

Law, Politics, and the Subaltern in Counter-Hegemonic Globalization

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1. Introduction

This book arose from our puzzlement at the paradoxical state of sociolegal knowledge on globalization. The beginning of the new millennium has witnessed a ground swell of proposals for the transformation or replacement of the national and international legal institutions underpinning hegemonic, neoliberal globalization. Put forth by variegated counter-hegemonic movements and organizations and articulated through transnational networks, these proposals challenge our sociological and legal imagination and belie the fatalistic ideology that “there is no alternative” to neoliberal institutions.

The initiatives are as diverse as the organizations and networks advocating them, as the case studies in this book lay bare. Impoverished women in Tanzania as well as marginalized communities and progressive parties in Brazil mobilize to change and democratize the national and international regulatory frameworks that effectively exclude them from key political arenas such as the process of allocating public budgets (see Rusimbi and Mbilinyi’s and Santos’ chapters on participatory budgeting). NGOs, unions, consumers, workers and other actors in the global North and South organize to challenge the market-friendly regulation of labor conditions, corporate accountability, intellectual property rights and the environment which fuels the spread of sweatshops in the Americas, the African AIDS pandemic, and environmental degradation in Europe (see Rodríguez-Garavito’s, Shamir’s, Klug’s, and Arriscado, Matias and Costa’s chapters). Progressive activist-researchers, people of faith and members of marginalized communities in the U.S. —the “inner Third World” of laid-off industrial workers, migrants and informal laborers— come together to collectively conceive cosmopolitan identities and legal rules in opposition to the exclusionary ideologies and laws of

immigration (see Ansley's and Larson's chapters). Social movements involving some of the most marginalized classes in the global South —landless peasants, subsistence farmers and indigenous peoples— strategically mobilize national courts and transnational advocacy networks (TANs) to assert their rights to the land, their culture and the environment (see Houtzager's, Rajagopal's, Visvanathan and Parmar's, and Rodríguez-Garavito and Arenas's chapters). Articulated through now well-established regional and global mechanisms such as the World Social Forum (see Santos' chapter), these and myriad other initiatives have shown not only that “another world is possible,” but have spurred an unprecedented effervescence of debate and experimentation in bottom-up legal reform and new international legal regimes (see Pureza's chapter).

Against the background of such fervent experimentation and institutional creativity at the grassroots level, the paradox lies in that theories and empirical studies on law and globalization have multiplied apace while missing almost entirely this most intellectually challenging and politically compelling aspect of globalization. Indeed, the existing literature draws on a rather conventional account of globalization and global legal transformations as top-down processes of diffusion of economic and legal models from the global North to the global South. Thus, the literature overwhelmingly focuses on the globalization of legal fields involving the most visible, hegemonic actors (whose visibility is thereby further enhanced) such as transnational corporations (TNCs) and Northern states. The result is a wide array of studies on such topics as the global spread of corporation-made *lex mercatoria* (Dezalay and Garth 1996; McBarnett 2002; Teubner 1997), the expansion of the interstate human rights regime and international law at large (Brysk 2002; Falk 1998; Falk, Ruiz and Walker 2002; Likosky 2002), the exacerbation of legal pluralism brought about by the globalization of production and new communication technologies (Snyder 2002), and the export and import of rule of law and judicial reform programs (Carothers 1998; Dezalay and Garth 2002a; Rodríguez-Garavito 2001; Santos 2002).

Therefore, law and society studies have largely failed to register the growing grassroots contestation of the spread of neoliberal institutions and the formulation of alternative legal frameworks by TANs and the populations most harmed by hegemonic globalization. Thus, despite a strong tradition of studies on the use of law by domestic

social movements (Handler 1978; McCann 1994; Scheingold 1974) and a growing literature on transnational social movements (Evans 2000; Keck and Sikkink 1998; Tarrow 2001), the role of law in counter-hegemonic globalization and the challenges that the latter poses to legal theory and practice have yet to be tackled.¹

Aware that the diagnosis of the insufficiencies of this approach was shared by numerous social scientists and legal scholars based in or deeply involved with the South (either the global South or the “inner South” in the core countries), who have themselves been participants in the global justice movement, in 2000 we decided to launch a collaborative research network (CRN) on law and counter-hegemonic globalization. The CRN was meant to serve as a meeting and discussion space for scholars/activists from around the world engaged in critical sociolegal research and legal advocacy across borders. Emphasizing the participation of researchers and activists from the global South, it brought together a core group of participants (including several of the contributors to this volume) in meetings in Miami (2000), Budapest (2001) and Oxford (2001).² The group rapidly expanded as we took the project to the sites of our own research and activism in Latin America, Africa, Europe and the U.S. It thus became a broad, loose circle that partially overlapped with other networks of sociolegal research and transnational advocacy in which the CRN members were involved.

