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Anti-individual morality in the international human rights system

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Abstract
This article argues that modern human rights practice is largely imbued with an understanding of morality which is properly described as 'anti-individual' in the sense in which Michael Oakeshott used that phrase. In summary, this means that the contemporary human rights movement is informed by a vision of morality as something that is to be imposed on populations from above for their own good, rather than something that inheres within each individual and is contingent on free choice. This gives effect to a fundamentally managerial approach, meaning that international human rights law now largely manifests itself in obligations imposed on States to coordinate societies towards benevolent ends. This undoubtedly derives from good motives, but it means that the human rights movement for the most part buttresses an aggrandisement of the State that will happen regardless. This places it on the side of a creeping paternalistic 'soft despotism' – a development that is to be regretted.

Keywords
Morality, oakeshott, negative freedom, criticism, the individual, capabilities approach

1. INTRODUCTION

Modern human rights practice is an increasingly technical exercise, often focused on the achievement of statistically verified goals of various kinds. In this article, I identify within this trend the prevalence of a particular understanding of morality, which the English political philosopher Michael Oakeshott labelled 'anti-individual'. According to Oakeshott, there is in modern

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governance a tendency to understand moral choice as being properly exercised by a class of experts who coordinate society towards benign, pre-determined ends, rather than something that inheres within each individual person. This, I suggest, manifests itself in the sphere of human rights in a conceptualisation of human rights law as being the means by which to bring about the improvement of universal welfare or well-being. Here, human rights become understood to be both the justification for the setting of certain societal goals, and as the means by which those goals are to be met, achieved chiefly through putting obligations on the State. This in turn encourages an increasingly managerial perspective on how human rights obligations are to be implemented – a vision of the State as the coordinator of society towards certain objectives. The consequence of the prevalence of this kind of morality within the international human rights system, I argue, is an understanding of the human individual as passive, pliant, and ever-more reliant on the State for the satisfaction of needs and wants. This is undesirable in itself, but also means that international human rights law for the most part simply buttresses wider trends in modern governance – something that can only be regarded as a missed opportunity.

2. HUMAN RIGHTS AND HUMAN AGENCY: TWO DISPOSITIONS

In the summary records of the early meetings on the drafting of what became the two core international human rights covenants, we find a revealing exchange, taking place between Lord Dukeston, the representative of Great Britain, and his Ukrainian counterpart, Michael Klekovkin. In it, Dukeston makes the claim that the aim of drawing up a binding international human rights convention was to secure freedom of speech, conscience, and association, so as to 'gradually bring [those rights] to the knowledge of those who did not yet enjoy them'. Once this was achieved, individuals could then, working together, achieve the creation of other rights if they so desired within their own domestic legal frameworks – but this was, ultimately, up to them. Economic and social rights might, without these fundamental freedoms, be 'imposed by a philanthropic State', but such would be little more than a 'dictatorship'. 'It [is] better to teach the common man how democracy work[s] than to regard him as a child and impose certain rules on him,' Dukeston goes on. 'The world [needs] free men and not well-fed slaves'.[1]

In reply, Klekovkin articulated the mirror-image of Dukeston's argument. 'Economic rights such as trade union rights, social insurance, the prevention of unemployment, etc., [are] the foundation of all other rights,' he argued. 'The common man [is] only interested in freedom of speech and freedom of the press, when he [is] protected against poverty.' This meant that any document that failed to recognise the primacy of economic and social rights would be 'lacking in sincerity' and, in times of unemployment or economic crisis, 'ring hollow'.[2]

To anybody familiar with the history of the human rights movement, of course, this exchange calls to mind the long-running dispute between proponents of purportedly 'negative' and 'positive' rights, which so characterised academic discussion of human rights during the Cold War, and which is now rightly felt to be old hat.[3] My aim in drawing attention to the comments of these now rather

1. UN Economic and Social Council, Commission on Human Rights, Second Session, 42nd Meeting, UN Doc E/CN.4/SR/42, 16th December 1947, 14-15.
2. ibid 16.
3. See for example Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2015) 562.

obscure figures is not to rework that debate. Rather, it is to raise a related, but more fundamental point. This is that the stances of these two men, Dukeston and Klekovkin, as expressed in their comments here, reveal a largely unspoken tension at the heart of the human rights movement, between two diametrically opposite attitudes towards the nature of individual agency. Put more specifically, their exchange implies that human rights can be conceived as a discourse that has the potential to produce two distinct archetypes of the human subject. On the one hand there is Dukeston's 'free man', who either alone or with others uses his rights of freedom of expression and association to achieve political change on his own terms. On the other, there is Klekovkin's 'common man', who is buffeted by the storms of economic and social crisis, against which he is helpless without having his basic substantive needs guaranteed.

And this, I suggest, also implies the existence of two distinct archetypes of the role that human rights play in the relationship between individual and State. For Dukeston, the State always had the potential to transform into a 'Leviathan' in René Cassin's sense: a dominant force imposing its purposes on the population for their own good, and rendering them little more than pawns or passive recipients of its munificence.[4] Human rights were the individual's bulwark against this. For Klekovkin, the State should act as carer, provider, and protector – securing substantive benefits for the populace and rescuing them from misfortune; and this was to be realised by imposing human rights obligations upon it.

It is important to make clear that these competing conceptions of individual and State do not directly derive from, or map to, explicit differences in political philosophy – and certainly nothing as crude as a division between right and left. Dukeston was, after all, by no means a Hayekian 'old whig'.[5] He was a former President of the Trades Union Congress and a founder member of the British Socialist Party, and an ally of Ernest Bevin. He clearly envisaged that the promotion of the fundamental freedoms he identified would eventually result in the creation of large welfare States.[6] And while Klekovkin's comments were undoubtedly much more carefully scripted,[7] it would perhaps be unfair to characterise them as simply parroting Leninist cynicism about civil rights; there was some authenticity in his warning that 'men are free but dying of hunger',[8] particularly given the context in which he was speaking, so soon after the Second World War.

In short, what I am emphasising is not so much a political or philosophical difference, but rather one of preference; a pair of competing attitudes towards the nature of human agency, rather than ideologically-derived statements about it. In one understanding, the human individual is the mistress of her fate, taking responsibility for her conduct and its consequences, and dignity inheres in her ability to pursue this path in the absence of State interference. In the other, the human

4. René Cassin, 'L'État-Leviathan' in F. Lalou, *La Pensée et l'Action* (Boulogne-sur-Seine 1972) 63, 63–71.
5. Friedrich Hayek, *The Constitution of Liberty* [1960] (Routledge 2006) 401–409.
6. Dukeston's working class background, lack of Foreign Office expertise, evident anti-colonial sympathies, and tendency to depart from his brief (which had been to make any reference to the rights of those living in the colonies to democratic participation 'as innocuous as possible') all made him a target for open and concealed criticism and snobbery from the British Foreign & Commonwealth Office. Indeed, the fact that he was clearly thought of as a loose cannon suggests that his comments can be taken at face value rather than simply rehearsed remarks. This is all rather amusingly detailed in Alfred William Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2001) 373–388.
7. Klekovkin appears to have been an architect, suggesting he was not selected to represent the Ukrainian SSR on the basis of his having any independent views on human rights. See UN Doc. E/272/Add. 1, 21st March 1947.
8. Klekovkin (n 1).

individual is the victim of circumstance, frequently brought low by misfortune or the malice of others, and requiring of active assistance from the State in order to live a secure life. Neither of these ways of describing the individual is particularly coherent or reasoned, and few thinkers if any embrace either wholeheartedly. But they underpin the conceptualisations of the individual rights-holder that Dukeston and Klekovkin were staking out.

