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Comment

The Autonomy of Law

Owen M. Fiss[†]

Law is an autonomous sphere of human activity that serves no master other than justice. We value law for that very reason and celebrate it by proclaiming that all must bow to the rule of law.

In recent years, Latin America, along with the rest of the developing world, has shown a renewed interest in law. To some extent this rule of law revival, as one author has described it,¹ is fueled by the market-oriented reforms that are a product of the development policy known as “neoliberalism.” The proponents of neoliberalism have sought to forge a link between that development policy and law, but in my mind there is no intrinsic connection. To insist upon one would deny the autonomy of law and ignore the fact that end of law is justice, not economic growth.

The second pillar of the rule of law revival—the ever-increasing ascendancy of the human rights movement—does not compromise the autonomy of the law, for the end of human rights is justice. In that respect the idea of human rights differs from neoliberalism. Yet, as we will see, in its quest for justice the human rights movement jeopardizes another of our cherished ideals, namely, democracy, and thus reveals the dark side of the law. The very recent triumphs of the human rights movement in Latin America, indeed the world over, underscore the fact that the requirements of justice are not necessarily compatible with democracy.

In sum, we can save law from the clutches of neoliberalism and the market only by affirming, as human rights advocates indeed do, the autonomy of law and its devotion to justice. But then we must also confront the threat that law, as an autonomous institution, poses to democracy and ponder afresh the value of the rule of law. Justice, alas, may not be the friend of either the market or democracy.

I.

Neoliberalism is a term used to describe a program for increasing the wealth of nations.² It requires abandonment of socialist policies in favor of a

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1. Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95, 95.
2. E.g., ECONOMIC DEVELOPMENT UNDER DEMOCRATIC REGIMES: NEOLIBERALISM IN LATIN

free market as the primary mechanism for ordering economic relationships. Specifically, neoliberalism prescribes privatization of state-owned industries, repeal of regulations that interfere with the operation of the free market, reduction of fiscal deficits, elimination of tariffs and other barriers to free trade, and freely floating exchange rates.

Neoliberalism has its roots in the Reagan-Thatcher years, but its greatest success occurred in the period following the revolutions of 1989 in Eastern Europe and the utter collapse of socialism as a model for development, or for that matter, anything else. Today, some claim that neoliberalism rests on a consensus among development economists, and refer to it (perhaps a little disparagingly) as the "Washington consensus." This expression reflects the pivotal role that the United States, as well as the World Bank and the IMF (both of which are located in Washington and dominated by the United States), have played in the formation and propagation of that consensus.

Neoliberal reforms have been instituted throughout the developing world, including Latin America. The neoliberal reforms of the Chilean economy began in an earlier and darker period at the hands of "the Chicago boys," a term used by Chileans to refer to economists associated with the University of Chicago and its philosophy.³ During the 1990s, we have witnessed a remarkable number of reforms under the banner of neoliberalism in the economies of most other Latin American countries, particularly in Argentina, Peru, Brazil, and Mexico. These reforms are of world historical importance.

An increasing demand for law has accompanied this institutionalization of neoliberal reforms in Latin America. Indeed, we are experiencing a new fascination and thirst for law in the region. The United States, the World Bank, and the IMF have amply supported and encouraged this interest in law. One hears so much talk these days about the importance of law in development policy circles that one is tempted to believe that there are two parts to the Washington consensus—neoliberalism and the rule of law.

To see the error in this program and to grasp more fully the distinction between neoliberalism and law, we must put aside any disagreements that we may have with neoliberalism as the governing development policy. We should assume that the establishment of a market economy will promote economic growth, and that such growth will improve the life of everyone, including the poorest—although their economic situation may not improve as much or as quickly as that of the rich. Let us further assume that any well-functioning market needs law.

At the very least, the market requires property law to determine who owns what. These rules are a precondition for trade and, by assuring owners of property that they will reap the benefit of any investment they might make, provide incentives to invest in the first place. Contract law is also indispensable to assure parties who are bargaining with each other that their promises will be enforced. Neither contracts nor property law, nor any other

AMERICA (Lowell S. Gustafson ed., 1994).

3. *E.g.*, SEBASTIAN EDWARDS & ALEJANDRA COX EDWARDS, *MONETARISM AND LIBERALIZATION: THE CHILEAN EXPERIMENT* (Univ. of Chicago Press 1991) (1987).

body of law (for example, torts or antitrust) that might be needed for the market to function, are self-enforcing. As a result, the market will also need an institution that can interpret and implement the relevant rules of law—a judiciary. This institution must be independent of the contesting parties as well as larger social and political forces.

