

SAVING HUMAN RIGHTS FROM HUMAN RIGHTS LAW

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1. International Human Rights Law: Internal and External Pressures

Human rights are always under pressure, a pressure that is exerted on at least two levels. The first level is that on which human rights are conceived as exacting moral standards: rights that ordinary moral reasoning, objectively albeit fallibly, discloses to us are possessed by all human beings simply in virtue of their humanity.¹ If we consider human rights as universal moral rights in this way, then they are constantly under pressure, both in relation to our understanding of them and our success in complying with them. The pressure stems from pervasive frailties that afflict the human condition – ignorance, lack of empathy and imagination, laziness and inertia, the impulse to domination, illegitimate self-preference, scarce resources, and so on – that hinder us in grasping those standards or adhering to their demands in practice.

But that human rights are under pressure is also true on a second, and more topical, level if we focus on the imposing and complex structure of international human rights law (IHRL), and its associated institutions, that have been built up in the post-war era. It is this second sort of pressure – on the edifice on IHRL – that I wish to focus on in this article. A major theme in what I will argue is that relieving the pressure on IHRL, including pressures that are external in character, requires grasping its relation to human rights on the first level. This is because the essential point of IHRL is to give expression and effect to an underlying morality of human

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¹ As I have argued we should in John Tasioulas, 'On the Nature of Human Rights', in G. Ernst and J-C Heilinger (eds.), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin: de Gruyter, 2012). This view differs from the legalistic, Benthamite view according to which human rights owe their existence to their embodiment in law, but also from the family of 'political' accounts of human rights, inspired by John Rawls's *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), according to which it is an essential feature of human rights norms that they play a specific political role, such as setting benchmarks for political legitimacy or serving as triggers for international concern or intervention in the event of their widespread and persistent violation.

rights, insofar as it is appropriate to do so, through the medium of individual legal rights ascribed to all human beings. This sums up what I have elsewhere called the Formative Aim Thesis (FAT).² The tendency to stray from this governing rationale is, I believe, liable to generate both internal and external pressures on IHRL.

That IHRL is under grave pressure is a common refrain in recent years. Two important recent lectures are exemplary illustrations of the phenomenon I have in mind. The first is ‘The Populist Challenge to Human Rights’ delivered at the London School of Economics on December 1st, 2016 by Professor Philip Alston of NYU, who is also the current UN Special Rapporteur on Extreme Poverty and Human Rights.³ The other lecture, ‘Is International Human Rights Law Under Threat?’, was delivered on July 26th, 2017 as the British Institute of International and Comparative Law Annual Grotius Lecture by Prince Zeid Ra’ad Al Hussein, who at the time was the UN High Commissioner for Human Rights.⁴ I choose these two lectures not only because they are illustrative of widely shared beliefs and anxieties among scholars and practitioners of IHRL, but also because the two authors are deservedly influential figures in the human rights field. Their words, therefore, deserve serious consideration – and, of course, critical scrutiny.

In his lecture, Philip Alston addresses the challenge posed by “[t]he populist agenda that has made such dramatic inroads recently”, an agenda that “is often avowedly nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda”. Alston proceeds to warn, in dire terms, that as a result of populism, “the challenges the human rights movement now faces are fundamentally different from much of what has gone before”.⁵ In the constructive part of his lecture, Alston advances a number of proposals for responding to the populist challenge to human rights, such as more effective synergies between international and local human rights movements; giving economic and social rights equal prominence in human rights advocacy alongside civil and political rights; broadening the

² I defend this characterisation of the aim of IHRL – the Formative Aim Thesis – in John Tasioulas, ‘Exiting the Hall of Mirrors: Morality and Law in Human Rights’, in T. Campbell and K. Bourne (eds), *Political and Legal Approaches to Human Rights* (Routledge, 2018).

³ Philip Alston, ‘The Populist Challenge to Human Rights’, *Journal of Human Rights Practice* 9 (2017): 1-15.

⁴ Prince Zeid, ‘Is International Human Rights Law Under Threat?’, BIICL Annual Grotius Lecture, delivered July 26th, 2017
https://www.biicl.org/documents/1680_is_international_human_rights_law_under_threat_speech_260617.pdf?s_howdocument=1

⁵ Alston, ‘The Populist Challenge to Human Rights’, p.1.

kinds of actors the human rights community engages with beyond states, so as to include, for example, corporations; making greater efforts to persuade sceptics about the soundness of human rights norms and institutions; and, in relation to human rights scholarship, he urges scholars to consider the “unintended consequences” of the scepticism they often express about human rights law and institutions.

The lecture by Prince Zeid delves deeper, aiming to unearth the psychological origins of the populist backlash against human rights. He asks: ‘Why is international human rights law such an easy target? Why is it so misunderstood, so reviled by some, feared by others, spurned, attacked?’⁶ The answer he gives, in broad terms, is that unscrupulous politicians stoke and exploit fears among the citizenry – xenophobia, the fear of terrorism, and so on – to justify human rights violations, such as torture, arbitrary detention, and the curtailment of free speech – in order to secure and maintain their grip on power. Those who oppose human rights law are acting on the basis of unreasoning fear, either by experiencing it themselves or promoting and exploiting it in others; by contrast, defenders of human rights law aspire to be guided by reason freed from the distortive influence of fear. In a truly striking passage, Zeid goes on to posit a difference in how the brains of those in the two opposed camps function:

The default condition of the human mind is, after all, fear. Primordial fear. That innermost instinctive mechanism protecting us from harm, from death. An emotion every extremist, skilled populists included, seeks to tap or stimulate... The emotional mechanism in the mind of a human rights defender works rather differently. To do good in our lives, and not just to some, but to all; to defend the human rights of all – this requires a continuous investment of thought, where the natural prejudices lying deep within each of us must be watched out for and rejected every day of our lives. The default flow in the minds of humanity may be reptilian; but the internal battle to overcome it is profoundly human..⁷

A powerful image: one side trapped in, or exploiting, our reptilian inheritance, the other seeking to transcend it by ascending to a standpoint oriented to the good of all.

⁶ Prince Zeid, ‘Is International Human Rights Law Under Threat?’, p.1.

⁷ This analysis chimes with some of the thoughts laid out in Martha Nussbaum’s *The Monarchy of Fear*, which gives primordial fear a fundamental role in explaining how other emotions –such as retributive anger and exclusionary forms of disgust – can have a toxic effect on liberal democracy.

For present purposes, I do not wish to contest anything said in these two lectures; indeed, I agree with many of Alston's constructive proposals.⁸ Rather, I simply want to convey the shape of the problem they present as confronting IHRL – one that arises from external and morally disreputable sources - and to draw attention to a startling omission common to the diagnosis presented in both lectures. Neither author contemplates the possibility that some of the most serious pressures on IHRL are internally generated, pressures arising from serious defects in the elaboration of human rights law and the self-understanding of its practitioners and scholars. In particular, they do not consider the extent to which IHRL has generated internal pressures by straying from its formative aim of giving substance and effect to a background morality of human rights. Had this possibility been in view, they might have gone on to consider to what extent these internal pressures are responsible for triggering or exacerbating some of the external pressures they identify. This latter move, however, would have required contemplating the possibility that the populist backlash that they decry is not accurately characterized in unremittingly negative terms as “xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda”, although no doubt such strands are present within it. Without wishing to pursue this point, it seems to me a plausible hypothesis that such an exclusively negative portrayal of contemporary populism is an unrealistically Manichean template for interpreting political realities.⁹

Now, it is admittedly true that Alston does occasionally refer to “shortcomings” within the human rights movement, but for him these are overwhelmingly at the level of strategy and implementation, not fundamental principle and approach. There is no question, he believes, of “giving up on basic principles”.¹⁰ To put it crudely, the impression conveyed is that the basics

⁸ For an insightful fuller discussion of pressures, both internal and external, on IHRL, see Gerald L. Neuman, ‘Human Rights, Treaties, and International Legitimacy’, in S. Voeneky and G.L. Neuman, *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge: Cambridge University Press, 2018).

⁹ The notion of ‘populism’ is of course a contested one, both as regards its meaning and its utility. Jan-Werner Müller has a pejorative definition, according to which populists falsely lay claim to being the exclusive representatives of the ‘real people’, ‘How Can Populism be Defeated?’, Michael Ignatieff and Stefan Roch (eds), *Rethinking Open Society: New Adversaries and New Opportunities* (CEU Press, 2018). Roger Eatwell and Matthew Goodwin in *National Populism: The Revolt Against Liberal Democracy* (Penguin, 2018). identify populism, in more neutral terms, with a thin, three-pronged ideology: ‘1) an attempt to make the popular will heard and acted on, (2) the call to defend the interests of the plain, ordinary people, 3) the desire to replace corrupt and distant elites’, p.78. To appreciate the complexities of contemporary populism’s relation to human rights, consider the way in which ‘populist’ politicians in Europe have justified greater restrictions on immigration on the basis of protecting women’s and LGBT rights or ensuring the continuation of democracy and strong social welfare policies.

¹⁰ Alston, ‘The Populist Challenge to Human Rights’, p.2.

of human rights law are in order, they just need better PR to secure a wider consensus on them and more effective mechanisms to improve levels of compliance. When he does broach deeper criticisms, Alston refers to scepticism about the very idea of human rights as a moral ideal - human rights on what I called the first-level. Specifically, he recounts a story about a famous international legal scholar who in a lecture at New York University dismissed human rights as an “illusion”, arguing that “there could not reasonably be universal rights to strive for; that there could be no way of proving or justifying any particular rights; and that most are heavily contingent and subjective.” This illusion, the famous scholar asserted, confronted would-be practitioners of IHRL with a yawning “abyss”. It is this kind of scepticism that Alston chastises academic critics of IHRL for engaging in; such critics fail in their responsibility to take seriously its “unintended consequences”, such as its demoralising effect on students and others committed to the cause of human rights.

