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Introduction

Human Rights and Legal Systems Across the Global South

CHRISTIANA OCHOA* & SHANE GREENE**

The “Global South” is the imagined and real geographic space from which the contributions to this issue of the *Indiana Journal of Global Legal Studies* draw their inspiration and information. The Global South includes nations in Africa, Central and Latin America, and most of Asia, comprising more than 150 of the world’s 184 recognized countries.¹ This fact alone would suggest that there should be almost no conference, symposium, or conversation about world affairs that is not dominated by considerations of the Global South. However, this is not the case. The Global South, even in a restrictive geographic sense, remains in the bulk of these discussions as peripheral rather than central, and reactive rather than antagonistic. By some accounts, the Global South is the successor to the Third World. However, the Third World may have been more appropriately geographically confined to countries south of the equator than the imaginary, nominally geographic Global South seems to be. Rather than actually being confined to the countries south of the equator, the concept of the Global South has emerged from the contemporary iteration of economic globalization and its effects on subaltern communities, wherever they may be located. These effects bespeak disaffected communities, as they are carted forth, robed in a multitude of undesirable characteristics: “political, social, and economic upheaval . . . poverty, displacement and diaspora, environmental

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1. *Global South - Center for the Global South*, AM. U. CTR. GLOBAL S., <http://www1.american.edu/academic.depts/acainst/cgs/about.html> (last visited Mar. 12, 2011).

degradation, human and civil rights abuses, war, hunger and disease.”² Notably each of these characteristics can be eroded through more careful investigation, revealing that this manner of thinking about the Global South is itself polemical and overly simple.

The organizers of this symposium agree that imagery of, and discourse about, the Global South demand nuance and context, especially with regard to the substantive questions addressed by this symposium. The contributors to this issue largely echo this orientation. Perhaps this should not be surprising, given that the substantive questions this issue addresses are fundamentally about the active engagement of communities in the Global South with a range of legal and quasi-legal mechanisms that may serve them in clarifying status, advancing claims, or seeking redress for harms. The contents of this issue are thus much less about victimhood than they are about agency and power—about the routes for exit and the tools for voice.

As a general matter, this symposium is about the engagement of the Global South with legal mechanisms at all scales with a special focus on Africa and Latin America, and on human rights as the concept is shaped, adapted, rejected, or contested in various locations. Social groups commonly operate within multiple legal systems that generally include an official state system of law and other systems based on indigenous legal practices, customary law, and nonsecular law. Scholars have used the term “legal pluralism” to analyze these complex legal situations, but their work has only begun to analyze how human rights discourse is articulated within these various legal systems. Among the challenges of this work is the conjunction of human rights with indigenous rights and women’s rights, all currently forceful movements across the Global South and on the international plane.

New waves of legal discourse are moving across the Global South, often employing the rhetoric of human rights and engaging with relatively novel domestic, regional, and international institutions created for the purpose of advancing the law of human rights. The spread of human rights may easily be characterized as part of the package of globalization, but the contents of this issue demonstrate that this view reflects incomplete and sometimes inaccurate thinking about communities in the Global South in relation to legal systems and human rights. Whether as part of a hegemonic or counterhegemonic project, the authors observe that each location they address serves as a space for the appropriation of selected elements of the global-homogenous version of human rights and the production of original,

2. Alfred J. López, *Preface and Acknowledgments*, GLOBAL S., no. 1, 2007 at v, available at http://muse.jhu.edu/journals/the_global_south/toc/gbs.1.1-2.html.

often unique hybrids that are shaped by local histories, social structures, and power relations within particular societies and among different social groups. This symposium contributes to and advances the existing literatures in law and the social sciences that recognize the significance of identity politics, civil society, religion, local cultural practices, and emancipatory struggles. The group of scholars in this issue comes from a variety of disciplines with in-depth experience in specific locations in Africa and Latin America, and together they explore the alchemy of particular legal systems and the discourse of human rights.

With this orientation and set of questions in mind, the Indiana University Maurer School of Law, the Center for Latin American and Caribbean Studies, and the African Studies Program joined to host a symposium on April 9–10, 2010. The intellectual products of that rich meeting are contained in this issue.

