

Book Review

Gráinne de Búrca. *Reframing Human Rights in a Turbulent Era*. Oxford: Oxford University Press, 2021. Pp. 256. £80.00. ISBN: 9780198299578.

What contribution can international human rights make to a turbulent era characterized by rising right-wing populism, stark political polarization, spiked resistance to international law and institutions and sweeping pandemic emergency measures? Can they have a meaningful impact on the ground under these conditions, and, if so, how do they become effective? Is the human rights movement in its current form well equipped to tackle the human rights challenges of the 21st century? These central questions for contemporary international human rights law are at the heart of Gráinne de Búrca's new book *Reframing Human Rights in a Turbulent Era* – arguably, one of the most important books in human rights scholarship in recent years.

Recent debates in human rights scholarship were influenced by damning criticism of the human rights movement, with prominent scholars such as Samuel Moyn proclaiming that human rights are '[n]ot enough',¹ and others asserting that we are witnessing their 'endtimes'² or 'twilight'³ and accusing the movement of 'companionship with neoliberalism'⁴ and an 'elitist and top-down nature'.⁵ *Reframing Human Rights* is driven by a visible frustration with this dystopian framing of human rights, a strong moral conviction to counter the negativity that has beset the scholarly discourse on human rights and a desire to set the record straight. To do so, de Búrca, an eminence in the fields of European Union (EU) law and governance beyond the state, has ventured out of her comfort zone to insert herself into the centre of one of the most prominent contemporary human rights debates. With her contribution, she becomes a much-needed counter-voice to the critics within the debate as she makes a sober and well-argued case for the ongoing impact of the human rights movement on a more just society in different parts of the world.

Reframing Human Rights is divided into five chapters that follow a brief introduction. The first chapter addresses the debate on the effectiveness of human rights, providing a diligent and analytically sharp overview of the debate, accurately identifying a lacuna and developing de Búrca's own account that explores and explains based on experimentalist governance theory the conditions for international human rights to be effective. Providing support for her account, the three middle chapters contain

¹ S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

² S. Hopgood, *The Endtimes of Human Rights* (2013).

³ E. Posner, *The Twilight of Human Rights Law* (2014).

⁴ Moyn, *supra* note 1, at 219, cited in G. de Búrca, *Reframing Human Rights in a Turbulent Era* (2021), at 217.

⁵ This is how Gráinne de Búrca herself summarizes some of the criticism (at 11).

detailed qualitative case studies of how international human rights were successfully mobilized in different parts of the world to make profound change: one on gender equality in Pakistan, one on disabilities rights in Argentina and two on children's and reproductive rights in Ireland. This scholarly approach is in many ways exemplary: it sets forth a methodologically well-defined project with a hypothesis that is fastidiously situated within a carefully analysed body of scholarship and proves the hypothesis with well-researched and effectively depicted case studies. Drawing on lessons from the case studies, the final chapter, which is of a more general nature, outlines contemporary challenges for human rights, such as illiberalism, digitalization, climate change, COVID-19 and increasing inequality, addressing the question whether human rights can rise to the challenge.

De Búrca manages to carve out a well-defined niche in the debate on whether human rights are effective despite the ink already spilled on the question. The debate had long been dominated by two parallel, partially interrelated discourses: one empirical discourse on the causal effects between the ratification of human rights treaties and positive social change based on large quantitative studies and another explanatory discourse about which factors drive improved human rights outcomes. Summarized in a nutshell, in the empirical discourse, critics of the international human rights system deny any positive impact of treaty ratification,⁶ while defenders seek to demonstrate such impact;⁷ in the explanatory discourse, legal scholars tend to emphasize the central role of international human rights norms and institutions,⁸ and political scientists treat domestic social movements and activists as the true source of human rights progress,⁹ while being critical of the alleged elitist character of international human rights institutions (at 14–20).

