

# HUMAN RIGHTS, GLOBALIZATION AND THE RULE OF LAW: FRIENDS, FOES OR FAMILY?

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*The universalization of human rights norms and the global liberalization of corporate and commercial endeavor are two especially conspicuous players on the globalization stage. Both, to some extent, rely on the notion of the Rule of Law to promote their ends, though they rely on different features of the notion in so doing—the latter more on “certainty;” the former more on “equality.” Within the context of the growing interest in investigating the relationship of human rights protection and economic enterprise, this article considers what role the Rule of Law plays in this relationship. Specifically, the question of what effect this dynamic has had on the global goal of the protection and promotion of human rights is addressed. The author concludes that as a result, partially, of the sheer complexity of the relationship between human rights and economic globalization, and partially as a result of the limitations of the Rule of Law concept itself, the Rule of Law may be seen as a desirable element of human rights protection, but it is certainly not sufficient. It is only where a less doctrinaire, more pluralistic approach to the mechanics of human rights protection is pursued—that is one incorporating political, social and economic, as well as legal dimensions—does such protection stand a chance of being delivered.*

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## INTRODUCTION

The phenomenon of globalization grips us. Everyday, and almost at every turn, we encounter directly the practical effects of its impact. Certainly, such encounters are evidence enough of the empirical fact of its existence, even if the concept of globalization remains nebulous. The process of its inductive construction continues as we try to make sense of our increased global interconnectedness on at least two levels. On one, the process is concerned with charting the causes of, and consequences for, our social lives as we live them. On another level, it is concerned with the conceptual placement of globalisation—that is, how the phenomenon relates to, impacts upon and is constituted by the myriad of other conceptual constructs that we use to understand, explain or promote the human, social condition. It is with the second level that this article is principally concerned, and specifically with two of these other conceptual constructs—the rule of law and human rights.

This article can be seen as part of the wider concern to identify, explain and analyze the fit between law and globalization.<sup>1</sup> Such a quest is, on its own, significant because of the central placement of the rule of law within notions of fair, just, and usually democratic government—indeed it is by law that we are ruled, not by whim or caprice. However, the particular concern here is with the interrelationship between the rule of law and the protection and promotion of human rights—within the context of globalization.

The globalization knot that ties the two notions has, at least since the advent of the modern (post-1945) iteration of universal human rights norms, been clear and crucial,<sup>2</sup> even if sometimes overwhelming.<sup>3</sup> In that sense it is

<sup>1</sup> Thereby, perhaps, providing an exception to what Philip Alston criticises as the myopia of (some) international lawyers having not “devote[d] more explicit attention to the process [of globalization] and its consequences and to explore more systematically the implications for international norms, institutions and processes that follow therefrom.” Phillip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435, 447 (1997). See also Gunther Teubner’s lament as to the “astonishing[ly] . . . poor” theoretical foundations of the debate over what he styles “global law,” Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

<sup>2</sup> No more so than since the fall of the Berlin Wall with the incorporation - with varying degrees of eagerness and success—of the notion of the rule of law into the governmental architecture of

by the development of human rights laws (both international and domestic) upon which so much of the promotion of human rights has relied over the past fifty years, even if the protection of human rights is still wanting.

Given that, one might ask, how is the notion of the rule of law faring today and how might it fare in the future as we become more aware and attuned to globalization as it affects and is affected by the universalizing objects of human rights? To what extent, in other words, must we now reinterpret the nature of the rule of law/human rights relationship and redraw the lines that mark out their synergy? To try to answer these questions, it is necessary first to analyze the relationship between human rights globalization and the globalization of the rule of law. And second, it is necessary to analyze the implications of this relationship within the context of a globalizing economy. These, broadly, are the aims of this article.

Finally, on a point of definition and distinction, it must be emphasized that though generally I shall be dealing with an undifferentiated body of human rights (in the sense that they are interdependent and indivisible), I shall at times highlight economic, social and cultural rights where their particular place in the quest to reconcile the disparate discourses of globalization, commercial enterprise, human rights, and the rule of law is especially significant.<sup>4</sup>

My analysis proceeds by way of 4 steps:

1. a discussion of certain perspectives of and trends in globalization;
2. an analysis of the relevant features of the notion of rule of law;
3. an analysis of the complexities of human rights globalization; and
4. consideration of the future utility of the rule of law in human rights protection.

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former Eastern Bloc countries. See generally *THE RULE OF LAW AFTER COMMUNISM* (Martin Krygier & Adam Czarnota eds., 1999) and for a more general, philosophical account, Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009 (1997).

<sup>3</sup> It can be argued that other means by which the same ends as human rights are sought—liberty, equality, dignity—have been swamped (inadvertently, as well as by design) by the tsunami of human rights ideology. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 6 *EUR. HUM. RTS. L. REV.* 245 (2001). A slightly different angle on the same point is to stress the fact that although the legal dimension of human rights is both necessary and important, it is but one dimension and is not alone sufficient either to understand them or to secure their protection. See generally David Kinley, *The Legal Dimension of Human Rights*, in *HUMAN RIGHTS IN AUSTRALIAN LAW* 2 (David Kinley ed. 1998).

<sup>4</sup> See generally Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 563 (Asbjørn Eide et al. eds., 2d ed. 2001).

## I. PERSPECTIVES OF GLOBALIZATION

The concern in this section is not to provide an account of all, or even the principal, globalization perspectives and theories, but rather to pick out those that are amenable to addressing the rule of law's impact upon the protection and promotion of human rights.

At the broadest level, the globalization theories that are most accommodating of the rule of law are those which highlight both the external and internal dimensions of globalization, for this resonates strongly with legal theory's own orthodox fixation with the binary of national and international law. Globalization is both an 'out there' and an 'in here' phenomenon, blending the distant with the local.<sup>5</sup> Furthermore, it is a two-way process. As Anthony Giddens puts it, the globalization process, "link[s] distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."<sup>6</sup> Such taxonomy applies equally to the interrelationship between national and international law.

An alternative perspective on the same theme is that of Boaventura de Sousa Santos's separation of two strands of the globalization process in an effort to source that which is perceived to have been globalized.<sup>7</sup> The first strand he terms "globalized localism," which occurs when essentially local phenomena are exported or propagated globally.<sup>8</sup> Examples of this abound, but certainly include soccer, certain retail brands (e.g. McDonalds, Sony, Manchester United Football Club merchandise and Coca-Cola), the English language, American intellectual property laws, Scotch whiskies, European Union (EU) data protection laws, Chinese cuisine, and Anglo-American popular music. The second he calls "localized globalism," which occurs where global phenomena are adopted locally—for example: tourist catering, free trade policies/laws, environmental degradation, internet penetration, human rights standards, satellite television.<sup>9</sup>

Though beguilingly simple and alliterative, we can have little use of such a division as an analytical tool if taken at face value, for the two strands do not operate on a linear plane, running, as it were, in opposite directions.<sup>10</sup>

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<sup>5</sup> Which include even intimacies of personal identity such that, as Anthony Giddens strikingly puts it, "the image of Nelson Mandela maybe is more familiar to us than the face of our next door neighbour." Anthony Giddens, *Lecture 1: Globalization*, in BBC REITH LECTURES (1999), at [http://www.lse.ac.uk/Giddens/reith\\_99/week1/week1.htm](http://www.lse.ac.uk/Giddens/reith_99/week1/week1.htm) (last visited Oct. 31, 2002).