This article will contend that the Klekovkinian disposition is now dominant in the international human rights system, even if the Dukestonian one retains some rhetorical force and practical application. This is not, of course, the way in which those working within the field, used to struggling to secure legitimacy for economic, social and cultural rights, typically understand matters.[9] Yet, I will argue, the general emphasis of what I shall refer to as the 'global human rights constituency' of UN treaty- and Charter-based mechanisms, NGOs, academics and advocates, derives from an understanding of the individual as fundamentally passive: what can the State do to improve the human rights of its population, and how can this be implemented? The system's focus is nowadays, in other words, on the improvement of the general physical and moral welfare of the population and groups within it, defined in reference to particular pre-determined visions of what that means, with those improvements being measured largely quantitatively and in the abstract, and achieved through the State and its capacity to coordinate public and private actors in its jurisdiction. The focus is not on increasing the sphere within which rights-holders can determine for themselves a vision of the good. As Michelle Bachelet herself put it in 2021, 'human rights laws and tools [are] drivers of peace and security, social stability, public health, a healthy environment and economy and sustainable development';[10] they are not chiefly for securing individual liberty vis-à-vis the State. The system has not entirely lost interest in fostering 'Dukestonian' freedom, and the classic 'negative' freedoms of expression, assembly, and conscience have not disappeared from modern human rights practice at the domestic or international levels – far from it. But they are not the global human rights constituency's chief concern, taken in the round.

3. EXPANDING THE SCOPE OF OBLIGATIONS

The main doctrinal impetus for the developments identified in the introduction to this article can be found in the reformulation of human rights obligations that began in the 1980s, initially in the context of the right to food. Concerned that the status of economic and social rights in general was insecure owing to doubts about justiciability and enforceability, Asbjorn Eide, the Special Rapporteur on the right to adequate food, set out during that period a new framework for putting such rights on a more secure legal footing.[11] In it, State obligations were described as operating not just at the level of non-interference with the individual; they had in fact three facets. The duty of a State was not merely to *respect* a given individual's rights in the sense of refraining from violating them. Rather, it was also to *protect* (which required the State to prevent other individuals or groups from violating a given individual's rights) and *fulfil* them (meaning to ensure that everybody in the jurisdiction could 'obtain satisfaction of those needs […] which cannot be secured

9. See for example Shareen Hertel and Lanse Minkler, 'The Terrain' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (CUP 2007) 1.
10. Michelle Bachelet, Foreword, *United Nations Human Rights Appeal 2021* (OHCHR 2021), 5.
11. UN Commission on Human Rights, *The New International Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Rights*, UN Doc. E/CN.4/Sub.2/1987/23 (1987).

by personal efforts'[12]). The State was no 'Leviathan' in Cassin's meaning of the term. It was, rather, that envisioned by Hobbes: 'protector and provider'.[13]

Eide's framework was adopted enthusiastically and has become the prevailing orthodoxy (it occupies a prominent position, for instance, in the Office of the UN High Commissioner for Human Rights (OHCHR)'s description of what 'international human rights law' means, as provided on its website[14]). But it has also taken on a life of its own. Eide himself was careful to attempt to strike a balance between the two aspects of the 'Janus-faced' State – insisting that States must both respect the constraints on their scope of action which rights provided, while also taking an active role in securing substantive benefits.[15] The balance, however, has since then tipped very far towards the latter. To understand quite how far, one need only look at the OHCHR's *Handbook for National Human Rights Institutions*, which describes the obligation to protect as being the duty to 'prevent the violation of any individual's rights by any other individual or non-State actor'; the obligation to fulfil as being the duty to 'guarantee […] full access to all entitlements […] that cannot be secured through exclusively personal efforts'; and the obligation to respect as being to 'abstain […] from tolerating any practice, policy or legal measure' that would violate human rights.[16] Even the obligation to respect, that is, transforms from Eide's requirement to refrain from interfering with an individual's rights, into refusing to 'tolerate' practices, policies or laws which would do so. The shift in emphasis, from non-interference towards an active role in 'abstaining from tolerating' practices deemed harmful, should be readily apparent. Human rights in the modern age are predicated on an active role for the State in all regards. As de Schutter puts it, channelling the modern orthodoxy, 'the State can never simply "abstain" from interfering with a right, since the right *cannot exist* [emphasis added] without State action.'[17]

And this, of course, finds practical application across the piece. The OHCHR's Annual Appeal for funding for 2021, the most recent at the time of writing, is illustrative.[18] While Michelle Bachelet's foreword to this document makes a passing mention to 'restrictions on fundamental freedoms in the civic space',[19] and while she is later cited describing 'freedom of expression and civic assembly' as contributing to 'protecting our well-being',[20] when it comes to detail, the emphasis of the Appeal is almost entirely on promoting a vision of the State as the active coordinator of almost every facet of society, fully supported by the UN human rights system and operationalised by human rights obligations of vast scope. The OHCHR will '[advise] on how to integrate States' human rights obligations in sectoral development agendas and economic plans and strategies' so as to promote development;[21] it will 'work with UN Country Teams to advance the right to a healthy environment at country level';[22] it will address inequalities through 'build[ing] on […] States' human rights obligations [to] provide evidence-driven advice policies […] with the aim of greater equality' and 'provid[ing] human rights advice on comprehensive social protection

12. ibid, para. 66–69.
13. ibid, para. 70.
14. See <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> accessed 12 April 2021.
15. (n 11), para 70–72.
16. OHCHR, *Handbook for National Human Rights Institutions* (OHCHR 2005) 15–19.
17. Olivier de Schutter, *International Human Rights Law: Cases, Materials and Commentary* (3rd edition, Cambridge University Press 2019) 303
18. OHCHR, *United Nations Human Rights Appeal 2021* (OHCHR 2021).
19. ibid 5.
20. ibid 15.
21. ibid 16-17.
22. ibid 18-19.

systems and universal access to health care […] and education for all;[23] it will help to end discrimination through 'support[ing] countries' efforts in mitigating the disproportionate impact of the [COVID-19] pandemic on women and girls';[24] and so on. And while there is some acknowledgement of the importance of the existence of a 'vibrant civil society' (the Appeal includes a section on 'Promoting and Expanding Civic Space, Online and Offline'), this is couched chiefly in terms either of the value that civil society can add to the flexibility, rapidity, and effectiveness of government programmes ('contributing to the implementation of measures adopted by the authorities' by providing 'accurate information' and 'feedback and oversight'),[25] or the need for UN fora and processes to be more 'inclusive' so as to get 'better feedback loops'.[26]

The OHCHR's priorities are not in other words on limiting State power. They are on 'fixing inequalities […] abolishing systemic gender inequality, strengthening universal health and social protection systems for all people, strengthening institutions, and tackling structural discrimination and human rights violations',[27] all of which may be laudable goals, but all of which also require an active role for the State throughout the economy and society. It is not, then, that the UN human rights system has abandoned entirely the notion that rights are for constraining State action. But that is emphatically not the way in which it primarily conceives of what rights are 'for'. They are, in fact, a series of justifications for a strongly interventionist model of State power, coordinating society towards objectives that are chiefly predetermined by human rights 'experts' on the population's behalf. The international human rights system is Klekovkinian, not Dukestonian, in the main.

