

WHAT CAN WE LEARN FROM A CLASH BETWEEN A PHILOSOPHER AND AN HISTORIAN?

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THE PHILOSOPHY OF HUMAN RIGHTS:

ITS ROLE IN GLOBAL JUSTICE

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WHAT CAN WE LEARN FROM A CLASH BETWEEN A PHILOSOPHER AND AN HISTORIAN?

“Moyn’s argument serves as an important provocation for philosophers, one that forces them to address productive questions about the role of philosophy in the study and advancement of human rights, and about the role of history in philosophy.” – Adam Etinson, *Human Rights: Moral or Political?*¹

“... productive cross-disciplinary dialogue on this apparently common subject-matter is not easily achieved.”
– John Tasioulas, *Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn*²

“The evil in the world comes almost always from ignorance, and goodwill can cause as much damage as ill-will if it is not enlightened ... there is no true goodness or fine love without the greatest possible degree of clear-sightedness.” – Albert Camus, *The Plague*³

What is the role of philosophy in the human rights project?⁴ And what is the role of human rights in creating a better world? These are the questions at the core of a dispute between the philosopher John Tasioulas and the historian Samuel Moyn, although it takes considerable work to see past the cross-talk and arrive at this core. In this paper I will show that disentangling the arguments of Moyn and Tasioulas is a fruitful task that lights a path

1. Adam Etinson, ‘Introduction’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 1, 10.

2. John Tasioulas, ‘Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 88, 88.

3. Albert Camus, *The Plague* (Penguin Modern Classics, first published 1947, 2001 ed), 100-1.

4. The ‘human rights project’ can be loosely defined as the efforts to ensure every human has minimum standards of living, be those standards political, economic, social, or otherwise (for example, minimum standards of health, minimum standards of political liberty, minimum standards of nutrition). As we will see in this essay, the definition of ‘human rights’ is contested.

towards advancing both human rights and global justice. Specifically, I will show that while human rights play a crucial role in bettering the world, it is in the interests of global justice for that role to be strictly delimited. Philosophers of human rights are necessary for this process of delimitation. The irony is that Moyn, instead of discrediting philosophers of human rights, actually helps us to better understand the urgency of their work.

Before discussing the disagreement between Tasioulas and Moyn, it helps to outline their respective views. Chapter 1 of my paper begins by detailing Tasioulas's problems with the philosophical inquiries into human rights thus far, which leads into an explanation of Tasioulas's orthodox 'threshold' theory of the correct normative grounds of human rights. Tasioulas's theory is important to this paper as a working example of the ways philosophers delimit the boundaries of human rights. Next, I explain Moyn's revisionist history of human rights. Moyn claims, in short, that human rights idealism emerged as an antipolitical 'utopia' during the 1970s as other political utopias – communism, nationalism – were losing support. Having laid the groundwork, I proceed to reconstruct the clash between Moyn and Tasioulas. I trace the dispute through several works – beginning with Moyn's *The Last Utopia*,⁵ then Tasioulas's *Towards a Philosophy of Human Rights*,⁶ on to Moyn's *Human Rights in Heaven* and finally Tasioulas's *Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn*.⁷ The argument between Tasioulas and Moyn has been interpreted as a version of the functionalist versus orthodox philosophical debate over human rights, but I reject that interpretation. I conclude Chapter 1 by arguing that much of the disagreement can be explained away as cross-talk caused by mutual miscomprehension, which in turn can be explained by the philosopher and the historian focusing on vastly different meanings of

5. Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 1st edition, 2010).

6. John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65(1) *Current Legal Problems* 1.

7. The last two papers appear together in an edited collection, *Human Rights: Moral or Political?*, published 15 March 2018 by Oxford University Press. The editor of that collection, Adam Etinson, was kind enough to supply me with preview materials from that collection.

‘human rights’.

Moyn and Tasioulas’s inquiries are not so different, though, that their disagreement is entirely cross-talk. By the very fact of their arguing both thinkers implicitly acknowledge the value of interdisciplinary dialogue. In Chapter 2, with the help of new work by Moyn,⁸ I identify the historian’s main grievance with the modern human rights as being what he calls the “capture” of global idealism by human rights.⁹ The problem with this ‘capture’ is that it doesn’t allow for other visions of global justice to flourish, which has meant that human rights have had an “accommodating relationship” with the massive rise in wealth inequality since the 1970s.¹⁰ Understanding Moyn’s true problem with the human rights project allows us to appreciate the reasons behind his attacks on philosophers: if Moyn is correct about the unintended consequences of human rights advocacy, then it would seem that Tasioulas’s (and other human rights philosophers’) concern with correct normative grounding is trivial and distracting.

Chapter 3 looks at how philosophers of human rights ought to respond to Moyn’s challenge in a way that might save them from the charge of irrelevance, and, at the same time, save the human rights movement from the “unacceptable fate” of leaving the world “more humane but enduringly unequal”.¹¹ Can human rights simply incorporate the more maximal aims of other global idealisms – such as the aim to have a ceiling on material inequality – into the language of human rights? I explain why this incorporation is not a valid extension of human rights, and, more generally, why the impulse to expand human rights is misguided. I then argue that this type of expansion is in fact an example of problem that

8. Samuel Moyn kindly provided me with a draft copy of the introduction to his new book *Not Enough: Human Rights in an Unequal World*, and Harvard University Press sent me an advance copy of the book prior to its official publication in April 2018.

9. Samuel Moyn, ‘After Utopia?’, *The Utopian* (online), 25 June 2012 <<http://www.the-utopian.org/post/16860148496/after-utopia>>.

10. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 1st edition, 2018), 10.

11. *Ibid* 11.

concerns both Tasioulas and Moyn: the problem of human rights ‘proliferation’. Proliferation – using the language of human rights to advance counterfeit or over-inflated human rights claims – is the reason why philosophers are so concerned to find the correct grounding of human rights, and, I argue, a mechanism behind human rights’ ‘capture’ of global idealism. If I am correct, then the role of human rights philosophers becomes clear: to provide the tools by which we can distinguish real human rights claims from over-inflated ones. This distinction must be drawn if we are to fight back against the outwards creep of human rights utopianism and leave room for other frameworks of global justice. Of course, this is work philosophers of human rights have always done. But now, thanks to Moyn, we can pinpoint exactly why that work is so important. I conclude Chapter 3 by anticipating and responding to two potential criticisms of my paper – an empirical criticism and a Marxist criticism.

I will show my thesis in action in Chapter 4, where I narrow my focus to the human right to health. The right to health is an example of a right that is often over-inflated in the way that ought to concern both Moyn and Tasioulas. In this chapter I set Tasioulas’ threshold theory to work in identifying points of over-inflation, and, following that, outline the practical detriments and benefits of a tightly defined human right to health. As anticipated, one significant benefit is that reining in rights over-inflation allows us to clearly see the ways that global health policy can and should be advanced through non-rights-based frameworks. Applying my thesis to the real world illustrates my argument, but also raises two new objections, which I answer.

The aim of this paper is to learn all we can from the clash between the two thinkers. I believe that this approach pays off: by attending closely to Moyn's genealogy of human rights, we are able to move past the thundering archetype of human rights as unimpeachable moral precepts, and to think more critically about their role in the world. The contribution of this

paper is to recalibrate our understanding of the relationship between human rights and utopianism, and to reassert the relevance of philosophy in the human rights project.

Chapter 1

TASIOULAS

A key task of the philosophy of human rights is the search for *what is special* about human rights which makes them distinct from other moral claims (also known as the search for the *nature* of human rights). Philosophers of human rights are divided on the question of nature. On one side are the functionalist philosophers, who believe that human rights are what they do; on the other side are the orthodox philosophers, who believe that the function of human rights is irrelevant to their nature, and instead argue that the concept of human rights is a moral concept that can be understood independently from political structures.

Let us begin with functionalism. It is strange that human rights functionalism originates from John Rawls, considering that his work in the 1970s, the era when human rights gained prominence, did not mention human rights. Rawls's concern was with individual rights, and his *The Law of Peoples* (updated in 1999 to include the now-popular language of human rights) advanced the theory that human rights are individual rights that operate on the international level, and as such ought to be understood by reference to their

international political functions.¹² What these functions are has since become a matter of debate. At the time, Rawls argued that the distinctive function of human rights was that they helped to set the necessary conditions of legitimacy for domestic governments, and that the breach of such rights by a domestic government was a trigger for external military intervention. Followers of Rawls agree on the substance of human rights as international individual rights, but differ on the details of their functions. For example, Ronald Dworkin claimed that human rights function as the sufficient conditions of a legitimate government.¹³ Joseph Raz claims that human rights function as a limit on the impregnability of state sovereignty.¹⁴ Beitz takes human rights as triggers of international ‘concern’.¹⁵ For all of these philosophers, the common belief is that it is not possible to understand human rights independently of their international political embodiment.¹⁶ One way to understand functionalist philosophers is to say they give conceptual significance to what is new about post-World War II human rights. On the functionalist understanding, human rights are political yardsticks for measuring moral standards, made distinct by their important role in international life.

Conversely, orthodox philosophers deny that the post-war incarnation of human rights as international standards has any conceptual bearing on what distinguishes human rights from other claims. Basically, the argument is that functionalist philosophers, looking at human rights through the keyhole of international politics, have a limited view of the concept. Human rights can and do perform the functions listed above, but orthodox

12. John Rawls, *The Law of Peoples* (Harvard University Press, first published 1971, 1999 ed).

13. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 1st edition, 2011), cited in Tasioulas, ‘Towards of Philosophy of Human Rights’, above n 6, 19.

14. Joseph Raz, ‘Human Rights without Foundations’, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 1st edition, 2010), cited in Tasioulas, ‘Towards of Philosophy of Human Rights’, above n 6, 19.

15. Beitz, Charles, *The Idea of Human Rights* (Oxford University Press, 1st edition, 2009), cited in Tasioulas, ‘Towards of Philosophy of Human Rights’, above n 6, 22 n 33.

16. Note that the term ‘political’ view of human rights is also used interchangeably with ‘functionalist view’. In this essay I will use the term ‘functionalist’.

philosophers such as Tasioulas claim that the functionalists make an error when asserting that these political functions are an essential part of the concept of human rights. As Tasioulas argues: “Whether and to what extent a particular human right should play any such political role is a matter for substantive argument; it is not something constitutive of its nature as a human right.”¹⁷ Instead, orthodox philosophers of human rights make the claim that human rights are rights which attach to people simply by virtue of their being human.

For reasons that will become clear, I favour the orthodox view of human rights. But the neat orthodox formulation of the nature of rights – that they are rights which attach to people by virtue of their humanity – is not the end of the matter, and instead raises many more questions, foremost among them the question of justification. If human rights aren’t justified by their valuable contribution to an international political system, then what *are* they explained by? In other words, what are the *grounds* of human rights that justify these distinctive moral claims and the wrongness attached to breaching them? And what takes a claim from being a preference about the state of the world to being a human right? That is, what is the proper *content* of human rights?

