Kratochwil. ***The Status of Law in World Society: Meditations on the Role and Rule of Law***. Cambridge University Press, 2014. Pp. 323. \$34.99. ISBN: 9781107681071.

When Fritz Kratochwil published his classic *Rules, Norms and Decisions* in 1989,¹ it was reviewed by an obviously bewildered David Bederman in the *American Journal of International Law*.² Clearly, it seemed, here was something international lawyers should take note of, but equally clearly, Bederman, no intellectual slouch by any standard, had a hard time figuring out what made the book relevant, or even just interesting, for international lawyers. It seems Bederman was expecting something along the lines of a description of the role of law in global politics, but no such story unfolded. Instead, *Rules, Norms and Decisions* posited not a description, but a way of looking at the role of norms in international politics, and did so unlike much of what had gone on before: this was neither a variation on realism, nor riding the wave of institutional liberalism, nor anything like the New Haven approach or sociological jurisprudence or Henkin-style behaviouralism. As it turned out, *Rules, Norms and Decisions* became the closest thing to a manifesto of constructivism in the study of world politics, and therewith became pigeonholed as one of the three grand theories of international relations.

This entailed considerable irony and, indeed, ironies abound when Kratochwil is concerned, and do so much to his delight, one suspects. One of these ironies is that Fritz Kratochwil, despite being one of the founding fathers of the grand theory of constructivism in the discipline of international relations, broadly denies the possibility of grand theory in the social sciences. Secondly, there is the irony that while Kratochwil may generally be considered as a theorist, he strongly advocates a practical orientation, distinguishing between scientific reasoning and practical reasoning.³ And thirdly, amidst all the talk about interdisciplinary scholarship, Kratochwil is both critical of much of this work and, at the same time, arguably its leading practitioner, even if not always recognized as such.⁴ For Kratochwil's *The Status of Law in World Society* is one of the best studies combining international law and international relations, and a few other (sub-) disciplines as well, including most obviously legal theory and political theory. *The Status of Law in World Society* is, in fact, a work of theory, indeed of grand theory, but it is a grand theory of detail, a grand theory denying any holistic truth claims. His aim is to analyse the political role of

¹ F. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

² See Bederman, 'Reviewing Kratochwil, *Rules, Norms, and Decisions*', 84 *AJIL* (1990) 775.

³ He tends to start by thinking in terms of concrete issues or puzzles, and then work through them, rather than by thinking deep thoughts and then aiming to apply these. It is no accident that a representative collection of his articles is published under reference to puzzle-solving: see F. Kratochwil, *The Puzzles of Politics* (2010).

⁴ This lack of recognition results from the fact that much interdisciplinary scholarship (and much advocacy of it) stems from self-styled rationalist perspectives, and this is far removed from Kratochwil's sensibilities. Hence, it should come as no surprise that he is hardly even mentioned in the more than 600 pages of a recent overview of interdisciplinary scholarship in international affairs, and even then is mentioned only in the two overtly non-rationalist contributions to that volume: see J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).

international law, and he succeeds very well in doing so: the book is a must-read for all serious international lawyers.⁵

The work is constructed as a set of meditations, following the model once set by Descartes but long since discarded as somehow ‘unscientific’. The hallmark of the meditation is that it does not follow a pre-ordained path: Kratochwil aims to think things through rather than to follow a research agenda set in advance. This entails that the story comes in twists and turns, although Kratochwil is a good enough writer to signal his twists and turns; hence, the meditations are not all that difficult to follow. Trickier is Kratochwil’s habit (one he happily acknowledges) of not explaining too much about his foils: whether he offers a critique of Dworkin or Habermas, of Slaughter or Goldsmith and Posner, of Luhmann or Koskenniemi, he expects the reader to be largely familiar with the object of critique.

