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IF DOROTHY HAD NOT HAD TOTO TO PULL BACK THE WIZARD'S CURTAIN: THE FABRICATION OF HUMAN RIGHTS AS A WORLD RELIGION

Richard Stith*

ABSTRACT: This paper examines the increasing penetration and control of nations by amorphous ideas of human rights, touching upon the symbiotic relation between global capital and human rights, the anti-democratic nature of many rights, the radically political nature of positive rights, the frequent absence of national self-esteem and the consequent yearning for supranational approval, the belief that judges and their surrogates are priests speaking for God, the search for validating judicial will as replacement for a dead God, loss of judicial confidence in reason, and banal judicial vanity. These lead to the creation of the last and greatest Leviathan, a mortal god that can never be dethroned.

I. INTRODUCTION

In the 1939 film, *The Wizard of Oz*,¹ Dorothy and her friends undertake a pilgrim quest to the Emerald City of Oz, in the fervent belief that the wizard who rules that city has the preternatural power to save them from several perceived afflictions. When Dorothy's dog Toto pulls back the curtain that veils the wizard, the group discovers not only that the supposed wizard is in fact a charlatan without any special powers—but also that they did not need the help of great magic, simply more self-confidence. If not for Toto, they might well have continued to depend on fake wizardry. This essay suggests that the worldwide quest for human rights may likewise be founded in part on a lack of self-esteem coupled with the credulous veneration of wizards—without a Toto to reveal the all-too-human character behind the curtain. It is worth examining the superhuman pretensions of some international human rights advocates and the strange sort of religion being fabricated to support those pretensions.

The title of the panel for which this paper was prepared (“Implementing International Human Rights in the Domestic Context”) betrays an American parochialism. The experience of much of the rest of the world belies the notion that such rights need to be “implemented” in order to become effective domestically. That is, our dualist American separation of national from international law and our superpower status

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¹ THE WIZARD OF OZ (Metro-Goldwyn-Mayer Studios 1939).

have preserved for us a democratic choice rapidly disappearing around the world. In Argentina and Mexico, for example, international law is directly effective and supreme² over both prior and subsequent national legislation; in the case of Argentina, a good many human rights treaties actually become part of the constitution.³ Mexico's treaty with the

² Argentina: Decisión de la Corte Suprema del 7 de julio de 1992 en el caso "Ekmekdjian, Miguel Ángel c/ Sofovich, Gerardo y otros." Art. 75 inciso 22 (first paragraph) of the Constitución Nacional reads: "Los tratados y concordatos tienen jerarquía superior a las leyes." ("Treaties and concordats rank higher than statutes.") Mexico: *Tratados internacionales. Se ubican jerárquicamente por encima de las leyes federales y en un segundopiano respecto de la constitución federal.* 9ª. Época; Pleno; S.J.F. y su Gaceta; X, Noviembre de 1999, página 46, Tesis: P. LXXVII/99 Tesis Aislada. Materia Constitucional, approved in private session 28 October 1999. This thesis was first elaborated in the amparo en revisión 1475/98, Sindicato Nacional de Controladores de Tránsito Aéreo, 11 de mayo de 1999.

³ Art. 75 inciso 22 of the Constitución Nacional of Argentina lists various constitution-level human rights declarations and treaties:

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo, la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación de razas; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Cruelles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos.

(In English): The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein.

Translated in Georgetown University, Political Database of the Americas, available at http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html (last visited Nov.

European Union authorizes a wide range of new secondary legislation by treaty-created bodies without further approval by any domestic legislature.⁴ The European Community treaties have all these effects among their signatory states.⁵

A Dutch commentator recently summarized a common non-American perspective:

[I]nternational law influences and often determines the domestic rule of law . . . governing directly the legal rights and obligations of private persons who are located in domestic legal orders. International law, particularly international human rights law, imposes such

15, 2009). Interpretations of these treaties by international tribunals may further affect the meaning of the Argentine constitution: Corte Suprema, 23/12/2004, Espósito, Miguel A.

⁴ The treaty states:

El Consejo Conjunto, a efectos de alcanzar los objetivos del presente Acuerdo, estará facultado para tomar decisiones en los casos previstos en el Acuerdo. Las decisiones que se adopten tendrán carácter vinculante para las Partes, que tomarán las medidas necesarias para ejecutarlas. El Consejo Conjunto podrá también hacer las recomendaciones pertinentes.

Las decisiones y recomendaciones se adoptarán previo acuerdo entre las dos Partes.

