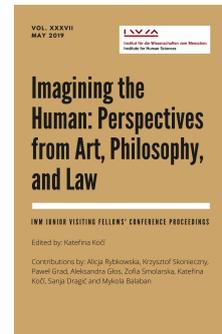


On the Concept of the ‘Human Rights Backlash’

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Usage of the terms ‘backlash’ and the ‘human rights backlash’ has become common in contemporary academic and non-academic circles. In international law and international relations scholarship, the word ‘backlash’ has been used to refer to, among other things, the denunciation of human rights treaties,[1] the *de facto* closing-down of human rights courts,[2] the ‘band of outlaw’ states ‘on the wrong side of history’,[3] shrinking space for civil society,[4] and the ‘citizen initiative for a just world economy’.[5] Thus, the term ‘backlash’ has been used in reference to very different concepts – from social movements to the behavior of states – and with both positive and negative connotations.

The human rights backlash has become a global phenomenon. More and more states are withdrawing from human rights institutions. In its letter of withdrawal, Venezuela stated that it had decided to “distance itself from the ... perverted practices of the organs of the inter-American human rights system.”[6] Additionally, It has become more common for states to enact domestic legislation limiting the activity of civil society organizations perceived or indeed funded by foreign sources. Nonetheless, despite the diversity of the forms of ‘backlash’, they seem to have common aims and consequences, which could provide the foundation for a common definition.

In order to define the phenomenon I will draw on literature explaining the process of so called ‘human rights change’ or ‘norm internalization.’[7] Scholars have identified key agents and tools of norm internalization. The term agents of change is used to refer to international institutions as well as domestic and international NGOs (sometimes also called ‘human rights promoters’). These agents use tools of law to target norm-violating states and through mechanisms of coercion and persuasion achieve norm internalization i.e. acceptance of a norm by a state as its own and behaving accordingly. Empirical observations point towards ‘backlash’ being a form of resistance by the target state against the agents of change and tools of human rights internalization. Consequently, ‘human rights backlash’ is understood as ‘*a strong negative reaction by a state against international human rights law and/or its promoters*’.

Mapping instances of ‘human rights backlash’ indicates that it is not a unified concept but occurs in a great variety of forms. One of the typologies highlights that reactions against the international structure can originate from all three branches of state, from the executive, legislative or the judicial branch of government – according to their respective powers in a given constitutional system.

The executive will most prominently act in the form of withdrawals or denunciations of international human rights treaties or by using official diplomatic channels with the aim of reshaping existing human rights institutions. Denunciations can come from one state or can be followed by other states, such as the example of African states withdrawals from the Rome Statute of the International Criminal Court (ICC). In this instance, three states, South Africa, Gambia and Burundi, have decided to withdraw from the Rome Statute of the ICC at the same time. Apart from passively resisting international law by refusing to participate in the regime, states also actively attempt to redesign international institutions. The South African Development Community (SADC) Tribunal, for example, was redesigned to exclude the right to individual petition, while the East African Court of Justice was reformed to include an appellate chamber. Further attempts have been made to redesign the ECOWAS Community Court of Justice and the Inter-American Court of Human Rights.

National parliaments can also act autonomously by enacting domestic legislation aimed at preventing human rights norm internalization. They could limit the activities of human rights promoters or target specific international human rights norms through domestic legislation. Notoriously, in the cases of Uganda and Russia, national parliaments have adopted new laws that protect ‘family values’ and curtail LGBT rights.[8] The Russian national parliament has also recently amended the Constitution in order to give power to the Constitutional Court to validate compatibility between judgments of the European Court of Human Rights and Russian laws.[9] Finally, a recent phenomenon that has spread around the world with unprecedented speed is the adoption of domestic laws that are targeting civil society actors when performing ‘political activities’ and funded by the ‘foreign sources.’[10] Civil society actors are often funded by foreign states or international organizations and are regarded as important actors in norm internalization process.[11] By targeting these actors and – in an indirect way – their donors, states are acting against the international human rights structure.

