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FOREWORD

LATIN AMERICA: ECONOMIC DEVELOPMENT AND SOCIAL JUSTICE

ROBERT J. DELAHUNTY*

The *St. Thomas Law Journal* is proud to have hosted the distinguished panelists who contributed essays to this volume on Latin America: Economic Development and Social Justice. St. Thomas Law School can claim a special interest in legal and policy issues touching on Latin America. As a Catholic institution of learning, it welcomes ideas and influences from that predominantly Catholic region, and seeks to deepen its ties with policymakers, scholars and practitioners from it. As a school situated in the commercial center of a border state, it is sensitive to the growing importance of cross-border interactions, whether they be in trade, politics, culture, or the movement of people. Finally, its interest reflects the recognition that only too often, the United States "has taken its southern neighbors for granted—a mistake that is potentially disastrous in any relationship."[1] Yet at the very time at which the United States has come to need Latin American partners to support its efforts in "securing sustainable energy supplies, combating and adapting to climate change, and combating organized crime and drug trafficking," Latin American countries "are diversifying their international economic and political relations, making them less reliant on the United States."[2] Accustomed for decades to prescribing lessons for the rest of the world, North Americans are belatedly beginning to discover that they have much to learn *from* it—and not least from the Latin peoples and nations with whom they share a continent and a hemisphere. This timely symposium was conceived in that spirit of openness and solidarity.

The keynote speaker at the symposium, Jorge I. Domínguez, the Vice Provost for International Affairs at Harvard University, provides a master-

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1. PARAG KHANNA, THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER 122 (2008).

2. THE BROOKINGS INSTITUTION, RETHINKING U.S.-LATIN AMERICAN RELATIONS: A HEMISPHERIC PARTNERSHIP FOR A TURBULENT WORLD 3 (Nov. 2008), *available at* http://www.brookings.edu/reports/2008/1124_latin_america_partnership.aspx.

ful and penetrating analysis of the major political and economic trends in Latin America from the authoritarianism of the 1970s to the more promising present.[3] Domínguez addresses the question, crucial not only for Latin America, of the compatibility of free markets and democratic governance.[4] Domínguez argues persuasively that:

> [D]uring the last third of the twentieth century Latin Americans discovered that the authoritarian regimes in their countries did not make the economies grow and did not provide for prosperity. Because the economic record of dictatorship in Latin America was so poor, it was easier in this region at this time to shift the course of history toward a future that would be open for the politics of hope.[5]

Domínguez identifies four ways in which democracy may serve and foster a market economy: by deconcentrating economic power, democracy makes it easier to deconcentrate political power as well; democracy facilitates the removal of bad rulers without coups, insurgencies, or revolutions; democracy enables the creation of voluntary bodies—political parties, nongovernmental organizations, social movements—that promote nonviolent change; and democracy encourages investment and capital formation because it can credibly promise more stable and predictable governmental policies for the future.[6] Domínguez demonstrates how Latin American governments in the 1980s and 1990s—including Chile, Argentina, and Brazil—absorbed and applied these lessons.[7] Domínguez cautions, however, that much of Latin America has still to taste the promised benefits of economic liberalization—in large part because income inequality remains a rooted and pervasive phenomenon.[8] Democracy will only be consolidated in Latin America, he seems to be saying, when the prosperity that free markets bring is more widely and fairly diffused.[9]

In an erudite and widely ranging article, John C. Reitz, Professor of Law and Associate Dean for International and Comparative Law Programs at the University of Iowa College of Law, addresses a central question of the relationship between law and politics.[10] As Reitz notes, the tension between law and politics is an enduring one that is "at the heart of virtually all

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3. Jorge I. Domínguez, *The Politics of Hope: Free Politics and Free Markets in Latin America*, 5 U. St. Thomas L.J. 625 (2009).

4. *Id.* For other important recent studies of this question, see Amy Chua, World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability (2004), and Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad (rev. ed. 2007).

5. Domínguez, *supra* note 3, at 630.

6. *Id.* at 631–633.

7. *Id.* at 633–636.

8. *Id.* at 637.

