

A VIEW FROM THE LEFT: INTERNATIONAL ECONOMIC LAW

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Part of the left/critical pedagogical project involves teaching “with and against the frame.” This might be thought of as teaching with, past, around and against various forms of “common sense” about law, including prevailing ideas about the normal legal structure of market societies and the place of human and constitutional rights in liberal political orders. In international economic law and the subfield of law and development, one task is to examine how this common sense informs two interlinked projects: first, the liberalization of trade; and second, the promotion of global economic integration through the convergence around particular regulatory objectives, the transplantation or diffusion of legal rules and doctrines, and the harmonization or modification of legal regimes.

I.

THE FIRST STEP LEFT

Although the task requires imagining law as a tool of social change, there is a first step, one that is not necessarily the most obvious for students and scholars embarking on the study of these fields: examining what law is doing now. This means investigating the ways and the extent to which law is a factor in the status quo, in order to make an assessment about the efficacy, or not, of focusing on legal rules, doctrines, institutions and ideas as instruments of transformative change. However, it also involves examining the common sense response to such projects, much of which is framed in terms of respect for, or the addition of, human rights to the development and economic reform agenda as it now stands.¹

First, the common sense claims about the projects themselves. The most basic claims are both positive and normative: liberalized trade and integrated markets are our future, and we stand to benefit from this future, or at least the benefits are such that we all *could* gain from integrated markets and more trade, because the gains will place the winners in a position to compensate the losers.

The first left intervention has nothing specifically legal about it, although it may indicate something about the types of legal analysis that we should undertake. At a strictly empirical level, we simply take the “body count” to see where and how the participants and actors in this project of global economic integration are distributed, how they are sorted out as between winners and losers. When we do so, we confront the awkward reality that in the era of

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1. See generally Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT’L L. 199 (2004).

liberalized trade and market integration, global inequality seems to be *increasing*, not decreasing. The problem extends well beyond the relatively uncontentious observation that there are discrete groups of people, configured around some axis of identity, who are clearly not doing well in the current order. Rather, as Branko Milanovic demonstrated in his recent path-breaking work on global inequality, *Worlds Apart*,² the vast majority of states are actually in a position of “downward mobility” in the global order, meaning that they have little prospect of joining the middle income countries let alone catching up with the leaders.³ In his view there is little reason to think, absent a massive shift in policy orientation that is nowhere on the horizon, that this state of affairs is likely to change.⁴ Within states, including those that are doing better in the international order, the picture is also disquieting: most states are also registering growing levels of internal income inequality.⁵ In some places, for example China, the gap between the internal winners and losers in the global growth and integration game has reached the point that it is recognized as politically destabilizing.⁶

II.

THE SECOND STEP LEFT: THE ROLE OF LAW

What does law—legal rules and adjudication, public policy, decision-making and institutions—have to do with it? Why is this of professional interest to scholars of law and governance, particularly those interested in progressive change?

One reason might be the following. In the last generation, the breakpoint—the point at which the post-war trend reversed, divergence overtook convergence, and so many states were launched on the path of downward mobility—occurred at the point at which liberalized trade and integrated markets were adopted as economic development orthodoxy and began to be widely institutionalized at the level of policy and practice in both domestic and international arenas. This was circa 1978–1980.⁷ Whatever the degree and direction of causation, the conjuncture among these events at least complicates the assertion that trade and market integration are good for all.

Although it has become a quite mainstream proposition that the problem of globalization is the problem of inequality, the paradox is that it can nonetheless

2. BRANKO MILANOVIC, *WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY* (2005).

3. *Id.* at 65–71.

4. *Id.* at 70.

5. Giovanni Andrea Cornia, *Inequality, Growth, and Poverty: An Overview of Changes over the Last Two Decades*, in *INEQUALITY, GROWTH, AND POVERTY IN AN ERA OF LIBERALIZATION AND GROWTH* 3, 6–7 (Giovanni Andrea Cornia ed., 2004).

6. Steven Roach, *Globalization's New Underclass*, ASIA TIMES ONLINE, Apr. 26, 2006, http://www.atimes.com/atimes/Global_Economy/HD26Dj01.html.

