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The Language of Law and the Laws of Language

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ABSTRACT

The Status of Law in World Society by Friedrich Kratochwil is a sophisticated attempt to reassert the importance of international law in a globalised world by grounding it in the actual practices of legal reasoning. Yet this attempt to ground normativity in practice strikes me as problematic. As I shall argue, what law is cannot be determined with reference to legal practices only, but will depend on the fulfillment of certain background requirements which themselves stand in need of further justification. Thus the recourse to linguistic practice is beset by an ambivalence that stems from the fact that language and law always already are intertwined, an ambivalence that cannot therefore be overcome with recourse to either. If it is the case that law has a language of its own, we must also be prepared to admit that language has its own laws. What then is gained by the recourse to linguistic practice is not so much a resolution but rather a temporary displacement of indeterminacy from the realm of law to that of language.

Keywords

international law, linguistic turn, practice, foundationalism

Introduction

Since it has been widely assumed that international norms must be justified with reference to philosophical principles in order to be considered law proper, the quest for such foundations has long haunted the discipline of international law. To early modern scholars like Gentili and Grotius, the ultimate justification of international norms was to be found in the principles of natural law, themselves grounded in notions of human sociability and reason. To Enlightenment authors like Vattel and Martens, international legal norms were justified with reference to a precarious blend of naturalist principles and custom as embodied in treatises. During the late nineteenth century, notions of legal evolution made it possible to claim that international norms were the fruits of European civilisation to the exclusion of non-European peoples from the purview of international law. Finally,

for much of the 20th century, legal scholars held that only positive agreements between states could provide international norms with sufficient justification, even if that meant that the content of these norms was likely to reflect underlying asymmetries of power in the international system.[1]

This quest for foundations has been greatly complicated during the past decades, and so has the autonomy and authority of international law. Following the linguistic turn in the social sciences and humanities, students of international law have become increasingly aware of the historical contingency and mutability of international legal norms. Rather than being derived from some universal and timeless foundation, both the content and function of international norms are increasingly being seen as dependent on the historical context in which they were articulated, thus necessarily reflecting the epistemic predispositions and ideological values peculiar to each age. Since then the quest for universal and timeless foundations of international norms has appeared futile if not perverse, with profound consequences for the integrity and scientific authority of the entire enterprise of international law.[2] But if international legal norms lack firm foundations and are historically contingent, how could they possibly be justified, and international law be defended against claims that it is merely the handmaiden of power, or at best an expression of a benign public opinion? Once we abandon the quest for immutable foundations, one remaining possibility would be to argue that international norms derive their justification from the very *practice* of international law and nowhere else.

Such is one of the core claims of *The Status of Law in World Society* by Friedrich Kratochwil.[3] This book is a sophisticated attempt to reassert the importance of international law in a fragmented world society already oversaturated by attempts at legal regulation at all levels. Reflecting a profound disappointment with the hitherto unfulfilled promises of law to solve pressing practical problems and generate real progress in world politics, Kratochwil traces the source of these failures precisely to the notion that international law needs to rest on firm philosophical foundations in order to deliver on its promises, as well as to the misguided efforts to put international law on an interdisciplinary footing in the hope of undoing the need for such foundations.

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[1] For an overview of the development of international law, see Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014).

[2] See for example, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

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

Since it is impossible to do this immensely rich and erudite book full justice within a short review essay like the present one, I shall focus on what I take to be a crucial part of the argument, which is set forth in the *Second Meditation*. In this chapter, Kratochwil disavows the quest for theoretical foundations in favour of a turn to the actual practices of international law, a turn motivated by the familiar conviction that '[i]n the social world the agreement on the proper use of concepts rather than on the existence of "things" or objects of "the world out there" are at issue'.[4] If conceptual meaning does not depend on a referential connection between words and things, but rather on how concepts are used by competent interlocutors, it follows that understanding linguistic practices is a necessary precursor to understanding conceptual meaning. Furthermore, since language is socially conditioned to the same extent as society is linguistically encoded, it follows that 'the formation of human societies depends rather on language and the use of common concepts that not only free us from the here and now…but also enables us to make choices, communicate with others, and engage in discourses of justice and responsibility, which ground our individual and common political projects'.[5]