In closing this section, it is worth dwelling briefly on how this affects our understanding of what rights mean for the human individual. Dworkin once described human rights as:

> [T]rumps over some background justification for political decisions that states a goal for the community as a whole. If someone has [a right], this means that it is for some reason wrong for officials to act in violation of that right, *even if they (correctly) believe that the community as a whole would be better off if they did* [emphasis added].[28]

As we can see, this formulation would now not only sound somewhat quaint, but is almost the reverse of the prevailing view. Far from rights being the individual's 'trump' against the consequences of political decisions, it would now be more accurate to describe them as the very background justifications, stating goals for the community as a whole, in question. If a right exists, then by definition it means that the *community as a whole* would be better off if it was respected, protected and fulfilled, and the only subject of interest is how that is to be achieved. To describe a right as a 'trump' against a background justification for acting in the general welfare would, in this conception, be hopelessly naïve. Rights *are* the general welfare. They are the guiding principles for State policy, or, as the OHCHR puts it, the means for 'build[ing] societies in which everyone has a chance to survive and flourish'.[29] Given that this is the case, to allow an individual to claim that his

23. ibid 20-21.
24. ibid 22-23.
25. ibid 24.
26. ibid
27. ibid 16.
28. R Dworkin, 'Is There a Right to Pornography?' (1981) 1 Oxford Journal of Legal Studies 177, 200.
29. OHCHR, *United Nations Human Rights Management Plan 2018-2021* <https://www.ohchr.org/Documents/Publications/OMP_II.pdf> accessed 12 April 2021, 5.

or her rights ought to limit State action where that action is being taken for the good of the community as a whole would be a non-sequitur. Respecting a given individual's rights is an exercise which, at best, is to be weighed against the need to respect, protect, and fulfil the rights of the population in the abstract, with even the 'respecting' of rights requiring a highly interventionist model for the State's 'abstaining from tolerating' harms.

4. HUMAN RIGHTS AS AN ENTERPRISE

The political philosopher Michael Oakeshott provides us with the conceptual tools to make sense of the developments that I have described. 'Law,' as Oakeshott put it, is an 'exceedingly ambiguous phenomenon.'[30] On the one hand, it often takes the guise of neutral, chiefly prohibitory, norms of universal application: one should not commit murder, for example. But on the other, it is readily imbued with overarching goals or *teloi* that mandate certain patterns of conduct designed to achieve particular ends, such as a law stipulating a 'sugar tax' so as to reduce obesity within the population and this improve its welfare.[31] The ambiguity arises because no single legal rule is ever entirely one thing or the other, entirely *nomos* or *telos*: the prohibition of murder might at face value resemble a general prohibitory norm, for example, but it might also be said to have a purpose or end (perhaps the furtherance of social stability). Likewise, while a sugar tax law is clearly enacted for an explicit purpose, it will also have a neutral, prohibitory element ('thou shalt not sell sugary products without paying the required levy'). Law is in truth always an admixture of these two different and rather distinct 'ideals', as Oakeshott would have called them.[32] However, the mixture does generally draw much more heavily from one or the other of these 'ideals' in specific cases – and particularly where a legal rule is more closely associated with one or the other of two modes of political arrangement which Oakeshott identified as competing against one another in the modern State. These he called 'civil' and 'enterprise' association, or *societas* and *universitas* respectively.[33]

In the first of these modes, the association is understood to be between what Oakeshott called *cives* – that is, equals, who have no particular loyalty or fidelity to one another, and pursue no common agenda, *except* insofar as they abide by a particular set of rules which apply to them all.[34] Like French speakers, who are united in no sense other than the fact that they follow the same grammatical system, *cives* associate with one another purely through adherence to a particular system of law.[35]

In the second, the association is an 'enterprise', and is thus purposive. Here, the agents who belong to the association are united in the pursuit of some 'substantive condition of things imagined and wished-for'.[36] While an enterprise association will often have rules, and while those rules will often be extensive, the bonds of loyalty between members do not derive from their common

30. Michael Oakeshott, *On Human Conduct* (Clarendon Press, 1975) 181.
31. These examples are my own, rather than Oakeshott's.
32. Oakeshott used the word 'ideal' in the sense of an abstract concept rather than a perfect, or wished-for, condition. See Oakeshott (n 30) 109.
33. Technically, 'civil' and 'enterprise' association can refer to any type of grouping, whereas '*societas*' and '*universitas*' specifically refer to visions of the State as being in one of those categories or the other. See Oakeshott (n 30) 199–203.
34. Oakeshott (n 30) 108–113.
35. It is, as he put it, a 'rule-articulated association'. ibid 124.
36. ibid 114.

adherence to those rules, but rather from their common purpose. That purpose could be anything,[37] but in the case of the modern State, Oakeshott suggested that it is typically understood to be the improvement of well-being or the public welfare in broad and general terms, with the specific meaning of that purpose changing, and being alternatively more or less coherent, according to context.[38]

Thinking on the nature of the modern State, in Oakeshott's view, was a 'ramshackle' mixture of different analogies and concepts,[39] but there might be said to be two broad camps: those who tended to understand the State along the analogy of civil association, and those who did so as an enterprise association. In other words, there is one idealised view of the State in which it resembles a neutral 'master of ceremonies' whose job is simply to oversee the smooth functioning of a neutral system of purposeless laws having universal application among *cives*; and there is another such view of the State in which it resembles a common enterprise among the populace, who are all united (or at least ought to be) in the pursuit of overall well-being. No State is in reality purely one or the other of these things – all are a somewhat awkward mixture of both – and States in practice tend to be tugged in this direction or that across time, but, for reasons which we will come to, Oakeshott considered the pull towards enterprise association to be inherently the stronger of the two.[40]

Central to the distinction is the role played by law. In the ideal of civil association, law is a set of neutral restraints which simply ensure that individual *cives* may pursue their own agendas, without having another's purposes (whether another individual or the State itself) imposed upon them. In that of enterprise association, by contrast, the rules are designed to help further the ends of the enterprise, directly or indirectly. Hence, in the former ideal, law is conceptualised as *nomos*; in the latter, *telos*. And at the root of this, as will be obvious, is a diametric opposition between two approaches to the imposition of purpose. A civil association is one in which there is no overarching purpose, and in which, indeed, the imposition of purpose of any kind is construed as a 'moral enormity' that prevents any individual *cive* pursuing her own goals.[41] An enterprise association is one in which there is such a purpose, and it is necessarily imposed on all the members of the association, whether they like it or not, lest they prevent its realisation.[42]

When the matter is put in this way, it is not difficult to understand Dukeston and Klekovkin as the avatars for these respective ideals. For Dukeston, the reason for the existence of human rights laws was precisely to prevent the imposition of an overarching purpose by the State upon the 'free men' comprising the population. Freedom of conscience, expression, and association were the means by which this was to be achieved. For Klekovkin, the State had a goal – what might be called securing the welfare of the 'common man' – and human rights were the vehicle for achieving this; they were, in other words, the mechanism for imposing an overarching purpose on the society in question. These two visions of the function of human rights therefore reflected a particular understanding of the State as either determinedly purposeless or purposive, respectively.

