

# International Human Rights Law as Power/Knowledge

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### ABSTRACT

It is often noted that the modern human rights discourse is predominately a discourse of international law. Interest groups, nongovernmental organizations, major international organizations, and states all accept that the global human rights regime is a legal construct. Scholarly work on human rights also adopts a predominately legal approach, as shown by several surveys of the literature and the human rights curriculum at the university level. This article places international human rights law within the context of critique in an effort to explain the hegemony of law within the human rights discourse. It begins with a discussion of the nature of human rights discourse as it is practiced in the current world order. It then moves to introduce the idea of discipline in world order, in particular "market discipline," which provides the dominant set of values upon which international action is undertaken. An additional section looks at the tensions between international human rights law and the norms that describe "market discipline." Finally, the conclusion is that international human rights law offers a discourse of both freedom and domination.

### I. INTRODUCTION

It is often noted that modern human rights discourse is predominately a discourse of international law. Interest groups, nongovernmental organiza-

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tions, major international organizations, and states all accept that the “global human rights regime is an international law construct.”<sup>1</sup> Scholarly work on human rights also adopts a predominately legal approach, as shown by several surveys of the literature and the human rights curriculum at the university level.<sup>2</sup> While political, cultural, economic, structural, and social aspects of rights are frequently acknowledged by the human rights community, the legal approach continues to be favored. If the human rights regime appears to fail in its purpose, the usual response is to clarify legal rules by drafting more international law, rather than to question the efficacy of the dominant legal approach or the norms and principles that international law is said to enshrine.<sup>3</sup> Underpinning the hegemony of international law is an assumption that the protection of human rights can be guaranteed, provided international society musters sufficient ingenuity, creativity, and resourcefulness when drafting treaties and creating international human rights institutions.

The reasons for understanding human rights as a legal regime are never fully explained. However, the literature appears to adopt the following narrative. The argument begins with the observation that the current world order no longer reflects the tenets of realism, which assumed a strict separation between internal and external affairs. While once how a state treated its population was seen as an exclusively domestic affair, today the global configuration of economic, political, and social forces makes human rights, dignity, and welfare a legitimate interest for all peoples.<sup>4</sup> Accordingly, membership in international society is conditional upon a state’s professed respect for human rights. The failure to fulfil this duty offers the prospect of delegitimation, exclusion, and, in extreme cases, the threat of intervention.<sup>5</sup> When a state fails to respect human rights, international society has a responsibility to take whatever action is necessary to protect the rights of those threatened by tyrannical and illegitimate governments. The increasing number of instances in which human rights are cited as a justification for intervention is said to provide evidence of this new order.<sup>6</sup>

Given this new normative order, the narrative continues by asserting the

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1. BERTIL DUNÉR, *THE GLOBAL HUMAN RIGHTS REGIME* 21 (2002).
  2. MICHAEL FREEMAN, *HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH* (2002).
  3. Tony Evans, *Citizenship and Human Rights in the Age of Globalization*, 25 *ALTERNATIVES: SOCIAL TRANSFORMATION & HUMANE GOVERNANCE* 415 (2000); J.S. Watson, *Legal Theory, Efficacy, and Validity in the Development of Human Rights Norms in International Law*, 3 *ILL. L. F.* 609 (1979).
  4. MERVYN FROST, *ETHICS IN INTERNATIONAL RELATIONS: A CONSTITUTIVE THEORY* (1996).
  5. Raymond Plant, *The Justification for Intervention: Needs Before Contexts*, in *POLITICAL THEORY, INTERNATIONAL RELATIONS AND THE ETHICS OF INTERVENTION* 104 (Ian Forbes & Mark Hoffman eds., 1993).
  6. DAVID CHANDLER, *FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* (2002).

need to develop a common law for all humankind, which embraces not only human rights but environmental protection and democracy. The tradition of positive international law, as the rules that govern relations between states, is seen as ill-equipped to serve this new order. While in the past it was possible to draw clear distinctions between states as the subjects of international law and the individual as its object, today this distinction is no longer tenable. Because the new order brings increasing levels of interconnectedness at all levels of social interaction, which for some suggests the emergence of a single world history,<sup>7</sup> the old political, economic, and social barriers erected during a past period are now obsolete. In contrast to a past era, in which the task of political philosophy was to problematize<sup>8</sup> human rights, the new order adopts international law as the solution. The international law of human rights is therefore said to represent an embryo system of law within a new, if still emergent, world constitution, which places notions of international citizenship and associated rights at its centre.<sup>9</sup>

This justification for presenting the promotion and protection of human rights as a legal discourse has attracted little comment.<sup>10</sup> This could, of course, be explained as mere oversight. However, despite repeated claims that human rights are the "idea of our time" and widely held assertions that human rights represent a universal and eternal truth now recognized by international society, the lack of reflection on the authority, relevance, and hegemony of international human rights law remains a puzzle.

This is not to argue that the literature consistently fails to engage in criticism of the international human rights regime. On the contrary, criticism is not hard to find, particularly criticism aimed at the failure of international society to solve the problems associated with compliance and implementation. However, these criticisms are commonly concerned with refining, polishing, and elaborating accepted norms and standards, in an attempt to make the regime more elegant, sophisticated, imposing, and magisterial. As one commentator has observed, it is criticism undertaken by committed human rights experts, resolutely "advancing the faith."<sup>11</sup>

What this approach conceals is a lack of critique. While criticism is

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7. Francis Fukuyama, *The End of History*, NAT'L INT., Summer 1989, at 3.
  8. The Oxford English Dictionary defines *problematize* as to "render problematic; to view or interpret (an issue, etc.) as a problem requiring a solution."
  9. Andrew Linklater, *What is a Good International Citizen?*, in ETHICS AND FOREIGN POLICY 21 (Paul Keal ed., 1992); Stephen P. Marks, *From the "Single confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution*, 20 HUM. RTS. Q. 459 (1998).
  10. B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, 34 ECON. & POL. WKLY. 349 (1999).
  11. CHANDLER, *supra* note 6 (referencing Alex De Waal).

confined to arguments about particular theories, philosophies, beliefs, ideologies, and regimes, critique is more concerned with an investigation into the ways in which these claims to truth are achieved, legitimated, and presented as the authoritative guide for action. If criticism can be thought of as part of a technical debate, intended to refine particular truths, then critique is concerned with the “politics of truth” itself.<sup>12</sup> As such, critique is concerned to expose the interests served by the production and maintenance of particular truths, and the processes that enable some forms of knowledge to be accepted as complete and legitimate while other forms are labelled partial and suspect. In this sense, critique occupies a limited space within the literature.