7. See MILANOVIC, *supra* note 2.

be extraordinarily difficult to face the issue head on. On the one hand, it is really not that controversial that there are at least *issues* around inequality, distributive justice and the structure of economic development in the international order, even if there are complex debates about how to account for it.⁸ Yet the terms on which we approach and debate the global economic context can have a powerfully moderating effect on our relationship to the issue. The prior, and entrenched, commitment to the liberalization of trade combined with the pursuit of market integration in a specific style and through a preferred set of institutions and mechanisms marks the encounter with inequality at every turn. Sometimes these commitments seem to prevent the issue from materializing at all, as when we lament the persistence of abject poverty but fail to acknowledge the growing inequality that often accompanies it. Even when inequality—either global or internal—does surface as a concern, normative and institutional commitments may still have a profound effect on the debate, shifting the point of entry into the conversation from what it might otherwise be, confining the set of available responses, or simply ordaining our attitudes and conclusions outright. For example, in a study of the fairness of globalization commissioned by the International Labour Organization (ILO),⁹ the body of experts began its discussion with the consensus observation that globalization is good, it just needs to be better.¹⁰ This is a conclusion that should have been at least somewhat qualified or controversial, given that so many of the current losers fall within the ILO's core constituency: workers.

III.

IN THE CLASSROOM: DEVELOPING A LEFT LEGAL FRAMEWORK

One of the pedagogical issues that arises when we try to examine these issues is the tendency of legal analysis to recede in the face of the economic claims. Many students come to class already persuaded about the inexorability of the forces driving economic integration. They have already been drawn in by the compulsive pull of mainstream economic explanations about the beneficial effects of liberalized trade. They are already prepared to automatically link, in both positive and negative ways, particular regulatory tools with particular economic outcomes assuming, for example, that intellectual property rules will necessarily spur innovation and growth while labor market institutions will inevitably impede those objectives. If only because they circulate as part of the air that we breathe, students can typically rehearse such arguments well before they have brought any of their newly-acquired disciplinary expertise in law to bear on the issue. This can be a powerful barrier to considering alternative eco-

8. Cornia, *supra* note 5, at 3–5.

9. WORLD COMM'N ON THE SOC. DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL (2004), available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

10. *See id.* at vii–viii.

conomic accounts or, more to the point, noticing, and examining, the complex legal apparatuses that are also at work. As one student said in the face of evidence that global welfare didn't seem to be unequivocally registering an uptick as a consequence of economic liberalization and market integration, "But it has to—it's an economic law!"

In these responses, students both reflect and participate in the common sense that that law is either irrelevant or obvious to the questions at issue. Law is irrelevant because the path of development is essentially determined by underlying economic factors and forces. So, for example, wage levels in developing countries *really do* just reflect the marginal productivity of workers, rather than the balance of bargaining power between workers and employers, constraints on labor mobility in the global economy, or the stratification of labor markets along ethnic, gender, and myriad other lines, all of which might have something to do with the presence or absence of legal rules, both domestic and international. (It's worth noting that the left position often mirrors this analysis in reverse: although the conclusion is that the situation is bad for workers, not good, the analysis still typically focuses on the economic forces in play.)

To the extent that this is not the case, to the extent that law is an independent variable or even a crucial cause of "non-development," its role in the process is obvious, in the sense that the connections between laws and economic outcomes are clear, linear and certain. We know what we want: the rule of law to counter corruption; property rights and contract enforcement to attract investment; deregulation to promote efficiency and eliminate rents and the possibility of capture by special interests. And we know what this is for: ensuring that markets operate smoothly with minimal transaction costs. Finally, we know what all this does, if done right: generate growth and prosperity. Even those who are suspicious of the program may not necessarily trouble the underlying regulatory claims. Instead, they are likely to simply propose the addition of a new "social" optic or a new set of (human) rights.

This default to orthodox economic explanations—even when they concern the most "legal" of questions, the nature and operation of rights and regulations—functions to impede what might otherwise be a more dispassionate, mechanical and even ordinary assessment of the underlying legal project. For example, rule and policy proposals could be analyzed as actions, choices and decisions that can be criticized, confirmed, amended or rejected according to a variety of criteria. And given the basic claims about the rationale for market integration and liberalized trade, namely welfare gains, distributive concerns would surely be among them. Merely by inhabiting their new professional roles, students might be both moved and empowered to adopt a more critically engaged stance toward the common sense claims concerning legal regulation and economic governance. But the recession of legal analysis in the face of the economic claims disables some of the comparative advantage that students could otherwise marshal. This is growing knowledge and familiarity, on a fairly intimate, case-specific and doctrinal level, with different rules and policies, how

they operate, what they do, what sort of controversies they engender, and how different decision-makers and legislative bodies have addressed and resolved them at different times and in different contexts.