Acuerdo de Asociación Económica, Concertación Política y Cooperación entre los Estados Unidos Mexicanos y la Comunidad Europea y sus Estados Miembros, art. 47, DIARIO OFICIAL DE LA FEDERACIÓN, 26 de Junio de 2000, Segunda Sección. The Consejo Conjunto may delegate its functions to the more technical Comité Conjunto, whose decisions become equally binding. *Id.* art. 48(2). Note that in the course of regulating trade, the Consejo may make judgments of “public morality.” *Id.* art. 5(k). And the Consejo will decide on abuses of economically dominant positions, including “state monopolies” and “public enterprises.” *Id.* art. 11(2)(b, d, e). “Human rights” are from the beginning declared to be an “essential element” of the treaty, all of which give Consejo (and the Comité) much discretion to develop the treaty. *Id.* art. 1. Respect for “democratic principles” is also mentioned (*id.*), but no mechanism for referral to Mexican democratic institutions is anywhere to be found. For a more detailed analysis of the Mexico-European Union Treaty of 2000, see Richard Stith, *México: ¿nuevamente una colonia europea?*, in 2 JEAN MONNET/ROBERT SCHUMANN PAPER SERIES No. 8, 2 (Mariela Arenas ed., 2003), available at <http://www6.miami.edu/EUCenter/stith/final.pdf>.

⁵ See *Treaty Establishing the European Community* for the direct effect of secondary regulations legislated by the treaty-created institutions and for the extremely wide scope of such secondary legislation. *Consolidated Version of the Treaty Establishing the European Community*, 45 OFFICIAL J. OF THE EUROPEAN COMMUNITIES C325/33 (2002), available at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf. Its supremacy over member state law was originally asserted by the European Court of Justice in the following two cases: Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 1963 C.M.L.R. 105 and Case 6/64 *Costa v. ENEL*, 1964 E.C.R. 585, 1964 C.M.L.R. 425. For a more detailed examination, see Richard T. Stith, *El problema del alto tribunal no razonable*, in DOS VISIONES NORTEAMERICANAS DE LA JURISDICCION DE LA UNION EUROPEA 29, 29–32 (Universidade de Santiago de Compostela 2000).

fundamental limitations on the power of government that in fact it has become hard to think of rule of law problems in the relationship between a state and its citizens that do not have some connection to international law.⁶

How has this widespread global governance come about? This short essay contends that one key factor has been the development of human rights as a kind of world religion. Conversion to this new religion, in turn, arguably results from a coming together of two factors: on the international side, what can be called “forces of domination,” and on the domestic side, what can be called “forces of surrender.”

II. FORCES OF DOMINATION

Most obviously, capitalism prefers property and commerce rights to be immune to the erratic and redistributive impulses of popular majorities, for the sake of economic predictability and security. Global capitalism is thus fundamentally anti-democratic, preferring uniform rules favoring capital imposed on all nations. For example, it may demand that international treaties be made constitutionally supreme over subsequent domestic legislation in order to reassure foreign investors that they need not fear local legal surprises. The “democratic deficit” has been labeled perhaps the “most severe” and “most serious” problem for the transnational legal order.⁷

Those who perceive workers’ interests and environmental conservation to be endangered by free trade have long engaged in protest against this undemocratic globalization. For example, back in 1999, a full-page advertisement in the New York Times denounced the World Trade Organization (WTO) as “the world’s first global government. But it was elected by no-one, it operates in secrecy, and its mandate is this: To undermine the constitutional rights of sovereign nations.”⁸

At first sight, it might seem that those who use the language of human rights would favor protecting national sovereignty and shielding

⁶ André Nollkaemper, *The Internationalized Rule of Law*, 1 HAGUE J. ON THE RULE OF L. 74, 75 (2009). Professor Kaemper directs the Amsterdam Center for International Law, University of Amsterdam.

⁷ Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT’L L. REV. 89, 113 (2008).