In other words, the only serious intellectual challenge to the human rights enterprise that Alston considers is that which trashes the very idea of a rationally-grounded morality of human rights. But let us leave this kind of root-and-branch rejection of human rights morality to one side, especially since it typically reflects a crude version of relativism that perhaps only narrowly escapes self-contradiction by lapsing into deep implausibility. Let us suppose you believe – as I do – that there is a sound human rights morality that can be rationally justified, even though our grasp of, and compliance with, it is inevitably far from perfect.¹¹ Even if you believe that societies that practice torture, slavery or female genital mutilation are not only proceeding on different cultural premises, but objectively wrong about profound moral questions, this still leaves us with the question whether or not existing human rights law is seriously flawed. In other words, you can be sceptical about IHRL not because you are sceptical about the moral idea of human rights, but precisely because you believe in that idea, and additionally believe that the law has fallen out of tune with it in important ways. Unfortunately, Alston skates over this possibility by assuming that the only serious intellectual or moral challenge to IHRL is one that repudiates the very idea of human rights morality, perhaps because he simply assumes that IHRL is broadly in line with such a morality. But this is simply question-begging.

Human rights laws and institutions, after all, are not themselves to be identified with sound human rights morality, they are not the deliverances of perfectly operating reason. To conceive

¹¹ John Tasioulas, ‘On the Foundations of Human Rights’, in R. Cruft et. al (eds), *Philosophical Foundations of Human Rights* (OUP, 2015).

of them in this way is a kind of fetishism, one that confuses man-made institutional means with objective ethical ends. Rather, they are fallible human creations, established by flawed human beings, relying on their inevitably limited reasoning powers against the countervailing influence of non-rational factors, such as egoism and fear. So, between merely strategic criticisms of international human rights law, on the one hand, and a scepticism about the very idea of human rights morality, it is imperative to address deeper criticisms of the way in which human rights law is elaborated and understood by its practitioners and scholars. Otherwise, we run the risk of serious complacency: engaging in the wholesale disparagement of critics of IHRL while neglecting to inquire into whether IHRL itself is in good order.

The idea that I wish to explore in this article is that of saving human rights from the way in which they have been distorted by human rights law that has transgressed its proper bounds. Once we have begun on that rescue operation, we may then be able to help save human rights law, by bringing it into greater alignment with the human rights morality it is supposed to advance. This is, of course, a massive project that requires the mobilization of many different forms of expertise, ranging from the purely philosophical, the legal-doctrinal and the social-scientific. All I can do here is sketch a few lines of thought that might encourage others to lend a hand to this rescue mission.¹²

2 The Formative Aim of International Human Rights Law

In order to assess whether IHRL has been subverted from within, it is important to build up an understanding of the formative point of IHRL. In this regard, IHRL is no different from any other coherent department of law. Each such department has its characteristic point that shapes its distinct identity as one department of law among others.

Some theorists argue that the point of contract law is to be understood as essentially that of recognizing and upholding, by means of law, certain morally binding promises. The moral idea

¹² As Jan-Werner Müller has stressed: ‘Dealing with populism is not just a PR challenge; it is above all a question of policy content and a question about the adequacy of some of our political institutions’, ‘How Can Populism be Defeated?’, in M. Ignatieff and S. Roch (eds), *Rethinking Open Society: New Adversaries and New Opportunities* (CEU Press, 2018). Although I am somewhat sceptical about the general helpfulness of the notion of “populism” in explaining current widespread disaffection with existing international and national political orders, this article can be viewed as an attempt to give substance to Müller’s claim in the specific domain of human rights law and policy.

of a promise is the justifying point that lends coherence to this body of law.¹³ This, of course, does not mean that all promises should be legally enforceable: some may be too trivial to merit legal concern, hence the winnowing effect of the doctrine of consideration, while others may belong to a private domain that should be free of legal intrusion. Nor does it mean that only transactions that are properly classified under the pre-legal idea of promise should be recognized under contract law. There may be perfectly good reasons to extend the scope of contract, by analogy, to other kinds of agreements. But it is to say that the idea of a promise is at the core of our understanding of contract, and deviating excessively from this idea risks distorting contract doctrine, alienating it from its true purpose. Such distortion would occur, on this understanding, if contract doctrine were developed in line with an overarching justifying rationale such as wealth-maximization. The account I have hinted at for contract law can be replicated for other departments of law, such as criminal law. There, I would argue, the formative aim is the idea of certain moral wrongs that there is a legitimate public interest in prohibiting, condemning and punishing.¹⁴ Accordingly, the criminal law tends to go astray, on this view, if it designates as crimes forms of conduct that do not fit the rubric of public wrongs of this kind. For example, when it proscribes conduct simply as a means of social control without regard to the moral wrongfulness of such conduct. Pursuing this line of thought, critics have plausibly argued that in recent decades both the United States and the United Kingdom have experienced rampant “overcriminalization”, with legislators succumbing to the temptation to attach criminal sanctions to forms of behaviour that they perceive to be undesirable even if they are not clearly morally wrongful or fall within the class of public wrongs that is the criminal law’s concern.¹⁵

In previous writings, I have argued a similar analysis can be carried out for IHRL. Specifically, I have defended the Formative Aim Thesis (FAT), according to which the point of IHRL is that it is primarily concerned with giving effect to universal moral rights, insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all human beings. Now, the idea that the point of IHRL is given by a relationship with a background morality of human rights is a familiar one, but it has been disputed in recent

¹³ For a version of this view, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 2nd ed. (OUP, 2015).

¹⁴ For a version of this view, see Sandra Marshall and R.A. Duff, ‘Sharing Wrongs’, *Canadian Journal of Law and Jurisprudence* 11 (1998): 7-22.

¹⁵ For a good example of such criticism, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP, 2008).

years, e.g. by philosophers such as Charles Beitz and Allen Buchanan.¹⁶ They have sought to articulate the point of IHRL without invoking a background morality of universal rights; I have argued elsewhere that such attempts fail, often collapsing back into some version of the FAT. In what follows, I shall simply assume the correctness of the FAT.

It is important, however, to clarify two features of the FAT. First, it is not the deeply mistaken view, which unfortunately is widely held, that IHRL is the only department of international law concerned with securing human rights morality, and that prior to the advent of IHRL international law did not concern itself with the protection of human rights.¹⁷ On the contrary, many domains of international law are vitally concerned with human rights, from humanitarian law to trade law. Indeed, if one were to ask which area of international law does most to safeguard human rights, the best answer may very well be the international law on the use of force and intervention, since war is probably the source of the gravest human rights catastrophes. Rather, the claim made by the FAT is that IHRL is concerned with human rights morality in a distinctive way: (a) giving effect to it is its *primary* aim, in that any other aims are appropriately subordinate or supplementary to this aim; and (b) it gives effect to it through a *specific legal technique*, i.e. by assigning individual legal rights to all human beings which impose corresponding obligations primarily on states.

The second misunderstanding to clear up is that the FAT does not assert that IHRL should simply mirror, in a simple-minded way, the background set of universal moral rights. It does not require an isomorphism of human rights morality and law, such that the latter set of norms precisely match the former in terms of their normative content, as given by their associated duties and their bearers. Recall the proviso embedded in the FAT: IHRL should give effect to universal moral rights only *insofar as it is appropriate for international law to do so* by assigning universal legal rights to individuals. There are both principled and pragmatic constraints on giving effect to human rights morality through human rights law. Even if human rights morality requires a just distribution of domestic chores, for example, it is not the law's proper business to get involved with private matters of this kind. This is a principled constraint. Pragmatic constraints will arise when, even assuming that advancing a given human right is

¹⁶ Charles Beitz, *The Idea of Human Rights* (OUP, 2013) and Allen Buchanan, *The Heart of Human Rights* (OUP, 2015).

¹⁷ This is a view endorsed in A. Buchanan, *The Heart of Human Rights* (OUP, 2015).

the law's business in principle, the adoption of legal means would be ineffective or even counter-productive. I will come back to these considerations towards the end of the article.

Although there are these constraints on IHRL, such a body of law can have significant value in enhancing compliance with human rights morality through a variety of means. First, it can offer a publicly accessible statement of the content of a given human right, one that can be discovered through formal legal reasoning rather than by means of more contestable moral reasoning. Among other things, this enables all the advantages of agreement on a set of human rights in spite of disagreeing about the underlying normative case for acknowledging them as human rights. Second, insofar as there is disagreement about the proper interpretation of any given component of human rights morality, the law can help single out an authoritative interpretation that can coordinate expectations among actors with disparate views on the merits. Thirdly, human rights norms in morality may need to be rendered more determinate in specific ways in order effectively to guide conduct. Lines need to be drawn, for example, regarding which forms of speech fall within the boundaries of the right to free speech and which (such as, perhaps, forms of hate speech) do not. This requires a process of specification or *determinatio* that goes beyond the strict operations of reason, involving some kind of collective volitional act that chooses between rationally eligible alternative specifications of a given right. Finally, a legal norm setting out a human right may also be backed up with one or more enforcement mechanisms, such as self-reporting by states bound by human rights, inquiries conducted by expert treaty bodies, formal criticism by other states or non-state actors such as NGOs, judicial protection, economic sanctions or military intervention.

The FAT, I believe, is not only the most appealing account of the point of IHRL, it also has a strong foothold in the self-understanding of the post-war human rights culture. A striking illustration of this is the history of Article 27 of the Universal Declaration of Human Rights which concerns, among other things, intellectual property rights. It has the unique distinction of having generated a controversy, during the drafting stage, as to whether or not these rights should have been included *at all*, as opposed to disputes about their precise formulation.¹⁸ The nature of the disagreement pays eloquent tribute to the influence of the FAT. On the one hand, states from the common law tradition objected to the inclusion of intellectual property rights

¹⁸ See the very helpful discussion in Lea Shaver, 'The Right to Science and Culture', *Wisconsin Law Review* 1 (2010): 121-184..

precisely because they did not see them as truly reflecting background moral rights, but rather as means of incentivizing technological innovation so as to promote economic prosperity. By contrast, states from the civil law tradition, which had long recognized the moral rights of authors, pressed for the inclusion of intellectual property rights. This is precisely the shape of debate one would expect among those who presuppose the truth of the FAT and therefore see IHRL as a vehicle for human rights morality.

