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Book Review Essay

The Sovereignty of Human Rights

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A primary purpose of a human rights theory is to provide a foundation from which the actual and complete nature of human rights can be gleaned. Particularly for rights that are controversial or do not enjoy widespread consensus, a human rights theory provides a system for understanding what rights exist or should exist and what rights contain or should contain. The most predominant theories of human rights are based in law, politics and morality. Patrick Macklem's The Sovereignty of Human Rights *proposes a new theory of human rights devised to bypass the shortcomings of those predominant theories. He argues that sovereignty is a better foundation for understanding human rights because sovereignty and its distribution in the international legal order has given rise to the need for certain rights to exist. The exercise of sovereign power by individuals also influences how human rights are implemented within state borders. He maintains that understanding the adverse effects of sovereignty and its distribution yields greater insight than other theories into why human rights exist, what they contain, and how they should be implemented.*

Following a brief summary of Macklem's argument, the review examines how his theory compares with the predominant theories of human rights, particularly in light of the shortcomings of those theories. The review outlines Macklem's position that the adverse effects of sovereignty can clarify the international community's understanding of why human rights are necessary and what forms of protection they include. The review then examines how Macklem's theory corresponds with traditional classifications of human rights, which depict such rights in terms of generations. Finally, the review concludes with reflections on the theory and poses new questions raised by Macklem's theory of human rights.

Keywords: Sovereignty, human rights theory, minority rights, indigenous rights, right of self-determination, pathologies of sovereignty

1. Introduction

Theories of human rights seek to answer questions about the nature and content of human rights. Although many people may agree that a human right exists, or on what a human right actually protects, they might still disagree about why it is a human right or how far its protection goes. The right to life is a human right, for example. While consensus on this point may be universal or nearly so, there is still considerable disagreement about what rights the right to life contains. Does it include the right to decide when to end one's own life? At what point in the growth cycle of a human being does the right to life attach? Is capital punishment a violation of the right to life? Having a theory of human rights helps to answer what are frequently the most challenging and controversial questions in the field of human rights.

Judges, lawyers, politicians, scholars and others rely on various human rights theories when they analyse the nature and content of human rights. Ideally, a human rights theory has both empirical and aspirational dimensions. The empirical dimension looks at how human rights are defined and implemented in the current international legal order. The aspirational dimension

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looks beyond the current field of human rights at what *should* qualify as a human right and what the content of a right *ought to be*. It is important for a human rights theory to strike a balance between both dimensions. Without both aspirational and empirical aspects, a human rights theory is less capable of fleshing out the full body of human rights and of adjusting to new developments in the field.

Moral, political, and legal accounts are the predominant theories of human rights. While each account provides insight into what human rights mean, each account fails, in its own way, to paint the full picture of human rights. In his book, *The Sovereignty of Human Rights*, Patrick Macklem presents a theory of human rights designed to overcome the shortcomings of other theories on the subject.[1] His approach draws from political and legal accounts of human rights, but grounds itself in the international sovereign legal order. A compelling perspective, Macklem's theory treats human rights as a counterbalance to the defects brought about by the distribution of sovereignty in the international global order and its dynamic and systemic nature (p 45).

Macklem's thoughtful, well-articulated argument offers a new perspective on the meaning and role of sovereignty, one which recognises the inherent flaws in the distribution and operation of sovereignty and seeks to correct them through the body of international human rights law. His approach looks at the ways in which rights are violated in order to determine their content. In this light, the experiences and opinions of human rights victims are critical to the issue. Merging the strongest elements of the political and legal approaches, Macklem's approach gives meaning and purpose to the contingencies of sovereignty's distribution and operation, a long overdue exercise.

This review proceeds in several parts. The first (Part 2) provides a brief summary of Macklem's thesis that human rights violations are tied to the structure and operation of sovereignty in the global order. Part 3 examines three predominant theories of human rights – moral, political and legal – and the shortcomings of each theory. Part 4 explores Macklem's proposed sovereignty-based approach, its advantages, and how it fits into the current human rights model. Part 5 reflects on Macklem's proposed theory of human rights and introduces new questions raised by his approach, followed by a conclusion (Part 6) that Macklem's approach for discerning the content of human rights is innovative, but is in need of further refinement.