The position is of course complicated by the fact that, at least in the first instance, it is the State which bears duties, rather than the individual members of the society in question; human rights laws

37. For example, profit for shareholders in the case of a company, or good sporting performance in the case of a football club.
38. ibid 287–300.
39. ibid 198.
40. ibid 266-267.
41. Michael Oakeshott, 'On Misunderstanding Human Conduct: A Reply to My Critics' (1976) 4 Political Theory 365, 367.
42. Oakeshott (n 30) 317.

even in their Dukestonian mode are thus not exactly akin to the prohibition of murder, which applies universally and equally among *cives*, but something more like what Oakeshott identified as the rules of *respublica* – the laws which bind the organs of the State.[43] And in practice, of course, just as there is no State which can be described purely as a civil or enterprise association, there is no system of law which could be said to purely comprise either *nomos* or *telos*, and 'actually existing human rights law', as it were, is always going to represent an uncomfortable admixture of the two positions that I have staked out. There will in other words sometimes be circumstances in which the deployment of a given human right appears to be furthering a vision of the State as a civil association, and some in which the deployment of the very same right will appear to be facilitating the State as an enterprise association, and it will often be difficult to resolve the ambiguity. The paradigm example of such a case would be freedom from discrimination, which in one sense seems to inhabit the realm of *nomos* within an Oakeshottian civil association, ensuring that all individuals can freely determine their own purposes in the absence of interference from others, but in another could be said to be imbued with an overarching *telos* – namely the realisation of *de facto* as well as *de jure* equality within the society in question, and hence the improvement of the well-being of the population. But there are of course many other such examples, and it is often easy to conceptualise any individual right as potentially occupying both positions.[44] Nonetheless, the distinction between the two ideals is clear: on the one hand, human rights exist to ensure that individuals are free, insofar as possible, to pursue their own goals; in the other, they exist to ensure that the overarching goal of improving universal human well-being is realised.

In summary, then, there is a tendency for both legal theory and practice to fluctuate between two distinct ideals, under the influence of particular visions of the role of the State which derive ultimately from a sense that its role should either be to enshrine the absence of the imposition of purposes, or to realise them. The two senses in which human rights were understood by Dukeston and Klekovkin seem to reflect these visions. In the messiness of reality, of course, human rights will never represent a pure or idealised form of either. They will be tugged this way or that, and will often be seen to bear the inflections of both. But the two 'ideals' of *nomos* and *telos*, civil association and enterprise association, remain to help us as aids to critical reflection. And this allows us to discern, in what I have identified as 'Klekovkinism', an increasing tendency to understand human rights as facilitating a sense that the State is an enterprise association: that the State has a purpose, that its purpose is to improve well-being, and that human rights are the means by which to impose the requisite duties to encourage the fulfilment of that purpose.

5. MANAGERIALISM AND THE ENTERPRISE ASSOCIATION

Another way of putting this is that the move towards Klekovkinism is represented in an increasingly managerial manifestation of human rights law. 'Managerialism' is a word that has been overdefined.[45] Here, I use it simply to mean the dominance of a management-oriented mindset – that is, a predilection for coordination by managers of the activities of those under their control in order to achieve pre-determined objectives. Naturally, the context in which we are most familiar

43. ibid 147–158.
44. Many theorists, of course, adopt the position that so-called 'negative' and 'positive' rights are mutually reinforcing. See for example Amartya Sen, *Freedoms and Needs* (*New Republic* 1994) 31.
45. See for example Thomas Klikauer, 'What is Managerialism?'(2015) 41 Critical Sociology 1103.

with managerialism is the workplace, but human rights practice has for some years been mimicking developments in that field in a marked and quite deliberate fashion.

It is now common, for instance, for National Human Rights Institutions (NHRIs) to develop a distinctly managerial approach to their role, and to be encouraged by the UN treaty- and charter-based mechanisms in doing so, through the making of national human rights action plans, strategic plans, and other tools mirroring those used in corporate management.[46] The UK's Equality and Human Rights Commission (EHRC) is a typical example, publishing most recently a *Strategic Plan 2019-2022*,[47] which sets out a series of goals which are to be achieved in this three-year period, framed by a 'vision' in which 'equality and human rights work effectively in Britain to help people live well together, making life safer, happier and more prosperous for us all'.[48] And at the apex of the UN human rights system itself we find the OHCHR producing its own *United Nations Human Rights Management Plan 2018-2021*, which also follows this type of pattern.[49] Presenting itself initially as a 'roadmap',[50] this document then sets out a 'theory of change', consisting initially of a list of 11 broad activities, such as 'monitor[ing] and publicly report[ing] on human rights situations', 'facilitat[ing] dialogue between diverse stakeholders on human rights issues', and 'rais[ing] human rights awareness'. These then feed into 6 'pillars' ('mechanisms', 'development', 'peace and security', 'non-discrimination', 'accountability' and 'participation'), which in turn produce 10 'results we contribute to'.[51] This is all designed to follow through into realising the ultimate goal of 'All human rights are achieved for all'.[52] And it only grows more complicated from there, running for 267 pages dense with tables and charts, and laying out six 'pillar strategies', 70 country or region-specific programmes, 30 indicators, 9 'organisational effectiveness plans', 4 strategic 'shifts', and an integrated performance monitoring system.

Whether such planning has any utility in terms of achieving its stated goals can be set to one side for the purposes of analysing what this all says about the underlying dispositions or preferences of those working in the human rights system. To put it in crude terms, the model presented is a 'top-down' one. While there is much mention of the need to increase 'participation' in the OHCHR's plan, for example, this tends to mean increasing the participation of marginalised groups in the 'civic space' or 'public life' within a given State.[53] It does not generally mean participation in defining what human rights mean, what human rights laws should be designed to achieve, or what in particular they should protect, prohibit or permit (let alone what the OHCHR's 'pillar strategies', 'theory of change' or 'results we contribute to' should be, or even if it should have any such things in the first place). Such matters are understood to be defined not by the rights-holders, but by the managers: the OHCHR itself, the NHRIs, and the wider global human rights constituency of NGOs, academics, and advocates. It is they who decide what human rights are 'for', and who design plans to coordinate the activities of government, public bodies, businesses, and civil society in order to achieve it. The rights-holder, in consequence,

46. See for example Azadeh Chalabi, *National Human Rights Action Planning* (OUP 2018).
47. EHRC, *Strategic Plan 2019–2022* <https://www.equalityhumanrights.com/sites/default/files/strategic-plan-2019-22.pdf> accessed 12 April 2021.
48. ibid 5.
49. OHCHR (n 29).
50. ibid 3.
51. ibid 7.
52. ibid.
53. See for instance ibid 106, 108, and 109.

largely disappears from the picture; not Dukeston's 'free man', using the freedoms of association, expression, and conscience along with like-minded fellow citizens in order to achieve desired political outcomes, but Klekovkin's 'common man', the beneficiary of the plans and designs of a benevolent managerial class who already 'know' what human rights mean and are attempting to put that into practice.

As a consequence of this the nature of human rights law itself is transformed: the idea of a right as a Dworkinian 'trump against the State', permitting the individual to stand outside of the scope of application of political decision-making even where it is done for the general welfare, is not only unnecessary but perverse in this context – a contradiction in terms. For if human rights 'can help us set a course towards inclusion, sustainable prosperity, justice, dignity, freedom and sustained peace', as the OHCHR puts it,[54] then they *are* for the general welfare, and human rights laws are to be understood not as constraints on State action *per se*, but rather as guiding principles or aspirations for setting State policy and coordinating its activities and those under its jurisdiction with that in mind.