If we construe the essential point of IHRL as that of subserving human rights morality through a specific institutional technique, as the FAT does, then we are well-placed to resist recent arguments to the effect that human rights is ‘an elite discourse’, one that has little foothold in the ‘moral operating systems’ – the day-to-day moral reasoning – of the vast majority of people across the globe.¹⁹ Pursuing this line of thought, Michael Ignatieff has recently argued that the moral thinking of most people revolves not around human rights but ‘ordinary virtues’, such as generosity, trustworthiness, resilience, and so on. This is a hypothesis that may suggest an alarming divide between enlightened, human rights-loving elites ranged against the benighted, reptilian-brained mass of the populace. In fact, Ignatieff is sceptical about the moral powers of human rights discourse, setting greater store by the capacity of the ordinary virtues to challenge the oppressive and dehumanising forces at work in the world today. But, in any case, Ignatieff’s entire set-up thrives on the basis of the dubious equation of human rights with IHRL. It is hardly surprising that most people’s moral thinking does not draw heavily on a set of international legal norms geared primarily to the regulation of state conduct. It would be very strange were it otherwise. But human rights are fundamentally moral norms, and the system of IHRL should be understood as subservient to them, in the manner of the FAT. Interpreted as moral norms we can more readily discern human rights embedded in the ‘moral operating systems’ of a striking number of people throughout the world irrespective of the place they occupy in any given social hierarchy. Indeed, Ignatieff himself tells us that his ethnographic investigations revealed that all of the people he spoke to believed they counted morally as individuals, that they have a ‘right to an equal voice’, that in virtue of their humanity they are

¹⁹ Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Cambridge, MA: Harvard University Press, 2017), characterising human rights as “an ‘elite discourse’, the lingua franca of an influential but thinly spread stratum of educated, middle-and upper-middle-class intellectuals, university teachers, students, activists, journalists and bureaucrats”, p.24.

not to be treated ‘like garbage’.²⁰ Even if the expression ‘human rights’ is not explicitly uttered by them in making these avowals, it is not difficult to see that the thought that they are articulating may be accurately rendered in its terms, especially if they believe the forms of treatment they are demanding should be accorded to them simply in virtue of their status as human beings.

Once we arrive at the conclusion that many people have an intuitive grasp of human rights morality – of moral rights possessed by all human beings simply in virtue of their humanity – it is no great stretch to suppose that their attitudes to IHRL are influenced, in broadly the manner suggested by FAT, by what they rightly or wrongly take to be the shape of that morality. Hence, for example, common expressions of suspicion or incredulity towards novel human rights, such as the rights to annual paid leave, internet access or same-sex marriage. This need not manifest a repudiation of the very idea of human rights, but rather scepticism that supposed rights of this kind deserve to be classed alongside paradigmatic human rights such as the rights against slavery and torture. If IHRL is commonly perceived to deviate excessively from FAT, this may help explain some of the popular backlash encountered by the former. But leaving these sociological speculations aside, we can turn now to the question posed at the beginning: is there any reason to suppose that IHRL really does deviate in any significant way from the demands of the FAT?

Without in any way purporting to give an exhaustive list of the ways in which IHRL may have strayed from the FAT, in the rest of this article I will highlight two important types of deviations that I believe have in recent years subverted IHRL from within:

- (a) A failure to recognize and follow through on the idea that IHRL is primarily concerned with giving effect to universal moral rights, which crucially have associated obligations, rather than either human interests generally or the full gamut of political values (section 3); and

²⁰Ignatieff, *The Ordinary Virtues*, p.198, 201. For a fuller presentation of my scepticism about Ignatieff’s claims, see J. Tasioulas, ‘Making Human Rights Ordinary Again: A Response to Ignatieff’, *King’s Law Journal* (forthcoming).

- (b) The enthusiastic promotion of both the legalization and, more specifically, the judicialization of human rights, as if these institutional mechanisms were necessitated by a commitment to human rights, without due regard to the efficacy or legitimacy of pursuing these methods of institutionalizing human rights (section 4).

These two deviations are not exhaustive of the ways in which human rights law deviates from the FAT, nor do I purport to give an exhaustive treatment of each of these points.²¹

3. Confusing Human Rights with Interests and Values

According to the FAT, IHRL must be assessed by reference to a background morality of human rights. Teasing out what this background morality consists in is the vital starting-point in determining whether or not IHRL is achieving its true purpose. What, then, is the content of the guiding idea of universal moral rights, moral rights possessed by all human beings simply in virtue of their humanity? This is, of course, an immense topic. Here I want to focus on only one vital aspect: the fact that moral rights are associated with obligations, which are their normative content. If we are speaking about human rights, we are not simply appealing to a universal human interest, such as freedom from pain, or the interest in autonomy, knowledge or friendship. Nor are we simply appealing to some other kind of deontic value, such as human dignity. I believe that both universal human interests and human dignity are values that lie at the foundations of human rights; they are the underlying values that ground human rights. But they are not to be identified with human rights. Human rights only exist when the values of universal interests and human dignity are sufficient, in the case of all human beings, to justify obligations to treat them in certain ways. That human rights involve counterpart obligations is significant in four ways:

First, obligations are categorical. Whether one is bound by them or not does not depend on one's attitudes or desires or projects; one is bound by them irrespective of how one happens to be motivated. A person cannot simply evade being subject to an obligation through the

²¹Other important deviations include the tendency to associate a genuine commitment to human rights morality with a robust commitment to military intervention in the case of their extensive violation and with an uncompromising attitude to the deployment of criminal law against individuals responsible for gross human rights violations.

expedient of changing their profile of desires, goals or preferences. Whether I have a reason to eat now or later is partly a function of my desires; but that I have an obligation to provide food for my dependent children obtains independently of my desires or other subjective attitudes towards doing so. Second, obligations are robustly resistant to being defeated by, or ‘traded-off’ against, other considerations, including other obligations. If we are simply talking about practical reasons to do or refrain from doing something, then reasons are habitually defeated by other reasons. I may have a reason to get out of bed early in the morning, but this could easily be defeated by countervailing reasons, such as the pleasantness of lingering a while longer in bed. But if I have promised to attend an 8 am meeting which I can only do by getting up early, then I have an obligation to get up, one that cannot be defeated by the reason to stay in bed because it would be pleasant. Of course, sometimes even obligations may be defeated, for example, in emergency cases, although there is an interesting question whether there is a class of moral obligations that are absolute in force, hence never subject to defeat. But, by their very nature, the instances where obligations are defeated will be exceptional. It is important, however, that we do not conflate the resistance of obligations to being defeated with the Dworkinian idea that rights are ‘trumps’ against the common good. This latter thesis embodies a conception of the common good – most likely, a utilitarian one – that does not incorporate human rights as part of its content, and construes rights as standardly liable to collide with the common good so construed. Both assumptions, I believe, are grave distortions.²² Third, the failure to comply with an obligation is wrongful. Someone who violates an obligation, without justification or excuse, is properly blameable by others and by himself, i.e. he has reason to feel guilty. Contrast failing to further another person’s interests, or even acting in a way detrimental to their interests: doing either of those things is not necessarily wrongful. There is no wrong committed if I fail to imperil my life in order to save yours, unless there is a special relationship between us. Equally, no wrong is committed if in a fair competition you drive me out of business or beat me for a coveted job. Finally, there may be obligations that are not associated with rights, for example, obligations of charity and mercy. However, there is a subset of obligations that are *directed* in character, insofar as they are *owed to* a right-holder. These rights-involving obligations (or, ‘perfect obligations’) have traditionally been thought to constitute the demands of *justice*, demands that *ceteris paribus* enjoy a certain priority over

²² For some different attempts to outline a more conciliatory relationship between rights and the common good, see John M. Finnis, ‘Human Rights and Their Enforcement’, in *Human Rights and the Common Good* (OUP, 2011); Joseph Raz, ‘Rights and Individual Well-Being’, *Ratio Juris* (1992): 127-42; and John Tasioulas and Effy Vayena, ‘The Place of Human Rights and the Common Good in Global Health Policy’, *Theoretical Medicine and Bioethics* (2016): 365-382, at pp.375-380.

other ethical considerations, including moral obligations that have not associated right-holder. The sub-set of these duties of justice that are owed to all human beings simply in virtue of their humanity is designated as *human rights*. It is a difficult question what explains the directedness of such rights-involving duties, but one plausible suggestion is that it arises from the nature of the justification of the relevant obligations: this appeals to some interest or value inhering in the right-holder, rather than in a collectivity of individuals.

The key premise I wish to extract from this sketch is that if IHRL is to be faithful to its point, it must be giving effect to universal moral rights that involve obligations in this sense, and not simply universal interests or values like human dignity. However, a persistent flaw of contemporary human rights discourse is the tendency to ignore the overarching demand that IHRL should be regulated by a background morality of human rights. One manifestation of this is the widespread anxiety about human rights inflation. This is not so much the vague concern that there are ‘too many’ human rights, but rather the idea that there is a troubling corrosion of the idea of human rights because the distinction between a universal human interest and a universal moral right is being overlooked by IHRL. In other work, I have tried to explain how one gets from interests to rights involving obligations. Three key considerations here are the following: (a) the putative obligation must be possible to comply with; (b) it must not impose excessive burdens on duty-bearers and others; and (c) the duties associated with a given right must satisfy as holistic constraint of being generally consistent with other rights.²³ Unfortunately, much of contemporary IHRL discourse fails to heed these considerations, damaging its ability to realise its formative aim of giving effect to human rights morality.

This was strongly borne in on me in the process of carrying out work as consultant for the World Bank on a project on minimum core obligations and their relevance to the right to health in particular.²⁴ Taking the human right to health as a point of focus is especially illuminating, in this context, because it resonates with the plausible claims of human rights advocates, such

²³ See John Tasioulas, ‘On the Foundations of Human Rights’, in R. Cruft et. al (eds), *Philosophical Foundations of Human Rights* (OUP, 2015).

