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From Human Rights to Humanity's Law

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6 FROM HUMAN RIGHTS TO HUMANITY'S LAW

The Current State of Play

Ruti G. Teitel

1 INTRODUCTION

What turns on the current narratives regarding the fields of human rights and humanitarianism? My contribution will attempt to sort through what is at stake here on account of the broader questions that animate this volume.

My argument is that the legal regimes represented by human rights, on the one hand, and humanitarianism, on the other have become less autonomous and distinct in recent decades with consequences for an understanding of human rights in the short run. My book on the topic entitled *Humanity's Law*¹ argued that for a number of reasons there had been a move towards humanity-based arguments and normative approaches in international legal and political discourse. In brief, political changes had weakened the state and produced conditions of humanitarian need and related demands in many places. This account predated the 'populist' turn we associate with the current moment and its complicated implications for human rights and their protection. Below, I address some of the resulting challenges.

2 HUMAN RIGHTS: MULTIPLE REGIMES AND DISCOURSES

2.1 *Sensing Change*

Two decades on since the immediate post-Cold War period it is widely conceded that there has been a remarkable shift from the view of human rights as a progressive narrative in the 1990s to the view – post-9/11 – of a threatened and diminished regime. One might characterize the ascendant view as a pessimistic or skeptical account of the human rights regime.² On this view, the setbacks for human rights in the post-9/11, war on terror era, intensified by the new populism on the right justify declaring an 'end' of the human rights

1 R.G. Teitel, *Humanity's Law*, Oxford. (2011).

2 See Teitel, 2011 for some illustrations. Also K. Sikkink, *Evidence for Hope: Making Human Rights Work for the 21st Century*, Princeton. (2017).

revolution, a permanent downward adjustment of the hopes for human rights towards a minimum.

A basic question here is what the standards – and parameters – for judgment are? For example, is one charting the rise and fall of a form of discourse, or measuring the functionality and impact of positive legal norms on the ground? The idea of the rights of man or humankind has vied in the modern period, really since the 16th century, with other modern meta-accounts of political and legal morality, communitarianism/nationalism, ‘political theology’ etc. The direct embodiment of human rights in positive legal norms at the international level is a more recent phenomenon, albeit one whose pre-history could be traced back to the humanism of Grotius or even the cosmopolitanism of the Stoics.³ Human rights have figured prominently in resistance or opposition to political and religious orthodoxies, as much or even more than regime-founding ideologies. All of this makes a single standard of judgment very difficult to discern. Indeed, it might lead to healthy skepticism about whether we have arrived at a privileged historical moment where we can appreciate the possibilities and weaknesses of human rights with some finality.

I argue below that the ‘endist’ account or narrative derives from a peculiar characterization of human rights in historical terms, as relating to a particular genealogy, namely, one that is a distinct set of practices or actors also related to a particular political period: the rise of global activism based on positive international human rights norms, and the (ostensible) incorporation of such activism as an essential aspect of the foreign policy of established “Western” liberal democracies, extending, at the limit, the use of economic sanctions or even the use of force in the name of human rights. My own approach to these questions revisits the prevailing human rights phenomena and asks what to make of what we might term here a dynamic set of normative practices. Would acknowledgment of the redefinition of the phenomena, namely a system of relevant norms, actors and practices inform the theorization and ongoing direction in the field?

There is a legal account and a political account; pursuing an interdisciplinary method and dialectic attempts to hold both lenses in place simultaneously with an eye to illuminating the status of the current approach. Recognition of both tensions and convergences in these two regimes, practices and discourses around key contemporary concerns points us not towards any final resolution of the fate of human rights, but instead towards the direction of what I term ‘humanity’s law’, namely the norms surrounding a minimum ethos of care/solidarity and a related set of demands across a globalizing world.⁴

3 See prominently Cicero, ‘On Duties’ [*De Officiis*]. (44 B.C.E.).

4 See Teitel, 2011.

2.2 On Regimes and Discourses

For some time now, in a number of scholarly communities there have been attempts to conduct a cross-disciplinary conversation about the status of human rights and the relationship of human rights and humanitarianism. By far, the dominant challenge comes from politics and law, with further insight from the vantage point of anthropology, philosophy and history. The crucial questions at stake clearly transcend one or even two scholarly disciplines, to a cross-disciplinary enterprise also reflected in the contributors to this volume.

There are concerns relating to the fate of this legal regime at this time. But it is worth starting the wide-ranging uses of key terms, often coupled with a sense that we – scholars – are talking past each other. If there is a central question we are taking up, it concerns the ongoing salience of human rights discourse. And what might its relation be to other regimes and discourses addressing related normative questions that might be equally or even more relevant in light of globalization.

To what extent can there be a shared answer to this question posed as such herein? For some, e.g., Jeff Flynn, the divergence in understandings in great part relates to differing terminology, and the related likelihood of misunderstanding due to interdisciplinarity and vocabulary differences in various agendas.⁵ Consider that philosophers of human rights, like John Tasioulas who aim to theorize the concept of human rights as such, which he defines in terms of “the universal interests of human beings each and every one of whom possesses an equal moral status arising from their common humanity.”⁶ For others, historians for instance, ‘human rights’ represents the practices of a particular set of actors at a particular time, though often these understandings have become generalized. The scholarship of Samuel Moyn might fall into this camp.⁷ While for still others such as Stephen Hopgood and Kathryn Sikkink – scholars whose work derives from their own prior human rights activism – the focus is even more limited, zeroing in on a distinct set of activities which are apparently related to a set of activists and concerns at particular times, namely the 1970s, and largely regarding foreign policy in Latin America. Small wonder there is debate about the status and direction of human rights.

These various semantic or discursive ‘framings’ – a cluster of them that overlap as to the field of human rights – imply differing narratives about the past (i.e., their intellectual genealogies) as well as varying views of the present, and about the nature of future trajectories, about areas of continuities and discontinuities. The varying linguistics can

5 J. Flynn, ‘Genealogies of Human Rights’, in A. Etison (ed.), *Human Rights: Moral or Political?*, Oxford. 103-114. (2018).

6 J. Tasioulas, ‘On the Foundations of Human Rights’, in R. Cruft, S. Matthew Liao & M. Renzo (eds.), *Philosophical Foundations of Human Rights*, Oxford. 50. (2015).