2. A Brief Summary of Macklem's Theory of Human Rights

Macklem's theory is that the distribution of sovereignty in the modern global order, however capable of adjustment or adaptation, has regrettably caused the proliferation of human rights violations against the most vulnerable and oppressed communities in the world. The drawing of boundary lines and the creation of sovereign states has created majority and minority groups within states, for example. Indigenous groups within a sovereign state have claimed sovereign autonomy to defend against the erosion of their cultures, languages, beliefs and values from cultural homogenisation. Macklem offers a new way of speaking about human rights, one that

[1] Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press 2015).

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defines the nature and purpose of human rights 'in terms of their capacity to mitigate adverse consequences that arise from the structure and operation of international law itself' (p 45). Macklem's theory strives to attend to those conditions which stem from how sovereignty has been, is, and will be distributed, and how it continues to operate in the international legal order.

By distancing his theory from the realms of morality, politics and law, and rooting it in sovereignty, Macklem hopes to avoid those shortcomings that undermine other human rights theories. He points to the 'true normative significance' of international labour rights, which is to 'monitor the structure and operation of the international legal order' (p 76). He gives an alternative explanation to the international legal significance of minority rights – namely, that they 'speak to adverse consequences that international law itself produces by distributing sovereignty to collectivities that it recognizes as States' (p 104). Minority rights also serve as a check to the international legal order; the process of excluding indigenous groups from international law's distribution of sovereignty has led to many adverse consequences which minority rights seek to correct (p 140). Similarly, the right of self-determination's 'new purpose is to mitigate adverse effects associated with how international law distributes sovereignty around the globe and how it authorizes its exercise by sovereign States' (p 164). In his final chapter, Macklem discusses the role of the right to development in addressing global poverty:

> Given that both the structure and operation of international law are implicated in the fact, if not the reproduction, of global poverty, the right to development imposes negative obligations on States and international legal institutions to fashion rules and policies governing the global economy in ways that prevent its exacerbation (p 213).

3. THE PREDOMINANT THEORIES OF HUMAN RIGHTS

How to determine the substantive content of human rights is a question that is subject to vigorous debate in a variety of disciplines – in particular, morality, law and political science. In each of these disciplines an array of human rights theories finds their roots.

The moral account of human rights derives the content of these rights from the universality of the human condition. It sees the purpose of human rights as being to protect universal features of what it means to be a human being (pp 5–6).

The political account of human rights derives the content of human rights from the practices and motivations of political, legal and other actors in the international arena. By defining the nature of human rights in terms of their function in global political discourse, the political account contributes the idea of extracting the content of human rights from the practice of participants. According to political theorist Charles Beitz, human rights are reasons cited in social practice to justify 'certain kinds of actions in certain circumstances' (p 14).[2]

[2] Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 102–17.

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The legal account looks at human rights in 'distinctly legal terms' and requires adherence to 'laws regarding the creation of legal rights and obligations and regulation of power' (pp 19, 21). Validity rests on compliance with more general norms regarding the creation of law.

3.1. SHORTCOMINGS OF THE PREDOMINANT HUMAN RIGHTS THEORIES

Macklem criticises the moral account's focus on universality for restricting its reach to rights that have universal application only. Focusing on universal features of humanity means turning a blind eye to rights that apply to some individuals but not all. In this light, Macklem asserts that the moral account exists as a shallow source of insight into the content of human rights (p 12). He concludes that human rights in international law are not those that moral theory generates. By conceptually excluding rights that apply to certain individuals or groups to the exclusion of others, the moral account establishes that it is not a normative account of international human rights law (p 13).

Macklem also asserts that moral accounts are aspirational, not empirical, in nature. Pointing to the moral account's lack of empirical qualities, Macklem concludes that it is ill-equipped to tackle those fundamental questions relating to how international law actually works (p 13).