<sup>6</sup> ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990).

<sup>7</sup> BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 263 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 262.

Rather, the best way to make sense of them is to view them as operating in perpetual circular motion—that which is (already) global and now is being localized, was itself, in some form, originally a local phenomenon made subject to globalization! The cycle is depicted therefore, as one of global practice leading to local impact, adaptation and export which leads to global impact, adaptation and practice. What is most useful about the Santos characterization is that it helps us to identify where, at any one time, a product, concept, genre or effect is in the cycle of globalization. It is to this end that I employ the Santos typology in respect of the notion of the rule of law later in this essay.

In addition to the important provision of analytical tools to aid us in charting the relationship of globalization and the rule of law, globalization theory also, to some degree, directly addresses the substantive issue itself. Gunther Teubner's "global law" thesis counters Kant's perception of an orderly procession towards a transcendental legal order for all mankind (by way largely of an international convention to that effect) on the simple basis that evidently it has not been borne out in practice. In its stead he sees "[t]oday's globalization . . . [as] a highly contradictory and . . . fragmented process,"<sup>11</sup> where the extent to which there is a globalization of the rule of law is as a consequence of "lawyers' law" (or "living law")<sup>12</sup> in practical decision-making, especially in regard to trans-global commercial contracts (*lex mercatoria*). And important though this is, for Teubner it is the exception that proves the rule, in that in the absence of any centralized, sovereign global law-making authority, the law's center of gravity is still the nation-state.<sup>13</sup>

Jean-Philippe Robé, writing alongside Teubner in the same volume, expands the details of the latter's analysis to include two important additional loci of globalized law, both of which he sees as challenges to States' self-proclaimed monopoly of law creation.<sup>14</sup> One arises out of the "construction of global deterritorialized legal orders—in other words, multinational enterprises."<sup>15</sup> The other, which is clearly linked to the first, is that of the national laws which have extraterritorial effect—specifically, in Robé's view, "the

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<sup>11</sup> Teubner, *supra* note 1, at 5.

<sup>12</sup> To adopt Ehrlich's terminology: see EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 493 (1962).

<sup>13</sup> Teubner, *supra* note 1, at 5-6.

<sup>14</sup> JEAN-PHILIPPE ROBÉ, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 1, at 45.

<sup>15</sup> *Id.* at 49.

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exportation by other states of their norms through international economic exchange, and in particular through multinational enterprises.”<sup>16</sup>

Together, these perspectives of the legal dimensions of globalization reflect the pluralist roots of global law. Thus, as William Twining points out, it is not surprising that, despite the almost exclusively municipal framework within which legal pluralism has been historically forged, it has much to offer any global law project.<sup>17</sup> This is so principally because of two key characteristics of legal pluralism: first, its obvious openness to other legal cultures and perspectives, and second, its openness to non-state sources of law. Together, these features of legal pluralism provide for a suitably textured canvas upon which the shape of international or global law can be traced.<sup>18</sup>

#### A. *Globalization Trends*

Among the many globalizing areas in which one can discern a specific and significant trend there are two that stand out—namely, corporate/commercial enterprise and human rights/humanitarian standard-setting. The corporate/commercial enterprise is characterized by the patent aggrandizement of the power of multinational enterprises, the influence of capital markets,<sup>19</sup> and the concomitant expansion of international regimes for trade regulation—such as the World Trade Organization (WTO), the North America Free Trade Agreement (NAFTA) and the EU—and for economic development—such as the International Monetary Fund (IMF), the World Bank and the regional development banks of Africa, Asia and South America.

Human rights standard setting is characterized by the spreading, though not unqualified, acceptance across states<sup>20</sup> of the universality and indivisibil-

<sup>16</sup> *Id.*

<sup>17</sup> WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 224-39 (2000).

<sup>18</sup> *Id.* at 226-27.

<sup>19</sup> See Ross P. Buckley, *The Essential Flaw in the Globalisation of Capital Markets: Its Impact on Human Rights in Developing Countries*, 32 CAL. W. INT'L. L.J. 119-20 (2002).

<sup>20</sup> As of 18 December 2001, the numbers of ratifications of the U.N.'s six principal human rights treaties were as follows: International Covenant on Civil and Political Rights, Dec. 19 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23 1976) [hereinafter ICCPR] - 147 parties; International Covenant on Economic, Social and Cultural Rights 1966, Dec. 16 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3 1976) [hereinafter ICESCR] - 145 parties; Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7 1966, 660 U.N.T.S. 195 (*entered into force* Mar. 12, 1969) [hereinafter ICERD] - 160 parties; International Convention on the Elimination of all forms of Discrimination Against Women, Dec. 18 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3 1981) [hereinafter CEDAW] - 170 parties; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85 (*entered into force* Jun. 26 1987) [hereinafter CAT] - 127 parties; Convention on the Rights of the Child, Nov. 20 1989, 1577 U.N.T.S.

ity of human rights. It is also characterized by the emergence of new regional human rights regimes beyond the European<sup>21</sup> and American<sup>22</sup> progenitors—that is in Africa,<sup>23</sup> the Arab States<sup>24</sup> and in rudimentary form in Asia.<sup>25</sup> What is of interest in the present context is the question: to what extent do these two trends compete with each other, complement each other or simply co-habit?

To be sure, there exists a perplexing dissonance between these two trends that haunts (or at least should haunt) all those concerned about globalization, the rule of law and human rights. Consider, for instance, the perspective of those who protested in Seattle, Davos, Melbourne or Genoa against

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3, (*entered into force* Sep. 2 1990) [hereinafter CRC] - 191 parties; *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF THE PRINCIPAL HUMAN RIGHTS TREATIES AS OF 18 DECEMBER 2001 (2001) at <http://www.unhchr.ch/pdf/report.pdf>. Significantly, two of the most recent international UN human rights instruments have attracted the widest (almost universal) support: the CRC (with 191 parties) and the Rome Statute of the International Criminal Court, Jul. 17 1998, U.N. Doc. A/CONF.183/9 of 17 July 1998 has been signed by 147 countries and as of January 2002 it has been ratified by 48 countries (60 ratifications are required for the Court to come into being).

<sup>21</sup> The Council of Europe's Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales [Convention for the Protection of Human Rights and Fundamental Freedoms], *opened for signature* 4 November 1950, (ETS No. 5), 213 U.N.T.S. 222, (*entered into force* Sept. 3 1953) [hereinafter ECHR] has 44 ratifications, at <http://conventions.coe.int/treaty/en/searchsig.asp?NT=005&CM=DF=>.

<sup>22</sup> The Organisation of American States' American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by* the Ninth International Conference of American States (1948) (*reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) and the American Convention on Human Rights, Nov. 22 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, (*entered into force* Aug. 27, 1979) [hereinafter the American Convention] (25 ratifications), at <http://www.oas.org/>.

<sup>23</sup> African [Banjul] Charter on Human and Peoples' Rights, OAU, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (*entered into force* Oct. 21 1986). Fifty-three states have ratified the Charter. The OAU is currently in the process of transforming into the African Union under *Constitutive Act of the African Union 2001* which entered into force on 26 May 2001.

