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*Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston**

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Alston's Comment on my article¹ systematically misrepresents my publications and imputes to me absurd and irresponsible views which I have rejected in more than 200 publications over 30 years (Section 1). Without taking into account my books on national and international constitutional law, and without any attempt to test or falsify my 'constitutional approach' and the historical evidence supporting it, Alston's criticism of 'methodological shortcomings' seeks refuge in polemics (Section 2). Alston ignores the vast European literature and legal practice in support of 'social market economies', and fails to identify and discuss the sources of our different human rights conceptions, i.e., my broader interpretation of human dignity and of personal liberty rights (Section 3). I hope that this short rejoinder will help readers understand that Alston's nightmare of a Don Quixotte attacking the UN system exists only in the author's aggressive fantasies.

* *Editors Note:* The Editors of the EJIL welcomed the request of Professor Petersmann to publish a rejoinder to the comment by Philip Alston and also welcomed his wish to have the rejoinder published in the same issue as the comment. This, however, limited both the time and space available to Professor Petersmann to prepare his rejoinder. The entire Petersmann–Alston exchange will be posted on the website (www.ejil.org), including the longer version of Professor Petersmann's paper to which he makes reference in his rejoinder. Both authors have been invited, should they wish, to amplify their comments on the website.

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¹ Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621–650.

1 Why Does Alston Distort My Views Rather than Discuss Them?

Since the beginning of my academic career as a lecturer in constitutional law at the universities of Hamburg and Heidelberg in the early 1970s, I have emphasized that the core of human rights consists of inalienable ‘birth rights’ deriving from the inherent dignity and basic needs of every human being, as universally recognized today in numerous human rights treaties. Even where this ‘constitutional contract premise’ is not recognized in national and international constitutional instruments (like the EC and WTO treaties), I have long been a supporter of interpreting national and international government obligations as serving ‘constitutional functions’ for the protection of human rights. Contrary to Alston’s claim, I have never argued for a ‘fundamentally different ideological underpinning’² of national and international law.

Again, contrary to Alston’s claims, I have never argued for ‘a freestanding human right to trade’.³ The Anglo-Saxon preference for interpreting the human right to liberty as protecting only civil and political liberties, together with Alston’s anti-market bias, seem to render it incomprehensible for him to extend constitutional liberty rights to economic and professional activities, including the movement of goods, services, persons and capital across frontiers, as is the case, for instance, in German and EU constitutional law.⁴ The everyday experience of billions of people who can survive only by trading the fruits of their labour in exchange for goods and services indispensable for their personal self-development should be recognized as a human rights problem rather than merely as a legislative or administrative task to be left to ‘benevolent governments’. Contrary to Alston’s insinuations, a broader interpretation and constitutional protection of human liberty (e.g. in the sense of maximum equal individual freedoms across frontiers, as protected by Article 2:1 of the German Basic Law) has nothing to do with ‘prioritizing property and free trade over virtually all other values’.⁵ My publications emphasize, in conformity with the jurisprudence of European courts, that all human rights need to be mutually balanced through the implementing legislation and administrative protection; and that international courts must respect the margin of appreciation of democratic parliaments in this balancing process.

My publications also stress that EC law (e.g. Article 30) and WTO law (e.g. Articles XX GATT, XIV GATS, 7, 8 TRIPS Agreement) rightly give priority to non-economic ‘human rights values’. This interpretation is not refuted by Alston’s schoolmasterly reply that the Bretton Woods Agreements and WTO law do not explicitly refer to human rights. Nor does Alston elaborate the allegedly ‘extremely negative conse-

² Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815, at 842 [hereinafter ‘Alston’].

³ *Ibid.*, at 817.

⁴ For more detailed explanations see Petersmann, *supra* note †, at 35–43.

⁵ Alston, at 841.

quences'⁶ of my recommendation to follow the example of EU law and explicitly recognize the human rights obligations of all IMF and WTO Members as part of international integration law (e.g. by means of IMF and WTO declarations).