⁸ *Invisible Government*, Advertisement, N.Y. TIMES, Nov. 29, 1999, at A15. The ad indicates that the signers (which include, for example, Greenpeace and the United Steelworkers of America) “are all part of a coalition of more than 60 non-profit organizations that favor democratic, localized, ecologically sound alternatives. . . .”

citizens from the abuses of global capital through democratic legislation. This inference would be a mistake. Except for political rights to democratic participation and rule, all rights are anti-democratic: All are intended to be (sometimes insuperable) barriers to the will of the political community as disclosed by majority vote.⁹ Those interested in various sorts of human rights are not necessarily opposed to “invisible” or “secret” government, as long as their kind of rights, not just property-related rights, get a cut of the action. They, in turn, have something to offer to capital, i.e. legitimation. Only when global governance comes to mean protection from domestic oppression, as opposed to merely protection from domestic property redistribution, is it likely to be accepted.¹⁰ (Franciscan friars did indeed humanize and soften the Spanish conquest of Mexico, and their motives may have been wholly benevolent. Yet at the same time they legitimated and facilitated that conquest.¹¹)

Already in 1998, former human rights activist Kenneth Anderson¹² put the matter in suitably religious terms:

⁹ The anti-democratic character of rights is obscured when the word “democratic” is used for private freedoms that are unrelated either to a *demos* or to a *kratos*, as for example in the phrase “It is undemocratic for the state to tell citizens where they must worship.” By contrast, “democratic” in the sense used in this paper refers always to majority-decision origin, not to private-rights content.

¹⁰ Thomas M. Franck, *Preface: International Institutions: Why Constitutionalize?*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE xiv (Jeffrey L. Dunoff & Joel Trachtman eds., 2009) [hereinafter RULING THE WORLD?] (quoting David Kennedy, *The Mystery of Global Governance*, in RULING THE WORLD?) 37, 40 (describing and proposing world constitutionalism as a basis for international law). The constitutional place of human rights in this scheme is spelled out in greatest detail by Mattias Kumm. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD? 258, 303–10. Stephen Gardbaum’s essay highlights the importance of human rights as a means of overcoming the delegitimation consequent upon supranational law’s endemic democracy deficit. See generally Stephen Gardbaum, *Human Rights and International Constitutionalism*, in RULING THE WORLD? 233. He notes that “No one talks of a democracy deficit in the European Convention on Human Rights[,]” and

[t]he story of the transformation of the European Union from a treaty-based to a supranational entity is now, of course, too familiar to require details... [Member states’] sovereignty was limited and partially transferred to a vertical, supranational system of international law. In this transformation, human rights famously played no intrinsic role but rather only an instrumental or pragmatic one as the sugar helping certain member state courts to swallow the pill.

Id. at 235, 246.

¹¹ T.R. FEHRENBACH, *FIRE AND BLOOD* 204–08 (DaCapo Press 1995).

¹² Professor Anderson recounts some of his activist experience in *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 91–120 (2000).

Painting such groups as human rights organizations and the like as fundamentally in tension with transnational capital is simply an illusion. If the global nongovernmental movement, as a key agent of internationalism, sees itself as a kind of “Sunday School of the nations,” schooling them in their moral duties, it is able to do so . . . [while global capital] serves as the battering ram to make societies accessible and malleable to internationalism itself.¹³

Let us look at a relatively non-controversial example of non-democratic human rights *hubris*, the fabrication of the right to water. Since no one is against drinking, we can avoid disputes concerning the right’s core content and focus instead on its pedigree and on the coherence of the many peripheral rights derived from it.¹⁴

The “right to water” is nowhere explicitly mentioned as a right *per se* in any global treaty.¹⁵ Yet the United Nations’ Committee on Economic, Social and Cultural Rights has indicated in eighteen-page detail what the “right to water” requires and how it will be enforced.¹⁶

Note first that this Committee, like other U.N. treaty-monitoring bodies, need be made up neither of jurists, nor of economists, nor of engineers or other technical experts. The only requirement is that its members “shall be experts with recognized competence in the field of human rights.”¹⁷ It does not operate as a court, with rules guaranteeing fair submission of evidence and argument on both sides. Nevertheless, the Committee felt jurisdictionally competent to issue General Comment No. 15,¹⁸ indicating in legal language precisely how the International

¹³ Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS 109, 113 (Carrie Gustafson & Peter Juviler eds., 1999).

¹⁴ Of course, in an inspirational sense, all post-war human rights claims can be said to originate in the recognition of the “inherent dignity” of all human beings. See The Universal Declaration of Human Rights pmbl., Dec. 10, 1948 (“Whereas recognition of the inherent dignity . . . of all members of the human family is the foundation of freedom, justice and peace in the world[.]”); Basic Law of the Federal Republic of Germany art. 1, para. 1, May 23, 1949 (“Die Würde des Menschen ist unantastbar.”).

¹⁵ This is not to say that no treaty ever refers to individual entitlements to water in certain contexts.

¹⁶ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), available at <http://www.fao.org/righttofood/KC/downloads/v1/docs/AH355.pdf>.

