

# THE LIMITS OF INTERNATIONAL LAW IN PROTECTING DIGNITY

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My perspective on international law and human dignity can be simply stated: International law, as currently constituted, is likely to fail to advance human dignity. The vehicles most relied upon to advance this great goal—human rights treaties—are flawed as a matter of substance and process. Nor can much hope be placed in the principles of customary law, because its process of generation provides no guarantee that its principles as a whole will be beneficial, particularly to those who most struggle for human dignity—the impoverished of the developing world. In contrast, world trade agreements provide the most likely international vehicle for advancing human dignity. By increasing wealth and bringing the world's poor into the web of exchange, multinational trade agreements are likely to move societies onto paths leading to more democratic governance and improved civil rights.<sup>1</sup>

The central premise of my talk is that, as a general matter, political systems that create the conditions necessary for human dignity are best rooted in popular consent and respect for basic economic freedoms. My reasons for this conclusion are historical, empirical, and theoretical. Historically, growing popular consent and economic freedom permitted a rising middle class in England, and then America, to create a society that protected civil rights to a degree unprecedented in human history.<sup>2</sup> Empirically, the nations that respect popular consent and democracy tend to protect the other civil rights that permit human beings to flourish.<sup>3</sup>

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1. See Richard A. Posner, *Equality, Wealth, and Political Stability*, 13 J.L. ECON. & ORG. 344, 344 (1997).

2. For a discussion of the revival of property rights in legal and political theory, see TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* (1998). For a book that shows the importance of property rights in generating prosperity, see DAVIS S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* (1998).

3. See JAMES GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD, 1975-1995*, at xxii (1996).

Theoretically as well, popular consent is an important step to make rulers govern according to the preferences of the people. Without popular consent and democracy, government structures operate for the benefit of the rulers and the factions that support them—a problem that bedevils all political systems and detracts systematically from human dignity. But even democratic institutions are bedeviled by high agency costs. Insofar as the actions of elected officials are not transparent, and the officials themselves are not accountable to the electorate, rulers of democratic governments display the same tendencies as dictatorships: to protect their own interests and the interests of the factions that support them at the expense of the public. Government should be structured to reduce those agency costs. When either tradition or constitutional principle allows individuals very substantial control over their own economic destiny, the scope and thereby the agency costs of government are substantially curtailed.

Unfortunately, as currently constituted, most mechanisms of international law fail to provide means for popular consent to the rules they create, and the substance of these rules have utterly failed to protect economic freedom. One reason for this failure is that the citizens of sovereign nations have no process by which they may hold accountable the architects of international rules. International rules do not generally emerge from the kind of process that gives us historical, empirical, and theoretical reasons to believe that the rules will actually protect human dignity. Because these international processes are distant from the average citizen, agency costs are in fact particularly high.

Here, I briefly review human rights treaties and customary international laws—two sources from which advocates seek a greater infusion of dignity from international law—and show why they are unlikely to contribute to human dignity. In contrast, the treaties promoting free trade under the aegis of the World Trade Organization can contribute to human dignity because their operations have relatively low agency costs and, in fact, particularly empower the poor, a group whose interests are at risk even in democratic systems.

First, let me begin with the procedural problems in the family of international law provisions that human rights advocates hold up as charters of human dignity, such as the Universal Declaration of Human Rights<sup>4</sup> and the International Covenant on Economic, Social,

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4. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

and Cultural Rights.<sup>5</sup> Both of these international human rights documents were negotiated during the period of the Cold War when the communist bloc was a party to these treaties and greatly influenced their content. This provenance greatly undermines the worth of these documents as vehicles for human dignity: They emerged from a process influenced by totalitarian regimes and not by a process of open popular consent. Obviously what went into these documents was in part a consequence of what these dictators wanted. Certainly, if human rights treaties had been negotiated during the ascendancy of Nazi Germany and its axis allies, no one would argue in favor of applying them because the process by which conventions were negotiated with such totalitarian nations could not provide any guarantee that the document should be relied upon independently as a guide to the principles that establish human dignity. I am, of course, not asserting that no provision in these agreements is a good one, but the process by which the provisions were generated provides no evidence that any particular provision is beneficial.

The substance of these documents also confirms their flaws as vehicles for protecting human dignity. To mention just a few, these documents mint all sorts of rights citizens as a collective have against the government—rights to good education, free health care, and even, in one case, the right to have the government assure paid holidays!<sup>6</sup> Neither of the covenants, however, contains a right to compensation for the taking of property, or provides protection for other individual economic freedoms, such as the right to contract. The Universal Declaration of Human Rights mentions property rights, but provides only for “the right to own property” and the right not to “be arbitrarily deprived of . . . property.”<sup>7</sup> It provides no specification of what constitutes property. It is wholly silent on other economic freedoms, like the right to contract. It thus seems to ignore the very rights that both historically and empirically have been the foundations of a culture that protect human dignity.