<sup>24</sup> Arab Charter of Human Rights, Res. 5437, Council of the League of Arab States, 102nd Sess., (1994) *reprinted in* 18 HUM. RTS. L.J. 151 (1997), *available at* <http://www1.umn.edu/humanrts/institute/arabhrcharter.html>.

<sup>25</sup> The Bangkok Declaration, Mar. 29- Apr. 2 1993, *available at* <http://www.thinkcentre.org/article.cfm?ArticleID=830> (last visited Nov. 21, 2002), was signed by 40 Asian States as part of the region's preparations for the Vienna World Conference on Human Rights 1993. However, the instrument was heavily laced with references to the supremacy of national sovereignty over any claims of universal human rights standards. A parallel document signed by 110 Asian NGOs, also entitled the Bangkok Declaration on Human Rights 1993, unequivocally supported the universality and indivisibility of human rights. The latter document has since been followed by another NGO-inspired initiative: the Asian Human Rights Charter 1997, May 17 1998, *available at* <http://www.ahrchk.net/charter/index.php>.

what they see as the facilitating role in commercial/corporate globalization of such institutions as the WTO, the IMF, the World Bank and the economic clubs of G8 and the Western Economic Forum in particular. One might also consider the potentially degrading effect such globalization has on local economies and culture everywhere (but especially in developing countries), to the benefit of a very few, already powerful, corporate elites in the West.<sup>26</sup> However, many of those same protestors were and are at the same time strong supporters of the globalization (or spreading universalism) of human rights standards.<sup>27</sup> Whilst in terms of desired outcome such a stance need not necessarily be contradictory, there is on its face, some inconsistency.

Of course, the most immediate response to this situation is to point out that it is not globalization *per se* that is the problem, but rather the nature of the phenomenon being globalized. It is argued, for example, that the commercial/corporate axis of globalization is to be resisted precisely because it distributes its benefits unequally—that is, to the few (mainly in the West) at the expense of the many everywhere.<sup>28</sup> On the other hand, human rights globalization is to be supported precisely because of its universalist nature—rights being available (or applied) to all, everywhere, at all times. To put it even more crudely, the claim is that whereas the former promotes inequality, the latter promotes equality.

In reality, these two phenomena are unlikely to be so starkly divergent, in that the current perception, though not without foundation, is due as much to the problem of it not being recognized that the two are both players on the same field of globalization. In the following section I consider whether by analyzing these two globalizing trends through the prism of the rule of law any light can be shed on how they do, will, or should overlap.

## II. RELEVANT DIMENSIONS OF THE NOTION OF THE RULE OF LAW

In order to analyze these trends through the Rule of Law there is no need here to embark on an exegetical voyage into the notion of the rule of law; not least because of the prodigious output of those that have gone before. Certainly, Lon Fuller captured the essence of the notion in a classically pithy statement coming out of his own substantial work on the subject, that “law is the enterprise of subjecting human conduct to the governance of

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<sup>26</sup> Robert Wade, *Global Inequality: Winners and Losers*, THE ECONOMIST, Apr. 28 2001, at 72-74; See also Alice Erh-Soon Tay, *The New Century, Globalisation and Human Rights*, 8 ASIA PACIFIC L. REV. 139 (2000).

<sup>27</sup> Wade, *supra* note 26.

<sup>28</sup> PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* 76, 94-6 (2d ed. 1999).



rules.”<sup>29</sup> Most, if not all, modern formulations of the rule of law have common base elements, even if their categorization, and the reasons for such, differ between leading commentators.<sup>30</sup> These are that the notion comprises rules of general application; that government is bound by rules; and, that rules are prospective and publicly accessible such that the legal implications of one’s future actions may be predicted.

Be that as it may, what is of specific interest in the present context is the narrower question of the role of the rule of law in these two fields of globalization. Drawing on the above local/global typology, it can be argued that law associated with the commercial/corporate axis of globalization is local–drawn principally from the liberalist philosophy of Western social, economic, political and legal thought, or, more specifically, from the competition policies, commercial laws, and corporate codes of the United States and Europe. The utility of law in this context is simultaneously to enhance free trade and freedom of contract and to exert commercial (that is, transactional) order through the extraterritorial imposition of Western municipal law,<sup>31</sup> multinational enterprise practice and Western-style regulatory regimes, backed by free-market ideology. Of the key principles that classically comprise the formal notion of the rule of law, the one here emphasized is that of the publicized and relatively predictable operation of laws and legal system.<sup>32</sup> In its orthodox formulation, this requires a system where the government “is bound by rules fixed and announced beforehand,” such that its actions are in theory knowable, allowing individuals and other legal persons to plan their own actions accordingly.<sup>33</sup> This principle’s substantive object of mitigating arbitrariness is achieved when, as Martin Krygier felicitously puts it:

[T]he law in general does not take you by surprise or keep you guessing, when it is accessible to you as is the thought that you might use it, when legal institutions are relatively independent of other significant social ac-

<sup>29</sup> LON L. FULLER, *THE MORALITY OF LAW* 117 (1964).

<sup>30</sup> See, for example, the philosophical analyses of the notion of various authors in *NOMOS XXXVI: THE RULE OF LAW* (Ian Shapiro ed., 1994), and the more critical approach adopted by those contributors to *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan C Hutchinson & Patrick Monahan eds., 1987). See also, Radin’s five-part categorization of the components of the notion in Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *BOSTON UNIVERSITY LAW REVIEW* 781, 792 (1989).

<sup>31</sup> See Robé, *supra* note 14.

<sup>32</sup> See, classically, ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION* 198-9 (8th ed. 1927); Joseph Raz, *The Rule of Law and its Virtue* 93 *LAW Q. REV.* 195 (1977); see also David Kinley, *Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law*, 22 *FED. L. REV.* 194, 201 (1994).

<sup>33</sup> FREDERICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

tors but not of legal doctrine, and when the powerful forces in society, including the government, are required to act, and come in significant measure to think, within the law; when the limits of what we imagine our options to be are set in significant part by the law and where these limits are widely taken seriously—when the law has integrity and it matters what the law allows and what it forbids.<sup>34</sup>

In accordance then with the typology of the formal conception of the rule of law, the concern here is with the prospect of surety that flows from the existence of the legal process itself. The law's instrumental integrity is more relevant than the substantive content of the law. Such a focus draws on the essential systemic rationality of law being a means, as Cotterrell puts it, "by which human beings impose reason, to the limits of their ability, on the otherwise chaotic conditions of their social existence."<sup>35</sup> Thus, in respect of this essay's concern with the commercial, corporate and regulatory drivers—both national and transnational—of the globalizing economy, this dimension of the rule of law is vital to the pursuit of their objects.<sup>36</sup>

The law associated with globalized human rights standards, on the other hand, is not so specifically sourced.<sup>37</sup> The claims to universality of human rights (and therefore human rights law) mark them out as inherently "global" in origin as well as application.<sup>38</sup> Above all, international human rights re-

<sup>34</sup> Martin Krygier, *The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law*, in IN AND OUT OF AUTHORITARIAN LAW (András Sajó ed., forthcoming 2002).

<sup>35</sup> ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 229 (1989).

<sup>36</sup> Consider for example, the Asian Development Bank's contention that is "the traditional concept of the rule of law [and] the existence of a stable and predictable legal system . . . [are] essential for the development of all DMCs [developing member countries]," which reflects a widely held view among these constituencies. *Legal Frameworks* in THE ASIAN DEVELOPMENT BANK, GOVERNANCE: SOUND DEVELOPMENT MANAGEMENT, WP No. 1-95 at 30 (of 34), (1995), available at: <http://www.adb.org/documents/policies/governance/govpolicy.pdf>.

