Book Review

Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015) 259 pages.

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A great deal of ink has been spilled over the years about sovereignty and human rights. Both concepts have long pedigrees and have been examined from an exceptionally wide range of perspectives. In *The Sovereignty of Human Rights*,[1] Patrick Macklem undertakes to develop a novel approach to both concepts (and the relation between them). In his view, the central "purpose of international human rights law is to identify and mitigate adverse effects of the structure and operation of the international legal order."[2] That is to say, human rights—which are typically framed as rights of individuals and non-state collectivities—are designed to "monitor the distribution and exercise of sovereign power to which international law extends legal validity."[3] If international law is a system that allocates and regulates the assertion of sovereign authority, human rights, on Macklem's account, are the rules and principles that assess the legitimacy and ameliorate the deficiencies of this system. Put differently, for Macklem, human rights are palliative responses to especially significant shortcomings of an international legal order that is unlikely to be replaced within the foreseeable future and is staunchly resistant to top-to-bottom transformation. To a significant degree, Macklem's argument is a contribution to a long-standing tradition of legal structuralism: it is the "structures" of the international legal order that must be scrutinized and it is in relation to these "structures" (and the way that they operate and change over time) that human rights law is to be positioned and interrogated.

From Aboriginal and constitutional law to public international and labour law, Macklem has long been at the forefront of a range of debates concerning the complex relation between law and inequality. *The Sovereignty of Human Rights* gives full expression to this breadth and erudition. Macklem develops his argument through a series of studies of international labour law, international indigenous law, international human rights law, the international

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1 Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015).

2 *Ibid* at 25.

3 *Ibid* at 26.

law of development, minority rights under international law and rights of self-determination at international law. It is around these issue-specific studies that the book is organized and that its central argument unfolds. Thus, Macklem devotes his third chapter to an extended discussion of Karel Vasak's famous thesis regarding the three "generations" of human rights.[4] Rejecting this thesis as analytically unsatisfactory and chronologically inaccurate, Macklem maintains that all human rights derive their significance from a capacity to "monitor the exercise of sovereign power that international law otherwise vests with legal validity."[5] Similarly, in the book's sixth chapter, which offers an excellent historical analysis of the rights of indigenous peoples under international law, Macklem contends that the fundamental objective of international indigenous law is to provide a measure of protection to indigenous peoples within the context of an international legal system that has consistently refused to accord them full-fledged sovereignty. "[I]nternational indigenous rights vest in indigenous peoples", writes Macklem pithily, "because international law vests sovereignty in States."[6]

At root, what makes Macklem's argument distinctive is also what renders it vulnerable to critique. Macklem is deeply committed to reviving interest in the possibility—indeed, to stressing the *necessity*—of a specifically legal approach to the study and practice of human rights. On the one hand, he seeks to distinguish his project from moral accounts which assume that human rights protect essential and universal entitlements that each of us possess simply on account of our common humanity. Macklem finds such accounts dissatisfying for a number of reasons, the most important of which is that they tend to conflate legal validity with moral legitimacy, sidestepping direct engagement with those human rights that have secured legal recognition in favour of broader, more speculative investigations into the moral dimensions of what it means to be human. Only by prioritizing considerations of legal validity, Macklem insists, can the role that human rights play in the normative architecture and day-to-day functioning of actually existing international law be appreciated.[7] On the other hand, Macklem is keen to distance himself from overtly political explanations of human rights. By focusing solely on the way in which human rights are deployed as part of global political struggles, such explanations collapse the distinction between law and politics, losing

[4] According to Vasak, human rights appear in three "generations". The first such "generation" comprises civil and political rights. The second consists of economic, social and cultural rights. The third is driven by what he terms "solidarity rights", such as the right to self-determination and the right to development. Vasak's typology has often been interpreted as entailing a hierarchy of human rights norms, and has unsurprisingly come in for serious criticism from numerous quarters. See Karel Vasak, "A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights", *The Unesco Courier* (November 1977) 29.