The effort to bridge the divides between South and North and between academic work and political engagement made the process of producing this book an exceptionally challenging and stimulating transnational endeavor. Further conversations and debates among contributors to this volume took place in such venues as the World Social Forum in Porto Alegre (2003, 2005) and Mumbai (2004), the Latin American Conference on Justice and Society organized by the Latin American Institute for Alternative Legal Services (ILSA) in Bogotá (2003), the International Conference on Law and Justice at the University of Coimbra (2003), and the Conference on Global Democracy and the Search

¹Some exceptions that confirm the rule are studies on law and “globalization from below” such as Falk (1998), Rajagopal (2003) and Santos (1995, 2002).

²The Law & Society Association sponsored the Miami and Budapest meetings. The Oxford meeting took place by invitation from the Centre for Socio-Legal Studies. We are grateful to both for financial and logistical support that made the take-off of the CRN possible.

for Justice at the University of Sheffield (2003). Moreover, several of the case studies were written in the field as the authors worked closely with the movements, state agencies and NGOs they analyze in their chapters. Thus, like the movements themselves, the contributors combined local engagement with transnational dialogue.

While the complications associated with this type of enterprise—from language barriers to the hectic pace of grassroots activism—made the editorial process all the more difficult, they also give this book its distinctive character. Indeed, in our view, the specific contribution of this volume and the common thread running through all its chapters lies in the particular, bottom-up perspective on law and globalization that it advances and empirically illustrates. This perspective has both an analytic and a political dimension. From an analytic viewpoint, it entails the detailed empirical study of legal orders as they operate on the ground. This includes not only the official law of courts and legislatures but also the myriad legal rules created and enforced by such disparate social actors as civil society organizations, corporations and marginalized communities. This staple analytic strategy of sociolegal research tends to exhaust the meaning of the “bottom-up” approach in the U.S. law and society tradition (see, for instance, McCann 1994). When applied to global social and legal processes, this research strategy calls for the type of approach that Marcus (1995) has dubbed “multi-sited ethnography:” a combination of qualitative methods applied to the study of different locales that aims to examine the operation of global sociolegal processes shaping events in such sites.

To our mind, the bottom-up perspective illustrated by the case studies in this book also has a distinctly political dimension that goes hand in hand with its analytic counterpart. As we explain in more detail below, the purpose driving the analysis is to expose the potential and the limitations of law-centered strategies for the advancement of counter-hegemonic political struggles in the context of globalization. This entails amplifying the voice of those who have been victimized by neoliberal globalization, be they indigenous peoples, landless peasants, impoverished women, squatter settlers, sweatshop workers or undocumented immigrants. Siding with those at the bottom, therefore, is a key part of our bottom-up approach. This is indeed how this approach is overwhelmingly understood in the global South, as the longstanding “alternative law”

movement in Latin America (ILSA 1986; Lourdes Souza 2001; Santos 1991) and “social action litigation” in India (Baxi 1987) bear witness.

In the remainder of this introductory chapter, we further characterize this approach in three steps. First, in order to locate this book in the context of the literature on law and globalization, we look more closely into the dominant sociolegal approaches and inquire into the reasons why they have rendered invisible grassroots resistance to neoliberal institutions and initiatives for alternative legal forms. Second, we elaborate on the tenets of our bottom-up approach to law and globalization, which we call subaltern cosmopolitan legality. We argue that subaltern cosmopolitan legality is a mode of sociolegal theory and practice suitable to comprehend and further the mode of political thought and action embodied by counter-hegemonic globalization. Finally, we explain the selection of topics and the organization of the book. Throughout the chapter, we describe, as we go along, the case studies contained in the remainder of the book and point to the ways in which, in our view, they illustrate subaltern cosmopolitan legality in action.