<sup>37</sup> Though a Western bias in their philosophical roots as well as the history of their modern expression in the international instruments is frequently claimed; see under (b) below. Certainly, an appreciation of the origins of contemporary human rights standards is important. See generally Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44 (2001). But the more significant issue is whether they are, despite their roots, universally applicable—and on that point arguments of cultural relativism are of elemental importance. For an especially insightful relativist critique amongst the many (both insightful and less so), see Onuma Yasuaki, *Toward an Intercivilizational Approach to Human Rights*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 103 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

<sup>38</sup> Referring specifically to the Universal Declaration of Human Rights, G.A. Res. 217 (III) art.18, U.N. GAOR, 3d Sess., at 138, U.N. Doc. A/810 (1948) [hereinafter UDHR], Waltz concludes her comprehensive study of its global origins by declaring that "the UDHR is a legacy that all of us can rightfully claim." Waltz, *supra* note 37, at 72.

gimes draw upon the rule of law's innate recognition of equality before the law, which forms an integral part of the fundamental concept of equality that underpins the concept of human rights itself.<sup>39</sup> But in so far as the notion of the rule of law implies more than the formal, architectural concerns of its strictly formal incarnation and includes also stipulations as to substance, the imperative of equality takes on added significance.

Of course, debate continues over the degree of this necessary leakage of substantive considerations into the formal conception of the rule of law.<sup>40</sup> However, it is significant that commentators such as Philip Selznick<sup>41</sup> and even Joseph Raz, the doyen of the formal conception, embrace certain substantive claims within their view of the ambit of the rule of law. Raz, for example, in his more recent work, maintains the necessary presupposition of "civil rights" in the notion of the rule of law.<sup>42</sup> In the same vein, but further still, Ronald Dworkin includes the protection of moral rights within his "rights conception" of the rule of law.<sup>43</sup> It is then where the rule of law promises (at the very least) substantive equality above merely formal equality that the most certain bond between globalizing human rights standards and the notion of the rule of law is fashioned.

There can be no doubt that these two features of the rule of law—the formal and the substantive—are distinct, but they are not, and cannot be, unrelated. The very fact that of the existence of a rule-producing system that is itself bound by rules is a substantive outcome, and one that is both desirable and necessary.<sup>44</sup> I raise this point here (I return to it in part 4 below) so as to stress its importance and to ensure it is borne in mind. For, I now proceed to assess the effect of distinctive dimensions of rule of law relied on in the different globalizing fora of corporate and commercial enterprise and human rights.

<sup>39</sup> The Preamble to the UDHR, para. 3, pronounces that "human rights should be protected by the rule of law."

<sup>40</sup> See generally Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

<sup>41</sup> PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 464 (1992).

<sup>42</sup> JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN, ESSAYS IN THE MORALITY OF LAW AND POLITICS* 360 (1994). For an earlier account of the same consideration in respect of the French, American and British legal traditions, see Norman S. Marsh, *The Rule of Law as a Supra-National Concept*, in *OXFORD ESSAYS IN JURISPRUDENCE* 232-4 (AG Guest ed., 1961).

<sup>43</sup> See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11-12 (1985).

<sup>44</sup> It was in this sense that the noted socialist commentator E.P. Thompson infamously, if with a touch of hyperbole, referred to the rule of law as an "unqualified human good," and got into a great deal of rhetorical trouble for doing so. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

If, in these two fora, the rule of law, or at least different aspects of it, is being globalized, what can we say about the nature of such globalization and its implications? Here again we can adopt the modified Santos categorizations such that the two categories operate within a cyclical relationship. It might be said that the category which most closely fits the role played by the rule of law in recent history of human rights globalization is “localized globalism”—on account of the equality claims made of it in underpinning the idea of the proclaimed universality of human rights. In contrast, the appropriate category for the place of the rule of law in the globalizing commercial/corporate axis is “globalized localism”—on account of its locally-sourced properties of certainty and predictability that underpin the global scope of secure commercial transactions and corporate enterprise.

What this characterization enables us to see is that the ends to which the rule of law is put by the two globalizing trends are apparently starkly divergent. On the one hand, it is avowedly a process of colonization by which local commercial laws and corporate practice are capturing the global market. On the other, in contrast, it is the project of globally situated human rights standards to seek to capture the local. One is imperial and hegemonic; the other is normatively based and universal.

However, as is so often the case with simple dichotomies of complex issues, the lines that divide these two globalizing phenomena and the conclusions that can be drawn from them are not as clear in practice. It is in this grey domain that there is potential not only to find common ground between the two but also to establish some form of mutually beneficial alliance.

### III. THE COMPLEXITY OF GLOBALIZATION AND HUMAN RIGHTS

There are many dimensions to this clouding of the distinction. Here I highlight four especially important ones, which separately and together have the effect of focusing our attention on human rights as a whole as well as the particular situation of economic, social and cultural rights. Together, the first two dimensions tend to obscure the normative claims made of human rights and thereby their characterization as global phenomena locally adopted (i.e. “localized globalism”). The latter dimensions challenge the assumption that commercial/corporate globalization is necessarily and always antithetical to the promotion of universal human rights observance.

The four dimensions are:

(a) *Human rights categorization.*

Not all categories of human rights are “globalized,” or at least globally accepted, to the same extent. Most importantly, there is a fundamental dif-

ference between the status and treatment of civil and political rights on the one hand, and economic, social and cultural rights on the other. The Universal Declaration of Human Rights' coverage of both sets of rights marks the apogee of the international community's commitment to their indivisibility.

Since 1948, and despite proclamations to the contrary,<sup>45</sup> the two sets of rights have been essentially separated (initially and fundamentally, in the form of the two separate UN Covenants in 1966)<sup>46</sup> with the result that civil and political rights have taken center stage in the program of human rights globalization. Civil and political rights are still frequently referred to—and in a hierarchical sense, are believed to be—"first generation" rights. Economic, social and cultural rights are considered to be "second generation" rights.

In terms of the relative legal standing of the two Covenants, this distinction is borne out in practice. By far the greatest body of human rights jurisprudence in the international arena concerns civil and political rights. The three busiest and most influential international human rights tribunals have custody over the civil and political rights instruments—namely, the European Court of Human Rights (the European Convention on Human Rights),<sup>47</sup> the U.N. Human Rights Committee (the International Covenant on Civil and Political Rights),<sup>48</sup> and the Inter-American Court on Human Rights (the American Convention on Human Rights 1969).<sup>49</sup> And although the Human Rights Committee is not a court—its conclusions are views, not judgments and are non-binding—the generally high regard in which the Committee's views are

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<sup>45</sup> Consider the following high-minded statement of the *Vienna Declaration and Programme of Action* U.N. World Conference on Human Rights, 14-25 June 1993 Part I at para. 5, U.N. Doc A/Conf.157/23 (1993):

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

<sup>46</sup> ICESCR, *supra* note 20 and ICCPR, *supra* note 20.

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<sup>47</sup> See generally P. VAN DIJK & G. J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1998).

<sup>48</sup> See generally SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (2000).