And to be sure, the book is brimming with critiques. Kratochwil is a fiercely independent thinker, and an equal-opportunity critic to boot. In a curious way, perhaps, his style is reminiscent mostly of Hannah Arendt, another fiercely independent thinker who traversed and spanned various academic disciplines, and who was often chided for not being overly systematic in her thought.⁶

Still, *The Status of Law*, for all its meditative qualities and twists and turns, is nothing if not systematic in its structure and its thought. The first meditations deal with large issues of theory and method, while increasingly the focus is sharpened so as to zoom in on discrete topics concerning international law, starting with a discussion of ambitious work on the constitutionalization of international law and ending with two meditations on human rights, before the final meditation concludes the book with a critique of ideal theory and something of a manifesto for praxis-oriented scholarship in global affairs. Hence, the meditations together form a cascade: from general to specific or, more accurately perhaps, from overarching to discrete, ending with the actual moment of redemption.

When *Rules, Norms, and Decisions* appeared, it almost single-handedly changed the study of international relations: drawing inspiration from Wittgenstein, speech act theory and both the communicative theorizing of Habermas and the legal theory of Hart, the book made clear that the world of international affairs is a constructed world. France, so to speak, does not exist; what does exist is a convention or set of conventions by which we all think of France as a state, an entity with certain characteristics that may nonetheless be highly fluid. This had at least two profound ramifications for the study of international law. First, much of the construction of the world occurs through legal rules and norms. Hence, the relevant question to ask about international law is not (or not solely) whether it constrains states from behaving as they please, much as political realists and rational choice theorists still cling to this equation of all law with criminal law. The question whether law constrains, after all, ignores the role played by the law in facilitating people’s lives and relationships: the law empowers states to enter into treaties, e.g., and facilitates the creation of agents of further cooperation, e.g., in the form of international organizations.⁷ Hence, the relevant role to demand from international law is whether it helps states to arrange their business, and this, surely, suggests a different track record for international law from the simplistic focus on whether it constrains behaviour.

⁵ In the preface, he expresses gratitude to a number of (international) lawyers for having commented on parts of the manuscript. In the interest of full disclosure I should mention that I am one of them: I had a look at one of the chapters before it went to print.

⁶ See generally Klabbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’, 20 *Leiden J Int’l L* (2007) 1.

⁷ Hart had drawn attention to the distinction between rules that prohibit and rules that facilitate, but not much of this had trickled down to students of international affairs, be it in law or the social sciences: see H.L.A. Hart, *The Concept of Law* (1961).

Secondly, Kratochwil made clear that legal reasoning is never merely a matter of simply applying a rule to a set of facts. Instead, legal reasoning is best seen as a form of practical reasoning (unlike scientific reasoning) and, like practical reasoning, depends a lot on preliminary choices. Thus, whoever gets to apply the law will first have to figure out which the relevant facts are, and how the law ought to be regarded. And this, in turn, has profound ramifications with respect to standard tropes such as whether rules of interpretation should be followed, or whether making rigid distinctions between interpretation and application of rules is even possible. As Kratochwil made clear, such types of reasoning are hopelessly artificial, and say little or nothing of relevance. Instead, when we discuss events in terms of international law we draw on analogy, on metaphors, and on *topoi* ('seats of argument', as he sometimes refers to them⁸), and the way issues are framed (itself a matter of interpretation) tends to be of greater relevance than any rule on interpretation can possibly ever be.

Kratochwil was not the only constructivist operating in the late 1980s, when an emerging constructivism was motivated in part by the faddish popularity of regime analysis at the time. Others who have been influential, not least when it comes to drawing attention to the role of rules in constructing the world,⁹ would include Nicholas Onuf¹⁰ (who taught the young Kratochwil after he first set foot in the US) and John Gerard Ruggie, Kratochwil's co-author of a classic anatomy of international relations scholarship which includes the legendary – and sadly still accurate – putdown that the doctors are thriving while the patient is moribund.¹¹ Still, it seems fair enough to claim that Kratochwil has carried the mantle, perhaps also because of his continued involvement with academic international law: Onuf, by contrast, has moved, however imperceptibly perhaps, a little towards political theory,¹² while Ruggie immersed himself in the world of practical politics.