¹⁷ U.N. Economic and Social Council Res. 1985/17 (May 28, 1985).

¹⁸ United Nations, *Substantive Issues*, *supra* note 16.

Covenant on Economic and Social Rights¹⁹ requires the right to water to be implemented world-wide.

Paragraph 3 of the General Comment begins with a claim of treaty textual support:

Article 11, paragraph 1, of the Covenant specifies . . . the right to an adequate standard of living “including adequate food, clothing and housing”. The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living The right to water is also inextricably related to . . . the rights to adequate housing and adequate food²⁰

Paragraph 6 elaborates: “water is necessary to produce food.”²¹ Yet it goes on simply to announce: “Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses.”²² Without missing a beat, it somehow manages to make many other things also prior: “Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.”²³

Paragraph 11 warns us further not to imagine some easy, mechanical way to comply with this right: “The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good.”²⁴

Paragraph 14 warns that “investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.”²⁵ Yet Paragraph 16(h) indicates somewhat to the contrary that “persons . . . living in arid and semi-arid areas, or on small islands are [to be] provided with safe and sufficient water.”²⁶ If the few persons

¹⁹ See generally GAOR, International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966), <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>.

²⁰ UNITED NATIONS, *Substantive Issues*, *supra* note 16, ¶ 3.

²¹ *Id.* ¶ 6.

²² *Id.*

²³ *Id.*

²⁴ *Id.* ¶ 11.

²⁵ *Id.* ¶ 14.

²⁶ *Id.* ¶ 16(h).

living in such regions have to move to cheaper water supplies, their human rights apparently will have been violated.

Paragraph 34 declares water-related duties to extend beyond national borders, “Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources”²⁷ adding in Paragraph 38, “[f]or the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties . . . to provide international assistance”²⁸ The rights to water declared by the Committee must be taken into account whenever a state enters an international agreement.²⁹

Enforcement mechanisms take up many pages of the Committee’s General Comment 15, but only a few quotations are needed to see the degree of supranational tutelage required: Paragraph 47 indicates that “States parties [have] an obligation to adopt a national strategy or plan of action to realize the right to water[,]” and that in so doing “States parties should avail themselves of technical assistance and cooperation of the United Nations specialized agencies”³⁰ Paragraph 54 adds “During the periodic reporting procedure, the Committee will engage in a process of . . . joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period [five years later].”³¹

Although the realization of many of the declared rights to water rights is thus progressive, i.e. there is no duty to fully comply at once, “States parties must establish that they have taken the necessary and feasible steps[,]” acting “in good faith to take such steps.”³² Failure to do so “amounts to a violation of the right.”³³ Much is expected: “A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant.”³⁴ As an example of treaty violation, Paragraph 44(c)(ii) mentions “insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups”³⁵

²⁷ *Id.* ¶ 34.

²⁸ *Id.* ¶ 38.

²⁹ *Id.* ¶ 44(c)(vii).

³⁰ *Id.* ¶ 47.

³¹ *Id.* ¶ 54.

³² *Id.* ¶ 40.

³³ *Id.*

³⁴ *Id.* ¶ 41.

³⁵ *Id.* ¶ 44(c)(ii).

What can be said of the Committee's work? There is no doubt that the world faces a crisis regarding the need for water.³⁶ The question is whether cock-sure activist intervention and a quasi-judicial enforcement style, the creation and imposition on states of duties to provide water that are contradictory, impossible to fulfill completely, and only tendentiously treaty-based, is the best way to proceed, as opposed to letting real jurists and technical experts hammer out workable international treaties and national legislation.³⁷ In the absence of any binding enforcement power by this and other U.N. treaty-monitoring bodies—or even a fair and official dispute resolution mechanism entrusted to the bodies—there would no doubt be much national resistance to the pretensions of the political activists on such committees were it not for the “forces of surrender” to be examined below.

However, before turning to those receptive forces, one should look more deeply at an inherent tension between any massive number of rights and democracy, quite apart from the additional problems of pedigree and competence presented by the new rights fabricated by monitoring bodies of lay human rights activists.³⁸

When rights are few and negative (requiring only that the state leave individuals alone in certain spheres), a large field is left open to democratic choice. That is, even when rights are meant completely to trump majority goals, where rights ask for little there may well be a way to achieve those goals without abrogating the rights in question. This is no longer so where rights expand to cover most human goods. If the

³⁶ Joseph W. Dellapenna's recent article is an excellent summary of the crisis and of the range of legal solutions available. See generally Joseph W. Dellapenna, *International Water Law in a Climate of Disruption*, 17 MICH. ST. J. INT'L L. 43 (2008). For a close study of the complexity of one part of the relevant law, see OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW (Ashgate 2007).