2. Between Global Governance and Global Hegemony: The Invisibility of Counter-Hegemony in Sociolegal Studies

Two lines of research stand out among the growing number of empirically grounded studies of law in globalization. On the one hand, a copious literature on “global governance” has developed that inquires into the transformation of law in the face of eroding state power and the decentralization of economic activities across borders. Concerned with social engineering and institutional design, this approach focuses on non-state centered forms of regulation allegedly capable of best governing the global economy. On the other hand, a post-law-and-development generation of students of international legal transplants has unveiled the power struggles and alliances between and within legal elites in the North and the South through which the hegemony of transnational capital and Northern states is reproduced. Contrary to the emphasis of the governance approach on successful institutional designs, hegemony theorists focus on the structural reasons that explain the *failure* of ostensibly progressive global legal designs

(e.g., the export of the rule of law and human rights) and the reproduction of the legal elites who promote them.

These approaches can be seen as reverberations of time-honored traditions in sociolegal scholarship. The governance perspective echoes the U.S. legal realists' and social pragmatists' concern with social engineering that inspired the first generation of law and development scholars and practitioners in the 1960s. However, as argued below, governance scholars have considerably moderated (if not abandoned) the reformist and oppositional political agenda that inspired their predecessors. Hegemony scholars, in turn, draw on a rich tradition of critical social theory of law—from Marx to Bourdieu and Foucault—to show the contribution of law to the resilience and pervasiveness of domination within and across borders. Nevertheless, as explained later on, in emphasizing the moment of hegemony they sideline the moment of counter-hegemony, which at least since Gramsci has been at the core of critical social theory.

In what follows we briefly examine these seemingly opposite approaches to set up the background against which we advance our own approach in the next section. We argue that, despite their radically different goals and theoretical roots, they share a top-down view of law, globalization and politics that explains their failure to capture the dynamics of bottom-up resistance and legal innovation taking place around the world. We further argue that they produce the invisibility of counter-hegemonic politics and legality in different ways: while in the governance paradigm organized bottom-up resistance becomes irrelevant, in the global hegemony literature resistance is ineffectual at best and counterproductive at worst as it tends to further reproduce hegemony.

2.1. From Regulation to Governance: The Irrelevance of Counter-Hegemony

A vast literature has developed over the last few years that theorizes and empirically studies novel forms of governing the economy that rely on collaboration among non-state actors (firms, civic organizations, NGOs, unions and so on) rather than on top-down state regulation. The variety of labels under which social scientists and legal scholars have pursued this approach is indicative of both its ascendancy and its diversity:

“responsive regulation” (Ayres and Braithwaite 1992), “post-regulatory law” (Teubner 1986), “soft law” (Snyder 1994; Trubek and Mosher 2003), “democratic experimentalism” (Dorf and Sabel 1998; Unger 1998), “collaborative governance” (Freeman 1997), “outsourced regulation,” (O’Rourke 2003) or simply “governance” (Mac Neil, Sargent and Swan 2000; Nye and Donahue 2000).

Differences in labeling and content notwithstanding, these studies broadly share a diagnosis and a proposal for the solution of the regulatory dilemmas posed by globalization. According to the diagnosis, the “regulatory fracture” of the global economy stems from the divergence between law and current economic processes. Such divergence results from the different scales at which global economic activities and national states’ regulations operate, and from the difficulties that national states face in applying their top-down regulatory logic to industries whose highly globalized system of production is based on a combination of market and network organizational logic.

From this viewpoint, the solution lies neither in the state nor in the market, but rather in a third type of organizational form —collaborative networks involving firms and secondary associations. By following a reflexive logic that fosters continuous dialogue and innovation, networks, it is argued, have the potential to overcome the regulatory dilemmas that markets (which follow the logic of exchange) and states (which follow the logic of command) cannot solve on their own.

Drawing to different degrees on pragmatist social theory, governance scholars have applied this insight to the analysis of institutions in a variety of fields and scales. Some examples are participatory school boards at the local level (Liebman and Sabel forthcoming), decentralized environmental regulation (Karkkainen 2002), mechanisms of regional regulatory coordination involving non-state actors (Zeitlin and Trubek 2003), and corporate codes of conduct to regulate labor conditions in global factories (Fung, O’Rourke and Sabel 2001).