As Adam Etinson states, the question of grounds exerts logical pressure on the question of content: if human rights are justified by certain facts about humans, then only those moral rights which are genuinely connected to those facts will qualify as human rights.¹⁸ Answering the questions of grounds and content is important because, as Martti Koskenniemi says, “everyone has a great interest in translating their preferences into rights. Without an authoritative list of such preferences, however, there is no limit to the translation process.”¹⁹ Clarity over the question of grounds and content is crucial, otherwise anybody

17. Tasioulas, ‘Towards a Philosophy of Human Rights’, above n 6, 18.

18. Etinson, ‘Introduction’, above n 1, 10.

19. Martti Koskenniemi, ‘Rights, History, Critique’, in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 41, 41-2.

will be able to assert that their personal preferences are owed to them as a matter of human rights, and there will be no principled way to disqualify fake or inflated claims. What Koskenniemi identifies is the problem of human rights ‘proliferation’ (also known as human rights inflation) – the tendency to translate all political claims into the language of human rights, thereby stretching the usage of the term. (The classic example is the African Charter’s human right to world peace. There are several examples of proliferation related to the human right to health, which I will get to in Chapter 4.)

Philosophers are alarmed by proliferation because it creates risk of an unacceptable vagueness and diluted urgency. As I will show later in this paper, those concerns pale next to other potential consequences of human rights over-inflation. Still, abstract concern about proliferation has motivated a large body of philosophical work on the search for the proper grounds (and hence the correct content) of human rights. As Tasioulas puts it, philosophers “present themselves as injecting a vital measure of quality control”.²⁰ This task is one that is well suited to the skills of philosophers, and they have flocked to it.

But Tasioulas thinks that, in their eagerness, philosophers have made a serious mistake in their search for the foundations of human rights. They have tried to find in human rights a *special, distinctive grounding* which separates human rights from all other moral claims. This search for special grounds upon which to rest human rights distorts our understanding rather than clarifying it, Tasioulas argues. One distortion comes from the orthodox philosophers who believe that this special grounding is linked to some kind of intrinsic metaphysical *status* carried by all human (for example, ‘human dignity’). On the other hand are the orthodox philosophers who believe that our *interests* ought to play an exclusive role in the justification of human rights (such as our interest in having our basic needs fulfilled, or our interest in agency). For reasons it is unnecessary to go into here,

20. Tasioulas, ‘Towards a Philosophy of Human Rights’, above n 6, 4.

neither of these accounts is adequate: there is more to human rights than protecting human dignity or certain pre-ordained interests.

Tasioulas's contribution is to introduce his own theory for the justification of human rights: the threshold theory, which accepts both status and interests as part of the plural foundations of human rights. The schema Tasioulas proposes is as such:

- i. In a given historical context, all human beings, simply in virtue of their humanity, have a basic interest in having X (where X is the object of the proposed right).
- ii. The interest for all human beings in having X is sufficiently important that it justifies the imposition of duties on others.
- iii. These duties are feasible claims on others, given the constraints within the historical context.

If the above three points are satisfied, then all human beings within the specified historical context will have a human right to X.²¹

The virtue of Tasioulas's threshold view is in its pluralism; its recognition that the grounds of human rights are multiple. The human right to be free from torture is grounded in each individual's interest in autonomy, true, as well as other universal interests like being free from suffering and being able to form trusting relationships with others.²² The human right to political participation is grounded in our interests in autonomy, accomplishment, bodily security, fairness, and liberty, among others. So long as an interest is universal, it can, along with other universal interests, form part of the justification for a human right. The 'intellectual rigour' that philosophers desire comes from the operation of the threshold – the requirement that the weight of the interests must be such that it justifies the imposition of the

21. John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 1st edition, 2015) 45, 50-1.

22. John Tasioulas and Effy Vayena, 'Just Global Health: Integrating Human Rights and Common Goods' in Thom Brooks (ed), *The Oxford Handbook of Global Justice* (Oxford University Press, forthcoming), 8.

attendant duty to X being owed to all human beings.²³

Another strength of Tasioulas's view is in its fidelity to the reality of human rights practice. Of course, it has become a cliché for philosophers (and historians) of human rights to claim 'fidelity to human rights practice', and then to propose wildly different theories of human rights based on wildly different understandings of the subject. What this demonstrates, I believe, is not that philosophers have bad eyes for reality, but that the reality of human rights is complex and multifaceted. Viewed from a slightly different angle, or from the same angle on a different day, the subject matter of 'human rights' will appear different. To settle on one interpretation of human rights practice as the correct one will be to immediately distort your work away from the complexity of reality. As Annabel Brett writes, "the present-day 'human rights phenomenon' is amorphous ... human rights are different things to different people, and to insist that they are one thing and not the other is immediately to take either a political or a philosophical position (or both)."²⁴ Where some philosophers – especially functionalists – go wrong is to found their theories on a fixed idea of what human rights are (for example, Beitz, a functionalist, takes as his starting point that human rights are "constitutive norms of global practice").²⁵

What makes Tasioulas different from these philosophers? Tasioulas does not claim fidelity to some (likely unknowable) 'canonical' view of human rights practice; rather, he claims fidelity to the very multiplicity of the topic. When Jacques Maritain, one of the five drafters of the Universal Declaration of Human Rights (UDHR), was interviewed about the document, he said "We agree about the rights but on the condition that no one asks us

23. Tasioulas, 'Towards a Philosophy of Human Rights', above n 6, 13.

24. Brett, Annabel, 'Doing Without an Original: A Commentary on Martti Koskenniemi', in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 61, 61. See also Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126(7) *Harvard Law Review* 2043, 2078.

25. Beitz, Charles, *The Idea of Human Rights* (Oxford University Press, 1st edition, 2009) 197, cited in John Tasioulas, 'On the Nature of Human Rights', in Gerhard Ernst, Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (Walter de Gruyter) 17, 52.

why.”²⁶ For every human right, whether codified or not, there are multiple interests supporting the right, and, furthermore, a multiplicity of ways that the right could be put to use – as a standard of intervention, an aspirational statement, a basis for a legal right, or as a rallying-cry for advocates, to name some common functions.

Tasioulas’s flexible theory accommodates all of these “multiple functions and plural justifications”.²⁷ For Tasioulas, human rights have no special essence, no “highly distinctive grounding”²⁸ – rather, it is the weight of the moral interests, the universality of those interests, and their ability to fit within a rights-duties structure that transforms a moral claim into a right which attaches to all people. In this way, Tasioulas’s theory gives us the tools to parse between genuine and non-genuine human rights. Tasioulas’s threshold theory of human rights will be the working philosophical theory of human rights of this paper.

MOYN

Samuel Moyn is currently a professor of law and history at Yale, and the author of *The Last Utopia*. The main claim of Moyn’s book is that human rights only achieved popularity as an influential language of global politics in the 1970s. *The Last Utopia* is a key text informing my thesis, so I will take the time to explain Moyn’s argument in some detail.

To make his argument successfully, Moyn first has to dispatch with the received wisdom that modern human rights were born with the UDHR in 1948 in a moment of post-war Holocaust consciousness and have been gradually gaining prominence ever since. Moyn acknowledges that the phrase “human rights” was used on the world stage for the first time during World War II by Franklin Roosevelt, but he contends that it was used as a rhetorical

26. Moyn, *The Last Utopia*, above n 5, 67.

27. Flynn, Jeffrey, ‘Genealogies of Human Rights: What’s at Stake?’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 103, 108.

28. Tasioulas, ‘On the Foundations of Human Rights’, above n 21, 70.

device to galvanise the United States' war efforts, and as such "entered history as a throwaway idea, not a well-considered idea."²⁹ Following the end of the war, the priority of the Allied leaders was to create collective security via the balancing of political power, and not to "moralize (let alone legalize) the world."³⁰ The overriding aim, Moyn argues, was the survival of the United Nations, not the creation of universal minimum rights. Human rights were mentioned in the United Nations Charter as "one symbolic element in the public rollout ... part of the rhetorical drive to distinguish the organization from prior instances of great power balance."³¹ The symbolic role of human rights makes sense of the fact that the Universal Declaration of 1948 was non-enforceable, and Moyn makes the comment that the ability to achieve consensus on the itemisation of rights "suggests that little was at stake in the proceedings".³²

Human rights did not catch on culturally in the 1940s, either. Moyn's explanation for this lack of uptake is that the idea of rights "solved no problems"³³ during the "heroic [post-WWII] age of the national welfare states". Rights, after all, promised only a minimum standard of life, and therefore had no purchase on the important debate between the competing ideals of society, national welfarism and communism.³⁴ Moyn's conclusion about the Holocaust-born human rights myth is that the story is based on a false, "depoliticised" understanding of the post-war period.³⁵ The *real* story of human rights idealism has more recent origins.

Moyn's core claim is that human rights emerged in the 1970s as an alternative utopia which transcended politics when the other political utopias of the era – revolutionary

29. Moyn, *The Last Utopia*, above n 5, 51.

30. Ibid 56.

31. Ibid 57-9.

32. Ibid 63.

33. Ibid 72.

34. Samuel Moyn, 'Do Human Rights Increase Inequality?', *The Chronicle of Higher Education* (online), 26 May 2015 <<https://www.chronicle.com/article/Do-Human-Rights-Increase/230297>>. See also Moyn, *The Last Utopia*, above n 5, 73; Moyn, *Not Enough*, above n 10, 59.

35. Moyn, *That Last Utopia*, above n 5, 83.

communism and interventionist nationalism – fell into moral disrepute. There is an element of coincidence to the rise of human rights: at the same time that Peter Benenson, the founder of Amnesty International, was pioneering a model of activism which claimed to be above politics, the romance of so-called Marxist humanism was collapsing into violent repression and the vacuum was being filled by dissidents engaged in a ‘moral struggle’ against Soviet power.³⁶ Across the Atlantic, in what Moyn calls “one of those extraordinary convergences in which history is made,” Jimmy Carter – a coalitional Democratic candidate who ran a campaign notable for its promises of a moral transcendence of politics – declared in his 1977 inaugural address that human rights would become the organising principle of the U.S.’s foreign policy (likely an attempt to recover the moral authority that America had lost during its engagement in the Vietnam War). Moyn describes Carter’s speech as putting human rights “in front of the viewing public for the first time in American history” and “embed[ding] it for the first time in popular consciousness and ordinary language.”³⁷ As additional evidence for his claim Moyn uses the simple metric of counting the frequency with which the term “human rights” appeared in the *New York Times*, the graph of which shows a cliff-like escalation in 1977.³⁸ This was also the year that Amnesty International was awarded the Nobel Peace Prize. Moyn calls 1977 “the breakthrough year” for human rights.³⁹

In Moyn’s own words, his view can be summarised as such:

“Human rights were preferable because they were strategically necessary and practically feasible but also because they were morally pure. The disavowal of earlier utopias took place in part out of the aspiration to achieve through a moral critique of politics the sense of a pure cause that had once been sought in politics itself.”⁴⁰

36. Ibid 129-132 and 136.

37. Ibid 155.

38. Ibid 231.

39. Ibid 122.

40. Ibid 171.

By the 1970s politics had become so soiled and compromised that human rights became what politics could no longer be: a language of hope and idealism.

