

1999

The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Themes and Variations

Samuel K. Murumba

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [International Humanitarian Law Commons](#)

INTRODUCTION

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AT 50 AND THE CHALLENGE OF GLOBAL MARKETS: THEMES AND VARIATIONS

*Samuel K. Murumba**

I. OVERVIEW

Those celebrating the Golden Jubilee of the Universal Declaration of Human Rights around the world had no shortage of topics and themes to choose from. This is because the Declaration, a terse catalogue of rights adopted by the United Nations General Assembly at the newly-built *Palais de Chaillot* in Paris that December night fifty years ago, has spawned a lavish structure of interlocking strands—instruments, procedures, and institutions that together make up the international human rights system—and each strand in that fabric will reward close study and reflection. Aware that others would pay abundant attention to this lavish fecundity of the past fifty years, our intuitions at Brooklyn were that it would be more rewarding to turn to the future where nothing loomed quite so large as the emergence of global markets. We believe that the superb papers and perspective embodied in this issue have proved our initial intuitions right. Intuitions, however, were only the starting point, not the decisive influence, on our selection of the relationship between human rights and global markets as the theme of our commemorative symposium. Of greater import was a happy confluence of theoretical and institutional considerations.

First, the theoretical consideration. As Dean Wexler reminded us in her Foreword, “the intersection of human rights

* Professor of Law, Brooklyn Law School.

and global markets was, of course, not the pressing issue of the times at the birth of the Universal Declaration of Human Rights . . . [but] will undoubtedly be a recurring theme in the Declaration's next 50 years."¹ There is a good reason for this. As originally conceived in the Universal Declaration, and in antecedent natural law theorizing, human rights were principally the claims of individuals "against" or "upon" the state or the society² it represented. In Hohfeldian terms, the state had the primary duties correlative to these rights.³ The state, even a democratically-constituted one, had a monopoly on all forms of power before which the individual was helpless. In the face of this overwhelming power, the doctrine of human rights acted as a normative zone of dignity around each human being, one that the state or the majority may not positively or negatively impinge. In the last decade of the 20th century, however, the notion of the all-powerful state undergirding the conception of human rights has taken a severe battering. Since the collapse of communism in 1989, there has been a steady diminution of state power and autonomy. There was, of course, some irony in the fact that this erosion of state power was a result of the demise of communism, not its success as Karl Marx had anticipated in the "withering away" thesis;⁴ the greater irony, however, was that the beneficiary of this diminution in state power was not "Marx's utopian conception of a full communist society" so idyllic as to need no conceptions of justice⁵ or rights, but the market—global markets. It is this shift in power and autonomy from states to markets, and the "disabling of the state as guardian of the global public good"⁶ that requires a reconceptualization of human rights to accommodate that significant new strand in the configuration of international affairs. Moreover, as indicated in Richard Dicker's account of corporate responsibility in this issue,⁷ the creative task of ex-

1. Joan G. Wexler, *Foreword*, 25 BROOK. J. INT'L L. 1, 3 (1999).

2. See LOUIS HENKIN, *THE AGE OF RIGHTS* 3 (1990).

3. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

4. Galbraith sees this as one of the failings in Marx's critique of the capitalist system. See JOHN KENNETH GALBRAITH, *A HISTORY OF ECONOMICS* 138 (1987).

5. This is an interpretation which Rawls attributes to R.C. Tucker. See JOHN RAWLS, *A THEORY OF JUSTICE* 281 (1971); R.C. TUCKER, *THE MARXIAN REVOLUTIONARY IDEA*, chs. I, II (1969).

6. RICHARD FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* (1998).

7. See *Indonesia: Intersection of Human Rights, Financial Markets and Com-*

tending human rights' correlative duties to non-state actors like corporations⁸ is of much more than theoretical significance.