7 See S. Moyn, *The Last Utopia: Human Rights in History*. Cambridge, Mass. (2011).

result in basic misunderstandings. So when legal historian and Europeanist Martti Koskenniemi reads *Humanity's Law*, he sees a determinist progressive historical narrative (indeed a triumphalist claim), rather than an interpretation of a particular shift in international law and political discourse, with a related set of tensions.⁸

During the Cold War's late period, human rights was indubitably part of the language of resistance which played a role in spurring the Soviet collapse (e.g. consider Helsinki Watch). Thereafter demand for human rights would prove, on the one hand, more ambitious, while on the other, more problematic, since the subsequent Balkans Wars and then Rwanda placed extreme burdens on human rights. Indeed, in the wake of the Soviet collapse both instances reflected a new context. One could see that there was a seemingly newfound possibility for human rights-based interventions. This apparent potential of post-Communist military or judicial interventions would simultaneously awaken us to a sense of its limits, foreshadowing the seeming convergence of two regimes and the related challenge to the previous rule of law in international affairs.

The predicament of the post-Soviet era could be stated as follows. Rather than understanding 'human rights' in terms of legal and constitutional rights articulated within a nation state, explicitly modeled in such instances of systematic political violence and persecution, it became clear that there was a human demand for protection *with or without the state*. In some instances engagement with the broader transnational humanitarian regime – whether military or judicial – was due to failed states, while in others it resulted from lacking capacity (e.g. in the Balkans). Therefore, already in the immediate post-war period one could see the strange moment of contact between the 'pure' human rights regime and the humanitarian regime: a new connection formed, as the *jus ad bellum* moment converged with the human rights protection regime.

This new justificatory regime was seen by orthodox or traditionalist public international lawyers as a serious challenge to the prevailing prohibition on the unilateral use of force in the UN *Charter* (with a narrow exception for self-defense). It is at this moment that the move to 'amend' began, in fact through evolutionary practice. Despite World War II atrocities the *Charter* hitherto said nothing about how to reconcile protection of self-determination with human rights. Now with Responsibility to Protect (or R2P) a new norm started to emerge at the UN to authorize and even to legitimate transnational humanitarian intervention. At the same time, Article 2(4) of the UN *Charter* itself, in prohibiting the use of force contrary to the principles and purposes of the United Nations,

8 See my exchange together with Robert Howse with Martti Koskenniemi on *Humanity's Law*: M. Koskenniemi, 'Humanity's Law by Ruti Teitel', 26 *Ethics and International Affairs*. 395. (2012); R. L. Howse & R. Teitel, 'Does Humanity Law Require (or Imply) a Progressive Theory of History? (And Other Questions for Martti Koskenniemi)', 27 *Temple International and Comparative Law Journal*. 377. (2013) and R. Teitel, 'A Response to Martti Koskenniemi's Review of Humanity's Law', 27 *Ethics and International Affairs*. 233. (2013).

left the door open to a teleological interpretation that would distinguish interventions to vindicate those principles and purposes from absolutely prohibited uses of force.

What did it mean? The demand for this new protective principle's application would occur quickly in yet another moment of political flux, the 'Arab Spring'. Once again, the demand for human rights based foreign affairs would recur, this time in Libya. By now, with the R2P discourse and a Security Council authorizing vote, there was the hitherto unheard maximum political support for and legal authorization of 'humanitarian intervention' with even Russia and China going along with the Security Council vote authorizing intervention all in all. Yet, shortly thereafter the Coalition's actions were interpreted after the fact as 'regime change' and thus began a strong reaction against the notion of transnational humanitarian intervention. The case for military action in the name of human rights no doubt was a hard one.

One may simply question whether contemporary human rights practices, in general, presuppose or require some sort of Whig philosophy of history (even if that is the implicit worldview of some of the practitioners), an issue that Rob Howse and I have raised in our critical engagement with Martti Koskenniemi.⁹ Together with Moyn, one can see that taking the progressive side could easily characterize the present situation as the final gasps of the *ancien régime*, as it tries to strike back, or as an interregnum of 'restoration'. Moyn often recalls the apparent looming gap between the idealistic view of human rights and the state of current practice:¹⁰ "the human rights moment, like the world it monitors, is in crisis."¹¹ But one wonders, if this 'endist' account can tell us, in his words, "enough?" Isn't it an odd critique that the form taken by contemporary human rights practices is no longer the same as three decades back? At best, this can be understood as an argument about the proper interpretation of the *past* role of human rights regime and, in particular, a strain of wrongheaded triumphalism. Yet, this account cannot begin to adequately explain the *present* politics of human rights with all its complexities.

3 BACKSLIDE, BACKLASH, BOOMERANG OR BRICOLAGE?

3.1 *Globalization and Its Implications for the Traditional Human Rights Model*

My approach here is interpretive, such as in *Humanity's Law*. There I aimed to show that the human rights movement and its evolving connection to the humanitarian regime

9 See Howse & Teitel, 2013, 377.

10 See S. Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge, Mass. (2018).

11 See S. Moyn, 'How the Human Rights Movement Failed', *The New York Times*. 23 April 2018.

derived from a distinct political context, post-Arab Spring and in globalization with its political and economic challenges. As is elaborated below, my argument is that human rights function in almost all relevant situations *in relation to* politics, despite what might transpire from certain simplistic legalist or moralist narratives of human rights as pure higher law. Even Kant, however, thought that when it was a matter of cosmopolitan right being realized, this would occur through war, trade and bargaining among sovereigns. It is in this sense that we are talking about a discourse or discourses of human rights, and their significance in politics.

Therefore, I aim to get beyond the judgments of the human rights regime abstracted from political context which seem to be all too common in the current moment. Perhaps more modestly, staying closer to the phenomena, I would like to urge a close look at contemporary practices in terms of the kind of meanings they create or shape, in law, but also in politics, and focus on what these observations might suggest in pointing us to a new framing going forward.

