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Introduction: International Review of Constitutionalism Special Issue on Law, Poverty and Economic Inequality

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EDITORS' INTRODUCTION

In late September, 2009, as this volume enters production, presidents, prime ministers and other heads of state gathered at the United Nations in New York to discuss global priorities, problems and initiatives. The events generated a standard fare: world leaders offering inspirational rhetoric mixed with self-serving lectures to the General Assembly and star-studded events highlighting global problems. Of importance among the business as usual this year, the UN revisited the Millennium Declaration Development Goals. Drafted in 2000, and with an achievement date of 2015, the Millennium Declaration's eight goals respond to the challenges of global development. Heading the list is the eradication of extreme poverty and hunger, followed by the achievement of primary education, promoting gender equality and empowering women, and reducing child mortality rates. Included also are improvement of maternal health, combating HIV/AIDS, malaria and other diseases, and ensuring environmental sustainability. The Declaration envisions a global partnership to achieve the goals.

In 2009, implementation of the Millennium Declaration Development Goals remains wanting, especially so in the wake of global financial crisis. After the meeting of the United Nations, the newly empowered G20 met in Pittsburgh, replacing the G7 summit among former colonial powers and a few others. Perhaps because they have ignored the Declaration's Goals for nearly a decade, the G20 made a commitment on the opening day henceforth to include the world's poor in global financial decision-making.

Until the financial crisis in 2008-2009, decades-long acceleration of economic globalization seemed, to many, to offer exciting possibilities for reducing poverty and inequality, although few such possibilities were realized. But after the meltdown of global capital in the last year, excitement has been replaced by caution and former commitments have been placed on hold. Persistent and escalating economic inequality and poverty remains a defining feature of globalization. Poverty, like global warming, has become a problem at once too big for small solutions and too profitable to motivate quick agreement on a solution.

Since World War II, boom and bust in transnational capitalism has shaped globalization, relationships between markets and states, and the urgency of movements for economic and social equity. Boom following World War II established a period of global hegemony by the US and

its allies supported by institutions of global finance. Economic crises dominating the 1970s and early 1980s drove a conservative attack on the concept of the welfare state, encouraging “hollowing out” state capacity and unleashing the private sector and markets in its place. Consequences for developing societies and social movements everywhere were broad and deep as market and governance became inseparable in the discourses of economic modernization and state capacity. And poverty and inequality deepened in spite of some efforts financed by wealthier societies to counter these trends.

A sudden reversal of that economic expansion, replaced now by deep and devastating recession, is once again changing the landscape of resource flows, connections among global activists, and the very meaning of social equity. Direct impact of the current crisis on jobs, security, and well-being is apparent everywhere, especially in the poorest countries. A deep crisis in developed countries has weakened and restructured the institutions that guided global finance. In the future they may have less to offer the developing world, and the changing global political and economic structure is almost certain to change the rules for access to their resources. Inward turning rich societies are likely to view relationships to poor, but developing rivals in a new light. Symbolic and material resources flowing through global networks to movements for social equity are in jeopardy. Social activists in all parts of the world are adjusting to the shifts, reaffirming commitments to human rights, environmental sustainability, and social equality, and they are testing the waters with a new discourse about an active state, safety nets to meet basic human needs. The new era of defensive capitalism and national security invites reexamination of the prospects for social movements which share the goal of social equity for vulnerable and marginalized groups whose fate is intertwined with global political and economic development.

The effects of poverty and economic inequality are most pronounced in less affluent countries, particularly those in Africa, but also are present in the Americas, Asia, and Eastern Europe. Even affluent northern countries like the United States have not been able to avoid some of the adverse consequences of globalization, including widespread loss of jobs, diminishing labor rights, depressed wages, and pervasive privatization of governmental functions, leading to a greater concentration of economic power and increasing disparities of

wealth and quality of life. In the wake of the global financial crisis, these shortcomings of the global economic system have become particularly pronounced.

Persistent poverty and inequality have different but often overlapping impacts on a broad range of vulnerable groups such as children, racial and ethnic minorities, indigenous communities, immigrants, refugees, women, and the elderly. Activists in the universities as well as in the field across the globe have responded to these evolving problems with documentation, analysis, and proposals for change in many societies and at many levels of action.

We thought it fitting for the inaugural American issue of the *International Review of Constitutionalism* to offer a sampling of creative responses by scholars to the problems that have paralyzed leaders on the world stage so profoundly and for so long. This collection of articles by noted scholars examines what law and legal institutions can do to alleviate poverty and economic inequality in the new economic and political environment. The articles explore the contours of many struggles for distributive justice. They describe contemporary constitutional strategies, such as the incorporation of economic, social and cultural rights in constitutions in relation to grassroots anti-poverty campaigns in many parts of the world, including campaigns for rights in South Africa, and poor people's economic and human rights campaigns in the United States. Such campaigns face well-known disadvantages in contending with entrenched, powerful, and vastly wealthier interests.