³⁷ For a critique of the rights approach to water from a proponent of global capitalism, favoring leaving water largely in the hands of the market, see Kendra Okonski, *Is Water a Human Right?*, 24 THE NEW ATLANTIS 61, 61-73 (Spring 2009), available at http://www.thenewatlantis.com/docLib/20090617_TNA24Okonski.pdf. See also Owen McIntyre, *Water Services Privatization and Recognition of the Human Right to Water in International Investment Law – Finding Fertile Ground in Unlikely Places*, Presentation on Global Justice and Sustainable Development organized by the International Law Association: Committee on International Law and Sustainable Development (Aug. 26-27, 2009) (on file with the Valparaiso University Law Review) (Prof. McIntyre argues that, contrary to the assumptions of many, the human right to water is compatible with privatization, albeit with some complexities).

³⁸ For quite different critiques of rights-based regimes, focusing on their excessive individualism, see Richard Stith, *The Priority of Respect*, 44 INT'L PHIL. Q. 165 (2004); Richard Stith, *Generosity: A Duty Without a Right*, 25 J. OF VALUE INQUIRY 203 (1991).

private achievement of almost any good overrides majority preferences, little room for democratic choice remains.

Furthermore, as they multiply, rights cannot maintain their near-absolute character, for they inevitably clash one with another. Some sort of hierarchy, or at least a balancing technique, has to be applied to determine which rights must give way.

It might seem that democratic voting would reenter here, to determine the balance or hierarchy of rights. However, this is not so, except where the rights flow only from some positive law source within a legislature's competence (e.g., a constitution able to be legislatively amended). For rights in the full sense are legal entitlements, not just competing social interests or desires. So only judicial or quasi-judicial authorities (using reasoned elaboration of general norms to decide cases), and not legislatures (representing the will of the people in formulating general norms), are competent to decide the concrete weight to be given to each right.

Yet at the same time, rights to various human goods, like the goods at which they aim, are often incommensurable, or nearly so, especially with the postmodern loss of Enlightenment confidence in reason. In our multicultural world, it is difficult or impossible to determine by reasoned deliberation an order of priority among clashing rights to form a family, to education, to work, to health, to worship God, and all the rest. Acts of will, of free choice, are needed to decide such conflicts. Only legislatures, not courts, are authorized so to act.

Thus choice among rights can be done neither by legislatures (because legitimation by reason is needed) nor by courts (because legitimation by will is needed).

Furthermore, many of the commonly proclaimed international rights, such as the right to water, are positive rather than negative. Everyone's negative right to water would require only that the state not act to cut off anyone's hydration. Everyone's positive right to water, as examined above, would require that the state act to supply all with hydration. These positive rights are even less rationally adjudicable than negative rights. After all, a state could uphold an infinite number of potentially conflicting rights if the rights in question were completely negative—via the simple recourse of doing absolutely nothing. But with positive rights, there is no escape from choices among incommensurable alternatives. Suppose resources are limited and either the right to health can be honored with a new hospital or the right to education can be honored with a new university, but not both. Which right is to be deemed superior?

Moreover, positive rights are typically not just rights to have the state act but rights to have the state act *effectively*, i.e. rights to a result, such as the provision of water. But the future is always uncertain. Rainfall and climate may vary. Rules for action or inaction, the stuff of ordinary litigation, can in principle be clear and even absolute, but the means needed to effect results are always tentative and contingent. Judicial reason is not enough to decide between alternatives here. An educated guess followed by an authoritative act of will, i.e. a legislative choice, is needed to choose a plan for the future. But if judicial reasoning cannot reach such a conclusion and no binding international legislature has been created to do so, no such mandate can be legitimate.

Without the ability to achieve legitimacy, either through careful judicial elaboration of already binding norms or through the will of the peoples of the world, how can a new list of positive international human rights requirements, like those proclaimed under “the right to water,” be made effective? Only one answer is possible: by dogmatic proclamation, *Roma locuta est* (“Rome has spoken”), backed up with guilt and shame for those who refuse to comply. Cut off from any other foundation, the option of a new religious authority is the only one left for human rights activists.