Kratochwil's meditations come a lot closer to the description of the role of law in world affairs that it seems Bederman expected in 1989, even though Kratochwil's main interest remains on the level of theory and method rather than on description *pur sang*. The book starts with a critique of the practical role of international law in today's global politics. Instead of speaking truth to power, international lawyers have become implicated in all kinds of dubious activities – think only of the writing of torture memos. The many recently created international tribunals hardly add up to the 'legalization of world politics', as liberal institutionalists proclaimed at the beginning of the new millennium but, instead, have by and large failed to deliver on their promise.¹³ *The Status of Law*, then, is a lengthy attempt at finding out what caused this sorry state of affairs. It does not arrive at a single conclusion, but hopes to present arguments that may 'contribute to understanding our predicament' and 'could enable us to change the way "things are"' (at 25).

The quotation marks in the last citation are essential Kratochwil: 'things' never just 'are': the way 'things are' is always a function of the way we look at things, of our epistemologies, of the stories we tell ourselves and the words we use, and how these enable us to look at the

⁸ An example is 'more is better than less', which can exercise quite a bit of attraction once the desirability of something has been established. The reverse can also be invoked, as in 'less is better than more', which already suggests an occasional need to choose.

⁹ Other constructivists pay less attention to the role of rules: see, e.g., A. Wendt, *Social Theory of International Politics* (1999).

¹⁰ See N.G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (1989, re-issued 2013).

¹¹ The article concerned is Kratochwil and Ruggie, 'International Organization: A State of the Art on an Art of the State', 40 *Int'l Org* (1986) 753, at 753. Ruggie would later become well-known as the architect of the UN Global Compact. Some of his relevant writings are brought together in J.G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (1998).

¹² See, e.g., N.G. Onuf, *The Republican Legacy in International Thought* (1998).

¹³ See J. Goldstein et al. (eds), *Legalization and World Politics* (2001).

world around us. As a result, not only is interdisciplinary scholarship difficult to attain (different disciplines utilize different epistemologies) but, more fundamentally, theoretical knowledge is structurally unable to inform practical action. Law cannot ‘cause’ action in any meaningful way; instead, law operates so as to provide reasons for action. It does not have a single defining characteristic, but is part of a Wittgensteinian language game, with different elements undergoing different uses, depending on context and practical situatedness.

If this is an accurate assessment, then the quest for a constitutional global legal order appears pretty hopeless, and indeed, Kratochwil is no optimist in this respect, either based on the evidence or as a matter of general disposition (‘[i]n the long run we’re all dead’, he merrily remarks on occasion). It is hardly a coincidence that instead new forms of governmentality have been emerging, characterized by fragmentation and often based on expert knowledge with the experts using – and abusing – the possibility of soft law. Attempts to glue the system back together again, with the help of notions such as *jus cogens* or *erga omnes* obligations, or an emerging global *ordre public*, have fairly little basis in political practice, and are ‘only tenuously held together by metaphors, conceptual constructs, and narratives’ (at 167).

If the grand overarching framework of constitutionalism or *ordre public* is by and large missing, then perhaps thinner projects can offer solace. Meditation 6 is devoted to global administrative law, whereas meditations 7 and 8 take a closer look at human rights. In both cases, though, there is not all that much to cheer about just yet. To some extent, global administrative law, by focusing on procedure internal to the regime, is barking up the wrong tree: the biggest challenges to any regime tend to come from outside the regime. The trade sector is a good example: free trade is no longer a matter of replacing import politics with export politics; instead, ‘the opposition to free trade nowadays emerges largely from non-trade concerns’ (at 193). And the faith displayed in judges and tribunals runs the risk of turning global administrative law itself into technocratic rule, this time by lawyers – who, lest we forget, also boast a highly specific expertise.¹⁴

An insistence on individual rights can hardly fare better. Not only can rights talk itself not answer the preliminary Arendtian question about the right to have rights, it is also the case that the popular idea of rights as trumps, developed by Dworkin, ignores the circumstance that (prolonging the metaphor) card games require a certain skill: one needs to know how and when to use the trumps, and especially when rights are in conflict such skill requires the sort of practical wisdom that the very idea of rights was meant to exclude. Moreover, as communitarians have argued since the 1970s, a strong insistence on individual rights may be socially awkward, and what are supposedly basic rights may well change in substance when background considerations change.