Finally, the judicial branch of government does have standing of its own in backlash movements. It can deliver decisions rejecting the validity of either human rights treaties or international human rights enforcement mechanisms. It is important here to distinguish between norm contestation and backlash. Acting against international human rights law and/or its promoters, in this account, does not include diverging interpretations of legal norms. Backlash coming from national courts occurs when national court rejects an international treaty or human rights promoters as such. The rejection of law or of promoters in these decisions is not limited to one specific case, but should be applicable to an indeterminate number of cases. The problem is not the different approach to specific legal norm and thus possible different interpretation based on either domestic or international law, but the law or its promoters as such. The most

prominent example is the decision of the Supreme Court of Sri Lanka in the case of *Nallaratnam Singarasa v Attorney General* where the Human Rights Committee's standing in national jurisdictional space was denied.^[12]

What these typologies make clear is that the 'human rights backlash' is not an empty concept. The state is not rejecting international law in a unitary manner, but each branch of government has its own form of resistance. Based on these variations, one could further account for backlash where domestic agents are resorting to domestic law, withdrawing from the international system or reshaping the international system. In the first two scenarios, the state aims at limiting international activities in its domestic space, while in the third; it acts against the source of 'norm internalization' and limits its effectiveness in other states as well.

Since the backlash as such is not necessarily contrary to international law, an additional typology of 'legal' versus illegal forms of backlash should be added. Some forms of backlash would seem to comply with international law. For instance, most of the international human rights treaties contain exit clauses and consequently envisage legal paths for the backlash to occur. Furthermore, redesigning international institutions also does not seem to contradict international law as it is based on the state consent. However, other forms of backlash such as domestic legislation limiting LGBT rights seem to be contrary to international human rights law.

Furthermore, distinction could be made between autocratic and democratic backlashes. It is often difficult to distinguish which state is democratic and which is not and some states can be both at the same time. Yet the aim of this typology is to put emphasis on the fact that backlashes do not originate solely from dictatorships. In fact, most of the 'backlash states' have some of the main features of democratic states.

Can backlash also come from non-state actors? As most non-state actors are not parties to human rights treaties, nor have standing before international human rights bodies, the concept of backlash as adopted here would not be applicable to them. However, backlash against certain agents that are putting pressure on the non-state actors, such as multinational corporations, could appear. It is very possible to imagine the occurrence and further proliferation of backlash coming from the non-state actors that would potentially target agents and tools of norm internalization.

There are a number of different forms that backlash can take, but what all of them have in common is the logic of directly or indirectly *acting against* agents and tools of human rights norm internalization and having as a consequence limitation of its effects. Having a similar target, aims and consequences makes it possible to unite all these variety of backlashes into one theoretical concept – the 'human rights backlash'.

[1] LR Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes' (2002) 102 Columbia Law Review 1832; C Balchin and others, *The Backlash against Investment Arbitration* (Kluwer Law International 2010); D Shelton, 'Whiplash and Backlash –

Reflections on a Human Rights Approach to Environmental Protection' (2015) 13(1) Santa Clara Journal of International Law 11; MR Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) Law and Contemporary Problems 141.

[2] K Alter, JT Gathii and LR Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 European Journal of International Law.

[3] A Lake, 'Confronting Backlash States' (1994) 73(2) Foreign Affairs 45.

[4] Carothers (n 80); M Acuto, 'Wilson Victorious? Understanding Democracy Promotion in the Midst of a "Backlash"' (2008) 33(4) Alternatives: Global, Local, Political 461.

[5] R Broad (ed), *Global Backlash: Citizen Initiatives for a Just World Economy* (Rowman & Littlefield Publishers 2002).

[6] Bolivarian Republic of Venezuela, Letter of Denunciation of the American Convention on Human Rights, 6 September 2012, p. 11.

[7] Among many see T Risse-Kappen, SC Ropp and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999); T Risse, SC Ropp and K Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).

[8] Anti Homosexuality Bill (Republic of Uganda, 14 October 2009); Anti Homosexuality Act (Republic of Uganda, 24 February 2014); Law on Protecting Children from Negative and Harmful Information (Russian Federation, 3 January 2011).

[9] Federal Constitutional Law No. 7-FKZ on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation (Russian Federation, 14 December 2015).

[10] Among many see Charities and Societies Proclamation, Federal Democratic Republic of Ethiopia (Federal Democratic Republic of Ethiopia, 13 February 2009); The Law on Non-Commercial Organisations (Russian Federation, 13 July 2012, 21 February 2014 and on 4 June 2014).

[11] On critique of domestic NGOs that are executing funders goals see Mutua M (ed), *Human Rights NGOs in East Africa Political and Normative Tensions* (University of Pennsylvania Press 2008).

[12] *Nallaratnam Singarasa v Attorney General* SC Application for Judicial Review, SC Spl (LA) No 182/99, ILDC 518 (LK 2006) (Supreme Court of Sri Lanka, 15 September 2006).