While this account might seem to establish a linkage between neoliberalism and law—and it is often used for that purpose—it fails because it narrowly instrumentalizes the law. It does not recognize that law is an autonomous institution that serves a rich panoply of values, a good number of which, such as political freedom, individual conscience, and substantive equality, are unrelated to the efficient operation of the market or to economic growth. Law may be a precondition to the market, but once law emerges, it takes on a life of its own as an autonomous sphere of human activity. Sometimes contracts and property law further the operation of the market; sometimes they do not—it all depends on the particular rules. Some scholars, most notably Richard Posner in his colossal *Economic Analysis of Law*,⁴ have tried to show that each and every rule of the law in fact serves the market, but these efforts have failed.⁵ Too much of law remains unexplained, and no mechanism has been offered to explain why the law would systematically achieve this imagined result—efficiency. The more fundamental point to insist upon is that even when it can be shown that some particular rule of contracts, property, or any other body of law promotes the efficient functioning of the market, law renders that service not as its aim but as an incidental by-product of the pursuit of a larger end—justice.

To illustrate the conceptual disjunction between neoliberalism and law, let us imagine a nation that operates under a written constitution that allocates power between the executive and the legislature. The constitution provides that any change in compensation of government employees, including pension rights, must be enacted by the legislature. Let us assume also that while the legislature is not committed to pursuing a neoliberal policy, the president is of another mind. The president is fully devoted to neoliberal reform and as part of his program seeks to cut the public deficit by requiring retired employees to make further contributions to the pension fund and by requiring present employees to increase their contributions. The president implements this plan through an executive decree. A court committed to the rule of law would, of course, block this measure. Even though we can agree that the president's decree would serve neoliberalism, the court's decision honors the rule of law because it vindicates the allocation of power under the constitution and the implicit set of property rights that the constitution confers on government employees.

In this example—loosely inspired by an important decision of the Brazilian Supreme Court in October 1999⁶—the disconnect between the rule

4. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed., Aspen Publishers 1998) (1973).

5. See, e.g., Owen M. Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1 (1986); A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 *HARV. L. REV.* 1655 (1974).

6. Ação Direita de Inconstitucionalidade nº2.010-2—Liminar, Supremo Tribunal Federal,

of law and neoliberalism arises from the fact that neoliberalism does not stipulate the means by which the market should be brought into being. Neoliberalism projects an end state—the operation of a free market—but does not prescribe how that system is to be created. A further disjunction between the rule of law and neoliberalism arises from the law's recognition of values that are part of justice, but that are not fully expressed or protected by the market and in fact may be transgressed by it.

An example of this phenomenon might be a strong antidiscrimination law, derived either from an interpretation of the constitution or a statutory enactment, that prohibits employers from rejecting members of a racial minority on the basis of their race. Admittedly, such a law may serve the market on the theory that race is unrelated to productivity. But the law that I am imagining would constrain the employer even when that is not so, for example, when the employer caters to the racial preferences of customers or other employees, or when race is correlated with and thus used as a proxy for other factors such as educational achievement that are in fact related to productivity. Such a law is antithetical to neoliberalism and market principles because it circumscribes the ability of property owners—in this instance the owners of firms—to pursue policies that maximize their returns. Yet it serves justice because it eliminates a caste structure that disfigures society and stifles human freedom.

Law aspires to justice but does not always achieve it. Law belongs to this world and like any human institution may fall short of its lofty goals. Sometimes we can detect a lack of justice by imagining what the result would be under a freely operating market. Hernando De Soto used such an approach to great advantage in his important book, *The Other Path*.⁷ He acknowledged that Peruvian law purported to be just, but, using the market as a benchmark, showed how it had been captured by the mercantile class and used to serve their private purposes. Law became an instrument for excluding from Lima and its productive activities the masses who had migrated to the city from the Andes and the Amazon. To acknowledge, however, the contribution of the neoliberal model to development or to the process of showing how law has been perverted to marginalize, impoverish, and exclude productive agents from organized society neither makes economic growth the end of law nor transforms the market into the measure of justice.

Justice is everyone's responsibility. We all try to be just. The judiciary differs from everyone else, however, because it has no other end than justice and is organized in such a way as to serve that end. Because judges are impartial and hear grievances they might otherwise wish to ignore and because they must justify their decisions in terms of shared principles, they are more likely to do justice than any other institution, including the legislature and executive. For that very reason, adjudication should be seen as an elaborate structure of power devoted to making certain that justice is done. Some private law theorists have sought to confine the judiciary to the

decided on September 30, 1999, reported by Min. Celso de Melo, published in *Diário da Justiça*, October 11, 1999.

7. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott, trans., 1989).

achievement of corrective justice, but this is an error. The courts may seek distributive justice as well, as *Brown v. Board of Education*⁸ and its progeny demonstrate.

On the best of days, the neoliberal market may enhance growth and distribute rewards according to the contribution that individuals make to productivity. This outcome may be an element of justice. We should also acknowledge, however, that the market does necessarily entail certain other measures that are integral to justice, for example, laws that assure satisfaction of minimum vital human needs. In fact, the market may work against certain measures required by justice, such as the strong anti-discrimination law that I imagined. The market may be a useful human institution in so far as it promotes growth—an important public value, especially in the developing world—but it is not the full measure of justice.

II.

The rule of law revival that we are experiencing today is not just a product of the neoliberal development paradigm but also of the recent triumphs of the human rights movement. The growing attachment to human rights has been warmly applauded throughout the world, even by those skeptical of neoliberalism. It represents, as Michael Ignatieff has said, a revolution in human consciousness.⁹ As part of this revolution, there has been an increasing demand for law or, more specifically, for the treatment of human rights as justiciable claims rather than mere aspirations, and for legal institutions that are able to enforce these claims.

This revolution in consciousness began in the period immediately following the Second World War and arose largely in response to the genocidal atrocities of the Nazis. The idea of human rights holds that each and every human being, simply by virtue of his or her humanity, possesses a dignity that both limits what can be done to that person and determines what is owed to that person. For most of the fifty-year period following the War, however, human rights did not give rise to legal claims enforceable by a court of law, but instead generally operated as social ideals.

These ideals were articulated and codified in a number of legal documents—the Universal Declaration of Human Rights,¹⁰ the International Covenant on Civil and Political Rights,¹¹ and the International Covenant on Economic, Social and Cultural Rights¹²—but these texts did not establish the institutional apparatus to turn their aspirations into enforceable claims. Some national courts incorporated these ideals within their domestic legal systems and thus treated them as legal claims; in other instances, regional tribunals were established that also treated these aspirations as claims. Yet these

8. 347 U.S. 483 (1954).

9. MICHAEL IGNATIEFF, *PRAEMIUM ERASMIANUM ESSAY: WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS* 10-11 (1999).

10. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

11. *Opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171. (entered into force Mar. 23, 1976).

12. *Opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

practices were exceptional. Human rights were for the most part conceived as aspirations.

As such, human rights spawned social movements and inspired people to act in certain ways. They also provided a foundation for the shaming tactics of Amnesty International and Human Rights Watch. But they did not of themselves constitute legally cognizable claims. Las Madres de Plaza de Mayo, to take one example, demanded the protection of human rights, and the so-called big trial of the junta held in Buenos Aires in 1985¹³ may be thought of as a response to those demands. But it is important to remember that the leaders of the junta were convicted of violating Argentine law, not human rights or any of the international covenants that codified them.¹⁴

History took a new turn in the 1990s. Just as neoliberalism gained ascendancy and rule of law emerged as a part of the Washington consensus, things began to change in the human rights field as well. There was a growing demand for treatment of human rights as legal claims and for creation of international institutions to enforce them. In part, this shift might have resulted from recognition of the exceptional nature of the Argentine experience and the failure of other national systems, including those of Chile, Brazil, and Peru, to prosecute their dictators for gross human rights abuses. Even more likely, the heightened impulse to endow human rights with legal status stemmed from the fact that the world community once again confronted the horrors of genocide. This occurred in the former Yugoslavia as the Serbs murdered the Bosnian Muslims, and then in Rwanda as the Hutu majority slaughtered the Tutsi.

In response to the Yugoslav and Rwandan tragedies, the U.N. Security Council established two ad-hoc tribunals to try those responsible for crimes against humanity.¹⁵ In the fall of 1998, the growing demand for law and a permanent tribunal capable of enforcing human rights on a global scale produced the Treaty of Rome, which establishes the International Criminal Court.¹⁶ The United States has refused to sign the treaty, and with ample reminders of the position it had taken in the development context, it has been berated for its failure to submit to the rule of law.

Although I believe that it is a mistake to link neoliberalism with the rule of law, my attitude toward those who connect human rights and the rule of law is different. As I said at the outset, human rights do not compromise the autonomy of law, but rather build on it—they are an embodiment of justice. Human rights advocates try to use law to protect human rights, and that may seem to some to instrumentalize law, in much the same way as neoliberalism.