This article places international human rights law within the context of critique in an effort to explain the hegemony of law within the human rights discourse. It begins with a discussion of the nature of human rights discourse as it is practiced in the current world order. It then moves to introduce the idea of discipline in world order, in particular “market discipline,” which provides the dominant set of values upon which international action is undertaken. An additional section looks at the tensions between international human rights law and the norms that describe “market discipline.” The conclusion to draw from this discussion is that international human rights offer a discourse of both freedom *and* domination.

## II. THE DISCOURSE OF HUMAN RIGHTS

The term “discourse” refers to the argument that language is not merely a way of describing external reality—a technique for labeling objects—but acts to signify generalised, socially constructed categories of thought to which important social meanings and values are attributed. Discourses promote particular categories of thought and belief that guide our responses to the prevailing social environment. In this sense, discourses lend structure to our experiences and to the meanings we give to our experiences. An example of this can be seen when we use the term “lawyer,” which does not simply describe an individual by professional category but also invokes a bundle of other meanings, expectations, and understandings that go far beyond mere empiricism. Included among these are assumptions about authority, fairness, social class, punishment, justice, legitimacy, erudition, and notions of social order. Discourses therefore provide sets of values and

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12. Michel Foucault, *What is Critique?*, in *WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS* 383 (James Schmidt ed., 1996).

beliefs that inform our social responses and actions, although not always self-consciously. Professional and intellectual discourses are among the most influential in this respect. Crucially, as professional, intellectual and interest based groups move to “privatize” and institutionalize discourse—through the introduction of specialized language, images, and concepts—the veracity, reliability, integrity, and authority of discourse “experts” is reinforced, while other voices from outside the discourse are marginalized, derided, excluded, and sometimes prohibited.<sup>13</sup>

Discourses therefore act as the meeting place for power and knowledge.<sup>14</sup> Foucault, for example, rejects the liberal notion that knowledge can flourish only in the absence of power. Instead, he argues that there can be no knowledge without power or power in the absence of knowledge.<sup>15</sup> To gain an insight into the truth-claims<sup>16</sup> emanating from discourse must therefore include an enquiry into power relations. However, such an investigation does not imply that the generation of truth is necessarily corrupted by power but, rather, that the social world described by discourses always involves power relations. In this sense, liberal concerns that power can be defined in terms of legitimacy and illegitimacy misses the important point that even the legitimate exercise of power also excludes, marginalizes, silences, and prohibits alternatives. Mutua illustrates this clearly in his discussion of the human rights discourse, which he argues is often expressed through images of the “savior” overthrowing the “savage” to restore human rights to the “victim.”<sup>17</sup> While the image of good triumphing over evil to save the wretched may inspire a sense of moral righteousness, it fails to acknowledge that the wretched may aspire to an alternative view of dignity, rights, and the good life than that offered by the savior. Within the current global order, while the savior will attempt to promote a set of negative rights associated with liberal freedoms as a universal truth and justification for intervention, the victim may harbor other expectations, for example, group rights and rights to economic and social equality, which liberalism finds difficulty in accommodating.<sup>18</sup>

Following this approach to discourse suggests that human rights are better understood as three overlapping discourses, each with its own

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13. ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW* (1993).

14. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977).

15. David Cozens Hoy, *Power, Repression, Progress: Foucault, Lukes, and the Frankfurt School*, in 5 MICHEL FOUCAULT (2): *CRITICAL ASSESSMENTS* 173 (Barry Smart ed., 1995); Joseph Rouse, *Power/Knowledge*, in *THE CAMBRIDGE COMPANION TO FOUCAULT* 92 (Gary Gutting ed., 1994).

16. The term *truth-claims* refers to the unproblematic assumptions about the nature of social life upon which discourse is built.

17. MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002).

18. Evans, *supra* note 3.

language, concepts, and normative framework. These discourses are the philosophical, the legal, and the political.

At the center of the philosophy of rights discourse is the project to discover secure foundations upon which human rights claims might be built. This project has included investigations into many possibilities, including the existence of a deity, human need, self-evidence, and theories of justice. In the most recent period, where the values of liberalism have achieved a global reach, the tradition of natural rights has accomplished an unchallenged, though often unspoken, place as the rationale for building the post-World War II global human rights regime. Claims that all rational nations now subscribe to the "settled norm" of human rights<sup>19</sup> and that "amazing progress" has been achieved in recent decades<sup>20</sup> reinforce this view. Together, the idea of the "settled norm" and the still prevalent naturalist account of human rights, suggest the discovery of a final "truth," making all further foundationalist inquiry redundant. Indeed, the President of the United Nations General Assembly once noted that the "quest for the basis of human rights to which philosophers, jurists and politicians devoted their interest and concern in the past . . . [has] lost it significance."<sup>21</sup> For critics, this conclusion is part of a "culture of contentment" that assumes discourse "closure" is possible and desirable, rather than an alternative understanding of discourse as inexorable process.<sup>22</sup> For some commentators, this error marks the contemporary philosophy of rights discourse as "as much round and round as ever forward,"<sup>23</sup> as a point of "arrival" for liberal cosmopolitanism, rather than a point of "departure" towards new ways of conceptualizing rights and social order<sup>24</sup> and as a conservative rather than a radical project.<sup>25</sup>

In contrast to the moral abstract nature of the philosophical discourse, the legal discourse focuses upon a large corpus of international human rights law, mostly generated under the auspices of the United Nations. The legal discourse focuses upon the internal logic of the law, its elegance, coherence, extent, and meaning, which the application of legal reason is

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19. FROST, *supra* note 4, at 266.

20. Torkel Opsahl, *Instruments of Implementation of Human Rights*, 10 HUM. RTS. L. J. 13 (1989).

21. CHANDLER, *supra* note 6, at 33.

22. Stephan Gill, *Market Civilisation and Disciplinary Neoliberalism*, 24 MILLENNIUM J. INT'L STUD. 399, 404 (1995).

23. R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 32 (1986); Tony Evans, *Universal Human Rights: "As Much Round and Round As Ever Forward,"* 7 INT'L J. HUM. RTS. 155 (2003).