<sup>49</sup> See generally *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* (David J. Harris & Stephen Livingstone eds., 1998). Though the American Convention, *supra* note 22, expressly provides protection for economic, social and cultural rights (in article 26) the vast bulk of the jurisprudence of the inter-American Court focuses on civil and political rights.

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held coupled with the sheer volume of its output assures their legal importance.

In stark contrast, the Committee on Economic, Social and Cultural Rights has no competence to hear individual complaints regarding violations of the Covenant's provisions and as such has no equivalent body of jurisprudence.<sup>50</sup> Further, proponents of economic, social and cultural rights have to battle against the powerful rhetorical claims that such rights are not even rights at all, or at any rate are non-justiciable, being expressed more in the form of policy aspirations and non-binding provisions which are not amenable to curial enforcement.<sup>51</sup> However, such a stance can hardly be sustained in the face of what role the law (and the courts) actually plays in the realization of human rights. For it is fundamentally the same legal vehicle by which implementation is supervised for *all* human rights (whether civil and political, or economic, social and cultural)—namely, the remedies available through administrative law or due process.<sup>52</sup> In regards to both sets of rights, it is insistence on the fairness of the procedures by which decisions are made concerning the substantive elements of a rights claim that is the key justiciable concern, not the allocation of resources required for the right's protection.

At the domestic level too, the great majority of legal provisions protecting human rights (whether constitutional, legislative or judge-made) address civil and political rights rather than economic, social and cultural rights. This preponderance is most marked regarding Western human rights charters and laws in both civil code and common law jurisdictions. Thus, since the courts of the West have produced the bulk of the case-law on domestic human rights protection, the dominance of civil and political rights is further entrenched.<sup>53</sup>

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<sup>50</sup> The Committee's General Comments and Resolutions—in common with those of all six of the main UN human rights committees—are more in the style of policy statements than legally binding proclamations.

<sup>51</sup> For a collection of arguments for and against justiciability of economic, social and cultural rights, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 275-300 (2d ed., 2000).

<sup>52</sup> MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 26 (1995).

<sup>53</sup> The developing bodies of law concerning the protection of economic, social and cultural rights emanating from the Indian Supreme Court and (more recently and therefore to a lesser extent) from the South African Constitutional Court are notable exceptions to this predominance. Regarding the former, see PAUL HUNT, *The Indian Experience*, in *Reclaiming Social Rights: International and Comparative Perspectives* 153 (1996); and in respect to the latter see specifically, the case of *Grootboom v. Government of the Republic of South Africa*, CCT38/00 and generally, *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: A RESOURCE BOOK* (Sandra Liebenberg & Karrisha Pillay eds., 2000).

*(b) Challenges to human rights universality.*

The conceptual structure of human rights is not monolithic; nor are human rights themselves hermetically sealed imperatives. Neither at the general nor specific levels are human rights stated unambiguously and applied unquestioningly—they never have been, nor will they ever be.

Therefore, claims as to the universality of human rights are not simply understood, let alone simply accepted or rejected. This indeterminacy has fueled the continuing and occasionally raging debate over the extent to which the assertion as to the universality of human rights is rebutted or qualified by relativist (usually cultural relativist) arguments. If it is the case that specific cultural groups derive their governing social norms (including human rights) from their own internal frame of reference, does this mean that universalist and cultural relativist arguments are mutually exclusive?<sup>54</sup> Or to put it another way: is not the argument for human rights universalism dealt a fatal blow by any significant admission of the cultural contingency of human rights in terms of meaning or application?

The intuitive reaction to this for many is to support universalism by way, in part at least, of an attack on cultural relativism. This, in turn, provokes a redoubling of efforts on the part of relativists to bolster their position . . . and so the cycle goes on. However, the depiction, as well as the fact of such a causal relationship, is premised on a basic misconception—namely that the full nature, extent and form of human rights are somehow identifiable. On the contrary, it is only once they have been identified that we are in a possession of that which is universally recognized. To question this premise is not to deny universalism, nor to champion cultural relativism; indeed, quite the reverse. It is to provide the ground upon which one might construct a fuller understanding of the relevance of human rights to all human beings, not as a conceptual strait-jacket into which we all must fit, but rather a garment that is still in the process of being fitted. It is to recognize that differing cultural perspectives necessarily contribute to both their design and fabric, not to mention that such inclusiveness *must* to some significant degree exist if the universal application of human rights is to be backed by their universal origins. “[S]incere intercivilizational dialogues are needed,” as Onuma Yasuaki argues, “if ever human rights are to be truly globalized.”<sup>55</sup>

<sup>54</sup> See ABDULLAH AHMED AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* 162-70 (1990), for both his articulation of this general problem and how he sees it being overcome in the context of Islamic traditions.

<sup>55</sup> Yasuaki, *supra* note 37, at 120. The objects of Yasuaki’s insistence on the sincerity of such dialogue are equally the West and the East (as he refers to them), such that it is incumbent on both to recognize “that scrutiny of the tension between predominant local cultures, ethics or religions,

International human rights laws do, in fact, reflect this situation in a number of ways. "Universalist" treaties such as the Universal Declaration of Human Rights (in article 28)<sup>56</sup> and both the International Covenant on Civil and Political Rights<sup>57</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>58</sup> (in article 1 of each) explicitly provide for cultural difference: the rights to cultural participation and self-determination, respectively. These and other treaties also provide scope for culturally contingent limitations on certain rights, typically in the form of legitimate reasons based on public morals, public interest, public health, and national security.<sup>59</sup> These provisions have given rise to a considerable body of jurisprudence (developed, in particular, by the European Court of Human Rights), on the limits of those limitations.<sup>60</sup> Reservations and declarations are another legally sanctioned vehicle for the legitimate expression of cultural particularities.<sup>61</sup>

Human rights universalism therefore has a necessary, if limited, embrace of cultural differences in the origin, interpretation, and implementation of human rights standards.<sup>62</sup> The significance in the present context of this manifestation of what David Forsythe refers to as "weak cultural relativism"<sup>63</sup> is that it exposes the intricate complexity of the relationship between the global and the local; between their respective imports and exports of the constituents of universal human rights standards; and ultimately between their ownership of normative human rights claims. Precisely where interna-

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with the aim to provide 'enlightened interpretations' compatible with international human rights standards, is needed . . .," *Id.* at 121.

<sup>56</sup> UDHR *supra* note 38.

<sup>57</sup> ICCPR *supra* note 20.

<sup>58</sup> ICESCR *supra* note 20.

<sup>59</sup> As provided most clearly by the European Convention on Human Rights, 1950, November 4, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), the ICCPR, *supra* note 20, and the American Convention, *supra* note 22, typically, in respect of rights to free speech, assembly, movement and association as well as freedom of religion, and implicitly in respect of rights to liberty and privacy.

<sup>60</sup> By way of the continuing development of the doctrine of the "margin of appreciation," allowing state parties a degree of scope or "elbow room" in their implementation of the rights in question. See HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1995).

<sup>61</sup> See generally, HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS (J.P. Gardner ed., 1997). On the difficulties in determining the legality of reservations, see generally R Baratta, *Should Invalid Reservations to Human Rights Treaties be Disregarded?* 11 EUR. J. OF INT'L L. 413 (2000).