13. For a translation of the decision, see Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 238, 238-344 (1987).

14. See Owen M. Fiss, *Human Rights as Social Ideals*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 263, 264-65, 267-68 (Carla Hesse & Robert Post eds., 1999).

15. SC Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. S/RES/955 (1994) (establishing the International Criminal Tribunal for Rwanda); SC Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia).

16. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

But such an impression is mistaken, for human rights stand on another plane altogether from the market or neoliberalism in general. The end of neoliberalism is economic growth and a system that rewards people on the basis of their contribution to productivity, while the end of human rights is decisively more robust—the protection of human dignity. Human rights are all-encompassing and seek to enhance all of the values that justice might actualize. For this very reason, the slogan “law is human rights” has a ring of plausibility that “law is efficiency” never achieved.

On the other hand, the attempt of human rights advocates to capitalize on the autonomy of the law reveals the threat that law poses to another transcendent value: democracy. Law is autonomous and, as I said, serves no master other than justice, but such autonomy may interfere with the ordinary processes of collective self-determination. Admittedly, conflicts between justice and democracy occur even within the nation-state—the people demand one thing, the courts something else. This tension is, however, significantly heightened in the case of human rights because, while human rights are of a global character, the processes of collective self-determination are essentially local in nature—they take place in the neighborhood, city, province, or nation-state.

Some of the substantive norms of human rights—for example, those protecting freedom of speech—enhance collective-will formation and thus may be seen to further democracy. Other norms have a more tangential, perhaps even an antithetical, relationship to collective self-determination. Imagine, for example, a Latin American nation fully committed to an orthodox religious view that insists that a woman’s place is in the home serving as a mother and keeper of the house, and that as a result bars contraception, abortion, and divorce. Such laws may truly express the will of the people of the nation, including women, and thus enjoy the legitimacy of being in accord with democratic principles, but they nonetheless offend fundamental notions of gender equality conceived on a more universalistic scale. They are affronts to human dignity and thus unjust.

Certainly, there are clever analytic ways to make the requirements of substantive justice consistent with democracy. In the case I just described, for example, it may well be argued that without gender equality there can be no true democracy. Such arguments have considerable force, but our commitment to gender equality and our willingness to condemn the subordination of women as unjust does not depend upon a belief that equality contributes to democracy. We value gender equality in and of itself. This point can be seen more clearly with other human rights, for example, the right to medical care, housing, or a clean environment. Our commitment to these rights stems not from a desire to enhance democracy but to affirm a certain understanding of human dignity.

Another, and perhaps more procedural, conflict between human rights and democracy arises from the risk of divergent interpretations of a shared norm. Local institutions, some of which may be fully democratic, may have one interpretation, while a global tribunal may have another. To fully understand this conflict, consider a substantive norm of justice over which

there is virtually no disagreement around the world: the prohibition of torture. The specter of divergent applications of that norm emerged in the Pinochet extradition proceeding.¹⁷ The Spanish judge, Baltasar Garzón, who sought to extradite General Pinochet from England and then try him for crimes committed in Chile may have been seeking justice for all the world, not just for Spanish citizens, but such a prosecution might have violated the decision of the Chilean people not to prosecute Pinochet for those crimes. For them, justice may have been served, at least in 1990, by declining to prosecute him.

Sometimes I bridle at this example, because the original decision of Chile in the early 1990s not to prosecute Pinochet for torture and other crimes did not reflect a process of full and fair deliberation. In the wake of the extradition proceeding, a criminal prosecution against General Pinochet has begun in Chile, thus reinforcing the impression that the initial decision not to prosecute him was more an exercise in self-amnesty than a considered judgment about the requirements of justice.¹⁸ The initial decision to forgo prosecution was made in a context where Pinochet controlled the army, the country operated under a constitution ratified during his reign of terror, and the Supreme Court was fully controlled by his appointees.

The case of Uruguay may present a more appropriate symbol of the conflict arising from the pluralization of decision centers under a regime protecting human rights. The decision to forgo the prosecution of the Uruguayan dictatorship for human rights violations was made after a plebiscite that most observers, including Carlos Nino,¹⁹ considered to be fair and open. Suppose that Judge Garzón had invoked the idea of universal jurisdiction, implicit in the idea of human rights, and sought to prosecute the Uruguayan junta. Human rights advocates might have applauded the result, but it would have entailed empowering the Spanish judge to place his view of justice over that of the people of Uruguay.