De Búrca argues persuasively that the empirical debate on effectiveness has reached a plateau and that more fine-grained, albeit less representative, explanatory accounts are needed to move the debate to the next level. Within this stream of literature, she distinguishes herself from the two most prominent explanatory theories that view domestic forces as the critical factor, from Beth Simmons' domestic mobilization thesis that emphasizes the crucial role of domestic actors in producing positive change following human rights treaty ratification¹⁰ to Margaret Keck and Kathryn Sikkink's 'boomerang thesis' that focuses on how domestic groups leverage the international

⁶ See, e.g., E. Posner, *The Twilight of Human Rights Law* (2014); Hathaway, 'Do Human Rights Treaties Make a Difference', 111 *Yale Law Journal* (2002) 1935; Hafner-Burton and Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', 110 *American Journal of Sociology* (2005) 1373; Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?', 36 *Journal of Peace Research* (1999) 85.

⁷ See, e.g., Simmons, 'From Ratification to Compliance: Quantitative Evidence on the Spiral Model', in T. Risse, S. Ropp and K. Sikkink (eds), *The Persistent Power of Human Rights* (2012) 43; Lupu, 'Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Treaties', 67 *International Organization* (2013) 469.

⁸ Nowak, 'The Need for a World Court of Human Rights', 7 *Human Rights Law Review* (2007) 251.

⁹ B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009); S. Hopgood, *The Endtimes of Human Rights* (2013).

¹⁰ Simmons, *supra* note 9.

arena to pressure their states for human rights changes.¹¹ By contrast, she situates her own account within recent human rights scholarship by anthropologists and scholar-practitioners that focus on the interaction between the global and the local to explain the effectiveness of international human rights (at 20–23), rejecting what she perceives as a false dichotomy between the top-down imposition of international human rights standards by international institutions, on one side, and the bottom-up mobilization by domestic actors, on the other side (at 20, 184). De Búrca contends that ‘moves to minimize or dismiss’ international human rights bodies and ‘to locate the real effectiveness of human rights reform instead in domestic action and activism’ would miss the critical interaction between international and domestic actors in forging ‘human rights-driven change’ (at 12).

The contribution of *Reframing Human Rights* to the debate is to provide a nuanced account of how the interaction between domestic actors and international human rights institutions has promoted human rights reform in various countries across the globe and to develop an appealing theoretical framework for this interaction. The book hypothesizes that profound human rights improvements on the ground are typically achieved through the iterative and long-term interaction between (i) domestic actors such as affected persons and their advocates who mobilize for change; (ii) international institutions that provide an external accountability forum; and (iii) domestic independent actors such as courts, ombudspersons and the media who generate additional leverage for reform (at 42–45). De Búrca conceptualizes this interaction as a form of experimentalist governance, a theory of multi-level governance originally developed with a view towards international environmental regimes and EU means of governance such as framework directives and open methods of coordination.¹²

Given the absence of a sovereign with authority to set specific common goals, this experimentalist account prefers ongoing interaction between the global and the local and domestic elaboration of broadly formulated international norms over hierarchical direction. It views the ambiguity and weak enforcement mechanisms of international human rights law not as a vice but, rather, as a virtue, emphasizing the importance of participation, local discretion, learning and iterative long-term processes rather than the top-down imposition of binding prescriptions for making human rights effective (at 38–39). More specifically, experimentalist governance is characterized by five core features. Boiled down to its essence, these are: (i) agreement amongst signatory states on a common problem; (ii) broad and flexible articulation of a shared set of norms; (iii) activation and implementation of these norms by engaged local stakeholders; (iv) non-binding external accountability and monitoring by international forums based on local feedback; and (v) periodic re-evaluation of practices to foster learning and incremental progress (at 41). This experimentalist account adequately captures central tenets of the UN human rights system. Globally agreed human rights norms are inherently vague, enabling loose agreement on a principle in the abstract (for example,

¹¹ M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

¹² See Sabel and Zeitlin, ‘Experimentalist Governance’, in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (2012) 169.

gender equality, free speech), but resulting in deep contestation about what the principle requires specifically in a particular local context. The state reporting procedure of the UN treaty bodies provides for ongoing monitoring, periodic re-evaluation and interactive engagement between state representatives, domestic non-governmental organizations (NGOs) and international experts.

