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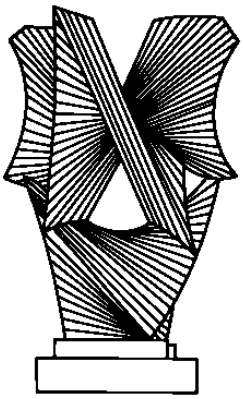

MARTII KOSKENNIEMI ON HUMAN RIGHTS: AN EMPIRICAL PERSPECTIVE

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Martii Koskenniemi on Human Rights: An Empirical Perspective

Eric A. Posner[1]

March 19, 2014

Abstract. Martii Koskenniemi argues that human rights law is indeterminate, and that arguments based on human rights unavoidably reflect the policy preferences of the speaker. I connect this argument to empirical evidence of the failure of international human rights treaties to improve human rights in countries that have ratified them. I argue that many features of the human rights regime that are celebrated by lawyers—the large number of treaties, the vast number of rights, the large amount of institutionalization, and the involvement of NGOs—actually reflect the failure of the regime. Governments tolerate these developments because they add to the indeterminacy of the legal regime, freeing them to act in the public interest when they are motivated to do so.

International law is a vast field governing countless relationships between states, yet a very small part of it receives most of the attention—human rights. This may seem puzzling. The treaties that created the human rights regime are no different from the treaties that created the law of the sea and international trade law. Yet clearly people think about human rights law differently from the rest of international law. Lawyers who discuss the law of the sea or international trade law are likely, sooner or later, to ask whether the rules in those areas are consistent with human rights norms, while human rights lawyers can discuss human rights law without thinking about the law of the sea or the WTO. Many people insist that states are bound to respect human rights even if they have not ratified the relevant treaties, or have ratified them subject to reservations—while countries that do not belong to the WTO are not bound by its rules. Some people believe that human rights law binds states even when states explicitly repudiate it; human rights law is said to have a "constitutional" dimension.

An enormous infrastructure has grown up around human rights. Countless NGOs monitor compliance with human rights in various countries. Governments routinely criticize each other for violating human rights. An endless array of commissions, councils, committees, courts, and offices attempt to administer the human rights treaties. While other treaty regimes also are governed by international organizations (the WTO, the Law of the Sea Authority), no other area of law has thrown up quite so many institutions, with complex, overlapping jurisdictions. It is also hard to think of another area of international law where there is so much activity: so many proposals for additional treaties, for expanding the scope of existing treaties, for strengthening and constructing new institutions.

And yet the accomplishments of international human rights law seem rather slim. Countries rarely try to enforce the treaties against each other—at least, in a systematic way. They do not "retaliate" against each other for violating the treaties the way they often retaliate against countries that violate trade law. Countries do threaten human-rights violators with sanctions from

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time to time, but they do not do so in a systematic way, and usually human rights violations are offered as an excuse or redundant justification when the real basis for concern is a country's militarism or aggression. And most human-rights violators are left alone. The international institutions that monitor human rights lack adequate staffing and funds, and with few exceptions are deprived of formal legal authority. There is not much evidence that human rights law has caused governments to improve respect for human rights.

What are we to make of this phenomenon? I will examine this question through the lens of Martii Koskenniemi's writings on human rights. His most focused writing on this topic can be found in two chapters of The Politics of International Law. He is interested in the tension between human rights discourse and the institutionalization of human rights. The discourse is fluid and indeterminate. The institutions, by contrast, are rigid. As he argues:

> [W]hile the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalises values and interests that resist translation into rights-language.[2]

The reasons are complex. Human rights discourse is frequently indeterminate and, when it isn't, it privileges certain moral relations over others in an arbitrary fashion. Indeterminacy can be seen in the ubiquitous problem of tradeoffs. When a person criticizes the government, his human right to expression must be weighed against interference with the government's legitimate activities, like providing security. Indeed, these tensions can be characterized as conflicts between rights—in this case, a conflict between the right to freedom of expression and the right to security—and the human rights treaties provide no method for resolving such conflicts. The larger problem is that governments have numerous responsibilities and limited resources. If they use some of their resources to advance certain human rights, there will be fewer resources left over for advancing other human rights or other legitimate interests of the public. There is no "recipe" for making these tradeoffs and judgments. The morally correct result depends on context.[3]

Worse, human rights law privileges certain moral values at the expense of others. So even if a government properly respects human rights, it could end up causing other moral harms. For example, in families moral claims are not based on rights but on relationships; there are pervasive worries that conceptualizing family relationships in terms of rights (for example, children have rights to love and support) mischaracterizes and damages them. In the United States, a recent lawsuit by a teenager against her parents claiming that they were legally required to pay her expensive high school tuition sparked widespread outrage. Although the plaintiff had a weak case, the concern is that she would not have even brought the case but for a culture in which everyone thinks about everything in terms of rights. A government that sought to protect human rights in the family context may end up harming family relationships.

