WHITE COLLAR RITUALISM

John P. Anderson

INTRODUCTION

-I want to talk about a phenomenon familiar to international human rights experts, but perhaps not so familiar to white collar criminal lawyers: regulatory ritualism.

-I will begin by defining the concept of “regulatory ritualism” and by situating it within the contemporary human rights arena. I will then say something about its relevance to comparative white collar crime—specifically the crime of insider trading.¹

-I will close with some lessons that can be drawn from the fact of white collar ritualism in the context of insider trading law, both at home and abroad.

I. HUMAN RIGHTS RITUALISM

-To a great extent, the modern international human rights regime was set forth in a series of post-WWII treaty documents.² These documents largely reflect the rights agenda of the wealthy Western liberal democracies who guided their drafting and who incentivized their adoption by poorer, non-Western states. Despite its relatively provincial beginnings, on its face the modern human rights system has been a dramatic success, achieving almost universal acceptance in the international community. For instance, the ICCPR has 168 state members and the ICESCR has 164 state members.³ Such broad acceptance is particularly remarkable given that both of these covenants require member states to incorporate the treaties’ numerous

¹ Associate Professor, Mississippi College School of Law.
² A fuller version of this paper will incorporate a discussion of ritualism and the Foreign Corrupt Practices Act (FCPA) as well.
³ The principal treat documents are the United Nations Charter (UNC) (1945), the Universal Declaration of Human Rights (UNDHR) (1948), the International Covenant of Civil and Political Rights (ICCPR) (1976); the International Covenant of Economic, Social, and Cultural Rights (ICSECR) (1976). Together these instruments are typically referred to as the International Bill of Rights. All except the UNDHR are legally binding treaties. The UNDHR is merely hortatory in nature.
guarantees (e.g., protections against arbitrary arrest or detention, prohibition of torture, right to habeas corpus, fair trial rights, freedom of movement, freedom of expression, freedom of the press, freedom of religion, right to vote, racial and gender equality under the law, right to health, right to Education, etc.) into their municipal law.\(^4\) It is tempting to conclude the following from all this:

(1) The near universal adoption of these human rights instruments reflects a dramatic trend toward universal cultural and political embrace of the values reflected in these instruments.

(2) Though the modern human rights regime was born of once controversial Western liberal cultural values, the recent trend toward near universal acceptance confirms the validity of these values.

(3) That near universal adoption of these treaties proves that these rights are in fact being protected within the member states and—based on (2)—this is a sign of progress.

It is tempting to draw these conclusions, but it would be hasty to do so.

- In his seminal book, *Social Theory and Social Structure*, Professor Robert Merton identifies five modes of adaptation to normative orders imposed upon individuals or cultures from without: conformity, innovation, ritualism, retreatism, and rebellion.\(^5\) Ritualism “occurs when there is no acceptance of particular normative goals, but great deference is paid to the formal institutions that support them. It can be defined as ‘acceptance of institutionalized means for securing regulatory goals while losing all focus

\(^4\) For example, Article 2 of the ICCPR provides that each State Party “undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” This includes ensuring that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...” Though more flexible, Article 2 of the ICESCR provides that “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant be all appropriate means, including particularly the adoption of legislative measures.”

on achieving the goals or outcomes themselves.\(^6\)

-Professor Hilary Charlesworth applies the concept of ritualism to the field of human rights. Human rights ritualism is understood “as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses.”\(^7\) Countries that adapt to the contemporary international human rights regime ritualistically “accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.”\(^8\) Far from atypical, Charlesworth points out that “rights ritualism is a more common response than an outright rejection of human rights standards and institutions.”\(^9\) By simply going through the motions of outwardly ratifying international treaties, but taking no steps to implement and/or enforce their provisions, countries have found that they can enjoy all the carrots associated with membership in the international human rights community while avoiding all the sticks.\(^10\) The human rights regime is complicit in this charade because the perceived universality that ritualism provides lends to the impression of authority for the regime.

-Appealing the fact of pervasive human rights ritualism forces us to question conclusions (1) through (3) above. In other words, given the prevalence of ritualism, near-universal ratification of the International Bill of Rights tells us almost nothing about: (1) the universal cultural and political embrace of the core values reflected in those instruments; (2) the

---


\(^7\) Charlesworth, *Swimming to Cambodia*, supra note 6.

\(^8\) Id.

\(^9\) Id.

validity of those values; and (3) whether the associated rights are actually being protected in member states, or even whether they should be protected.