Thinking about this phenomenon in terms of the trend towards enterprise association is therefore helpful, because it allows us to identify the proximate cause of these developments. Oakeshott explicitly described enterprise associations as 'managerial'.[55] This was because, as he put it, if an association is pursuing a purpose of some kind, it must continually respond to emergent situations 'by deciding to do *this* rather than *that* in the hope or the expectation of procuring an imagined and wished-for outcome connected with that purpose'.[56] There must, that is, be a decision-maker or group of decision-makers – managers – who coordinate the responses of the members of the association to events as they unfold, in order to attempt to realise its overarching goal. Koskenniemi, of course, has also made this point, in slightly different terms, with respect to international law in general: if international law is envisaged to be about the pursuit of certain values, then there very rapidly and inevitably emerges a field of technical expertise designed to realise those values, and hence a class of 'experts', or managers, to develop and apply it.[57] The central observations here are the same: that once one conceives of a particular purpose, however grand or banal, the creation of law alone is never sufficient; one must also *implement* the purpose that the law enshrines, and that means continual, day-to-day coordination of all of the elements of a society from above in order to ensure that the purpose is realised.

In summary, then, managerialism is the direct and natural consequence of the conceptualisation of law as having purposes or goals, and human rights will be no exception to this. Where human rights laws are understood as having purposes which must be realised, it is inevitable that this will give rise to attempts at implementation, only growing in scale and detail over time in response to ever-changing circumstance. The consequence is the rapid-expansion of managerial apparatus, and at the forefront of which is the OHCHR and the rest of the UN treaty- and charter-based mechanisms.

54. OHCHR (n 29) 5.
55. Oakeshott (n 30) 125.
56. ibid 115. See also 125, 145-148, and 172 [emphasis added].
57. Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 European Journal of Legal Studies 1, 6.

6. THE STATE AS ENTERPRISE ASSOCIATION AND 'ANTI-INDIVIDUAL MORALITY'

Thinking about the managerialisation of human rights law along the lines of Oakeshott's schema is thus instructive. It allows us to understand that phenomenon as deriving from widespread 'Klekovkinian' view of rights as having an overarching purpose – securing universal well-being, achieved through imposing duties on the State – which is ultimately associated with an idealised vision of the State as an enterprise association, whose goal is to improve the welfare of the populace, however nebulously. But the question naturally then becomes: why should this view of rights have proliferated?

Oakeshott provided a wide range of explanations for why the State as *universitas*, or enterprise association, should become more prevalent in the mixture of ways of conceptualising public power than *societas*, or civil association, across time.[58] Perhaps the most salient was what he described as a prevailing type of social morality, which he called the morality of the 'anti-individual'.[59] The morality of the anti-individual, for Oakeshott, refers to the disposition to understand moral choice as something that is properly located not at the level of the human individual, but rather at the level of a clerisy of experts, exercised in reference to some greater value or set of values, which are often to do with 'welfare' or the public benefit.[60] Since individuals may make the 'wrong' choices with respect to that higher virtue or virtues – acting against or in a manner orthogonal to the public welfare – they are not to be trusted with the capacity to make moral choice at all; it is instead to be imposed on them from above.

In an anti-individual moral system, therefore, government becomes intimately connected with the realisation of overarching values of a broad and often universal kind. It is not generally that government or the State becomes entirely synonymous with 'society' or 'the public interest' or however those values are framed (although that is in essence the heart of totalitarianism).[61] Rather, it is that the object of government often comes to be seen as defining what the desirable conditions of human experience are – in the abstract – and then ensuring that those conditions are realised through the coordination of society towards that greater purpose.[62] The State's role comes to be seen as to cajole, manipulate or coerce its population into doing the 'right' thing. The individual, as a result, is in such a moral system no longer Kant's absolute and autonomous Person, an end in herself, but simply one node in a matrix of responsibility towards some higher end.[63]

This can be contrasted with what Oakeshott called 'individual morality', which is predicated on a different higher virtue: authentic moral choice taking place at the level of the individual. In such a moral system it is for the individual to decide what is right and wrong in any given instance – in reference to the standards of his society and culture, and without interfering with the freedom of others – rather than to have it imposed by the State in reference to some overarching societal goal which he has had no real role in determining. Here, freedom is itself understood as an intrinsic good, and individual autonomy is the fundamental basis, despite its inevitable incompleteness and

58. Oakeshott (n 30) 267-279.
59. ibid 236; see also Michael Oakeshott, 'The Masses in Representative Democracy' in Michael Oakeshott, *Rationalism in Politics and Other Essays* [1962] (ed Timothy Fuller, Liberty Fund 1991) 363.
60. Oakeshott (n 30) 277.
61. ibid 196-197, 231-232, and 369; see also Oakeshott (n 59) 368-370 and 376-383.
62. Oakeshott (n 30) 311-312.
63. Oakeshott (n 59) 367-368.

its flaws, for the arrangement of society. Free individuals make mistakes and bad choices, but they accept this as the price paid for the opportunity to live a truly authentic moral life: the potential of failing is a necessary prerequisite of having the freedom to choose.[64]

The growth of the regulatory State, then, was for Oakeshott attributable at least in part to a shift in prevailing social norms. For a society valuing individual morality, the State will tend to take on the features of a nightwatchman, uninterested in dictating to its populace how they ought or ought not to live. It will recognise that individual people may make the 'wrong' decisions or bad choices, but it will accept this as the price to be paid in the name of realising that society's higher virtue. It will, in short, resemble a civil association. For a State that has developed along anti-individual lines, the opposite will be true: since the higher virtue in question is welfare or well-being, and since individuals exercising free choice may act against that broader interest, the State must make moral choice on the population's behalf, and implement it through the direct or indirect coordination of the people's activities. In other words, it will be an enterprise association, with the purpose of realising the population's well-being.

This also, of course, for reasons which should now be obvious, gives an explanation for why a system of law might develop in a particular way. In a society in which individual morality prevails, law will be conceived of primarily as *nomos*: as a framework of chiefly prohibitive rules which seek to prevent individuals from interfering directly with each other's freedom to make moral choices of their own. In a society dominated by anti-individual morality, on the other hand, law will mostly take on a *teleocratic* guise: a system of regulations and guidance for people to follow so as to bring about the preconceived conditions of the good which have been determined by the lawmakers and their advisors in advance.[65] Law's development, in other words, may be thought of as being rooted in the same ground as that of the State, with the two growing together in tandem; where the soil is anti-individual, the State will take on a purposive, welfarist guise, and the law will increasingly take *teleocratic* form accordingly.

For Oakeshott, then, the tendency to conceptualise the State as civil or enterprise association, *societas* or *universitas*, at least partially derived from underlying notions about the *locus* of moral choice, and moral responsibility. Where it is commonly understood that it must be the individual who makes moral choices, and takes responsibility for the consequences, it naturally follows that the State is more readily envisioned as something like a civil association. Where it is commonly understood that the correct moral choices ought to be imposed on individuals for the greater good, and that it is the State which bears responsibility for the consequences, the analogy of the State as enterprise association becomes more prevalent. The reason why the global human rights constituency has taken on an increasingly Klekovkinian bent, and hence why it has become more managerial over time, therefore can be at least partially traced to a particular vision of morality, which Oakeshott called anti-individual, and the path from the latter to the former should now be apparent.

7. POSITIVE FREEDOM

The phrase 'anti-individual' is, however, inflammatory. Let us take a moment to elucidate exactly why it is apt to describe the global human rights constituency as having adopted this kind of moral vision.

