

Globalization, Free Markets, and Social Justice: A Critical Legal Analysis of the Welfare State, Development-Induced Displacement, and Unemployment

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Abstract

This paper examines critically the various layers of dynamics of interactions between economic globalization, free-market orthodoxy and the basic requirements of social justice in the current state system. The study explores the structural transformation of the Welfare State from provider of direct welfare to a regulatory institution that enables the market in the light of globalization and neoliberal jurisprudence, by focusing on the evaluation of the changes in the concept of the social contract. The paper explores two core socio-legal pathologies of economic integration: Development-Induced Displacement (DID) and the structural precarity or unemployment, through an analysis of the international regimes and laws, constitutional rights, state practice and judicial responses, focusing on jurisdictions from the global South. The analysis shows that open market policies have sparked transnational capital flows and overall economic development, but that their working process creates externalities that affect the whole system, which happen to be disproportionately opposed to the many susceptible groups. This paper will advance these arguments in the context of critical legal theory, human rights frameworks and constitutional jurisprudence, establishing that the economic growth model will not solve social inequalities without affirmative legal actions. The modern Welfare State cannot, therefore, simply go back or go back to being a hyper-minimalist state that is efficient in the market. Rather it should evolve towards a stronger, protective and rights-based regulatory system that can enforce social justice, which is currently being undermined by unchecked economic forces.

A. Introduction

Economic globalization, in the name of socio-legal principles of deregulation, privatization, trade liberalization and capital mobility, was hailed as a driver of economic growth and poverty eradication over the last four decades¹. The modern sovereign state was historically founded on its ability to secure socio-economic guarantees and distributive justice for its citizens over and against the systemic economic vulnerabilities. In the social democratic settlement that followed World War II, law served mainly as a pacifying tool to balance the growth of private capital accumulation and public welfare². To make sure that the benefits of economic growth were distributed throughout society, courts and legislatures built up

¹ See Joseph E. Stiglitz, *Globalization and Its Discontents* 21–28 (2002).

² See David Harvey, *A Brief History of Neoliberalism* 64–70 (2005).

'structural protections' including collective bargaining standards, progressive tax regimes, land tenure protections, and universal social security systems.

The legal balance was upset, however, with the advent of transnational economic integration. The globalization project was not only a process of de-centralisation of state sovereignty but one of a restructuring of the nature of statehood in law. The reconfiguration of sovereignty to the interests of transnational capital was termed by legal scholars as a new global constitutionalism. In this governance structure, the key decisions of the economy are protected from democratic scrutiny by multilateral agreements, bilateral investment treaties and structural adjustment programs. This change in structure is expressed as a fundamental conflict between two opposing sets of legal orders: the transnational market paradigm with its emphasis on absolute property rights, freedom of contract and investor protection; and the constitutional social paradigm, based on human rights instruments and social state doctrines that require the sovereign to ensure human capabilities and dignity³.

Globalization's structural paradox is that it has an unequal legal structure that imposes heavy regulatory pressures on domestic legal orders for deregulation of labour markets, land appropriation for industrial growth, and uniform reduction of social security measures⁴. Labour is geographically constrained, whereas capital is free to move and has strong legal enforcement systems in international jurisdictions, but weaker ones in domestic jurisdictions, which is leading to increasing fragmentation of domestic labour law. In the same way, although international arbitral tribunals can award binding decisions of millions of dollars against states, socio-economic rights are restricted to internal political decisions or to platitudes of hope⁵. Neoliberal law is the institutional lineage of the Washington Consensus which is a series of market oriented policy prescriptions promoted by multilateral financial institutions and by international bodies and organizations of trade⁶. In this legal system, the state's duty is primarily to create private property rights, to guarantee monetary stability, to enforce contracts, and to eliminate legal impediments to the movement of capital⁷. This law has a special conception of the rule of law based almost entirely on the predictability of markets and contract enforcement. According to this market-formalist doctrine, legal stability is largely important in terms of the transaction costs it saves investors and the corporations. The law is considered more as a means of providing a neutral platform on which independent economic actors strive for utility maximisation rather than as a means of creating a substantive socio-economic equality. The free market is not a natural process that regulates itself, but rather an institution, built and sustained, by certain legal rules, which determine the distribution of market power⁸. Moreover, these rules have been reframed by globalised neoliberal jurisprudence; under it, wealth gaps are not seen as socio-legal decisions but rather as neutral provisions of the market which clear it from the nuisance of democratic

³ See David M. Trubek & Alvaro Santos, *Introduction: The Third Wave of Law and Development Studies and the Emergence of a New Neoliberalism*, in *The New Law and Economic Development: A Critical Appraisal* 1, 8–15 (David M. Trubek & Alvaro Santos eds., 2006).

⁴ See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 Hum. Rts. Q. 755, 762–768 (2005).