²⁴ John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, (World Bank: Washington D.C. 2017) <https://openknowledge.worldbank.org/handle/10986/29144>; and John Tasioulas, *The Minimum Content of the Human Right to Health*, (World Bank: Washington D.C., 2017) <https://openknowledge.worldbank.org/handle/10986/29143>. See also the symposium on this work published on May 10, 2018 with contributions from Michael Kirby, Martha Nussbaum, Sakiko Fukuda-Parr and others <http://jamesgstewart.com/new-symposium-john-tasioulas-minimum-core-obligations-in-economic-cultural-and-social-rights/>

as Alston, that an effective response to the populist backlash against human rights must accord socio-economic rights, in whose provision the general populace might more readily see itself as having a stake, equal visibility alongside more familiar civil and political rights, which are often (wrongly) conceived as primarily of benefit to minority groups, criminals, refugees, terrorists and others. The standard interpretation of the human right to health, however, is disfigured by two forms of bloating arising from the failure to heed the vital distinction between interests and rights.

The first form of bloating pertains to the normative scope of the human right to health, i.e. the subject-matter of this right that individuates it as one distinct human right among other human rights. The human right to health is standardly treated as not only encompassing the provision of (certain kinds of) medical treatment, public health measures, and social determinants of health. It is also taken to include any right that bears on the interest in health, including, the right to education, to work, to political participation, the right not to be tortured or discriminated against, and so on.²⁵ This interpretation is doubly problematic: it renders the human right to health an unwieldy standard of assessment, since compliance with it involves compliance with a large schedule of other rights, and it undercuts the very enterprise of having an enumerated list of specific, largely non-overlapping, rights since it turns out that one of these rights incorporates virtually all of the others. What underlies these difficulties is a failure adequately to distinguish the right to health from the interest in health. The former is one right among others; the latter is a universal interest that underlies many rights, among which is the right to health (the same is true of an interest like autonomy, which also lies at the basis of many human rights, hence cannot serve as the basis for individuating their normative scope). The proper way of individuating distinct human rights is not simply by reference to the profile of interests they serve (since these will often be very similar in the case of quite different rights)

²⁵ United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health*, Document E/C.12/2000/4, para 3: 'The right to health is closely related to and dependent upon the realization of other human rights... including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health'. A leading global health law scholar has found this characterization of the scope of the human right to health too limited, and has suggested the inclusion of 'gender equality, employment, and social inclusion', Lawrence Gostin, *Global Health Law* (Cambridge MA: Harvard University Press, 2014), p.257. Meanwhile, a 'Fact Sheet' jointly issued by the the Office of the UN High Commissioner for Human Rights and the World Health Organization has, in similar terms, described the right to health as incorporating a range of other rights, including gender equality and freedom from torture and other cruel, inhuman, or degrading treatment of punishment. United Nations Office of the High Commissioner for Human Rights and the World Health Organization, *The right to health: Fact sheet no.31* (2008) (23, p.3).

but by reference to the subject-matter of the obligations associated with them. In the case of the human right to health, these obligations are best interpreted as relating to medical treatment, public health measures, and social determinants of health. On this view, therefore, torture, chronic unemployment, and gender discrimination can all be human rights violations that have a severely negative impact on health without also thereby constituting violations of the human right to health.²⁶

The second way in which the human right to health is bloated relates to its content, i.e. the content of the obligations associated with it, even if we restrict it to those obligations whose subject-matter falls within the scope of medical treatment, public health measures, and relevant social determinants of health. This content is standardly made to encompass elements that it is not remotely plausible to claim are owed to all because it is not possible, or it is unduly burdensome, to impose them as obligations. Consider, again, the Economic, Social and Cultural Rights Committee's General Comment 14 on the human right to health, and let us focus on what it says about the special category of minimum core obligations – these are supposed to be obligations of immediate effect, unlike other obligations associated with socio-economic rights they are not subject to progressive realization over time, and also obligations which the General Comment interprets (wrongly, in my view) as non-derogable. The minimum core is interpreted as including elements, such as the adoption of 'a national public health strategy and plan of action on the basis of epidemiological evidence' that, as leading commentators have pointed out, the richest and most advanced societies would struggle to meet. In the words of John Tobin, 'the vision of the minimum core obligations of states under the right to health, as advanced by the ESC Committee, is dissociated from the capacity of states to realize this vision. It simply does not offer a principled, practical, or coherent rationale which is sufficiently sensitive to the context in which the right to health must be operationalized'.²⁷

Is it any wonder, in light of the kind of approach detailed above, that critics of the policy significance of the human right to health have dismissed it on the grounds that it represents 'a

²⁶ For further development of this view of the individuation of the human right to health, see John Tasioulas and Effy Vayena, 'The Place of Human Rights and the Common Good in Global Health Policy', *Theoretical Medicine and Bioethics* (2016): 365-382.

²⁷ John Tobin, *The Right to Health in International Law* (OUP, 2012), p.240.

claim on funds that has no natural limit, since any of us could get healthier with more care’?²⁸ This criticism would hit its intended target if the expansive interpretation of human rights as interests were defensible in terms of the FAT, but it is not. Once we begin to identify the right with the underlying interest which it serves we are left with a supposed “right” that no longer has content with the shape and force of an obligation; it is to a large extent unfeasible; it is readily and systematically overridden by competing considerations, given an environment of multiple competing claims on scarce resources. In defiance of the FAT, it increasingly alienates IHRL from its normative roots in human rights morality, breeding scepticism about human rights law that may end up becoming, by a foreseeable if not justifiable process of blowback, scepticism about human rights morality itself.²⁹

A human rights doctrine that exemplifies the concerns I am expressing here is that of proportionality, a doctrine whose influence has migrated from its origins in German theology to German constitutional law and on to human rights legal thinking more generally, although the United States has remained largely impervious to its otherwise extensive influence. This doctrine involves a very expansive interpretation of human rights, such that they are equated with virtually any legally cognizable interest an individual may possess. Having inflated the scope and content of human rights in this way, it then asks whether a measure that infringes this wide right might nonetheless be justified on a proportionality analysis that takes into account valid purposes served by the infringement.³⁰ I will focus my discussion on the very first step of the proportionality analysis - the highly expansive interpretation of the content of human rights with which it starts.

²⁸ William Easterly, ‘Human rights are the wrong basis for health care’, Financial Times Oct 12, 2009 <http://www.ft.com/cms/s/0/89bbda2-b763-11de-9812-00144feab49a.html#axzz3ym5AIA9w>

²⁹ For a helpful discussion of the ways in which expansion in the content of IHRL can undermine their effectiveness, see Yuval Shany, *The Universality of Human Rights: Pragmatism Meets Idealism* (New York City, NY: Jacob Blaustein Institute for the Advancement of Human Rights, 2018).

³⁰ There are different formulations of the doctrine, but one that has achieved canonical status proceeds by (1) identifying a legitimate aim served by some measure, (2) asking whether the means adopted are effective in achieving that end and (3) whether they have the smallest negative impact on other rights and interests, and (4) asking whether, all things considered, the pursuit of the aim through these means is reasonable having regard not only to the harm done as a side-effect (3, above), but also to the harm that would ensue by not pursuing the aim at all (or through these or comparable means). There are various criticism to be made of these elements (see footnote 35 below), but my focus is on a prior step in proportionality analysis: the tendency to identify rights with interests and hence to be quick to identify all sorts of measures as interferences with rights that need to be vindicated via proportionality analysis.

Although proponents of the proportionality approach may use the words ‘obligation’ or ‘duty’, proportionality exerts great pressure on the key idea that human rights are rights as opposed to interests or values. As the leading theoretical proponent of the doctrine, Robert Alexy, has recognised, on the proportionality view fundamental rights are “ubiquitous”, just because legally cognisable interests of individuals are ubiquitous.³¹ But the price of this ubiquity is a worrying diminution in significance. As Mattias Kumm, another of the leading defenders of proportionality, has written: “a rights-holder does not have very much in virtue of having a right... An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified”.³² What is lost here is the idea that human rights involve obligations, because obligations are not ubiquitous and of their nature generally resistant to being overridden by countervailing considerations. In candidly setting out manifest implications of the proportionality doctrine, Alexy and Kumm inadvertently provide us with its *reductio ad absurdum*.

To elaborate somewhat on this last point, it is important to distinguish three real or seeming conflict scenarios that need to be accommodated by human rights morality, and a human rights law that is properly responsive to it. The first scenario is that in which a given human right *appears* to be in conflict with another consideration, including perhaps another human right, but this appearance is false. One reason why there is no conflict may be that the supposed conflicting consideration falls within the scope of an exception built into the specification of the relevant human right’s associated obligations. It is an open question, of course, whether there are any human rights that identify wrongs that are not subject to exceptions. The obligations associated with the human right not to be tortured are often interpreted in this way.³³ It is as a case of exception, I believe, that we should treat the criminal who has been justly sentenced to a term of imprisonment for having committed murder. His right to liberty is not in conflict with the demands of retributive justice which justify the imprisonment.³⁴

³¹Robert Alexy, ‘Constitutional Rights: Balancing and Proportionality’, p.133.

³²Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’, in G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publications, 2007), p.139.

³³As a matter of law, Article 7 of the International Covenant on Civil and Political Rights, which prohibits governments subjecting anyone “to torture or to cruel, inhuman or degrading treatment or punishment” is standardly interpreted as exceptionless.

³⁴But cf. James Griffin, *On Human Rights* (OUP, 2008), ch.3. This is the leading contemporary philosophical discussion of human rights, but it is plagued by a tendency to identify human rights with our interest in personhood, ignoring the vital role of obligations in specifying the content of human rights. This, I have argued,

Instead, the obligation associated with his right to liberty is subject to certain exceptions, and one of them is an exception catering for loss of liberty based on the infliction of a just punishment. Such a criminal's *interest* in liberty is undeniably set back in virtue of the just sentence imposed upon him – that set-back to interests is, after all, a crucial part of the point of punishing him - but his *right* to liberty is unaffected. This is something that we cannot easily say on the proportionality analysis which tends to reduce the right to liberty to the criminal's interest in liberty, and therefore is compelled to regard the just sentence as an infringement – a justified violation – of that right.