This missionary spirit is not hidden. The website for UNESCO begins with these words under “About UNESCO”:

UNESCO—the United Nations Educational, Scientific and Cultural Organization (UNESCO) was founded on 16 November 1945. For this specialized United Nations agency, it is not enough to build classrooms in devastated countries or to publish scientific breakthroughs. Education, Social and Natural Science, Culture and Communication are the means to a far more ambitious goal: to build peace in the minds of men.

Today, UNESCO functions as a laboratory of ideas and a standard-setter to forge universal agreements on emerging ethical issues.³⁹

To the end of forging such agreements, where none now exist, novice missionaries must be catechized and sent forth. Thus the June 2009 UNESCO “International Guidelines on Sexuality Education” indicate

³⁹ UNESCO, What is it? What Does it do?, http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Nov. 8, 2009).

that children as young as fifteen are to be taught “Advocacy to promote the right to and access to safe abortion.”⁴⁰

Yet the U.N.’s is a strange religion, one with many dogmas but without a theology—i.e., without a systematic understanding that ranks all rights and relates them to the premise of inherent human dignity.⁴¹ The result is what Kenneth Anderson has called “serial absolutism”⁴²: activist proclamation of each right as an absolute demand, before going on to another, potentially conflicting, absolute, as we saw in the various contradictory rights to water.

This repeatedly-cascading disintegration (in the set of human rights) conflicts, moreover, with the rule of law itself. If “priority in the allocation of water must be given to the right to water for personal and domestic uses” and “must also be given to the water resources required to prevent starvation and disease,” a nation can always be held in violation and subject to censure (or “name and shame” as the activists like to call it).⁴³ Conflicting, incommensurable, mutable duties do not provide the notice essential to the rule of law.⁴⁴ Why would nations genuflect before them?

⁴⁰ UNESCO, International Guidelines on Sexuality Education: An Evidence Informed Approach to Effective Sex, Relationships and HIV/STI Education 42 (2009), available at <http://unesdoc.unesco.org/images/0018/001832/183281e.pdf>. Despite its “evidence informed” subtitle, no evidence for or against abortion or abortion rights is included in the proposed sexuality curriculum guide; the right to abortion is simply proclaimed. Conservative opposition to the guidelines (calling them, e.g., a “one-size-fits-all approach that’s damaging to cultures, religions and to children[.]”) may result in their revision. Steven Erlanger, *U.N. Guide for Sex Ed Generates Opposition*, N.Y. TIMES, Sept. 3, 2009, at A6.

⁴¹ Even as human rights gain ever-increasing global force, the ideological core of human rights, the idea of inherent human dignity [see *supra* note 14] may itself be in the process of disintegration. On the one hand, efforts are being made to recognize the dignity of animals and even of plants. The Swiss Constitution speaks in Article 120(2) of the “dignity of the creature” including the plant. See BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [Constitution] art. 120(2) (Switz.) (“Der Bund erlässt Vorschriften über den Umgang mit Keim- und Erbgut von Tieren, Pflanzen und anderen Organismen. Er trägt dabei der Würde der Kreatur . . .”). On the other hand, the idea of “dignity” is itself under attack. Human autonomy rather than human dignity is to be respected. See generally Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC, May 28, 2008, available at <http://www.tnr.com/article/the-stupidity-dignity>, reviewed by Open to Interpretation, NATURE, June 12, 2008, at 824, available at <http://www.nature.com/nature/journal/v453/n7197/pdf/453824b.pdf>. But few if any animals or plants are capable of autonomy in the sense of human free choice. Will non-autonomous non-humans have rights while only autonomous humans have rights? Belief in such a religion will be a challenge.

⁴² John Fonte, *Democracy’s Trojan Horse*, 76 THE NATIONAL INTEREST 117, 125 (2004), available at http://hudson.org/files/publications/fonte_national_interest_summer_04.pdf.

⁴³ United Nations, *Substantive Issues*, *supra* note 16.

⁴⁴ Kristina Morvai of Hungary, then a member of the treaty-monitoring body for the Convention on the Elimination of All Discrimination Against Women, has made this very point, stating that “one of the basic principles of the Rule of Law is that interpretations of

III. FORCES OF SURRENDER

It is easy to see why global capital would need a human rights crusade to cover up its seizure of world power and not hard to discern how nations could be pressured financially to go along. After all, to be excluded from the WTO or the World Bank as a human rights pariah would be to incur significant material deprivations. But many nations do more than just go along with international human rights; they welcome them. Why would they happily surrender their sovereignty and the rule of law to dogmatic activists who possess no coherent program with which all nations agree?