Human rights retain considerable normative power, the power to construct meanings. But these meanings and the effects that relate to them are multiple, and we may need more than one lens from several disciplines to evaluate them in any kind of comprehensive way. Suffice it to say that in many areas human rights norms inform core understandings of accountability and rule of law, from areas of sovereign debt to smart sanctions enforced against country leaders with significant consequences, to political mobilization particularly with respect to religious freedom as well as gender and sexuality rights, starting from Saudi Arabia (regarding women's rights) to Ireland to Poland to Argentina and Chile protecting reproductive freedom rights, or Chechnya (rights discourse in mobilization against discrimination against gays and lesbians). The point is that – despite naysayers – there are many instances where the normative discourse of human rights is used and is effective: it is having an impact for greater accountability and liberalization.

Have there been changes since the 1990s? Yes, but this involves a more granular examination of the human rights discourse in its context. Consider what might such an examination tell us. It reveals a number of changes, in part relating to the ambit of the human rights field and its relation to politics. Rather than understanding human rights as it had been in largely legal and constitutional rights, as a strategy of *limiting* power of the *state* (indeed explicitly modeled as such), what we see today in light of recurring and systematic political violence and persecution, is that there is a human demand for protection, beyond constitutional rights, *with or without the state*. Indeed, one might characterize it as 'human rights of foreign affairs'.

Already immediately after the Cold War, as discussed above, one could see the transformation of the traditional human rights regime associated with the state to a new connection, at least in the potential with the humanitarian regime: the *jus ad bellum* moment converged with and has become transformed by a new justification couched in

terms of demands for human rights protection. This new justificatory discourse was seen as a serious challenge by some to existing international rule of law, which was informed by the post-World War II security system via establishment of the UN Security Council, the UN *Charter*, and its prohibition on intervention (other than for self-defense). So began the move to supplement the *Charter* with the Responsibility to Protect.¹²

What are these changes in brief? First, the Cold War's end and related geo-political changes associated with the Soviet Bloc's collapse triggered a move away from certain established post-World War II power-sharing arrangements. Next, in the domain of socio-economic rights traditionally associated with the state, globalization and its unfoldings, and a related technological revolution are now underway. One can clearly see power shifts beyond the state to private actors, often transnational ones, complexifying the basis for political action and for human security. It follows that human rights values and practices are increasingly justified in foreign policy terms.

These developments predicate and reflect change in the traditional human rights paradigm which will be taken up below. Here it bears remembering that the fact of significant contestation as to human rights hardly points to 'endism', i.e., whether we are indeed living through yet another cycle of 'endings', reminiscent of Francis Fukuyama's post-Cold War putative 'end of history'.¹³ Rather – to the contrary – we witness the ongoing purchase of the core human rights idea. Like that earlier claim, this judgment is also too conclusory and somehow seems the wrong interpretation of the valence of human rights in the current moment. Instead, it is necessary to understand how the discourse is now being used.

For what we are experiencing is not the end of the discourse of human rights. *Tout au contraire*: we can see that in the current moment human rights normativity is hardly irrelevant, rather it seems to be a galvanizing object of attack. In some political movements (or in the case of some political leaders) the discourse or regime of "human rights" has become an enemy that unites certain sorts of resentments in domestic politics. This is particularly so in places of not yet consolidated transition (e.g., in Orbán's Hungary, Putin's Russia), but also in Trump's America. Consider what these leaders represent: a response to human rights, as associated either ideologically or sociologically with a putative global elite. They depict human rights as something external imposed from outside the state, whether by the EU and/or by global civil society.¹⁴ Yet, as discussed below these are largely misrepresentations, caricatures of one dimension of human rights associated with

12 See on R2P: Secretary-General of the United Nations, 'A More Secure World: Our Shared Responsibility', Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004.

13 See Moyn *versus* Sikkink.

14 See K. Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values*, (2017). Available at <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>.

globalization – namely a challenge to certain outside actors or institutions as if they were representative of human rights in general.

Indeed, the caricature of human rights as coming from an outside global elite – the so-called ‘Human Rights movement’ – is one that animates odd bedfellows from polar political extremes: it animates nationalist opposition, as well as a certain strain of critical scholarship from the left. Frankly, this caricature seems a distortion of the language and operation of human rights: it appears to conflate human rights with a particular moment, namely the 1990s ‘human rights as foreign affairs’ moment, where human rights discourse for a brief period was associated with interventionist foreign policy. Yet, one that appeared honored in the breach, as it was highly selective and hence vulnerable from the perspective of legitimacy. State foreign affairs policies are a product of multiple interests and, therefore, even well-intentioned human rights do not always gain the upper hand. Indeed, these dilemmas of intervention are among the hardest.¹⁵

3.2 *The Challenge to a Human Rights Beyond the State*

Why is this the characterization of the current moment? What changes are underway? Below I identify and analyze current challenges to the human rights regime. To begin, as a general matter, human rights are largely protected legally at the level of the state. This is reflected in human rights treaties and conventions where state parties commit to compliance with certain norms and to related remedies, monitoring and enforcement. So from whence the challenge of human rights beyond the state? There is currently a weak-state phenomenon with a real impact for dilemmas for human rights enforcement. Two decades on, from the post-1989 transitions, in many states, one can see an incomplete consolidation of democratic institutions. This has resulted in current threats to maintaining even threshold rule of law protection affecting human rights.

Since the 1990s, and the unauthorized NATO intervention in Kosovo, there is a related claim that human rights is an internationalist regime, associated with strategies of external pressures and that this normative system somehow poses a threat to state sovereignty. This is despite the fact that the leading international and regional human rights treaties are products of state consent and ratification. It is obvious that the primary actor in human rights enforcement is always the state. Of course, states have varying capacities for human rights protection, and we have seen that geo-political developments have resulted in weak and failed states with little or no capacity for human rights enforcement. Particularly, under such conditions, it has been important to have recourse to regional actors and related institutions.

15 On this evolving understanding of human rights in humanitarian intervention, see Teitel, 2011, 105-138.

Even where there is capacity there is still the matter of political will (see e.g., the ICC complementarity principle). In addition to factoring in the nature and capacities of different states, there are also broader geo-political developments (e.g., globalization) as a source of malaise with an impact on the status of human rights relating to globalization, as well as the rise of regional actors, often far from traditional communal centers. In this regard, consider the ongoing backlash to the European Union¹⁶ and the skepticism regarding the notion of critical economic decisions being made outside the country's borders, hence, 'Brexit'.