9. Domínguez, *supra* note 3.

10. John C. Reitz, *Politics, Executive Dominance, and Transformative Law in the Culture of Judicial Independence*, 5 U. St. Thomas L.J. 743 (2009).

conceptions of the rule of law,"[11] and helps to explain why even in nations like France and the United Kingdom, "substantial institutional protections for the judges' independence were only adopted recently."[12] Assuming that the antagonistic values of judicial independence and political responsibility can be brought into an appropriate balance, Reitz seeks to identify the conditions that would foster in Latin America a culture of judicial freedom from executive domination.[13] Reitz argues that "one important value underpinning the culture supportive of substantial judicial independence is a view of law as 'transformative' of society, and that without that view, a culture is unlikely to be sufficiently concerned about executive control over the courts to insist on the enactment of significant institutional guarantees for judicial independence." By "transformative law," Reitz means law that "is intended to change society," not just "enforce the status quo."[14] Thus, Reitz says, federal antidiscrimination statutes in the United States exemplify "transformative law," in part because they aim at decreasing inequalities by applying uniform legal categories in a depersonalized way, whereas traditional Islamic law, by contrast, is non-transformative, largely because it rests on personalized and situational decision-making.[15] Democracy tends to promote judicial independence, Reitz argues, because it gives the popularly-elected executive a growing interest in transformative law and its applications.[16] But as the executive's stake in judicial outcomes rises, the pressure for judicial independence mounts with it—for if the executive is perceived as controlling the courts' decisions, the courts will fail to maintain their legitimacy.[17] Transformative law thus "generat[es] support for judicial independence."[18] Reitz substantiates his theoretical account with specific case studies of Britain, the United States and France.[19] While Reitz disavows the claim that "belief in transformative law will quickly or easily lead to formation of a culture supportive of greater degrees of judicial independence," he does contend that that belief "sets up the dynamic" that tends towards such independence.[20] Reitz expresses the hope that "there is an opportunity to renew the commitment to judicial review" in Latin America.[21] If there is a missing piece in Reitz's powerful argument, it is that he does not consider that judicial independence may also *block* the emergence of "transformative laws" that promote social and economic

11. *Id.* at 745.
12. *Id.* at 772.
13. Reitz, *supra* note 10.
14. *Id.* at 761.
15. *Id.* at 761–765.
16. *Id.* at 769.
17. *Id.* at 770.
18. *Id.* at 769.
19. Reitz, *supra* note 10, at 780–793.
20. *Id.* at 804.
21. *Id.*

equality—as happened, *e.g.*, during Franklin Roosevelt's New Deal,[22] or again (some scholars claim) in some contemporary constitutional regimes when radical political forces have pressed for fundamental change.[23]

Rogelio Pérez-Perdomo, the Dean of the Law School of the Universidad Metropolitana in Caracas, Venezuela, explores the antimony of law and politics from another angle.[24] Pérez-Perdomo first underscores the importance of the "rule of law" for Latin American society.[25] By the "rule of law" he means "that those invested with political power act in accordance with the constitution and legislation, and especially, that they respect the people's rights."[26] For Pérez-Perdomo, if the rule of law were conceived of merely as the recognition of a sphere of private action sheltered from state interference or merely as formal, rule-bound equality, it would be compatible with extreme material inequalities, and would thus give insufficient weight to the normative demands of social justice.[27] Here, Pérez-Perdomo's article recalls Reitz's view of "transformative law," for the "central idea" of social justice as Pérez-Perdomo views it "is that law and the state should favor people with social disadvantages in order to promote a more equal society in material or social terms . . . ."[28] The tension between a purely formal rule of law and this substantive conception of social justice (or more generally between "law" and "politics") arises because "[t]he operation of the legal system itself can limit or even destroy the search for material equality embodied in legislation. . . . The legal system . . . imposes structural limitations on the search for social justice through law."[29] Pérez-Perdomo rejects revolutionary political violence as the corrective to this structural problem, and instead looks to the emergence of "public interest" or "cause" lawyers to soften the antagonism (in Latin America and elsewhere) between social justice and the formal rule of law.[30]

Eglé Iturbe de Blanco, as the former Finance Minister of Venezuela, writes with special expertise and authority on the emergence of women in leadership roles in Latin American politics.[31] Amplifying Jorge Domínguez's theme that broadly-based societal consensus is needed to anchor democratic institutions and legal reforms in Latin America, Iturbe de

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22. For an account of the New Deal's constitutional conflict with the Supreme Court, see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 290–311 (1998).

23. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

24. Rogelio Pérez-Perdomo, *Lawyers, Rule of Law, and Social Justice: A Latin American Perspective*, 5 U. ST. THOMAS L.J. 730 (2009).