Even though Alston quotes my calls for stronger legal protection of social human rights, he infers from my citations of Hayek and other defenders of liberty rights that I must be a supporter of the opposite belief that 'human rights and market freedoms are, in effect, one and the same thing'.⁷ Alston fails to mention the effective protection of a 'social market economy', for instance in German and EC constitutional law, nor does he refer to the vast European literature (including my own books) on why and how liberal and social values must be reconciled through social legislation. My books⁸ define the 'human rights functions' of international economic law not only in terms of promoting the availability and accessibility of traded goods (like food and medicines), traded services (like health and education services) and open markets that are essential for the fulfilment of many social human rights (e.g. to food, health, education and development). They also suggest interpreting national and international guarantees of freedom, non-discrimination, rule of law and social justice (e.g. in the Bretton Woods and WTO agreements) in a mutually coherent manner as empowering citizens, obliging governments and reinforcing individual rights (e.g. to 'negative' as well as 'positive freedoms', non-discrimination and individual access to courts). It is not only the numerous 'general exceptions' in EC and WTO law that can be construed as serving social human rights (e.g. to protection of human health against dangerous imports). The basic EC and WTO guarantees of liberty and non-discrimination should also be recognized, and in part are recognized (e.g. in the European Court of Justice (ECJ) jurisprudence on the 'principle of equal pay for male and female workers for equal work' in Article 141 EC) as human rights protecting personal liberty and human dignity.

In contrast to Alston's assertion, I have never argued 'that the EU has attained any sort of ideal equilibrium'⁹ in protecting human rights. My argument is modest: EU integration law, including the ECHR, protects civil, political, economic and social human rights in a more balanced way than does UN law, notwithstanding the many weaknesses of EU law and its late explicit recognition of the ECHR (cf. Article 6 EU). Contrary to Alston's claims, I have never asserted 'that the international community is committed to a global version of EU integration';¹⁰ nor that the EU is 'an ideal model for the world as a whole';¹¹ nor that the EU is 'the persistently virtuous actor in international affairs'.¹² My publications on EU international relations law are often quoted because of my criticism of the EU (e.g. its welfare-reducing WTO violations).

⁶ *Ibid.*, at 815.

⁷ *Ibid.*, at Section 3B.

⁸ Cf. e.g. E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

⁹ Alston, at 823.

¹⁰ *Ibid.*, at 831.

¹¹ *Ibid.*, at 832.

¹² *Ibid.*, at 833.

Alston carelessly invents and imputes to me irresponsible views, such as that UN human rights arrangements should ‘be replaced by the WTO as the principal means by which to promote respect for human rights’;¹³ that ‘the WTO would protect human rights more effectively than any other international institutional arrangement’;¹⁴ that the WTO ‘reflects an ideal checks and balances approach’;¹⁵ that ‘the WTO and the IMF are the most effective agents for the promotion of human rights’;¹⁶ or that one should give ‘the principal responsibility for promoting, interpreting, and even implementing . . . core UN human rights standards to the WTO’.¹⁷ I have expressed none of these views. My argument is that, just as EU protection of human rights has usefully complemented protection under the ECHR, so too consideration of the human rights obligations of WTO Members in interpreting WTO rules could reinforce UN human rights law and help create the resources needed for the enjoyment of human rights.

A quick perusal of my books on GATT and WTO law could have enabled Alston to realize that I have long emphasized the limited scope of WTO law, the limited jurisdiction of WTO dispute settlement bodies, and the inadequate democratic ‘checks and balances’ in the WTO. My *EJIL* contribution argues in favour of strengthening UN human rights law by integrating it into the law of worldwide organisations such as the WTO.

Alston’s presentation of me as someone who wishes to see ‘individuals become the objects rather than the holders of human rights’¹⁸ puts my human rights arguments on their head. Furthermore, empirical evidence (e.g. in the EC) contradicts Alston’s claim that recognition of individual economic and social market rights makes ‘human rights detached from their foundations in human dignity’.¹⁹ Personal self-development in dignity depends on access to scarce resources and to a welfare-increasing division of labour as matters of individual rights and of individual responsibility, not only as a matter of government benevolence.