Beyond the scholarly literature, there are several related political developments, such as the rise of blatantly nationalist leaders, for whom human rights are not irrelevant, but depicted as an outside 'enemy' or enemy within (e.g., Putin, Erdogan, Orbán, Trump, Duterte and the evident challenges to pluralism both within the state and transnationally).¹⁷ Insofar as their political rhetoric is directed against foreigners/outside and embraces a nativist thread, their political values seem antithetical to the core claim of human rights, i.e. universality and equal dignity under the law and within society. Indeed, as presently framed, this anti-human rights argument goes to the key principle of international human rights which relativizes any absolute understanding of national sovereignty. Consequently, persecution or other extreme human rights abuses may well be a matter of relevance beyond state borders.

One can see that even in staunch democracies with established rule of law systems – situated in previously stable regions are nonetheless under threat on this very point – the question of where to draw the normative parameters of a human rights as foreign affairs. Consider the European Union debate over migration: With Brexit, there is a significant possibility of the UK withdrawing from the European Court of Human Rights. Human rights-related regionalism is under threat in many areas.

Notwithstanding the above critical assumptions, the core 'humanitarian' norm is hardly predicated on a 1990s human rights culture but instead draws on much earlier humanitarian understandings. Indeed, for one of the most longstanding accounts on the significance of human rights values consider post-war jurist Hersch Lauterpacht. Referring to the Grotian tradition laying the basis for principle of humanitarian intervention Lauterpacht has stated: "[T]his is the first authoritative statement of the principle of humanitarian intervention – the principle¹⁸ that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins." This was the case in the 17th century, which was followed of course, by

16 On 'backlash' see L. Vinjamuri, 'Human Rights Futures', in S. Hopgood, J. Snyder & L. Vinjamuri (eds.), *Human Rights Futures*, Cambridge. 114-134. (2017).

17 See J.-W. Mueller, *What is Populism?*, Philadelphia. (2016); P. Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice*. 1. (2017); Roth, 2017.

18 See H. Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yearbook of International Law*. 1, 46. (1946).

the 'Rights of Man' animating political debate in the 18th century. It was Lauterpacht, one of the architects of the post-World War II trials, who emphasized (deriving all the way back from Grotius) crimes against humanity as the central norm whose prosecution justified wartime judicial and other transnational intervention.

Given these core values can one contextualize human rights in local terms? While it is clear that there is a centuries-old understanding of a potential politics of human solidarity, one can take a hard look to see how human rights norms are part of domestic law, but can also be further democratized, indigenized and reclaimed as bottom-up ideology. This is further discussed on the following pages.

4 WHAT IS THE CHALLENGE POSED BY THE GLOBALIZATION OF HUMAN RIGHTS?

4.1 *Implications for the Traditional Human Rights Account*

Globalization has had an impact in many countries on economic well-being.¹⁹ We can see related changes that hardly go hand in hand with a progressive rights narrative about Communism's collapse. Instead, immediately after that event we would see the effects of an unbridled open market and a new harshness in the current(?) economic situation, i.e., a spike in income disparities as Piketty has documented. This has also become true of highly developed industrialized countries such as the U.S. which is experiencing a new 'Gilded Age'. We are now living with the very real consequences of these ongoing discoveries of the dark side of globalization.

Yet, to what extent is the absence of market regulation occasioned by human rights? This latest claim seems an iteration of the critique of human rights as a bourgeois distraction based on Karl Marx in *On the Jewish Question* (1844). Moyn seems to be the most recent advocate for this position, arguing that the deployment of human rights discourse is somehow apposite to political mobilization, though as mentioned *supra*, some versions of the critique also appear to reiterate political opposition to human rights by right wing populists.

It is hard to understand this point in the abstract: why should these rights be dichotomous everywhere? Instead one can see a contextual aspect to all of this and to the relative significance say of property rights worldwide. Just to illustrate, to return to the post-Cold War period and the rise of neo-liberalism: in great part, the initial reforms constituted a reaction in the East to controlled economies and deprivations of personal

19 T. Piketty, *Capital in the 21st Century*. Cambridge, Mass. (2016).

liberties. In this regard one might contrast the post-Communist constitutions and their elevation of personal property rights²⁰ with that of post-apartheid South Africa or post-military junta Americas which had failed to do so. Instead, in these latter cases one can see a broad understanding of international human rights entrenched in the constitutions. The point here is that there is no necessary antinomy or contradiction that pits human rights protections against economic equality: in many places, particularly the former Soviet bloc, this framing just reiterates choices coming out of Communist experiments and controlled economies. Moreover, many societies where political freedoms are in short supply are also among those with very high economic disparities (e.g., Saudi Arabia), providing further indicia that these are not in any necessary or logical tension. In fact, in the Arab Spring, the human rights discourse was deployed as offering a mobilization language for demand against corruption and for accountability.

4.2 *The Challenge to Human Rights as Legal and Political and Not Social or Economic*

Despite the above, there has been a slow response on the part of rights activists who for historical reasons have tended to privilege political over economic rights, often with a stated concern for positivist modes of enforcement, etc. This in great part relates to the extremes associated with the Soviet empire in Eastern Europe, Latin America and Africa.

Yet, there is nothing intrinsic to the notion of human rights values that is in opposition to economic justice. Indeed, these rights are articulated in the *Universal Declaration* together since the postwar normative developments – a well-documented point²¹ conceded by Moyn in his latest book *Not Enough* (2018). These are also set out in one of the two leading covenants, the *Covenant on Economic and Social Rights*, where they were bifurcated not for normative reasons, but due to political divisions associated with the Cold War at the time. Indeed, as will be discussed in the next part below, even if civil and political human rights seem to be facing impasses at the moment in some respects, there has been a renaissance of the *Covenant on Economic and Social Rights*, as it is increasingly deployed in debates over globalization, the Washington Consensus and so on, as a normative counter-narrative to neoliberalism. Moreover, the so-called ‘Millennium Development Goals’ and the more recent ‘Sustainable Development Goals’ adopted at the United Nations have also become markers for basic development over the last decade.

There is an emerging local critique, whereby ‘human rights’ is characterized as a language of law as opposed to politics, and relatedly one which has become part of the

20 See R. G. Teitel, ‘Paradoxes in the Revolution of the Rule of Law’, 19 *Yale Journal of International Law*. 239. (1994); R. G. Teitel, *Transitional Justice*, Oxford. (2000).