Justified violations, or infringements, of a right represent the second kind of conflict scenario. They involve cases where the obligation associated with a right is engaged but its normative force is overridden or at least counter-balanced by another consideration, whether a human right or some other value. Again, it is an open question whether an obligation associated with a given right is defeasible in this way or, instead, possesses absolute force and therefore is never open to being justifiably overridden. Almost by definition, the occurrence of cases of infringement will tend to be rare, arising in emergency situations rather than the ordinary course of life. Reverting to the human right to liberty, an example of an infringement of a human right would be a situation in which, in order to avert a massive terrorist attack, a large number of people are locked in a building for a whole day in order to prevent the launch of that attack by a terrorist reasonably suspected to be hiding in that building. Here the rights to liberty of the innocents in the building have been violated, but justifiably so. That they have been violated, in contrast with the case of the criminal sentenced to a just punishment, is shown by the fact that they, unlike him, deserve an apology and perhaps even compensation for the permissible violation of their rights. The obligations to apologise and to compensate are what has been termed 'remainders' of the initial obligation not to interfere with their liberty. Moreover, they, unlike the criminal, would have good reason to seek to evade the restriction of their liberty, if they could do so in such a way as to not unduly risk imperilling the measures taken to foil the terrorist attack.

Finally, the third scenario is that in which is a genuine conflict between the human right and the other practical consideration, but there is no justification for overriding the obligation

has unfortunate consequences for Griffin's account of the grounding of human rights and their role in practical conflicts, see John Tasioulas, 'Taking Rights out of Human Rights', *Ethics* (2010).

associated with the right. Failure to comply with the right in such a case is a straightforward violation of the human right. The only ameliorating factors here may be considerations that tend to excuse the rights-violator, such as the fact that they were provoked or acted in ignorance, or that justify extending merciful treatment to them, such as the fact that they have repented of their wrong-doing.

Part of the poverty of the proportionality analysis is that, in conflating rights with interests in its very first step, it fails to accommodate this threefold scheme in the right way, being too ready to find conflicts where there are none and, as a result, to massively inflate the category of infringements.³⁵ But this is inconsistent with the fact that the normative content of rights is given by their associated obligations and that it belongs to the very idea of such an obligation that it is robustly (if not absolutely) resistant to being overridden. Or, as T.M. Scanlon has put it: ‘interests are balanced, rights are re-defined’.³⁶ In other words, while interests, considered purely as interests, pervasively come into conflict among themselves and with other considerations and have to be traded-off against each other, rights have as their content obligations, and serious thinking about the latter has to focus on specifying their content in such a way that they are generally resistant to being overridden, which may indeed involve re-defining those obligations over time.³⁷

It is not difficult to see how severing the connection between IHRL and human rights morality can lead to general disaffection with the former. One way is through people coming to feel that the FAT, which they believe ought to regulate the development of IHRL, is not being complied with by the latter. Such a possibility is not far-fetched if, as I have suggested above, elements of human rights morality figure strongly in the moral consciousness of ordinary people, combined with the common-sensical belief that the point of IHRL is to give appropriate effect to this morality. But a more indirect path to discontent makes less ambitious assumptions about

³⁵ Article 19 (2) of the German Basic Law protects the ‘essence’ of a basic right from being qualified. But this expedient of identifying a non-derogable core leaves out the central case, where the obligation is robustly, but not absolutely, resistant to trade-off.

³⁶ T.M. Scanlon, ‘A Framework for Thinking about Freedom of Speech, with Some Applications’ (unpublished MS, October 26, 2018), p.5.

³⁷ For reasons of the kind sketched above, I have been encouraged by recent work by John Finnis, ‘Judicial Power: Past, Present and Future’ October 20, 2015 <http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf>, Francisco Urbina, *A Critique of Proportionality and Balancing* (CUP, 2017) and Guglielmo Verdirame, ‘Rescuing Human Rights From Proportionality’, in R. Cruft et. al (eds.), *Philosophical Foundations of Human Rights* (OUP, 2015), which criticises proportionality as a subversion of human rights morality.

implicit moral knowledge. For, even if ordinary people are persuaded that the basic interests discussed above are their rights, it is inevitable that the aspirational and insatiable character of such demands will lead those interests to go systematically under-fulfilled. This, after all, is the clear message of the proportionality analysis in conceding that “a rights-holder does not have very much in virtue of having a right”. We can anticipate that those who have had their hopes raised about lavish entitlements to health care, education or work opportunities will be liable to fall victim to intense frustration when these entitlements are not remotely satisfied, followed by anger and eventually cynicism about the whole enterprise of IHRL, and perhaps even about human rights morality itself.³⁸

We can, of course, anticipate various responses on the part of those who tend to identify human rights with interests. I focus here on two broad lines of response that concede the substance of the critique that I have been elaborating. The first response, which is broadly technocratic in character, can be put in the mouths of the friends of the proportionality doctrine. Accepting the categorical difference between universal interests and human rights morality, they might nonetheless defend proportionality as a useful judicial heuristic device or decision-procedure. This would be to contend that, although it does not closely map on to the logic of human rights proper, nonetheless proportionality is the procedure best calculated to secure overall superior human rights outcomes in judicial adjudication, thereby meeting the demands of the FAT. Much here will depend upon whether the vaunted advantages really are in the offing, something regarding which it is possible to be doubtful, especially when it comes to the limits of judicial expertise in the domain of socio-economic policy within which so-called welfare rights must operate. But even if these doubts could be assuaged, there would still be a problem of legitimacy confronting the proposal to confer such broad-ranging discretion upon judges in human rights adjudication (see section 4 below).

The second response, call it the vanguard response, might be attributed especially to human rights activists operating beyond the strict confines of legal adjudication. The response is that

³⁸ For a powerful expression of this sort of theme, see Onora O’Neill, ‘The Dark Side of Human Rights’, *International Affairs* 81 (2005): 427-439. However, O’Neill imposes the more stringent demand that not only must there be obligations associated with human rights, but that these obligations must be allocatable by pure moral reasoning, without any kind of institutional fiat. This leads her to reject the bona fides of socio-economic rights as human rights, since the allocation of the positive obligations associated with them typically does demand some institutional mechanism. I have argued against this more austere view in John Tasioulas, ‘The Moral Reality of Human Rights’ in T. Pogge (ed.), *Freedom from Poverty as a Human Right* (OUP, 2007).

the distinction between interests and rights is correct as matter of strict moral logic, but neglects the advantages of treating human rights as important human interests when it comes to fashioning and deploying a politically effective rhetoric. Only such an ambitious, aspirational rhetoric, the response goes, will galvanize ordinary people to further the interests of their fellow citizens and others, only such a rhetoric will set a high enough bar against which to judge official action, given the inveterate tendency of governments to fall short of the objectives they have been set. This response too is to be judged empirically on whether it achieves its advertised pay-offs, rather than breeding cynicism about human rights law as embodying practically meaningless utopian ideals that give with one hand only to take with the other. But, beyond this outcome-oriented concern, there is also an inherent strain in advancing the human rights cause by means of literally overblown claims that deviate from the actual truth about human rights. After all, the strategy advocated involves misleading people about their human rights in order to achieve a supposedly improved human rights outcome.

If, as I have urged, we discipline IHRL in line with the FAT, then we have to jettison – happily, rather than with regret – the idea that IHRL is a blueprint for utopia. We have to give up the idea that IHRL is a means for pursuing all of the moral and political ideals we properly recognise. Instead, IHRL is primarily aimed at advancing human rights morality through a distinctive legal technique. But human rights morality does not exhaust the whole of morality, nor even everything that is most important in morality. In addition to universal moral rights, there are moral rights that we have not in virtue of our humanity, but in virtue of our membership of particular communities, call them citizenship or membership rights. These rights form a natural template for thinking about legally-enshrined constitutional rights within a given polity.³⁹ There are also moral rights possessed by groups, such as the right to national self-determination, and also rights held by non-human animals. In addition to these rights, morality includes obligations that are not associated with rights, such as obligations of charity or mercy, which have an important place in practical deliberation despite not being claimable by any of their beneficiaries as a matter of right. Finally, it includes ideals – such as ideals of excellence, heroism or love – that we have good reason to pursue but which are not obligatory. It in no way undermines the distinctive significance of human rights to observe that they do

³⁹ For a helpful exploration of the idea of citizenship rights, see David Miller, *National Responsibility and Global Justice* (OUP, 2007).

not exhaust the whole field of moral concern; on the contrary, it is essential to registering that distinctive significance.⁴⁰

Fortified with this anti-utopian insight, we are better placed to defend a reformed IHRL against leading critics from both the right and the left of the political spectrum. These are important critics who in no way fit Alston's and Zeid's profile of the populist opponents of human rights as nationalists, xenophobes and misogynists. One double-barrelled line of objection from the right can be found in Eric Posner's book, *The Twilight of Human Rights Law*. Posner's first objection takes its rise from the tendency of human rights in IHRL to proliferate in number and expand uncontrollably in their content. This tendency, Posner argues, deprives human rights law of its ability effectively to guide the conduct of states or, therefore, to provide a determinate yardstick for subjecting state policy to critical evaluation. Putting a somewhat cynical spin on this phenomenon, he observes that since human rights demands are numerous and impossible to comply with immediately as a complete set, a state can always plausibly claim to postpone compliance with one right (or a given obligation associated with a right) in order to comply with another right (or its associated obligation).⁴¹ But, even if this has some strength against current hypertrophic tendencies of IHRL, the proper answer is to bring such law into line with the FAT, and to develop more fully doctrines, such as those of progressive realisation and minimum core obligations, which offer guidance with respect to the prioritisation of human rights demands in the face of scarce resources. Posner's second line of objection is that, to the extent that IHRL does provide guidance when it comes to matters of development, development economics is a far superior source of guidance than IHRL:

If the goal is to help people in poor countries, and limited funds are available, then those funds should be used in ways that do the most good, not to compel the country to submit to an abstract formulation of human rights that Westerners imagine are right for everyone in the world.⁴²

⁴⁰ This has been a persistent theme in the work of Onora O'Neill, see her contribution to J. Tasioulas (ed.), *The Cambridge Companion to the Philosophy of Law* (CUP, forthcoming).