<sup>62</sup> But only where the claimed reasons for qualifying the universal is actually based on cultural difference rather than merely a front for political expediency or economic gain. See Yash Ghai, *Human Rights and Asian Values* 9 PUB. L. REV.168 (1998).

<sup>63</sup> DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 5 (1991).

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tional human rights are on the Santos chart of globalization “isms” is genuinely open to debate.

(c) *Prosperity and human capabilities*

There are two fundamental perspectives of how economic globalization does and will impact global prosperity. One perspective is the essentially utilitarian claim that economic globalization—in particular, the elemental role played by globalized free-markets—will increase the size of the economic pie. Therefore, all will be better off to some appreciable degree.<sup>64</sup> The fact that a few will benefit enormously is acknowledged both as an incentive as well as a necessary price to be paid for an overall increase in prosperity.<sup>65</sup>

The alternative perspective rejects such an utilitarian rationale by first questioning whether the size of the pie increases at all. Even if it is accepted that it does, the very fact that it benefits the few at the expense of the many strips it of any moral or possibly even economic legitimacy. Thus, far from benefiting even marginally, the greatest number would suffer (and some suffer terribly) through economic exploitation, social disintegration, and cultural degradation.<sup>66</sup>

Irrespective of the relative merits of these two positions, both rest on the same, largely unspoken premise regarding human rights protection. Namely, that in order to improve the lot of the many, the conditions within which they live must be such that as individuals they are *capable* of, what might be called “human rights fulfillment”: that is, broadly, the state in which the basic object of human rights protection—the upholding of individual dignity—is attained. Within the immediate context we are concerned with economic conditions or needs. John Gray, who belongs to the latter skeptical school argues that in respect of the on-going globalization of laissez-faire economic policies, “free markets are creatures of state power, and persist only so long as the state is able to prevent human needs for security and the control of economic risk from finding political expression.”<sup>67</sup>

<sup>64</sup> Anthony Giddens & Will Hutton, *Fighting Back*, in *ON THE EDGE: LIVING WITH GLOBAL CAPITALISM* 213 (Will Hutton & Anthony Giddens eds., 2000).

<sup>65</sup> THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 444-50 (2000); and on the argument as to the inevitability of such disparity within a viable liberal democracy, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 314-16 (1992).

<sup>66</sup> JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 87-92 (1998). See also John Rawls’ objection to the utilitarian argument on the ground that it treats people as means rather than ends: JOHN RAWLS, *A THEORY OF JUSTICE* 179-83 (1971).

<sup>67</sup> GRAY, *supra* note 66, at 17.

Such an economic analysis echoes the human rights concerns of those who advocate the so-called “needs” or “capabilities” approach to the advancement of human welfare and quality of life. Strictly speaking, as the pioneers of this movement, Martha Nussbaum and Amartya Sen point out, the capabilities and the human rights approaches are distinct.<sup>68</sup> For the capabilities approach, the key lies in the nature of the central question that must be asked in order to determine the gap between the actual and target states of individual well-being. Both authors also insist that the capabilities approach necessarily incorporates within it a focus on human rights protection.<sup>69</sup>

The capabilities and human rights approaches share the same concern of individual well-being, however, what differs is the means by which one conceives the steps to be taken to promote that end. As Nussbaum puts it: “[w]hat is [a person] actually able to do and to be?”<sup>70</sup> If the answer is that the person is unable to reach certain minimum life-states by reason of the conditions in which they live, then the inquiry shifts to identifying what are the individual needs they require to close the gap. For example, in order that a person is able to have good health, they must be provided with adequate nourishment, shelter and health care. To use the senses of imagination, thought, and reason, to create and maintain attachments to people outside one’s self and to be able to form a perception of the good, one must be cultivated by adequate education and freedom to associate with other human beings.<sup>71</sup>

This approach impacts upon the argument being developed in this article in two important and interrelated respects. First, a focus on needs and capabilities exposes the reality that for the vast majority of the world’s population, favorable economic and social conditions are at least as important to the fulfillment of an individual’s capabilities as facilitative civil and political conditions. Second, that globalizing economic forces not only have the means and the opportunity to address these needs, but also, perhaps, the obligation by virtue of the capabilities approach’s assimilation of international human rights laws.

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<sup>68</sup> Martha Nussbaum & Amartya Sen, *THE QUALITY OF LIFE* 3 (Martha Nussbaum & Amartya Sen eds., 1993). See also Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE*, *supra* note 68, at 30-1.

<sup>69</sup> Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 292-7 (1997); Amartya Sen, *Freedoms and Needs*, *NEW REPUBLIC*, Jan. 10 & 17, 1994, at 38.

<sup>70</sup> Nussbaum, *supra* note 69, at 285.

<sup>71</sup> I have drawn these examples from what Nussbaum refers to as a working list of central human capabilities; see Nussbaum, *supra* note 69, at 285-8.

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*(d) Common goals*

The rhetorically proclaimed opposition of human rights globalization and economic globalization belies a growing body of common goals between the two. Certainly, on the face of it, the growth of this common ground has been exponential over the last few years. On many fronts and for many reasons there now exist a variety of partnerships, co-operative initiatives, forced marriages and mediated settlements between corporate and human rights interests. These arrangements, or their products, include: (i) purely voluntary self-regulation—the conspicuous number of human rights codes of conduct developed by individual corporations or industry peak bodies; (ii) third-party mediated codes, guidelines or compacts—the UN’s Global Compact, and the Draft Norms on Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights,<sup>72</sup> and the OECD’s Guidelines for Multinational Enterprises; and (iii) the legal obligations and proposals for legislative regulation. For example, the expanding jurisprudence of the United States’ federal Alien Tort Claims Act,<sup>73</sup> the mounting willingness of British and Australian courts in particular, to limit protection afforded to corporations by the doctrine of *forum non-conveniens*,<sup>74</sup> the legislative proposals before both the U.S. Congress<sup>75</sup> and the Australian Parliament<sup>76</sup> to make corporations accountable under domestic law for their actions overseas,<sup>77</sup> and the deliberations of the European Commission.<sup>78</sup> Human rights considerations have also begun to impact the planning and

<sup>72</sup> As formulated by a working group of the U.N. Sub-Commission on the Promotion and Protection of Human Rights. See U.N. ESCOR, Hum. Rts. Comm., Sub-commission on the Promotion and Protection of Hum. Rts., 54th Sess. Annex, Agenda Item 4 at 15, U.N. Doc. E/CN.4/Sub.2/2002/13 (Aug. 15, 2002), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/971d73502dd31b7bc1256c1e00533042/\\$FILE/G0215007.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/971d73502dd31b7bc1256c1e00533042/$FILE/G0215007.pdf).

<sup>73</sup> See e.g., Development in the Laws, International Criminal Law: *Corporate Liability for Violations of International Human Rights Law* 114 HARVARD L. REV. 2025, 2025-48, and Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua and Aguinda* 36 TEX. INT’L L. J. 299 (2001).

<sup>74</sup> See Sarah Joseph, *Taming the Leviathan: Multinational Enterprises and Human Rights*, 46 NETHERLANDS INT’L L. REV. 171, and Rogge, *supra*, note 73.

<sup>75</sup> The *Corporate Code of Conduct Act of 2000*, H.R. 4596, 107th Cong. (2000).