When human rights are institutionalized—and here Koskenniemi seems to have in mind domestic legal and constitutional structures—the moral tradeoffs (the first problem) are put in

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[2] Martti Koskenniemi, The Politics of International Law 133 (2011).
[3] Id., at 143.

the hands of courts and administrators who may make them improperly, reflecting self-interest, the values of the elites, or institutional self-preservation, or resulting from error. The bureaucratic enforcement of rights then leads to denigration of moral values that cannot be put into the language of rights (the second problem).

The upshot is that although people who are treated unjustly often can advance their cause by using the language of rights, once those rights are recognized, legalized, and institutionalized, they become just one of a large number of rights that must be traded off against each other, often with disregard to moral values not (yet) recognized as rights. This seems to be the petrification that Koskenniemi alludes to. One might add that the problem is not just that other moral values are not recognized, but that the institutions may, while recognizing many rights, not make the right tradeoffs and thus effectively violate some or many of them.

Koskenniemi's discussion is abstract; as I mentioned, he seems to have in mind a vaguely defined human rights discourse that is partially legalized. In this essay, I bring down the level of abstraction, and examine how his argument plays out in international law. My starting point is evidence compiled over the last decade that suggests that international human rights law has been ineffective. I will argue that the problem is not petrification of human rights but the difficulty of eliminating discretion and tradeoffs. States are required to promote the public good and resist the straitjacket of a rights regime that would interfere with this agenda. As a result, states have deliberately ensured that international human rights law is vague, and that international legal institutions are too weak to give it content. I argue that the failure can be traced to a basic conceptual problem with rights. Because any effort to reduce the public good to a short list of rights unavoidably skirts things that people care about, there will always be constant pressure to increase the number of rights. This pressure comes from the public, NGOs, political activists, and many other persons and organizations. But as the number of rights increases (a phenomenon I call the "hypertrophy" of human rights), and it becomes more and more necessary to make tradeoffs between them, it becomes harder to criticize countries for failing to advance some rights rather than others. Paradoxically, the huge quantity of human rights gives states immunity to criticism for violating them.

Some Evidence

Until recently, it was taken for granted among international lawyers that human rights treaties advanced the cause of human rights. How could they not? Governments, NGOs, and other institutions put a huge amount of effort into negotiating these treaties. They set up committees, commissions, and courts to monitor compliance, interpret terms, and pester governments that fail to live up to their obligations. Leaders of virtually all governments regularly declare their devotion to human rights, and criticize other governments for violating human rights. Thousands of NGOs have been formed by people who hope to hold their governments and foreign governments to those governments' human rights obligations. Aid may be conditioned on human rights. Routine human-rights violators may be isolated. The International Criminal Court was created to ensure that government officials responsible for the worst human rights violations are held criminally accountable.

Over the decades, international human rights law has deeply penetrated domestic political and legal institutions. Many governments have drafted new constitutions, and every new constitution contains rights that can be traced to international documents. Domestic courts are often empowered to enforce those rights. The European Court of Human Rights has taken the lead in deepening and advancing the human rights regime. Roughly contemporaneous with the rise of international human rights law, democracy spread from country to country, in a series of waves that took place after World War II, during the 1970s, and during the 1990s. Today, most countries are democracies, and even non-democracies must pay tribute to democratic ideals by holding (fake) elections.

One of the most interesting features of the human rights regime is the rapid increase in the number of human rights treaties, and the rapid increase in the number of internationally recognized human rights (most but not all of them created by the treaties). Major treaties entered into force in 1969, 1976 (two), 1981, 1987, 1990, 2003, 2008, and 2010. The number of rights that came into existence expanded from 20 or so in the first treaty (depending on how one counts them), to over 100 in 1976, more than 150 in the 1990s, to around 300 today. Or to put the point differently, the range of human activities that are governed by international human rights law has expanded greatly, so that today, nearly everything one might think of is formally governed by human rights law—the family, the workplace, political institutions, religious organizations, education, health, indigenous groups, disability, and on and on.