The governance approach to law and society rests on four theoretical claims derived from its pragmatist roots. First, interests are discursively formed rather than derived from actors’ locations in the social field (Sabel 1994:139). Actors’ definition of interests, goals and means takes place during their engagement in the deliberative processes characteristic of pragmatist institutions of governance (participatory councils,

developmental associations, and so on) (Dorf and Sabel 1998:285). Second, gains in economic and political efficiency result from the use of local knowledge. Thus, decentralizing and democratizing institutions are needed to devolve decision-making authority to the local scale and to involve all the relevant “stakeholders.” Third, asymmetries of power among societal actors are not so profound as to impede the type of horizontal collaboration envisaged by pragmatist governance (Dorf and Sabel 1998:410). The bargaining disadvantages of the have-nots are not insurmountable, politics is an uncertain and open-ended game, and the results of deliberation are not predetermined by differences in resources among participants. Therefore, against “liberal legalism,” sociolegal scholars contributing to this approach reject structuralist conceptions of power as well as “populist views” of law and society that draw a stark contrast between powerful actors (e.g., corporations) and powerless “victims” (e.g., unions, the poor, etc.) (Simon 2004:5). Fourth, in line with its conception of interests and power, this approach explicitly shies away from any discussion of the preconditions –namely redistribution of resources to counter power asymmetries among “stakeholders”-- that would be necessary for collaborative governance to work. Given that the limits of “interests, values or institutions...can always become the starting point of their redefinition” (Sabel 1994:158) through deliberative processes, the conditions for the success of governance are contingent upon the particularities of each social context.

This is not the place to undertake a detailed critical analysis of the governance approach as applied to the regulation of the global economy.³ In light of the specific purpose of this chapter, our chief concern is with the contributions and failures of the approach with regard to the task of studying and valuing the potential of experiences in counter-hegemonic legality of the type documented in this book. In this sense, contributors to the governance debate within legal academia must be given credit for having steered discussions away from the obsession of legal doctrine with ever more sophisticated criteria for separating law and politics. Indeed, they have cogently reconceived “legal analysis as institutional imagination” (Unger 1996:25), thus reconnecting legal and sociolegal scholarship with the political debates of our time, including those on globalization.

³ See Rodríguez-Garavito (2005) and Chapter 2 by Santos.

However, the kind of political action envisaged by the governance approach is a far cry from that of counter-hegemonic globalization. Given its conception of power and its focus on problem solving, the governance approach tends to bracket deep power asymmetries among actors (for instance, those between capital and labor in global code of conduct systems) and to view the public sphere as a rather depoliticized arena of collaboration among generic “stakeholders” (see Rodríguez-Garavito 2005). In contrast to critical theories of law that view contentious collective action by the excluded as a political requisite for the attainment of meaningful legal transformations, “the Pragmatist...relies on ‘bootstrapping’ –the bracketing of self-interest and distributive claims in order to focus attention on common interests and values,” thus explicitly rejecting the “victim’s perspective” (Simon 2004:26) that is central to subaltern cosmopolitan politics and legality.

As a result, the governance perspective’s telling call for participatory exercises in institutional imagination lacks a theory of political agency suited to the task. By default or by design, those doing the imagining are the elites or members of the middle-class with the economic and cultural capital to count as “stakeholders.” Either way, the process is a top-down one in which those at the bottom are either incorporated only once the institutional blueprint has been fully laid out or are not incorporated at all. The post hoc inclusion of the excluded is illustrated by Unger’s otherwise powerful theory of democratic experimentalism: “if social alliances need institutional innovations to be sustained, institutional innovations do not require preexisting social alliances. All they demand are party-political agents and institutional programs, having those class or group alliances as a project —as a project rather than as a premise” (1996:137). The exclusion of those at the bottom from governance schemes is candidly acknowledged by Simon: “pragmatist initiatives are likely to by-pass the most desperate and the most deviant. Pragmatism supposes a measure of mutual accountability and engagement that may not be attractive to or possible for everyone” (2004:23).

As it turns out, in the context of neoliberal globalization, the most desperate and marginalized —those living in poverty and excluded from the benefits of social citizenship due to class, gender, racial or ethnic oppression—account for the immense majority of the world population. The challenge of institutional imagination, therefore, cannot be met

but by privileging the excluded as actors and beneficiaries of new forms of global politics and legality. This is the strategy of counter-hegemonic globalization and its legal counterpart, subaltern cosmopolitan legality.