⁵ See Upendra Baxi, *The Future of Human Rights* 132–145 (3d ed. 2008).

⁶ See John Williamson, *What Washington Means by Policy Reform*, in *Latin American Adjustment: How Much Has Happened?* 7, 9–20 (John Williamson ed., 1990).

⁷ See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *The New Law and Economic Development: A Critical Appraisal* 19, 63–71 (David M. Trubek & Alvaro Santos eds., 2006).

⁸ See Roberto Mangabeira Unger, *Free Trade Fallacy: Theoretical Priorities and Economic Development* 42–50 (2007).

redistribution.⁹ In addition, international investment law has built walls to this insulation, such as the Investor-State Dispute Settlement instruments. States can be held liable by foreign investors for any action that reduces the profits they anticipate receiving from their business operations under investor-state dispute clauses in investment treaties, even if the action is taken in good faith to ensure public health, safety or even environmental sustainability. This creates a "regulatory chill" for host states: A progressive social welfare law would be unlikely to be passed because of the risk of costly arbitral litigation.

In contrast to market formalism, contemporary social justices theories espouse a substantive equality such that the presence of substantive economic inequalities is a bar to the enjoyment of individuals' basic rights. There is a foundational theory of justice which has been developed by John Rawls, which states that inequalities in socio-economic status are acceptable only if they are in line with the Difference Principle; which is that they benefit the least well off members of society the most. The legal system does not meet criteria of justice in a globalized economic system where the free market policies tend to focus on concentrating wealth and passing on systemic risks to vulnerable communities. In extending this normative framework to socio-legal practice, Amartya Sen and Martha Nussbaum's Capabilities Approach proposes an alternative understanding of development, one that posits development as the enhancement of real human freedoms the capabilities enjoyed by individuals to lead a life they value to have and suggests that the role of the law is to systematically eliminate those structural obstacles that hinder human flourishing, including poverty, illiteracy, displacement and labor exploitation¹⁰. When a community is displaced by the state or the market without adequate rehabilitation or when the capability of the individual and collective to earn a living is taken away, there is a direct impact on their capability. In a constitutional democracy, social justice is a moral law of the state which seeks to protect and redistribute against the aggregate market forces¹¹.

II. Socio-Legal Pathology: Development-Induced Displacement

One of the most obvious cases of how constitutional rights are in conflict with global capital expansion is Development-Induced Displacement (DID). Large parcels of land are bought for Special Economic Zones, mega-dams, mining, industrial corridors and commercial real estate projects by state governments looking to bring in foreign direct investment and develop large infrastructure projects¹². Traditionally, the term public purpose would include state-owned and state-operated infrastructure, including public roads, railways, post offices, military installations and more. In the era of globalization, however, the definition of public purpose has grown broader even for private commercial projects, public-private partnerships and privately owned industrial parks and the legal argument has shifted to a focus on indirect benefits to the public interest.

This growth may give rise to a violation of the fundamental constitutional rights in a systemic way. Legal institutions dealing with land acquisition in many developing countries were often based on provisions of colonial law for the rapid acquisition of land without compensation by the state. These laws were relics

⁹ See Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* 88–95 (2002).

¹⁰ See Amartya Sen, *Development as Freedom* 70–86 (1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* 17–32 (2011).

¹¹ See John Rawls, *A Theory of Justice* 60–75 (rev. ed. 1999).

¹² See Michael M. Cernea, *Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement*, 35 *Econ. & Pol. Wkly.* 3659, 3660–3663 (2000).

that were only concerned with compensation in monetary terms to individual landowners who owned land titles, ignoring communal land ownership structures, customary land use rights, and non-monetized ways of life of agricultural workers, artisans and indigenous peoples. According to the sociological and legal framework, there are eight major socio-economic risks associated with forced displacement, such as: landlessness, joblessness, homelessness, marginalization, food insecurity, rise in mortality and morbidity rates, common property resources loss, and social disarticulation.

These risks of impoverishment can be analyzed and understood within an international human rights framework, and they align with basic violations of one's rights. The right to livelihood is often infringed by forced displacement, as it is part of the right to life, and the right to adequate housing and protection from arbitrary eviction under international covenants and customary land and cultural rights of indigenous peoples. The fault of the traditional land acquisition systems is their formal market-value compensation system. Cash compensation is based on a flawed legal premise, that land is an interchangeable economic asset that can be acquired on the market. But for agrarian and indigenous communities, land is not just social status and cultural identity, it is also an ecological sustainability and intergenerational security. But when the compensation is in cash in less developed land markets, the cash is often lost in the local market through financial illiteracy or inflation, pushing uprooted families into endless cycles of landlessness and poverty.