THE DISAGREEMENT

How does the work of Moyn and Tasioulas help us to better understand the role of human rights in global justice? To answer that question, I will examine how and why the two thinkers clashed. The disagreement between Moyn and Tasioulas has its starting point in the epilogue of Moyn's *The Last Utopia*, published in 2010. In the very first line of that chapter Moyn disparages "the myths of deep origins", a myth that makes the rise of human rights seem inevitable, and which Moyn thinks ought not to be part of the human rights story.⁴¹ Whether or not Moyn meant it, his disavowal of human rights' "deep origins" maps onto the orthodox versus functionalist debate within philosophy, and clearly aligns with the side of the functionalists. Like the functionalists, Moyn places an exclusive emphasis on the post-WWII developments of human rights. In his epilogue Moyn criticises philosophers for "obscur[ing] the essential novelty of human rights".⁴² It is easy to see the similarities between Moyn and the functionalists, and to see how Moyn's flamboyant language could lead him to be seen as an adherent of functionalism.

Moyn's opening salvos, as imprecise as they are, led to a volley of papers between himself and John Tasioulas. In *Towards a Philosophy of Human Rights* (2012) Tasioulas argues that Moyn's revised history of human rights has been "led astray by functionalism, especially the version which interprets human rights as essentially limitations on state sovereignty or triggers for some kind of international action".⁴³ Tasioulas's reply is that

41. Moyn, *The Last Utopia*, above n 5, 212.

42. Ibid 215.

43. Tasioulas, 'Towards a Philosophy of Human Rights', above n 6, 27.

post-war human rights – when properly understood as moral rights which attach to humans by virtue of their humanity – “presents strong continuities between human rights and the traditional idea of natural rights.”⁴⁴ Both human rights and natural rights attach to individuals by virtue of their humanity, and while the *application* of the concept to the world may have changed, the concept has remained consistent.

Moyn’s reply comes in a paper titled *Human Rights in Heaven* (first published 2014), in which he refers to Tasioulas’s view as “antediluvian” and warns that the philosopher “distracts from political challenges” if he exchanges historical inquiry for philosophical reassurance about the “sempiternal nature” of human rights.⁴⁵ The problem, according to Moyn, is that philosophers are chasing principle at the cost of contributing to practice. This wrong turn in the philosophy of human rights owes to Rawls’s conflation of human rights with international political standards in his book *The Law of Peoples*.⁴⁶ Since then, Moyn argues, the ‘mission’ of human rights philosophers has been “saving human rights from John Rawls”.⁴⁷ In responding to Rawls, Tasioulas and others like him have been overzealous in pursuit of the orthodox case, obeying the “Platonic imperative to defunctionalize human rights” in their search for clarity of human rights norms, “whether or not useful to anyone”.⁴⁸ Whether or not Rawls was correct, in arguing over Rawls’s theory philosophers have forgotten that their work ought to have practical value. Moyn is scathing of the philosophical search for moral validity: “Important as normative inquiry is for philosophers and scholars generally, it does not appear that human rights practice needs it much.”⁴⁹

What the practice *does* need, Moyn argues in *Human Rights in Heaven*, is a reckoning

44. Ibid 26.

45. Samuel Moyn, ‘Human Rights in Heaven’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 1st edition, 2018) 69, 78 and 77.

46. Rawls, *The Law of Peoples*, above n 12.

47. Moyn, ‘Human Rights in Heaven’, above n 45, 71.

48. Ibid 81.

49. Ibid 85.

with its questionable origins. Seeing human rights as an historically contingent political enterprise allows us to overcome the dead-end of equating human rights with divine moral principles, unimpeachable and exempt from criticism. History shows us that the rise of human rights was not inevitable, and, moreover, that human rights displaced other ‘utopias’ during their rise to prominence in the 1970s. This insight allows us step outside of the blind worship of human rights and finally have “a debate about what sort of utopianism to endorse”.⁵⁰ According to Moyn, philosophers have not come close to this debate – “not by a long shot”.⁵¹

Tasioulas, in a response to Moyn titled *Philosophizing the Real World of Human Rights* (also first published 2014), stated dryly that Moyn’s contribution shows that “productive cross-disciplinary dialogue on this apparently common subject-matter is not easily achieved.”⁵² Tasioulas’s reply is that neither philosophers nor human rights are claiming to save the world single-handedly, and nor should they be judged on such grandiose criteria. Human rights are only “one globally relevant kind of norm among others”,⁵³ and the tendency of philosophers to focus on philosophical questions of human rights does not entail any disrespect for all of the other questions relating to them.⁵⁴ The role of philosophy within the wider human rights project is, Tasioulas states, to “offer conceptual and normative arguments that provide a basis for a clear-sighted and justified commitment to human rights, as well as a general framework within which important practical questions for the pursuit of human rights can be formulated and addressed.”⁵⁵ The practical questions Tasioulas refers to, and which philosophers can also help to resolve, include question of: the proper specification

50. Ibid 86.

51. Ibid 85.

52. Tasioulas, ‘A Reply to Samuel Moyn’, above n 2, 88.

53. Ibid 93.

54. “[N]o aspersions are cast on the validity of the questions they tend to ignore ...”: Tasioulas, ‘A Reply to Samuel Moyn’, above n 2, 88.

55. Ibid, above n 2, 95.

and allocation of duties; the ways to resolve clashes between human rights and other moral values; the accommodation of cultural differences when implementing human rights; and the principles which ought to guide the institutional embodiment of human rights, among other questions.⁵⁶ It should go without saying that these practical questions need to be solved in order to advance human rights and global justice. At the same time, Tasioulas reminds Moyn that while sound normative principles are necessary for answering these practical questions, they will not be sufficient: “philosophy is but one of the disciplinary perspectives on which we need to draw.”⁵⁷

As for Moyn’s scepticism about whether human rights are the utopia we ought to be aiming for, Tasioulas replies that his philosophical work is “not a cheerleading exercise”.⁵⁸ But if we are properly evaluate human rights then we must first understand the complex philosophical justifications for human rights.⁵⁹ Tasioulas clearly believes that Moyn is taking an unfairly one-dimensional view of human rights, and states that Moyn “obviously adheres to some yet-to-be fully specified version of the political view of contemporary human rights discourse”.⁶⁰

THE CROSS-TALK

The tussle between Moyn and Tasioulas resembles that between functionalist and orthodox philosophers, but I want to assert that the two debates are not the same. While Tasioulas is an orthodox philosopher, Moyn is not a functionalist. Human rights functionalism is a conceptual claim: to reiterate, it is the belief that the functions which human rights serve in

56. Ibid 94.

57. Ibid 94.

58. Ibid 90.

59. Ibid 89.

60. Ibid 91.

international politics are essential to the very concept of human rights. But just because Moyn is interested in the same time period as the functionalists, it does not mean that he adopts their conceptual claim. Indeed, as one commentator states, “Moyn need not take any position at all on the essential nature or meaning of human rights in order to do history, nor is it clear that he has.”⁶¹ The confusion is understandable, of course; as noted above, Moyn tends to use phrases like “the essential novelty of human rights” loosely, which has led others to conclude that his view is more conceptually extreme than it is. This extreme interpretation is typified by Philip Alston’s characterisation of Moyn’s view as a “big bang theory” of human rights.⁶² If Moyn is really saying that human rights arose as a new phenomenon in the 1970s, then this can only be conceptually true if by ‘human rights’ Moyn is referring to the new international legal rights that entered into force during that decade.

Alston’s characterisation is wrong: Moyn’s point is explicitly *not* that human rights emerged *sui generis* in the 1970s, but rather that it was only during this decade that the idea of human rights (the conceptual origins of which Moyn doesn’t show much concern for) came to dominate the world stage as the new language of global idealism. Any doubt that Moyn is taking the side of the functionalists in the conceptual debate over the nature of human rights should be put to rest by *Human Rights in Heaven*, in which Moyn writes:

*“Tasioulas and Waldron seem correct that, from abstract enough a point of view, human rights share much with rights traditions that preceded them. Who ever doubted it?”*⁶³

That last aside – ‘Who ever doubted it?’ – makes it clear that the conceptual debate is of scant relevance to Moyn, and that Moyn’s focus is elsewhere.

61. Flynn, ‘Genealogies of Human Rights: What’s at Stake?’, above n 27, 108.

62. Philip Alston, ‘Does the Past Matter? On the Origins of Human Rights’ (2013) 126(7) *Harvard Law Review* 2043, 2076.

63. Moyn, ‘Human Rights in Heaven’, above n 45, 76.

What *is* Moyn's focus? Moyn writes that Tasioulas's desire for the unity of rights movements across history does not "absolve historians from charting the changing functions and rise in salience of human rights".⁶⁴ The word 'salience' is the big hint as to why Tasioulas and Moyn become ensnarled in cross-talk. To explain the importance of Moyn's emphasis on 'salience', I will introduce a new framework for understanding the work of historians.

In a clarifying article written in 2012, Moyn identifies three enterprises historians can undertake: substance history, scalar history, and salience history. As applied to human rights, substance history traces the content or concept of rights (such as the back-story of particular rights, or the history of the idea that rights might attach to individual subjects). Scalar history charts human rights' geographical and geopolitical applications (for example, national versus international). Salience history looks at the impact and uptake of an idea. Moyn describes salience history as tracking "the prominence and believability of human rights as a language of political ideology, manoeuvring, and struggle".⁶⁵

With this trifurcation in mind, it is clear that salience history is the main game of Moyn's *The Last Utopia*. Moyn is not making the substance-historical claim (as Tasioulas seems to think he is) that the concept of human rights didn't exist before 1970. When Moyn states that "human rights as a powerful transnational ideal and movement have distinctive origins of a much more recent date", his words need to be read closely.⁶⁶ He is not claiming that the concept or content (the *substance*) of post-war human rights is new; but that rights only recently became a powerful transnational ideal and movement. Moyn is interested in that way that the concept of human rights has held sway or visibility at certain times throughout history.

Understood this way, the claim of Moyn's *The Last Utopia* isn't really a conceptual

64. Ibid 77.

65. Samuel Moyn, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights' (2012) 8 *Annual Review of Law and Social Science* 123, 125.

66. Moyn, *The Last Utopia*, above n 5, 7.

claim at all, but a revision to the modern history of human rights. To restate: Moyn's core argument is that it was only in the 1970s – not the 1940s – that human rights became the new vessel of idealism. (Of course, Moyn doesn't eliminate the significance of the 1940s altogether. *The Last Utopia* also makes the scalar-historical claim that prior to World War II rights operated at the level of the nation state, and it was only when they were declared to be part of international law in the 1940s that rights made the scalar move beyond the nation. In this, Moyn follows Hannah Arendt's famous analysis of rights in *The Origins of Totalitarianism*.⁶⁷) Moyn's salience point is simply that human rights emerged as a notable language with which to advance moral claims much later than we think.