This might seem like a great triumph for human rights, but the picture becomes murkier as one looks more closely at it. Human-rights monitors churn out dismal reports at an ever-greater rate, and these reports show that human rights violations remain common in most countries. Torture is used routinely to extract confessions or intimidate dissidents. Police use extrajudicial killings to keep order or extract bribes. Women are treated extremely badly in all but the most advanced western countries. In poor countries, children are forced to work and denied adequate education. Health care is miserable. Religious freedom is limited. Press freedom varies greatly even in democracies, as does the ability of the public to exercise its will through political institutions.

The various international institutions charged with monitoring and enforcing the treaties are starved for funds and routinely ignored by states. The treaty committees are marginal institutions. The UN Human Rights Council is tainted by its human-rights violating members who protect themselves from criticism. The European Court of Human Rights has presided over the return of authoritarianism to Russia. And the effectiveness of domestic human-rights institutions is questionable. Outside the west, most countries have weak and frequently corrupt legal institutions.

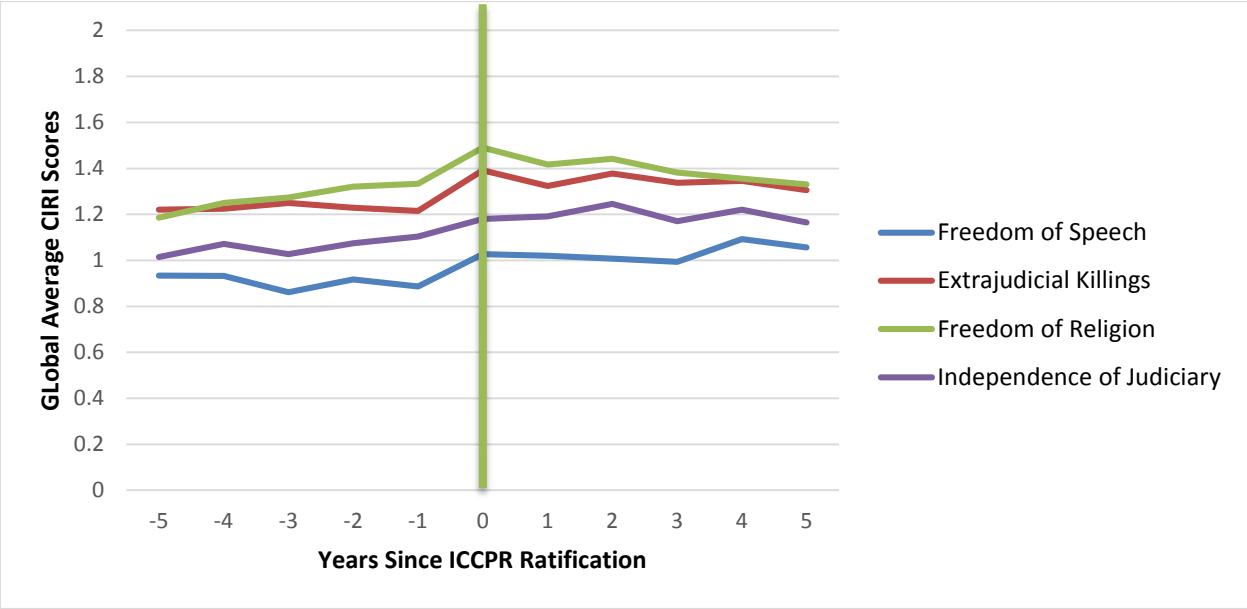
And while democracy has indeed spread, and so has the incorporation of rights into national constitutions, it seems hardly accurate to say that human rights—at least, in the conventional western sense—play a dominant ideological or political role around the world. Consider the ten most populous states, which in aggregate contain well over half the population of the world. Of them, only the United States and (to a lesser extent) Japan could be considered a liberal democracy where rights are widely respected. Russia and China are authoritarian countries. India is a democracy and enjoys a free press, but culturally—with its lingering caste

system and mistreatment of women, especially in vast rural areas—it is about as far from liberal as is possible. Indonesia, Pakistan, Bangladesh, and Nigeria also would be well down on the list of leading rights-respecting nations. Brazil, the best of the remaining lot, has enormous problems like rampant extrajudicial killing.