21 See R. G. Teitel, ‘Human Rights Genealogy’, 66 *Fordham Law Review*. 301. (1997).

daily workings of the UN and EU bureaucracies, as well as the norms that are at the center of the regional human rights courts. It is of course true that states entering European regional organizations had to adhere to a certain understanding of European rights as well as to the International Criminal Tribunal for Yugoslavia, a regional enforcing body.

It may seem peculiar that institutions that historically have been associated with political struggle and the attempt to cabin the state modeled on domestic constitutionalism now likewise have come to be targets of the challenges to globalization, so that ‘human rights’ have become the most outward sign of the fact of transnational norms, and resented by some for that very reason. Indeed, one can see that the very idea of human rights has become nubs of contestation. This is particularly so where one might see human rights actors or practices that appear to challenge sovereignty in ways that trigger nationalist responses.

4.3 *The Challenge to Human Rights as a Universalizing and Secular Morality*

The nationalist criticism is an overstated and historically inaccurate understanding of the derivation of humanity norms. For a long time, we have seen that advocates of ‘rights talk’ such as Kathryn Sikkink or Aryeh Neier characterize human rights as ‘trumps’, e.g., human rights as a sort of an ‘*uber* morality’, a conversation stopper. These advocates would fathom the ‘rights as religion’ view of the human rights regime and its discourse. This challenge has become more acute with more recent invocations of humanitarianism.

But putting it this way departs from principles of interpretation underlying international rule of law. Reflecting on their historical role, human rights are best understood as building blocks of liberal democracies and not as a singular source for the human rights regime that has long competed with other forms of morality. The real question is: what are our expectations of the positive norms? In looking at functions of human rights below we see a *particular* kind of legal discourse: neither purely epiphenomenal, nor a higher moral law or liberal theology. It is one that is predicated on deliberation and choice, not the opposite of faith.

Human rights are bound to be part of ongoing dialogue, sometimes constructive engagement, sometimes bitter struggle, between reason and revelation, modernity and tradition. The vocabulary itself, with its ideas of limits to rights, of conflicts surrounding rights-rights tradeoffs, margin of appreciation etc. can accommodate such dialogue. Indeed, it is worth remembering that it accommodated earlier challenges of cultural relativism, with potential reservations, and competing understandings with the tools of interpretation and fragmentation of the international legal regime.

Perhaps the French secularist tradition must be set against greater appreciation of some of the religious sources of human rights, like the Jewish narrative of the people's liberation from slavery, the Christian narrative of the equality of all human beings before god, the Islamic narrative of the universal just city (Al Farabi, ca. 870(?)–950). Consider how deeply Martin Luther King's discourse of civil rights is permeated with the Bible. In the US civil rights tradition has evolved side by side with the progressive churches.²²

4.4 *Revisiting the 'Endist' Account*

These developments relate to the debate in the human rights community about whether we are indeed living through yet another cycle of so-called 'endism', discussed above. Debates about the meaning of post-1989 continue to be vital in more than one circle which seem to inform the interpretation of the current status of the human rights regime. For more than one reason it seems that the critique enshrines the post-1989 period as the Human Rights Moment. The question is why and whether this makes sense as a parameter by which to judge the regime today?

In both political debates and scholarly writing, one can see a recurring series of references which on the surface hark back to the post-Cold War moment. Indeed, one can say that the end of the Cold War launched this period of intense political transition. One recalls Francis Fukuyama and his notorious essay and subsequent book, which not only took the Soviet collapse as a harbinger of liberalism's final triumph, but also presumed a path of linear progressivism, arguing that the engine of history depended on a political dialectic which appeared to have vanished post-1989. Yugoslavia manifested how in the absence of political control the existing forces unleash ethnic conflict. Here, human rights campaigns played a direct role, hence for some, like Michael Ignatieff, there was a heady sense of linear progression projected at the time. Of course, we would later see this as too facile, and that the forces of 'endism' had not seen or could not anticipate that – no matter the liberating political changes – simply opening borders and markets would have also illiberal effects. Fukuyama did also predict some backlash from discontents with a liberalized pacified world: Many found it boring or meaningless to exist in a world of 'men without chests'. We are now seeing the full brunt of this.

Indeed, recalling the phenomenon of the post-Cold War Human Rights moment might well pave the way for a better understanding of our present moment. Just what does it mean that 'endism' is rearing its head in recent years? Somehow this is a wrongheaded interpretation of the status of human rights today. One thing is clear: it is not the end of

22 See J. Snyder, 'Empowering Rights Through Mass Movements, Religion, and Reform Parties', in St. Hopgood, J. Snyder & L. Vinjamuri (eds.), *Human Rights Futures*, Cambridge. 88, 91. (2017).

the discourse of human rights. *Tout au contraire*: we can see that in the current moment human rights' normativity seems to offer a galvanizing basis of attack in many illiberal states.

The above leads us to have to think critically about the notion of a coherent standard of judgment of human rights in the world. We should acknowledge the close association of current human rights narratives with distinct practices. So, for example, a number of contemporary human rights accounts, namely, Moyn, Sikkink and Hopgood tell their human rights stories as starting in the 1970s, focusing on human rights activism which is associated with particular actors and advocacy. Yet, this focus is remarkably short, it emphasizes practices and actors associated with this period, and is largely focused on South American activists and associated with Cold War struggles.

Yet, there are alternative human rights narratives associated with other timelines e.g. the post-war period as a starting point, the post-Nuremberg humanity mentality, followed by the post-1945 Cold War divide between the West and the East and the role of human rights (civil and political, social and economic) in Soviet countries, or the rise of US promoting human rights Europe.²³ There are still other historical starting points associated with prior political conflicts and galvanizing moments, such as Grotius' idea of humanity in response to the Religious Wars.