De Búrca's experimentalist account offers new insights and enhances our understanding of how the interaction between domestic civil society activism and international human rights institutions can affect change by carving out the specific roles that these actors assume in the interactive process, adequately theorizing this interaction and productively combining theory with in-depth case studies. First, her explanatory account demonstrates how the international human rights system critically relies upon, and is closely interlinked with, domestic civil society actors that claim and adapt international human rights for their cause to generate international attention, actively engage with international human rights bodies and provide shadow reports to challenge the self-congratulatory accounts of governments (at 10, 139). Although the critical role of NGOs and social movements has long been recognized in human rights scholarship, it has not been properly integrated into a theoretical framework on the governance of international human rights. The legal field especially has traditionally struggled with integrating mobilization, despite its undeniable significance for generating social change, into its concepts and theories, focusing instead on legal rules and structures, thereby leaving the analysis of this phenomenon to the disciplines of political science and sociology. But any descriptively accurate account of international human rights must account for mobilization and advocacy, and de Búrca's experimentalist theory does so admirably.

Second, *Reframing Human Rights* carves out the distinctive contributions of international institutions, especially the United Nations (UN) treaty bodies, to human rights processes. Stressing that their role would be misunderstood if conceived as top-down enforcers of international human rights norms, de Búrca highlights their various roles in reinforcing domestic mobilization. She outlines how they provide an external accountability forum for engagement with the government and for rights claims and grievances to be aired (at 43–44), enable information generation and reporting by government and domestic civil society actors (at 86), catalyse collaboration amongst NGOs and other social groups (at 186) and elaborate normative sources to be later invoked and relied upon in domestic courts (at 126–127).

Third, *Reframing Human Rights* fruitfully combines theory and case studies, ensuring that de Búrca's account of human rights experimentalism avoids one-dimensional narratives and simplistic models. As noted above, the book includes four well-selected and meticulously researched case studies of successful human rights campaigns from different parts of the world, analysing the mobilization for gender equality in Pakistan, for disability rights in Argentina and for children's rights and reproductive rights in Ireland. They cover three different human rights conventions that form part of the UN treaty body regime: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities

(CRPD) and the Convention on the Rights of the Child (CRC).¹³ In a refreshing way, the analysis does not primarily focus on classical civil rights but on less examined rights such as the right to education and the right to child welfare. The use of different case studies brings several benefits: it does not only offer fascinating insights into the variety of the human rights movement, but it also helps to capture the complexity of human rights practice on the ground and interactions between relevant international and domestic actors. The case studies on Argentina and Ireland trace, for example, how the ratification of international human rights treaties and the state reporting process led various advocacy groups to form broader coalitions and to shift their approach towards a rights-based strategy (at 99, 138). The case study on Pakistan demonstrates how women's rights groups successfully elaborated and adapted international human rights norms to the local context by recognizing religious arguments, thereby appealing to broader segments of the population (at 58).

All this makes for an important contribution. But de Búrca's experimentalist account also raises doubts about the limitations of this model of human rights protection and about how vital international human rights institutions truly are for successful human rights campaigns. First, *Reframing Human Rights* may have benefited from more critical reflection on the potential limits of experimentalist governance in the field of human rights. One of the motivations of many states underlying the introduction of monitoring as a governance technology into the international human rights framework was precisely to avoid an overly intrusive accountability mechanism. The various institutional deficits by which the treaty bodies are plagued and the long-standing concerns about low implementation rates of their recommendations indicate that recalcitrant states manage successfully to limit the impact of treaty body monitoring. In a book chapter written in 2005 on new modes of governance in human rights in the context of the EU's Fundamental Rights Agency, de Búrca herself observed 'a tension between a "rights" model and a "governance" model', raising a note of caution 'before a monitoring, informational and coordinating approach to human rights protection is whole heartedly embraced'.¹⁴ It likely would have enriched the discussion to read more about how de Búrca thinks about this tension in the context of international human rights monitoring and why concerns about the risks involved with the 'governance' model, such as denuding the character of human rights as rights, rendering standards of protection fluid and flexible and relying upon voluntarism and self-regulation by states,¹⁵ may not resound with human rights experimentalist governance.