64. Oakeshott (n 30) 238-241.
65. Oakeshott (n 30) 276.

Contemporary orthodox thought on human rights tends, explicitly or otherwise, to be informed by a particular understanding of what freedom means and how it is to be realised – namely, through and after the achievement of certain necessary substantive and moral conditions, provided chiefly by the State. In recent decades this vision has come to be strongly influenced, directly or indirectly, by what is often referred to as the 'capabilities approach'.[66] Here, 'the proper goal of government' is understood to be to 'bring all citizens up to a certain basic minimum level of capability',[67] and it is only '*after* they have the[se] capabilities' that citizens should be free to determine their own course.[68] The freedom to live one's life by one's own lights, in other words, logically only follows on from the securement of the fundamental elements of the good life. And, lest anyone be misled by the use of the word 'basic', those minimum levels of capability of course extend far beyond protection from poverty, and include everything from 'good health' to 'having opportunities for sexual satisfaction', from 'not having one's emotional development blighted by fear and anxiety' to 'being able to use imagination and thought in connection with experiencing and producing expressive works', and from 'being able to laugh, to play and to enjoy recreational activities' to 'having the right to employment'.[69]

This finds such clear expression in the field of human rights because, of course, it is only a short step from accepting the initial premise that 'the proper goal of government is to bring all citizens up to a certain basic minimum level of capability' to adopting the view that citizens therefore have *rights* to that 'certain basic minimum'. And once that view has been adopted, it is only another short step to the conclusion that rights are not so much 'trumps against the State', nor even the basis for individual claims to certain substantive goods, but rather are broad sources of societal goals with which the State is to engage in providing for its citizens. Here, in other words, it is not that individuals simply exercise their rights against the State at their own initiative; the State instead exercises rights on behalf of the individuals collectively, providing them with the substantive and moral conditions upon which freedom is based. 'Only the State,' to cite one of the most influential books on this theme, 'can supply what is needed for an individual to fully enjoy [their] human rights'.[70] Rights do not protect the individual from the interference of the overbearing State, but are instead better understood as the conditions of the good life, achieved once the State has exercised its duty in realising the necessary 'capabilities' for the individual concerned. The question is not in other words what human rights can do to prevent the State from dominating the lives of its citizens, but what the State can do to 'bring its citizens up' so that they can enjoy the fruits of what human rights purportedly promise.

In this paradigm, then, the idea that there is any sort of trade-off between freedom and State power, as Dukeston was suggesting, is entirely artificial. For Dukeston, it will be remembered, one could not have one's cake and eat it: one could either have 'free men' or 'well-fed slaves', not both. The philanthropic State would ultimately be a dictatorial one, treating its population like children by imposing rules upon them, and this would never be the recipe for a free society. For the Klekovkinian view which dominates, that concern – which is in essence, of course, an

66. Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review 273.
67. ibid 280.
68. ibid 289 [emphasis added].
69. ibid 287-288.
70. Sandra Fredman, *Human Rights Transformed* (OUP 2008) 9.

antecedent to those expressed by Berlin,[71] Hayek,[72] Nozick[73] and others – derives only from a paucity of imagination. Since 'poverty, poor health and lack of education' constrain freedom as much as 'tyranny and intolerance',[74] there is no trade-off to be made. Freedom follows from the State 'bringing its citizens up' through meeting their substantive and moral needs, and no contradiction therefore exists. At the same time, as it is often argued, there is in any case simply no such thing as 'negative' liberty classically understood, because all purportedly negative liberties require active intervention by the State in society to certain degrees. Without the State actively working to suppress discrimination, for example, freedom of association may be impossible or severely hindered by private actors. Without the State providing a public education system and ensuring that there is media balance, freedom of expression and conscience may be stunted. Without the State intervening to restrain the expression of dominant actors, the free expression of members of subaltern groups may be limited. And so on.[75] Meanwhile, the idea that there could ever be a truly 'neutral' system of negative constraints on State action is itself criticised as deeply ideological: a means by which liberalism perpetuates itself through 'self-critique' or self-limitation,[76] or, alternatively, a means by which privilege or dominance is maintained through the strict delineation of public and private spheres.[77]

In the modern, orthodox view, then, it is entirely correct and natural to see human rights through their Klekovkinian lens. One might even say that, in this view, there is no distinction to be drawn in the first place; the Dukestonian position has been entirely superseded. Where necessary, human rights law does indeed act as a bar on the State overreaching itself through the much more sophisticated and rational tool of proportionality assessment, which allows fine-tuned balancing of the competing priorities of individual freedom and societal welfare, and which renders the concept of 'rights as trumps' unnecessary and crude.[78] What remains to be realised are the 'marginalised' concepts of economic, social and cultural rights, and protection of the expressive individualism of members of subaltern groups.

The prevailing morality of all of this should be clear. A vision of the State as having the role of 'bringing all citizens up to a certain basic minimum level of capability', of ensuring that they have 'opportunities for sexual satisfaction' and are 'able to laugh, to play and to enjoy recreational activities' while living free from 'fear and anxiety' and enjoying 'the right to employment' is not one which locates moral choice, and moral responsibility, in the human individual. It is one that rather locates them in the State – and the members of the managerial class who coordinate society in its name, and who must necessarily determine what the 'minimum level of capability' entails. And an understanding of rights as empowering the State to intervene so as to achieving this 'bringing up' through the imposition of duties upon it is, likewise, not one which is designed to create space within which the individual rights-holder can determine his or her own conception of

71. Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 118.
72. Friedrich Hayek, *The Road to Serfdom* (Routledge 1944).
73. Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974).
74. Sandra Fredman (n 70) 11.
75. See for example Dinah Shelton and Ariel Gould (n 3).
76. See for example Philippe Chevalier, 'Michel Foucault and the Question of Right' in Ben Golder (ed), *Re-Reading Foucault: On Law, Power and Rights* (Routledge 2013).
77. See for example Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443.
78. See for example Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012).

the good. Contemporary thinking on the nature of rights, in summary, is steeped in what Oakeshott called anti-individual morality – even if more neutral phrasing may be preferred.

8. ANTI-INDIVIDUAL MORALITY AND THE PRODUCTION OF THE INDIVIDUAL *MANQUÉ*

The question must then become what exactly is wrong with the 'anti-individual morality' which has become so prevalent?

I will advance one argument against it. And here, it is necessary to return to Oakeshott. For while modern human rights orthodoxy suggests that one need not compromise – that human liberty can be obtained through extensive 'positive' State action – Oakeshott's work provides us with the clear warning that there are, in fact, always trade-offs to be made.

It is often difficult to sympathise with the traditional defence of minimalist or 'negative' conceptions of rights, which is that genuine liberty only consists in 'deciding what use we shall make of the circumstances in which we find ourselves'.[79] As long as the State is not actively interfering with individuals' rights, and is following due process, the formal characteristics of freedom are secured. As is often pointed out, such a position is all very well to adopt when one is well-educated, well-off, well-brought up, and well-endowed with intelligence or other natural gifts which one cannot reasonably be said to deserve. It is much less plausibly advanced when the listener has been born into extreme poverty, an abusive family life, chronic ill-health, a segregated society, and so on. But Oakeshott's position is much more subtle than simply to insist on formal liberty as the cure for all ills. Rather than characterising any positive steps taken by the State to alleviate poverty or discrimination as 'coercion' or 'despotism', his response is rather to point out, as de Jasay puts it, that State intervention in the economy and society comes at a cost: it affects 'how people [come] to view their responsibility for their own fate'.[80] It does not necessarily follow, as Nussbaum suggests, that once the State has 'brought all citizens up to a certain basic minimum level of capability' those citizens will then be capable of setting and achieving their own goals. It seems just as likely, if not more so, that they will come to rely on the State in perpetuity, losing as a consequence 'the habits of [spontaneous] civic action' forever, and being rendered permanently passive and pliant.[81] The concern, in other words, is not that any intervention by the State in economy or society is by definition coercive. It is that such interventions have consequences for how the human individual comes to be perceived – and perceives herself.

