
Book Reviews

Manfred Nowak, ***Human Rights or Global Capitalism: The Limits of Privatization***. Philadelphia: University of Pennsylvania Press, 2017. Pp 256. £50.00. ISBN 978-0-8122-4875-3

In many Western airports these days, the moment you have passed through security you will find yourself in the duty-free shop. There is no way to avoid this; the shop is not located in such a way that it can be ignored, but is immediately there, in your face, while you are still placing your laptop back into your bag and putting your watch back on your wrist. This is rather unpleasant; it is clear that airport commerce is viewing us as potential customers, who should not even be given the chance to think about whether to enter the store. From the airport's perspective, this makes sense as airports tend to make their money not based on air travel, as one may have thought but, rather, on the shopping that takes place around it. Hence, as many customers as possible should be relieved of as much money as possible. And if that entails treating air passengers as walking wallets, so be it.¹

The passenger that is keen on a modicum of respect might consider formulating something of a human rights-based claim against the invasiveness of the duty-free store – for instance, by insisting on being treated with human dignity, but the sad truth is that the duty-free operator can probably find stronger human rights-related backing for the opposite claim. There is, after all, a right to trade and a right to engage in the profession of one's choice, some would say. Locating a store in such a way that passengers have no choice but to pass through is not prohibited and, therewith, perfectly okay; the more boisterous entrepreneurs may claim that operating the stores right after security actually provides a service to potential customers, who no longer need to search for the duty-free store. And if locating a store in such a way is to be conceptualized as a form of advertising, then it might even be protected as free speech.

It is with some regret that considerations such as these on the relationship between human rights and global capitalism are missing from Manfred Nowak's monograph. Despite the promise of its title, this is neither a radical critique of the possible incompatibility of global capitalism and human rights nor a radical critique (and this would be a more plausible thesis) of the way human rights law helps to facilitate global capitalism.² Instead, it is a balanced and measured overview of how some instances of the privatization of public services may be in tension with established human rights standards, normatively based on an appreciation of Keynesian thought. However, even then, Nowak is at pains to make clear that he takes no stand on the economic merits of Keynesianism versus neo-liberal thought. At the heart of the book is the thesis that international human rights law developed against a Keynesian background; it was created on the model of the advanced welfare state. In the first two chapters of the book, Nowak sketches this background and laments, plausibly enough, that the West ended up viewing the fall of communism as a victory for capitalism rather than as a victory for human rights, democracy and the rule of law.

¹ Some of the connections between commerce and airports are fleshed out in J. Kasarda and G. Lindsay, *Aerotropolis: The Way We'll Live Next* (2011).

² Nowak himself deems the title 'somewhat provocative and generalizing' (at 4).

The core of the book consists of six more or less empirical chapters, addressing privatization in six different domains: education, health, social security, water, detention and personal security.³ The chapters follow similar patterns: they contain a discussion of some examples of privatization; a discussion and interpretation of the relevant legal instruments (mostly, but not exclusively, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights), typically supported by a sprinkling of relevant judicial or quasi-judicial decisions or official opinions following formal periodic review procedures, and concluded with a discussion of the limits of privatization in that particular domain.⁴ Given Nowak's impressive track record in human rights (he is a former United Nations (UN) special rapporteur on torture, for example), he can draw on personal experience and insights – in particular, on issues such as detention – and, at one point, he mentions having visited 'hundreds of prisons and other detention facilities in all world regions' (at 135), and this adds considerable gravitas to his analysis of prison privatization.

The conclusions to each of these six chapters are essentially the same. International human rights law, so the argument goes, envisages the progressive realization of economic and social rights. Privatization typically involves a regression in terms of these rights and is therewith incompatible with human rights. The privatization of education involves a violation of the right to education; in the domain of health, some measures involve a 'deliberate retrogressive' course of action (at 80); privatization of social security 'will necessarily lead to more inequality and, therefore, to less social security, social justice, and standard of living' [*sic*] (at 98); water is best not seen as a commodity but, rather, as part of the global commons; prisoners, likewise, should not be viewed as a commodity, as doing so 'violates their basic human right to human dignity' (at 137) and guaranteeing personal security and public safety are 'inherent governmental functions' (at 164).