Second, *Reframing Human Rights* does not remove all doubts as to whether and to what extent sustained interaction with international institutions truly is an essential condition for successful human rights campaigns. De Búrca has consciously selected successful human rights campaigns as case studies to explore their common features

¹³ Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13; Convention on the Rights of Persons with Disabilities, Doc. A/RES/61/106, 13 December 2006; Convention on the Rights of the Child 1989, 1577 UNTS 3.

¹⁴ De Búrca, 'New Modes of Governance and the Protection of Human Rights', in P. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU* (2005) 31.

¹⁵ *Ibid.*

and to uncover the conditions under which international human rights flourish (at 25). As a result of this choice, the processes described in the case studies are comparable but hardly representative.¹⁶ The book does not analyse failed or ambivalent human rights campaigns or successful campaigns consciously abstaining from engaging international institutions, even though those too may teach us important lessons about the interplay between domestic human rights mobilization, independent domestic actors and international accountability fora. In addition, de Búrca does not trace alternative or complementary explanations for the human rights reforms enacted, even though the case studies seem to point to strong domestic forces and support from key actors such as governments that are open to reform, judicial landmark decisions, favourable media coverage and broad public appeal. For example, the Pakistani government is portrayed as supportive of promoting women's rights during the modernization programme pursued under General Pervez Musharraf's presidency (at 55), and the Irish media is portrayed as broadly covering the individual stories of women suffering under the restrictive abortion laws (at 181–182).

This may suggest that domestic actors and forces are the key drivers behind profound human rights changes, with international monitoring processes arguably only having a supporting role. Take the example of reproductive rights in Ireland – a long-term political process that, according to de Búrca, commenced with the foundation of the Irish reproductive rights movement in the late 1960s and ended, at least for the time being, in the constitutional referendum of 2018 liberalizing abortions (at 158–160). It does not seem surprising that domestic advocacy groups choose to interact with international monitoring processes to derive some benefits from this strategy such as laying the groundwork for presenting a stronger case in domestic litigation or increasing media attention. But it seems equally plausible to assume that an exclusive look at the human rights process and the interaction between domestic and international human rights actors does not nearly tell the full story of this profound societal value transformation that resulted in a sweeping popular support of 66.4 percent for the abortion vote in the referendum.

Macro-sociological theories of law suggest that such profound changes in the law are often driven by society-level conditions such as the changed social status of women or in society.¹⁷ In the specific case of Ireland, the declining role of the Catholic Church, a staunch pro-life defender, likely also had a central impact.¹⁸ In addition, the role of political parties and their platforms, which is typically pivotal in the political process in democracies, is not discussed in the book, which raises the question how impactful, or even indispensable, the participation of Ireland in review processes conducted under the UN treaty bodies and the Universal Periodic Review (UPR) procedures truly was. While it is impossible to establish the precise causal effect (or lack

¹⁶ On the intrinsic trade-off between comparability and representativeness in case study design, see Gerring, 'What Is a Case Study and What Is It Good for?', 98 *American Political Science Review* (2004) 341, at 348.

¹⁷ See, e.g., L. Barnett, *Explaining Law: Macrosociological Theory and Empirical Evidence* (2015), at 98.

¹⁸ For more detail on this, see Elkins *et al.*, 'The Death of Conservative Ireland? The 2018 Abortion Referendum', 65 *Electoral Studies* (2020) 1, at 9 (pointing to religion and socio-demographic variables as central forces behind the voter behaviour at the referendum).

thereof) of international human rights processes ‘in bringing about change’, as de Búrca correctly notes (at 180), a comparative look into other countries such as the USA or Germany at least suggests that political processes concerning abortion are often dominated by domestic actors and forces.