⁴¹ Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014), p.92: 'The dilemma for human rights enforcers is that they cannot demand that states comply with all rights perfectly, but if they do not, then they have no basis for criticizing a country's decision to allocate more resources to satisfy one rather than another'. For a more moderate version of this objection, see Gerald L. Neuman, 'Human Rights, Treaties, and International Legitimacy', in S. Voeneky and G.L. Neuman, *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge: Cambridge University Press, 2018), pp.70-1.

⁴² Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014), p.145.

Crudely put, if our goal is to maximise utility in a less developed country, mosquito nets are generally superior to law suits. But notice that Posner simply appears to assume that maximising utility ('do the most good'), and its customary proxy, economic growth, is the ultimate objective. Whether or not you believe that there is a requirement to maximise utility – whether or not you are a utilitarian of some sort – according to the FAT this is decidedly not the aim of IHRL. Human rights law should secure human rights even if, as is often the case, doing so fails to maximise aggregate utility, e.g. because it rules out forms of surveillance or interrogation that would maximise welfare but violate the right to privacy or the right not to be tortured. Human rights are a vital component of an account of sustainable development, but scarcely the whole of it. If we are clearer about the important, but circumscribed, objective of IHRL, such critics can be put on the back foot. We can challenge the yardstick they employ to measure the performance of IHRL, and this will force critics like Posner to articulate and defend their own normative assumptions, something that they typically avoid doing (often on the irrelevant grounds that they are not advancing 'philosophical' theses). Unfortunately, international lawyers have not been in a position to do this because they have tended to embrace the idea that IHRL is about the promotion of interests generally, collapsing the human rights system into what Posner calls 'an undifferentiated welfarism', thereby gifting him precisely the opening his scepticism needs to question the efficacy of IHRL.⁴³

Something similar goes for critics from the left. Writers like Samuel Moyn, for example, have explicitly attributed to IHRL the aim of constructing utopia – the last utopia, in the words of his well-known book, a replacement for the post-War collapse of socialist and communist ideals. They go on to point out that IHRL has come drastically short of building utopia on earth, in part because human rights do not give us enough of the values we cherish. In particular, IHRL has not done enough to address the massive economic inequalities that have arisen in the very same period during which the human rights ideology has been ascendant. Now, it seems to me there are many things that one could say in reply to Moyn. One is that he has not adequately specified what kind of egalitarianism he has in mind, let alone defended it against objections. This requires hard normative work, as the philosophical literature on equality

⁴³ As Posner puts it: 'The more human rights there are, and thus the greater the variety of human interests that are protected, the more that the human rights system collapses into an undifferentiated welfarism in which all interests must be taken seriously for the sake of the public good', p.94.

shows. Another is that he underestimates the potential of human rights to constrain permissible material inequality, perhaps because he focuses too much on how IHRL is understood or implemented, rather than on what it requires or ought to require. It's worth asking: how much truly worrying inequality would persist if human rights were fully realised throughout the globe? This question, which goes to the core of his criticism, is one that does not receive enough attention from Moyn. But the third point I want to stress here is that we should reject the utopian interpretation of IHRL – we should reject the idea that IHRL is supposed to be the primary conduit for realising all of our most important human values. So, even if leftist critics like Moyn can articulate a compelling egalitarian ideal, the question will remain whether that ideal is the proper business of IHRL. It may, instead, be one of a number of eligible conceptions of social justice, none of which has a compelling claim in the abstract to be realized through IHRL. We cannot assume that any such egalitarian ideal is the proper business of IHRL on the illusory basis that everything of great value reduces to human rights.

Both criticisms from the left and the right, I have said, could be parried if IHRL were properly responsive to the circumscribed objective described by the FAT. As an anecdotal matter, however, it's worth observing that whereas criticisms along the lines that 'IHRL is overshooting in its ambitions' are often regarded by insiders as heretical, criticisms that it is 'not doing enough' usually get a much more receptive hearing. This is not just because it is those nominally associated politically with 'the right' that are prone to make criticisms of the former kind. This asymmetry in response, I believe, also reflects the misguided totalizing ambitions of many in the human rights movement, hence their reluctance to accept that not everything of great value is a matter of human rights or to be pursued through IHRL. It is this totalizing ambition, above all, that needs to be discarded as a prelude to a proper understanding of both human rights morality and IHRL.

4. Legalization and Judicialization

Let me turn now to the second way in which I foreshadowed that contemporary IHRL strays from the FAT: through the unjustified legalization or judicialization of human rights morality. I begin with legalization before turning to judicialization. Many have argued that it belongs to the very nature of human rights that they are oriented towards legalization, in that affirming the existence of a norm of human rights morality carries the implication that there is at least a

pro tanto case for its legal enactment: whether as law generally (Raz), as constitutional law (Habermas), or as part of IHRL (Buchanan). By contrast, I have argued, following the lead of Amartya Sen, that we do better to resist the idea that there is a conceptual link between human rights morality and human rights law of any of these kinds.⁴⁴ But leaving this rather abstract conceptual question aside, there is the substantive question of whether or not, all things considered, a given aspect of human rights morality should be pursued through any particular mode of legal ordering at a given time and place. Recall that, according to the FAT, there are both principled and pragmatic constraints bearing on the question whether some component of human rights morality should be enshrined in, or given effect through IHRL. One pragmatic constraint relates to whether IHRL will actually work to bring about increased compliance with human rights morality or will, instead, be neutral or even counter-productive in its effect. So, to focus our discussion, let us consider the question of whether joining a multilateral human rights treaty regime enhances compliance by member states.

Empirical investigations into this question generate an interesting conundrum. On the one hand, the strongest evidence for a positive effect of treaty membership relates only to a sub-set of states. These do not include established liberal democracies or autocratic regimes – the best and worst performers with regard to human rights compliance, one might plausibly suppose – but rather the group of states that are moderately democratic or transitioning towards democracy after a period of turmoil, such as a civil war. This was the finding of Beth Simmons' ground-breaking book *Mobilizing for Human Rights*.⁴⁵ We need not be detained here by questions about the mechanisms through which this improvement in performance is achieved, suffice to say that Simmons and others strongly emphasize the impact of treaties on domestic politics and litigation rather than on the workings of external, 'white knight' interventions by other states or international organisations.⁴⁶ Hence the significance of a state's possessing a quasi-democratic character in channelling the influence of IHRL into state policy and conduct.

⁴⁴ J. Raz, 'Human Rights Without Foundations', in S. Besson and J. Tasiouals (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010); Habermas; Buchanan, *The Heart of Human Rights*; Amartya Sen, 'Human Rights and the Limits of Law', *Cardozo Law Review* (2005-6) 27: 2913; Tasioulas, 'On the Nature of Human Rights'.

⁴⁵ Beth Simmons, *Mobilizing for Human Rights* (CUP, 2009). A somewhat different way of identifying the states that are most benefit is formulated by Guzman and Linos: they are those states who are close to, but below, the relevant international legal human rights norm. Andrew Guzman and Katerina Linos, 'Human Rights Backsliding', *California Law Review* (2014) 102: 603-654, p.646.

⁴⁶ 'The real politics of change is likely to occur at the domestic level', Simmons, *Mobilizing for Human Rights*, pp.125-6.

However, in addition to this positive effect, there is also evidence of backsliding – of deterioration in compliance with human rights relative to what it was or might have been domestically for a given state – when high-performing states, especially democratic states that are highly integrated into the international legal order, join human rights treaties. In an original and richly suggestive article, Andrew Guzman and Katerina Linos set out some cases of backsliding,⁴⁷ including how membership of the European Convention on Human Rights has had various negative effects on the rights of criminal defendants and gay people in the United Kingdom and on welfare entitlements in Sweden. Guzman and Linos claim that the existence of backsliding explains various human rights-related phenomena, including the reluctance of high-performing states to join human rights treaties and the emergence of regional human rights regimes (since such regimes will typically involve less gaping discrepancies in human rights performance among participating states than international regimes, thereby diminishing the threat of backsliding). Guzman and Linos argue these effects occur also beyond the treaty context, for example in relation to customary international law and ‘soft law’ norms as well, since such norms can also shape the views of some domestic political agents and enhance their influence at the expense of others. This means that the phenomenon of backsliding cannot be localized to situations in which there is state consent to the international norms in question, as in the multilateral treaty scenario.

Now, the overall phenomenon that potentially emerges here is what has been aptly termed a ‘race to the middle’: as some poorer performing states are lifted upwards by a human rights treaty, high-performing states are pulled down.⁴⁸ More importantly, the two phenomena of uplift and backsliding are intimately related. On the one hand, the very same democratic or quasi-democratic domestic mechanisms that lead to human rights improvements in the case of poorer-performing states can also lead to deteriorations in performance in the case of higher-performing states.⁴⁹ On the other hand, one cannot simply respond to this situation by excluding high-performing states from such treaty regimes, since their beneficial effect on poorer-performing states appears to be significantly dependent on the participation of the former.⁵⁰

⁴⁷ Andrew Guzman and Katerina Linos, ‘Human Rights Backsliding’, *California Law Review* (2014) 102: 603-654.

⁴⁸ Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* p.75; pp.192-3.

⁴⁹ Guzman and Linos, ‘Human Rights Backsliding’, p.638

⁵⁰ Guzman and Linos, ‘Human Rights Backsliding’, pp.647-8.

This is a troubling scenario derived from empirical investigation into how human rights treaty regimes actually work, one that calls into question the complacent assumption that human rights laws have an exclusively positive effect on human rights compliance across the board. In the remainder of this discussion, I will simply assume that this ‘race to the middle’ exists, recognizing that whether it does so is a matter of controversy that needs to be settled through the deployment of skills beyond those of the professional philosopher. One observation worth making, however, is that Guzman and Linos are not immune to the tendency to identify human rights with underlying interests that I criticized in the previous section. This arguably leads them to exaggerate the incidence and extent of backsliding insofar as they are prepared to find that it has occurred whenever there is a reduction in the fulfilment of interests even without addressing the question whether this reduction breaches any obligation generated by those interests.⁵¹ However, I shall leave such concerns aside and simply assume that backsliding is a real possibility in order to raise two questions about it.