But even setting aside the defects in the process that gave rise to these human rights documents and the flaws in the documents themselves, grounding human dignity in an international human rights regime faces substantial obstacles. The dilemma is simply that outside of certain core matters like genocide and the like, the optimal

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5. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

6. *See id.* at 50.

7. *See* G.A. Res. 217, *supra* note 4, at 74.

contours of many rights vary with the level of development and culture of the country. Thus it is difficult, if not impossible, for an international document to provide the optimal set of civil rights in the context of each nation. As a result, any document would need to be pitched at a very high level of generality in its definition of civil rights, and even many property rights. That generality would then need to be interpreted in a specific context. The question of who would do the interpreting then raises the problems of agency costs yet again: who will watch over the interpreters to guard against unrepresentative or special-interest interpretations?

This problem is more than a theoretical one, because those who have the most influence over the interpretation of these treaties, such as law professors and nongovernmental organizations, are not representative of citizens. Take the case of law professors—the publicists of international law. First, they are predominantly from the developed, rather than the developing, world. Intellectuals are expensive, and the developed world can simply afford more of them, just as it can afford other luxuries. Second, even within their own nations, law professors, like intellectuals generally, have distinctly unrepresentative views. For instance, in the United States, law professors are overwhelmingly left-liberal in their political orientation.<sup>8</sup> Overall, Democratic-leaning law professors outnumber Republican-leaning law professors by about eleven to two, and a recent study that I have conducted on campaign contributions suggests that international law professors are at least as liberal as other professors.<sup>9</sup> While data on the political preferences of law professors in Europe and other Western countries is not as readily available, in general the academic class stands well to the left of modern society.

The combination of these two biases can be quite powerful. Because academics come from countries that are already wealthy, they profit less from growth than the average global citizen who may be more willing to take risks to better his very low standard of living.

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8. Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 172 (1999) (citing studies that show that the legal academy is overwhelmingly “left-liberal” with about eighty percent self-identifying as Democrats and only ten percent as conservatives); Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998) (reporting that a large majority of law professors characterized themselves as “‘moderately’ or ‘strongly’ liberal or left” in recent survey of the academy).

9. See John O. McGinnis et al., *Ideology in the Legal Academy* (unpublished draft manuscript, on file with author).

Because academics are left-liberal, they are less sympathetic to entrepreneurial ideas than the average citizen. The combination would lead to risk-averse rules that provide the state with great power to protect the environment and income equality even at the expense of growth. These kinds of rules would not necessarily promote either the prosperity or autonomy of citizens around the world in the long run, as economic growth is the primary spur to structures that protect human dignity.

Nongovernmental organizations—the other principal influence in the interpretation of these treaties—are also unrepresentative by definition since they are civic associations that do not stand for election. Representing people with interests in the environment, labor, and human rights, NGOs are the equivalent of special interest groups in the domestic polity. However, in the international sphere they are not restrained by the influence of the more diffuse citizenry come election time. These groups also are drawn largely from the developed world.

The problem of unrepresentativeness affects other groups with power to fill in the generalities of human right treaties. International Court of Justice (ICJ) judges are always lawyers and share the characteristic biases of the legal class: an interest in “fair” process rather than economic growth. (By this point, I do not mean, of course, that lawyers are not valuable; fair process, as well as economic growth, is important to a society. But tradeoffs may need to be made.) Moreover, institutionally international judges have a vested interest in expanding the power of international law, which is likely to mean a bias in favor of finding evidence of widespread acceptance even when that evidence is for one reason or another insufficient.<sup>10</sup>

International human rights law can be created by custom as well as by interpretation of these past agreements, but the process of fabricating customary international law is even less representative and has even higher agency costs. In its modern version, customary law represents a general practice of nations that is pursued as a matter of international legal obligation. Given this definition, customary law is even less likely to represent a popular consensus than treaties are.<sup>11</sup>

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10. Although I have surprisingly found no discussion in the international law literature of the self-aggrandizing tendencies of ICJ or other international judges, the interest of domestic judges in expanding their power has been frequently noted. *See, e.g.,* Larry Ribstein, *The Illogic and Limits of Partners' Liability in Bankruptcy*, 32 WAKE FOREST L. REV. 31, 63 (1997) (suggesting that bankruptcy judges decide cases in a manner that expands their own authority).

11. I discuss the question of the process by which international law is generated at

Nations do not ratify their assent to customary international law in a way that gives notice to their people as they often do in the case of treaties. Second, unlike treaties, customary international law is made up of inferences from states' practices and does not generate a text of agreed-upon principles. It is thus less transparent to the public. Finally, because it is made from inferences from state practice, customary law is even more in need of an interpretative body than are treaties. And these interpreters are the unrepresentative internationalist publicists who may well be biased against the economic freedoms that have been a principal engine of the drive for human dignity.