There are lots of basic tools and techniques lying around that assist in bringing the legal dimension of market integration and liberalized trade into view: attending to background rules and institutions that structure markets; challenging vertical linkages between theoretical concepts, legal rules and doctrines and outcomes; factoring in the presence of competing normative orders, both formal and informal; bringing empirical assumptions to the foreground and measuring them against what we know about the actual context under consideration; comparing the evolution of different legal orders over time; or simply tracing the wonderfully diverse and complex paths that legal reasoning routinely takes in adjudication of disputes within the common law. That said, the ability to use these tools and techniques is often undeveloped. Students may not have the habit of using them routinely in legal analysis, and it can be slow and painstaking to keep them on task.

However, this is the frame. One of the basic questions we probe is, what *is* the legal structure of open markets anyway? We make lists: what's in, what's out, and why? Here, we try to either challenge our initial intuitions or affiliate with different sides of the debate. We consider the controversies, not only between the right and the left but within the right and the left about what should be in, what should be out, and why. We ask whether there are places where conventional ideas about what is left and right—what the division itself actually means or entails—get in the way of aims and interests that we might care about. There is no closed list of strategies. Instead, the general point is to open up spaces to rethink the connections between assumptions and theories, theories and legal and institutional reforms, and reforms and specific outcomes, so as to test the stability and strength of what often turn out to be tenuous connections among them.

In the process, three families of questions tend to recur:

1. What difference does it make to look at a problem as aberrational rather than normal or systemic, something that could be seen as a structural dimension of the global order?
2. What work do different categories and disciplinary divisions within the field of international law do to our analysis and conclusions? For example, what difference does it make to look at something as a human rights violation rather than as part of trade or investment law? What turns on using the lens of public international law rather than that of international economic law?

3. What is the status of ethical claims in the face of the logic that usually informs our analysis of economic development? When, for example, is it safe to assume that successful identification or capture of an issue under the banner of human rights claims represents progress?

IV.

A SUGGESTIVE EXAMPLE: THE CASE OF FORCED LABOR

By way of illustrating the ways that these questions might arise in the analysis of a concrete issue, I will briefly refer to a recent ILO report, *A Global Alliance Against Forced Labour*.¹¹

A Global Alliance Against Forced Labour is part of the follow-up to the ILO *Declaration on Fundamental Principles and Rights at Work*.¹² Promulgated in the wake of the failure to link labor standards to the global trade regime, the Declaration identifies four “core” labor rights or standards, isolates them from the contingencies of development, and announces that, notwithstanding any commitments that they may or may not have made under treaty law, all member states of the ILO have an obligation to promote and respect them. These core labor standards have been very widely promoted and taken up, so much so that they might be thought of as a (re)statement of workers’ basic rights in the global economy.

Forced labor—slavery—is a quintessential left issue; understanding how it persists and the forms it takes in the contemporary economic context would seem to be a critical task. One of the first things to note about *A Global Alliance Against Forced Labour* is how hard it works to insist upon the exceptional character of forced labor. The Report tackles the definitional issue upfront, zeroing in on two distinctive features of forced labor: first, it is work done under the threat of a penalty to which, second, the person has not voluntarily consented.¹³ However, we are immediately instructed that forced labor is not just “bad work”; that is, it is not just work performed for low wages or under substandard conditions. And while coercion is an essential element of forced labor, coercion arising from economic necessity alone doesn’t count. Forced labor is uniquely reprehensible and morally deplorable—in short, much worse. And almost everyone seems to agree: virtually no one defends forced labor.

Yet notwithstanding the effort to define forced labor and differentiate it from other bad or exploitative work, within the analysis itself, the borders and distinctions often collapse. For labor scholars, the connections between forced

11. INT’L LABOUR OFFICE, *A GLOBAL ALLIANCE AGAINST FORCED LABOUR* (2005) [hereinafter *A GLOBAL ALLIANCE*].

12. Int’l Labour Org., *Declaration on Fundamental Principles and Rights at Work*, Geneva, 86th Session, June 1998, <http://www.ilo.org/public/english/standards/decl/index.htm> (last visited Apr. 23, 2007).