25. *Id.* at 731.

26. *Id.*

27. *Id.* at 735.

28. *Id.* at 736; *see* Reitz, *supra* note 10.

29. Pérez-Perdomo, *supra* note 24, at 736–737.

30. *Id.* at 737.

31. Eglé Iturbe de Blanco, *Women: Power and Development in Latin America*, 5 U. ST. THOMAS L.J. 675 (2009).

Blanco asks how it could be possible to achieve such a result "when one-half of the population holds less than one-fourth of the important positions in which consensus-based solutions ought to be formulated and proposed."[32] Her answer is that it would *not* be possible: consensus-building requires "the active and genuine participation of women. Their vision—their perception and points of view—must be part of the solution, which cannot happen if women do not . . . wield real power to foster real changes."[33] Although she carefully documents the progress of Latin American women in attaining positions of political leadership, especially in ministerial positions (there have been more than four hundred female ministers since 1994), she also finds that this phenomenon has not, thus far, translated into more power or more development.[34] This is so because, "in general, [women ministers] have not been included in the inner circles of decision-making that surround the president of the republic."[35] One of Iturbe de Blanco's recommendations for the way forward is to introduce more *formality* into the governmental decision-making process, thus bringing real and formal power into closer correspondence.[36]

Antonio F. Perez, Professor of Law at the Columbus School of Law at the Catholic University of America and a former member of the Inter-American Juridical Committee of the Organization of American States (OAS), focuses on the problem of crafting an appropriate hemispheric legal regime for the protection of consumer rights.[37] For Perez, progress in the ongoing OAS negotiations over the terms of such a legal regime will require "reconceptualizing the problem of international consumer protection as a problem in international trade and politics rather than a technical set of issues in a private international law."[38] Intimately familiar himself with the negotiations over the consumer protection problem, Perez identifies two main reasons why its solution has proven so difficult: first, because of the need to answer the general problem of vindicating numerous small claims—a problem that states face in domestic as well as in cross-border trade; and second, because of a set of more specific problems arising in the context of cross-border transactions between suppliers and consumers, especially as mediated through the internet.[39] Perez argues that finding a solution to the problem of international consumer protection should matter to the OAS not only for economic reasons (including both fraud prevention and ensuring a wide and deep array of consumer choices) but also for socio-

32. *Id.* at 692; *see* Domínguez, *supra* note 3.
33. Iturbe de Blanco, *supra* note 31, at 692.
34. *Id.* at 696.
35. *Id.* at 690.
36. *Id.*
37. Antonio F. Perez, *Consumer Protection in the Americas: A Second Wave of American Revolutions?*, 5 U. St. Thomas L.J. 698 (2009).
38. *Id.* at 699.
39. *Id.* at 704.

political reasons and indeed for reasons of foreign policy.[40] Perez's paper is at its most interesting (for this reader at least) in its exploration of the socio-political justifications for consumer protection that do *not* "tend[ ] to objectify the person, treating him or her as a mere economic unit, seeking to maximize welfare understood in purely hedonistic terms."[41] Seen in this light, consumption is instead to be understood as "a morally laden fact [that] can evince and enable the exercise of political power."[42] Thus, a heightened recognition of their power as consumers, Perez suggests, "will begin to enable Latin American consumers to challenge the deep-seated sense of fatalism and powerlessness that seems for many to be characteristic of Latin American culture."[43] Furthermore, "creating better legal regimes for consumers to vindicate their rights (the supply side of rights, if you will) and building a greater sense of entitlement and empowerment among consumers (the demand side of rights, if you will) changes the political equilibrium between the political class and citizens."[44] Finally, from a foreign policy angle, Perez argues that "a more active and pro-consumer U.S. engagement in the [OAS consumer protection negotiations] process can show the commitment to values all Americans can share, from Alaska to Tierra del Fuego"[45]—values that "a vibrant consumer culture can further," including "social solidarity through group action and, therefore, support for greater transparency and intolerance of governmental corruption, which is the political equivalent of private fraud."[46] Perez concludes by outlining a new U.S. legal strategy that would implement this concept.[47]