Nor is there much evidence that the progress that has been achieved is related to international law per se. The leading liberal democracies—the United Kingdom, the United States, France, Germany, the Netherlands, Canada, Australia, and so on—respected human rights long before the international treaty regime was put into place in the 1970s. Some of these countries can trace their commitment to human rights back to the Enlightenment. The causes of recent conversions to human rights lie outside the law. The failure of numerous authoritarian regimes—after World War I, World War II, and the Cold War—immensely bolstered the prestige of democracy and human rights. Democracy and respect for human rights appears to be correlated with economic growth—and there may well be a causal relationship running from wealth to rights. Thus, the factors that cause countries to respect human rights appear to be unrelated to international law.

Over the last 15 years, law professors and political scientists have attempted to test rigorously the hypothesis that international human rights law improves respect for human rights. This hypothesis implies that if a countries enters a human rights treaty, its human-rights performance will improve at the same time or in the years afterwards. In fact, there is hardly any evidence for this pattern, as Figure 1 illustrates.

Figure 1: Effect of ICCPR on Four Types of Rights



The graph shows four types of human rights-related outcomes—freedom of speech, extrajudicial killings, freedom of religion, and independence of the judiciary, as measured by a pair of

respected political scientists, where 0 is worst and 2 is best.[4] When a country ratifies the ICCPR, it binds itself to recognize rights to freedom of expression and freedom of religion—and so measures of respect for those rights should increase. In addition, the country binds itself to recognize the right to due process, and accordingly one would expect the country's avoidance of extrajudicial killings and the independence of its judiciary would improve. Yet the graph shows that performance along these dimensions hardly budges. There is perhaps a small improvement in the year leading up to ratification, but this improvement mostly erodes over the next several years. Statistical studies that control for other factors like changes in the country's wealth confirm that treaty ratification does not affect a country's human rights performance at a statistically significant level.[5]

The pattern for other treaties is roughly the same, though there is some variation. Scholars have found some evidence that literacy rates for women improved in countries that ratified CEDAW, for example. But respect for other rights go *down* after ratification. When there are dozens or even hundreds of rights, random variation will ensure that some coefficients are statistically significant. But the overall pattern is clear: treaty ratification either has no effect on human rights, or a very small effect that is greatly at variance with all the attention given to human rights.

Explanations

Why haven't human rights treaties increased respect for human rights? There are a number of familiar explanations. One is that countries do not really care about human rights, and the treaties are a hypocritical exercise in propaganda. And the advanced liberal countries made sure to design the treaties so that they ratified rights that those countries already recognized, so no change in behavior was necessary. Another is that they do care about human rights, but not very much, so while countries enter into human rights treaties in good faith, it turns out to be too difficult to comply with them because of problems of entrenched interests, civil disorder, and so forth. Wealthy and powerful countries that might be expected to enforce human rights in other countries must contend with competing interests like security and geopolitical stability.

I want to explore a third possibility, one more closely in line with Koskenniemi's claims. Koskenniemi argues that rights become oppressive when they are institutionalized because they marginalize certain interests that are not embodied in these rights. Part of the explanation is that certain human values do not lend themselves to embodiment in rights. He mentions nationalistic aspirations: many people feel that they have a duty to make sacrifices for the good of the nation, but they do not believe that anyone else has a corresponding right to those sacrifices. Another example perhaps is embodied in the idea of virtue. A person may feel that he has an obligation to improve his talents without thinking that he has a right to do so. Family relations are notoriously difficult to describe in the language of rights: does one spouse have a right to care and support from the other spouse?

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[4] David L. Cingranelli, David L. Richards, and K. Chad Clay, The CIRI Human Rights Dataset (2013), http://www.humanrightsdata.org.

[5] I discuss the evidence in Eric A. Posner, The Twilight of Human Rights Law (Oxford University Press, forthcoming 2014).

Yet while these familiar objections to "rights-talk" carry some force, it is not clear that they apply to the international human rights regime. After all, that regime has never demanded that government disregard morality that is not embodied in rights. The idea from the start was to create a set of minimum or basic rights, not to dictate the entire moral system. Governments can pursue their own (or their population's) vision of the good if they like without running afoul of the human rights regime.

