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Globalization and Comparative Family Law: A Discussion of Pluralism, Universality, and Markets

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GLOBALIZATION AND COMPARATIVE FAMILY LAW: A DISCUSSION OF PLURALISM, UNIVERSALITY, AND MARKETS

FOREWORD

James Thuo Gathii and Patricia Youngblood Reyhan***

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Welcome to this special symposium Issue on Globalization and Comparative Family Law: A Discussion of Pluralism, Universality and Markets, which is being published as one section in a double Issue of the Albany Law Review. In this Issue, a stellar group of contributors¹ offer a rich combination of theoretical, practical, and above all illuminating and challenging insights about the international gender equality project. They explore the relationship and structural interaction of domestic and international legal norms and policies, with culture, religion, markets, and families. The papers in this Issue are based on the revised and extended

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We would like to thank Dean Thomas F. Guernsey for supporting this Symposium. Thanks too, to our speakers for their thoughtful and insightful contributions and to the Editors of the Albany Law Review for their commitment and work in preparing this section for publication.

¹ In addition to the contributors to this Issue, three speakers who presented their work in the symposium have not published their work here. See Stephen Clark, *Deconstructing Sexual Orientation* (Feb. 6, 2004) (unpublished manuscript, preliminary draft on file with author); Thandabantu Nhlapo, *African Customary Law in the interim Constitution, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE* 157, 159–63 (Sandra Liebenberg ed., 1995); see also Thandabantu Nhlapo, *Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate*, 9 INT'L J.L. & FAM. 208, 214–15 (1995) (suggesting that many in Africa continue to think of themselves in the collective despite the individualistic influences of Westernization); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68 (2002); see also Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL'Y 261 (2002).

presentations at the first Robert H. Jackson International and Comparative Law Program symposium at Albany Law School.

The International and Comparative Law Program of Albany Law School is named for Robert H. Jackson, Chief Prosecutor for the United States at the Nuremberg War Crimes Trials. Albany Law School is deeply honored to count Justice Jackson (Class of 1912) as one of its alumni. His contribution at Nuremberg was instrumental in shaping the law of individual responsibility for war crimes and for crimes against humanity. Justice Jackson's legacy continues into the 21st century as a direct influence on the creation of the International Criminal Court.

This symposium was organized to honor Professor Katheryn D. Katz who has been a powerful and effective advocate for the advancement of the rights of women, children, and families throughout her three-decade career in education and in the profession of law. She became one of the first women to join the Albany Law School faculty in 1975. In 1995, she was the recipient of the Law School's prestigious Kate Stoneman Award, honoring those in the legal profession "actively seeking change and expanding opportunities for women." Indeed, early in her career, she built a reputation as a lawyer who worked for reform, particularly in the areas of social services, housing, education, and family law. She continues an active professional commitment to the examination of women's issues and to actively research and write authoritatively on the changing boundaries of family law. Some of her most recent work on the clonal child, grandparents visitation rights, and commentaries on recent cases pushing the boundaries of traditional heterosexual families into the arena of single mothers, roommates, unmarried heterosexual couples, and gay and lesbian couples, among others, are at the cutting edge of family law.

The symposium was also organized to coincide with the visit to Albany Law School of another remarkable woman—Justice Yvonne Mokgoro of the South African Constitutional Court. She joined us as the 2003 Kate Stoneman Professor of Law and Democracy. Justice Mokgoro, the only African woman sitting on South Africa's highest court, was educated in apartheid South Africa. Justice Mokgoro inspired Albany Law School faculty and students with her insightful lectures on the emerging constitutional jurisprudence in South Africa and the practical challenges of realizing a democratic future there. Her lifetime commitment to the cause of equality for the most disenfranchised and her humility won the admiration of all that met her. Justice Mokgoro's luncheon address, which is

published in this Issue,² was one of many highlights of the conference. John J. Hayes, who co-founded the all-black high school³ in apartheid South Africa which Justice Mokgoro attended and where John taught, attended the conference upon hearing that Justice Mokgoro would be giving the luncheon address. His surprise attendance to see his once young South African student deliver the luncheon address was an emotional reunion—a moment that brought into sharp focus the struggle of two people, a black woman and a white man, to overcome the barriers of a racist, sexist, and segregated society—some of the very themes around which the symposium was organized.