One focus of this scholarship is the meager support and difficult political terrain on which movements struggle for equity as laissez faire economic policies continue to entrench themselves globally and to delegitimize government intervention to restore equity. A number of the articles describe strategies deployed on behalf of the marginal, the politically weak, the excluded – women, racial minorities, the poor, migrants, and others. Social cause lawyers from all parts of the globe report a shift in the legal and political institutions which they must contend reducing receptivity to claims for greater equity. Many such projects have been aided by transnational resources – whether symbolic or material resources, technical knowledge, or simply manpower. We anticipated a decline in such support since September, 2008, and those authors who were able to conduct field work in the intervening months report such a shift. But activists and movements for marginal groups have always struggled with limited means and have found ways of surviving and persisting in spite of fickle international support, which is not new to them.

An important new perspective on the role of law in the global struggle for equity contends that the global capitalism promotes a particular form of constitutional governance, referred to by Boa de Sousa Santos as the “judicialization of politics.”¹ Institutional development, and especially constitutionalism, has long been embraced by the dominant forces in globalization. Describing the consequences of the constitutionalization of rights (and especially rights similar to liberal democratic rights established in the Global North), Upendra Baxi² contends that the language of human rights has become the lingua franca of progressive politics, usurping other ethical discourses and replacing the language of redistribution as the dominant “emancipatory script.” Yet the role of the judiciary, indeed the role of law, is far from established in many developing countries. Movements for social equity may simultaneously struggle against judicialization of rights which overshadow more authentic, non-legal understandings of social equity on one hand and for constitutionalization of truly progressive social entitlements and relationships and for the political as well as legal means to enforce them on the other. Further, the judiciary in such societies rarely has the social position or political power idealized by American jurisprudence. Some of the authors contributing to this volume examine closely the law’s value for movements for social equity, considered both as a symbolic resource embodied in contemporary constitutionalism and enforced primarily by institutions of the state and as a resource with other, different and emergent roles or perhaps no role at all. The authors have remained particularly sensitive to the apparent tensions in movements between rhetorical framing of movement goals as claims for political and economic power on one hand and as claims for rights for rights on the other.

Creative solutions for global inequities must be found not only on the frontlines of movements but in the institutions which train and credential lawyers, create and legitimate their expertise, and orient lawyers toward pursuit of justice. Some of the authors whose work appears in this volume focus on the supply end of human rights advocacy. Legal education, bending old law to new human rights objectives, and securing access to constitutional review are the major

¹ BOAVENTURA DE SOUSA SANTOS, TOWARD THE NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 266 – 267 (1995).

² Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 125 (1998).

themes of two papers, and they resonate with problems encountered by advocacy described in all the papers about movements.

Part I of the volume examines the power of law to help social movements. The first four papers by Scott Cummings and Louise Trubek, Stephen Meili, Frank Munger, and Mimi Ajzenstadt explore a growing global movement of cause advocacy by lawyers. The authors' concern is not only advocacy in the developing world, but also the relationships between the global north and the global south. The global north is a source of symbolic examples, expertise in legal entrepreneurship, policies supporting particular understandings of human rights and meanings of law, and material resources. But cause advocacy in every society, whether in the global north or global south, is encounter challenges created by need for human, political, and material resources.

Scott Cummings and Louise Trubek examine the emergence and growth of the global public law project, in historical and contemporary perspective, contemplating whether the term "public interest law" is even appropriate, in light of the highly contextualized nature of lawyering and legal culture. They pursue two key questions: First, they ponder the reasons for, and the manner and details of, the globalization of public interest law. In their words: "...why and how is it happening?" Second, they question what public interest law might look like at this globalized moment and whether there are "consistent practices and themes that are evident across national domains, or whether indeed public interest law is "too context-specific to be generalized?" In their exploration, they highlight some interesting issues for future examination, including questions regarding the nature of legal education, the structure of the legal profession, national and international networks of public interest lawyers and their pursuit of rights and justice at both the local and global level.

Stephen Meili turns his gaze on the "Southern Cone of Latin America" to examine the opportunities and challenges facing public interest lawyers as they navigate the democratic transitions underway in the region. Meili describes public interest lawyers in Argentina, Brazil and Chile as key players in the "development of the post-authoritarian legal systems that have developed in each country." They have made the rule of law central to legal education, trained judges and other legal actors law school clinics and other experiential learning models, and have crafted a rights-based litigation agenda, borrowing from the American public interest and civil

rights tradition. Meili observes that public interest lawyers have legitimated legal systems that have long labored under a lack of credibility, but he also concludes that their legitimating function locates them as part of the legal establishment, and risks alienating social movements and the wider public when law fails them.