<sup>76</sup> The *Corporate Code of Conduct Bill of 2000*, <http://scaleplus.law.gov.au/html/bills/0/2000/0/0642452180.htm>, a Private Member’s Bill sponsored by Senator Vicki Bourne (introduced in September 2000); the bill lapsed with the 2001 general election.

<sup>77</sup> For an overview and brief discussion of these developments, see David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, COMMERCIAL LAW AND HUMAN RIGHTS (Stephen Bottomley & David Kinley eds., 2002). For another account, see INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BUSINESS WRONGS AND RIGHTS: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (DRAFT REPORT), (2001) (on file with author).

operations of international trade and aid organizations such as the World Trade Organization, the International Monetary Fund, the World Bank and the Asian Development Bank.<sup>79</sup> Therefore, the link between international trade and human rights is now well established,<sup>80</sup> even if its implications are yet to be fully realized.<sup>81</sup> The argument against recognizing that trade *necessarily* affects human rights is no longer sustainable (if it ever was and even if some still hold to it); rather the debate has now shifted to the issue of the extent to which free trade is compromised by any link between human rights protectionism.<sup>82</sup>

These developments are symptomatic of an apparent shift in corporate culture, especially in large multinational corporations. The commercial context in which they operate is changing.<sup>83</sup> Increasingly, institutional as well as individual shareholders are guided by principles of ethical investment. Many of the largest corporations are now subject (or subject themselves) to social audits undertaken by a variety of auditors, importantly including some of the large accounting firms such as KPMG and PricewaterhouseCoopers. Furthermore, there has been an explosion in the provision of advice on corporate social responsibility, whether as part of the standard portfolio of management consultancy or by way of firms specifically focused on providing advice on corporate reputations and responsibilities. There are a host of influential, non-aligned, watch-dog organizations which scrutinize the social responsibility performances of corporations, including for example, Business for Social Responsibility in the United States, Corporate Social Responsibility in Eu-

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<sup>78</sup> *Promoting a European Framework for Corporate Social Responsibility: Green Paper* (July 2001), and *Communication From the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 Final, (2 July 2002). See also, generally, Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS*, 565-7 (Philip Alston ed. 1999).

<sup>79</sup> See e.g., SIGRUN SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001).

<sup>80</sup> See e.g., Adelle Blackett, *Whither the Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 1 (1999).

<sup>81</sup> See Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1, 2 (2002) and Anne Orford, *Globalization and the Right to Development*, in *PEOPLES' RIGHTS* 147 (Philip Alston ed. 2001).

<sup>82</sup> See, e.g., S. Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. OF GLOBAL TRADE 62 (2001).

<sup>83</sup> See, for example, the extraordinary array of material that evidences this, accessible at *Business and Human Rights: A Resource Website*, expertly maintained by Chris Avery, available at <http://www.business-humanrights.org/>.

rope and specialized units within Amnesty International and the U.S.-based Lawyers' Committee for Human Rights.

There is considerable potential for corporate impact, beneficial as well as detrimental, on human rights generally, but in particular on economic, social and cultural rights standards. One has little difficulty cataloguing a host of potential scenarios that violate existing international human rights treaties (both global and regional) and domestic laws that protect or can be read to protect economic, social and cultural rights.<sup>84</sup> On the positive side of the ledger, clearly any prevention or reversal of such infringements aids human rights protection. But, there are other more proactive avenues that can be pursued. It has, for instance, been pointed out that the protection of economic, social and cultural rights "will be most important for businesses that carry out apparent state functions [particularly in developing countries], perhaps providing schools or health clinics in a "company town."<sup>85</sup> And there is further, the fact of pressure being brought to bear indirectly on corporations to conform to the obligations of the ICESCR, by way of the demands of the Covenant made directly by the signatory states in which the corporations operate or reside.<sup>86</sup>

#### IV. THE ROLE OF THE RULE OF LAW

The fact of this demonstrated overlap between the phenomena of human rights globalization and commercial/corporate globalization, brings with it a blurring of their respective rule of law claims articulated earlier. As foreshadowed, the classification of the latter's rule of law interests being largely formal and those of the former being largely substantive is too simplistic. Corporate and commercial concerns are now at least more conversant with the social content of laws. In addition, human rights protagonists accept qualifications to their normative assertions, and they accept that in the articulation, substantiation, and implementation of human rights, the formal conception of the rule of law has been of enormous importance. These points notwithstanding, perhaps the most revealing conclusion that can be drawn from the preceding analysis is the fact that the rule of law may have only a relatively limited part to play in determining the nature and effect of the globalization of human rights.

<sup>84</sup> See, e.g., Scott, *supra* note 4, at 563-68.

<sup>85</sup> INTERNATIONAL COUNCIL FOR HUMAN RIGHTS POLICY, *supra* note 77, at 117.

<sup>86</sup> As Matthew Craven points out regarding the U.N. Committee on Economic, Social and Cultural Rights, it now sees that "the realm of State responsibility extends not only to the acts of agents of the State but also those of third parties over whom the State has or should have control." Craven, *supra* note 52, at 113.

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Thus, the identification, under (b) above (“challenges to human rights universality”), of a dimension of cultural relativity in the conception and application of universal human rights, further attenuates the certainty and predictability of the law that backs them. In (c) above (“prosperity and human capabilities”), though the rule of law plays a part in providing the regulatory framework within which greater wealth may be created through the global expansion of commerce and free trade, “legal rights and legal systems” do little (though not nothing) to ensure anything like an equitable division of the spoils as needs demand. Also, the bulk of the developments discussed under (d) above (“common goals”) are non-binding or are not yet in force. The many and various codes of conduct, alliances, compacts and guidelines are indicative of some degree of corporate cultural enlightenment, but they are nevertheless voluntary and inspirational, with no or very little legal backing. It is only under (a) above (“human rights categorization”) that there exists the prospect of a significant place for the rule of law, but only if one is able to overcome the fact that economic, social and cultural rights are jurisprudentially maligned. Pointing out the analytical shortcomings of the claims that such rights are policy considerations and therefore not amenable to curial decision-making, does not change the fact that economic and social rights are infrequently accorded the same level of legal significance (if expressly articulated as legal rights at all) as civil and political rights.

Notwithstanding these limited opportunities, I must reiterate that I do not see the notion of the rule of law as irrelevant to the notion of human rights. It could not be so, not least for the reasons that I have pointed out in this essay. First, the two constructs share a number of important precepts, and second, as I have stressed throughout, the legalization of human rights aided their standardization. Instead, my conclusion is that the rule of law on its own is not and will not be sufficient to provide even for minimal human rights protection. Still less can it be sufficient so long as the concept of human rights remains essentially contested in terms of nature, content and implementation, and so long as human rights share the globalization stage with economic actors. Where rules proclaiming human rights are supported by a broad social, political and economic determination to promote them, rather than pulling themselves up by their own bootstraps, as it were, then the rule of law would truly facilitate their global promotion and protection. The necessity of this relationship is as true at any one instant, as it is across time when the form, nature and circumstance of these supporting structures change. For the notion of the rule of law is, as Philip Selznick puts it,

a governing ideal, not a specific set of injunctions. This ideal is to be realized in history and not outside it . . . . Even when we know the meaning of legality we must work out the relation between general princi-

ples [including human rights] and the changing structure of society. New circumstances do not necessarily alter principles, but they may and do require that new rules of law be formulated and old ones changed.<sup>87</sup>

It is true that in circumstances of extreme political, economic and social upheaval the contingencies of the rule of law may be of a different order. As Ruti Teitel argues, there exists:

a tension between the rule of law as backward-looking and forward-looking, as settled versus dynamic. In this dilemma, the rule of law is ultimately contingent; rather than grounding legal order, it serves to mediate the normative shifts in justice that characterize these extraordinary periods.<sup>88</sup>

But this perspective overplays the stability or “settledness” of legal order not in hyper-transition. It fails to recognize the fact that the rule of law is nevertheless and always contingent on political circumstance in more ordinary times—the difference is simply one of degree, not kind. The system by which a legal order is maintained continues to mediate change in society, to varying levels of efficacy, whether such change is big or small, sudden or gradual.