Conversely, Macklem maintains that the political account effectively conflates fact with norm by deriving meaning from the practice of participants. Practice alone can inform the empirical dimensions of human rights, but it does little to inform with regard to aspirational substance. A theory based solely on practice would neutralise the ability of human rights instruments to critique existing practices. Although it takes a worthwhile look at actual problems related to the structure and operation of international law to derive the meaning of rights, Macklem concludes that the deficiencies of the political approach in aspirational qualities paint only a partial picture of the meaning of human rights (p 17). While the political account has a strong empirical dimension – deriving meaning from the practice of actual participants in the human rights project – it lacks a corresponding aspirational dimension that considers what human rights should be rather than what they currently are. A human rights theory that strikes a balance of both dimensions is more likely to shed greater light on the full body of human rights and adjust to future developments in the field.

The legal account of human rights, Macklem contends, enjoys validity, which moral and political accounts do not. Unlike the moral or political accounts, the legal account carries more weight because general lawmaking norms must be observed in order for it to enjoy any measure of validity.

4. A NEW THEORY OF HUMAN RIGHTS

Macklem explains that the most useful account of human rights is that which answers fundamental normative questions relating to the structure and operation of the international legal order. Purely empirical accounts shed light on the current content and meaning of rights, but

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leave other questions unanswered. Aspirational accounts focus too much on what rights should appear on the list instead of what being on the list actually means in terms of content (p 13).

Having identified the shortcomings intrinsic to the moral and political accounts of human rights, Macklem discusses how these shortcomings have led to their divorce from international law. He posits that international lawyers and scholars have seen separating international law from justice and morality as 'critical to the capacity of international law to provide legal order to global politics' (p 20). States' use of the rhetoric of claims of morality and justice to 'provide a legal veneer to self-interested international political aspirations' render moral accounts less than reliable sources of the content of human rights (p 20). The political account recommends deriving meaning from practice, but practice alone is incapable of shedding light on the full content of a human right.

Macklem presents a solution that pulls from both legal and political discourse on the subject. He argues that human rights serve the important purpose of restricting states' sovereignty to the extent necessary to ensure the protection of the rights of individuals and communities within their borders. In this way, human rights law 'do[es] justice to the structure and operation of the actual international legal order in which we find ourselves' (p 23).

The core of Macklem's position is that the structure and operation of the internationally legitimised distribution of state sovereignty lead to infringements of human rights. He argues that human rights as a whole operate to restrict state sovereignty for the purposes of redressing human rights violations. The equalising role played by international human rights law sheds light on the substantive content of the rights themselves (pp 1–3).

Taking care not to reincorporate moral considerations, Macklem argues that the 'purposes of human rights inescapably possess normative dimensions' (p 22). The purpose of human rights is to understand the relationship between those rights and the 'structure and operation of the international legal order in which they operate'. Put another way, the normative content of rights remains tethered to the international legal order in which they are being implemented (p 22). Macklem concludes that human rights as a whole inform the normative content of individual rights because practice itself reveals how human rights are designed to ameliorate problems stemming from the structure and operation of the international sovereign order.

Macklem's conception of human rights is that they are instruments that mitigate adverse consequences of how international law organises global politics into an international legal system. In this way, human rights play an ameliorative role. Citing Allen Buchanan, Macklem argues they have the 'potential to ameliorate the damages caused by flaws of the international legal order because of the extensive latitude the traditional international legal order conferred on States in the exercise of the sovereign authority' (p 24).[3] The traditional legal order operated in such a way that the international community eventually decided it was necessary to restrict state sovereignty if basic conditions of human need were not respected. Thus, human rights are a counterbalance to the latitude that comes with sovereign power.

[3] Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013) 125.

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4.1. Advantages of a Sovereignty-Based Approach to Human Rights

Macklem expands on his conception of human rights with the proposition that the international legal order is closely associated with international political and economic developments by virtue of the many instruments, institutions, principles and rules that exist. He describes this association as a 'deep-rooted commitment to the concept of sovereignty' (p 29). In this capacity, sovereignty functions as an international legal entitlement vesting in groups of people internationally recognised as states (p 29). It is generally agreed that sovereignty is a legal right. International law distributes sovereign power on an ongoing basis. In this way, there is a key benefit to the international sovereign order in that international law provides a way to adjust and adapt to changing political climates.