As we shall see below, this recourse to linguistic practice is crucial to the attempt to defend the autonomy and importance of international law vis-à-vis international politics, and as such, in tune with other attempts in political and legal theory to ground normativity in various philosophies of language.[6] Yet such attempts to ground normativity in linguistic practice strike me as problematic for two reasons. As I shall argue, what law is cannot be determined with reference to legal practices only, but will depend on the fulfillment of certain background requirements which themselves stand in need of explanation and justification. This being so, since linguistic practices presuppose a set of shared norms in order to fulfill the functions alluded to above by Kratochwil. Thus the recourse to linguistic practice is beset by an ambivalence that stems from the fact that language and law are always already intertwined, an ambivalence that cannot therefore be overcome with recourse to either. If it is the case that law has a language of its own, we must also be prepared to admit that language has its own laws, and that the latter are no less tainted by indeterminacy than the former. What then is gained by the recourse to linguistic practice is not so much a solution to the problem of indeterminacy, but rather a displacement of this problem from the realm of law to that of language.

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[4] Kratochwil, *The Status of Law*, 20.

[5] Ibid., 39.

[6] For a critical overview of such attempts, see Eva Erman and Niklas Möller, 'What Not to Expect from the Pragmatic Turn in Political Theory', *European Journal of Political Philosophy* 14, no. 2 (2015): 121–40.

The Language of Law

Given the absence of overarching political authority in the international realm, to what extent could international law be said to be proper law, rather than an expression of public morality? At least since Austin, this question has been raised by those who have equated law with sovereign command, always with disturbing consequences for the discipline of international law and its claims to autonomy and authority. Drawing on Wittgenstein's notion of family resemblance, Kratochwil responds to this problem by pointing out that what we habitually call law consists of rules and norms that can have more than one characteristic which some of them but not all share in common. Since legal practices are heterogeneous in character, there is no reason to judge international law according to standards other than those that inhere in international legal practice itself. From this point of view, the positivist objection that international law is not really law simply appears beside the point. Furthermore, this view has profound implications for our understanding of legal rules and norms and how they relate to actions. Rather than viewing legal rules and norms as external constraints or efficient causes of actions, we need an account of how competent performers use norms and rules in order to authorise, forbid, or require a certain conduct of other actors in certain contexts. Hence, 'to understand what the law *is*, we must comprehend what it *does*, namely how it functions'.[7]

Legal rules have to be interpreted and related to the facts of each case in order to be applicable, yet these rules themselves contain no guidance as to their range of applicability and actual interpretation. Hence we need to clarify how we actually proceed when we use rules for making decisions and link norms to action.[8] An important first step towards clarification is to recognise that rules cannot strictly *cause* an actor to behave in a certain way on their own behalf. A second step is to realise that rules are not obeyed blindly as a consequence of having been internalised or emulated. Rather rules and norms condition action by providing reasons and justifications that actors can act upon intentionally, and these reasons and justifications are intelligible only against the backdrop of an intersubjective language and the underlying form of life that this language reflects. As Kratochwil states, 'our interpretations always presuppose that something is already in place that can be used as a background for dealing with the ruptures in our interaction'.[9] Yet should any interpretative agreement fail to materialise among interlocutors, we might have to fall back on other methods for justifying our decisions, such as majority voting, or by a simple refusal to take on the case. Hence, there is always a remainder of indeterminacy or arbitrariness in law than cannot be overcome by appealing to some ultimate foundation or principle,

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[7] Kratochwil, *The Status of Law*, 54.

[8] Ibid., 56.

[9] Ibid., 60.

but which can only be handled through the practice of legal reasoning. So although there is no logically compelling bridge from 'is' to 'ought', this does not mean that 'is' and 'ought' cannot be bridged at all. In fact, this is what legal reasoning is all about.

Fair enough. But this recourse to linguistic practice as a metaphor and model for our understanding what law is and how legal reasoning operates in the absence of foundations is then supplemented with a series of formal requirements that arguably *cannot* be inferred from the actual practice of legal reasoning nor from the concept of law itself, but have to be posited as their conditions of possibility. Thus, we learn that 'the development of third-party settlement and a class of official rule-handlers is a precondition for the emergence of law'. And should those norms of consistency that allow us to treat like cases alike fail to develop, 'it is difficult to argue that we have a settled practice of *juris dictio*, of 'finding', 'declaring' or 'making' the law'.[10] Yet these requirements are necessary but not sufficient, since it also takes the evolution of 'criteria of appraisal that included the credibility of witnesses, procedural corroboration…and imputing motives…as well as counterfactual reasoning ruling out some otherwise plausible possibilities'.[11] While Kratochwil does not claim these requirements of legality to be timeless or universal, they are nevertheless integral to what the language game of law is all about in our present society. What counts as a valid legal reason is ultimately circumscribed by law itself, and defined with reference to a series of authorised sources. In the final analysis, 'the language game of "law" seems to require that there exists a group of authorised persons deciding what the law "is"', whose decisions are accepted as binding and that those on the receiving end are obliged to abide those decisions in the name of law.[12]