The Indian experience of the development of land acquisition law is a powerful example of the structural tension between market development and socio-economic justice. The Land Acquisition Act of 1894 was in operation for more than a century throughout the Indian subcontinent, controlling land acquisition. This legislation gave the executive the broad authority to take any land under the banner of public purpose with the minimalistic requirements of a simple notification process, with little to no cash compensation based on the recorded transaction value, which was often undervalued in order to minimise tax on the transaction. It was decades of grassroots opposition to large projects that showed the severe human costs of this colonial model. Displaced citizens were not compensated and had their rehabilitation efforts not been institutionalized, mainly composed of the Scheduled Castes and Scheduled Tribes, numbering in the millions.

The Indian Parliament passed the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013' in response to the continuing issues with constitutional challenges and social conflicts. This law created a new and fundamental rethinking of the legal principles relating to eminent domain, applying social justice principles to the legal process itself. It also instituted Social Impact Assessments as a mandatory requirement to consider the social impact of a project as it applies for approval before it is built, in an independent assessment process. It established explicit informed consent procedures, and required 70-80% consent for public-private partnerships and private commercial projects. In addition, it created the requirement of full rehabilitation, rather than only monetary compensation: land for land, jobs guaranteed, housing provided, infrastructure developed in resettlement centers. Constitutionally, constitutional courts in developing countries have increasingly interpreted socio-economic protections, such as the right to social security, into the basic constitutional rights, and confirmed that the right to life also includes the right to live in a humane manner, meaning right to shelter, clean environment and sustainable livelihoods. It has been decided by courts that, in cases where displacement is inevitable, the State has an absolute constitutional obligation to implement full rehabilitation before physical displacement.

III. The Structural Precarity in relation to Free Markets and Informalisation-

In addition to land displacement, the economic globalisation has also substantially changed the framework of domestic labour law. National governments are under strong structural pressure to loosen the grip on the labour market, in order to draw in volatile foreign investment. In legal terms, labour flexibility means the reduction of the formal legal obligations for terminating workers, decreasing the requirements for severance payments, controlling the scope of collective bargaining rights, abridging the scope of legal right to strike and allowing temporary contract labour force for essential core functions of business¹³ These processes lead to a regulatory race to the bottom between developing and transition countries in terms of the legal costs of firing workers, the extent of severance payments, the extent of collective bargaining rights, the extent of the right to strike, and the possibility of hiring temporary contract workers for key business areas. States are actively dismantling protective labour laws or deliberately choosing to go on pretending they do not exist. States purposefully weaken protective labour legislation or choose an explicit approach to administrative non-enforcement in order to attract FDI, and become part of the process of Global Value Chains.

The traditional, bilateral nature of the employment relationship, with a more or less clearly defined employer, fixed workplace and statutory guarantees of the employment relationship, is being systematically compromised through the spread of production networks across various national jurisdictions by multinational corporations. It is superseded by elaborate multi-level subcontracting chains where lead companies have functional control over operations and eschew legal employment responsibility for workers in their chains. In both industrial and developing countries, new forms of labour regulation and technological platforms have resulted in a precariat class, which is a large group of workers whose employment is unstable, where they have no institutional voice, a precarious income and no security of social protection¹⁴.

Firms in informal economic activities and digital platforms often designate their employees as self-employed partners or independent contractors. It protects capital owners from the statutory requirements to meet the standards of the national minimum wage, the maximum working hours, overtime payments, the workplace occupational health and safety legislation, paid sick leave, maternity leave and pension or unemployment funds contributions¹⁵. The established employment contract that has long been the main channel for the redistribution of wealth and extension of social rights to citizens now exists in a precarious state, as a result of uncoordinated forces in the market.

This systemic problem can only be redressed by restoring the primacy of constitutional law and international labour standards over private commercial contracts. The human right to work is guaranteed by international legal instruments, notably the International Covenant on Economic, Social and Cultural Rights, which states that the right of all persons to gain a living through work is freely chosen or accepted under fair and favourable conditions. Likewise, the International Labour Organization (ILO) has taken a step forward with the Decent Work Agenda, stating that employment policy should not centre only on the number of jobs created but also on the “qualitative legal standards” that should be guaranteed: freedom of

¹³ See Int'l Labour Org., Decent Work and the Informal Economy, Report VI, International Labour Conference, 90th Session (2002).

¹⁴ See Guy Standing, The Precariat: The New Dangerous Class 24–31 (2011).

¹⁵ See Jeremias Prassl, Humans as a Service: The Promise and Perils of the On-Demand Economy 55–62 (2018).

association, effective collective bargaining, the abolition of forced labour, non-discrimination and universal social safety floors.

Progressive courts have started challenging arbitrary labour practices which seek to avoid statutory protection at the domestic constitutional level. The doctrine of substantive equality has been increasingly embraced by judges, who are more likely to disregard formal contractual classifications, like those that designate the parties as independent contractors, and consider the economic dependency and functional control of the parties' relationship. Through the use of functional economic reality testing, courts in different jurisdictions have found that gig workers are statutory employees, thus granting minimum wage protections, anti-discrimination protections, and collective bargaining rights to these precarious workers.