2.2. Global Hegemony and the Law: The Futility of Resistance

With theoretical tools and practical goals that stand in stark contrast with those of the governance literature, sociolegal analysts of the role of law in hegemonic globalization have made a provocative contribution to the debate. The merits of this approach are twofold. First, by combining the insights of neo-institutional and reflexive sociology, scholars in this tradition have dug into the origins of global legal designs (from international arbitration to the rule of law and judicial reform) that provide neoliberal globalization with political and scientific legitimacy. This genealogical expedition has unearthed the hierarchies, power struggles and tactical moves through which hegemonic institutions are produced and reproduced, and through which non-elite actors are systematically excluded.

Second, analysts of global hegemony have made a methodological contribution by following across borders the actors of the processes of exportation and importation of legal models. The results are empirically grounded accounts of the complex transnational mechanisms whereby elite lawyers and economists in the North and the South, NGOs, U.S. foundations, state officials and transnational economic elites have interacted to spread “new legal orthodoxies” around the world —from the ideologies of monetarism and law and economics to human rights and judicial reform projects in Latin America (Dezalay and Garth 2002a) to global commercial arbitration (Dezalay and Garth 1996).

For the present purposes, what is particularly relevant about this line of work are its epistemological tenets and its conception of hegemony, which stand in explicit contrast with those of subaltern cosmopolitan legality. Studies of global legal hegemony aim at a “more realist understanding of the production of the new international economic and political order” (Dezalay and Garth 2002b:315). Such a realist perspective is explicitly built on a twofold critique of approaches such as ours that seek to expose and

underscore the potential of counter-hegemonic forms of political and legal action. On the one hand, it draws a sharp distinction between description and prescription and confines proper scholarship to the former. On the other hand, it is keen on highlighting the links between hegemonic and counter-hegemonic actors --for instance, between philanthropic foundations in the North and human rights organizations in the South— as well as tensions and contradictions within transnational activist coalitions. From this viewpoint, such links and tensions reveal that, far from “happily coexisting in this effort to work together to produce new and emancipatory global norms,” (Dezalay and Garth 2002b:318), NGOs and other actors of counter-hegemonic globalization are part and parcel of the elites benefiting from neoliberal globalization and thus contribute to the construction of new global orthodoxies through programs to export U.S. legal institutions and expertise.

We offer a response to these criticisms in laying out the epistemological and political tenets of subaltern cosmopolitan legality in the next section. For the purposes of this section, a brief discussion of the limitations and tensions of the hegemony approach is in order. First, despite its call for realist descriptions, the reality grasped with its analytical lenses is a highly partial one. Since its entry point of choice into global legal processes is the world of transnational elites, the description it offers is as revealing as it is limited. Missing from this top-down picture are the myriad local, non-English speaking actors --from grassroots organizations to community leaders— who, albeit oftentimes working in alliance with transnational NGOs and progressive elites, mobilize popular resistance to neoliberal legality while remaining as local as ever. From Bolivian peasants resisting the privatization of water services to indigenous peoples around the world resisting corporate biopiracy, these subaltern actors are a critical part of processes whereby global legal rules are defined, as the current contestation over the regulation of water provision and property rights on traditional knowledge bear witness.

Second, the analysis misses differences among sectors of the elites that are as real as the links among them. Conflating international human rights lawyers risking their lives on the job with transnational corporate lawyers making a fortune attains analytical bite at the cost of descriptive oversimplification. While lawyers and activists participating in

TANs benefit from transnational connections and support, they advance agendas that stand in explicit contrast with those of hegemonic actors. As several of the chapters in this book show, this makes for a radically different type of legal practice and political engagement than those of corporate consultants. Witness, for instance, the hardships of grassroots legal advocacy against patriarchal neoliberal institutions in Tanzania described in Rusimbi and Mbilinyi's chapter, or the perils of straddling the line between legality and illegality in Houtzager's chapter on the landless peasants' movement in Brazil. This does not mean that counter-hegemonic coalitions are devoid of tensions, or that subaltern legal strategies are always productive. Indeed, several chapters explore these tensions and limitations. (See, for instance, Shamir's contribution on corporate cooptation of some NGOs, and Rajagopal's chapter on the limits of law in counter-hegemonic globalization). Such tensions, however, do not obliterate the distinction between hegemonic and counter-hegemonic globalization, which is clear to practitioners in either camp. Therefore, in addition to a description of global structural constraints and the workings of hegemonic legal discourses and practices, we need a critical analysis of spaces for and strategies of counter-hegemony.