But there is a related possibility, which I have called "rights hypertrophy"—the proliferation of human rights to the point that any specific human right loses its normative content.[6] All countries have limited resources, whereas most rights—at least, if understood naively—require a large expenditures for vindication. A country can stop torture and guarantee due process only by investing resources in training police and judges, paying them adequately, and investigating corruption. It is very hard to know what fraction of the country's GDP must be spent on these activities in order to vindicate the rights of criminal suspects. Everyone understands that rights violations cannot be brought down to zero, and so the question becomes how many rights violations can be tolerated for a country to be deemed in compliance with the human rights treaties.

Meanwhile, this same hypothetical country must vindicate numerous other rights. It must respect the right to free speech—which means providing security and crowd control for demonstrations. It must respect the right to freedom of religion—which may mean providing legal exemptions as well as protection for religious minorities. It must respect rights to education and health—which means investing substantial resources in schools and medical clinics. It must reduce discrimination against women—which again will require, especially in a traditional society, massive investments in education, training, and protection. If, as is normally the case, respect for rights requires a modern, well-funded legal system, then resources must go in that direction as well. And while doing all of this, the government must maintain political support among traditional groups and conservative citizens who object to these policies. And yet if resources are limited—and they always are—then the country must make tradeoffs, and invest less in vindicating rights than might seem appropriate in the abstract.

Anxieties based on these sorts of considerations have led many commentators to argue that human rights should be arranged hierarchically, so countries are encouraged to address the most important, like rights related to bodily integrity. But there has been no movement in this direction. The reason for this is that most governments see their role as that of advancing the general public good. Even cynical, corrupt, and authoritarian governments put some effort into providing benefits to the public—even if they are more concerned with helping themselves and their cronies—if only to prevent a revolution. The public good is typically understood as some mixture of economic prosperity, security, and protection of values. Governments do best by allocating resources to these goals in proportion to the marginal benefits that are available. If torture exists because it is a deeply entrenched practice among local police, and no amount of money spent on retraining will eliminate it, then it is better to use money to build schools and medical clinics than throw it away on investigations and training programs that will not make a dent in the torture problem. If spending more money on schools does not turn out to improve

[6] Posner, supra.

educational outcomes by very much, then at the margin money may be better spent on parks, or better streets, or higher salaries for civil servants, or a stronger military.

Philosophers dislike rights hypotrophy because the proliferation of rights (including rights to leisure and vacation) seems to trivialize the human rights project.[7] But it is a reasonable for a government to spend resources on apparently trivial goods (vacation, leisure) if those resources cannot on the margin purchase goods that might seem more significant or otherwise more deeply connected to human well-being (bodily integrity, religious freedom). It is probably for this reason that the list of rights continues to grow rather than contract. To rationalize spending on parks when many people receive inadequate schooling or medical care, someone will advocate a "right to parks," or claim that park-building advances some other rights to leisure or environmental well-being or some such thing. The flexibility of language combines with the needs of policy to ensure that rights are indeterminate in practice. Governance is complicated; good governance cannot be reduced to a list of obligations.

If all this is so, one can see why human rights treaties seem to be as entrenched as ever, and indeed continue to be proposed and ratified, with the number of recognized rights increasing all the time—while at the same time the treaties do not have measurable effect on the behavior of countries. Countries add new treaties and new rights to make clear that they are not bound to a short list of basic rights, including the liberal or negative rights touted by the United States in particular, and can instead act with the flexibility that they believe necessary to meet public needs. Commentators and scholars abet this activity by discovering new human interests that the rights regime should protect. But the upshot is the treaties become unenforceable. It becomes difficult to argue that a country violated a treaty X because it violated right Y, when the country can reply that it cannot afford to respect right Y while also ensuring the vindication of rights W and Z. These arguments are familiar. Many poor countries claim that they can exercise a right to development in order to excuse their failure to comply with political rights. We may (or may not) criticize these arguments on moral grounds, but the treaties themselves provide no resources for criticism. If the treaties were (implausibly) interpreted to require countries to reduce all rights violations to zero, then they would require the impossible, and countries can't be asked to do the impossible. But if, more plausibly, the treaties require countries to use "best efforts" or "good faith" to reduce violations, and to make reasonable tradeoffs, then they provide no basis for distinguishing countries that are in compliance and those that are not—putting aside extreme cases like countries that commit genocide or (like North Korea) sustain totalitarian systems that exploit and impoverish their populations.

