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Book Review

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Book Review: Paradigms of International Human Rights, by Aaron Xavier Fellmeth

Abstract
Aaron Xavier Fellmeth's Paradigms of International Human Rights Law makes an important contribution to the scholarship on international human rights law (IHRL). In the introduction, Fellmeth begins by noting that previous scholarly literature on IHRL has often focused on the content and enforceability of human rights, but that the broader structure and framing of human rights has been undertheorized. With that in mind, Fellmeth identifies that the first purpose of his book "is to begin a structural critique of some of [the] systemic features of IHRL." The second purpose is "to make some progress in bridging moral theory with legal theory in the human rights field," since human rights law is particularly imbued with normative assumptions about morality. Despite the ambitious nature of Fellmeth's proposed undertaking, he goes to great lengths to underscore that the book's aim is not to develop a comprehensive moral theory of IHRL.

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Book Review

Paradigms of International Human Rights, by Aaron Xavier Fellmeth[1]

ERIC FREEMAN[2]

AARON XAVIER FELLMETH'S *Paradigms of International Human Rights Law* makes an important contribution to the scholarship on international human rights law (IHRL). In the introduction, Fellmeth begins by noting that previous scholarly literature on IHRL has often focused on the content and enforceability of human rights, but that the broader structure and framing of human rights has been undertheorized. With that in mind, Fellmeth identifies that the first purpose of his book "is to begin a structural critique of some of [the] systemic features of IHRL."[3] The second purpose is "to make some progress in bridging moral theory with legal theory in the human rights field,"[4] since human rights law is particularly imbued with normative assumptions about morality. Despite the ambitious nature of Fellmeth's proposed undertaking, he goes to great lengths to underscore that the book's aim is not to develop a comprehensive moral theory of IHRL. Indeed, political and pragmatic constraints attenuate the ethical underpinnings of IHRL, and none of the various human rights instruments or regimes can be distilled within a single philosophical theory.[5] Nevertheless, Fellmeth highlights the importance of trying to bridge the gap between the legal and moral theory of IHRL, noting that it is "as fruitless to analyze IHRL without recourse to ethical

1. Aaron Xavier Fellmeth, *Paradigms of International Law* (New York: Oxford University Press, 2016).
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3. Fellmeth, *supra* note 1 at 1.
4. *Ibid* at 2.
5. *Ibid* at 2-3.

theory as it would be to analyze international trade law without reference to economic theory."[6] Through a structural critique of three different paradigms of IHRL, *Paradigms of International Human Rights Law* works to both recognize the relationship between moral and legal theory and show how legal theory can be further refined to better serve the underlying moral vision of IHRL.

The book is organized into three parts, each critiquing and deconstructing a different paradigm of IHRL. The three specific paradigms that structure the analysis in the book "were chosen because each undergirds the fundamental assumptions and beliefs of international lawyers and, to a lesser extent, philosophers about how IHRL does, can, and should operate to protect and promote human dignity."[7] In part one, Fellmeth analyzes the primacy of a rights-based paradigm within IHRL, noting the overall neglect of individual, collective, or corporate duties. Part two examines the role of non-discrimination rights in IHRL, contrasting non-discrimination rights with more specific substantive rights. In part three, Fellmeth analyzes the distinction between positive and negative rights, challenging how these rights have been conventionally conceptualized.

Fellmeth's overarching argument in part one is that human rights law and theory should afford more weight to duties than to rights. As the name implies, IHRL has been overwhelmingly premised on the creation and subsequent protection of rights, rather than on the creation and promotion of duties. Although "[r]ights always implicate duties, because rights justify claims by the right holder against the holder of a correlative duty,"[8] free-standing legal duties that do not correlate to a specific right are relatively rare in IHRL. When they do appear, they often take the form of vague moral exhortations.[9] Despite this, Fellmeth posits that individuals are "enmeshed in a network of moral and legal duties to other individuals, groups, humankind as a whole, and animals."[10] As such, he argues that it is feasible to broaden IHRL to include specific individual, corporate, and state legal duties.

Fellmeth's analysis of duties then proceeds to conceptualize how international legal duties could act "as an alternative or supplementary paradigm to IHRL."[11] Having established the feasibility of incorporating duties more extensively within the IHRL paradigm, Fellmeth turns to examine the desirability of creating

6. *Ibid* at 2.
7. *Ibid* at 5.
8. *Ibid* at 12.
9. *Ibid* at 38.
10. *Ibid* at 59.
11. *Ibid* at 60.

international individual, corporate, and state duties. He argues that a greater incorporation of duties within the rights paradigm would ultimately be beneficial, as a "fundamental duties paradigm can promote some important interests with greater facility than a fundamental rights paradigm."[12]