As opposed to Moyn, Tasioulas is squarely interested in the substance history of human rights, when he is interested in the history of human rights at all. When Tasioulas writes that he “reject[s] the increasingly popular view that the Universal Declaration ushered in a new concept, one marking a radical departure from the natural rights tradition”⁶⁸ he is making a claim that the rights tradition has been continuous in its concept, its substance. As for the post-war developments of the rights tradition – the 1940s scalar shift of rights into the international sphere or the massively increased salience of human rights in the 1970s – Tasioulas denies that these changes in uptake have any significance to the substantive concept of human rights. When Moyn refers to Tasioulas's “abstract enough point of view”, we can assume that Moyn is referring to Tasioulas's substance-historical view of human rights.

Thus, it appears that the clash between Moyn and Tasioulas is mostly one of mutual miscomprehension. Moyn is interested in human rights as a social movement (“the core

67. Arendt, Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, first published 1951, 1973 ed).

68. Tasioulas, ‘Towards a Philosophy of Human Rights’, above n 6, 26.

language of a new politics of humanity”),⁶⁹ whereas Tasioulas’s focus is on the normative core behind human rights (he characterises his work as a “conceptual investigation”).⁷⁰ If I can put it another way, Moyn is interested in the expansion of the borders of the human rights movement, and in the way that movement maps onto the terrain of idealism and politics. Tasioulas is mainly concerned with what goes on inside the borders; with how the nation of human rights governs itself.

Note that I say *mostly* a clash of miscomprehension. The picture I have painted above – of two thinkers in parallel ruts – is unedifying. Both Moyn and Tasioulas are, after all, working towards the same goal: the progress of global justice. And both implicitly acknowledge, by the very fact of their arguing, that this goal is one that requires a coalition of disciplines. The distinction between substance history and salience history is helpful to the task of teasing apart the arguments of Moyn and Tasioulas and achieving clarity as to where they are engaged in cross-talk, but the question still remains: is there more than cross-talk? There might still be a genuine disagreement between the two, the identification of which may illuminate the proper role of human rights in the world.

Our best chance to identify this genuine disagreement, if there is one, lies with understanding Moyn’s position more so than it does with understanding Tasioulas’s. Throughout their disagreement, Tasioulas is single-minded and clear in justifying the orthodox philosophical position against Moyn’s perceived functionalism. But as shown above, Moyn’s view does not map onto that debate. Moyn’s work is somewhat grander in scope: his concern is with the questions that arise when you look past the supra-moral façade of human rights and examine their origins. A closer examination of Moyn’s work, and the reasons for his suspect attitude towards human rights, will occupy the next chapter of this

69. Moyn, *The Last Utopia*, above n 5, 227.

70. Tasioulas, ‘A Reply to Samuel Moyn’, above n 2, 89.

paper.

Chapter 2

THE *REAL* DISAGREEMENT

In *Human Rights in Heaven* – the main site of Moyn’s attack against Tasioulas – the historian makes a claim that is, at first, confusing. Moyn argues that, if he is right and the growth of human rights in the 1970s was due to their strategic antipolitical disguise, then “the main quandary about human rights now, one that philosophers as much as anyone else are eligible to solve, is whether and how to correct them normatively and practically.”⁷¹ Moyn’s claim is vague: what, exactly, is there to correct?

I am not the only one to note Moyn’s vagueness. In Tasioulas’s *Reply* to Moyn, he refers to Moyn’s “very general formulation of his dissatisfaction with the contemporary philosophical human rights scene”.⁷² This generality on Moyn’s part is, I believe, a main reason why the conversation between the historian and the philosopher often feels fruitless. It is impossible for Tasioulas to respond to Moyn’s ‘main quandary’ about human rights when

71. Moyn, ‘Human Rights in Heaven’, above n 45, 84.

72. Tasioulas, ‘A Reply to Samuel Moyn’, above n 2, 95.

Tasioulas doesn't know what that quandary is.

A good starting point in the attempt to identify Moyn's 'main quandary' is to look into the significance of Moyn's thesis about the 1970s being the breakthrough decade for human rights. In *Human Rights in Heaven* Moyn seems especially irritated by any suggestion that his revisionist history of human rights might be "mere trivia".⁷³ Moyn is right to deny that his argument is trivial, but at the same time it *is* true that in *The Last Utopia* his main focus is on establishing the validity of his revised, 1970s-centric view of human rights, rather than explaining its relevance. It is only recently that Moyn has fully applied himself to explaining the relevance of his revised history, and it is Moyn's new book, *Not Enough*, that finally illuminates the significance of his earlier work. *The Last Utopia* and *Not Enough* can be thought of as parts one and two of Moyn's wider thesis on human rights.

Moyn begins *Not Enough* with the story of Zdena Tominová, a dissident playwright from communist Czechoslovakia who gave a speech in Dublin in 1981. Tominová was a human rights activist, and also a strong proponent of socialism. Her speech argued that human rights need not be abandoned in the pursuit of economic progress, and that nor should human rights activism detract from the cause of material equality. "Decades later," Moyn writes, "Tominová's speech looks ironic."⁷⁴

Moyn's argument throughout *Not Enough* is that the timing of human rights' rise in the 1970s is relevant because it coincided with the rise of market fundamentalism and a new, ongoing period of massive wealth inequality. The era of human rights has also been "a golden age for the rich", owing partly to the fact that the aim of human rights is sufficiency, not equality.⁷⁵ The point Moyn makes is that the sufficiency-based language of human rights

73. Moyn, 'Human Rights in Heaven', above n 45, 75.

74. Moyn, *Not Enough*, above n 10, 2.

75. *Ibid* 5.

isn't capable of criticising a ballooning gap in material inequality. In their narrow quest to provide enough and no more, human rights have "become a worldwide slogan in a time of downsized ambition".⁷⁶ "The biggest reason that human rights have been a powerless companion of market fundamentalism," Moyn writes, "is that they simply have nothing to say about inequality."⁷⁷

Moyn again uses a frequency graph to demonstrate the inverse relationship between the popularity of the term 'human rights' and the fall of the term 'socialism'⁷⁸ – evidence, Moyn claims, that any aim of egalitarianism has been quietly dropped for the more modest aim of sufficientarianism. Human rights (and the philosophers who espouse them) aim too low – and in their low ambitions they have allowed injustices above the threshold of human rights to flourish.

There is an obvious response to Moyn's attack on human rights as companions of neoliberalism: namely, that the content of human rights doesn't pretend to address material inequality, nor do human rights pretend to be an exclusive system of global morality.⁷⁹ Human rights aren't claiming to save the world single-handedly. This is a point that Tasioulas makes in *Philosophizing the Real World of Human Rights*, in response to Moyn's characterisation of human rights as a 'totalizing ideology'. Tasioulas writes that "[i]t is doubtful, however, that a charitable construal of human rights morality would conceptually

76. Moyn, *Not Enough*, above n 10, 5.

77. Moyn, *Not Enough*, above n 10, 216.

78. Moyn uses a graph generated by Google's Ngram viewer, which tracks the appearance of phrases in English-language books. See Moyn, *Not Enough*, above n 10, 182.

79. In this essay I use the terms 'neoliberalism' and 'market fundamentalism' interchangeably. This is not an essay on neoliberalism, per se, so I hope that the reader arrives with some prior understanding of the concept, and its connection with the growth of distributional inequality. I use the term 'distributional inequality' (or material inequality, or wealth inequality) to refer to the economic gap between the rich and the poor, within nations and also globally. This gap has widened exponentially since market fundamentalism took hold of world economies from the 1970s onwards. For a good, accessible primer on this topic I recommend: Stephen Metcalf, 'Neoliberalism: the idea that swallowed the world', *The Guardian* (online), 18 August 2017 <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>>.

lumber it with such grandiose aspirations.”⁸⁰ Under a charitable reading human rights “would be one globally relevant kind of norm among others.”⁸¹ Human rights do not address material inequality because they don’t try to; that’s a job for another type of norm.

But this reply does not understand the full scope of Moyn’s argument. Recall that in *The Last Utopia* Moyn argued that human rights activism adopted an antipolitical image in the 1970s, and it was this that led to the breakthrough of human rights. This aura of moral transcendence allowed human rights to succeed where the utopias of communism and nationalism were losing credibility: “Human rights are best understood as survivors: the god that did not fail while other political ideologies did.”⁸² But this ‘survival’ of human rights was not passive – it did not occur by luck or chance. Rather, human rights took an active, ‘strategic’ route to power.

One of the main players in the strategic rise of human rights’ influence was Amnesty International (AI), who practiced human rights advocacy that was conspicuously antipolitical (for example, each local chapter of AI focused its advocacy on three prisoners, one each from the first world, second world, and third world).⁸³ In the words of AI founder Peter Benenson, AI’s antipolitical strategy served to “absorb the latent enthusiasm of great numbers of idealists who have, since the eclipse of Socialism, become increasingly frustrated; similarly it is geared to appeal to the young searching for an ideal...”⁸⁴ The choice to market human rights as a moral struggle was also a way to avoid the messiness of “political struggle, which would inevitably incite people to violence, sectarianism, and frenzy.”⁸⁵

Human rights, then, arose as a vessel for idealism that allowed people to be

80. Tasioulas, ‘A Reply to Samuel Moyn’, above n 2, 93.

81. Ibid.

82. Moyn, *The Last Utopia*, above n 5, 5.

83. Ibid 132.

84. Ibid 130.

85. These are the words of Andrei Sakharov, a dissident Soviet physicist, quoted in Moyn, *The Last Utopia*, above n 5, 139.

aspirational without requiring them to countenance violence. When you understand these “Machiavellian”⁸⁶ origins, Moyn argues, it becomes possible to understand that human rights have become a catch-all idealism and have dominated the language of idealism in a way that does not allow space for the uptake of other visions of global justice. What is more, because of this hollow ‘strategic’ route to power – offering the promise of morality without the mess of politics – Moyn argues that human rights have been a success on the rhetorical level and not much else.⁸⁷ As he has written elsewhere, “[i]nternational human rights captured the utopian imagination”⁸⁸ ‘Captured’ is not meant as a compliment. When Moyn refers to human rights as ‘the last utopia’, I believe that what he really means is that human rights are our only remaining idealism, not in theory, but in practice.

To complete the thought: if human rights are not, in practice, one globally relevant norm among others, but have effectively dominated the field, then it *is* a dire problem if our last remaining language of idealism is incapable of addressing perhaps the most pressing concern of global justice: wealth inequality. Moyn’s point across *The Last Utopia* and *Not Enough* is that human rights’ ‘capture’ of our global imaginations coincided, disastrously, with the rise of market fundamentalism. The massive wealth inequality caused by market fundamentalism has meant that human rights’ aspiration for sufficiency is itself insufficient: we need higher ambitions.