The first section of this issue is devoted to problems of the universal and the particular. The articles in this section suggest a way of thinking about communities in the Global South. These communities are often envisaged as disparate, isolated, and distant. The articles presented here, however, contest this vision and instead present communities as interconnected with each other, with the North, and with a history that makes any claims of particularity or universality simultaneously true as well as highly suspect. Kamari Clarke discusses international criminal courts, particularly the Special Court for Sierra Leone and its capacity to focus the public's attention on the "African warlord" in order to construct victimhood vis-à-vis particular acts of acute violence, instead of vis-à-vis a larger system of fundamental, systemic, and global inequalities that give rise to war in the first place.³ Siba Grovogui's article similarly questions the use of human rights as a tool merely for upholding the rule of law or imposing responsibility on identifiable perpetrators of violence.⁴ Through a historical analysis of what human rights meant to Haitian slaves in the eighteenth century, Grovogui argues that human rights should be conceived of as a tool to protect communities against the political, economic, and social harms embedded in liberal constitutional and modern colonial orders.

The issue then turns to "claims in context." This section includes contributions discussing women's rights from a variety of perspectives and in a number of locations. Susan Williams' article sets the stage by

3. Kamari Maxine Clarke, *The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord*, 18 IND. J. GLOBAL LEGAL STUD. 7 (2011).

4. Siba N. Grovogui, *To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican Liberal Traditions*, 18 IND. J. GLOBAL LEGAL STUD. 41 (2011).

referring to an ongoing, seemingly insoluble conflict in some locations between protecting and preserving cultural traditions, on the one hand, and promoting women's equality, on the other.⁵ Williams' article presents a solution: "a constructivist view of culture and a dialogic model focused on the need for challenge as part of the dialogue," which would open space for women to participate in the shaping of customary law in their own communities.⁶ Very much in dialogue with Williams, Muna Ndulo examines the roles courts play in advancing women's rights in Africa and the importance of recognizing that "traditional social and economic relations on which the customary norms that discriminate against women are founded, and on which traditionalists rely . . . have in reality been radically transformed" in such a way as to weaken them in the face of women's legal claims.⁷

From across the Atlantic, Paula Spieler provides a narrative account of a women's rights claim that pitted Brazilian culture and tradition against women's rights in exactly the ways Williams and Ndulo discuss.⁸ In addition, her article describes an instance in which women were able to exit the domestic legal system in order to make claims before the Inter-American Human Rights System. This multiscalar impact litigation resulted in greatly enhanced human rights protections for women in Brazil. Finally, in order to provide some large-scale observations, Mala Htun and Laurel Weldon's article investigates the variation in family and women's rights protections around the world.⁹ It offers tentative answers to a number of questions: "What accounts for these divergent approaches to family law? Why are laws of personal status so seemingly resistant to change in some places? How can we explain both this resistance and the overall trend toward sex equality?"¹⁰

The subsequent set of articles demonstrates the conceptual rubric of law as a tool in struggles for identity amidst the collective. The articles in this section illustrate the empowering capacity of human rights discourse and law and, at the same time, the capacities of that same

5. Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOBAL LEGAL STUD. 65 (2011).

6. *Id.* at 66.

7. Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87, 92-93 (2011).

8. Paula Spieler, *The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil*, 18 IND. J. GLOBAL LEGAL STUD. 121 (2011).

9. Mala Htun and S. Laurel Weldon, *State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law*, 18 IND. J. GLOBAL LEGAL STUD. 145 (2011).

10. *Id.* at 147.

discourse and law to expose deep tensions and particularities in particular locations, among particular communities, at particular moments in time.

Erika George situates her article in South Africa where the HIV/AIDS epidemic has been the impetus for a global social movement to use the legal frameworks and rhetorical tools of the human right to health as a counterweight to a global intellectual property rights regime that privileges property and profit over health and access to medicines.¹¹ Specifically, she points to the alliance of activists from South Africa, India, and Brazil on these issues to demonstrate their ability to influence access to medicines and thereby affect health outcomes for individuals with HIV/AIDS.