Oakeshott describes early modernity as bringing emancipation from the ties of community, occupation, relationship, and conduct which had characterised medieval life – and as thrusting this new-found freedom upon all alike, whether they welcomed it or not.[82] Some people welcomed the 'dissipation [of] communal warmth' that came with the end of feudalism, but others were 'depressed and discomforted' by the associated uncertainty and instability.[83] This essential division of modern society into two dispositions towards freedom had, in Oakeshott's view, coloured approaches to the relationship between the individual and the State ever since – albeit in different

79. Friedrich Hayek (n 5) 19.
80. Anthony de Jasay, *The State* [1985] (Liberty Fund 1998) 87.
81. ibid 4.
82. Oakeshott (n 30) 275.
83. ibid.

guises. There are some people, in short, who welcome freedom and consider it to be the 'chief ingredient of human dignity', seeking to 'enjoy it at almost any cost', irrespective of its dangers.[84] Prioritising pride, honour and self-enactment ('Not Adam, not Prometheus, but Proteus'[85]), and considering freedom of choice to be an intrinsic good, this character above all represents an adventurer, imbued with purposes all of their own. For such a person, the ideal conception of the State was of course Oakeshott's civil association. But there are other persons – which he referred to as 'individual *manqués*'[86] – who are diametrically opposed. Considering freedom (risky and fraught with uncertainty as it is) to be a burden which they would prefer not to have to exercise, and by implication considering human dignity to inhere in the meeting of what Oakeshott called 'substantive satisfactions',[87] such persons naturally gravitate towards the vision of the State as Oakeshott's *universitas*, acting for the good of all and bestowing benefits on the population, and towards an understanding of the 'office of government [as being] to make substantive choices for those unable or indisposed to make them for themselves'.[88]

It is perfectly clear where Oakeshott's sympathies lay, and the picture he paints of the individual *manqué* is almost unrelentingly harsh ('servile',[89] suffused with 'radical self-distrust',[90] seeking only the 'composure of a conscript assured of his dinner'[91]; it is not difficult to agree with Pitkin's description of his tone as 'crotchety'[92]). Critics of various stripes have as a consequence tended to dismiss his characterisation as at best haughty or 'bitter',[93] or at worst a form of 'dandyish masochism'[94]: a hopeless defence of old-fashioned English Tory or aristocratic values (the 'moralisation of pride itself'[95]) with what could only ever be a vanishingly small number of adherents on the 'extreme Right'.[96]

But these criticisms miss the crucial element of Oakeshott's dichotomy, assuming it to be intended as an actual depiction of the personalities of genuine human beings rather than simply another iteration of a highly repetitive technique, deployed in all of his work,[97] which is to describe two non-existent and extreme 'ideals' as an abstracted aid to reflection on the untidy complexity of actual affairs. It is perfectly evident, taking his work in the round, that Oakeshott did not conceive of real human beings as being perfectly divided into two psychosocial 'camps', with a small number of beleaguered true individuals being conscripted against their will into an interventionist State by the prejudices of an undistinguished mass of individual *manqués*. For Oakeshott, there was no human

84. ibid 274.
85. Oakeshott (n 59) 364.
86. 'Individual *manqué*' is an idiosyncratic phrase, '*manqué*' referring to a person who has failed in an ambition or career of some kind.
87. Oakeshott (n 30), 275-276.
88. ibid 274.
89. ibid 317.
90. ibid 277.
91. ibid 317.
92. Hanna Pitkin, 'Inhuman Conduct and Unpolitical Theory' (1976) 4 Political Theory 301, 302.
93. Michael Rushton, 'Michael Oakeshott: A Review Essay' (1992) 54 The Review of Politics 665, 672.
94. Bernard Crick, 'Prince of Sceptics' (The Observer, 20 April 1975) 30.
95. Jan-Werner Muller, 'Re-Imagining Leviathan: Schmitt and Oakeshott on Hobbes and the Problem of Political Order' (2010) 13 Critical Review of International Social and Political Philosophy 317, 324.
96. Richard Crossman, 'The Ultimate Conservative' (1951) 42 New Statesman and Nation 60-61.
97. Neil McInnes accurately calls this technique a 'tic', in Neil McInnes, 'A Sceptical Conservative' (2000) 61 The National Interest 82.

nature (only, he insisted, a 'human condition'[98]): we are 'what we learn to become'.[99] It is not, then, that in modernity real human beings can be neatly divided into individuals versus individual *manqués*. It is rather that the circumstances of life can draw out a tendency to resemble one or the other of these archetypes in different contexts. If the individual *manqué* is to be associated with 'the poor' (although Oakeshott himself denied this implication),[100] it is only so inasmuch as poverty will often result in a desire to draw on the support of benevolent public authority in circumstances in which it exists. However, the figure of the individual *manqué* is much more closely associated in Oakeshott's view, not with poverty, but with a certain disposition towards freedom - one which is not inherent, or simply a result of misfortune, but *encouraged*.[101] This is, in other words, the morality of the anti-individual, which works to bring out the characteristics of the individual *manqué* wherever it becomes prevalent, insisting on defining and implementing the conditions of the good life on the behalf of a population it perceives as child-like and ignorant, and thereby ensuring that the members of the population meet the low expectations set for them.

The individual *manqué*, in other words, is not to be understood in Oakeshott's schema as the product of poverty or material deprivation, but rather of a particular view of the role of public authority: as being to determine the conditions of the good life and to coordinate society towards them – the operationalisation, that is, of anti-individual morality. This has the effect of depriving the individual of her own moral autonomy, and rendering her meek and passive, incapable of making decisions of her own and looking always to the State for guidance and the meeting of her needs. And, if anything, this phenomenon has coincided historically not with poverty but with development; it is a feature not of poor societies, but of wealthy ones, where the State takes on an ever-more dominant role in the arrangement of society towards desired ends. The individual *manqué* is 'not born, but made'. And he is made not by poverty, but by the prevailing conceptualisation of the relationship between the individual and the State.

The danger of anti-individual morality for Oakeshott, then, is not *per se* anything to do with whether it results in the State's intervention in the economy or society. It is the consequence that such a morality, if given effect, will have for the way that the human individual comes to be perceived and ultimately therefore self-describes. Anti-individual morality ultimately derives from a particular conception of the human individual as passive, pliant, subject to the vagaries of fortune, and looking always to the State to protect and make choices for him. Once it is given wings, operationalised through law, it will instantiate this vision, and will do so in ever more marked terms over time due to the propensity for political arrangements to produce self-reinforcing preferences.[102] This will then result in ever more efforts being undertaken to improve 'public well-being', or whatever nomenclature is preferred, through the imposition of yet more detailed and minute regulations, rules and 'nudges' – rendering the human individual ever more inept and helpless as a consequence.