Let me say a few more words about the ‘capture’ of global idealism by human rights as a way of clarifying Moyn’s dislike for philosophers. Jeffrey Flynn of Fordham University characterises Moyn’s work as a ‘genealogy’ of human rights. Genealogy, according to Flynn,

86. Moyn, ‘Human Rights in Heaven’, above n 45, 84.

87. “[Human rights] have done far more to transform the terrain of idealism than they have the world itself”: Moyn, *The Last Utopia*, above n 5, 9.

88. Moyn, ‘After Utopia?’, above n 9.

is more than a mere search for origins. It is a critical philosophical tool that has two ‘classic’ moves: the “historicizing move” and the “challenge to the identity of the readers”.⁸⁹ The first move reveals the contingent roots and roots of an historical phenomenon. The second move gives an account of the ways in which *we ourselves* have been shaped by history, and the ways in which our commitments may have been altered or limited by historical phenomenon.

In another paper published in the same volume that Moyn and Tasioulas have their disagreement, Martti Koskenniemi argues that human rights bring with them an “intellectual dead end”.⁹⁰ As human rights have overtaken our idealism, their claims to moral transcendence have obscured *our own* ability to see that this is what they have done.

I take it to be Moyn’s point that philosophers of human rights contribute to this intellectual dead end. Moyn’s work forces us to overcome this dead end by placing human rights in their historical context. Orthodox human rights philosophers, in contrast, deliberately abstract human rights from their context. Their aim in doing so is to develop a theory of human rights that is not conceptually tied to mutable institutions, but the result is still a decontextualisation of human rights. This decontextualisation obscures the historical contingency of human rights’ rise, when it is absolutely vital to understand the conditions of this rise in order to understand human rights’ problematic relationship with neoliberalism. No wonder Moyn accuses Tasioulas and other philosophers of “distracting from political challenges” with their focus on the corrective normative grounds of human rights.⁹¹ Hence Moyn’s ‘main quandary’: if human rights are not actually doing much good in the world (and are, in fact, detracting from other efforts to improve the world) how do we correct them?

We can escape the cross-talk between Moyn and Tasioulas by widening our scope to include

89. Flynn, ‘Genealogies of Human Rights’, above n 27, 110.

90. Koskenniemi, ‘Rights, History, Critique’, above n 19, 56.

91. Moyn, ‘Human Rights in Heaven’, above n 45, 78.

Moyn's most recent work, *Not Enough*. In that book Moyn makes clear the problem with human rights; namely, that their 'capture' of global idealism coincided with the rise of neoliberalism and massive wealth inequality, which human rights are incapable of addressing.

Now that we have properly understood Moyn's concern, how should philosophers of human rights respond to the broadside attack that their work is a mere 'distraction'? And can human rights somehow 'correct' themselves so they no longer detract from the campaign against distributional inequality? These questions will occupy the next chapter my paper, and in answering them I will clarify both the role of human rights in the world, and the role of philosophy in the human rights movement.

Chapter 3

HOW SHOULD PHILOSOPHERS RESPOND TO MOYN'S CHARGE THAT THEIR WORK IS A 'DISTRACTION'?

Before answering Moyn's attack on philosophers of human rights and his criticisms of human rights in general, it should be noted that, while Moyn's argument is contentious, it would require an historian to challenge it on empirical grounds. Instead, for the purposes of this paper, I will assume his empirical claim – that human rights idealism has been somehow complicit in or accommodating of the massive spike in distributional inequality since the 1970s – is correct.

How might philosophers of human rights respond to Moyn's critique? If the contribution of human rights to material inequality is the problem, then might it be possible to save human rights (and thereby human rights philosophers) by somehow modifying human rights to become part of the fight against massive distributional inequality? For example, such a modification might take the form of a human right to distributional equality – or, more feasibly, a human right to a ceiling on material inequality. To my knowledge nobody has actually suggested a human right to a ceiling on material inequality – that is, some limit on

the size of the gap between the richest and the poorest. But the suggestion raises an interesting hypothetical: could such a claim be a viable human right? Applying Tasioulas's 'threshold' schema, the relevant questions will be:

- i. In a given historical context, do all human beings, simply in virtue of their humanity, have a basic interest in a ceiling on material inequality?
- ii. Do all human beings have an interest in a ceiling on material inequality that is sufficiently important that it justifies the imposition of duties on others?
- iii. Are these duties feasible claims on others, given the constraints within the historical context?

There is evidence to show that a ceiling on material inequality would serve universal basic interests (step i), including, directly, psychological interests.⁹² Indirectly, there is no doubt that greater distributional equality would serve the interests of the most vulnerable in having food, shelter, education, health, and so on.⁹³ It is difficult to think of interests that are more important. However, the proposal runs into serious problems at step ii. Step ii requires the weight of the interests to justify the imposition of duties on others to achieve a ceiling on inequality. Clearly the interests identified above are weighty, but the fatal rebuttal to the proposed right is that eating well and being healthy does *not* require everybody to have close to equal wealth; sufficient wealth will achieve those interests just as well.⁹⁴

92. Elizabeth Kolbert, 'Feeling Low: The psychology of inequality', *The New Yorker* (New York), 15 January 2018, 28.

93. Provided that a move towards global distributional equality does not have the side-effect of bringing about massive economic collapse – and there is no reason to believe that this would be the case. As I understand it, the economic consensus is that raising the wealth of the poorest classes is the surest way to achieve economic growth, *à la* China's rising middle class.

94. Note also that even if (ii) could be satisfied, the question of feasibility (iii) is another hurdle. For example: given that total distributional equality will be impossible under the given historical circumstances (i.e. capitalism), then what is an acceptable level of distributional inequality? Which body would be in charge of this system of global taxation? And so on.

This example demonstrates that human rights are an inherently sufficientarian mechanism. Of course, equality and sufficiency can co-exist. When civil and political human rights create duties of equal treatment (for example, the right to a fair trial, or the right to freedom from discrimination based on gender, race), these duties to status equality exist because in civil and political matters the minimum level of treatment that is acceptable *is* equal treatment. Sufficiency requires equality. But this is not the case with so-called social and economic rights: sufficiency only requires sufficiency.

So, the above attempt to try and stretch human rights to deal with distributional inequality is misguided, but it is misguided in an instructive way. I mentioned at the very start of Chapter 1 that much of the philosophy of human rights is directed towards solving the problem of any and all preferences being framed in the language of human rights: what philosophers refer to as ‘proliferation’. This proliferation, or, more broadly, inflation of human rights is the reason why philosophers are so concerned to find the correct nature and grounds of human rights; so that rights claims which are not genuine can be discarded. The example of the proposed right to a ceiling on material inequality is a moral claim that operates above the threshold of a genuine human right: that is, an example of the human rights inflation that philosophers like Tasioulas are concerned about.

RIGHTS INFLATION

I will argue in this section that Moyn, too, is concerned with human rights inflation, even though the word does not feature much in his work. While philosophers are more concerned with combating human rights proliferation than discovering its causes, Moyn’s work gives us a story that explains rights inflation. Part of Moyn’s argument in *The Last Utopia* is that human rights became the last utopia standing because they had clean hands: they were not

overtly political, and therefore did not have to make messy commitments about the correct exercise of power or violence in a situation. However, once human rights *were* the only remaining ideology, they had to make the shift “from antipolitics to political program”.⁹⁵ As I explained in Chapter 1, when no other ideologies remained to tell us how to act in the world, human rights filled the void. They have become the default language which people now use to make moral claims.

In light of Moyn’s history, the inflation of human rights can be understood as a bursting-from-the-seams of political idealisms that cannot be accommodated within the sufficientarian container of human rights. Take, for example, the African Charter’s declaration of a human right to world peace,⁹⁶ or the right to democracy found in several national constitutions.⁹⁷ Rights inflation, I argue, is the mechanism behind what Moyn calls the ‘capture’ of global idealism by the slow outwards creep of human rights language.

If *The Last Utopia* can be seen as explaining the causes of human rights inflation, then Moyn’s later work, *Not Enough*, sounds the alarm about some of its consequences. If I am right and the outwards creep of human rights idealism is responsible for the ‘capture’ of global activism – and if Moyn is right and this ‘capture’ in turn undercuts other efforts to address booming material inequality – then it follows that human rights inflation is partly to blame for human rights’ role as a handmaiden for neoliberalism.

THE ROLE OF PHILOSOPHERS

Framing Moyn’s problem of the ‘capture’ of global idealism through this lens of human rights inflation brings Tasioulas into direct conversation with Moyn, which finally allows us

95. Moyn, *The Last Utopia*, above n 5, 225.

96. *African Charter on Human and Peoples’ Rights 1981* art 12 <<http://www.achpr.org/instruments/achpr/>>.

97. David Miller, ‘Is there a human right to democracy?’ (CSSJ Working Paper No SJ032, Centre for the Study of Social Justice, Department of Politics and International Relations, University of Oxford, April 2015).

to identify the specific role of philosophers within the human rights project. To begin this task, it is helpful first of all to restate the obvious point – which arises in the work of both Moyn and Tasioulas – that human rights idealism is not enough, and that other global idealisms are necessary to address distributional inequality (as well as other global wrongs that operate above the sufficientarian threshold of human rights). Thus, part of the way forward for human rights is a clear reaffirmation of the principle that human rights ought to be one global language of idealism among others (for example, socialism or national welfarism, to name two of Moyn’s favourites). This is a principle that needs to be widely understood by activists, politicians and law-makers if human rights are not to fall victim to over-inflation. We need to understand the place of human rights in global politics.

However, if those who employ the language of human rights are to recognise that not all claims can be formulated as human rights, then there needs to be some clear way to determine which claims are and are not valid. Here is where the philosophy of human rights has its role: a robust theory of human rights is the only way to identify wrongful human rights inflation, which in turn is necessary to help prevent human rights from seeping into the territory of and damaging other global idealisms. New claims of human rights arise all the time, whether through changing circumstances or new technologies bringing with them new interests, or through politicians using the language of human rights to gain a rhetorical edge over opponents; or through the earnest desire of activists to state their case in the most morally forceful way, or otherwise. The central task of a philosophy of human rights is to guard the border between genuine, philosophically sound rights claims, and unsupportable, easily discredited claims; between rights that are valid and those that are puffery. We need to have the tools to discern which new claims are over-inflation or ‘bad’ proliferation, and which new claims might genuinely be human rights. A strong theory of human rights – such as Tasioulas’s threshold theory – provides these tools.

This is the practical significance of Tasioulas's theory, and why Moyn is wrong to attack it as a 'distraction'.⁹⁸ We can now understand that this task of discernment is important for both the integrity of human rights (something that philosophers have always been concerned about), and the general health of global idealism (something that we can see thanks to the work of Moyn).

The role I have described for the philosophy of human rights – of reining in damaging human rights inflation – is a small one, which seems right. As Tasioulas points out in his *Reply to Moyn*, philosophy is just one discipline working towards the furtherance of the human rights project – crucial work is also needed in the disciplines of law, economics, political science, psychology, history, education, and many others.⁹⁹ These disciplines are the bridge between theory and practice, without which human rights would be a mere idea. As Tasioulas says, there is no straight line between philosophy and real-world implementation, and the contours of human rights' realisation must be figured out right-by-right.¹⁰⁰ The final translation of human rights into a real-world force (whatever form that force takes, be it legal, economic, military, cultural...) will always rely on more than the work of philosophers.