24. See D.D. Raphael, *The Liberal Western Tradition of Human Rights*, 18 INT'L SOC. SCI. J. 22 (1966).

25. TERRELL CARVER, *THE POSTMODERN MARX* (1998).

said to reveal.<sup>26</sup> A second aspect of the legal discourse investigates questions concerning the extent to which human rights law can be said to have transformed the principles of international law into a system perhaps more appropriately labelled transnational law.<sup>27</sup> The purpose of this move is to resolve the contradictions between the cosmopolitan claims of human rights and the principles of sovereignty, non-intervention, and domestic jurisdiction, upon which the tradition of international law is built. Although this move may have noble motives, critics argue that it "impedes the application of basic international legal doctrine to human rights law; impedes its conceptual and academic development and obscures conflicts between the two."<sup>28</sup> In common with natural rights foundationalism, which claims to articulate a set of values that stands above those describing any particular society, culture, or civilization, international human rights law claims to articulate a set of "neutral" values to which all reasonable people should subscribe.<sup>29</sup>

Lastly, the political discourse seeks to contextualize the prevailing values expressed in law and philosophy. It is therefore concerned with questions of power and interests associated with the dominant conception of human rights and the expression of those interests as legal and philosophical "truths."<sup>30</sup> While the application of reason and claims of neutrality have tended to legitimate the historic contribution of philosophy and international law, the political discourse is often seen as a value-laden, ideological project; a potential cause of conflict over human rights rather than a source of further "progress." From both the philosophical and legal perspective, to take account of power and interests in the human rights discourse raises the specter of old conflicts over foundationalism, fosters doubts about "settled norms," offers comfort for cultural relativists, raises questions over the legitimacy of international law, and thus threatens to bring down the whole post-World War II project for universal human rights. The political discourse is therefore treated with suspicion.

In response, those engaged in the political discourse argue that the failure to include an account of power and interests obstructs further investigation into human rights within a changing world order. Mutua, for example, argues that the "end of history" thesis promoted by Fukuyama and

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26. VINCENT, *supra* note 23.

27. ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* (1990).

28. Christine Chinkin, *International Law and Human Rights*, in *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* 105, 106 (Tony Evans ed., 1998).

29. Marks, *supra* note 9; Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 *HUM. RTS. Q.* 735 (1999).

30. TONY EVANS, *US HEGEMONY AND THE PROJECT OF UNIVERSAL HUMAN RIGHTS* (1996); Neil Stammers, *Human Rights and Power*, *XLI POL. STUD.* 70 (1993).

others,<sup>31</sup> which proclaims the triumph of particular truths over all previous heretical doctrines, fails to understand the dynamic nature of social formation.<sup>32</sup>

[The human rights movement is still young and] its youth gives it an experimental status, as opposed to a final truth. The major authors of human rights discourse seem to believe that all the most important human rights standards and norms have been set and that what remains of the project is elaboration and implementation. This attitude is at the heart of the push to prematurely cut off debate about the political and philosophical roots, nature, and relevance of the human rights corpus.<sup>33</sup>

Consequently, the rejection of the political discourse on human rights disables our abilities to imagine new futures. Furthermore, and perhaps most importantly, the attempt to cut off further debate deflects our attention from the project to understand the causes of human rights violations. Instead, the human rights discourse seems content to orchestrate debates on the best means for redressing consequences.

Put simply, it can be argued that the legal discourse plays the dominant role, while the philosophical discourse has atrophied, and the political discourse is marginalized. The consequence that flows from this argument is that the discourse of human rights is routinely conceptualized as a narrative that passes through several chapters before reaching its inevitable conclusion. This narrative begins with the horror of Nazism, moves to the centrality of human rights in the UN Charter, eulogizes the Universal Declaration, applauds the achievements of standard setting as set out in the major international covenants, offers detailed analysis of methods of monitoring, and, finally, speculates on the future of compliance and enforcement. Today, it is often argued, the narrative is on a cusp; somewhere between developing methods for monitoring existing human rights practice and reaching agreement on creating methods for achieving greater levels of compliance in the future. The often stated assertion that the "major deficiency of the regime in the eyes of many professional observers is poor *compliance* to the purposes of a treaty," reflects a commonly held perspective on the narrative of universal human rights.<sup>34</sup> Although there is, of course, some pessimism over continued reports of torture, genocide, structural economic deprivation, disappearances, ethnic cleansing, political prisoners, the suppression of trade unions, gender inequality, religious persecution, and many other violations of internationally agreed upon

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31. Fukuyama, *supra* note 7 at 1.

32. MUTUA, *supra* note 17.

33. *Id.* at 4.

34. DUNÉR, *supra* note 1, at 35.



human rights, the dominance of the international law discourse brings many commentators to the conclusion that a rights-based international order is not only possible but has already made considerable advances. While there is still much work to do, the literature reflects a view that the normative power of rights, together with the development of an extensive system of international law on human rights, provides a clear indication of steady “progress” towards achieving the aims of the regime.

The habit of assuming that human rights is best understood as a singular discourse, a discourse upon which general agreement has been achieved, therefore obscures important and continuing disagreements that are seldom confronted. Most importantly, the substitution of legal norms for human rights norms, reinforced by drawing a line under the philosophical discourse and denying the political discourse, offers an illusion of concord that is often inconsistent with social movements and social protests, both locally and globally.

### III. DISCIPLINE AND HUMAN RIGHTS

The atrophy characteristic of the philosophical discourse on human rights, together with the marginalization of the political discourse, privileges the legal discourse as the sole source of truth-claims for the global human rights regime. If the assertion that there actually exists a global consensus on human rights is correct, theory and practice would be in harmony, assuming that international law represented an accurate reflection of that consensus. Questions of power and interest would not arise because the human rights regime, through the medium of international law, would express the interests of all rather than particular groups. However, an increasing number of scholars argue that it is no longer acceptable that we view the human rights discourse as an unproblematic moral program upon which all states and peoples agree.<sup>35</sup> If this assessment is apposite and claims of global agreement are indeed premature, then the privileging of international law as a solution to an imagined consensus raises many questions. What, for example, is the role of international human rights law in the global order? Why is international law so privileged within the discourse of human rights if no consensus exists? What interests does the privileging serve?

An insight into these questions can be gained through the concept of “discipline,” which is closely related to that of discourse. Discipline refers to a mode of social organization that operates without the need for coercion.

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35. See, for example, the critique of John Charvet in Anthony J. Langlois, *Human Rights: The Globalization and Fragmentation of Moral Discourse*, 28 REV. INT'L STUD. 479, 484 (2002).