The aim of this foreword is to provide a very brief outline of the themes explored in the symposium and in this Issue. The aim of the symposium was to reflect on and build upon the fascinating and ongoing work of the international gender equality project around issues of legal pluralism, feminism, market reform, and universality. As Frances Olsen notes in her keynote address, these issues present very difficult conceptual and practical challenges.⁴ Professor Olsen's keynote, in part, suggests that globalization invites a role for international institutions in her path-breaking work on the ideological interaction between the state, the family, and the market.⁵ In some societies, she notes, the role of religion should also be recognized and the interaction between state and religion explored; in others, it might be the interaction between the state and culture. While she does not come to any definitive conclusion about how the complex ways in which religion, rights, culture, markets and international institutions are mediated by the state, she challenges us not to forget the equally important practical work of protecting women involved in institutions such as the global mail-order bride business from violence and oppression.

Professors Berta Esperanza Hernandez-Truyol⁶ and Penelope Andrews⁷ explore the relationship between gender equality, formal

² Justice Yvonne Mokgoro, *Constitutional Claims for Gender Equality in South Africa: A Judicial Response*, 67 ALB. L. REV. 565 (2003).

³ St. Boniface Native Mission High School, now simply St. Boniface High School. Mr. Hayes co-founded the school on January 15, 1951 and at the time it served black children living in the Galeshewe Village in Kimberley in the North West Cape of South Africa.

⁴ Frances Olsen, *Keynote*, 67 ALB. L. REV. 555 (2003).

⁵ Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

⁶ Berta Esperanza Hernandez-Truyol, *Glocalizing Law and Culture: Towards a Cross-Constitute Paradigm*, 67 ALB. L. REV. 617 (2003).

⁷ Penelope Andrews, *Women's Human Rights and the Conversation Across Culture*, 67 ALB. L. REV. 609 (2003).

law, and cultural norms in plural legal contexts. Professor Andrews focuses on how war, dislocation, and dispossession in Africa and Afghanistan pose challenges for liberal visions of women's rights such as those embodied in the Convention on Elimination of Discrimination Against Women (CEDAW). After all, in these societies the Judeo-Christian assumptions upon which CEDAW is predicated are either weak or absent. In addition, the implementation of these rights is constrained by a lack of resources. Ultimately, Professor Andrews reminds us that it is the cultures of both the *modern* and the *traditional* that must be engaged to fruitfully universalize human rights. Professor Hernandez-Truyol explores the potential of law to change culture, but at the same time analyzes the potential for culture to resist or withstand legal change, using the experience of Cubans on the island and those in the United States. To show how culture can resist or withstand efforts to change it through law, she uses the example of a Cuban law mandating that men share equally in childcare and rearing responsibilities. By contrast, she shows how Cuban women in the United States have overcome the taboo of sexuality and marriage-for-life as enforced by the Catholic Church by taking advantage of divorce laws to exit marriage and remarry, unlike their counterparts on the island. Here, a legal regime has changed a religious and cultural norm. While she acknowledges that these women may have been simply shifting from private to public patriarchy, the two contrasting examples yield a fruitful way to relate law and culture. She calls it a cross-constitutive theory of law and culture to emphasize that the influence between law and culture is reciprocal rather than linear. Both Professors Andrews and Hernandez-Truyol therefore show us that while norms such as those embodied in CEDAW appear neutral and universal, they in fact are not. In addition, they demonstrate that culture is not fixed and stable but is both varied and unstable.

Doctor Leslye Amede Obiora shows us that free market reformers erroneously proceed from representations of African women that depict them as having acquiesced to their own oppression.⁸ Doctor Obiora discounts this as a self-serving myth of neo-conservative political forces who seek to co-opt feminist struggles in Africa to legitimate projects of global capitalism. This portrayal of African women, she argues, overlooks their agency and resistance. She is

⁸ L. Amede Obiora, *Affirmations and Ambiguities: Some Thoughts on Women and Agency*, 67 ALB. L. REV. 629 (2003).

therefore critical of the World Bank's Gender and Law Program, which she once helped to manage, to the extent that it failed to tackle the "interlocking structures of social, economic, and political power," that disempower African women. Indeed, she argues that the Bank's effort to enhance the global equity agenda was fraught with problems. First, because it was largely an episodic and/or stop gap measure—rather than a sustained examination of the consequences for women of the changing role of the state—the state was no longer providing social goodies, including basic needs like health care, education, and water. Second, it compartmentalized between social-economic issues, on the one hand, and issues of formal gender equality—which it favored at the expense of the former—on the other. Doctor Obiora concludes that any viable gender and law programming at the Bank must take into account the fact that failed projects say something about what works and what does not. If the Bank is interested in what works, then acknowledging the agency of women in their resistance to failed projects and to patriarchy by closely consulting them in designing future projects is the best place to begin in "identifying the minimum set of conditions necessary" for a successful gender and the law initiative.