In the final part of this paper, I will use the specific example of the human right to

98. I must point out that my reply to Moyn is an addition to the replies already made by Tasioulas. In his paper 'Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn', above n 2, Tasioulas argues that by clarifying the nature, grounds, and content of human rights, philosophy helps us to know exactly what we are committed to and why – so when questions of implementation *do* arise, we have "a general framework within which important practical questions for the pursuit of human rights can be formulated and addressed" (Tasioulas, 'A Reply to Samuel Moyn', above n 2, 95). Furthermore, when we discover through philosophical inquiry the multiple values behind our commitments, those moral values can give us guidance when it comes to some of those important practical questions, such as: who should bear the duties imposed by human rights?; if two human rights conflict, which should be preferred?; if human rights conflict with other considerations, which should be preferred?; how can human rights accommodate cultural differences without losing their universality? and so on. These are sound and pertinent replies, but I believe that my additional reply to Moyn is an improvement on the replies already made by Tasioulas. For one, my argument in this thesis identifies a direct contribution made by the philosophy of human rights, whereas Tasioulas's replies offer only indirect contribution to the realisation of human rights, by way of giving guidance to practical politics. My reply is also a particularly robust defence against Moyn's attacks, because it uses Moyn's own work to establish the urgency of the very discipline he attacks.

99. *Ibid* 98.

100. Tasioulas, 'A Reply to Samuel Moyn', above n 2, 94.

health to illustrate some of the ways that a sound philosophy of human rights dovetails with real-world questions of human rights' implementation. The discussion of the human right to health will also give examples of the ways in which over-inflation of human rights can undercut both human rights and other idealisms. First, however, I will anticipate and answer some criticisms that could be made of my paper thus far.

TWO OBJECTIONS

The essence of my argument is to reframe the work of Moyn so that it can be understood in terms of the philosophical language of 'proliferation' – therefore, the first criticism of my argument will be that, in reframing Moyn's work, I have done so incorrectly. I claimed that human rights inflation is a cause of the 'capture' of global idealism by human rights (and thus that philosophers have a vital role to play in fighting back this inflation). But what if I am wrong about the consequences of rights inflation?

This is an empirical criticism. One way I can reply is by pointing out that my argument for the relevance of philosophy does not require that human rights proliferation be the *only* cause of the human rights 'capture' of global idealism. Even if the proliferation of human rights language is only a small part of the problem, then philosophers will still have a proportional part to play in fighting back against proliferation.

But the critic could push back against this reply by arguing that, in fact, human rights inflation had *no* role in the historical 'capture'. As evidence for their assertion, they could point to the timeline of modern human rights. After all, Moyn's thesis (as I have re-interpreted it) is that rights inflation was the result of human rights transforming "from antipolitics to program"... but this transformation only occurred because human rights were *already* the last remaining global ideology. Therefore, rights inflation occurred *after* the

original ‘capture’ of the terrain of global idealism. I must be wrong: the ‘capture’ lead to rights inflation, and not the other way around.

What this rejoinder misses is the fact that the ‘capture’ of global idealism is ongoing. The problem with human rights today is that they have continued to stifle other idealisms from arising. It seems likely that rights inflation is part of a positive feedback loop: both a symptom of the original ‘capture’ of global idealism and the subsequent transformation from antipolitics to program, and also a mechanism that has sustained the grip that human rights has on the way we express idealism. It seems overwhelmingly likely that rights inflation has had some role in undercutting other languages of idealism since the 1970s. The exact impact of rights inflation in modern history would be a fruitful area for further research.

The second criticism is Marxist in nature. Moyn’s second book, *Not Enough*, attacks human rights for their “accommodating relationship”¹⁰¹ with market fundamentalism and unequal outcomes. However, what if the relationship is more than accommodating? What if human rights are, by their very nature, a *cause* of distributional inequality? If this is the case, then no amount of philosophical boundary-guarding will help to redeem human rights. Is it possible that human rights are an active cause of distributional inequality?

In his essay, *On the Jewish Question*, Marx argues that the original French and American declarations of the ‘rights of man’ codified an antagonism between the civic individual and the bourgeois, property-owning individual. The rights of man favour the latter, Marx argues; the ‘freedom’ that these rights protect is, in practice, the freedom to own and to dispose of property without restraint. So understood, the rights of man are the expression of bourgeois egoism, and it is this egoism which is at the root of distributional inequality.

Martti Koskenniemi makes a partial reply to this Marxist critique in his paper *Rights*,

101. Moyn, *Not Enough*, above n 10, 9.

History, Critique. In that paper, he writes of the Marxist critique that: “the spread of rights to cover goods of a collective type, including economic and social rights (however lacking in implementation), has mitigated that concern.”¹⁰² That is, the adoption of socioeconomic rights has effectively blunted Marx’s charge that rights are egoistic. This is where Moyn’s *Not Enough* enters the picture. Although social and economic human rights may mitigate the abstract Marxist concern of rights’ egoism, Moyn established that they do nothing to mitigate the practical consequences of this egoism: namely, massive inequality. And, in fact, Moyn even goes so far as to say that these new rights “humanize but [do] not overthrow”¹⁰³ market fundamentalism, meaning that the legacy of human rights may be to leave the world “more humane but enduringly unequal.”¹⁰⁴ Human rights, on this view, imagine the world in a kind of economic stasis: where people are not allowed to be poor enough for it to kill them, but where market fundamentalism will nonetheless be carnivorous and inequality unlimited.

It is plausible that human rights have ‘humanized’ and helped to lock in massive inequality in the way the Marxist critique claims. But a plausible story is not a true story. To find out whether human rights have actively contributed to distributional inequality would require a complex empirical study, one that I do not have the scope to conduct. It should be noted, however, that Moyn himself considered this question of causation in a 2015 paper and again in *Not Enough*.¹⁰⁵ In those texts Moyn makes the point that human rights *say* they will provide a floor to suffering and poverty, but one only has to look at “the simple failures of human rights in the socioeconomic domain”¹⁰⁶ to see that the practical impact of human rights (good or bad) has been minimal. Human rights could not have abetted massive inequality by holding the world in stasis because, in reality, socioeconomic human rights

102. Koskenniemi, ‘Rights, History, Critique’, above n 19, 55.

103. Moyn, *Not Enough*, above n 10, 8.

104. *Ibid* 10.

105. Moyn, Samuel, ‘Do Human Rights Increase Inequality?’, *The Chronicle of Higher Education* (online), 26 May 2015 <<https://www.chronicle.com/article/Do-Human-Rights-Increase/230297>>.

106. *Ibid*.

have never been realised. Moyn concludes that “neoliberalism, not human rights, is to blame for neoliberalism.”¹⁰⁷

107. Ibid. Also repeated in Moyn, *Not Enough*, above n 10, 192.

Chapter 4

CASE STUDY: THE HUMAN RIGHT TO HEALTH

Let us take stock of the progress of this essay. I have argued that, despite the cross-talk, the volley of arguments between Moyn and Tasioulas does boil down to a core dispute. The core dispute has to do with the role of human rights and the usefulness of the philosophy of human rights. Tasioulas obviously thinks that his philosophical work has a place; Moyn is sceptical. Moyn's scepticism is a by-product of his revisionist history of human rights. If it is true that human rights swallowed our imaginations at the precise moment that neoliberalism needed to be resisted, then we desperately need to re-evaluate the role of human rights in the world. Moyn is disparaging towards the philosophy of human rights because the field is house-bound to an inwards-looking and decontextualised analysis of human rights, when what is *really* needed is an activist critique of the impact of human rights in the world.

My thesis reasserts the practical importance of the philosophy of human rights, using Moyn's own work to sharpen our understanding of philosophy's necessity. Moyn's work helps us to see that a key quandary with human rights is in the expansiveness of the 'human rights movement'. Human rights advocacy has sucked all political aspirations under its

expanding umbra and translated [our hopes](#) for global justice into its own language (a language which is inadequate insofar as it can only advocate for sufficiency). For the advancement of global justice, we need a way to resist this distension of the human rights movement; to put rights in their place, so to speak. This is *exactly* what a good philosophy of human rights allows us to do. Tasioulas's threshold theory about the nature and grounds of human rights is aimed at separating the genuine claims of human right from the over-inflated claims. Moyn's work, then, helps us to identify the crucial role the philosophy of human rights plays in the advancement of global justice.

In this final chapter I want to show my thesis in action. The human right to health is obviously a vital right, but I argue it is also a right that has been over-inflated. This over-inflation has several practical *detriments*, which I outline. I also want to show the *benefits* of a clear definition – specifically, the way in which a disciplined definition of the human right to health gives us space to consider other crucial moral frameworks for the advancement of global health. This last part directly illustrates my main argument: while human rights have a key role to play in global justice, the philosophy of human rights has a critical task in making sure that human rights don't overstep this role, which would be to the advantage of nobody.

However, in the same way that a real-world example strengthens my argument, so too does provide fresh openings for critics like Moyn and philosopher Gopal Sreenivasan. I will raise and respond to two sceptical arguments.

Imagine a world of perfect human rights achievement. There is no torture, no capital punishment. Everybody has adequate shelter, nobody goes hungry, and nobody lacks medical treatment. Tasioulas and his co-author Effy Vayena run this thought experiment at the beginning of a recent paper, but then ask the more pointed question: in a world where the human rights of all people are fully met, “[c]ould there yet be grave health deficits in this

world?”¹⁰⁸ Clearly, yes. Tasioulas gives the examples of high obesity, a lack of organ donation, or inadequate participation in medical research as three grave health deficits that could co-exist with the universal fulfilment of the human right to health (rights cannot force people to look after their weight, nor can human rights justify a duty for people to participate in organ donation or medical research).¹⁰⁹ These are problems that exist above the sufficientarian threshold of the human rights to health. They illustrate one of the assertions of this thesis: that sufficientarian human rights are not enough.

But this should not detract from the crucial role that human rights *do* play. Whatever other values we must account for in setting a global health policy, we should always keep in mind the moral importance of providing some standard of health to every individual. As Tasioulas and Vayena write, the human right to health “inject[s] a distinctive moral dimension into policy objectives, one that is especially responsive to the plight of victims of injustice throughout the globe.”¹¹⁰

What, exactly, does the human right to health inject into policy objectives? To put it another way, what *is* the human right to health? As I identified in Chapter 1, the question of the *content* of a human right is influenced by the question of its *proper grounding*. So we must ask a prior question: what are the proper grounds of the human right to health? Here I can illustrate the operation of Tasioulas’s threshold theory of human rights. The threshold theory of human rights helps us to understand that there are plural interests which go towards grounding the right to health: primarily our intrinsic interest in being healthy, but also our interests in accomplishment, enjoyment, understanding the world, having fulfilling friendships, and so on.¹¹¹ As such (Tasioulas argues) the right to health may include entitlements that are not primarily intended to serve the bearer’s interest in health – for

108. Tasioulas and Vayena, ‘Just Global Health’, above n 22, 20.

109. *Ibid* 20.