2 Why Does Alston Denounce My ‘Constitutional Approach’ without Testing or ‘Falsifying’ It?

Alston’s relentless misrepresentations continue when he criticizes ‘methodological shortcomings’.²⁰ For instance, even though the ECJ has explicitly described the non-discrimination requirement in Article 141 as a ‘fundamental human right’, and has explained its case law on direct applicability of EC Treaty provisions on the free movement of goods in terms of ‘freedom of trade as a fundamental right’, Alston

¹³ *Ibid.*, at 833.

¹⁴ *Ibid.*, at Section 3E.

¹⁵ *Ibid.*, at 834.

¹⁶ *Ibid.*, at 835.

¹⁷ *Ibid.*, at 835.

¹⁸ *Ibid.*, at 842.

¹⁹ *Ibid.*, at 842.

²⁰ *Ibid.*, at Section 2.

denies that 'such a right has already been recognized'.²¹ One may disagree with these quotations from the ECJ, as well as with my proposal to interpret the judicial recognition of 'fundamental market freedoms' in the EC as a logical continuum of a broad concept of 'the right to liberty' (cf. Article 6 EU Charter of Fundamental Rights) and of the 'freedom to conduct a business in accordance with Community law and national laws' (Article 16 EU Charter). But why does Alston deny indisputable facts in the jurisprudence of the ECJ?

Alston nowhere tests my empirical and normative hypotheses on interrelationships between human rights and constitutionalism. My doctoral thesis, which compared regional integration law in Europe, the Americas, Africa and Asia, identified 'normative individualism' as one reason for the comparatively greater effectiveness and welfare-creating effects of European integration law.²² My habilitation book, which compared national and international constitutional restraints on foreign policy powers in federal states and in the EC, identified 'international constitutionalism' as a precondition for the effective protection of human rights and the rule of law in international relations. My functional definition of 'international constitutionalism' in terms of six 'core principles' and their functional interrelationships²³ differs inevitably from my definition of 'constitutionalism' in nation-states (e.g. focusing on the basic long-term rules constituting a political community and on their legal primacy over post-constitutional legislation and policies).²⁴ Alston ignores the functional dependence of human rights on national and international constitutional restraints and makes no attempt to refute my hypotheses.

Alston likewise refuses to test or falsify the vast empirical evidence which indicates that the economic welfare of most countries, and the consumer welfare of their citizens, are clearly related to their constitutional guarantees of freedom, property rights and other human rights.²⁵ As emphasized in my publications, the non-economic benefits of integration law (such as the protection of human rights and 'democratic peace' in Europe, compulsory jurisdiction for peaceful settlement of disputes in the EC and WTO) offer additional evidence for mutual synergies between economic integration law, human rights and social welfare. Alston's authoritarian reliance on discretionary government regulation of economic activities ignores the fact that governments usually cannot directly produce the economic resources needed for the protection of human rights. Economic welfare depends on constitutional guarantees for the division of labour, savings, investments and trade among individuals and on the protection of human rights.

My 'constitutional approach' and its underlying hypothesis — i.e., that effective

²¹ *Ibid.*, at 825.

²² E.-U. Petersmann, *Wirtschaftsintegrationsrecht und Investitionsgesetzgebung der Entwicklungsländer* (1974).

²³ See Petersmann, *supra* note 1, at n. 76.

²⁴ Cf. Petersmann, *supra* note 4, 212 *et seq.*

²⁵ See, e.g., the annual reports on 'Economic Freedom in the World', published by the Fraser Institute in Vancouver, which emphasize the empirical correlations between economic freedom, economic welfare and relatively higher average income of poor people.

protection of human rights in international relations depends on national and international legal protection of six constitutional ‘core principles’ — are rarely applied in the literature on international relations. Rather than denouncing the brief summaries of my methodological assumptions as “‘stump” speeches’,²⁶ Alston should broaden his perspective and examine the interrelationships between human rights and constitutionalism more seriously. Alston laments that the 29 pages of his comment do not allow him to give ‘a detailed response’ to our controversies: yet, is it honest of him to blame me for not discussing his numerous additional human rights questions on the 30 pages accorded my article, and to then portray this as proof that I am ‘reluctant to engage with those few scholars who have been critical of [my] work’?²⁷

3 Why Does Alston Fail to Discuss Our Different Normative Premises?

Alston neither identifies nor discusses the three normative differences between our human rights conceptions:

1 My interpretation of human liberty rights aims not only at protecting maximum equal freedom, subject to democratic legislation, in all areas of personal self-development (e.g., also including individual production and consumption of essential goods, services and income) and across frontiers (i.e., challenging welfare-reducing border discrimination against foreign goods, services and persons). Alston limits Kant’s ‘categorical imperative’ to its ‘universal law component’; the additional objectives of Kant’s moral imperative referred to in my article — i.e., protection of human dignity and personal self-government by treating human beings as legal subjects rather than as mere objects, and by accepting ‘universalizable personal freedom’ as an end in itself — prompt me to argue for constitutional liberty rights as justiciable individual rights which courts should also protect in transnational relations as individual rights (e.g., to import and export essential goods and services subject to democratic legislation, balancing this freedom with the protection of other human rights). Conferring equal individual rights enables a higher degree of legal autonomy, empowerment and responsibility of individuals, and a more decentralized ‘self-enforcing constitution’, than does a paternalistic reliance on authoritarian regulation of personal freedom without legal and judicial protection of individual rights (as in many foreign policy areas). The experience with constitutional and judicial protection of every individual’s ‘right to free development of his personality’, pursuant to Article 2 of the German Basic Law, confirms that such a broad constitutional and judicial protection of personal freedom offers individuals important procedural and substantive legal safeguards without unduly limiting the regulatory discretion of democratic legislatures and democratic governments.

2 My focus on the ‘indivisibility’ and ‘inalienable nature’ of core human rights

²⁶ Alston, at 816.

²⁷ *Ibid.*, at 817.

reduces the dangers of a 'positivist' reliance on separate 'civil', 'political', 'economic', 'social' and 'cultural' human rights that have been conceded by governments at particular times in particular human rights instruments, such as the risk of leaving non-enumerated 'inalienable' human rights without legal protection and curtailing human personality by artificial legal distinctions. Treating separate human rights treaties as deriving from one 'inalienable human rights constitution' better protects the diversity and holistic nature of human personality and helps overcome partial human rights perspectives, such as Alston's refusal to protect 'normative individualism' and human rights in 'economic markets' no less than in 'political markets'. Human liberty rights, property rights, non-discrimination rights, social rights, procedural and democratic rights can be protected more effectively if they are understood as parts of a constitutional law that dynamically evolves, in particular national and international contexts, in response to new human rights preferences and challenges (e.g., as formulated in the EU Charter of Fundamental Rights).

3 Human rights protect individual and democratic diversity (e.g., human dignity in the sense of moral and rational autonomy) and, in a world of scarce resources, inevitably give rise to competition. The resulting conflicts of interest — for instance, between utility-maximizing producers and consumers in economic markets, and among citizens and self-interested politicians in political markets — create human rights problems which cannot be understood without taking into account 'market failures' as well as 'government failures'. The welfare-increasing effects of economic and political competition (e.g., as a spontaneous information mechanism, allocation-, coordination- and sanctioning-mechanisms, 'voice' and 'exit options' vis-à-vis abuses of power) are not gifts of nature. They depend on the protection of human rights through a 'limiting constitution' and an 'enabling constitution' (e.g., enabling a collective supply of public goods) in all areas of personal self-development. Hence, an 'economic constitution' is no less necessary than a 'political constitution'. Alston's preference for promoting human rights through 'benevolent governments' rests on authoritarian premises and a pretence of knowledge often dispersed among individuals and unknown to centralized bureaucracies. My proposals for empowering individuals pursue the same human rights values through decentralized and more complex 'market governance mechanisms' which treat citizens as legal subjects rather than mere objects. My emphasis on the instrumental functions of human rights (e.g., as incentives for rendering citizens not only 'better democrats' but also 'better economic actors') pursues the same human rights objective of a life of dignity and personal self-government.

4 Conclusion

Alston's Comment offers polemics rather than constructive criticism. Human rights must be constitutionally protected in economic markets no less than in political markets. Human rights specialists who neglect the constitutive function of human rights for welfare-creation, as well as the need for competitive markets and efficient policy instruments for reducing unnecessary poverty, risk undermining personal self-development and human rights.