The capability of international law to recalibrate and realign the distribution of sovereignty when the political arena changes is critical to the international legal order, but negative results also flow from this arrangement (p 29). One such consequence is the validation of the discretionary exercise of sovereign power under the law. Macklem maintains that human rights are inherently capable of counterbalancing these adverse consequences.

4.2. The Pathologies of Sovereignty

Macklem explains that sovereignty as a concept can mean different things, but in legal terms it is power vesting in an entity lawfully entitled to its exercise. International law views sovereignty as 'the legal power of a State to rule people and territory' (p 33). International law also informs 'who possesses sovereignty' (p 33). Although it is generally agreed that human rights 'operate to check the exercise of internal sovereign power', there is disagreement over the reasons *why* such rights check the exercise of internal sovereign power (p 33). Macklem asks why human rights are conceived. He concludes that their purpose is to attend to 'pathologies' of international law's own making (p 34).

Is sovereignty conditional on the protection of basic human rights? Do states have a responsibility to address human rights violations being committed by other states? To answer these questions, Macklem recalls the constitutionalist perspective, which is the duty that accompanies states' sovereign power to advance human rights within their borders. The dualist view is that the international legal order functions autonomously from states, which in turn function according to their own legal order 'of constitutional quality' (p 39). Macklem concludes that current-day sovereignty, by incorporating human rights law, ameliorates the effects of sovereignty's deployment (p 40). In this way, sovereignty is made conditional upon respect for human rights.

Macklem emphasises that the issue at hand is not the meaning of sovereignty, but the power that flows from having it. The allocation of sovereign power and the accompanying authority to exercise the powers associated with sovereignty is what really raises doubts about the legitimacy of the international legal order (p 40). Macklem posits that these doubts have more to do with how the field itself produces injustices than with abstract conceptions of moral wrongs. The

political account focuses on how human rights redress 'pathologies' of the current global political structure, and answers the question of which human rights claims are legitimate (p 45). It does not, however, answer the question of how they ameliorate the negative effects flowing from the structure and operation of international law.

Macklem asserts that there are further qualities associated with the distribution of sovereign power that are not associated with the focus of the political account on the legitimacy of human rights claims. The distribution of sovereignty also offers insight into the content of rights. The distribution of sovereignty is 'dynamic' and 'systemic' (pp 45–46). It is dynamic because determinations of sovereignty occur on an ongoing basis and, for that reason, can recalibrate or realign how sovereign power is distributed if certain, previously identified, conditions have been met. This quality enables the distribution of sovereignty to adjust to aspirational rules and principles that 'project into the future' (p 47). The distribution of sovereignty is systemic because it affects all states to some degree, some more than others. The core recognition is that sovereign states are equal to each other regardless of power, strength, or amount of wealth.

Despite the advantages these qualities provide, they also spawn unique 'pathologies' (p 1). The dynamic and systemic nature of the distribution of sovereignty privileges older states over newer states (pp 48–49). Even founding an international legal architecture on the principle of equality produces inequalities, such as those that result whenever minorities and majorities emerge. Macklem concedes that the distribution of sovereignty is empirically weak, but it does have important aspirational qualities (p 50).

4.3. How a New Theory Corresponds with Traditional Classifications of Human Rights

Traditional classifications of human rights place rights in separate categories, which have developed over time. The first generation of human rights comprised civil and political rights. The second generation consists of economic, social and cultural rights. Third-generation rights comprise minority rights, the right of self-determination, and the right to development (p 51). Macklem asserts that the generational approach does not, as its name might suggest, refer to the order in which rights were conceived or prioritised; nor does it aid in the analysis of their content. The core failing of the generational approach, however, is its negation of the 'common purpose' of human rights, which in actuality is to buffer the structure and operation of international law in today's world (p 52).