My view of the relation of international law to the possibility of human dignity is not unreservedly negative. International trade agreements can improve human dignity. Trade treaties are not as liable to the high agency costs of international law because they largely focus on removing regulation.<sup>12</sup> Thus they typically do not require the formulation of international regulations that permit special interests to fashion regulatory regimes against the public interest. Second, trade agreements, particularly the most recent versions negotiated as part of the World Trade Organization (WTO), are ratified by increasingly democratic governments around the world. Third, the WTO trade agreements are a complex code, not simply a set of general principles, and thus do not offer as much discretion for interpretation as the abstract principles of human rights law. Finally, every few years, representatives from member nations gather to update the treaty, permitting generally democratic governments to make revisions. Of course, this is not to say that the WTO has a perfect democratic pedigree, but its process of generation appears more democratic than the current international vehicles for human rights.

We also have a strong independent basis to confirm that trade agreements can help the poor of the world. Evidence overwhelmingly supports the proposition that trade helps poor countries become wealthier.<sup>13</sup> One major difference between developing countries that

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much greater length in *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Case of the WTO*, 44 VA. J. INT'L L. (forthcoming 2004).

12. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

13. See, e.g., L. Alan Winters, *Trade and Poverty, Is There a Connection*, in DAN BEN-DAVID ET AL., *TRADE, INCOME DISPARITY AND POVERTY* 43 (2000), available at [http://www.wto.org/english/news\\_e/press00\\_e/pov3\\_e.pdf](http://www.wto.org/english/news_e/press00_e/pov3_e.pdf); David Dollar & Aart Kraay, *Growth Is Good for the Poor*, 7 J. ECON. GROWTH 195 (2002), available at

have prospered and those that have not is their participation in world trade.<sup>14</sup> Empirical evidence further shows that international trade helps those lowest on the income scale of developing nations as much as those higher on the income scale.<sup>15</sup>

Trade agreements also bring the poor into the web of world-wide exchange, encouraging the skills of entrepreneurship and the habits of industry that will lift them from poverty. In turn, additional skills and income help give the poor independence from their governments, an essential aspect of human dignity, and consequently leverage to push for changes in their own nations that will better their lot.

Over time, trade agreements also facilitate the growth of civil rights that promote human dignity. Civil rights are highly correlated with the wealth of a society.<sup>16</sup> This correlation accords with historical evidence that because of prosperity, a rising middle class demands civil and political rights to help secure its swelling wealth against the dangers of tyrannical government and political instability.<sup>17</sup> Trade agreements, however, generate these rights not through fiat but by encouraging a process that will generate internal pressure for such rights. This mechanism has two advantages. First, internally generated rights are less fragile and less subject to revocation as foreign imports. Second, the content of these rights can be more sensitive to the nation's traditions and historical circumstances.

The ability of multilateral trading agreements to cascade into civil rights has yet another important advantage over the direct international pursuit of human rights: trade agreements are more likely to be honored by the despotic countries.<sup>18</sup> Many countries, particularly developing nations that have signed the Universal Declaration on Human Rights as well as the most important human rights conventions, nevertheless continue systematically to abuse the civil and political rights of their people and to resist basic democracy.<sup>19</sup> In contrast, authoritarian regimes are more likely to

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<http://www.worldbank.org/research/growth/pdffiles/growthgoodforpoor.pdf> (citing a World Bank study, using data from 92 countries over four decades, that confirms that openness to trade boosts economic growth and that the average incomes of the poor rise proportionately to overall growth).

14. See Dollar & Kraay, *supra* note 13, at 213.

15. See generally *id.*

16. See GWARTNEY ET AL., *supra* note 3, at 92-97.

17. See John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029, 1032 (1999).

18. See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381, 392 (2000).

19. *Id.*

honor trade multilateralism because expanding trade increases the nation's wealth and thereby enlarges tax revenues and other exactions by its leaders. Therefore, by offering attractive bait to hook the leaders of despotic regimes, multilateral trade agreements may provide an effective route to securing civil and political rights. In this way trade agreements are, in the long run, advantageous to the poor.<sup>20</sup>

It is important to note that world trade agreements help the poor gain the advantage of lower tariffs. Protectionist interest groups have substantial leverage in developed democracies and use that leverage to block the importation of goods from other countries.<sup>21</sup> The World Trade Organization, however, provides a framework for reciprocal tariff reductions. Reciprocity gives exporters in developed countries an incentive to lower their tariffs so that they can obtain lower tariffs abroad.<sup>22</sup> This political structure makes rich exporters the guarantors of the interests of the world's poor in the global economy.

In conclusion, I believe that many of the current vehicles of international law can generally do little for human dignity, and may often be counterproductive by empowering unrepresentative elites and by creating agency costs that give power to special interests. International agreements that expand trade are an exception. By increasing wealth, they help put the developing world on the path the West took in arriving at institutions that, with all their imperfections, protect human dignity better than any other regimes in human history.

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20. *See id.*

21. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 238-42 (1989).

22. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 545-46 (2000).