Frank Munger's article furthers the discussion on the judicialization of politics and cause lawyering through a case study of an environmental law practice in Thailand. Munger elicits the personal narratives of individual lawyers within the larger narrative of Thailand's constitutional history, and particularly the interplay of monarchy and constitutional democracy. Munger paints a compelling picture of the convergence of individual experience, political commitment, institutional development, and offshore intervention that spawns a version of cause lawyering peculiar to Thailand. Munger examines the valiant endeavors of cause lawyers in the face of notable obstacles, including institutional constraints and resource limitations. By focusing his spotlight on the biographies of individual lawyers, Munger eschews simplistic evaluations and conclusions, in favor of a more nuanced, layered and complex appreciation of the role of lawyers and courts in developing societies.

Mimi Ajzenstadt presents a case study of sophisticated strategies used by the Israeli NGO, Kav LaOved, to deploy law on behalf of undocumented foreign workers. Foreign workers are at once a valuable exploitable commodity, unprotected by neo-liberal labor policies, and excluded from basic citizenship protections – the perfect human rights storm. Ajzenstadt's synthesis of perspectives drawn from the literatures on judicialization, neo-liberalization, and social movements creates a rich background for her study, enabling her not only to recognize the importance of unconventional strategies, such as shaming and confrontation, used by the NGO to deploy the symbolic power of law, but also to interpret their broader significance for struggle in the new era of neoliberalization. Her interpretation challenges the critics of "judicialization" to construct theories that also account for the creativity of advocates and the powerful shadow cast by judicial enforcement which can be turned against neoliberal policies hostile to rights without the intervention of courts.

Part II of this special issue includes the work of scholars who grapple with another aspect of the problem of social movement capacity, namely effective use and mobilization of

constitutional courts. Both authors focus on the socio-economic jurisprudence of the South African Constitutional Court, raising the question of the capacity of the courts to contribute in a meaningful way to the eradication of poverty and bridging the inequality gap that typifies the political and economic reality in South Africa.

Heinz Klug examines the constitutional drafting process in South Africa in the early 1990s, at a time when the language of redistribution was superseded by the language of rights in the aftermath of the collapse of the communist regimes of Eastern Europe. The constitutional drafters saw the inclusion of social and economic rights in an expansive Bill of Rights as an essential strategy to redress economic inequality and poverty. Klug explores the interpretation and implementation of these constitutional provisions by the Constitutional Court, and he traces the evolution of a socio-economic rights jurisprudence that is at once cautious, but that has also impelled the government into action during strategies interventions by public interest lawyers and social movements. Klug also addresses anti-poverty strategies adopted by the national government, for provincial and local implementation, in the face of limited capacity, inertia, and corruption, and the difficulties these place on poverty reduction.

Brian Ray examines the use of scientific evidence in one Constitutional Court case that focuses on the right to health.³ He points to the difficulties that arise when the enforcement of rights rests on scientific evidence, especially since developments in science inevitably overtake judicial decisions. To ameliorate this problem, Ray adopts a comparative methodology to suggest the use of a “democratic experimentalism” form of judicial review, one that he argues is superior to the strong version of judicial review adopted in the USA. He then applies this “democratic experimentalist” approach to the TAC case, arguing that the use of this approach might have “mitigated” some of the problems that surfaced in the case. He concludes by suggesting that the Constitutional Court’s remedy of engagement in a recent socio-economic rights case “offers a particularly promising version of democratic experimentalist review in socioeconomic rights cases”.

In Part III, two scholars reflect on the problems of the supply of human rights and movement advocacy. Of concern to these scholars is first, the problem of training the next generation of advocates – against the grain of socialization in most law schools – and second, the

³ *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC).

need for creative scholarship to suggest new uses of human rights principles to counter the negative effects of global economic development.

Andrea McArdle illustrates the potential direct contributions of educators who train the next generation of advocates and scholars searching for new applications of existing law to human rights problems. Using one of her advanced upper level courses, *Writing from a Judicial Perspective*, McArdle illustrates the important role of judicial writing “in attending to the impact of economic marginality on access to justice.” She explains how the course demonstrates the linkages between social justice and judicial writing. She contextualizes these issues within the recent hearings on the nomination of Justice Sonia Sotomayer to the United States Supreme Court.

Allison Christians urges integration of international human rights principles and tax policy, a domain traditionally limited by national interests and concepts of sovereignty. Christians begins her powerful argument for an international human rights framework for tax policy deliberations by noting that sovereign interests have already been rendered deeply problematic by the intended and far reaching effects of American tax policy on the economies and sovereign capacities of other nations. U.S. status as signatory to important human rights conventions acknowledges the interdependence of sovereign interests and international welfare. Using those principals to guide tax policy does no more than incorporate that interdependence. Further, she argues, traditional principles of tax fairness have become so weak and subordinate to efficiency concerns that the revitalization of moral values in tax policy must come from another source. American commitment to international human rights provides a compelling and legitimate alternative.

We have enjoyed collaborating and working with each other, and we hope that this volume contributes in a meaningful manner to the ongoing scholarly and advocacy debates about these issues. We hope that this volume is of use to scholars, advocates, students, legal practitioners, and policy makers concerned with addressing poverty and economic inequality

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