Indubitably, each of these disparate historical starting points produces its own historical narrative. And, in turn, each of these human rights narratives is associated with different practices. Therefore, in a purely descriptive way, where those practices change or even the same kinds of practices have different meanings, the limits of a master narrative, as it were, become apparent. Here, methodologically one might think of Foucault's or Nietzsche's accounts of genealogy. Consider in this regard the framing in Moyn's *The Last Utopia* arguing that human rights is a utopian project with a limited trajectory. Or, consider Hopgood's *The Endtimes of Human Rights*.²⁴ Like Moyn, whose subject is the historical role of human rights activism, Hopgood also diagnoses its demise based on a falling off of certain activist practices. Likewise consider the formulation in challenges posed by political scientists Snyder and Vinjamuri's questioning the way forward in *Human Rights Futures*.²⁵

Recalling the fate of post-Cold War 'endism' – to what extent it is signaling a new political phase – might well pave the way for understanding of our present moment better. Just what does it mean that 'endism' is rearing its head in recent years? Consider other 'endist' tracts, such as Edward Luce's *The Retreat of Western Liberalism* which looks to the rise of illiberal populism and the fate of several democracies to draw our attention to

23 See L. Henkin, *The Age of Human Rights*, New York. (1989); A. Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice*, Ann Arbor. (1989); Teitel, 2005.

24 St. Hopgood, *The Endtimes of Human Rights*, New York. (2013).

25 Snyder, 2017, 88-113; Vinjamuri, 2017, 114-134.

growing vulnerabilities relating to economic scarcity and a related loss of liberal democratic consensus.²⁶ Luce's intent seems above all to sound an alarm bell, before it is 'too late' for liberal democracy, even if at times he seems thoroughly pessimistic. Or, consider Richard Haass' *A World in Disarray: American Foreign Policy and the Crisis of the Old Order* discussing the new chaos occasioned by loss of stable regionalism throughout the world.²⁷ Some chapters in this volume reflect on the further chipping away of rules-based orders.

In sum, while one cannot do justice to all of these developments, we should consider seriously the direction of this scholarship over the last decade. Critical scholarship about human rights has now expanded into broader statements about deterioration in liberalism and the decay of democracy. This points to a *signaling* function of human rights and to the broader significance of developments taken up in this volume.

5 THE ONGOING RELEVANCE OF HUMANITY LAW

Now let us turn to what is currently understood by the human rights regime and its relationship with the humanitarian regime. It may be useful to begin by addressing a wide range of understandings over its uses, that is the contestation over what counts as human rights discourse. One might imagine that the difference in what is considered as relevant phenomena will have an impact on understandings of genealogy, relevant actors, institutions, enforcement practices, *inter alia*, as well as likely future trajectories.

Here I would like to re-situate and re-interpret the current account of a human rights regime in decline, and instead interpret the status of human rights in the contemporary political and economic context characterized by political, economic and legal globalization. Here we need to recognize that we are in a 'beyond the state' situation, one which in some regard *underscores* the core human rights message, while at the same time, rendering it harder to operationalize (i.e., to apply and enforce).

In the current political context, the traditional human rights paradigm, which was patterned on constitutionalism and related constitutional rights ratified and enforced within the state – has had to yield to other approaches. This presents challenges for conceptualizing the role of human rights and defining and measuring compliance. Some analysts emphasize positivism in human rights and the associated practice of the related measure of compliance. Consider Sikkink versus Posner in this regard,²⁸ or consider Yuval Shany's pragmatic view of human rights compliance as a form of human rights

26 E. Luce, *The Retreat of Western Liberalism*, New York. (2017).

27 R. N. Haass, *A World in Disarray: American Foreign Policy and the Crisis of the Old Order*, New York. (2017).

28 See J. L. Goldsmith & E. A. Posner, *The Limits of International Law*, Oxford. (2006). See also E. A. Posner, *The Twilight of Human Rights*, Oxford. (2014).

pragmatism,²⁹ which he explains as a regime or rule of law which has to be seen in light of and in a sense relativized by other norms.³⁰ Beyond compliance, the discussion goes to how to grasp or fathom the complex impact of international human rights norms on the world, once we see that the impact is not exhausted by and may not be even be typified by a state's self-conscious or explicit compliance with specific positive rules of international human rights.

But the problem of practices of compliance is deep; the very measure of compliance assumes state capacity whereas many of the territorial constellations with the worst human rights records lack such state institutions and therefore means of rights enforcement. At present, with weak and failed states, this problem has become further aggravated. Therefore, it is precisely in the current context of globalization that we can see struggle over both how to obtain human rights enforcement and how to measure or evaluate it. Not surprisingly in such a context, the singular emphasis on state-based compliance simply misses a lot of the phenomena first off, as it understates compliance as being just about the state, whereas rights are reflected via social constructivism, involving a set of diverse actors and their array of interests.³¹

Once we let in the 'beyond the state' character of human rights enforcement today, real world effects result from changing the understanding and self-understanding of non-state actors, even if state 'compliance' may be low or just hard to measure. If all one studied are limited practices of state behavior, then the political developments above appear to reflect lower state compliance and a waning in international rights law uses. But this approach misses a lot of the phenomena. Inadequate for understanding international legality's normative effects, it oversimplifies if not distorts the relationship of international law to politics.

Moreover, 'compliance' studies tend to abstract from the problem of interpretation. Interpretation is determinative of what happens to legal rules in the real world, though outside of the law this is often not well understood. We can see particularly in a moment of extreme fragmentation of legal orders – such as we currently have – the significance and indeed demand for interpretation in response to the problems and to the messiness of legal globalization. To begin, consider that human rights is a discourse associated with secularism, universalizability, rationalism and legality. This itself defines in a way for whom and in what situations it can be empowering and constructive of individual and collective

29 R. L. Howse & R. G. Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* 127. (2010).

30 See Y. Shany, 'The Universality of Human Rights: Pragmatism Meets Idealism', *The Jacob Blaustein Institute Human Rights Lecture*, 18 July 2018. Available at <https://www.jbi-humanrights.org/BlausteinLecture2. Online.24July18.pdf>.

31 Howse & Teitel, 2010, 127.

identity, as well indeed as for whom human rights will be seen or can be made to be seen as an 'enemy'.