The institutional factor which prompted our choice was, of course, the presence at Brooklyn Law School of the two outstanding institutions whose concerns nicely correspond with the broad components of our theme: the Center for the Study of International Business Law (for the markets component) and the Edward V. Sparer Public Interest Program (for the human rights component). These two had hitherto carried on their respective work in parallel universes that will now begin to intersect more frequently as their concerns become more and more hybridized. For me, personally, and for others similarly placed, this hybridization has the added bonus of reintegrating two parts of what had long appeared as an intellectual split-personality: equal devotion to, say, intellectual property and to international human rights. The idea of a symposium on the above theme was warmly supported by Dean Wexler (whose wise counsel at all stages saved us from some hilarious pitfalls)⁹ and readily embraced by the Sparer Committee, the Business Law Center Committee, and, of course, the *Brooklyn Journal of International Law*, whose editor, Dorothy Giobbe, and Faculty Advisors, Professors Claire Kelly and Maryellen Fullerton, performed the Herculean task of putting together this written record of the symposium. A joint organizing committee was duly formed with myself as chair¹⁰ and began work in earnest at the beginning of 1998.

It is great to settle on a wonderful theme so propitiously, but a wonderful theme alone does not a symposium make; for an outstanding symposium, one needs outstanding speakers.

petition Policy, 25 BROOK. J. INT'L L. 161, 167 (1999).

8. See Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights in the Twenty-First Century* in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 207, 239 (A. Anghie & G. Sturgess, eds., 1998).

9. Such as my enthusiastic brainchild of having Judge Weeramantry's address at the dinner rather than the symposium. Dean Wexler gently reminded us that the audience would consist only of the panelists!

10. The other members of the joint organizing committee were: Professors Claire Kelly and Maryellen Fullerton, Faculty Advisors to this *Journal*; Professors Larry Solan, Stacy Caplow and Mary Jo Eyster from Sparer Committee; and Associate Dean Spencer Weber Waller and Professors Norman Poser and Arthur Pinto from the Business Law Center.

We were fortunate that Professor Henkin accepted Dean Wexler's invitation to be our keynote speaker and His Excellency Judge Weeramantry accepted mine to fly down from the Hague to give the luncheon address. For the papers and commentators for the morning panel, Associate Dean Spencer Weber Waller secured us Professors Garcia and Dunoff, Mark Warner, Esq., and Steve Charnovitz, Esq. I thought it would be an excellent idea to have discussion panels rather than formal papers for the afternoon session. The impact of global markets on women's rights, and of the financial crisis in Indonesia seemed perfect candidates, but I know little about one and even less about the other. This is where my friends at Human Rights Watch came to the rescue. Kathleen Peratis, Esq. of Frank & Peratis, and a fellow Board member who also chairs the Advisory Committee for the Women's Rights Division of Human Rights Watch, put together and wonderfully moderated a magnificent women's rights panel; Sidney Jones, Executive Director of the Asia Division, and Richard Dicker, Associate Counsel at Human Rights Watch, along with Associate Dean Spencer Weber Waller gave excellent presentations on the intersection of human rights, financial markets and competition policy in Indonesia. The structure of the symposium just described and reflected in the arrangement of this issue has three segments: Professor Henkin's keynote speech and Judge Weeramantry's luncheon address, the morning session papers and commentators' views on those papers, and the afternoon panels on women's rights and Indonesia.

One of the greatest strengths of the symposium, as the Dean mentioned, was the rich diversity of perspectives, all, however, variations on the same theme of the interaction between human rights and global markets.

II. PROFESSOR HENKIN'S KEYNOTE SPEECH AND JUDGE WEERAMANTRY'S LUNCHEON ADDRESS

Professor Henkin's keynote speech which set the tone for the whole symposium was at once both a resounding affirmation of the case for celebrating the 50th anniversary of the Universal Declaration of Human Rights—he called it the “birth certificate” of the human rights movement—and a rare insight into that instrument's intellectual history and pride of place among the ideas of our time. With characteristic incisiveness

and lucidity, Professor Henkin painted a four-pillar portrait of the achievements embodied in the Universal Declaration.