The international tribunals established in the late 1990s are sometimes heralded as an attempt to moderate the conflict between justice and democracy inherent in the activism of the famed Spanish judge in the Pinochet case, but they do not do so. True, they centralize the decision to prosecute and eliminate the oddity of having one nation's judge appoint himself as the agent of universal justice. The tribunals rationalize justice but do not democratize it, for these tribunals can also make decisions that run counter to the sentiment of a local collectivity and its understanding of justice. There are, moreover, no democratic institutions to which these international institutions must answer. There may be mechanisms to hold them accountable, but not to a *demos*.

The two ad-hoc international tribunals established in the late 1990s to enforce human rights are accountable to the United Nations, but that

17. See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286 (1999); Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (2000).

18. AMNESTY INT'L, *Chile*, in ANNUAL REPORT 2000, at <http://www.web.amnesty.org/web/ar2000web.nsf/countries/7633dc997bf5ee96802568f200552911?OpenDocument> (last visited Apr. 20, 2001); HUMAN RIGHTS WATCH, *Chile: Human Rights Developments*, in WORLD REPORT 2000, at <http://www.hrw.org/wr2k/americas-02.htm> (last visited Apr. 20, 2001).

19. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 36 (1996).

international organization is not a democratic one. Not all representatives to the United Nations are fully responsive to the people of the nations that send them—just think of the case of China—and the voting structure of the General Assembly is not democratic. Democracy requires one person, one vote, not one nation, one vote. What possible democratic principle would justify giving Brazil, with 170 million persons, the same vote as Guyana, with a population of under 800,000? The situation is even worse in the Security Council, where each of the five permanent members, not one of which comes from the Southern Hemisphere, has a veto power.

The United Nations was brought into being by treaty and thus the tribunals that are accountable to it may appear to be legitimated by the treaty-making process. Each nation must consent to a treaty in order to be bound by it. This same element of consent may apply to the new International Criminal Court, which was established by treaty. In my view, however, the consensual element inherent in the treaty-making process does not give these tribunals a democratic foundation. For one thing, the internal processes of treaty ratification are not necessarily democratic. Would the ratification of a treaty by China represent an act of consent by its citizens? Even in the United States, the ratification of a treaty lies in the hands of the Senate, which is not apportioned according to democratic principles but rather is based on one state, two votes. Moreover, even if the treaty is ratified by a democratically elected body and thus may be said to rest on the consent of the nation, that particular form of consent lies properly within the domain of contracts, not democratic politics. Democracy requires assent of the governed in periodic elections to make certain that the government acts in accordance with the present-day wishes of present-day citizens.

Of course, the conflict between justice and democracy is present even at the national level, and in that context there are many, including myself, who see an important place for justice and the rule of law. We cannot assume, however, that the priority we assign to justice within the national sphere automatically carries over to the international one. Although justice requires insulation of the courts from politics, there are important ties between the citizenry and the judiciary within the nation-state that are lacking on the global level.

The federal judicial system in the United States, to take one example, is one of the most independent in the world, but judges are nominated by the President and confirmed by the Senate. They depend on Congress and the President to protect their salaries from inflation and to enforce their decrees. Congress can override a statutory interpretation by simple legislation and can, with the concurrence of a large number of states, override a constitutional interpretation by amendment. Admittedly, in all of these instances the voice of the ordinary citizen is muffled and distorted, but these linkages to the people are sufficient to justify the view that the federal courts are part of the democratic system understood as a *system*. To embrace international human rights tribunals in a similar way, however, we would need political institutions at the international level as democratic in character as we have in the national

sphere, for example, a fully democratic world legislature and perhaps a world prime minister or president.

For visionaries, these institutions may lie in the future, but only if we transcend differences in language and culture and establish what Jürgen Habermas has called a “world public sphere.”²⁰ The international human rights movement, the plank of neoliberalism that calls for free trade, and the extraordinary developments taking place these days in the technology of communications and transportation may be bringing a world *demos* into being at an ever accelerating rate. But it does not exist yet. Nor do we have anything that might remotely resemble world representative institutions. As a result, the international tribunals recently established to protect human rights remain unaccountable to the citizens of the world organized according to democratic principles, and thus should be seen as a loss for democracy even though these tribunals further justice.

III.

Justice and its servant the law are unqualified human goods. Human rights spring from the essential dignity of each person, and thus are able to give content to justice in a way that is not true of neoliberalism. But because certain human rights and the mechanisms to enforce them are sometimes in conflict with democracy, the revolution in consciousness and institutions sparked by the human rights movement reveals that justice is not the only good and that even so noble an ideal as the rule of law has its limits.

20. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 514 (1996).