Charles Piot's article on the "right" to be trafficked presents a polemic that demonstrates the potential tensions embedded in human rights regimes.¹² In stark contrast to a strong thread of human rights discourse on human trafficking, Piot's article illuminates Togolese children's invocations of "human rights" as the right to be free from parental control so that they may leave their villages and participate in a Nigerian labor regime that has been widely denounced as a human trafficking tragedy.

Jacqueline Solway, Jan Hoffman French, César Rodríguez-Garavito, and Guillermo de la Peña contribute articles that illustrate some of the divergent, malleable, innovative, empowering, destabilizing, and disturbing tacks that human rights take when applied to claims by communities for recognition of indigenous or minority status. Solway illustrates how strong claims for minority self-identity and protection within Botswana have resulted in the state's attempts to reduce these claims into celebrations of minority groups' dance, food, and costume.¹³ This integrationist approach to minority rights—at the local, state, and international level—has long been the norm, both in the minority rights and the indigenous rights contexts.

French's and Rodríguez-Garavito's articles demonstrate that the asymmetrical development of minority rights and indigenous rights has resulted in legal claims for either minority or indigenous status that have important substantive outcomes. Building on her prior work, French argues that the lack of definition of "indigenous" in the United

11. Erika George, *The Human Right to Health and HIV/AIDS: South Africa and South-South Cooperation to Reframe Global Intellectual Property Principles and Promote Access to Essential Medicines*, 18 IND. J. GLOBAL LEGAL STUD. 167 (2011).

12. Charles Piot, *The "Right" to be Trafficked*, 18 IND. J. GLOBAL LEGAL STUD. 199 (2011).

13. Jacqueline Solway, "Culture Fatigue": *The State and Minority Rights in Botswana*, 18 IND. J. GLOBAL LEGAL STUD. 211 (2011).

Nations Declaration on the Rights of Indigenous Peoples has resulted in multiple claims by communities in Brazil who stake claims on indigeneity, rather than minority status, even though they share none of the indicia of indigenous “authenticity.”¹⁴

Touching on the integrationist paradigm that Solway’s article on minority protections in Botswana illustrates so well (and which has represented the paradigmatic approach to indigenous communities), Rodríguez-Garavito notes a palpable shift in the treatment of indigenous people under international law from “the objectives of integration to that of respect for identity of [indigenous] populations.”¹⁵ He illustrates and analyzes how this shift has taken root through discussion of the free, prior, and informed consultation process that now dominates the initial relations between indigenous actors and corporate mining operations seeking to extract natural resources from indigenous lands. Balancing these three articles, Guillermo de la Peña’s article is a note of caution about claims to indigeneity.¹⁶ He demonstrates that, despite strong constitutional protections for indigenous peoples in Mexico, variant, slow, and ineffective implementation of legislation has left populations vulnerable.

Peter Geschiere’s article concludes this issue because it resonates nicely with many of the ideas, claims, and groups discussed in the preceding articles. Geschiere uses the vehicle of autochthony to explore what it means to “belong” in a global context and what autochthony and globalization mean for citizenship claims and the paradoxes of exclusion.¹⁷ Taken together with the many observations, questions, and problems posed by each of the contributions to this issue, Geschiere’s explorations are a wonderful way to conclude.

14. Jan Hoffman French, *The Power of Definition: Brazil’s Contribution to Universal Concepts of Indigeneity*, 18 IND. J. GLOBAL LEGAL STUD. 241 (2011).

15. César Rodríguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEGAL STUD. 263, 268 (2011) (quoting ILO, PROGRAM AND BUDGET OF THE BIENNIUM 1986/1987: 60TH FINANCIAL PERIOD ¶ 50.16 (1985)).

16. Guillermo de la Peña, *Ethnographies of Indigenous Exclusion in Western Mexico*, 18 IND. J. GLOBAL LEGAL STUD. 307 (2011).

17. Peter Geschiere, *Autochthony, Citizenship, and Exclusion – Paradoxes in the Politics of Belonging in Africa and Europe*, 18 IND. J. GLOBAL LEGAL STUD. 321 (2011).