With regard to the temptation to guess the reasons for this sequencing of rights, Macklem explains that temporal ordering is untenable because principles like freedom for minority communities have been enshrined in international law as far back as the Treaty of Westphalia, long before the adoption of the International Covenant on Civil and Political Rights in 1966[4] (p 55). It also makes little sense to infer that the ordering corresponds with rights of varying degrees of importance. Some have argued that civil and political rights are the most urgent

[4] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

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because they were codified first (p 61). There is significant disagreement on this view, many pointing to the loss of second and third-generation rights as an impediment to the exercise of first-generation civil and political rights. Still others say that first and second-generation rights cannot be fully realised without the implementation of third-generation rights (p 61). Macklem concludes that regardless of categorisation, it is now 'beyond dispute' that human rights are indivisible, which means they cannot exist in isolation (pp 63–64). Human rights are also interdependent, which means that the enjoyment of one right requires the enjoyment of others. Finally, they are interrelated: there is a mutual connection between rights.

In addition to the relationship 'between and among' rights, the generational approach tends to eclipse the commonalities between rights (p 64). Having outlined the shortcomings of the generational approach, Macklem expounds on the merits of viewing human rights as checks against the 'pathologies' produced by the international legal order. He argues that the purpose of civil and political rights is to mitigate the harm that states can cause to the legal and political standing of individuals in their exercise of sovereign power (p 65). As he states, these are disputes that 'arise out of unpredictable contexts' (p 65). The purpose of social and economic rights is to do the same: mitigate harm that comes as a result of an international order founded on the principle of sovereignty (p 70).

Macklem returns to the approach of political theorist Charles Beitz, which is to look at the practice of international legal and political actors for insight regarding the content of human rights (p 70). He posits that the reasoning of the political account, for the purpose of gleaning the content of rights, is circular. If the content of a right is informed by the practice of international legal and political actors, then all aspirational meaning is lost because the power to monitor regulatory power is held by those same legal and political actors whose actions are being monitored (pp 70–72). There is nevertheless a pragmatic aspect to the political account of human rights that Macklem embraces in his conception of human rights. The political approach hones in on the 'certain predictable dangers' that political projects succeed in raising to the level of international norm. Importantly, it recognises that there are dangers associated with the exercise of sovereign power, a characteristic not found in the moral account (p 70). Macklem's conception of human rights thus weaves together the political account's focus on practice with the legal account's heightened validity and capacity for aspirational direction.

In summary, Macklem's claim is that human rights comprise a sovereign entity that checks the extent of state sovereign power, and we can derive the content of human rights from the fact of this relationship. This conception of human rights is grounded in general principles of law and stands independently from other accounts of human rights – specifically moral and political accounts. Human rights interact with the international legal order to redress the 'pathologies' produced by the international legal order.

Having identified that the international legal order produces pathologies in the form of human rights violations, Macklem argues that the purpose of human rights is to address those pathologies, and he partially draws from the political account in formulating his approach. He explains that the political account conceives of the purpose of human rights as being to 'address pathologies of a global political structure that concentrates power at dispersed locations not subject to higher level

control' (p 45). In this vein, sovereignty is a 'concentration of power' that naturally incurs the risk that sovereigns will abuse the power and which human rights seek to correct (p 45).

Macklem's conception of human rights deviates from the political account on the question of *why* human rights ought to perform the function of addressing pathologies produced by the international legal order. While the political account relies on practice to determine which human rights claims deserve normative legitimacy, Macklem's approach looks at human rights in terms of their 'capacity to mitigate adverse consequences that arise from the structure and operation of international law itself' (p 45).

5. REFLECTIONS ON MACKLEM'S CONCEPTION OF HUMAN RIGHTS

For this reader, Macklem's approach raises several questions. First, is it empirically accurate to say that the structure and operation of international law lead to any and all human rights violations? Second, will this approach yield sufficient aspirational insight into the content of human rights? Finally, what effect will pathologising the causes of human rights violations have on understanding past violations and preventing future violations from occurring?

5.1. IS THE STRUCTURE AND OPERATION OF INTERNATIONAL LAW THE CAUSE OF (ALL) HUMAN RIGHTS ABUSES?

Macklem asserts that the structure and operation of international law are the root causes of human rights violations. For example, the drawing of boundary lines between sovereign states created majorities and minorities, groups with claims to sovereign autonomy, and the need for certain groups to determine their futures independently of the sovereignty in which they find themselves. These conditions led to the adoption of international legal instruments designed to protect minority rights, indigenous rights and the right of self-determination (pp 114–15).[5] According to Macklem, the establishment of an international sovereign order created the need for the protection of these groups by international human rights law (p 45).