The final meditation, meditation 9, takes things back to the starting point: it offers a critique of ideal theory, whether Rawlsian or economic, by pointing out that things never exist in a vacuum: moral philosophers and economists alike have their own preferences, and their own sets of epistemologies. Here Kratochwil is predominantly concerned with attempts to colonize the law by economic thinking, as practised by law and economics scholars and rational choice theorists (and, to be sure, not unreasonably he views Rawls as an exponent of the latter). Be that as it may, ideal theory, in the case of practical issues with a moral element, suffers from a paradox: ideal theory may provide universal principles, but is unable to provide a theory of judgement on when and how to apply those universal principles (at 285).

This then leads to four corollaries. First, the point of a practical theory is not to deny ideals, but to find ways to flesh them out. Such a practical theory cannot proceed by setting ideal targets (‘thou shalt always behave in such-and-suchlike manner’), but by presenting actions that are

¹⁴ See also Klabbers, ‘The Virtues of Expertise’, in M. Ambrus *et al.* (eds), *The Role of ‘Experts’ in International and European Decision-making Processes* (2014), at 82.

suitable to the context at hand, and by definition these need to be based on actual experiences. Secondly, this may well lead to an endorsement of second-best solutions rather than the best solutions, as the latter may not be possible to achieve – and this is a lesson all institution-builders should take to heart. Thirdly, this should lead to an appreciation of the art of the possible: since the ideal is unachievable at any rate, whatever institution is designed or whatever outcome settled on is by definition the result of political action: there is no ‘true’ outcome, there are only outcomes that someone somewhere is responsible for choosing. And, finally, it would seem to follow that no evaluation of political action can – or has to – take place in terms of universal values; this would lead to political paralysis, as all political projects are, eventually, parochial or particular in origin, and will end up offending someone somewhere.

In short, the final meditation is a lengthy plea for a practical approach to politics and law. Politics is a messy business, with decision-makers inevitably lacking relevant information, acting under severe time pressure, and being held hostage by a diversity of interest groups, lobbies, and other constituencies. In those circumstances, while it may be helpful to develop guidelines for action, it is pointless to turn such guidelines into categorical imperatives, or trumps, or any similar construction. Such will either prove counterproductive or paralysing – or both.

It is at least arguable that with *The Status of Law*, Kratochwil has written the international law book of the year. There is much here to admire, there is much to take to heart and also (he will be delighted to see) some things to disagree with. Or rather, at some points it seems he may not go quite far or deep enough. Thus, this reader would have hoped for a more in-depth discussion of responsibility than currently contained in the book, and that applies not just to formal legal responsibility regimes, but more generally to the individual responsibility we carry for the world around us. Relatedly, given his insistence on the relevance of practical reasoning, there is fairly little on the individuals who are actually engaged in practical reasoning: what drives them? What are their senses of right and wrong, and how can we ever ascertain this? There may also be legitimate questions on how to give effect to practical projects without relying on universal values: does that mean that particular projects can only be measured in terms of their own success or failure? And if so, does this entail a relapse into some nondescript functionalism?

Kratochwil once described himself as a wanderer between two worlds, by which he seemed to suggest two different, if equally appropriate, juxtapositions.¹⁵ He has moved back and forth between Europe and the US for purposes of education and employment, and between the classics and the moderns when it comes to substance. As his readership knows, he effortlessly moves back and forth between Plato and Habermas, Thucydides and Hirschman, Aristotle and Koskenniemi. Surprisingly missing from that self-description is his wandering between the worlds of international relations scholarship and international law. The result may well be that of the eternal outsider looking in, and perhaps seeing more sharply what goes on inside than those who are assembled on the inside.

And perhaps it takes a relative outsider to remind international lawyers that international law is, more often than not, a matter of muddling through. Somehow reality – however framed or defined – always interferes with the grandest and most grandiose of political ambitions and the dreams of visionary institution-builders. In these circumstances, international lawyers could do worse than to follow Kratochwil’s grand theory of detail and practical puzzles, his own modest clarion call.

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¹⁵ See Kratochwil, ‘A Wanderer between Two Worlds: An Attempt at an Intellectual Biography’, in Kratochwil, *supra* note 3, at 1.