The first is what can be done to mitigate, or even eliminate, the risk of human rights backsliding by higher performing states? Here there is an interesting proposal by Guzman and Linos that opposes the general drift of my argument in the earlier parts of this article. They claim that one way to ‘eliminate’ the risk of human rights backsliding is by having human rights standards in treaties that are ‘maximal’: standards that are very hard or impossible to meet even by high-performing states:

A demanding norm – perhaps even one that exceeds every country’s existing practice – reduces the associated backsliding costs because it reduces the number of states for which the international norm is less demanding than their ex ante domestic policy. In the most extreme cases, such as the CEDAW requirement that states take “all appropriate measures... to modify the social and cultural patterns of conduct of men and women,” the number of such countries may be reduced to zero, which eliminates the risk of backsliding completely.⁵²

⁵¹ The conflation of rights and interests is suggested at various points in their article, e.g. in their talk of ‘infinite provision of the right’ (p.626), ‘greatest improvements to human welfare’ (p.648) as well as in their proposal that maximal specifications of human rights in law will eliminate backsliding (p.653).

⁵² Guzman and Linos, ‘Human Rights Backsliding’, p.653, see also p.614.

However, they concede that this solution would come at a cost, since maximal standards would diminish the extent to which poor performers can be influenced to improve their compliance with human rights, given that such influence will only operate on states that do not fall far short of the relevant international norm.

The idea that having ‘maximal’ standards in treaties eliminates the risk of backsliding, however, seems very questionable. First of all, if a standard is so ‘maximal’ that it is virtually impossible for high-performing states ever to meet – like General Comment 14’s ambitious ‘minimum core obligations’ associated with the human right to health, which we encountered previously – then it is unlikely to embody the demands of human rights morality.⁵³ Human rights morality imposes a set of obligations that it is feasible, in general, for states to meet. Meeting those obligations is a moral demand, not a mere aspiration; failure to meet them is a wrong, not an inevitable disappointment. ‘Maximal’ standards, by contrast, seem more like aspirations. To this concern, the reply may come: “Why worry if the ‘maximal’ standard goes far beyond the content of the relevant human rights? Won’t it be the case that by striving to meet that maximal standard states are unlikely to do worse in human rights terms than they were doing before joining the treaty?” There are two main reasons why this hypothesis is misguided.

First, in seeking to advance human rights by means of a maximal, aspirational norm, one creates a conflict in human rights consciousness. Human rights are supposed to be moral demands that are feasible and that it is morally wrong to violate; maximal standards will include many elements that are neither of these things. The risk is that casting human rights law in aspirational terms discredits the very idea of human rights, promoting a sense of disenchantment and cynicism, or at least laxity, that is detrimental to our commitment to the morality of human rights and, indirectly, to our compliance with it.⁵⁴ Second, and more importantly, a maximal human rights norm will presumably encompass some elements that are genuinely human rights demands and some that are not. But given that the maximal norm cannot be realistically fully complied with, a state must inevitably choose which of its

⁵³ Guzman and Linos sometimes characterize ‘maximal’ norms in a more moderate way, as embodying standards not state currently complies with, rather than standards that are all-but impossible to meet. My argument does not apply to this more moderate characterization, since it seems to me that it may well be the case that there are many moral human rights norms that are not currently fully complied with by any state.

⁵⁴ For a perceptive discussion of the problems that arise when a large and chronically persistent gap opens up between the content of IHRL and actual state practice, see Shany, *The Universality of Human Rights*, pp.8-12.

components to meet and which to leave unmet. The risk is great that a state will choose to fulfil a merely aspirational component of the norm at the expense of a component that genuinely reflects a human right. This might occur not only within the components of a single maximal norm, but also between different maximal norms, such as the rights to health and to education. So, for example, faced with resource limitations, a state might choose to provide cosmetic surgery – an aspirational component – at the expense of adequate provision of secondary education – a rights-based component. It would then be complying with human rights law, but backsliding in terms of human rights morality.

I turn now to the second question prompted by the phenomenon of backsliding. Assume that backsliding by high performing states as a result of joining a human rights treaty cannot be eliminated. This is a reason, *pro tanto*, for such states not to join these treaties. On the other hand, there remains the fact that a treaty regime would have a positive effect on poor performing states. Let us assume that this positive effect is partly conditional on high-performing states also joining the treaty regime. Now, the question that arises here is whether it is acceptable for a government to join a treaty regime, reasonably anticipating that it will lead to backsliding domestically, but to justify its decision on the basis of the human rights benefits to citizens of other states?⁵⁵ The question is not fanciful – it is precisely the way in which many British judges justify the United Kingdom’s membership of the European Convention on Human Rights. In order to answer this question, we have to decide how to weigh the human rights of our own citizens against those of citizens of other countries.

One line of thought is that a state should give *absolute priority* to the human rights of its own citizens. No gains in the human rights of foreigners can be achieved at the expense of human rights losses at home. When it comes to human rights, it is “fellow citizens first”. When I was teaching a graduate class on human rights recently, I was somewhat surprised to discover that this was the overwhelming answer given by my students, all of whom were in some broad sense “pro human rights”. But it has its difficulties, especially when you consider that the obligations associated with human rights vary greatly in importance despite all arising from moral rights possessed by all human beings simply in virtue of their humanity. If membership of a human rights treaty will bring a significant reduction in the torture and degrading treatment

⁵⁵ Of course, if Guzman and Linos are right, this worry will extend beyond treaty norms to customary law and soft law which can have a ‘backsliding’ effect on a state even if it has not consented to them. But I leave this issue to one side.

of prisoners in foreign lands, does the fact that it might have some negative effects domestically at the margins of the right to free speech really preclude joining the treaty?

At the other extreme, one might argue that when it comes to human rights, the human rights of all should count equally; if human rights are at stake, we should treat people entirely *sub specie humanitatis*. No priority whatsoever should be accorded to our fellow citizens simply in virtue of the fact that they are fellow citizens. A state would therefore be justified, perhaps required, to join a human rights treaty if it has a net positive effect on human rights compliance by states parties, even if this came at the cost of serious backsliding at home. Like the absolute priority view, however, this *no priority* view is strong medicine. It is perhaps most plausible if the set of human rights were highly constrained, limited to such rights as the right not to be tortured or enslaved. But on a more expansive reading of human rights, it seems very hard to sustain against the plausible thought that states have a special responsibility for their own citizens, which requires them to accord extra weight to their rights, even if not absolute weight. Presumably, the thought that states have a special responsibility to advance the rights and welfare of their own citizens lies at the core of much of the populist revolt against forms of economic globalization that – very arguably – have helped raise the living standards of some of the very poorest people on earth.

So, the middle ground proposal is that states should give a weighted but not absolute priority to the fulfilment of their own citizens' human rights. The difficulty, of course, is in specifying the added weight and justifying it. The justification, presumably, would be sought in the special value of membership of a political community and, in consequence, the special responsibility that governments have to the members of their community. That special value is a function, broadly, of the intrinsic and instrumental value of membership of a community. Moreover, this value partly encompasses human rights concerns. Arguably, the right to a nationality and to democratic participation are partly grounded in the intrinsic value to individuals of community membership. Equally, it can be argued that one form of political community – the state – is the most effective instrument for the realization of human rights in the world today. Hence, the extra weighting accorded to fellow citizens' rights would not merely reflect the force of communitarian, non-human rights values.

My strong inclination is to accept a version of the weighted priority view. However, I don't claim to have provided an answer to the challenge arising from the asymmetric distributional

effects across states of human rights treaties. But once we see that human rights law has to be assessed by reference to a background human rights morality, and its implications for such a morality cannot be assumed always to be positive, it is precisely such difficult questions with which we need to wrestle. Unfortunately, there is little evidence that advocates of the legalization of human rights morality have done so, leaving them open to objections along the lines that human rights treaties unjustifiably sacrifice the rights and interests of domestic constituencies.

I turn now from legalization to judicialization. That human rights norms are given effect through some legal system or other is one thing (legalization), that these norms may be upheld through judicial procedures of some sort (judicialization) is another. Again, for many a serious commitment to human rights morality involves a commitment not only to the legalization of its norms but also their effective justiciability. It is a powerful theme in contemporary human rights theory and practice that rights, especially human rights, are the special province of the courts. On a crude, but influential, version of this account attributable to Ronald Dworkin, legislatures deal with matters of policy, which concern maximizing the fulfilment of the interests or preferences of citizens, while courts are forums of principle in which rights that set a limit to the pursuit of the general welfare are identified, interpreted and applied to the specific circumstances of a case. But this attempt to solder certain categories of values to corresponding types of institutions (legislature/welfare, courts/rights) is misguided, as is the idea that rights essentially protect minorities from majorities.⁵⁶ This is partly for the reason, broached earlier in this article, that the idea that rights stand in a dichotomous and generally antagonistic relationship to the general welfare or the common good is a profound error. But here I want to explore another strain in this crude picture, which is the assumption that giving adequate effect to rights entails rendering them justiciable. The matter is complicated by the fact that there are different forms of justiciability, but I will focus on the relatively strong form according to which a right is justiciable if its possessor is empowered to seek their entitlements under the right in question to be granted to them by means of a judicial decision upholding that right.