110. *Ibid* 3.

111. *Ibid* 8.

instance, corrective cosmetic surgery for the disfigured.¹¹² Determining the exact entitlements of the human right to health will require an evaluation of whether universal *interests* in health are together weighty enough to justify crossing the threshold into *rights* claimable by everyone against duty-bearers.

The operation of the threshold will vary case-by-case for each proposed entitlement, but there are some general comments that can be made. When making the evaluation about whether interests will pass into entitlements, we must keep in mind the limitations imposed by *possibility* and *burdensomeness*.¹¹³ *Possibility* can refer to any number of considerations, since there are any number of ways that a proposed right can be impossible to fulfil: for example, physical impossibility (there can be no right to eternal life); contingent impossibility (given limited global resources, claiming a universal right to bionic limb transplants would be unsupportable); logical impossibility; metaphysical impossibility; and something which Tasioulas calls evaluative impossibility (he gives the example of an entitlement to romantic love, since love is only valuable if freely given).¹¹⁴ *Burdensomeness* requires us to look at “the joint feasibility of the supposed duties generated severally by each and every supposed right-holder”.¹¹⁵ In other words, does fulfilling the right detract too much from other values that we ought to care about? If a proposed entitlement is too burdensome, it will be disqualified as a right.

Tasioulas’s threshold theory of human rights gives us guidance in determining what the human right to health is *not*. However, beyond identifying where a claim ought to be disqualified as a genuine human right, it is difficult for philosophers to say much more about which specific entitlements will and won’t cross the threshold. As Tasioulas says:

112. Ibid 8.

113. Tasioulas, ‘On the Foundations of Human Rights’, above n 21; Tasioulas, ‘Towards a Philosophy of Human Rights’, above n 6.

114. Tasioulas, ‘Towards a Philosophy of Human Rights’, above n 6, 15-16.

115. Tasioulas, ‘On the Foundations of Human Rights’, above n 21, 60.

The specification of the content of the human right to health is evidently a formidably complex matter. In this domain as in others, a fully adequate specification through pure moral reasoning is typically unavailable; instead, a workable standard must to a significant degree be the product of social decision-making, whether conventional or legal.¹¹⁶

This passage illustrates one of my conclusions in Chapter 3 of this paper: that the role of philosophers is a small one, and that there is no straight line between a philosophy of human rights and the implementation of human rights. Philosophy sets us on the path towards recognising universal minimum standards, but the exact standards must be worked out in practice. This leap between theory and practice will be mediated by law, economics, social science, institutions, cultural shifts, political practice, and so on. The philosophy of human rights has its limits.

Even though the role of philosophy in implementation *is* limited, there are, I argue, crucial reasons why we need a philosophy of human rights. In short, my argument (in Chapter 3 of this paper) is that a philosophy of human rights is necessary for addressing the damaging over-inflation of the language of human rights.

The human right to health is one area where this over-inflation is visible. In 1966, Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) articulated the right to health as the right of everybody to enjoy “the highest attainable standard of physical and mental health”.¹¹⁷ More recently, there has been a movement to adopt a ‘radically inclusive’ understanding of the human right to health, which takes all of the social determinants of health – for example, food, housing, life, education, privacy and access

116. Tasioulas and Vayena, ‘Just Global Health’, above n 22, 17.

117. *International Covenant on Economic, Social and Cultural Rights* 1966 art 12 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>>.

to information – and claims that these social determinants should be thought of as “integral components of the right to health”.¹¹⁸ This is an interpretation peddled, influentially, by the UN Committee on Economic, Social and Cultural Rights among others.

What is so wrong with the above definitions? In the case of ICESCR’s Article 12, the requirement of “the highest attainable standard ... of health” is philosophically unsupportable. It is physically impossible to bring everybody in the world to peak health (due to, among other things, insuperable genetic defects). Moreover, it would be too normatively burdensome to do so: attaining universal peak health would presumably require massive intervention in people’s lives which would undoubtedly infringe on their human right to autonomy;¹¹⁹ and would also impose a prohibitively burdensome cost on the duty-bearers, whoever they are.¹²⁰ The ‘radically inclusive’ version of the human right to health is harder to reject. Education and other social determinants may actually have a greater impact on health than medical measures – for example, the World Health Organisation has attributed a 40% decline in women’s mortality between 1960 and 1990 to improvements in adult women’s education.¹²¹ But should we really think of the human right to education as something emanating from the human right to health? Of course not. The interests which underpin the human right to education do not simply relate to our health; they also include our interests in, for example, accomplishment and knowledge, both of which may be intelligibly pursued even if it means sacrificing our health. Trying to reframe the human right to health as some kind of ‘master right’ through which other human rights flow is a mistake. Tasioulas’s threshold theory of human rights allows us to recognise this kind of mistaken over-inflation

118. Lawrence Gostin, *Global Health Law* (Harvard University Press, 1st edition, 2014) 257, cited in Tasioulas and Vayena, ‘Just Global Health’, above n 22, 9.

119. Tasioulas and Vayena, ‘Just Global Health’, above n 22, 13.

120. An alternative interpretation of Article 12 sees the words “highest attainable” not as a demand for peak health, but as a caveat which allows for variable standards of health attainment across different countries. This interpretation also falls foul of moral requirements: the point of human rights is that they are universal.

121. Jonathan Wolff, *The Human Right to Health* (Norton, 1st edition, 2013) 94, cited in Tasioulas and Vayena, ‘Just Global Health’, above n 22, 10.

for what it is.

Our concern is not only with theory. What are the practical detriments of an over-inflated human right to health? We know from Moyn's genealogy (as interpreted in Chapter 2) that the major legacy of human rights thus far has been to dominate our visions of utopia in a way that has displaced other languages of global idealism. Focusing specifically on the human right to health, how exactly has over-inflation detracted from the wider landscape of global health policy, and from global idealism generally?

These are empirical questions, and it would take an historian to give specific answers to them. Even so, there are some general observations I can make about the types of damage right-to-health over-inflation might cause, and hence why it is important to guard against it. The over-inflation of human rights risks making the Universal Declaration of Human Rights (UDHR) redundant, which would be a bad outcome insofar as a list of human rights is a valuable thing.¹²² Enumeration is valuable for rhetorical and pragmatic reasons. Rhetorically, having a list of somewhat specific rights gives us a shorthand way to identify the distinctive moral concerns raised in cases of rights abuse. Pragmatically, when measuring the fulfilment of the human right to health, an expansive definition of that right which incorporates education levels, food security, and access to information will make measuring the fulfilment of 'health' extremely difficult. Trying to achieve health where health incorporates every known component of human well-being would be a frustrating, fruitless task. As Tasioulas argues, "progress towards such a massively sprawling goal is hard to monitor, and extremely difficult to achieve,"¹²³ and would bring advocates to "uncertainty, frustration and despair".¹²⁴

122. For completeness, I should note that some believe that the UDHR itself is an over-inflated list. The point I am making is that a list of rights is valuable, even if it isn't the exact list set out in 1948.

123. Tasioulas and Vayena, 'Just Global Health', above n 22, 11.

124. Ibid 11-12.

On the other hand, there are serious real-world benefits to having a well-defined human right to health. A properly defined understanding of the human right to health, guided by the threshold theory, helps us to set “a more determinate and manageable but still demanding target” of rights achievement.¹²⁵ Even more importantly, a precise understanding of the human right to health gives us greater clarity of the role of rights (both the right to health and other rights) in shaping global health policy. I argued in Chapter 3 that an over-inflated understanding of human rights obscures us from seeing the other ways in which global justice can be achieved. To put this conclusion into practice: when we understand that the human right to health does not require us to achieve peak health for everybody, but we still think that this is a valuable goal, then we are forced to consider other moral frameworks for working towards this aspiration.

What might these other moral frameworks be? Consider again the thought experiment at the start of this section: in a world of full human rights attainment, we could still have health deficits like obesity or lack of organ donation. You can add to this list the persistence of incurable cancers, or of stress-related illnesses, or the existence of congenital genetic defects. These hypothetical health deficits hint towards two important non-rights-based considerations of good health policy. If obesity and stress would continue even in a rights-utopia, this indicates that a good health policy must also take cues from the *duties that people owe to themselves*. And the shortage of organ donations or the persistence of diseases which could presumably be cured with better medical research points us towards the fact that a just global health policy will also work towards promoting and maintaining *common goods*.

‘Common goods’ means goods that serve the interests of all people in a uniform way, and the enjoyment of which by one person will not detract from enjoyment by others.¹²⁶ Examples of health-related common goods include things like herd immunity from diseases, a ready

125. Ibid 12.

126. Ibid 21-22.

supply of kidneys or blood, or a culture which promotes leisure or participation in medical research. Note also that a global health policy might also prioritise human rights that bear on the social determinants of health, such as the right to education. Good global health policy – concerned with what happens above the threshold of rights as well as below it – will actively promote human rights as well as common goods, the duties we owe in light of common goods, and the duties we owe to ourselves. An over-inflated version of the human right to health will obscure these other rights-based and non-rights-based considerations. For the sake of global justice, we must keep human rights in their proper place. The philosophy of human rights helps us to do just that.

I mentioned at the beginning of this chapter that an illustration of the real-world application of my thesis might also raise new objections to my argument; I will now attempt to anticipate such objections. In many ways, my choice to focus on the human right to health plays into the hands of Moyn. In *Not Enough* Moyn identifies the human right to health as a norm that was “elaborated as part of an expansion of humanitarianism after decolonization,” and one that was carried by the desire to make the globalising world more humane, without necessarily making it more fair.¹²⁷ Undoubtedly, the intention behind developing the right to health was good insofar as it sought to provide basic health care to all of humankind. But, Moyn states, “this enlargement had to work across hierarchical lines of wealth and power without challenging them.”¹²⁸ The human right to health is a paragon example of a right that sought to humanise an unequal world.

In response, I think now is a good time to point out an essential ambiguity in Moyn’s work. Moyn is abundantly clear on the problems with human rights, but less lucid on human rights’ place in the future of global justice. This should not be read as a criticism: Moyn is,

127. Moyn, *Not Enough*, above n 10, 193-94 and 197.

128. *Ibid* 198.

after all, an historian. But when Moyn *does* mention the future of human rights he sends mixed messages. At times – especially in the conclusion of *The Last Utopia* – it feels like Moyn is for the outright rejection of the human rights movement, whereas elsewhere Moyn is forgiving of human rights’ failures (in *Not Enough* he writes “None of this is to say that human rights activism is irrelevant, any more than it would indict a hammer to say it is useless for turning a screw.”)¹²⁹ It seems that Moyn has changed his mind recently and is inclined to think that the future does hold human rights, albeit in a more limited capacity. In a recent *New York Times* opinion piece, Moyn wrote that policymakers and politicians “must keep human rights in perspective”, which is essentially what I have argued in this thesis.¹³⁰ I believe there has been a recent convergence between the work of Moyn and Tasioulas. Provided that human rights distance themselves from neoliberalism, they *do* have a place in an unequal world.