Justice Mokgoro's luncheon address examines the judiciary's response to constitutional claims for gender equality in South Africa. She begins by noting that gender equality is complicated because "poverty and inequality are so strongly gendered," and that the position of an overwhelming number of black women is further exacerbated by patriarchal cultural and religious norms and a history of colonialism and apartheid. Against this backdrop, she examines how the values of equality, freedom, and human dignity in the South African Bill of Rights have played in transforming the position of women so far. A primary maxim developed by the South African Constitutional court is that differentiation that has no rational connection with a legitimate state or government purpose is discriminatory. The Court has also construed the equality provisions of the Constitution as requiring substantive or effective equality and not merely formal equality between the sexes. However, Justice Mokgoro's examination of the cases demonstrates an uneven application of this transformative vision of equality. For example, she argues that "courts must pay particular attention to any possible indirect discriminatory impact that laws and policies

have on women.”⁹ Justice Mokgoro shows that conventional human rights approaches in advancing human rights standards in non-Judeo Christian contexts such as South Africa have potential where they take into account how history, social, and economic circumstances of a society contribute to gender inequality. South Africa’s unique efforts to combine first generation rights (civil and political), with second generation rights (social and economic), and third generation rights (cultural), between and among individuals and groups in both public and private domains is perhaps one of the most novel national responses to gender hierarchy and patriarchy in the international community to date. Yet, Justice Mokgoro is cognizant that since litigation is often a privilege that the overwhelming number of the poor do not have access to in a society such as South Africa, the struggle for gender equality must continue outside the courtroom within a vigilant civil society seeking to influence legislation and policy.

Professor Marie-Claire Belleau’s contribution on mail order brides is a great example of the practical challenges Justice Mokgoro contemplates as needing vigilance in getting the attention of legal and policy makers and in influencing governmental and intergovernmental agencies across the world. Trafficking in women is facilitated by a variety of factors. These include the lack of opportunities for women, patriarchal norms in developing countries, and the romantic fantasy on the part of at least some women for a husband of the “Hollywood star variety” in a developed country.¹⁰ Within developed countries, there are men seeking a “docile, submissive and subservient bride whom [they] can control and dominate.”¹¹ For the most part, these unrealistic expectations on both the trafficked women and their western seekers are a crucible for disappointment, particularly for the women. The divorce laws and conditional residency status of the women in the immigration laws of Canada and the U.S. give men seeking trafficked women overwhelming power over them. This is because these men can revoke the immigration status of the trafficked women, thereby potentially opening the door to their deportation back to their home countries. In effect, immigration laws and policies ostensibly designed to facilitate family reunions have promoted mail-order bondage, sometimes to abusive, cruel, and battering husbands.

⁹ Justice Yvonne Mokgoro, *Constitutional Claims for Gender Equality in South Africa: A Judicial Response*, 67 ALB. L. REV. 565 (2003).

¹⁰ Marie-Claire Belleau, *Mail-Order Brides in a Global World*, 67 ALB. L. REV. 595 (2003).

¹¹ *Id.*

Though recent legislative changes have somewhat ameliorated these problems, they have not eliminated them. Professor Belleau thus identifies the highly unequal relations based on ethnicity, sex, and social class between first-world husbands and women from poor countries as one of the central challenges produced by the mail-order business. While Professor Belleau acknowledges that some women who come to first world rich countries as mail-order brides realize the dream of becoming self-supporting or are able to support their relatives in their countries of origin, she remains concerned that the mail-order bride business amounts to an inhumane trafficking of women for profit that thrives as much on stereotypes of gender roles of women both in the poor and rich countries as on immigration laws and policies that facilitate patriarchal and unequal relations for these women in rich countries. Among other recommendations, Professor Belleau argues in favor of accentuating the campaign to seek change in immigration laws and policies to facilitate egalitarian relationships between men and women, irrespective of their nationality, race, ethnicity, or class. Undoubtedly, the mail-order bride business demonstrates the link between globalization of markets, on the one hand, with the social, cultural, and legal dynamics of the family, on the other.