Fellmeth analyzes potential objections regarding the incorporation of individual legal duties within IHRL. Indeed, such duties are likely unnecessary, redundant, unenforceable, and would ultimately "contribute very little toward the progressive realization of a world public order based on dignity."[13] With respect to the incorporation of corporate legal duties, Fellmeth's treatment is much shorter and more superficial. Although noting some potential objections to corporate duties, Fellmeth concludes that the "reasons for refraining from applying such duties to individuals are less persuasive in the case of MNEs [multinational enterprises]."[14] Notwithstanding the analysis elsewhere, it appears Fellmeth misses an opportunity to more comprehensively explore the contours of potential corporate legal duties. Despite justifying his refusal to engage with the overall desirability of corporate legal duties because doing so would require a more detailed analysis of contextual factors,[15] the limited engagement here undermines the persuasiveness of Fellmeth's argument about the beneficial potential of a duties-based paradigm.

When discussing the incorporation of state duties into IHRL, Fellmeth's analysis is once again rigorous and persuasive. Fellmeth notes that some international conventions already contain state duties that are not concomitant with a particular human right—such as the obligation on states in the *Convention on the Rights of the Child* to educate parents about child health and nutrition.[16] Such duties "have no correlative right holder."[17] Nevertheless, Fellmeth argues that a greater emphasis on state duties—supplementing but not replacing the dominant rights paradigm—could be beneficial. First, the duties paradigm offers states greater flexibly to balance an international duty with other competing policy interests and duties. Because rights tend to be "trumps" that must be prioritized over other policy interests, "rights assertions tend to polarize and legalize policy debates."[18] While rights provide a high degree of protection, their absolute nature can result in a more circumscribed catalog of rights. A duties

12. *Ibid* at 283.
13. *Ibid* at 77.
14. *Ibid* at 79.
15. *Ibid*.
16. *Ibid* at 79-80.
17. *Ibid* at 79.
18. *Ibid* at 85-86.

paradigm, therefore, offers "greater flexibility in public policy precisely because duties may conflict and need to be balanced with each other."[19] Second, a duties paradigm more clearly identifies the duty holder and the extent of their duty. In the rights paradigm, the focus is on the individual rights holder. Although human rights create a correlative duty on the state to perform a specific act or refrain from some act, the extent of the duty on the state can be ambiguous. Therefore, Fellmeth advocates for "[d]irect statements of duties" because they "tend to invite greater precision in the type and extent of expectations for the duty holder's conduct, and accordingly discourage absolutist claims without the need for creative interpretation by human rights decision authorities."[20] Third, Fellmeth argues that a greater emphasis on duties is more amenable to protecting certain human interests that do not fit comfortably within a rights paradigm—such as duties toward animals, future generations, or the environment. Here, Fellmeth makes the strongest case for placing greater weight on duties within IHRL. Giving a right to future generations, for example, creates a metaphysical problem for the current rights paradigm because "what does not exist cannot have a present right."[21] Duties are therefore able to protect important human interests that are not held by an individual person or that cannot be incorporated easily within the rights paradigm.

In part two, Fellmeth analyzes the paradigm of non-discrimination rights, contrasting them with more substantive rights. On the one hand, substantive rights—such as a right to be free from torture—can usually be defined by their determinacy, the underlying theoretical interest that they are intended to protect, and the universality of their application. Non-discrimination rights, on the other hand, differ "from other human rights because the concept of discrimination per se does not presuppose any theory about which specific benefits or freedoms a group of persons should have."[22] Indeed, such rights are inherently comparative, they are not subject specific, and they are, in practice, dependent upon a claimant's identification with a particular class of persons.[23] Fellmeth proceeds to analyze the Strasbourg Court's doctrinal approach to non-discrimination. The analysis here is cogent and thorough. The Strasbourg Court's approach deems discrimination to have occurred when there is (1) different treatment of persons or groups in a similar situation and (2) where the distinction has "no objective

19. *Ibid* at 86.
20. *Ibid* at 90.
21. *Ibid* at 95.
22. *Ibid* at 105.
23. *Ibid* at 110.

and reasonable justification."[24] Examining the various international instruments that enshrine a non-discrimination right and the corresponding jurisprudence, Fellmeth deconstructs five factors relevant to determining an unjustifiable ground for discrimination. This includes whether the distinction is made based on prohibited grounds, the relative importance of the protected interest, the individual and social consequences of the discrimination, whether the source of the threat is the state or a private actor, and finally whether there was an intention to discriminate. The analysis establishes a solid foundation upon which Fellmeth subsequently assesses the interchangeability and complementary nature of substantive and non-discrimination rights.

Because non-discrimination rights are largely defined in the abstract and can overlap and intersect with violations of substantive human rights, many violations can be framed either as an infringement of a substantive human right or as a prohibited ground of discrimination. Fellmeth provides several examples of this overlap. For example, if a national minority group applies for a permit to hold a parade but is denied the permit based on public order concerns despite the fact that parade permits are regularly granted for the majority group, the minority group could challenge the decision in two ways.[25] They could challenge the denial of their permit on substantive grounds as a violation of their right to freedom of expression or freedom of assembly. Similarly, they could challenge the denial of the permit as an unjustifiable form of discrimination.