There is another possible reading of Moyn’s revisionist history, which brings me to the second new objection to my thesis. Moyn specifically rejects the idea that human rights caused market fundamentalism, but he doesn’t ever rule out a necessary antagonism between human rights and collective goods. On the contrary, he states that “[t]he coexistence of the human rights phenomenon with the death of socialism, however, is a historical fact that needs to be named.”¹³¹ Is it possible that human rights, deeply individualistic, are unable to coexist with moral frameworks that emphasise common goods?

Gopal Sreenivasan has made this exact argument, at least in relation to the human right to health. While Sreenivasan is broadly sceptical that a moral human right to health exists, the relevant parts of his attack for this paper are his ‘deflationary’ arguments, as he

129. Ibid 217.

130. Samuel Moyn, ‘How Human Rights Groups Failed on Economic Inequality’, *The New York Times* (New York), 24 April 2018, A23.

131. Moyn, *Not Enough*, above n 10, 217.

calls them – arguments designed to show that even if a human right to health does exist, it contributes nothing to the wider aims of health policy. The implication is that any energy used advocating for health via human rights is energy wasted. Sreenivasan has two deflationary arguments.

Sreenivasan’s first attack points out, correctly, that we live in a world of limited resources. There are many medically effective services that *could* be provided by a system of health care, but “alas, health care rationing is a requirement of justice.”¹³² The human right to health does not help us with this rationing process – it does not help us to decide between the provision of some medical services over others (for example, funding antiretroviral therapy or cosmetic surgery), nor does it help us to balance the need for health care against other costly demands of justice (good schools, a robust legal system).

My reply to this first attack is that Sreenivasan is expecting too much from the human right to health. The human right to health is not a theory about the correct allocation of resources, except insofar as it tells us that we cannot allocate resources in such a way that individuals would miss out on minimum standards of health. Rights give negative guidance, in this respect. To see how resources ought to be allocated, we need an all-things-considered theory of justice. The human right to health will be only one important consideration among others.¹³³

Sreenivasan’s second deflationary attack begins with the argument that most, if not all, of the claims made under the human right to health are actually claims for common goods. The example Sreenivasan uses is herd immunity from diphtheria. Herd immunity protects those individuals who (for whatever reason) are not personally vaccinated against

132. Gopal Sreenivasan, ‘A Human Right to Health? Some Inconclusive Scepticism’ (2012) 86(1) *Proceedings of the Aristotelian Society Supplementary Volume* 239, 247.

133. Note also that this is yet another illustration of the need for a good philosophy of human rights: in order to balance the values contained within rights with other non-rights-based values, we will need a clear-sighted understanding of the normative grounds/values/interests underpinning a right.

diphtheria. For the benefit of herd immunity to accrue for those individuals, most of the population needs to be vaccinated. But, Sreenivasan argues, it is not possible to claim, as a matter of individual human right, that most of the population be vaccinated. The same could be said, *mutatis mutandis*, of the provision of public hospitals or an emergency ambulance service: the right of one individual does not justify the massive cost imposition on duty-bearers of providing such common goods. “[N]o individual can have a moral claim-right to any pure public good.”¹³⁴

This leads into Sreenivasan’s larger point: in the same way that the right to health does not justify public health care measures, it also does not have a justified claim on the main factors that affect well-being, namely, the social determinants of health. The greatest determinants of an individual’s health are whether they are rich or poor, educated or not. Human rights are individualistic; they cannot justify the re-engineering of society to maximise these social determinants of health. As Sreenivasan says, “the field of socially controllable causal factors needed to maximize an individual’s health outstrips the narrow intersection properly controlled by an individual’s claim-right to health.”¹³⁵ This point aligns with Moyn’s intuitions that human rights claims are a distraction at best from the real political work that needs to be done towards fixing inequality.

I have two replies to make to Sreenivasan’s second attack. The first reply (a reply made by Tasioulas and Vayena) is that Sreenivasan is wrong about the missed connection between individual rights and common goods. At the core of Sreenivasan’s argument is the claim that the human rights of an individual will never be weighty enough to justify, say, a regime of immunisation or a public health care system.¹³⁶ Sreenivasan is likely correct about this relative weighting. But his argument does not hit home, because the rights of one

134. Sreenivasan, ‘A Human Right to Health?’, above n 132, 256.

135. *Ibid* 259.

136. Tasioulas and Vayena, ‘Just Global Health’, above n 22, 22-23.

individual do not need to justify the duty on others to bear the whole cost of providing a common good.¹³⁷ As Tasioulas and Vayena pointing out, Sreenivasan “fails to duly acknowledge the fact that the right-holder is just one among many enjoying the benefits of the system.”¹³⁸ Each individual gets a benefit from the common good, and the cost of providing this benefit to each individual is only a proportion of the whole cost of providing the common good to everybody who benefits. So the real calculation that must be made is: do the interests of the individual in having the common good justify their proportion of the cost? This is a much more realistic threshold. Understood this way, a human rights framework can actually provide normative support for common goods.

My final reply to Sreenivasan is more conciliatory. The thrust of Sreenivasan’s argument is towards limiting the role of human rights in global health policy, with his eventual conclusion being that human rights have *no* place in health policy. While I have argued that Sreenivasan overreaches in his conclusion (for the reasons set out above), I believe his thinking is in the right direction. Sreenivasan and I converge, I think, on the impulse to put human rights in their place – we just disagree about what that place is. In this paper my argument is that human rights have a tightly defined role to play in public policy. In this chapter my conclusion is that the role of the human right to health in global health policy is necessary but delimited, in order that attention can be given to other moral frameworks for advancing health.

Ultimately, I think a powerful argument could be made that health (and, probably, most economic and social human rights, such as shelter or food) ought to be *primarily* advanced via a moral framework other than human rights. Human rights give good justifications for the provision of these goods, but I believe that non-rights-based moral frameworks could provide a better and more persuasive framework for pursuing the health

137. Ibid 24-25.

138. Ibid 25.

(and socioeconomic well-being) of all people. (There will also be the added benefit that non-rights-based moral frameworks – for example, a rediscovery of the arguments for common goods and for the duties we owe in light of common goods – will have less risk of companionship with neoliberalism.) This is, however, an argument for another paper.

Let me return, briefly, to the role of the philosophy of human rights, and to the philosophical debate between functionalist and orthodox philosophers of rights. In this thesis, I argued that a philosophy of human rights *can* provide us with a mechanism for preventing the damaging over-inflation of human rights. Here I want to make a stronger claim: that the philosophy of human rights *should* perform this task; that is, that this task is a criterion by which the value of a theory of human rights ought to be judged. Moyn's work helps us to see the dangers of over-inflation, and, therefore, why this task of parsing genuine rights-claims from non-genuine ones is so important.

Functionalist theories of rights generally follow practice, and therefore will likely lack solid external footing from which to carry out this task of discernment. The theory best suited to this task is arguably Tasioulas's orthodox theory of human rights. Prior to Tasioulas's threshold theory, if you put twelve philosophers in a room, you would get twelve theories of human rights, which in turn would derive twelve sets of human rights content. Tasioulas is the thirteenth philosopher in this scenario. His threshold theory does not disagree with any prior theory of human rights.¹³⁹ Rather, it provides an umbrella theory of sorts, which incorporates all of the prior arguments for rights and yet still provides the philosophical rigour that delivers one set of content for human rights.¹⁴⁰ With the understanding, developed

139. It does not even disagree with functionalism: an orthodox theory of human rights accepts that human rights can perform the functions outlined by the functionalist theory. The orthodox theory just does not think these functions have any conceptual significance for the nature of human rights.

140. At least in theory – as Tasioulas says, the final content of human rights must be worked out in practice, which will inevitably lead to border disputes.

in this paper, of philosophy's crucial role in fighting back over-inflation, the argument could be made that Tasioulas's theory is the current high-water mark of the philosophy of human rights.

Conclusion

What have we learnt from the argument between Moyn and Tasioulas? When we take a wide view of Moyn's work, we find that his disdain for philosophers of human rights stems from his larger concern with human rights. Moyn's investigation into the history of human rights reveals serious problems. When human rights took a 'strategic' route to prominence in the 1970s, they effectively displaced all other visions of utopia. Disastrously, this rise of human rights coincided with the rise of market fundamentalism and massive wealth inequality, which human rights have been incapable of resisting. Moyn attacks philosophers because he perceives their work as 'papering over' this history of human rights, at a time when historical study is needed to apprehend the damaging side-effects of the rise of human rights.

Moyn is wrong to dismiss philosophers. In this paper I argued that the displacement of other visions of utopia has occurred, at least in part, through the mechanism of rights inflation. As the language of human rights has spread outwards, its spread has sapped the vitality from other moral frameworks of global justice. As such, the role of philosophers has never been more clear, or more urgent. For the sake of global justice, the philosophy of human rights must provide us with the tools for separating the real from the fake. It is only

with a robust philosophy of human rights that we can fight back the damaging spread of human rights language.

As much as this paper was about the necessity of human rights and of human rights philosophy, so too was it about their limits. In terms of philosophy's limits, we must recognise that most questions about the real-world realisation of human rights fall to other disciplines, such as law or social science, or to practical politics: "A philosophical treatise on human rights cannot plausibly aspire to be a practical blueprint for achieving a human rights utopia".¹⁴¹ And while human rights themselves are important in highlighting a "distinctive moral dimension"¹⁴² of global idealism (i.e. the minimum standards owed to each person in virtue of their humanity), their fulfilment will never be enough to achieve global justice. Human rights are a sufficientarian enterprise, and therefore will never be able to resist the injustices that operate 'above the threshold'. This paper focused on massive distributional inequality, but my conclusion can be generalised to all problems that exist above the human rights threshold, like degradation of the environment, or civic apathy towards democracy. As I argued in relation to global health policy, other moral framework will be needed if we are to pursue a holistic vision of global justice.

Speaking of limits, this paper can only do so much. It will be up to historians to examine exactly how human rights inflation has contributed to the 'capture' of global idealism. The insight of psychologists and social scientists will be invaluable in studying why such inflation occurs, and what might be done to prevent it. Other philosophers should be recruited to study the precise relations between human rights and other moral frameworks of global justice, and to revitalise non-rights-based frameworks.

The future of human rights will require clear dialogue between these and other disciplines, including a continued dialogue between historians and philosophers. I hope this

141. Tasioulas, 'A Reply to Samuel Moyn', above n 2, 94.

142. Tasioulas and Vayena, 'Just Global Health', above n 22, 3.

paper provides a model for cross-disciplinary conversations. I have shown that the dispute between Moyn and Tasioulas, when understood properly, reveals to us that human rights – situated within history and guided by philosophy – play a contained but crucial role in the long path toward a better world.

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