Dr. María de Lourdes Dieck Assad, the Director of the School of Government, Social Sciences and Humanities, at the Instituto Tecnológico de Monterrey in Mexico, takes as her topic the relationship between the promotion of human rights and "social cohesion."[48] Although she points out that there is no universally agreed-on definition of "social cohesion," as she uses the term it refers principally to the reduction of inequality and poverty and the promotion of social inclusion or belonging and of well-being.[49] In her view, promoting human rights and advancing social cohesion are inescapably intertwined: "they overlap, and one is imbedded in the other, so that they cannot be viewed as separate issues. Hence, public policy that addresses them must be designed in complete coordination."[50] Dieck Assad

40. *Id.* at 706–724.
41. *Id.* at 716.
42. *Id.* at 718.
43. Perez, *supra* note 37, at 718.
44. *Id.* at 719.
45. *Id.* at 724.
46. *Id.*
47. *Id.*
48. Maria de Lourdes Dieck Assad, *Social Cohesion as the First Item in the Human Rights Agenda: Mexico's Performance*, 5 U. St. Thomas L.J. 639 (2009).
49. *Id.*
50. *Id.* at 640.

first charts out Mexico's vigorous human rights policy. She then turns to establishing the relationship between human rights and social cohesion, arguing that:

> If the government does not address issues inherent to SC [social cohesion] . . . , and if it does not carry out the necessary, specific actions to promote a sense of belonging, commitment and social solidarity, economic growth will be slow and unsustainable. . . . Furthermore, a lack of SC will contribute to a weakening of democracy . . . .[51]

She concludes with a detailed and informative examination of various indicators for measuring Mexico's and Latin America's performance in promoting social cohesion.[52] Thus, *e.g.*, she reports that while there have been significant improvements in basic indicators of well-being in Latin America in a relatively brief period—such as increases in life expectancy at birth and decreases in child mortality and malnutrition—economic growth has been slow for three decades, poverty remains widespread and persistent, and the region continues to have the most regressive income distribution in the world.[53] Dieck Assad proposes a redesign of human rights policy that makes the achievement of social cohesion in all its dimensions its highest priority.[54]

The dialogue between Mariana Hernandez Crespo,[55] Assistant Professor of Law at the University of St. Thomas, and Frank Sander, *Emeritus* Professor of Law at Harvard Law School, offers fascinating glimpses into two projects: first, the origins of Alternative Dispute Resolution (ADR), whose study Sander pioneered, and second, Hernandez Crespo's own innovative research on the application of one of Sander's key ideas—"the multi-door courthouse"—to the Latin American setting.[56] Sander explains that the idea of the multi-door courthouse was "to look at different forms of dispute resolution—mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration) . . . . [to] see whether [there was] some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes."[57] Hernandez Crespo shows how this idea can be fruitfully applied in the Latin American context, not only to provide more affordable justice than the judicial system can, but also more generally to

51. *Id.* at 649.

52. *Id.* at 652–660.

53. *Id.*

54. Dieck Assad, *supra* note 48.

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56. Frank Sander & Mariana Hernandez Crespo, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. St. Thomas L.J. 665 (2009).

57. *Id.* at 670.

promote social decision-making that is fairer, more inclusive, more fully consensual, and more respectful of human dignity. She says:

> I saw . . . that ADR methods, particularly the multi-door courthouse, could help bring the disenfranchised majority into the ball game on a level playing field . . . . Coming from Latin America (from Venezuela) I have seen that getting into the participatory circle is on many people's minds . . . the poor and disenfranchised there make up the majority and have little say in how things are run. . . . I saw that the multi-door courthouse could promote this opportunity for citizens to experience participation . . . by selecting the conflict-resolution process, by experiencing a different form of dispute resolution, and by having more options—not just the courtroom and the court's coercion as the main mechanisms for dispute resolution.[58]

Hernandez Crespo has conducted a pilot program in Brazil that aims at exploring how the multi-door courthouse can be used exactly in this way to enlarge "the participatory circle." Her effort to promote social and political change through engaging the poor and disenfranchised contrasts with (or perhaps complements?) the more top-down approaches advocated by Iturbe de Blanco's call for women to hold more positions within political *élites* and by Pérez-Perdomo's hopes for a cadre of professionally-trained "public interest" litigators.[59]

Taken together, these fine essays provide a searching and well-informed diagnosis of the main legal and policy problems currently facing Latin America, and offer sound, practicable ideas for the way forward.

58. *Id.* at 668.

59. *See* Sander & Hernandez Crespo, *supra* note 56; Iturbe de Blanco, *supra* note 31; Pérez-Perdomo, *supra* note 24.