The first pillar of achievement was the movement from a 17th and 18th century idea of natural rights to the powerful current ideology of human rights we know today. Although the rights idea features prominently in the American Declaration of Independence and the French Revolution's Declaration of the Rights of Man and the Citizen, its progress in the intervening 150 years was far from assured. In France, it kind of fizzled and was not heard of until the end of the Second World War; in America it labored on but under some serious and debilitating genetic defects. It was the Universal Declaration of Human Rights which gave new life, and ultimately transformed the original idea into the world ideology of human rights. The Declaration's second pillar of achievement was the definitional transformation of the phrase "human rights" into a reasonably precise catalogue of rights—a marriage of the liberal rights of freedom and the benefits of the welfare state. The third pillar was the universalization of the original rights, and their acceptance throughout the international community. The fourth was the rejection of the principle that how a state treated its own nationals was no one else's business—what Henkin calls the "death certificate" of that axiom and the enthronement of the notion that human rights everywhere are the responsibility of everyone, obligations to everyone. As for global markets, however, Professor Henkin does not see these as supplanting nation states, though they can be brought within the normative universe of human rights indirectly through the primary responsibility of states or directly through vulnerability to civil litigation or concern for brand integrity.

Professor Henkin's exposition of the international human rights movement even in its historical and conceptual fullness, however, understates his own remarkable contribution to that process. His name is almost synonymous with international human rights norms which, as gifted teacher and scholar, he has worked tirelessly to shape and articulate. Much of this creative work is embodied in such of his works as *The Rights of Man Today*,¹¹ *The Age of Rights*,¹² *Foreign Affairs and the*

11. LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* (1978).

12. LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

U.S. Constitution,¹³ and, of course, his outstanding work as Chief Reporter of the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States,¹⁴ which contains one of the most authoritative articulations of the customary international law of human rights. As a colleague on that project tells it, Professor Henkin's unmistakable imprint on international human rights law which came from that work was no accident:

I came to know Henkin intimately in the course of work on the Restatement (Third) of the Foreign Relations Law of the United States We did not like the title of the Restatement that we were presented with. In many ways we were engaged in stating, not restating [and] Louis Henkin was not ashamed to be original in his thinking. Furthermore, we were not addressing Foreign Relations law—to some persons virtually an oxymoron and certainly not a discipline. It was international law that was our focus, [even] if, more than once in our endeavors, Professor Henkin had to explain to a prominent judge or lawyer that "Yes, Virginia, there is such a law" ¹⁵

His Excellency Judge Weeramantry's luncheon address focused on the specific relationship between human rights and the market, one of his enduring scholarly interests. Judge Weeramantry—who has been a member of the International Court of Justice since 1991 and Vice-President of that Court since February 1997, and was, prior to that, the Sir Hayden Starke Professor of Law at Monash University, Melbourne, Australia—is a prolific scholar who has written sixteen books and numerous articles on the law of contract, jurisprudence and human rights, including five books on the relationship between human rights and technology. But his scholarly output did not cease with his election to the World Court. On the contrary, it has flourished on that court as well, resulting in judicial opinions that have attracted scholarly attention.¹⁶

13. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* (2d ed. 1996).

14. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987).

15. See Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 *COL. J. TRANSNAT'L L.* 121 (1997).

16. Most recently, see FALK, *supra* note 6, at 178-79, 190-98, 203-05.

Judge Weeramantry's thesis that human rights and markets are inextricably intertwined is built on two premises: the fact that all human rights—not just social and economic rights—have an economic substratum, and the need for markets to be brought into the moral or ethical universe. I think that to understand the complex portrait of the relationship between human rights and markets which Judge Weeramantry painted we need to view it against the background of traditional understandings of those two notions.

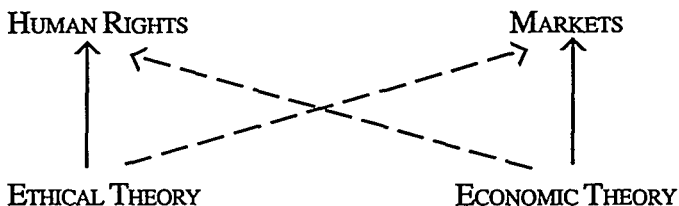
Let us begin with our basic pair—human rights and markets—the relationship between which may not be readily apparent at first. Next, let us supply the other phenomena which are traditionally regarded as the respective theoretical substrata of our basic pair: ethical theory or ethics for human rights, and economic theory for markets. Now we have the traditional set of correlates that looks something like this:

FIGURE I.



We, however, still do not have an obvious relationship between human rights and markets. That is revealed by the next stage of Weeramantry's scheme, which cross-links these notions to each other's substratum, so that human rights now have an economic theory as a strand in their substratum, and markets have ethics as a strand in theirs. The picture now looks something like this:

FIGURE II.