Many human rights violations can therefore be pursued as a violation of a non-discrimination right or as a violation of a particular substantive right. As Fellmeth notes, "[a]lthough the Strasbourg Court often likes to say, once it has found a violation of a substantive right, that discrimination claims raise no new issues, in fact approaching a human rights claim from a nondiscrimination perspective differs in several quite important respects from approaching it from a substantive rights perspective."[26] When presented as a violation of a substantive right, human rights authorities are frequently called upon to "delimit the right's boundaries and thereby develop IHRL doctrine for that specific right."[27] Moreover, because substantive rights generally apply universally, a remedy for a substantive violation applies across various societal cleavages. The universality of substantive rights can make it easier for vulnerable and repressed minorities to mount a rights claims, as doing so will be less likely to provoke the ire and

24. *Ibid* at 112.
25. *Ibid* at 180.
26. *Ibid* at 187.
27. *Ibid* at 198.

resentment of the majority.[28] In contrast, because non-discrimination rights are inherently comparative and context-specific, "remedies for discrimination claims will tend to equalize treatment between different segments of society without necessarily improving conditions in society generally."[29] Nevertheless, the way in which discrimination claims specifically draw attention to difference can be "functional and constructive,"[30] as it discourages arbitrary measures that perpetuate disadvantage or stereotype. Similar to how a duties paradigm can complement and supplement a rights paradigm, Fellmeth concludes that the non-discrimination paradigm complements the substantive rights paradigm; although both paradigms serve to protect human dignity, by operating in different ways "[e]ach paradigm can achieve a kind of social engineering that the other cannot."[31]

Fellmeth's analysis in part two is persuasive. Nevertheless, it would have been helpful had Fellmeth further developed the concept of how non-discrimination and substantive rights could be combined to greater effect. Despite providing some generic examples of how non-discrimination and substantive rights can complement and supplement each other, further engagement with specific IHRL instruments could have added greater support for this argument.

In part three, Fellmeth examines the implications of framing a human right in either negative or positive terms. Although there is significant literature on negative and positive rights, Fellmeth precisely delineates the difference between positive and negative rights. Conventionally, negative rights are conceptualized as involving a duty of self-restraint whereby the state refrains from infringing on a particular right; in contrast, positive rights are often conceptualized as imposing an affirmative duty to act to assist the right holder.[32] Instead, Fellmeth argues that the source of the threat, rather than the nature of the duty, is the most salient feature distinguishing positive and negative rights. He states:

> Instead, the definition of positive rights rests much more coherently on the source and nature of the harm that the state is obligated to prevent or remedy. A duty to redress harms originating most directly from the state itself—including its officials and agents—is a negative duty. A duty to redress harms originating most directly from sources other than the state itself is a positive duty.[33]

28. *Ibid* at 200-201.
29. *Ibid* at 201.
30. *Ibid* at 202.
31. *Ibid* at 209.
32. *Ibid* at 215-16.
33. *Ibid* at 241.

Fellmeth proceeds to discuss the distinctions between framing a right as positive and negative. As in the first two parts of the book, Fellmeth once again emphasizes the complementary nature of a positive rights paradigm with that of a negative rights paradigm; framing a particular right in positive, rather than exclusively negative terms, can expand the ambit of a particular human right in a way that prioritizes different political theories on the role of the state.[34] Building on this argument, Fellmeth notes that, because not all states share the same characteristics, framing rights in positive terms can be efficacious in some countries but potentially deleterious in others. The positive framing of rights in developing countries can, for example, undermine negative rights; if a state is inadequately equipped to redress violations where the state is not the main source of the threat, framing rights in positive terms can result in the diminishment of rights as merely aspirational. Given the discrepancy in the capabilities of countries, Fellmeth concludes that the "ideal balance would appear to be an ambitious interpretation of rights that maintains pressure on states to increasingly conform their practices to a minimum standard of protection and fulfillment of human rights."[35] Although Fellmeth's analysis of the potential benefits and pitfalls of positive framing is compelling, a regionally fragmented application of IHRL seems to be the inevitable consequence. Such fragmentation could, in turn, lead to countries selectively framing rights to their advantage. This seems extremely problematic and requires further engagement and theorization.

Overall, *Paradigms of International Human Rights Law* is an informative read. Fellmeth successfully accomplishes his stated goals of providing a structural critique of IHRL and bridging moral and legal theory. Despite the highly theoretical nature of the subject matter, Fellmeth writes clearly and presents his arguments in a highly systematic and understandable manner. Although there are times when more extensive analysis of particular issues would have been fruitful, the overall work represents a compelling piece of scholarship.

34. *Ibid* at 212.
35. *Ibid* at 276.