One might respond to this argument by pointing out that many advanced countries respect the human rights of their citizens, and the tradeoff problem does not render this promise indeterminate, even when many rights can be bound in the constitution. In these countries, people can tell when the government violates their rights, and can obtain redress in the courts. But the difference between the domestic case and international law is that countries use institutions to resolve conflicts about rights, to make whatever tradeoffs that are necessary. Those institutions draw on their understanding of the public good and popular opinion in order to make these tradeoffs, which are then embodied in law that is often (although not always) predictable in application. The difficulty with international human rights is that no comparable

[7] See, e.g., James Griffin, Human Rights 186 (2009).

institutions exist. International human rights institutions are feeble and lacking in legitimacy. The reason for that is that legal institutions can operate only when they are trusted or at least accepted by the public, and while populations in advanced states generally trust their domestic institutions, they do not trust international institutions. And for that reason, governments cannot give international institutions the resources and respect that would enable them to operate effectively.

The Sociology of the International Law Profession

Koskenniemi says little about the actual practices of states and treaty enforcement, focusing instead on intellectual history. A major theme in his work is how international lawyers—and especially international law scholars—think about international law. He argues that international legal scholarship was traditionally joined to the Kantian tradition of liberal cosmopolitanism, which gave legal scholars the ability to act as a "legal conscience" for the international order. Meanwhile, international law was seen as an idealistic profession. But this position was always in tension with the realities of the international order. The old ideals are today in shambles. "Faith in progressive internationalism may have become impossible to articulate in an intellectually respectable fashion."[8] International legal practice increasingly seems like a technical field with no specific normative valence.

Koskenniemi overstates the collapse of progressive thinking in international law. Maybe he is so persuaded by his own critique of human rights scholarship—that it acts in bad faith by presenting contested policy positions as though they reflect neutral, apolitical rights[9]—that he believes that others must agree with it. His critique is indeed persuasive, but in the United States, at least, the progressive thinking he criticizes continues to dominate international law scholarship. For every paper written about trade, the law of the sea, or state responsibility, dozens or even hundreds are written about human rights. The human rights papers typically seek to expand the reach of the human rights regimes—by defining existing rights broadly or proposing new rights. Another enormous subject is international criminal law, where again the goal is to legitimize, extend, and broaden the norms of international criminal law, so as to punish human-rights violators. I know European scholarship less well, but it seems clear that human rights is also a central feature of that scholarship, indeed, where there is a commonly asserted view (still rare in the United States) that international human rights have become "constitutionalized."

Figure 2 shows the enormous increase in the frequency of law review articles in the United States that mention the term "human rights." It is a crude measure—since not all of these articles are focused on human rights—but it seems intuitively right. Writing about human rights received two boosts. The first was the Carter administration's promotion of human rights in the late 1970s, which was surprisingly adopted by the Reagan administration. The second was the end of the Cold War, which suddenly seemed to make a cosmopolitan order based on western human right principles possible.

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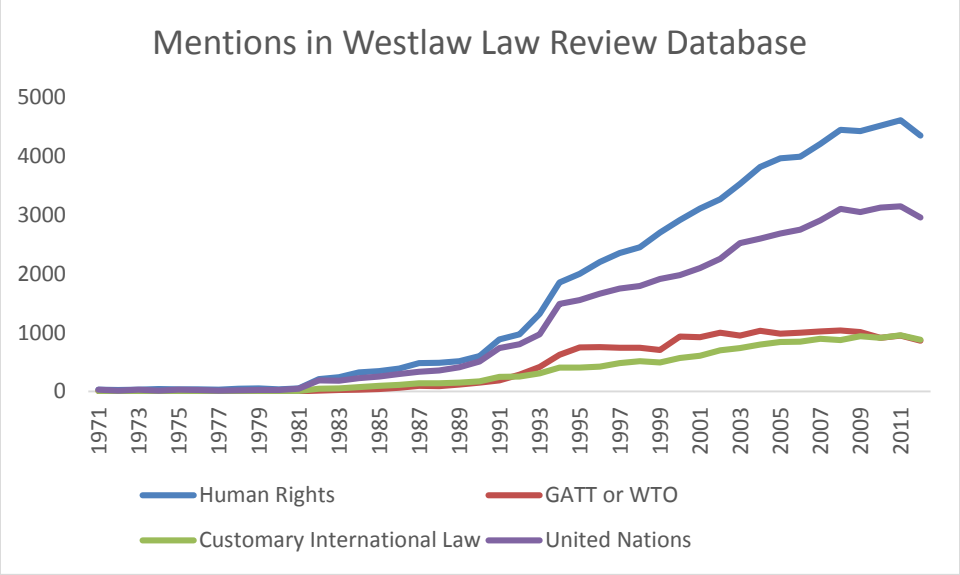
[8] Koskenniemi, Gentle Civilizer of Nations, at 514.
[9] Koskenniemi, Politics of International Law, at 151-52.