Third, this partial picture, far from being a non-prescriptive description, has a normative connotation. Collapsing highly diverse actors and organizations into a generic category of elites and very different agendas into a catch-all category of global orthodoxies yields a politically demobilizing picture of law and globalization. If hegemonic structures and discourses are so pervasive as to absorb and dilute counter-hegemonic strategies (which renders the latter undistinguishable from what they oppose), we are left with a deterministic image of globalization in which there is virtually no space for resistance and change. Resistance goes on happening and alternatives continue to arise nonetheless. To take some examples from the following chapters, corporate dominance of the global regulation of intellectual property rights and labor have not prevented activists, human rights lawyers, workers and marginalized communities in South Africa and the Americas to successfully push for new legal frameworks allowing the production of affordable antiretroviral drugs for AIDS patients and fighting sweatshop conditions in global factories (see Klug's and Rodríguez-Garavito's chapters).

The fact that these counter-hegemonic coalitions aim to substitute such solidaristic, cosmopolitan legal frameworks for the existing corporate-friendly laws means that they indeed seek to establish a new legal hegemony (in the Gramscian sense of a new common sense) or “global legal orthodoxy.” But it hardly needs explaining that the effects of this new hegemony on the lives and livelihoods of the marginalized majorities of the world would be radically different from those of currently dominant regulations.

In sum, in addition to hegemony theories that explain why global legal structures are as they are, we need sociolegal approaches capable of telling why and how they change. This entails turning our analytic gaze to plural forms of resistance and embryonic legal alternatives arising from the bottom the world over. This is the goal of subaltern cosmopolitan legality, to which we now turn.

3. Subaltern Cosmopolitan Legality

In critically engaging with sociolegal research on globalization in the previous section, we touched upon the core elements of subaltern cosmopolitan legality, the perspective that informed the dialogue leading to this volume. In this section we gather together and elaborate on those elements to lay out the claims of our approach.⁴ We speak of subaltern cosmopolitan legality as a perspective or an approach rather than as a theory for several reasons. To our mind, the plurality of efforts at counter-hegemonic globalization cannot be encompassed by an overarching theory. Rather, the scholarly task consists in providing analytical clarity and translation devices to make such efforts mutually intelligible. Further, the potential contribution of our approach lies in its distinctive bottom-up perspective as explained above, rather than in a set of fixed substantive claims. Finally, the chapters in this volume –which are inspired by different theoretical perspectives and tackle diverse topics— cannot be subsumed in a rigid general framework. Still, since they originated from a collaborative research project that explicitly engaged with subaltern cosmopolitan legality, a further characterization of this approach is in order to lay bare some of the traits that we believe are shared by the case

⁴For a detailed discussion of the concept of subaltern cosmopolitan legality, which served as a common reference point in the dialogue among contributors to this volume, see Santos (2002:Chapter 9).

studies in this volume. We undertake this task by first looking into the meaning and viewpoint of subaltern cosmopolitan legality and then spelling out its epistemological tenets and analytical instruments.

3.1. The Subaltern, the Cosmopolitan and the Legal

Cosmopolitan projects have a long and ambiguous history anchored in Western modernity. In opposition to global designs aimed to manage the world—from colonial Christianity in the sixteenth century to nineteenth-century imperialism to contemporary neoliberal/military globalization—, cosmopolitanism has vindicated the basic moral claim that “neither nationality nor state boundaries, as such, have moral standing with respect to questions of justice” (Satz 1999:67). Thus, cosmopolitanism—be it in the form of the Enlightenment’s human rights doctrines, anti-colonialism, or contemporary transnational social movements—entails counter-hegemonic projects seeking to subvert interstate hierarchies and borders (Santos 1995:263). As Mignolo has put it, cosmopolitanism “is a set of projects toward planetary conviviality” (2002:157). Such convivial sociability focuses on conversations among places whereby people in disparate geographic and cultural locations understand and welcome their differences while striving to pursue joint endeavors (Appiah 2003; Santos 2002:460).

More often than not, however, cosmopolitan political and legal projects have been as Western- or Northern-centric and exclusionary as the global designs they oppose. For instance, human rights institutions and doctrines, with their Western roots and liberal bent, have oftentimes been blind to non-Western conceptions of human dignity and collective rights that hold out the prospect for an expanded, cosmopolitan conception of rights (Mutua 1996; Rajagopal 2003). This is the case, for instance, of indigenous peoples’ oppositional understanding of property rights as collective entitlements subordinated to the imperative of environmental and cultural preservation (see Rodríguez-Garavito and Arenas’ chapter).