The reality is that the state of human rights protection just about everywhere at the present time can be fairly said to be somewhere in between the poles of empty proclamation and proclamation with punch.

#### *A. A Pluralist Implementation of Human Rights?*

In terms of the future implementation of human rights, it may be asked: whither the rule of law? From the standpoint of the concerns of the present context, there are at least two lines of inquiry that flow from this question—one general, the other specific.

The first, more general analysis, is to re-conceive the role we assign to the notion of the rule of law, and move it away from the conception of it as providing the framework for, or instrument of, human rights protection, *sine qua non*. It is more realistic to side step, or at least stand back from this doctrinaire, “access to justice” model. To do so would have the salutary effect of expanding the interests and expertise of those involved in human rights discourse, action, and enforcement beyond the traditional dominance

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<sup>87</sup> Philip Selznick, *Sociology and Natural Law*, 6 NAT. L. F. 84, 103 (1961). Or, as Martin Krygier says in answer to his own question as to how much does context make a difference to the instantiation of the rule of law in post-communist, Eastern European states (the subject of his particular interest), it matters “much, but not *so* much,” Martin Krygier, *Transitional Questions About the Rule of Law: Why, What and How?* 28 EAST CENTRAL EUROPE/L’EUROPE DU CENTRE EST. EINE WISSENSCHAFTLICHE ZEITSCHRIFT 1, 2 (2001).

<sup>88</sup> Teitel, *supra*, note 2, at 2016.

of lawyers (especially), diplomats, secretariat officials of international organizations and non-government organization representatives.<sup>89</sup> The traditional dominance of such groups has arisen out of the essentially legally-based means by which they execute their mandates to promote human rights protection.

However, as many have pointed out, these techniques are especially ill-suited to handling, for example, the pressing issues that lie at the heart of economic, social and cultural rights.<sup>90</sup> Law, lawyers and legal apparatus are important, but they are not alone sufficient. Broader economic policy and social welfare strategies are of equal if not more profound importance. In this regard, Craig Scott warns in his critique of the dominance of the legal perspective within human rights discourse generally that, “[e]specially after fifty years of gradually building up a body of juridical human rights doctrine, there is a risk that rights analysis could lose touch with the basic rationales for human rights protection. Legal doctrine can all too easily come to develop a legal logic all of its own, to the point that the tail (of doctrinal analysis) begins to wag the dog (of human rights).”<sup>91</sup> At the very least, this highlights the need to accept and adopt a pluralist approach if we are fully to understand, let alone effectively promote, human rights standards.

The second, specific line of inquiry, stems from the possibility of corporate/commercial globalization throwing up a supplementary vehicle for the protection of human rights. If the arena of human rights is to be broadened as suggested above, then that must include the prospect of domestic and international corporations as well as global economic regulatory bodies taking on active roles as human rights guardians, parallel to the guardianship responsibilities of States. Just as States, at one and the same time, are capable of breaching human rights standards and are charged with the responsibility of upholding those standards, so corporations and other global commercial actors are equally capable and can be expected to shoulder the same or similar responsibility. They may, in any case, be doing so “voluntarily”—that is where ultimately they see it as in their own economic interests.<sup>92</sup> Or, they

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<sup>89</sup> Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 152-53 (Louis Henkin & John Lawrence Hargrove eds., 1994). On the restrictions of an overly legal conception of economic and social rights, see generally Craig Scott, *Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”* 21 HUM. RTS. Q. 633 (1999).

<sup>90</sup> See, e.g., Alston, *supra* note 89, at 152-53.

<sup>91</sup> Scott, *supra* note 89, at 637.

<sup>92</sup> As the relatively long-standing protection of core labor rights, at least in the West, classically demonstrates.



may be doing so in response to perceived or actual legal duress.<sup>93</sup> In reality, the extent of the current coalition of global commercial and human rights interests is a result of a combination of pro-action and reaction on the part of corporate and economic regulators. Still, their concern to protect human rights interests stretches only so far as such protection is seen as instrumental in promoting key commercial interests.

The question is whether this is desirable, legitimate and above all, enough. Certainly, I think it can be said that it is desirable if only because expecting anything more altruistic of the globalized corporate/commercial axis would be unrealistic and quite possibly counter-productive. The legal legitimacy of such responsibility is not yet firmly established, but it seems inevitable that it will to some extent soon be in place.<sup>94</sup> Clearly, the current level of human rights protection by these means is not, nor will it ever be enough, if only because whatever may be expected of the human rights responsibilities of global economic actors, it can never replace the overriding obligations of state actors.<sup>95</sup>

### CONCLUSION

This essay has sought to explore the relationship between the rule of law and the protection and promotion of human rights within the context of globalization, especially economic globalization. I have used the notion of the rule of law mainly as an analytical tool to help to understand the significance of global expansion along the commercial/corporate axis and globalization of human rights standards, both as regards their separate development and their overlap and limited merger. In so doing, the role of the rule of law itself has been thrown into relief. It transpires that its significance has not been as great as might be supposed and that what role it has played is of more historical rather than future importance.

Most certainly, the rule of law has been and is part of the facilitative framework upon which the global expansion of both corporate and commercial enterprise and the promotion of human rights have been built—albeit that they use different parts of the framework. Yet, it remains the case that favorable economic conditions are what principally lie behind the designs

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<sup>93</sup> As discussed under (c) above.

<sup>94</sup> See, for example, the collection of essays in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* (Menno T. Kamminga & S. Zia-Zarifi eds., 2000).

<sup>95</sup> See David Kinley, *Human Rights and the Shrinking State: The New Footprint of State Responsibility*, paper delivered at Human Rights and Global Challenges Conference, Castan Centre for Human Rights Law, Monash University, Melbourne 10-11 December 2001, at <http://www.law.monash.edu.au/castancentre/conference2001/papers/kinley.html> (last modified Sept. 30, 2002).

and successes of globalizing corporate enterprise,<sup>96</sup> rather than the presence of stable, rule-bound legal systems.

In regards to the international expansion of human rights' acceptance, application and enforcement, the legal imperative that they be backed by effective sanction remains ultimately at the mercy of political will. It is accepted that the notion and practice of the rule of law necessarily forms part of these economic and political determinants, but it is in fact this very exposure of the rule of law as merely a subordinate part that is crucial.

In terms of the continuing global promotion and observance of human rights, it is with the reconciliation of the economic with the political, broadly conceived, that so much hangs in the balance. The approach, ideas and propositions here sketched out are intended to provide some limited grounds for consideration as to how this reconciliation might be done for the protection of human rights in general, and economic, social and cultural rights in particular.

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<sup>96</sup> See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 44-5 (1999).