13. *A GLOBAL ALLIANCE*, *supra* note 11, at 5.

labor and “just work” in the global economy surface at every turn. One of the most striking parts of the Report itself is not simply how present, even prevalent, forced labor is in the global economy. Rather, it is how much forced labor seems to be produced by many of the same rules, trends and forces that are driving developments in the labor market as a whole.¹⁴ As the Report itself notes, contemporary forms of forced labor often occur at the tail end of a global production chain where work is informal, competition among producers fierce, and where there are both powerful incentives to keep costs down and no real possibility of surveillance or monitoring the conditions at work.¹⁵ Contractors and suppliers, for example, may be accepting fees for work that are so low that it is virtually impossible for them to comply with national laws;¹⁶ this in turn denies workers their legal entitlements, one of the potential “penalties” that definitionally gives rise to forced labor. In short, forced labor in the global economy seems most likely to occur where the conditions are almost certain to produce a range of forms of degraded and precarious work.

What should we make of this strategy of separation then, the insistence upon the uniquely reprehensible character of forced labor? While it seems so right from one perspective, and there are certainly contexts in which we will want to make the case that forced labor is uniquely deserving of censure, consider what else this structure of analysis does.

First, it draws our attention away from the ubiquity of coercion in labor contracting in the global economy. An enormous number of people now work under conditions of considerable economic insecurity. There is general agreement that workers bear an increasing amount of risk under current institutional arrangements; moreover, they do not do so because it is their choice. In addition, growing numbers of people work full time, in jobs that are fully integrated into the global economy, and are still unable to make enough money to survive above poverty level, whether defined in absolute or relative terms. Those engaged in debt bondage, a recognized form of forced labor, stand out as extreme embodiments of such insecurity, risk and exploitation. But imagining that such workers occupy a separate place, both in the world of work and in the moral universe, may lead us to underestimate the importance of the factors and trends which contribute both to the growth of forced labor and to the general rise in economic insecurity for workers in the new economy. It may also detract attention from issues that, if not nearly as attention-grabbing, are also important. To put it another way, were we to see the problems of work in the new economy as of a piece, rather than as a series of discrete and severable issues, we might see some new connections between the things we are *really sure* we don’t like, and

14. *Defining Forced Labor and Identifying Key Actors*, in PROGRAM ON HUMAN RIGHTS AND JUSTICE, CTR. FOR INT’L STUDIES, MASS. INST. OF TECH., FORCED LABOR IN THE GLOBAL ECONOMY: A REPORT OF DISCUSSIONS 2, 2–3 (May 14, 2005), available at <http://mit.edu/phrj/conferences.html>.

15. A GLOBAL ALLIANCE, *supra* note 11, para. 290.

16. *Id.* para. 291.

others that we still have trouble coming to grips with, both ethically and analytically.

Second, and following directly from the first point, we might also have a better window on the phenomenon of global economic inequality. An important part of the story of the new economy is the shift in the distribution of income; less income is going to workers in the form of wages and more is being paid out to capital holders. Put simply, workers, in the aggregate, are seeing less in the way of returns from economic activity now than they did in the past.¹⁷ If most of us are destined to be workers, and most of us remain dependent on the income from work, how, why, and where the returns to work are declining—and what else this shift might be linked to—are questions of crucial interest.

Third, we are less likely to be distracted by disputes that are neither productive nor illuminating in the end. Insistence upon tight definitional distinctions and exclusions will inevitably produce disagreements about what problems and which workers raise basic concerns about human rights and are the proper objects of our concern.¹⁸ These disagreements, in turn, may actually impede rather than further our ability to effectively address the concerns of the workers involved. The distinction between forced and other forms of coerced labor is not likely to be resolved once and for all in any event, if only because new forms of forced labor seem to keep emerging and new practices of coercion are continually invented. If we were to relax our efforts to fix the border between lesser and greater or permissible and impermissible forms of labor market coercion, we might perceive, and be open to, a wider and more flexible range of policy and regulatory responses. However counterintuitive it may seem, some of these responses seem likely to get us farther in the end in curbing degraded forms of labor, both those that are blatant and extreme and those that are simply subtly destructive and corrosive, than a simple and singular focus on forced labor alone.

17. For example, in the United States, wages and salaries represented 45% of GDP, a marked decline from almost 50% in 2001. See Steven Greenhouse and David Leonhardt, *Real Wages Fail to Match a Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006, at A1.

18. The government of India for example, has maintained that “[l]abour may be forced not only owing to physical force . . . but also owing to hunger and poverty which compels [a worker] to accept employment for remuneration which is less than the statutory minimum wage.” *Report of the Government of India, in REVIEW OF INTERNATIONAL REPORTS UNDER THE DECLARATION*, pt. 2, at 200 (2000), cited in INT’L LABOUR OFFICE, STOPPING FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 9, n.1 (2001), available at www.ilo.org/declaration.