IV. Comparative Constitutional Approaches and the Regulatory State -

Different approaches have been taken to resolve the conflict between free international markets, displacement, and social justice in legal systems throughout the world. In South Africa, the Constitutional Court has in a seminal judgment, confirmed that socio-economic rights, which are contained within the 1996 (SA) Constitution, are directly justiciable. It was decided that state housing and welfare policies should include "deliberate, reasonable measures" to provide "emergency relief" for people who have found themselves in "desperate" situations or who are threatened with eviction because of development projects, and that reasonableness review is a powerful tool for the Court to hold state policies to account for their arbitrary nature. In Colombia, the Constitutional Court has conducted structural supervision over the Executive Branch in regards to displaced populations, establishing an unconstitutional situation that forced its reconfiguration to change the distribution of budgets and implement FPIC for indigenous populations impacted by resource extraction.

But in the EU the recent legislative developments point to the shift toward the protection of market precarity. Under the EU Platform Work Directive, the presumption of employment applies to gig platform workers, meaning that employers have the burden of proof to show that they are indeed self-employed. At the same time, the Corporate Sustainability Due Diligence Directive (CSDD) brings legal obligations for human rights and environmental issues across the entire supply chain of large corporations across the world. The comparative approaches here demonstrate how a constitutional and regional legal system can provide a powerful counterbalance to market forces and help to hold economic development to account in terms of human dignity.

The traditional socio-legal solution to a market failure has been to depend on the government as a direct supplier of jobs, shelter, health care and basic services. Public provision of services is still needed in certain critical areas, but simply relying on a paternalistic provider-only approach has obvious institutional barriers in a globalised and constrained budgetary economy. Public social expenditures are especially sensitive to international macroeconomic crises and sovereign debt limits, as they can quickly lead to sudden changes in public spending. Moreover, centralized provider monopoly may be administratively inflexible and corrupt, and may not be able to gain access to the poor and marginalized, or may not recognize their decisions.

The modern Welfare State needs to move towards a rights-based, protective and regulatory approach in order to achieve social justice in open economies. This framework is not a reduction or downsizing of the state this is a strategic realignment of legal sovereign power, on four basic pillars:

- **Mandatory Due Diligence:** Corporate entities are to be required to carry out extensive human rights and environmental impact assessments before the projects are approved, under Mandatory Due

Diligence. For indigenous and traditional communities, Free, Prior, and Informed Consent (FPIC) must be a mandatory and not an optional statutory process that serves as a consultation process.

- **Restorative Land Governance:** Legal principles around land acquisition should move away from cash-only approaches to valuing land. The regulatory state needs to implement compulsory rehabilitation measures with a strong push for land-for-land substitution, a continuous livelihood rehabilitation process, and benefit sharing mechanisms, such as an equity stake or royalty payments, to share the wealth generated by the lands of origin with uprooted populations.
- **Universal Social Floors:** labour informalisation needs to trigger the adoption of a non-negotiable Social Protection Floor through the legal system, the so called Universal Social Floor. Social security guarantees, such as access to healthcare, disability insurance, parental leave, pensions etc., should be separated from the current formal employment contract and linked to citizenship or residency status to foster a portable social protection contract for all types of employment.
- **Transnational Corporate Accountability:** A rights-based regulatory framework should provide for easy access to judicial mechanisms to enforce rights, such as public interest litigation, and class actions. In addition, national parliaments need to adopt extraterritorial corporate liability laws to legally prosecute parent companies in their domestic courts for human rights abuses, illegal land appropriation and labour exploitation by their foreign subsidiaries, and by their global subcontractors.

V. Conclusion

Globalization and free market integration has changed the nature of the legal ties between the State, the market and the citizen. Open market strategies can help to speed up the expansion of macro-economic activity, trade volumes and private investment, but they are not inherently able to create equitable social outcomes. The systemic nature of DID and the high susceptibility of displaced people in the labor market to market driven growth shows that it has severe social costs that have to be taken up by the most vulnerable people within the society.¹⁶

The critical legal analysis shows that the state cannot be a silent bystander and cannot justify that socio-economic marginalisation is an inevitable cost of economic development. The traditional welfare-as-giver welfare-as-received approach is not enough to deal with the challenge of today's transnational capital. The modern Welfare State, therefore, needs to become an active, protective and rights-oriented regulator. The law can build in provision of socio-economic rights into constitutions, set up a regulatory regime over private capital, provide for comprehensive protection of land and labour, and guarantee universal social protection floors to ensure that markets work in tandem with human dignity. Sustainable development and global economic integration is legitimate only when it is based on a legal order that promotes substantive social justice.

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¹⁶ See Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary 480–495 (2d ed. 2014).

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