One theme that brings together the symposium papers is that they examine the validity of the assumption that religious norms, customs and cultures of non-European societies necessarily lack a recognition of women's rights. They also examine the validity of the assumption that formal equality rights borrowed from the West are all that women in non-European societies need to be "liberated" from patriarchal religious, cultural, and customary norms. In doing so, these papers belong to an international gender equality project that questions the view that cultural, religious, and other identity systems outside the West invariably consign women and sexual minorities to perpetual inferiority or that individualistic norms of formal equality are sufficient to overcome patriarchal and oppressive norms both formal and informal in rich and poor countries. This international gender equality project challenges these simplistic assumptions by demonstrating that religious norms and praxis, as well as cultures, are not stable, rigid, and static but rather are flexible and varied in their calibration of relative rights among members of society. As such, this work goes to show that just like formal law, culture, religion, and markets may be used to challenge or reinforce gender hierarchy, patriarchy, and sexual choice.

Another significant contribution of this symposium Issue to the

international gender equality project is its exploration of the intersection of free market reforms and the impact of markets on families, vulnerable identity minorities, and women in particular. Hence, rather than solely focusing on culture, tradition, religion, and custom as the only sites affecting women, gay and lesbian, and other vulnerable family groups adversely, this tradition examines how markets, just like legal structures and culture, custom, tradition, and religion can be used to both liberate or disadvantage these groups. Contemporary forms of free market reform, this tradition argues, disguise the impact of market restructuring on families through exaggerated claims of the benefits of economic growth. In addition, this cutting-edge work demonstrates the central role of law in structuring economic reforms in ways that invariably expose women and families to hardship in a variety of forms. In the meantime, certain family structures, particularly families headed by poor single women, gays or lesbians, are entirely omitted from receiving benefits available to traditional heterosexual families or receiving any protection from the state against both public and private discrimination.

Professor Kerry Rittich has pioneered in putting this understanding and approach to work. In her paper,¹² she does so by critically appraising a recent World Bank report titled *Engendering Development: Through Gender Equality in Rights, Resources, and Voice*. She argues that the report embodies a new vision and a new institutional practice of gender equality at variance with the widely embraced objective of substantive equality that has become a central part of the international gender equality project. Professor Rittich refers to the World Bank's effort to co-opt and dumb-down the goal of substantive equality as market-centered equality. Market-centered equality proceeds from the neo-liberal economic view of the state as "a weak instrument," incapable of changing cultural norms and social practices. This view of the state further controversially presupposes that gender equality is good for growth and that growth is good for gender equality. Thus, Professor Rittich argues that the role of the state should be confined to establishing incentives to discourage gender discrimination rather than requiring the state to be involved in the struggle to attain gender equality. Further, market-centered equality seeks the increased participation and presence of women in the market, based on the

¹² Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575 (2003).

assumption that such presence and participation is directly correlated with gender equality. As Professor Rittich shows, this market-centered equality approach only pays attention to levels of education for women, their mortality rates, and the extent of their political participation. Beyond that, this market-centered gender equality approach pays little or no attention to women's economic disadvantage as evidenced by indicators such as wages, income, wealth, and poverty. This paradigm's faith in the market, Professor Rittich argues, leads it to mistakenly presume that cultural norms inhibiting girl school enrolment, for example, would be overcome if economic incentives were introduced to lure girls to go to school. Thus, this market-centered view of gender equality blames culture and embraces markets as the solution to resolve gender inequalities. Yet, as Professor Rittich and the other symposium contributors recognize, the goal of gender equality cannot be attained through programs that separate culture and markets as distinct spheres from the broader social and economic context.

In the final analysis, the contributions in this symposium examine the role of law, markets, religion, and culture in consciously crafting regimes with practical implications for families. They express skepticism in universal claims that animate the proselytizing message of the redeeming attributes of western-style individualistic equal rights for women and notions of market-centered equality that are animated with advocacy for free market reforms. The contributions demonstrate how such gender equality paradigms underestimate the unevenness and disjunctions of law, markets, religion, and culture through their efforts to homogenize and disguise differences in outcomes for women. As a result, one of the significant contributions of this symposium is to show how narrow definitions of law, market, family, religion, and culture can be enriched by scrutinizing how accepted and taken-for-granted dichotomies between the market and the family, between state and religion, between culture and state, between liberal notions of rights and non-western notions of dignity, between sexuality and the politics of culture, and between production and reproduction necessarily shape our assumptions about family.

As the ongoing democratization of the public sphere has closely scrutinized colonial, authoritarian, and totalitarian governance, so too must the private sphere of family, market, religion, and culture undergo the same spirited critical scrutiny. Hopefully, this Symposium has in some small way contributed to this project by continuing the ongoing re-thinking and re-working of assumptions

about family, market, religion, and law and by problematizing traditional notions of sexual, cultural, and economic difference and opening them up with a view to building a set of conceptual and practical tools to mediate between the egalitarian and disenfranchising impulses within them.