It is easy to see the connection between the distribution of sovereignty and many types of human rights violation. Minority rights, indigenous rights and the right of self-determination are examples of rights that came to exist as a result of colonisation and the drawing of border lines. Although Macklem presents a tidy approach to sourcing the content of rights from this connection, the connection between the distribution of sovereignty and subcultural violations, or violations that occur in the private sphere, is less clear because they occur independently of the operation of international law.

[5] In 1979 the UN Special Rapporteur, Francesco Capotorti, wrote the influential report on the rights of persons belonging to ethnic, religious and linguistic minorities. Capotorti characterised minority protection as requiring both equal treatment and positive measures. The declaration finds support from the presence of both equality and minority rights in the 1992 Declaration and the ICCPR (ibid), which require states to employ positive measures to protect minorities.

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For example, discrimination on a variety of bases is a violation of human rights. Discrimination rising to the level of rights violations occurs subculturally, sometimes at the hands of non-state actors, but also by government officials or international actors. Discrimination is present in the vast majority, if not totality, of states. One nexus between subcultural and private sphere violations and the international legal order is the obligation of states to protect individuals from these violations, and their almost universal failure to do so. How discrimination is caused, not merely tolerated after the fact, by the structure and operation of international law is not clear.

At the core of Macklem's approach is that the structure and operation of international law cause human rights violations (p 45). The establishment of the international legal order, however, is analytically unrelated to some rights. While the laying down of boundary lines may have created minorities and majorities, groups with claims to sovereign autonomy and groups entitled to determine their futures independently of the sovereignty in which they find themselves, it is a vague connection with regard to other rights. For private sphere violations and violations that occur subculturally, the structure and operation of international law is a tangential consideration that cannot provide meaningful insight into the content of rights. This reader wonders what effects will result from adopting such an approach for these and other groups.

5.2. Will this Approach Yield Sufficient Aspirational Insight into the Content of Human Rights?

As discussed above, an approach should strike a balance between aspirational and empirical dimensions. The aspirational dimension is concerned with what rights should appear on the list of human rights, as well as how the content of those rights should be shaped by international actors. The empirical dimension is concerned with how rights are actually defined and implemented in the international legal order. A balance of both dimensions is necessary in order to have a system of human rights that is capable of adapting to the pressing needs of future generations.

Macklem's critique of the moral approach is that it is too aspirational. He maintains that the moral approach is capable of determining which rights appear on the list, but not their normative content. With its focus on universality, Macklem argues that the moral approach turns a blind eye to rights that apply to some but not all individuals (p 10). Macklem posits that the focus of the moral account on universality renders it incapable of painting a complete picture of human rights. Put another way, at its best the moral account looks only at rights, not content, and only reaches some, not all, individuals. Since the moral account paints an incomplete picture, it cannot be the source of the content of human rights (p 13). Macklem's concern is that the moral account is incapable of answering the question of how to tackle those fundamental questions relating to how international law actually works.

This reader wonders whether it is accurate to say that the moral account does not have an empirical dimension capable of informing the content of rights. Is it possible to imagine a right without *some* idea as to its content? How much content can be informed by the original vision of the right and how much can be derived after the right is enshrined in international

law? Moral theorists have grappled with questions like these in relation to the account's focus on universality.[6] Furthermore, even if it were true that the moral approach only gives guidance on what rights should appear on the list, is it not also true that the current list of rights is not complete, giving purpose to the moral approach even in its purportedly purely aspirational state? This reader wonders why even a purely aspirational account of human rights cannot be capable of providing insight into the purpose of modern international human rights law.

Even a purely aspirational account could be useful. By dismissing the moral account, with its basis in universality, as a whole, Macklem throws out the baby with the bathwater. Even if, as Macklem claims, the moral approach cannot inform the content of some rights because of its focus on universality, the moral approach might still inform the content of rights that have universal application. The universality of the human condition surely informs the right to be free from genocide, slavery, torture, racial discrimination, and forced disappearance as much as, if not more than, the fact that the distribution and operation of sovereignty gave rise to the circumstances in which these rights were and continue to be violated.