It is a form of modernist power that imbues the individual with particular ways of thinking, knowing, and behaving, thus instilling modes of social consciousness that make social action predictable. Discipline is learned and practiced in the day-to-day complex of social life, through institutional training received, for example, in the school, the university, the military, the workplace, the church and the prison, where notions of correct and incorrect behavior and thought are clearly delimited. The epithet "common sense" is achieved when a particular mode of thought and conduct is unquestioningly accepted as normal.<sup>36</sup> This is not to argue that the disciplines cannot be defined as systems of rules, but these are not necessarily the rules articulated within the pages of international law. Instead, these rules are concerned with "norms" and the generation of "normalization."<sup>37</sup> In this sense, the disciplines, which are within the domain of global civil society, exert collective pressure by legitimating particular customs, modes of thought, and ways of acting, while continuing to avoid the full consequences of formal obligations.<sup>38</sup>

The maintenance of disciplinary power is conducted through systems of surveillance: the processes of data collection through observation, recording, measuring, inspecting, reporting, and monitoring, which today are more easily facilitated by systems of electronic data collection. Data accumulated from the observation of large numbers defines the "normal," opening the possibility of specifying the attributes of "acceptable" and "unacceptable" behavior within the values, terms, and language of dominant discourses of truth. Those who violate the norms of acceptable behavior are therefore identifiable, enabling appropriate sanctions to be applied, while those who conform are rewarded. Foucault argues that the form of disciplinary power operating within the contemporary world order emerged during the eighteenth century, noting ironically that "the Enlightenment, which discovered the liberties, also invented the disciplines."<sup>39</sup>

While the idea of discipline may suggest a social order rife with ideological intent and conspiracy, such a conclusion would be a mistake.<sup>40</sup> Instead, the conceptualization of discipline is an attempt to understand the ways in which knowledge is accumulated and truth and rights are established as the foundation for legitimate social action.<sup>41</sup> From the perspective of discipline as social knowledge, power is not located within

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36. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).

37. Michel Foucault, *Two Lectures*, in CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE 17 (Michael Kelly ed., 1994).

38. GRAMSCI, *supra* note 36, at 245–46, 326–32.

39. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 14, at 222.

40. CARLOS PRADO, STARTING WITH FOUCAULT: AN INTRODUCTION TO GENEALOGY (1995).

41. See FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 14, at 222.

governments or particular factions, classes, institutions, or cadres but is instead exercised in the actions of everyday life. In contrast to the premodern period, in which the exercise of power was associated with a readily identifiable agent who operated irregularly and intermittently, modern forms of disciplinary power operate continuously and without agency. The distinctive nature of disciplinary power is that it replaces violence and the threat of violence with more temperate modes of action associated with visibility through surveillance.<sup>42</sup> This is not to argue that we can expect violence and the threat of violence to play no further role in the contemporary world order. As Robert Cox has observed, there may still be times when disciplinary power breaks down:

To cope with the excluded and potentially disruptive, the institutions of global governance have devised instruments of global poor relief and riot control. Humanitarian assistance (the poor relief component) has become a top priority of the United Nations and a major activity of a vast range of nongovernmental agencies. Where poor relief is inadequate to prevent political destabilization, then military force (the riot control component) is evoked by the international community. Together, they help to sustain the emerging social structure of the world by minimizing the risk of chaos in the bottom layer.<sup>43</sup>

From the perspective of disciplinary power, critics of liberal notions of power have argued that the institutionalization of discourse, which produces and promotes truth-claims, obscures and conceals the processes of domination that lie beneath normal social practice.<sup>44</sup> Following Gill, I will refer to the most prominent of the disciplines within the current global order as “market discipline,” which stresses economic growth and development, deregulation, the free market, the privatization of public services, and minimum government.<sup>45</sup> Market discipline describes a set of normative relationships with a global reach, supported by discourses of truth, and widely accepted as “common sense.” These relationships are manifest at both the domestic and global levels, for example, in national and international economic planning, market-based solutions for environmental degradation, the move to privatize social welfare provision, and the move to privatize life itself, seen in the scramble to patent the genes of both human and non-human life forms. Surveillance is undertaken by international and

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42. Nancy Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions* in 5 MICHEL FOUCAULT (2): CRITICAL ASSESSMENTS, *supra* note 15, at 133.

43. Robert Cox, *Democracy in Hard Times: Economic Globalization and the Limits to Liberal Democracy*, in THE TRANSFORMATION OF DEMOCRACY?: GLOBALIZATION AND TERRITORIAL DEMOCRACY 49, 58 (Anthony McGrew ed., 1997).

44. Duncan Ivison, *The Disciplinary Moment: Foucault, Law and the Reinscription of Rights*, in THE LATER FOUCAULT: POLITICS AND PHILOSOPHY 129 (Jeremy Moss ed., 1998).

45. Gill, *Market Civilisation and Disciplinary Neoliberalism*, *supra* note 22, at 412.

regional agencies—for example, the World Trade Organization (WTO), the World Bank, the European Union (EU), and the North American Free Trade Agreement (NAFTA). Each of these is understood as an authentic voice of market discipline and each exercises systems of surveillance and data collection on a global and regional scale.

Within the ambit of market discipline, as opposed to that of international law, human rights are conceptualized as the freedoms necessary to maintain and legitimate particular forms of production and exchange. These are a set of negative rights associated with liberty, security, and property, which offer a moral and normative foundation for justifying actions within the current global political economy. Although the global legal human rights regime is said to embrace the unity of all rights, including economic, social, and cultural rights, market discipline pursues only those rights necessary to sustain legitimate claims for liberal freedoms.<sup>46</sup> The catalogue of rights associated with market discipline therefore describes human beings as individuals and agents of a particular kind and type. For critics, the human rights regime is partial. It offers an idealized vision of human rights that obscures the consequences of the discourse. While the discourse makes claims for the pursuit of human dignity and community, it also provides the context where free will, equality within exchange relations, and property converge to create social relations characterized by selfishness, gain, and private interests, rather than the pursuit of human dignity and community.<sup>47</sup> Despite the mechanisms of self-discipline at the center of market discipline, there remains a need for authoritative expert pronouncements and idioms when norms are transgressed.<sup>48</sup> This is a central role of international law, which itself reflects self-discipline through the international legal principle of reciprocity and articulates the “neutral” rules of conduct that describe the “natural” global order as presented by market discipline.

Although today the discourse of human rights, which is a legal discourse, is presented as superior to all other kinds of rules, the predominance of market discipline suggests that human life is valued as a means to an end rather than as an end in itself.<sup>49</sup> This is seen in the greater attention given to trade, property, and finance, compared to that concerned with humanitarian issues, for example, poverty, the environment, and socio-economic rights. For critics, market discipline implies that “profit for investors

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46. It is not unusual for defenders of market discipline rights to dismiss the International Covenant on Economic, Social and Cultural Rights as “aspirational” and therefore qualitatively different from other claims. See, e.g., House of Commons Foreign Affairs Committee, Report on UK Ethical Foreign Policy, HC100-4 (1997).