[5] Macklem, *supra* note 1 at 71.

[6] *Ibid* at 156.

[7] *Ibid* at 13.

sight of the fact that the authority of human rights to "bring[] legal order to global politics"[8] stems from "their role as criteria for determining which of the countless claims and acts of power that constitute global politics can assume a mantle of international legal legitimacy."[9] Macklem argues for the necessity of "[s]eparating international law from justice or morality"[10] in order to develop a strictly legal explanation of the place of human rights in an increasingly complex and dynamic international legal order.

As fascinating as this approach may be, it is not entirely clear that it is tenable. Quite apart from the question of whether human rights have actually succeeded in combating injustice and inequality, the source of a variety of lively debates in recent years,[11] there is the question of whether the kind of legalism on which Macklem pins his hopes is genuinely sustainable. Since the outbreak of legal realism in the early twentieth century, wave upon wave of legal theory has cast doubt upon the extent to which the legal can be segregated from the extra-legal. Legal scholars today generally maintain that all types of law, international law included, are distinguished by certain formal properties. Among other things, the presence of such formal properties is what enables us to use the word "law" in a meaningful way (rather than having recourse to the vocabularies of morality and politics). That said, few scholars today subscribe to the view that law can plausibly be characterized as *fully* autonomous, in the sense of involving a sharp, hard-and-fast distinction between law and non-law. Although Macklem is aware of the porous boundary between law and non-law (and much of his previous work is testimony to that awareness), he does not pay sufficient attention to it in this book. More to the point, he *cannot* do so, given the uncompromising legalism in which his argument is anchored.

In this connection, Macklem leans heavily on the work of Hans Kelsen, the legal philosopher whose "pure theory of law" gave us what is still the most influential variant of legal positivism outside the English-speaking world.[12] Indeed, Kelsen is something of a touchstone for Macklem throughout *The Sovereignty of Human Rights*. This is both revealing and perplexing as only a few legal theorists today seek to defend Kelsenian variants of legal positivism. Kelsen's insistence on distinguishing sharply between the "is" and the "ought", his fondness for the idea that law is unintelligible in the absence

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[8] *Ibid* at 45.

[9] *Ibid* at 3.

[10] *Ibid* at 20.

[11] For a taste of only one such debate, see e.g. Oona A Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111:8 Yale LJ 1935; Ryan Goodman & Derek Jinks, "Measuring the Effects of Human Rights Treaties" (2003) 14:1 Eur J Intl L 171; Samuel Moyn, "Do Human Rights Treaties Make Enough of a Difference?" in Conor Gearty & Costas Douzinas, eds, *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 329.

[12] See e.g. Macklem, *supra* note 1 at 19–20, 40, 133–34, 136–39, 158.

of the coercive authority of the state, his concomitant repudiation of the possibility that non-state normative orders may possess legal qualifications and, above all, his notoriously nebulous theory of the *Grundnorm*—the "basic norm" that he regards as presupposed by every effective legal system—have for some time attracted not only critique but outright derision. Kelsen's views on international law, a body of law to which he attaches even greater structural importance than domestic law, have proven susceptible to similar scepticism. One cannot help but wonder why Macklem feels the need to marshal the Kelsenian tradition of legal theory—and, more fundamentally, whether doing so hurts rather than helps his effort to develop a novel account of sovereignty and human rights.

The Sovereignty of Human Rights is a work of impressive ambition, showcasing the full range of knowledge for which its author is rightly renowned. Macklem's attempt to develop a purely legal account of human rights as a response to the "pathologies" of existing distributions of sovereign authority may not persuade every reader, particularly since his reliance upon Kelsen (and legal positivism more generally) is sure to raise eyebrows.[13] Yet few readers will come away from this book without having their knowledge of international law enriched. This is a work that repays careful reading and rereading and will certainly be debated for years to come.

[13] Intriguingly, Macklem uses the suggestive term "pathologies" on numerous occasions. See e.g. *ibid* at 1, 27, 34, 45, 64, 66, 105.