If Nowak's discussions are compelling within their own four corners, less compelling are some of his suggestions for improvement. He blissfully notes that while it may be difficult to reverse the dominance of neo-liberal market forces, it is nonetheless 'possible if the political will to change is present' (at 177), conveniently ignoring that 'political will' is a vacuous concept. Still, change is possible because, he notes, we have the required international institutions in place, such as, believe it or not, the World Bank and the International Monetary Fund (IMF). These just need to change their policies, or so it seems, and while the West cannot do it alone, it still has sufficient power 'to start the necessary reforms and to lead by example (at 177) – others might be tempted to think that the West is, to a considerable extent, part of the problem. The reforms he mentions, in turn, are classic institutional reforms. Thus, he endorses a reform of the UN Security Council and would like to see the establishment of a World Court of Human Rights. More substantively, full implementation of Agenda 2030 and 'a concerted Western approach toward global climate change' might help reduce inequality and prevent environmental disaster (at 177).

In the end, Nowak's is a sympathetic plea for a better, more just and more humane world. To be sure, it is not without its shortcomings. For one thing, the historical connection between the Keynesian welfare state and the emergence of international human rights law has recently been questioned by authors as diverse as Jenny Martinez and Samuel Moyn, with Martinez suggesting that human rights law can be traced back to the anti-slavery courts of the latter part of the

³ These are not empirical in any rigorous sociological sense (systematic overviews of what happened in selected states or to selected groups), but they do contain references to jurisprudence, practical incidents and occurrences, treaty provisions and the like and, therewith, have a basis in some form of empirical reality.

⁴ Universal Declaration of Human Rights, GA Res. 217, 10 December 1948; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

19th century and Moyn provocatively asserting that human rights never really took off until the 1970s.⁵ This debate has been highly visible and has provoked a sensible intervention by Philip Alston, but none of it is reflected in Nowak's writing.⁶ That is not to say he is wrong, but it is to suggest that his claim concerning the modelling of human rights on the welfare state could have been fleshed out more persuasively.

What is also remarkable is his constant rehearsal that he is not out to question capitalism *per se* or even neo-liberalism *per se*. As he naively claims, his is a 'purely legal' study (at 3); he is not out to question the wisdom of privatization but, rather, is concerned about some of its effects. Indeed, he repeatedly remarks that he is convinced that privatization can have positive effects and sees, for instance, little problem with privatization of industry, banks, transport and means of communication. Here, 'privatization has led to more efficiency and has had no direct positive or negative impact on the enjoyment of human rights' (at 3). This assessment owes much to how exactly one conceptualizes human rights; surely, for the elderly in rural areas whose regular bus routes are cut, one could argue that privatization actually does affect some of their human rights – and, ironically, it is precisely in the dismantling of the welfare state that his cherished Keynesian conception is undercut by privatization. But this requires a deeper, more structural way of seeing the relations between human rights and privatization than the view that Nowak employs. If human rights law is about specific prohibitions and specific provisions, then surely he has a point. If human rights law is about actually trying to guarantee a decent and flourishing life for all, then his conceptualization of the relations between privatization and human rights may be unduly narrow.

Likewise, his proposed solutions are not particularly compelling and seem to have been written mostly by way of afterthought. The reform of the UN Security Council is mostly a red herring; surely, expanding the Council with Brazil or Nigeria may make it more representative but not necessarily more progressive, friendlier or disposed towards human rights. It is, in the end, somewhat unsatisfactory to blame the institutions of global finance (and there is plenty of blame directed at the World Bank and the IMF throughout the book) and then to expect them to change their policies without looking into why, somehow, the succession of their policies always leads to the same result.

Still, *Human Rights or Global Capitalism* is a most welcome addition to the human rights literature. It is one of the first legal analyses of how privatization can be addressed in human rights terms, and by a leading human rights advocate at that. The argument is bound to resonate among policymakers, and one cannot escape the impression that this was precisely what Nowak had in mind. He wanted to write a book, one surmises, that policymakers could understand and could take to heart – a book that would give them the legal arguments to counter unpleasant privatization initiatives. In this, he has succeeded very well.

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⁵ See J. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2012); S. Moyn, *The Last Utopia: Human Rights in History* (2010).

⁶ See Alston, 'Does the Past Matter? On the Origins of Human Rights', 126 *Harvard Law Review* (2013) 2043.