Oakeshott's description of the individual *manqué*, then, provides us with a warning not mainly about the State's coerciveness, but about the kind of population which managerialism – smothering society in minute and detailed rules, regulations, and policies so as to coordinate it towards

98. Michael Oakeshott, 'A Place of Learning' in Michael Oakeshott, *The Voice of Liberal Learning* (ed. Timothy Fuller, Liberty Fund 2001) 1, 1.
99. ibid.
100. Oakeshott (n 30) 275-276.
101. ibid 276-278.
102. de Jasay (n 80) 21.

predetermined aims – will tend to produce. This will not be a population composed of free, vigorous, and informed individuals, capable of looking after themselves and their families and communities, and in the habit of spontaneously cooperating with each other. It will rather comprise for the most part his individual *manqués*, seeking only the meeting of their substantive needs, lacking in initiative and independence, easily manipulated, and ever more reliant on the State. It will be not a society characterised by the kind of healthy interdependence and mutual cooperation which cannot help but evolve where the State is absent, but rather one rooted in the 'tutelary dependence on impersonal authorities and institutions' that arises where the administrative State takes it as its mission to care for its citizens in every aspect of their lives.[103]

The danger, then, of the operationalisation of anti-individual morality through law is acute for all that it is unacknowledged. Once law is conceived of in this way – as the means by which a vision of universal welfare is imposed on a society from above – it will, for reasons which we have already identified, give rapid and ineluctable rise to a pervasive sphere of managerial apparatus whose aims, for all that they are benevolent, have the final effect of draining individuals, and ultimately therefore of society itself, of the initiative, responsibility, self-direction, and self-discipline that are the very foundations of freedom. It is not that once the State has 'brought up' its citizenry their freedom will take flight; the danger is that the process of 'bringing them up' will permanently deprive them of freedom's basic conditions.

9. CONCLUSION

It would go much too far, of course, to suggest that the managerial, anti-individual tendencies of the modern international human rights system have any hand in actually contributing to the dismal picture of enervation and passivity that Oakeshott depicts. It is trite to observe that the system is very far removed from the practical implementation of policy, and very distant from the minds of politicians and law-makers when actually deciding what to do in any given context. Moreover, the growth of the administrative state has almost certainly been the most salient feature of political life across the developed world in the period from 1945 to the present day. In this sense, the development of human rights law can be understood as being on a similar trajectory to that which de Jasay identifies the State itself as having taken across the course of the last century or so, from the 'capitalist State', erring on the side of self-restraint, to 'State capitalism', which takes almost every facet of its citizens' lives under its purview, and seeks to channel a limited form of freedom towards consumptive ends alone.[104] In the wider context, the State is simply no longer conceived, for the most part, as being in need of restraining, but rather as the means by which a healthy, safe, and prosperous society is secured. It may well therefore be considered only natural that human rights law should have taken on a chiefly Klekovkinian guise – not a way to constrain power, but a method for the careful balancing and calibration of interests within a powerful and pervasive regulatory apparatus.[105] The type of 'hortatory' or 'best practice-sharing'[106] activity that makes up so much of international human rights practice is much more plausibly characterised

103. Brian Smith, 'Smith and Tocqueville on the Commercial Ethos' (2010) 13 Journal of Markets and Morality 29.
104. de Jasay (n 80).
105. See for example Talya Ucaryilmaz, 'The Principle of Proportionality in Modern Ius Gentium' (2021) 36 Utrecht Journal of International and European Law 14.
106. Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 116, 121.

therefore as reflecting, rather than influencing, trends in the dynamic between individual and State. Why, then, is it necessary to raise objections to the trends identified in this article at all?

The answer to this question can only be to point out the irony of the modern human rights system's managerial turn: that it serves as no brake whatsoever on political and social forces whose cumulative effects are at every turn to render the human individual more passive rather than less. It can escape nobody's attention that the administrative State has everywhere in the world become ever more interested in nudging and manipulating its citizenry towards predetermined ends. (Some of the many prominent examples of such projects carried out by the British State at the time of writing being the Department of Health and Social Care's attempts to drive down the consumption of sugar;[107] the Gambling Commission's efforts to 'make gambling safer';[108] the Department for Transport's efforts to 'make walking and cycling the natural choices for shorter journeys';[109] and the general drive to 'tackle obesity'.[110]) The threat of Tocqueville's 'soft despotism', reducing the population to a 'flock of timid and industrious animals, of which the government is the shepherd', grows ever more real.[111] For the most part, this kind of societal tinkering by politicians takes place at such a trivial level that it would be rather melodramatic to describe it as being the appropriate subject matter for human rights law. No sensible person would suggest that courts should be involved in assessing whether nudges designed to 'Make Gambling Safer' interfere with fundamental rights. But the existence of this kind of policy is indicative of the extent to which anti-individual morality prevails in modern democracies.[112] And the growth of the Klekovkinian disposition in the international human rights system must be seen as being entirely of a piece with this wider trend.

This cannot be understood as anything other than a missed opportunity. Human rights – rhetorically and philosophically – still rest on the understanding that they are designed to liberate and empower. This remains the source of whatever remains of their moral force. The ambition of human rights law must surely be to do something more than merely to reinforce broader 'nannyish'[113] trends in modern governance – what de Jouvenel once called 'the great phenomenon of modern times'[114] – which will undoubtedly only strengthen regardless.

107. HM Treasury, 'Soft Drinks Industry Levy Comes into Effect' <https://www.gov.uk/government/news/soft-drinks-industry-levy-comes-into-effect> accessed 12 May 2021
108. Gambling Commission, 'How We Make Gambling Safer' <https://www.gamblingcommission.gov.uk/about/Who-we-are-and-what-we-do/How-we-make-gambling-safer.aspx> accessed 12 April 2021.
109. UK Department for Transport, Cycling and Walking Investment Strategy (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918442/cycling-walking-investment-strategy.pdf> accessed 21 April 2021.
110. UK Department of Health and Social Care, 'Tackling Obesity: Empowering Adults and Children to Live Healthier Lives' (2020) <https://www.gov.uk/government/publications/tackling-obesity-government-strategy/tackling-obesity-empowering-adults-and-children-to-live-healthier-lives> accessed 21 April 2021.
111. Alexis de Tocqueville, *Democracy in America, vol. II* [1840] (Liberty Fund 2012; translation by James Schleifer) 1248–1252.
112. The red herring that what is commonly called 'neoliberalism' represented a retreat of the State from governing the life of the citizen was, of course, thoroughly debunked by Foucault before it even began. See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Palgrave Macmillan 2008; ed, Arnold Davidson, transation by Graham Burchell).
113. Anthony DeMaria, 'The Nanny State and 'Coercive Paternalism' (2013) 61 Journal of the American College of Cardiology 2108.
114. Bertrand de Jouvenel, *On Power: The Natural History of Its Growth* [1945] (Viking Press 1976) 397.

More broadly, what I have referred to as the global human rights constituency has a tendency towards a kind of myopia, about which Dukeston's comments forewarn us. Dukeston's own socialist pedigree, as we have seen, was impeccable, and he undoubtedly believed that civil and political freedoms of the classical kind would ultimately give effect to redistributive outcomes. This was because he was of the view that freedom of expression, association, and conscience were the fundamental elements of the democratic process, and that if they were secured, the 'right' policies would be implemented politically in any event. There are in other words other methods for achieving social and economic goals than enshrining them in the language of rights, and it is worth the risk of leaving the achievement of them to the good sense of 'free men' and women who are in the habit of the kind of spontaneous civic action that freedom encourages. One of the main benefits of doing so would be the opening up of the meaning of rights to continued democratic contestation: not the passivity that comes from the understanding that what rights are 'for' has been determined in advance, but the active engagement that would result from leaving their content up for grabs.

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