Contrary to the traditional view which sees them only in terms of ethical theory, human rights according to Judge Weeramantry—be they civil and political rights or economic and social rights—have an economic substratum or they would not be much use to anyone. The economic substratum is thus of their very essence. Similarly, markets, too, have an ethical substratum. They presuppose a whole variety of norms—such as those constraining violence or fraud—including those establishing rights such as the right to property.¹⁷ Moreover, they have no normative primacy as ends in themselves, and to treat them as such flies in the face of their historical role and is productive of the “blindspots” which Judge Weeramantry outlines in his speech. In sum, although on the surface, there is no obvious link between human rights and markets, an indirect relationship emerges in their deeper structure which Judge Weeramantry reveals.

III. THE MORNING SESSION

The morning session consisted of Frank Garcia and Mark Warner’s lively contrasting perspectives on whether the global market was a friend or foe of human rights, and of the views of able commentators—Jeffrey Dunoff and Steve Charnovitz—on those perspectives.

Frank Garcia’s excellent paper is an incisive scrutiny of the relationship between human rights and what he sees as the two principal components of globalization: transactional and regulatory. Together these have transferred much autonomy from states to the marketplace and its institutions.

Although Frank Garcia acknowledges some positive effects of market globalization—in both its transactional and regulatory forms—on the vitality and effectiveness of human rights, he also warns against an unqualified embrace of globalization as a friend of human rights. His cautionary note prompted by the fact that the institutional and normative underpinnings of the marketplace with its consequentialist trade-offs and their model of human beings as *homo economicus*, or rational self-interest maximizers, is inherently alien to the deontological vision and model of humanity which are at the heart of human

17. See Jeremy Waldron, *Is Coleman Hobbes or Hume (or Perhaps Locke?)*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 117, 117 (Brian Bix ed., 1998).

rights. It is possible to alleviate some of the worst aspects of this disjunction, for instance by subjecting the consequentialist trade-offs of trade institutions like the WTO to robust human rights standards. That, however, is not an approach these institutions do, or are as yet likely to embrace with any enthusiasm.

By contrast to Frank Garcia's caution about the wholehearted embrace of markets, Mark Warner mounts a wonderfully provocative and spirited defense of the global market and reserves his cautionary note for the Universal Declaration of Human Rights in particular, and the human rights movement in general. For Warner, globalization of markets is not something sinister; rather, it is the spur to economic liberalization, cheaper prices, and universal welfare. The Universal Declaration of Human Rights, on the other hand, is hopelessly incoherent because it tries to do too many things, while human rights NGOs are undemocratic and lacking in transparency. Warner is reluctant to leave human welfare to such a combination of normative incoherence and institutional unaccountability. Beyond a very narrow group of human rights concerns that can command universal consensus—for instance, slavery, apartheid, torture—he would rather leave the rest to the economic liberalization of global markets which, in his view, are more likely to deliver greater welfare and benefits to people everywhere than incoherent rights.

In two brilliant commentaries on these contrasting main perspectives, Steve Charnovitz and Jeffrey Dunoff bring fresh insights of their own to this debate. Both challenge the basic premises of the contrast between rights and markets on which Garcia and Warner take sharply opposing sides. Charnovitz ingeniously argues that, far from natural enemies, both international economic law and international human rights law are avenues to the common end of individual freedom and autonomy, since both limit or circumscribe governmental interference in private decisionmaking. Although one could argue that this view is more true of negative rights than of positive rights, it highlights a point of significant convergence of human rights and markets that is easily overlooked. Jeffrey Dunoff's comment on the principal papers tackles another tenet of the "divergence thesis": the displacement of states by the market. There is an echo here of Professor Henkin's argument but Professor Dunoff makes the further point that were the state

indeed to wither away, both human rights and markets would suffer, not benefit. In this respect, he has joined two groups of contemporary scholars: those who have questioned the adequacy of what Jules Coleman has referred to as the market paradigm¹⁸ or its claim to normative or ontological primacy on the one hand, and those who have demonstrated that even liberty cannot exist without a structure¹⁹ and that liberalism is not inconsistent with affirmative obligations,²⁰ on the other. These two perspectives are a useful corrective upon respective tendencies to turn human rights or markets into utopian, autonomous constructs.