II. WHITE COLLAR RITUALISM: INSIDER TRADING

- Outside of the United States, there was little, if any, insider trading regulation as we understand it today until the 1980s. 11 Around this time, the Securities and Exchange Commission (SEC) was pressing for expanded powers and resources to combat insider trading in the United States on the theory that trading based on material nonpublic information is inherently unfair and undermines market confidence. Though the SEC was pushing for an “equal access” or “parity of information” regime in the United States, the Supreme Court pushed back, insisting that the statutory authority for insider trading enforcement requires a showing of actual or constructive fraud. 12

- In addition to pressing for expanded insider trading regulation in the United States (or perhaps as a coordinated aspect of these efforts), the SEC used its international clout to “prod” foreign governments to regulate insider trading in their own markets. 13 In 1980, the United Kingdom promulgated the Companies Act which, for the first time, included a specific (though limited) criminal offense for insider trading. 14 Few countries on the continent followed the U.K.’s lead until the European Council passed the 1989 Directive Coordinating Regulations of Insider Dealing, which mandated that member states regulate insider trading. 15 At the time this directive was adopted, twelve of the European Community’s members had no insider trading regulations whatsoever. 16 Since the

11 Indeed, despite the fact that Securities Exchange Act Section 10(b) was enacted in 1934, there was no federal insider trading regulation pursuant to that statute in the United States until the 1960s.
16 See Thomas C. Newkirk (Associate Director, Division of Enforcement) and Melissa
Directive’s adoption, all twelve of these countries have complied with the mandate to implement insider trading regulations.

-The story is similar elsewhere around the world. For example, in the East, Japan passed its first insider trading regulation in 1988.\(^{17}\) Hong Kong adopted regulations making insider trading illegal in 1991.\(^{18}\) India created its Securities and Exchange Board regulating insider trading in 1992. China had no regulations pertaining insider trading until it adopted the Establishment of Securities Companies with Foreign Equity Participation Rules in 1993.\(^{19}\) And Russia enacted its first insider trading law in 1996.\(^{20}\) In the global South, South Africa adopted insider trading regulations in 1989. Columbia and Costa Rica made insider trading illegal in 1990.\(^{21}\) And Argentina, Chile and Peru adopted insider trading regulations in 1991.\(^{22}\) All told, 77 of the 87 countries that currently have insider trading laws on the books adopted them after 1980.\(^{23}\) The average year of adoption for developed countries was 1990, and the average year of adoption for undeveloped countries was 1991.\(^{24}\) In fact, of the 103 countries that have established stock exchanges, only 16 have yet to adopt insider trading regulations.\(^{25}\)

-All of the above demonstrates a remarkable trend toward regulation in the last three decades. And, as in the human rights context, it is tempting to conclude that this trend licenses the following inferences:

---


19 See id.


21 See id., at 287.

22 Id., at 287-288.

23 Id., at 287-289.

24 Id.

25 Id.
That near universal adoption of insider trading prohibitions reflects a global-cultural recognition that insider trading is harmful, inefficient, and otherwise undermines healthy markets.

Though the United States was for many years the only country regulating insider trading, the recent trend toward near-universal regulation has proven its importance and validity.

That near universal adoption of insider trading regulations proves that insider trading proscriptions are enforced the world over and—based on (2)—this is a sign of progress.

Indeed, many within the SEC have hastened to draw just these conclusions. As Thomas C. Newkirk, then-Associate Director, Division of Enforcement, put it:

Indeed, the European Economic Community has formally recognized the importance of insider trading prohibitions by passing a directive requiring its members to adopt insider trading legislation. The preamble to the directive stresses the economic importance of a healthy securities market, recognizes that maintaining healthy markets requires investor confidence and acknowledges that investor confidence depends on the ‘assurance afforded to investors that are placed on an equal footing and that they will be protected against the improper use of inside information.’ These precepts echo around the world as reports of increased insider trading regulation and enforcement efforts are daily news.26

Far from indicating a rapid cultural convergence, however, the very need for the European directive reflects the fact that, as indicated above, many European countries were unwilling to adopt insider trading absent compulsion. Instead, the recent trend toward insider trading regulation seems better explained as an example of regulatory ritualism.

The case of Germany is instructive. As one commentator puts it, for “a

26 Newkirk, supra note 18.
long time, Germany represented a capital marketplace which refused to take
the regulation of insider trading seriously.”27 Non-binding insider trading
guidelines were adopted in Germany in 1970, but “they were only a
voluntary code of behavior to which one had to subject oneself to
expressly.”28 Germany grudgingly acquiesced to regulating insider trading
after the directive was adopted because it had no choice—and because it
recognized that, without the regulations, “it would lose its reputation as a
developed market.”29 Even still, Germany delayed adoption of insider
trading regulations for five years until 1994, and the regulations that were
adopted had glaring gaps in coverage.30

-Outside of Europe, other international bodies (also under the influence
of the United States) began associating carrots and sticks with the adoption
of insider trading regulations. For example, in 1998, the International
Organization of Securities Commissions (IOSCO) included an insider
trading regulation among its “Objectives of Securities Regulation.”31 Not
only are 85 percent of the world’s markets members of the IOSCO, but the
World Bank and International Monetary Fund use the IOSCO’s objectives
to review the “financial health” of countries. Consequently, as one
commentator puts it, the “convergence of laws [pertaining to insider
trading] can be attributed to convergence of cultural attitudes only
marginally. For the most part, competitive pressures are the more likely
reason, and political pressures, primarily from the United States [and
international bodies under American influence], playing a major role as
well.”32