47. KARL MARX: SELECTED WRITINGS 61 (Oxford University Press, 2000).

48. PRADO, *supra* note 40.

49. KEVIN WATKINS, THE OXFAM POVERTY REPORT 250 (1995).

[is] the supreme human value, to which all else must be subordinated," so that "[h]uman life has value as far as it contributes to this end."<sup>50</sup> The creation of authoritative international organizations provides the professionalized voice for truth-claims, performs the task of surveillance, ensures adherence to market disciplinary norms, and acts to maintain a particular set of rights and freedoms that are integral to sustaining a particular order. If human rights have any significance within the contemporary global order, they offer a set of values delimited by an assumed normative consensus that legitimates activities associated with market discipline, specifically, negative rights and those associated with property.

Three examples often found in the literature illustrate the primacy of market discipline over human rights. First, the tensions between the norms of market discipline and those of international human rights law are manifest in the changing role of the state in the current global order. Robert Cox has argued that the current world order should be seen as a complex of social relations in which the social core and social periphery cut across national boundaries, creating new patterns of economic growth and consumption.<sup>51</sup> While in the previous stage of world history it was assumed that the state could adopt national strategies for ordering the national economy, today the global organization of production and finance means that states assume the role of administrators, with the mission to ensure the smooth, efficient, uncontested operation of the global economy.<sup>52</sup> The state no longer assumes its traditional role as guardian of rights but instead acts to create and manage a global order that expresses the values found in an emerging global civil society informed by market discipline.<sup>53</sup> Market discipline provides the guide for action within self-defining parameters that include human rights of a particular kind.

Second, the centrality of market discipline within the current world order can be seen in the work of the WTO, which is concerned with arguments over the exercise of liberal freedoms. Indeed, the WTO was intended not merely to secure the old rights and freedoms associated with liberal trade but to extend the agenda into new areas of property rights not previously explored, for example, intellectual property rights and investment rights.<sup>54</sup> Some commentators have suggested that the powers given to

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50. NOAM CHOMSKY, *WORLD ORDERS, OLD AND NEW* 162 (1994).

51. Micheal Cox et al., *Introduction to AMERICAN DEMOCRACY PROMOTION: IMPULSES, STRATEGIES, AND IMPACT 1* (Micheal Cox et al. eds., 2000).

52. Robert W. Cox, *Civil Society at the Turn of the Millennium: Prospects for an Alternative World Order*, 25 *REV. INT'L STUD.* 3 (1999).

53. Leo Panitch, *Rethinking the Role of the State*, in *GLOBALIZATION: CRITICAL REFLECTIONS* 83 (James H. Mittelman ed., 1996).

54. World Health Organization, *WHO Policy Perspectives on Medicines: Globalization, TRIPS and Access to Pharmaceuticals* (Mar. 2001), available at [www.who.int/medicines/library/general/PPMedicines/PPM03ENG.pdf](http://www.who.int/medicines/library/general/PPMedicines/PPM03ENG.pdf).

the WTO, including the authority to strike down the decisions of sovereign states,<sup>55</sup> signals the dawning of a new legal system, based not upon the normative order of states or concern for human dignity but upon the normative order of market discipline.<sup>56</sup> The authority given to international human rights law will therefore depend upon its relevance to achieving the aims of market discipline, while all claims outside this aim are rejected.

Third, a further indication of the consequences of market discipline is seen in what I have referred to elsewhere as the “Dutch auction” of human rights.<sup>57</sup> Under the terms of this auction, the force of market discipline sees countries bidding against each other to provide a low-cost economic environment that is attractive to investors.<sup>58</sup> Policy decisions taken for this purpose include low or nonexistent levels of environmental protection, employment law, trade union law, human rights regulation, and protection for health and safety.<sup>59</sup> Similarly, aid conditionality brings consequences for human rights when, for example, less developed countries are asked to reduce substantially, or withdraw completely, from social programs on health, education, and housing. Such programs are seen by international banks as a drain on resources better directed at future economic growth, which is a central tenet of market discipline.<sup>60</sup> In both the case of the “Dutch auction” and that of conditionality, priority is given to the exigencies of market discipline rather than human rights, dignity, and welfare. When critics accuse companies of engaging in activities that make them complicit in human rights violations, environmental degradation, and increasing incidents of ill health, corporate managers remain confident that “normal” business practices remain largely immune from punishment. In the rare cases in which legal action is brought, corporations are fully aware that their investment and financial muscle provides powerful arguments in their defense.

It must be stressed that the consequences of such examples are not restricted to economic and social rights. The low social standards offered as a magnet for investment leads the disadvantaged, dispossessed, marginalized, and excluded to organize politically, perhaps by creating independent trade unions and citizen groups to resist the harsher consequences of market

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55. SUSAN GEORGE, *THE LUGANO REPORT: ON PRESERVING CAPITALISM IN THE TWENTY-FIRST CENTURY* (1999).

56. Joseph A. Camilleri, *Rethinking Sovereignty in a Shrinking, Fragmented world*, in *CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY* 13 (R.B.J. Walker & Saul H. Mendlovitz eds., 1990).

57. TONY EVANS, *THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE* 67–69 (2001).

58. *Id.*

59. Joyce V. Millen et al., *Dying for Growth Part II: The Political Influence of National and Transnational Corporations*, in *DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR* 225 (Jim Yong Kim et al. eds., 2000).

60. MALCOLM WATERS, *GLOBALIZATION* (1995).

discipline. In such cases, violence and the threat of violence is often used against those daring to voice a contrary view that challenges market disciplinary principles and the liberal rationale for economic development.<sup>61</sup> Because all governments take economic development as a central policy objective, the deprivations suffered by those whose environment is degraded, culture devastated, freedom to protest peacefully suppressed, and traditional ties with the land forcibly severed are seen less as the victims of human rights violations and more as the generation who must bear the cost of economic progress for the good of the wider, future community.<sup>62</sup> Those who continue to protest are referred to pejoratively as insular, conservative, or traditionalists, bent on denying the benefits of modernization to the mass of the people.

Consequently, developing countries often defend their human rights records with a market discipline response rather than by reference to international law. For example, a Singapore Ministerial Declaration in 1998 stated that the developed economies invocation of human rights was merely an attempt to "overcome the comparative advantage of low-wage developing counties," rather than a genuine concern for humanity.<sup>63</sup>

Caught between the demand for market discipline from above and the demand for human rights from below, accession to international human rights treaties offers a legal response that need not necessarily damage the prospect of achieving economic growth and development. As Mittelman observes, although in theory governments are assumed to protect their citizens' human rights, "in practice leaders are accountable to market forces, most notably debt structures and structural adjustment programs."<sup>64</sup> Thus, the necessity to respond to market discipline has seen many governments plead for special tolerance of their human rights record.<sup>65</sup> Many of these governments argue that their attitude toward human rights is conditioned by two important factors that set them apart from developed

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61. EVANS, *THE POLITICS OF HUMAN RIGHTS*, *supra* note 57.