Whether one subscribes to de Búrca’s account or not, her experimentalist theory of human rights raises important issues about international human rights law that merit further reflection. I will focus on three aspects: one concerns its normative status, another its sociology and the third its institutional design. The first question that emerges from the experimentalist account is how we should think about the normative status of international human rights if they must be claimed by engaged domestic actors, adapted to different local contexts and negotiated in open-ended experimental processes between the government, international institutions, local civil society actors and independent domestic institutions. If it is true that normative ambiguity and weak enforcement mechanisms can be regarded as strengths of the international human rights system under an experimentalist account, it begs the question of what place remains for the idea that international human rights law should protect non-negotiable and universal minimum human rights standards for every human being, even in societies without an active civil society. Not much it seems. De Búrca’s account suggests – and I think she is right – that we need to conceive of global human rights law (things may be different for regional human rights systems) less in terms of universally shared values legally protected and enforced by international institutions from the top down and more in interactive, pluralist and process-oriented terms. *Reframing Human Rights* outlines in detail which form this interaction takes and how international monitoring processes support domestic human rights campaigns. Perhaps, the international human rights system can be thought of against this background as an institutionally flawed, yet useful, framework based on highly appealing, yet inevitably contested, values that critically relies upon, and can be meaningfully utilized by, determined domestic actors that seek to achieve human rights reforms.

The second question is: which features turn international review mechanisms such as the treaty bodies and the UPR into useful external accountability forums? Is it that they are external to the domestic realm, thus appearing as a ‘neutral’ arbiter for an internally contested issue? Or is it that they are international and therefore carry the aura of universalism? Could it be that the key lies in their function to monitor the self-commitments of states laid down in the human rights treaties? And does it matter whether accountability is secured by experts or peers and on which form of reasoning (legal or political) it is based? *Reframing Human Rights* does not address this question even though these international institutions assume a central place within human rights experimentalism. It simply conceptualizes them as external accountability forums without specifying which features are relevant for this role. But it is an important question. The treaty body and the UPR processes are very different monitoring mechanisms – the former conducted by international experts and the latter by state peers. Do such differences matter for their role as external accountability forums and, if so, how?

The third and final issue to be reflected upon here concerns the institutional design of international human rights institutions. If we assume that engaged domestic civil society actors are the lifeblood of the human rights movement and that their participation is critical to international monitoring mechanisms, then we should take stock of whether the latter are institutionally designed in a way that harnesses the positive force of the former. Although NGOs and national human rights institutions are formally and informally involved in treaty body and UPR processes in various ways – providing shadow reports, participating in oral sessions and regularly meeting with state representatives – their role is carefully circumscribed. An obvious area of reform based on de Búrca’s findings is to improve the access of domestic civil society to the treaty bodies and the Human Rights Council in meaningful ways, but there surely are other institutional design lessons to draw.

This book review started with noting the contemporary critique of the international human rights movement and *Reframing Human Rights*’ motivation to counter this critique. This raises the final question whether and to what extent the book succeeds in refuting the critics. While acknowledging weaknesses of the human rights movement that the critics have rightly exposed and the need for reform (at 4), de Búrca persuasively demonstrates the diversity and invaluable real-world contributions of human rights activism around the globe and the ways in which it interacts with international institutions to invigorate its causes. At the same time, she does not address some of the central objections against the movement articulated by its critics, such as the institutional criticism of a bureaucratic UN human rights system and of the influence of big-donor funding on the policies of large global North NGOs like Amnesty International and Human Rights Watch and the disregard of rising inequality and neo-liberal tendencies within the movement. None of the case studies prominently discuss socio-economic rights even though these would have been most useful to reply to Moyn’s thesis that the human rights movement has failed to confront socio-economic inequality. Even though the critics’ case is not closed after *Reframing Human Rights*, the book builds a strong argument for the continuing attractiveness and difference-making vitality of the human rights movement, casting doubt on the more dystopian portrayals and calls for abandoning the movement for an unspecified alternative.¹⁹

Andrej Lang 

School of Law, Martin Luther University
Halle-Wittenberg, Germany
Email: andrej.lang@jura.uni-halle.de

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