-Further proof of an absence of cultural consensus concerning the
regulation of insider trading is found in evidence of enforcement—or the
lack thereof. It is true that recent decades have witnessed an explosion of
insider trading regulations finding their way to the statute books, but, as in
the context of human rights, this does not mean they are being enforced.
For example, even the U.K., which was out in front of Europe in adopting
insider trading regulation, lags far behind the United States in

28 Id.
29 Id.
30 Id.
32 Licht, supra note 13.
enforcement. Predictably, German adoption was followed by weak enforcement, and many European countries (e.g., Austria, Ireland, and Luxembourg) have never enforced their laws. Other developed economies such as Japan, China, Hong Kong, and New Zealand have been notoriously weak with respect to insider trading enforcement. The tale of enforcement is still bleaker for emerging market countries. Of the 67 emerging-market countries that have enacted insider trading regulations, a whopping 47 have yet to bring a single enforcement action. But perhaps the most remarkable illustration of regulatory ritualism in this context is provided by India. India adopted insider trading regulations in 1992, however it took its regulators “17 years to realize the term ‘insider trading’ did not literally mean insider within the company.” Even after this “humbling” realization, a 2011 review found that India had yet to win a single insider trading conviction.

- The evidence suggests that the recent global trend toward the adoption of insider trading laws is best explained as regulatory ritualism. And, just as in the context of human rights, evidence of ritualism should force us to pause before drawing hasty conclusions from the near-universal regulation of insider trading. Specifically, given the prevalence of ritualism, the near-universal adoption of insider trading laws tells us almost nothing about the universal cultural and political embrace of the policy rationale’s typically espoused by regulatory bodies as informing insider trading regulations, nor does pervasive regulation support the validity of those rationales. Indeed, the evidence suggests that the majority of those states that have adopted insider trading regulations do not enforce them. Indeed, as is often the case in the human rights context, the lack of enforcement suggests that many countries may have adopted insider trading laws precisely to deflect international scrutiny of their markets.

III. SO WHAT? SOME TAKEAWAYS

- If you happen to be an abolitionist along the lines of Henry Manne and his followers, then you may rejoice in the fact that this evidence of

33 Thompson, supra note 18, at 6.
34 Id., at 11.
35 See Laura Beny, supra note 20, at 287.
36 See, e.g., Beny, supra note 20, at 287 (noting that as of 2013, neither China nor New Zealand had enforced their insider trading laws even once); see also, Thompson, supra note 18, at 7-15 (noting weak enforcement in Hong Kong and minimal fines for insider trading in Japan).
37 See, e.g., Beny, supra note 20, at 287-289.
38 Thompson, supra note 18, at 8.
39 Id.
regulatory ritualism removes a number of arrows from the quiver of those who defend insider trading’s continued regulation. First, the fact of ritualism significantly weakens claims of regulatory inevitability and global consensus that are often enlisted against abolitionists. Second, far from proving the argument for insider trading regulation, the reality that most of the developed and technologically advanced markets in the world have insider trading laws on the books but choose not to enforce them argues strongly against many of the traditional policy justifications for insider trading regulation. Third, the fact of insider trading ritualism also suggests that even the appearance of global consensus (based on the number of insider trading laws on the books) is quite flimsy. To the extent that these laws were adopted as result of external pressure from the United States or other international bodies (and not from a genuine cultural embrace of the rules or the rationales behind them), they will only remain on the books so long as those incentives remain unchanged. Just as recent shifts in global political and economic power from West to East, and North to South have tested the viability of the Western corpus of human rights that are embraced only ritualistically, those same shifts may also test the continued recognition of insider trading regulation as an international norm.

-If you happen to be pro regulation, then evidence of insider trading ritualism should be interpreted as a call to action. If we Americans are truly convinced that markets cannot be fair, efficient, or inspire confidence unless insider trading is regulated, then we will need to do a better job of convincing other cultures of this. U.S. incentives and influence may have been enough to get these laws on the books in other countries, but, as Professor Marc Steinberg explains, the likelihood that “admired” executives may be faced with criminal prosecution in a culture that has declined to embrace the evils of such “gentlemen” offenses” is low.40 To overcome the problem of insider trading ritualism in resisting cultures, it will be necessary to switch from incentives to persuasion as the preferred method of influence. Economic arguments should be demonstrated rather than assumed. And the equally important ethical justifications should be made explicit by appeal to paradigms and tropes familiar to the target culture. Such “enlightenment missions” should strive to appeal directly (and in a culturally sensitive manner) to the constituencies within that country who are directly affected by insider trading abuses: “corporate insiders, bankers, brokers, judges, legislators, and the investing public.”41

41 Id., at 171.
I am convinced that, even as exporters of the norms of insider trading regulation, our insider trading enforcement regime in the United States would benefit a great deal from a more frank discourse concerning the economic and ethical implications of insider trading regulation within our own culture. Faced with insider trading ritualism elsewhere around the world, however, I fear that meaningful insider trading enforcement outside the United States is unlikely to even get off the ground without such discourse.