62. Smitu Kothari, *Global Economic Institutions and Democracy: A View from India*, in *BEYOND BRETTON WOODS: ALTERNATIVES TO THE GLOBAL ECONOMIC ORDER 39* (John Cavanagh et al. eds., 1994); KATARINA TOMAŠEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS REVISITED* (1993).

63. World Trade Organization, *WTO Geneva Ministerial Declaration*, adopted 20 May 1998, available at [www.jus.uio.no/lm/wto.ministerial.declaration.geneva.1998/doc](http://www.jus.uio.no/lm/wto.ministerial.declaration.geneva.1998/doc).

64. James H. Mittelman, *The Dynamics of Globalization*, in *GLOBALIZATION: CRITICAL REFLECTIONS*, *supra* note 53, at 1.

65. Much of the debate on "Asian values" is conducted in the language of tolerance of human rights records. The need to modernize rapidly and the colonial heritage are often cited as the rationale for this plea. See, e.g., Kishmore Mabbubani, *The West and the Rest*, *NAT'L INT.*, Summer 1992, at 3. For debates on Asian values, see JOANNE R. BAUER & DANIEL A. BELL, *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (1999); Diane K. Mauzy, *The Human Rights and 'Asian Values' Debate in Southeast Asia: Trying to Clarify the Key Issues*, 10 *PAC. REV.* 201 (1997).

countries. The first is the need to build a nation on the remains of colonial institutions, which were created with no concern for human rights and dignity. Given this legacy, many less-developed states stress the need for a transitional period, which will allow the necessary conditions for stability to be implemented. From this perspective, questions of human rights should be framed within the context of whether a particular human right helps or hinders the process of nation building and the move from postcolonial to a mature state. Second, in common with all states, the less developed embrace the idea that economic development in accordance with market disciplinary principles is of paramount importance to achieving the goal of long-term stability and security. Hence, governments must not allow traditional values, alternative versions of development, and dissident voices to deflect the nation from achieving the goal of economic development through full integration within the current liberal market order. Violations of human rights, suppression, and the coercion of those who attempt to stand in the way of social, cultural, and political changes necessary to achieve this goal are therefore legitimate, in the interests of future generations.<sup>66</sup>

Typical of this approach is that of Kishore Mahbubani, who argues that conditions in most developing states necessitate a "period of strong and firm government," committed to radical social reform in order to "break out of the vicious circle of poverty sustained by social structures contained in vested interests opposed to real change."<sup>67</sup> Those who support this approach point to the success of authoritarian governments who achieved the so-called East Asian "miracle," in which governments promoted a very circumscribed definition of democracy and human rights. Economic collapse in these countries during late 1997 and early 1998, which coincided with a growing demand for democracy and rights domestically, only serves to remind political leaders and economic interests that such demands may damage the prospect of further economic growth, which should be countered by strengthening "market-preserving authoritarianism."<sup>68</sup>

Vivid evidence of human rights embedded within market discipline was seen at the press conference given at the opening of the United Nations 2000 annual human rights assembly. Although the representatives of the world's press questioned the High Commissioner on Human Rights, Mary Robinson, on a wide range of high profile abuses of civil and political rights, not one question was asked about economic and social rights.<sup>69</sup> While the

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66. V.T. TAMILMORAN, HUMAN RIGHTS IN THIRD WORLD PERSPECTIVE 69–71 (1992).

67. Kishore Mahbubani, *The West and the Rest*, NAT'L INT., Summer 1992, at 3.

68. Michael C. Davies, *The Price of Rights: Constitution and East Asian Economic Development*, 20 HUM. RTS. Q. 303, 312 (1998).

69. Someshwar Singh, *Human Rights—A Charade of the Virtuous* (21 Mar. 2000), available at [www.twinside.org.sg/title/charade.htm](http://www.twinside.org.sg/title/charade.htm).



international law formally recognizes the unity of human rights, global civil society promotes only those rights that support market discipline through rhetoric, policy, and action.

#### IV. MARKET DISCIPLINE, NORMALIZATION, AND INTERNATIONAL LAW

Market discipline may now be seen as “counter-law”; as a guide for action that stands above international human rights law. However, it does not follow that international law is of little consequence for market discipline. On the contrary, as Gill has observed, international law in general, and international human rights law in particular, play a central role in an emerging “constitutional” global order, which is characterized by a growing concern to promote sets of common rules that guide economic, social, and political action.<sup>70</sup> The dominance of human rights as a legal regime and the marginalization of the philosophical and political discourses of rights acts to reify the freedoms necessary to legitimate market discipline by providing a framework that is promoted as immutable and binding. Thus, while criticism is commonly found in the literature on human rights, such criticism is confined to disagreements within a framework of rights that seldom attract critique. In short, in as much as the politics of rights is considered at all, what passes for politics is framed within a set of rules that are incontrovertibly accepted, while the framework itself remains unquestioned.

One difficulty with this argument is that the legal regime also includes rights that are often seen as antithetical to market disciplinary interests. The claim for the unity of all rights, which is often repeated in declarations and policy statements, cannot be denied, at least at the formal level represented by international law. However, this argument fails to place human rights within the context of market discipline, which represents the dominant values for action. The intellectual gymnastics conducted by way of avoiding this contextualization include the claim that although all rights are equally important, economic, social, and cultural rights are of a different order from civil and political rights; that economic, social, and cultural rights should be considered as “aspirational” rather than real rights to be claimed immediately;<sup>71</sup> and that although there is a unity of all rights, the duty to protect economic, social, and cultural rights cannot be discharged until civil and

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70. Gill, *Market Civilisation and Disciplinary Neoliberalism*, *supra* note 22, at 135–39; Stephen Gill, *Constitutionalizing Inequality and the Clash of Civilizations*, 4 INT’L STUD. REV. 47 (2002).