IV. THE AFTERNOON PANELS

As already mentioned, the format of the afternoon session was different from that of the morning session. Instead of formal papers and the views of commentators, the afternoon session consisted of two panels of experts dealing in considerable depth with two contemporary sites of dynamic interaction between human rights and markets: women's human rights and crises in financial markets. These offered an opportunity to test the theoretical perspectives of the morning session on concrete problems, and we were fortunate to have panelists with rich and varied practical experience.

As already mentioned, the women's rights panel was put together and moderated by Kathleen Peratis, whose experience as a litigator and human rights advocate in this field in the United States and overseas is unrivaled. As she conceptualized it, it had three components. The first component was a general perspective on the historical exclusion of women from the reach of international human rights law, and was addressed by Joanna Kerr, a senior researcher at the North-South Institute, Ottawa. She noted that to the traditional barriers to women's equality in the form of laws, religious and social attitudes, and

18. See JULES COLEMAN, *RISKS AND WRONGS* (1992); Waldron, *supra* note 17, at 117 (stating "the market paradigm presents economic competition as the basic or primal form of human interaction, and holds that cooperative interaction—that is, social decisionmaking through political processes yielding legal rules—is necessary only in circumstances where market competition fails").

19. See RANDY E. BARRETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

20. See PATRICIA G. SMITH, *LIBERALISM AND AFFIRMATIVE OBLIGATIONS* (1998).

institutions, we can now add the globalization of markets, which has encouraged or compounded the problems of sexual slavery and forced labor. She also challenged Mark Warner's conception of "core rights" which did not include these violations as well as his neo-classical economic model as fraught with the blind spots of the kind outlined in Judge Weeramantry's speech.

The second component of the women's right panel consisted of three specific contexts in which the global market has had a major impact. These were lucidly detailed by Martina Vandenberg, a researcher on women's rights at Human Rights Watch. The three illustrative case studies which Ms. Vandenberg appropriately characterized as "violations without borders" are rape and sexual harassment in the Russian Federation, pregnancy-based sex discrimination in the *Maquiladoras*, and the trafficking of Burmese women and girls into Thailand for forced prostitution. With a wealth of detail, Vandenberg painted a vivid and instructive picture of the darker side market globalization in these three case studies.

The final component in the women's rights panel was Professor Elizabeth Schneider's reflection on, and exposition of, challenges, strategies and lessons for those concerned with women's human rights. These had to be conceptualized from what had been learnt about notions such as the public/private dichotomy, the violence of privatization, as well as the human rights concept of universalization that Professor Henkin had articulated in his keynote speech, as a rallying point of international consensus and network of women's rights activists. Professor Schneider, who is the Chair of the Sparer Committee, the co-sponsor of the symposium, used her litigation, activist, and theoretical experience to give an interesting insight into the interaction between the international and domestic contexts of women's rights.

The final panel focused on the impact of global financial markets and multinational companies (especially those involved in extractive industries) with a particular emphasis on Indonesia. This panel, which was chaired by Professor Larry Solan, consisted of three presentations. The first was one of the most lucid and illuminating accounts of the complex situation in Indonesia given by Sidney Jones, Executive Director of Human Rights Watch/Asia Division. This dealt not only with the antecedents to globalization, but also with the impact of

this and the financial crisis which hit Indonesia recently, on human rights and democratization.

Richard Dicker, Associate Counsel at Human Rights Watch, focused his talk on corporate responsibility abroad and the conceptual and legal strategies honed in years of research and advocacy in this field. The principal legal and conceptual problem here is the traditional understanding of human rights and international human rights instruments as primarily addressed to states. He outlined an innovative response to this obstacle in the ingenious "theory of accomplice liability" which he expounds in his excellent paper in this issue.

The afternoon session concluded with Spencer Weber Waller's demonstration of yet another link between markets and human rights in the common logic of decentralization of power. With a wealth of historical and contemporary examples, Waller persuasively argued that the monopolists' concentration of *economic* power, which distorts markets, has a perfect analog in the dictator's concentration of *political* power, which is anathema to human rights. It is no surprise, therefore, that as in the case of Indonesia, one finds both in the same person or family.

As the papers in this issue reflect, the afternoon panel was a lively and enlightening experience and as essential a component of this successful symposium as the morning one.