I think there is much to be learned, in this connection, from the way in which the Constitutional Court of South Africa has engaged with socio-economic rights, including minimum core

⁵⁶ Some prevailing myths of this kind are nicely exposed in G. Webber et. Al. (eds.), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018), Introduction (by Gregoire Webber and Paul Yowell). See also John Finnis, 'Judicial Power: Past, Present and Future', p.19ff.

obligations associated with various socio-economic rights enshrined in the constitution. As I have argued elsewhere, what can be found in the South African jurisprudence is a combination of three elements: (a) a rejection of any justiciable claim to be immediately furnished with the content of one's socio-economic rights, including that covered by minimum core obligations; (b) an acknowledgement that the doctrine of minimum core may nonetheless be relevant to the all-things-considered test of reasonableness in realizing the relevant rights; and (c) a general failure by the Court *explicitly* to articulate, or even rely upon, specific minimum core obligations in reaching its decisions. Notwithstanding (c), however, it is possible that the minimum core doctrine may be implicit in some of the decisions – especially those that involve fulfilment of the right to health insofar as it addresses *urgent needs* (*Grootboom*), as well as various forms of *unjustified exclusions* (*TAC No.2*).⁵⁷

This interpretation of the relevant South African jurisprudence contradicts those commentators who argue that the Court has preferred a test of reasonableness in regard to the fulfilment of socio-economic rights to the idea of minimum core obligations.⁵⁸ Quite apart from posing a false opposition between minimum core obligations and the test of reasonableness, these latter interpretations seem to be in thrall to the mistaken idea that properly affirming the existence of a human right entails rendering it justiciable in the strong sense of justiciability described above. In reality, there are many practical and principled considerations that stand in the way of that simplistic inference. A key passage that helps us understand why this is so can be found in the Court's judgment in *Minister for Health v Treatment Action Campaign* (No.2):

It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards... should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demand on the public purse... Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. Such

⁵⁷ John Tasioulas, *The Minimum Core of the Human Right to Health*, p.18

⁵⁸ E.J. Broster, 'Litigating the Right to Health Care in South Africa', in E. Durojaye (ed), *Litigating the Right to Health in Africa: Challenges and Prospects*, p.116 and Eric Posner, *The Twilight of Human Rights Law* (OUP, 2014), pp87-8.

determinations of reasonableness may in fact have budgetary implications, but are not themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.⁵⁹

Expanding somewhat on this paragraph, we can identify at least four significant limitations on the idea of strong justiciability in relation to human rights claims, especially those grounded in socio-economic rights such as the human right to health. I will assume that part and parcel of any such justiciability will be a strong role for courts in determining the content of abstract and open-ended human rights provisions. To begin with, there are constraints on judicial expertise, itself formed by legal education, experience of legal practice and of judging, when it comes to specifying the content of human rights and the best means for securing that content. The process of specification would not only require an adequate grasp of the interests in play, but also of the costs that would be incurred in fulfilling those interests by means of an obligation of a particular shape, including the appropriateness of distributing those costs in various ways across the different members of society, and in addition a grasp of the best policies for implementing those obligations. Of course, the issue of cost arises with respect to all human rights, whether they belong to the category of civil and political rights or else to economic, social and cultural rights. Nonetheless, it poses an especially acute problem for rights of the latter kind, both because of the relative lack of a long-standing judicial tradition of engaging with such rights in most jurisdictions, but also because the process for determining whether the benefit to the right-holder justifies incurring the costs of a given obligation is generally a more complex one in their case. Of course, it is not the mere existence of these constraints that is at issue here, but whether they bear more heavily on judges than on legislators. This is, at least, a matter to be determined case by case, depending on an assessment of the capabilities of the various governmental organs in different jurisdictions, rather than one in which there is a presumption in favour of superior judicial competence.

A second limitation on the making human rights strongly justiciable should be recognized that is independent of the first. Even if courts are just as good, or even better, than legislatures in specifying the content of human rights and the institutional means for their realisation, enabling

⁵⁹ *Minister for Health v Treatment Action Campaign* (No.2) CCT 8/02 (2002), paras. 37-38, see also paras 93-114 (Court held that the government policy of restricting the use of nevirapine, an antiretroviral drug used to combat mother-to-child transmission of HIV, to research and training sites, unreasonably excluded individuals in the case of which such treatment was medically indicated). Although this decision required the government to revise its policy on access to nevirapine, the Court stressed that this did not mean that 'everyone can immediately claim access to such treatment, although the ideal... is to achieve that goal' (para.125).

litigants to claim their entitlements under those rights in court may be counter-productive so far as overall compliance with human rights is concerned. A dramatic illustration of this is the experience of certain Latin American jurisdictions, such as Brazil and Colombia, in which there are strongly justiciable constitutional rights to health. Rather than enhancing the fulfilment of this right, justiciability has had the opposite effect due to contextual economic and social factors bearing on people's access to justice. Wealthier individuals are better-placed to exercise their human rights entitlements, insofar as they are better informed and more able to bear the costs of litigation, than less well-off individuals. The upshot, given an overall static or non-expanding health budget, is that more scarce resources are used to benefit better-off people at the expense of the poor than would otherwise be the case, irrespective of the comparative weight of the human rights considerations.⁶⁰

A third limitation arises out of the essentially law-creating function countenanced by the strong judicial role in relation to human rights. One problem is that, in conflict with the rule of law, this undermines the ability of courts credibly to present themselves as fundamentally law-applying bodies within an overall constitutional structure that includes a legislature. Courts will be robbed of their legitimacy insofar as they come to assume the role of retrospective law-makers, or are widely perceived to have done so. It is no answer to say this problem is obviated so long as courts are good at arriving at with correct specifications of the content of human rights. This is because it is highly unlikely that there is a single correct specification of a workable human rights standard in each case, which means that inevitably a choice will need to be made to adopt one eligible formulation of the human right from a range of others. Of course, there are ways to mitigate this problem, such as according such judicial decisions only prospective effect. But still a fourth problem would remain: that such law-making is not democratic in character, which for many is a litmus test of law's legitimacy. Again, much here will depend on the details of the particular scheme of justiciability that is in play, and in particular whether judicial determinations of human rights can be overturned or amended by democratically elected bodies or by democratic referendums. But even leaving aside the compromised legitimacy of law that is not subject to robust democratic accountability, there is still the more diffuse point that the vitality of the human rights ethos in a democratic society

⁶⁰ See, for example. Octavio L. M. Ferraz, 'Health Inequalities, Rights and Courts: The Social Impact of the "Judicialization" of Health' in A.E. Yamin and S. Gloppen (eds), *Litigating Health Rights: Can courts bring more justice to health* (Cambridge MA: Harvard University Press, 2011) (regarding Brazil) and David Landau, 'The Reality of Social Rights Enforcement', *Harvard International Law Journal* 53 (2012): 189 (regarding Colombia).

will be sapped by having human rights matters systematically decided in court proceedings rather than as part of ordinary democratic policies. This not only risks fuelling the ‘populist’ charge that human rights are the playthings of ‘elites’, trump cards they arbitrarily deploy to short-circuit the democratic process. By reducing the vast majority of citizens primarily spectators of, rather than active participants in, the politics of human rights, it also risks undercutting their general awareness of human rights matters, their commitment to such rights, and their willingness and ability to engage with them at the requisite level of sophistication. This last point resonates with what the human rights strategist, Mona Younis, has identified as the greatest flaw of the contemporary human rights movement – the privileging of expert technical expertise and the concomitant failure to engage a mobilized citizenry:

By neglecting citizen engagement, the human rights movement has failed not only to secure all rights but has put the civil and political rights already secured at risk, including in the North. Indeed, our gravest error has arguably been to imagine that we could achieve rights-respecting governments without a mobilized citizenry. We disregarded the need for movements in our efforts, despite our knowledge of the essential role of social movements in all significant social and political transformations.

61

Naturally, the four types of concerns enumerated above apply with even greater force to regional or international courts. Their very character distances them from domestic jurisdictions in ways that exacerbate the problems of competence, effectiveness, rule of law, and democratic legitimacy and ethos.

5. Conclusion

Proceeding from an account of the formative point of IHRL, as specified by the FAT, I have sought to identify challenges confronting this body of law that do not arise from sources external to it, but rather from failures on the part of its scholars and practitioners to ensure proper responsiveness to this formative point. Very tentatively, I have also suggested that some

⁶¹ Mona Younis, ‘Back to the Future: Returning to Human Rights’, *OpenGlobalRights* (November 1, 2018) <https://www.openglobalrights.org/Back-to-the-Future-returning-to-human-rights/>. Younis’ emphasis on popular social movements, as opposed to elite agendas, in driving progressive social change echoes a theme developed at length in Elizabeth Anderson, *Social Movements, Experiments in Living, and Moral Progress: Case Studies from Britain’s Abolition of Slavery*, The Lindley Lecture (University of Kansas, 2014). In addition to the failure to engage a mobilized citizenry, Younis’ insightful commentary identifies the privileging of civil and political rights over socio-economic rights, and the related privileging of Western human rights accomplishments over those outside the West, as the three major failures of the contemporary (Western) human rights movement.

of the external frustrations with IHRL – those often ascribed to a ‘populist backlash’ – may be partly explicable as themselves responses to these internal failures. The internal problems I have identified are located on two broad levels: the first – the conflation of rights and interests – arises at the level of the overarching point of IHRL; the second – the uncritical enthusiasm for legalization and judicialization – relates to the institutional embodiment of human rights norms. Inevitably, I have been highly selective in the illustrations I have given of these problems; inevitably, also, I have had to pass over other varieties of deviation from the FAT that doubtless arise at both of these levels. Beyond that, I believe that some of the most significant deviations from the FAT occur at a third level – that concerned with appropriate responses to violations of IHRL. In this connection, I have in mind especially the tendency of IHRL to be recruited both in campaigns to expand the legal grounds for military intervention and to restrict or eliminate the scope of immunity to criminal prosecution for human rights violations. Both of these developments are erosions of state sovereignty partly caused by the increasing dominance in recent years of IHRL within the international legal order.⁶² As a result, it is also not difficult to see both developments as triggering a backlash on the part of those anxious to resist any such erosion. But pursuing these speculations is a task for another day. Harking back to the outward-looking diagnoses of the challenges confronting IHRL of Alston and Zeid from which we began, I hope that this article has given credence to the thought that human rights also need to be saved from many of their avowed friends, and not just from their sworn enemies.

⁶² For a compelling exploration of some of these issues, see Ingrid Wuerth, ‘International Law in the Post-Human Rights Era’ (2017) 96 *Texas Law Review*. This article is impressively sensitive both to the concerns that motivate the FAT and to the fact that IHRL is, in principle, only one among various mechanisms, legal and non-legal, for realizing human rights morality.