71. V.J. Staples, *What are Human Rights?*, THE LANCET, May 1999.

political rights are secured.<sup>72</sup> Following these arguments, market discipline provides a mode of discipline designed to secure compliance and conformity to particular values that are “supplemented and even replace law as a primary mode of government.”<sup>73</sup> From this perspective it can be argued that international law acts as a mask for structural inequalities characteristic of market discipline.<sup>74</sup> In the contemporary global order, which is increasingly characterized as globalization, the arena in which rights are exercised is defined by the mechanisms of discipline rather than international human rights law.<sup>75</sup>

The tension between the formal and legal human rights regime and the norms of market discipline are at their most visible within global civil society. In particular, the notion of “civility” emanating from global civil society and represented by the formal human rights regime narrows the political agenda and thus excludes some groups from full participation. Stressing this point, Pasha and Blaney argue that the effort to promote particular notions of civility, for example, by attempting to universalize a particular conception of democracy or human rights, adds to the “sense of grievance that motivates a politics that transgresses civility.”<sup>76</sup> In other words, the more vigorously global civil society promotes market discipline and its associated human rights values, the greater the resistance, creating a “periodic and irresolvable problem of policing the non-civil in civil society.”<sup>77</sup> Those who adhere to the norms of civility and aspire to the ends promoted by global civil society are included, while those who offend against the “normal,” perhaps through critique, reflective alternatives, or a stubborn refusal to participate, are excluded. Disapproval may be registered by the agencies of global civil society in a number of ways, for example, by including aid conditions that emasculate government decision-making powers, by threatening intervention, by simply labelling alternative voices as “mad”<sup>78</sup> or by asserting that the excluded do not possess the moral capacity to engage fully in decision-making processes about their own best interests.<sup>79</sup>

72. CHARLES JONES, *GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM* (1999); Mahbubani, *supra* note 67; Mahmood Monshipouri, *Islamic Thinking and the Internationalization of Human Rights*, LXXXIV *MUSLIM WORLD* 217 (1994).

73. ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AND GOVERNANCE* 2 (1994).

74. JOHAN GALTUNG, *HUMAN RIGHTS IN ANOTHER KEY* (1994); MUTUA, *supra* note 17.

75. Foucault, *Two Lectures*, *supra* note 37.

76. Mustapha Kamal Pasha & David L. Blaney, *Elusive Paradise: The Promise and Perils of Global Civil Society*, 23 *ALTERNATIVES* 417, 424 (1998).

77. *Id.*

78. James Keeley, *Towards a Foucauldian Analysis of International Regimes*, 44 *INT'L ORG.* 83 (1990).

79. Barry Hindess, *Power and Rationality: The Western Conception of Political Community*, 17 *ALTERNATIVES* 149 (1992).

At the forefront of the shift towards a singular notion of civility and its formal expression are transnational professional, business, and financial organizations, which have grown in number and power under conditions of globalization. These groups are mindful that their long-term prosperity depends upon the legal and normative context of competition within global markets. It is therefore important for these organizations to gain an influential voice in international and regional policy forums that generate the rules that govern the market. Several illustrations of this phenomenon are explored by Millen, Lyon, and Irwin.<sup>80</sup> For example, in 1997 the chief executives of ten major transnational corporations met with UN leaders and high ranking government officials from several countries to discuss "avenues for a formalization of corporate involvement in the affairs of the United Nations."<sup>81</sup> The International Chamber of Commerce, which has identified environmentalist, human rights, and social protection groups as a possible threat to the further expansion of corporate activities, has moved to gain as much influence at the UN as possible to counter these forces. Similarly, the Australian delegation at the Uruguay Round of talks on world trade included eight representatives of business but rejected all attempts by nongovernmental organizations with an interest in human rights to gain a seat.<sup>82</sup> A final example is seen in Cargill's involvement in developing the US negotiating position during the Uruguay Round. Christian Aid reports that the corporation, which controls half the global trade in grains, was given responsibility for the final draft policy document.<sup>83</sup> The history of corporate-government relations is therefore one characterized by corporate pressure to expand corporate rights rather than the rights found within the pages international human rights law.

The complex tensions between the demands of human rights and those of market discipline has encouraged two opposing interpretations of the status of human rights within the current world order, one optimistic and one pessimistic. Both optimists and pessimists begin by noting significant shifts in the spatial reach and intensity of networks of social relations, including social movements, nongovernmental organizations, interest groups, indigenous peoples' organizations, citizens groups, and business interest groups.<sup>84</sup> Although disagreement continues over the exact nature of these

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80. Millen et al., *supra* note 59.

81. *Id.* at 238.

82. Christian Aid, *Fair Shares? Transnational Corporations, the WTO and the World's Poorest Communities* (1999), available at [www.christian-aid.org.uk/indepth/9911fair/fairshar.htm](http://www.christian-aid.org.uk/indepth/9911fair/fairshar.htm).

83. *Id.*

84. Cox, *supra* note 51; GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (David Held et al. eds., 1999); ANDREW LINKLATER, THE TRANSFORMATION OF POLITICAL SOCIETY (1998); ROBERT O'BRIEN ET AL., CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS (2000); Pasha & Blaney, *supra* note 76.

changes,<sup>85</sup> optimists argue that the ubiquity of social networks promises to increase the demand to secure human rights, democracy, and environmental protection for all. While the old order meant that arguments over sovereignty and the national interest often stood in the way of making progress on these issues, optimists argue that today such arguments are untenable.<sup>86</sup> The greater interconnectedness characteristic of globalization and increasing demands for transparency mean that the demand for human rights cannot be ignored. The vast body of international human rights law created in the last few decades is seen by optimists as the formal expression of normative changes that place human rights near the top of the political agenda. For optimists, the new order represents "power to the people" in that human rights offers the oppressed, the excluded, and the victims of tyrannical governments an opportunity to gain the "moral high ground" in the struggle for emancipation and freedom.

For pessimists, on the other hand, international human rights law also offers an opportunity to exercise "power over people" by promoting particular modes of thought and practice that support market discipline.<sup>87</sup> From this perspective, the freedoms described and "normalized" by market discipline accentuate processes of inclusion and exclusion, equality and inequality, to the detriment of human rights.<sup>88</sup> Pessimists feel vindicated, for instance, when a leading member of a prominent investment house, commenting on the possibility of human rights within the current global order, remarks that the "great beauty of globalization is that no one is in control."<sup>89</sup> While international human rights law includes a wide spectrum of rights, the values associated with market discipline remain the dominant mode of thought for global political, social, and economic action.

The human rights regime therefore supports competing conceptions that often provide a sharp focus for deeply rooted political struggles. While the formal, institutionalized, and legal regime is presented as guaranteeing

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85. Jan Aart Scholte, *Towards a Critical Theory of Globalization*, in GLOBALIZATION: THEORY AND PRACTICE 43 (Elenore Kofman & Gillian Young eds., 1996); TONY SPYBEY, GLOBALIZATION AND WORLD SOCIETY (1996).