As further justification for removing moral considerations from approaches used to determine the content of rights, Macklem points out that states sometimes rely on moral rhetoric to 'provide a legal veneer to self-interested international political aspirations' (p 20). While this is no doubt true, it is not necessarily untrue that the same could be said of political, even legal rhetoric. Macklem does not explain how political or legal rhetoric is shielded or incapable of being used to promote an international actor's self-interested political aspirations under the guise of legal or political legitimacy. Macklem does not articulate how his proposed approach excises these issues in ways that the moral approach failed to do. If the fact that some states rely on a particular form of rhetoric to promote their own interests justifies dismissing the ideology as a whole, then by the same logic any misuse of rhetoric should justify the complete dismissal of the ideology implicated in such misuse, regardless of its objective merit.

5.3. WHAT EFFECTS WILL RESULT FROM PATHOLOGISING THE ROOT CAUSES OF HUMAN RIGHTS VIOLATIONS?

Of final concern to this reader is Macklem's use of the pathology metaphor to describe the adverse consequences that flow from the distribution and operation of sovereignty. The pathology metaphor might distract from the urgent need to understand how human rights violations occur and the best way to prevent them from happening. In her article, 'The Pedagogy of Violence', Yxta Maya Murray identifies the danger of the 'contagion metaphor' in the context of violence in the United States.[7] Murray argues that the tendencies of scholars and academics to paint violence as a social contagion is a metaphorical distraction from understanding the root causes of

[6] See, eg, John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980); Paolo G Carozza, 'Human Dignity' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 345.

[7] Yxta Maya Murray, 'The Pedagogy of Violence' (2011) 20 *Southern California Interdisciplinary Law Journal* 537.

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violence.[8] Despite its 'seductive appeal' and its ability to 'energize antiviolence agendas', Murray maintains that comparing the cause and spread of violence with the cause and spread of disease 'has other, more deleterious consequences'. Such consequences include the 'dangerous characterization of offenders and its invitation to perform an inexact analysis of the root causes of violence'.[9] Murray maintains that the contagion metaphor obscures 'the pedagogy of violence – that is, the ways that we teach each other to be violent'.[10]

Macklem's pathology metaphor is similar to the contagion metaphor examined by Murray. The contagion metaphor describes the transmission of violence-learning as an 'insentient, amoral process'.[11] Macklem's pathology metaphor similarly describes the distribution and operation of sovereignty, rather than those who wield it, as producers of injustice. In this way, describing human rights violations as pathologies of sovereignty is a metaphorical distraction from understanding why they occur and how to prevent them from happening. Macklem's pathology metaphor obscures the fact that sovereignty is not itself the cause of human rights violations, but one of many tools used by individuals to infringe and fail to protect human rights. Perhaps a more practical approach would be to consider, like Murray's pedagogy of violence, the pedagogy of sovereignty. Such an approach would examine the method and practice of violating human rights and tolerating human rights violations on a sovereign level by individual wielders of sovereignty.

6. CONCLUSION

Macklem presents a theory of human rights that is informed primarily by the adverse consequences of the distribution and operation of sovereignty. His approach seeks to overcome the shortcomings of the moral and political approaches in answering the difficult question of determining the content of human rights. In doing so, he offers an engaging idea: that the content of such rights can be informed by how they are violated. In this sense, the source of human rights content can be many things, including the experiences and opinions of victims of rights violations. Macklem's consideration of sovereignty as the source of the content of human rights is limited to how the distribution and operation of sovereignty causes violations of such rights, specifically minority rights, indigenous rights and the right of self-determination. In this regard, his approach is compelling; it acknowledges that sovereignty can be restricted through the body of international human rights law, and that the fact of this relationship can provide insight into the content of human rights. As identified above, there are shortcomings to this approach. Nonetheless, Macklem offers his readers a well-articulated argument that advances discourse on the subject. He also gives them a fascinating, in-depth review of the origination of workers' rights, minority and indigenous rights, the right of self-determination and the right to development, which supports his approach.

[8] ibid 538.
[9] ibid 537–38.
[10] ibid 538.
[11] ibid 545.

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