For many nations with a Judeo-Christian heritage, one answer may be that they have long been waiting for a world-wide messianic era. After all, it is only in the context of the submission of all nations to Jerusalem that Isaiah could prophesy "they shall beat their swords into ploughshares."⁴⁵ Pope Benedict XVI's recent encyclical *Caritas in Veritate* states "there is urgent need of a true world political authority . . . vested with the effective power to ensure security for all, regard for justice, and respect for rights."⁴⁶ Like the Aztecs who mistook the Spanish *conquistador* for the returning god Quetzalcoatl, Roman Catholic nations, of Latin America in particular, may see the agents of human rights as God's messengers.⁴⁷ More generally, devout and conservative nations throughout the world may imagine a divine inspiration behind the oracular pontifications of the U.N. and its treaty monitoring bodies.

the law must be coherent and consistent, and decisions based on the law must be predictable and foreseeable," concluding that as long as treaty bodies engage in "creative interpretation" they are "largely incompatible" with the rule of law and thus cannot be accepted as legally binding. Kristina Morvai, Respecting National Sovereignty and Restoring International Law: The Need to Reform UN Treaty Monitoring Committees, Briefing at UN Headquarters, New York (Sept. 6, 2006), *quoted in* DOUGLAS SYLVA & SUSAN YOSHIHARA, RIGHTS BY STEALTH: THE ROLE OF UN HUMAN RIGHTS TREATY BODIES IN THE CAMPAIGN FOR AN INTERNATIONAL RIGHT TO ABORTION 35 (The International Organizations Research Group 2006), *available at* http://www.c-fam.org/docLib/20080425_Number_8_Rights_By_Stealth.pdf. For further, probing analysis of the dilemmas of positive rights, see Susan Yoshihara, *The Quest for Happiness: How the UN's Advocacy of Economic, Social, and Cultural Rights Undermines Liberty and Opportunity*, in CONUNDRUM: THE LIMITS OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES (Brett D. Schaefer ed., 2009).

⁴⁵ *Isaiah* 2:4.

⁴⁶ POPE BENEDICT XVI, *CARITAS IN VERITATE* ¶ 67 (2009), *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben_xvi_en_c_20090629_caritas_in_veritate_en.html.

⁴⁷ Mary Ann Glendon argues that Catholic traditions have made Latin American nations leading advocates of positive social and economic rights. *See generally* Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Rights Idea*, 16 HARV. HUM. RTS. J. 27 (2003).

Not the presence but the loss of faith may also be operative. It was lack of confidence in themselves that led the lion, the scarecrow, and the tin woodman to turn to the wizard of Oz to save them. Kenneth Anderson suggests that a worldwide deconstructive attack may be operative: "The global market penetrates what remains of traditional societies with its irresistible consumer goods and saturates all places with the media message, its own form of the good news, that the world is one and cultural differences are nothing more than differences in consumer preferences."⁴⁸ Human rights then step in to fill the ensuing moral and spiritual void. Human rights provide a gratefully received "foundationalism[.]"⁴⁹ once the old religions have been destroyed by consumerism. Those who judge such rights are the "new priests of civil society," according to Quebec Chief Justice Michel Robert.⁵⁰

Those nations, such as Argentina, that have committed obvious past atrocities no doubt feel a special need to be utterly deferential and contrite before the "new priests." But humility is guaranteed for many other countries by the impossibility of compliance with all the requirements of contradictory human rights. Like Luther's use of the law to "increase transgressions[.]"⁵¹ human rights demands may be so difficult and unending that they function to cow nations into submission. Already ashamed at being poor and backward, a state may sense that it may never have the means fully to supply all positive rights, or even just the right to water. Such a government may seek to prove its sincere intentions by abject apologies and repeated confessions of absolute faith in human rights, and wholesale surrender to the demands of the authorities claiming to articulate those rights.

Yet the plight to which the new religion of human rights responds should not be seen as one which afflicts only societies that still seek a god. Human rights also meet a special postmodern need.

⁴⁸ See Anderson, *supra* note 13, at 112.

⁴⁹ Yeh & Chang, *supra* note 7, at 108.

⁵⁰ Cristin Schmitz, *Quebec's Chief Justice Sees a Need to Change Traditional Legal Training*, 24 LAW WEEKLY, No. 1 (May 7, 2004).