86. Human rights literature often focuses upon the post-World War II achievements in standard setting, including the generation of the Universal Declaration of Human Rights and the major covenants. *Optimists* tend to focus upon these achievements, leaving questions of sovereignty, legitimacy, the nature and status of international human rights law, and reports of continued violations throughout the world to one side.

87. See TONY EVANS, HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL (1998) for examples of *pessimists*.

88. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1997: HUMAN DEVELOPMENT TO ERADICATE POVERTY (1997); UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999: GLOBALIZATION WITH A HUMAN FACE (1999).

89. Robert Hormats, *Globalization and Human Rights: Complete Interviews* (Public Broadcasting Service, Feb. 1998), available at [www.globalvision.org/program/globalization/hormats1.html](http://www.globalvision.org/program/globalization/hormats1.html).

protection for human rights and offers encouragement to a growing number of nongovernmental organizations, the informal, privately motivated, and extra-legal normative order associated with global practice suggests that the values of market discipline take precedence.<sup>90</sup>

## V. THE MASK OF INTERNATIONAL HUMAN RIGHTS LAW

The success of human rights associated with market discipline may be seen in claims that in “virtually all regions of the world . . . there is broad acceptance of the triad of human rights, free markets and democracy as desirable, attainable policy objectives.”<sup>91</sup> Of course, the rights referred to here assume a particular conception of rights, defined as the freedom of the individual to invest time, capital, and resources in processes of production and exchange.<sup>92</sup> However, while it may be possible to claim that all regions of the world do now embrace the concept of human rights, there can be no certainty that the conception of human rights associated with market discipline has achieved universal acceptance. While there may now be a clamor for human rights globally, how do we know that this is the same conception of rights currently expressed in international law? In answering this question Pasha and Blaney have argued,

[w]e need only gesture to the contested status of human rights within world politics, to debates about the nature of democracy, or to disputes about who can speak for nature . . . in order to suggest that consensus is most lacking. Or we might point to the contested status of the very idea of a cosmopolitan view of justice. Or we might simply ask: how does one know, short of . . . global democracy . . . that a consensus exists? In other words, advocates of [global civil society] are quite premature in declaring the existence of a global common good where the deliberative process that could establish such a result are not in place.<sup>93</sup>

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90. Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980 (1999). Such a conclusion raises questions about the role and status of NGOs that seek to promote human rights through formal means, for example, by gaining the right to a seat during negotiations for a new treaty. Although the answers to these questions cannot be pursued here, some scholars have suggested that the most prominent NGOs do not offer a radical challenge to market disciplinary values but, instead, are co-opted organizations that lend further legitimacy to the existing order. In cases in which NGOs have given some attention to economic and social rights (Amnesty International, for example) this does not imply a challenge to market discipline. Furthermore, high profile NGOs accept that international law provides the most effective means for securing universal human rights but have little to say about the contemporary disciplines that are often the cause of violations.
91. Marshall Conley & Daniel Livermore, *Human Rights, Development and Democracy*, XIX CANADIAN J. DEV. STUD. 19, 19 (1996).
92. Mary Ann Tetrault, *Regimes and Liberal World Order*, 13 ALTERNATIVES 5 (1988).
93. Pasha & Blaney, *supra* note 76, at 346.

What, then, is the role of international law if no global consensus exists? In taking center stage within the discourse of human rights, international law obfuscates the distinction between legal rules and normal social practice. While on one hand international law is presented and promoted as the solution to problems of human rights, on the other, the practices of market discipline continue to provide the context in which human rights are violated. International law might therefore be seen as a "mask" that conceals the true causes of many human rights violations. The professional and intellectual discourse of law provides the "authentic" voice in the human rights discourse, although this voice has little to say about power and interests associated with the dominant conception of human rights. As the dominant voice, the legal discourse also subordinates alternative voices with an interest in exposing the causes of human rights violations. The hegemony of international law may therefore be seen as an attempt at "closure," rather than an attempt to protect the rights of the persecuted and excluded.<sup>94</sup>

Finally, and following from the above, the practices that flow from "normal" market disciplinary practices produce particular patterns of inclusion and exclusion.<sup>95</sup> Many examples of this are offered in the recent literature on globalization.<sup>96</sup> Emphasizing this point, Roy Bhasker argues that human rights and human emancipation "depends upon the transformation of structures rather than just the amelioration of states of affairs," which is the task most suited to international law.<sup>97</sup> Similarly, both Katarina Tomaševski and Christine Chinkin have stressed that while international law may have the capacity for redressing consequences, it cannot address causes.<sup>98</sup> In short, political, economic, and social structures cannot be judicial persons with intentions and capabilities, nor can they be arrested, put before a court, punished for their crimes, or subjected to sanctions.<sup>99</sup> The dominance of the legal discourse therefore acts as a barrier to investigating the causes for human rights violations, many of which might be attributable to market discipline. This suggests that we should exercise caution if we are to avoid confusing the "sites" of violations with the "causes" of violations, a confusion that international law encourages.

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94. Mahbubani, *supra* note 67.

95. Michael J. Shapiro, *Social Science, Geophilosophy and Inequality*, 4 INT'L STUD. REV. 25 (2002).

96. ANKIE HOOGVELT, *GLOBALIZATION AND THE POSTCOLONIAL WORLD: THE NEW POLITICAL ECONOMY OF DEVELOPMENT* (2001); O'BRIEN ET AL., *supra* note 84. Scholte, *supra* note 85; Caroline Thomas, *International Financial Institutions and Social and Economic Rights: An Exploration*, in *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL*, *supra* note 28, at 161.

97. ROY BHASKAR, *PHILOSOPHY AND THE IDEA OF FREEDOM* 76 (1991).

98. Chinkin, *supra* note 28; TOMAŠEVSKI, *supra* note 62.

99. GALTUNG, *supra* note 74.

The discussion presented here should not be understood as a wholesale rejection of either international law or human rights. Nor is it a rail against the priority given to liberal notions of civil and political rights within the current world order. Instead, the intention here is to gain an insight into the ways in which power is exercised through the discourse of human rights. While the literature presents human rights as a concept that empowers those threatened by state violence, the concept also offers an instrument for domination. In particular, the discussion here has sought to show how international law, institutions, and regulations associated with human rights, which provide the main focus for the human rights discourse, transmit a set of ideas associated with notions of freedom *and* a set of ideas that reflect relations of power and dominance. Thus, the human rights regime must be understood as a discourse of both freedom and domination and cannot be understood as one or the other.<sup>100</sup> Seen in this way, the dominance of the international legal discourse on human rights, which supports a particular conception of rights, acts to mask power relations and stifles the possibility of engaging in critique.

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100. Foucault, *Two Lectures*, *supra* note 37.