Learning the language of law means to participate in a practice, a shared form of life handed down by tradition. Legal rules emanate from a range of different sources, all of which are to be found in the past. Yet the past itself cannot offer any guidance to the lawyer, other than by virtue of somehow being present in the present. What is handed down by tradition is therefore not the historical past as such, but rather those aspects of the past that provide authoritative sources and materials for the solution of present problems. Hence legal traditions are no mere repositories of past events, but constructed and reconstructed for the purpose of the present. They are remembered into existence rather than found, and can only offer guidance within the limits of a 'concrete historical society and its own sedimented practices'.[13] Thus, in sum, if law *is* what law *does*, then what law does is a matter of what competent practitioners do when they play the language game of law in

[10] Ibid., 65.

[11] Ibid., 65.

[12] Ibid., 66.

[13] Ibid., 70.

order to authorise or prohibit certain forms of conduct within a given society in part held together by shared legal practices and common legal traditions.

The Laws of Language

By abandoning the quest for philosophical foundations and instead focusing on legal practices, it could be argued that Kratochwil relinquishes the traditional normative and universalistic aspirations of law in favour of a descriptive account of how international law *actually* functions, not how it ideally *ought* to function in order to be able to deliver on its promises of order and progress. Yet I think that this objection misses the point. In contrast to those who have taken the linguistic turn in the hope of grounding their normative standpoints in theories of meaning, Kratochwil does not attempt to extract any *substantial* legal principles from actual legal practice. Yet he is also fully aware that the recourse to linguistic practice does not rule out that some normative principles might be more justifiable than others, even if these justifications then must be established on independent grounds, that is, without recourse to the language of law under consideration. So although the turn to linguistic practice might help us to make better sense of how norms and rules function in social and legal life, an inquiry into these practices cannot help us decide between conflicting normative standpoints. This means that our understanding of legal practices cannot entail any commitment as to the validity of the principles that happen to be at stake. At best, attending to legal practices might help us clarify what distinguishes legal reasoning from other forms of normative reasoning, as well as why legal reasoning necessitates a distinct kind of normative judgments precisely because rules and norms contain no criteria that could guide their application in concrete cases. Kratochwil thereby sets out to explore the realm of legal practice and the uses of legal reasoning within this realm, yet he wisely resists the temptation to develop an ideal theory that would aspire to reconcile the underlying tension between 'is' and 'ought', and thus overcome the inescapable indeterminacy of our normative judgments. Instead, Kratochwil comes close to arguing that once we re-describe what appears a conflict between different legal standpoints as a contest of incommensurable language games, the exercise of judgment becomes indispensable to any attempt to settle differences between them. But since this kind of judgment cannot be derived from any other authoritative source, it must remain contingent upon the context of its exercise but without its verdict therefore being in any way arbitrary.[14]

[14] For a sophisticated statement of such a position, see Jean-Francois Lyotard, *The Differend. Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988).

But perhaps it does not take a tour through the philosophy of language to capture this valuable point. As Aristotle pointed out, whenever a particular case arises that constitutes an exception to a given universal rule, then law is deficient on account of its very universality, not because of the nature of the case. To Aristotle, this was the reason why not everything is regulated by law, '[f]or when the object is indeterminate, so also is the rule'.[15] So rather than being an external limit that legal reasoning must struggle to overcome in order to retain its epistemic authority and political legitimacy, the intrinsic indeterminacy of law turns out to be its very *raison d'être*. This means that if the relationship between the universal rule and the particular case were wholly determinate – if there were a case for every rule and a rule for every case – not much legal reasoning and very little legal practice worthy of the name would be necessary for law to fulfill its essential functions in sociopolitical life: a world in which universal law reigned supreme untainted by indeterminacy would most likely be a world without lawyers.