⁵¹ MARTIN LUTHER, A COMMENTARY ON ST. PAUL'S EPISTLE TO THE GALATIANS 298 (James Clarke & Co. Ltd. 1953). In his *On Christian Liberty*, Luther explains that commandments which are impossible to fulfill have the function of teaching man to "despair of his own ability For example, the commandment 'You shall not covet' [Exod. 20:17], is a command which proves us all to be sinners, for no one can avoid coveting no matter how much he may struggle against it." MARTIN LUTHER, ON CHRISTIAN LIBERTY 11-12 (W. A. Lambert trans., Fortress Press 2003). "Therefore, . . . a man is compelled to despair of himself, to seek the help which he does not find in himself elsewhere . . ." *Id.* at 12. Luther, of course, had man seek that help in God rather than in a United Nations. *Id.*

The postmodern world of many or most Western societies, the world where God and even reason are dead, has been well described by J.H.H. Weiler:

[T]here is no doubt that the notion that all observations are relative to the perception of the observer, that what we have are just competing narratives, has moved from being a philosophic position to a social reality. It is part of political discourse: multiculturalism is premised on it as are the breakdown of authority (political, scientific, social) and the ascendant culture of extreme individualism and subjectivity. Indeed, objectivity itself is considered a constraint on freedom—a strange freedom, to be sure, empty of content.⁵²

In such a world, no legal “theology” could survive. No rational system of thought could withstand postmodern skepticism. Every foundation would turn to sand. And yet the human need for validation does not disappear. As John Rawls has written, “unless our endeavors are appreciated by our associates it is impossible for us to maintain the conviction that they are worthwhile[.]”⁵³ The amorphous “serial absolutism” of the human rights world is the answer to this conundrum: It is precisely those accustomed to doubt all truths who are the least self-sufficient in securing their own self-respect, who must conform to, or generate, some political correctness in order to validate their desire to be considered persons of moral decency. In the absence of any faith in God or reason, political approval stands as psychological surrogate for truth. Certitude can be achieved only by the elimination of all open opposition. Thus the passionate need for final moral victory before the highest legal authorities of the world.

Even those occupying the seats of those authorities, even justices on the highest courts of the world, must feel this need. Absent faith in the correctness of their own decisions, they must rely on some outside assurance of the worthiness of their opinions. I recall hearing United States Supreme Court Chief Justice William Rehnquist admit to being at a loss for words at a cocktail party with Canadian justices. “We cite you. Why don’t you cite us?” they asked him. He said he felt embarrassed

⁵² J.H.H. Weiler, *To Be a European Citizen: Eros and Civilization*, in J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 324, 331 (1999).

⁵³ JOHN RAWLS, *A THEORY OF JUSTICE* 441 (Belknap Press 1971). For an extensive examination of the logic of validation, see Richard Stith, *Punishment, Invalidation, and Nonvalidation*, 14 *LEGAL THEORY* 219 (2008).

and decided to make more effort to cite them in the future.⁵⁴ In other words, Canadian jurisprudence would begin to have some weight in United States Supreme Court decisions so that Chief Justice Rehnquist could earn the approval of his peers in Canada. Human rights enforcement offers itself as an obvious transnational task in which high courts throughout the world can collaborate and compete for acceptance and prestige.

Anne-Marie Slaughter's seminal work generalizes this observation; she shows that judges (like many other professionals) seek validation for their acts from their increasingly transnational peers.⁵⁵ Courts and quasi-courts will decide cases according to what they predict their peers (or their most prestigious peers) will decide, and world jurisprudence will approach unanimity.⁵⁶

No one will be able to argue with these tribunals, for they will not claim a basis in text or reason. They will just be RIGHT and that is it. If one were trapped under a national dictator by this rejection of reason, even if there were no possible physical escape, the mere fact that there was an outside—some other authority somewhere—might give one the strength to maintain a critical spirit. But the unfolding international human rights religion will be universally established. An "immense tutelary power"⁵⁷ will have been created with nothing at all beyond its jurisdiction.

⁵⁴ William Rehnquist, Chief Justice of the Supreme Court of the United States, Oral Presentation at Georgetown University Conference on Comparative Constitutional Law: Defining the Field (Sept. 1999).

⁵⁵ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004).

⁵⁶ I have suggested that, in order to have some hope of avoiding this fate, legal interpretation (in this case of human rights) must be shared with non-judicial institutions which rely on religious or other independent cultural interpretive traditions and are thus relatively immune to the need for approval by judicial peers. Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument from Comparative Law*, 35 HASTINGS CONST. L.Q. 401, 434 n.105 (2008).

⁵⁷ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 663 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000).