What is the function of this specific legal discourse? What is its subject? Its distinct practices? Its normativity? I aimed to show that we were in a distinct context. Post-Arab Spring and amidst recent shifts in globalization with its political and economic challenges a shift in human rights discourse has occurred, which I have called humanity-law, arguing that there had been fundamental changes in the subject and *aegis* of human rights law. Where there were increasing numbers of sites of pervasive violence, a hybrid legal regime emerged which addresses both war and peace via human rights and humanitarian law. This hybrid regime addresses both state and non-state actors, an important feature of globalization via international humanitarian law. Finally, rights enforcement through international humanitarian law aims both individually and collectively to protect the rights of persons in armed combat.

Equipped with this added interpretive lens, one might re-consider the role of human rights today by looking at the how and where human rights demand discourse and how and where human rights practices are used effectively. Therefore, I now turn to consider the role of human rights today by looking at when, in what contexts, and how the discourse and practices are being used most effectively as a source of resistance and liberalization. A closer look should illuminate an array of roles for the human rights regime, discourse and practices, and related values and norms used in weak democracies, in transitions, and beyond. It also reveals the connections between human rights and humanity-based legal norms more generally.

6 HUMAN RIGHTS AND NORMATIVE GAP FILLING

6.1 *Human Rights Informing Domestic Constitutionalism*

One might begin with the unseen obvious: there is a regular use of international human rights norms even in established democracies for gap filling where due to a particular culture, religions, etc., there remain normative gaps in the domestic constitutional scheme.³² Consider, for example, in this regard, *Lawrence v. Texas* where the US Supreme Court overturned its earlier ruling relying in part on international human rights law and European Court of Human Rights case law in order to close a gap relating to privacy and due process rights, thus, contributing normative support to the decriminalization of gay sex in a

32 See K. Knop, 'Here and There: International law in Domestic Courts', 32 *New York University Journal of International Law and Policy*. 501. (1999-2000).

constitutional case on appeal from Texas.³³ Likewise, one can see the uses of international human rights norms informing the area of death penalty litigation reflecting interaction of human rights with domestic constitutionalism.³⁴ Areas as diverse as counter-terror and even affirmative action decisions have been informed by international conventions and consensus.³⁵

In another region, consider the challenges to abortion rights in number of Latin American countries also drawing on international human rights instruments. There have been mass mobilizations for women's reproductive rights grounded in human rights normativity. Similarly, in post-Communist countries, where with the rise of traditional religion which had been long suppressed, such as in Poland, there is an ongoing political struggle over reproductive rights. Articulating the struggle for reproductive rights in rights terms has been a source for political mobilization also in Ireland.

Another often related political context where we have seen a significant ongoing interest in the uses of discourse of human rights is the post-transition moment. Here too one can see the functions of international human rights: this regime informs and lays the basis for domestic constitutionalism. Consider for example post-apartheid South Africa and its Interim Constitution and the extent to which its conception of domestic constitutional rights was informed and shaped by international human rights instruments. This is also true throughout Latin America where many countries explicitly reference international law as a source of higher constitutional norms.³⁶

6.2 *Human Rights as Countervailing Discourse in Political Mobilization in the Pre-Transitional Context*

Another context which illustrates functions of human rights as an alternative discourse to deploy is in resistance to repression – one might say pre-transition – where invoking human rights values offers a source of countervailing moral authority.

For a Cold War example, consider the Helsinki Accords campaign and its impact within the Eastern Bloc. No one expected communist countries to comply fully with the Accords,

33 *Lawrence v. Texas*, 539 U.S. 558 (2003). See R. G. Teitel, 'Comparative Constitutionalism in a Global Age', 117 *Harvard Law Review*. 2570. (2004). See also *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) challenging similar criminalization of gay sex where challenge is brought under the *International Covenant* and at the UN Human Rights Committee because there was a constitutional gap regarding such rights under the Australian Constitution.

34 See *Roper v. Simmons*, 543 U.S. 551 (2005) (referencing international human rights consensus prohibiting juvenile death penalty).

35 See R. Bader Ginsburg, 'A Decent Respect to the Opinions of (Human)kind: The Value of a Comparative Perspective in Constitutional Adjudication', Keynote Address to the 99th Annual Meeting of the American Society of International Law, 99 *Proceedings of the ASIL Annual Meeting*. 351. (2005).

36 Consider in this regard, e.g. Argentina's post-Junta Constitution.

as that would have entailed regime change. Nevertheless, establishment of the norms as fully 'universal' constituted a source of solidarity and support for resistance and dissent, a valuable and admirable function, even if the end of the Cold War seemed distant or perhaps ever distant. Consider the direct relationship between Helsinki, Charter 77 and the emergence of the Civic Forum in the former Czechoslovakia. Relatedly, one could see in the Arab Spring the destabilizing role of claims of rights on the cusp of economic and political rights against corruption and to rule of law.³⁷

6.3 *Human Rights as Process*

There are recent instances where we see a role for international human rights in contributing to the rules of the game in political transition. We see parties binding themselves via human rights rules. Consider Colombia's recent peace process and agreement.³⁸ In this regard, one thinks of the late jurist scholar Carlos Nino's view of democracy in terms of deliberation,³⁹ and relatedly the uses of the Argentine trials to open up hitherto closed decision-making processes.⁴⁰ The context is fairly recent. Where there is political change underway, but where no common script exists, often we see that the rights at issue are largely procedural.

6.4 *Human Rights as Human Security in the Context of Economic Globalization*

In the last ten years, we have seen the ways in which the human rights regime can provide a discourse and normativity that can be very helpful in times of unregulated economic globalization. Indeed, here we see the move to 'humanity law' and demands for human security whether in conflict or peacetime.⁴¹

In the post-Cold War context we began to see a move away from purely political rights to social and economic rights. This is indeed not surprising, given the Cold War, i.e., the

37 See Human Rights Watch, 'World Report: Tunisia' (2011). Available at <https://www.hrw.org/world-report/2011/country-chapters/tunisia>.

38 On this point, see R. G. Teitel, 'Transitional Justice and Judicial Activism: A Right to Accountability', 48 *Cornell International Law Journal*. 385, 412-422. (2013).

39 C. Santiago Nino, *The Constitution of Deliberative Democracy*, New Haven. (1996).

40 See R. G. Teitel, 'The Global Jurist as Pedagogue? Ronald Dworkin in Post-junta Argentina', 5 *London Review of International Law*. 269. (2018). Consider also U.S. Supreme Court's *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). where the Court drew upon international law to inform due process, specifically the law of war (Geneva Convention no. 3 Relative to the Treatment of Prisoners of War) to conclude that even "enemy combatants" have rights to a factual hearing.