What I find more problematic is the fact that the relationship between the practices of law and their institutional background requirements remains vague in this account. While it seems indisputable that the emergence of law – at least in any recognisably modern sense of this term – requires the prior establishment of third-party settlement and a class of rule-handlers authorised to decide what the law 'is', the necessity of these institutional requirements cannot be inferred directly from legal practices nor from the meaning of the concept of law itself without inviting infinite regress. This implies that to the same extent that they are deemed necessary for law and legal practices to emerge, these requirements and their fulfillment have to be explained and justified on independent grounds, that is, without reference to the same practices they allegedly help bring into life. Something similar goes for the appeal to legal traditions. In order to provide legal practitioners with the precedents and examples that can guide their actions in the present, traditions have first to be reconstructed and endowed with sufficient authority to be perceived as viable and legitimate sources of legal knowledge. Now it seems that these requirements cannot be posited without raising questions about how they have been met historically, and why they are deemed necessary in order for law and legal practice to emerge in modern societies. I do not think that these questions can be answered without assuming that some political authority has been responsible for creating and upholding these requirements, as well as for maintaining the kind institutional continuity that makes an appeal to legal traditions possible in the first place. And since it could easily be argued that none of these requirements are presently being fully met in the global realm, this is unlikely to produce an

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[15] Aristotle, *Nicomachean Ethics*, trans. Roger Crisp (Cambridge: Cambridge University Press, 2004), 1137b29-30, 100.

exhaustive account of actual legal practices in world society. But since these issues touch upon the philosophical foundations of law and legal practice, Kratochwil remains silent.

I suspect that this silence could be circumvented by yet another recourse to linguistic practice. It could be argued that the language of law stands in need of no authority other than that it procures for itself, and that legal practices authorise themselves simply by authorising some people to tell us what the law is. Hence what looks like an invitation to infinite regress could be recast as a healthy circularity that perhaps could help us account for how the institutional requirements of law and the corresponding legal practices have been co-constituted over time. If this interpretation is valid, philosophical questions about the foundations of legal authority of the kind I have raised above are misguided, and our answers to them will only issue in the same old paradoxes that the turn to linguistic practice was intended to dissolve once and for all.

Yet I think that the turn to linguistic practice must face its own limitations. I have already pointed out that it is difficult to distill any substantial normative insights from descriptive accounts of how norms are used and how they function in sociopolitical life. A further limitation has to do with the fact that all linguistic practices are subject to regulation by norms that determine what counts as a meaningful or valid utterance in a given context. To point this out was an original upshot of the linguistic turn, long before philosophies of language were harnessed for the purpose of normative theorising. This would imply that whatever problems we have to confront when making sense of a specific kind of linguistic practice – like that of law – are likely to recur in a more generalised form as soon as we start to ask questions about what *all* linguistic practice is all about. While the set of norms that govern the production of normative utterances in legal arguments are categorically distinct from those norms that those utterances are *about*, they are nevertheless norms, and as such susceptible to the same inquiry: and such inquiries are likely to yield similar insights about their indeterminacy. Hence using language as a model or metaphor for the attempt to ground law in legal practice and then legal practice in linguistic practice does little but displacing the problem of norms and their function from one domain to another, rather than dissolving this problem in accordance with the ambition of those who were the first to take the linguistic turn. It therefore seems that the indeterminacy with which lawyers have had to wrestle reflects a more general predicament that has to do with the contingency of conceptual meaning, and the difficulty of grounding *any* normative standpoint or principle in linguistic practice.

Yet none of these philosophical objections should be allowed to undermine the value of this book. Having clarified what legal practice is all about, Kratochwil makes it possible to expose the many ways in which legal reasoning is *abused* in the contemporary world: when the empire of law suffers from severe overstretch, and appeals to the rule of law and human rights often are but pretexts for further encroachments on civil liberties. One of the many virtues of this brilliant book is to detail

the many perverse consequences of legal oversaturation, but without thereby abandoning the hope that legal practice – once properly conducted – could restore trust in rule of law as the best available antidote to the arbitrary and excessive use of political power. What we need is certainly not more law, only better law.

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Jens Bartelson is Professor of Political Science at Lund University. His fields of interest include international political theory, the history of political thought, political philosophy and social theory. Jens Bartelson has written mainly about the concept of the sovereign state and the philosophy of world community. He is the author of *Visions of World Community* (Cambridge University Press, 2009), *The Critique of the State* (Cambridge University Press, 2001), *A Genealogy of Sovereignty* (Cambridge University Press, 1995).