Figure 2: Frequency of Mention of "Human Rights" and Other Terms in Legal Articles[10]



What is true is that this type of scholarship is not taken very seriously by scholars outside of international law, appears to have little influence on governments, and has been challenged in recent years by empirically-oriented legal scholars and political scientists, who have, as I explained above, provided evidence that human rights treaties have had little effect on the behavior of states. The standard normative proposals to expand human rights and to strengthen human-rights institutions have become increasingly difficult to sustain in the face of state intransigence. Indeed, human rights scholarship has had little influence or respectability even in U.S. law schools, which tend to ghettoize their international law scholars.

Conclusion

Koskenniemi's focus on the arguments and beliefs of scholars obscures the radical implications of his thinking for international law itself. Consider his claim that "if there is no general recipe for the solution of rights conflicts, no single vision of the good life that rights would express, then everything hinges on the appreciation of context, on the act of ad hoc balancing, that is to say, on the kind of politics for the articulation of which rights leave no room."[11] If that is the case, then the human rights treaties cannot operate as they were intended. A government acting in good faith to comply with a human rights treaty will take into account "context," and a government acting in bad faith can similarly claim that "context" explains why it has made choices that observers may disapprove of. Any attempt to criticize a government for violating a human rights treaty becomes a claim that the observer understands the "context"—the complicated mixture of local values, threats, practicalities, and so on—better than the government itself does, which is frequently implausible. International courts and other legal institutions face a similar problem. If international human rights arguments are in the end policy arguments, why should a state accept an international body's policy judgments in preference to those of its government or population? Should we be surprised that they don't?

[10] Compiled from Thomson Reuters, Westlaw JLR Database, http://westlaw.com.
[11] Koskenniemi, Politics of International Law, at 143.

I have tried to add to this account a description of the ways in which this dilemma has worked itself out institutionally, and how it reveals in new (negative) light developments that international lawyers have almost always celebrated.

The increase in the number of human rights treaties and human rights embodied in those treaties is usually seen as a vindication of the human rights project. In fact, the multiplication of rights reflects deep disagreement across countries about the priority that different human interests should be given. It also undermines efforts to hold governments to account by increasing their formal legal discretion to plead context and make ad hoc tradeoffs.

The growth in international legal organizations, like courts and commissions, that are devoted to human rights is usually seen as a reflection of the international community's commitment to enforcing human rights. In fact, these institutions, which are starved for funds, and granted conflicting jurisdictions and little or no legal power, weaken enforcement by multiplying the number of interpretations of rights provisions, enabling states to select whichever ones serve their interests.

The multiplication of human-rights NGOs—domestic and international—is usually seen as an essential feature of the international human rights regimes, as NGOs perform important monitoring and enforcement functions. In fact, human-rights NGOs all have different agendas and causes; they frequently disagree with each other and offer different interpretations of international human rights, often ignoring the treaties altogether. Many NGOs pursue right-wing agendas at variance with the liberal spirit of the treaties.[12]

The explosion of human-rights scholarship, almost all of it devoted to broad interpretations of human rights law or calling for more rights and stronger institutions, is seen as an important supplement to international human rights law. In fact, this scholarship has had little influence on states. Government officials who read Koskenniemi[13] will rightly see it as political advocacy, which they can disregard, rather than legal interpretation that they should take seriously.

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[12] Clifford Bob, The Global Right Wing and the Clash of World Politics (2012).
[13] Koskenniemi, From Apology to Utopia, at 613.

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