41 For scholarly research and writing on this, see: Teitel, 2011, Ch. 6.

political contingency of the 'divide'.⁴² In recent decades, there has been an important encounter between the human rights regime, especially the part of it that concerned economic and social rights and neoliberal globalization, which Rob Howse and I call 'Beyond the Divide'.⁴³ At a time of economic deregulation, and financial crisis and greater vulnerabilities, we can see an upsurge in references to 'the right to health' and 'right to work' set out in the UN *Covenant on Economic, Social and Cultural Rights*.⁴⁴ It is clear that, in particular, realizing rights to food and to health (access to medicine) raise important issues regarding trade policies confronted by the WTO.⁴⁵

Indeed, there is a movement right now towards framing the Sustainable Development Goals (SDGs) in terms of economic, social and cultural rights.⁴⁶ This can be seen in the 2030 Agenda for Sustainable Development⁴⁷ which makes clear links to international human rights law, envisaging "a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination." This rights framing offers a direction for follow-up and review processes, which will be "participatory and rights-based" and will "benefit from the active support of the United Nations system." The current thinking is that by linking these together more systematically in their work, UN human rights mechanisms contribute to accountability in realizing these goals and the broader economic, social and cultural rights.

One can see the growing usefulness of these concepts in the political arena as well. Both in the UK with debates around Brexit centering on health insurance guarantees and likewise in the US, the notion of a 'right to health' played an important role during the last election in galvanizing progressive politics and one can see that this idea is gaining ever greater political traction. International human rights protections can be a counterweight to the problem of economic downturn and precarity which for many has been associated with globalization. The rights regime enables disaggregating health and other benefits from employment which for many has become increasingly precarious. Relatedly, we can see the development of a concept of 'human security'.⁴⁸

In civil society, as well, one can see newfound political mobilization relating to economic, social and cultural rights. There are political movements today relying on equality rights

42 See Teitel, 1997, 301.

43 See R. L. Howse & R. G. Teitel, 'Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the WTO', *Dialogue on Globalization: Occasional Papers*, No. 30. Geneva. (2007).

44 See ICESCR, Art. 12 (right to health), Art. 6 (right to work) and also rights to adequate standard of living, "including adequate food, clothing and housing and to the continuous improvement of living conditions."

45 See United Nations Office of the High Commissioner for Human Rights, *2002 Report of the Office of UN High Commissioner for Human Rights*. Available at <https://www.ohchr.org/Documents/AboutUs/annualreport2002.pdf>.

46 GA Res, A/RES/70/1, 21 October 2015.

47 <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

48 Teitel, 2011, 139-164.

and equal treatment regarding work on a rights basis. See, e.g., the rise of 'Women's Marches', the revival of the Equal Rights Amendment, concerning equality of pay and equal treatment at work.

6.5 *Other Forms of Human Security: Human Rights in the Context of Humanitarian Intervention*

What role for human rights in conflict? One of the oldest areas of normativity is international humanitarian law which plays an important role in closing gaps between plain disorder and other conflict. Addressing cleavages in humanitarian law on the continuum between interstate conflict, traditional war, internal conflict, and other situations, civil disorder, occupation, emergency, where today we see very difficult, perhaps impossible, efforts to apply the humanitarian regime as a self-contained regime or code. Consider the security issues in Israel and Palestine, and just how difficult it is to make the *jus in bello* regime work as a self-contained regime given contemporary realities.

Often this use of human rights and humanitarianism is characterized as a latter-day development, as one somehow starting with the Bosnia conflict and then ratified in R2P (and then misapplied in Libya).⁴⁹ The historical principle seems to still be current although there was a lot of debate following Libya as the notion that started as humanitarian intervention ended in full-fledged 'regime change'. Furthermore, we continue to see rare instances of outside intervention justified in terms of human rights. Consider Obama's statement regarding the so-called 'red line' in Syria.⁵⁰

Yet, the preoccupation goes back to the very beginnings of the history and conceptualization of international law. It is a normative delimiting of the interstate system. The concern relates to the most longstanding conceptions of the significance of human rights values, dating back to the 17th century Grotian position (of humanitarian intervention.)⁵¹ Hence one can trace a longstanding historical concern, and yet also persistent difficulties in implementation.

With respect to the question of 'human rights as humanitarian intervention' there has been significant learning from the 1990s, as seen in the subsequent institutional development in terms of R2P's structure at a time of globalizing human rights which incorporate a key global guiding principle: the "principle of complementarity" which is predicated on a layered approach where the local and regional are prior to global intervention. Indeed, in one region (Europe), there has been a call for a collective human

49 See Teitel, 2011, 111-112.

50 See D. Chollet, 'Obama's Red Line, Revisited,' *Politico Magazine*. 19 July 2016.

51 Teitel, 2011, 111-112.

rights-based military policy.⁵² One can see this as well in other regions. The point is that there is now a more nuanced understanding of legal and military engagement in a global context in which human rights continue to play a significant role.

7 CONCLUSION

Globalization pressures have effected changes in the relevant actors and institutions operating in the human rights field. There are pressures on prevailing practices in human rights which may well be related to prior political contexts and needs. Hence, we need to identify changes in the relevant subjects, institutions and actors. As a general matter, one sees a turn away from inward-looking institutions and NGOs with predetermined agendas to more decentralized actors, global civil society, social media. According to some, these changes might be seen as a retrenchment. Yet, in some contexts one might interpret this also a salutary move away from institutionalization and commodification of human rights to more local and less institutionalized – more dynamic – forms of activism. In a sense, one might characterize this as returning the human to human rights.⁵³

52 See D. Rodin, Ask Reddit-Thread. Available at https://www.reddit.com/r/changemyview/comments/8ta2fw/cmvthe_european_union_should_make_international/, where he argues that the EU should make human rights the basis for all use of military force by member states.

53 See I. Rangelov & R. G. Teitel, 'Global Civil Society and Transitional Justice', in H. Anheier, M. Glasius, M. Kaldor, G.S. Park & C. Sengupta (eds.), *Global Civil Society 2011: Global Civil Society Yearbook*. London. (2011).