Instead of discarding cosmopolitanism as just one more variety of global hegemony, we propose to revise the concept by shifting the focus of attention to those

who currently need it. Who needs cosmopolitanism? The answer is straightforward: whoever is a victim of local intolerance and discrimination needs cross-border tolerance and support; whoever lives in misery in a world of wealth needs cosmopolitan solidarity; whoever is a non- or second-class citizen of a country or the world needs an alternative conception of national and global citizenship. In short, the large majority of the world's populace, excluded from top-down cosmopolitan projects, needs a different type of cosmopolitanism. Subaltern cosmopolitanism, with its emphasis on social inclusion, is therefore of an oppositional variety (Santos 2002:460).

Providing the intellectual and experiential foundations of this oppositional stance is a shift of perspective from which global processes are analyzed and evaluated. Post-colonial scholars have variously theorized this move as a shift to a view from the experience of the victims, in the terms proposed by Dussel (1998); a new perspective from the exterior of Western modernity, in the terms of Mignolo (2002); or a view from the reality of coloniality of power, in Quijano's (2000). In our own terms, we conceive this change of perspective as one that shifts from the North to the South, with the South expressing not a geographical location but all forms of subordination (economic exploitation; gender, racial and ethnic oppression and so on) associated with neoliberal globalization. The South, in short, denotes the forms of suffering caused by global capitalism. In this sense, the South is unevenly spread throughout the world, including the North and the West (Santos 1995:507). In inquiring into globalization from the point of view of the lived experiences of the South, therefore, subaltern cosmopolitanism takes the perspective of what Dussel (1998) has aptly called "the community of the victims."

The victims in this transnational community of suffering, however, are not passive, nor is the separation between the South and the North a static one. The perspective of subaltern cosmopolitan studies of globalization aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter.

In the specific realm of legal knowledge and practice, subaltern cosmopolitanism translates into the bottom-up approach to the study of law in globalization described

above. In line with its analytical focus on detailed case studies of counter-hegemonic legal forms and its goal of furthering the potential of the latter, subaltern cosmopolitanism calls for a conception of the legal field suitable for reconnecting law and politics and reimagining legal institutions from below. This involves several tasks that stand in contrast to those privileged by existing approaches to the study of law in globalization. First, it entails inquiring into the combination of legal and illegal (as well as non-legal) strategies through which transnational and local movements advance their causes. Rallies, strikes, consumer boycotts, civil disobedience and other forms of (oftentimes illegal) direct action are part and parcel of counter-hegemonic movements that simultaneously pursue institutional avenues such as litigation and lobbying. This is clear, for instance, in Larson's chapter on squatter settlements (*colonias*) in Texas, where marginalized immigrant communities have imaginatively straddled the border between legality and illegality and challenged the state to conceive a hybrid approach to regulation that implies a gradual enforcement of the law suited to their realities and housing needs. Another eloquent example of the relation between legal, illegal and non-legal strategies is the combination of land occupation and litigation by the landless peasants' movement (MST) in Brazil analyzed in Houtzager's chapter, which goes a long way to explaining the success and endurance of the movement in the face of stiff resistance from large landowners. Similarly, the participatory budgeting process of Porto Alegre (Brazil), which has become an icon of progressive institutional reform, remains an informal arrangement not codified by state law. As discussed in Santos' chapter on the matter, this non-legal character, together with continuous political support, helps explain the success and flexibility of this mechanism of participatory democracy.

Second, with regard to the long-standing sociolegal debate on the politics of rights (Rosenberg 1991; Scheingold 1974), subaltern cosmopolitan legality seeks to expand the legal canon beyond individual rights and focuses on the importance of political mobilization for the success of rights-centered strategies. The emphasis on the expansion of the range of rights does not mean the abandonment of individual rights. Indeed, individual rights are a central part of subaltern cosmopolitan legality in the current context of unilateral militarism at the global scale and repressive neoliberalism (with its

attendant trends towards coercive control of marginalized populations) at the national and local scales (Wacquant 2004). However, experiments in subaltern cosmopolitan legality also seek to articulate new notions of rights that go beyond the liberal ideal of individual autonomy, and incorporate solidaristic understandings of entitlements grounded on alternative forms of legal knowledge. This is evident, for instance, in the multifarious grassroots struggles for the collective rights to the commons, culture, land, and traditional knowledge in India that Visvanathan and Parmar study in their chapter.

Further, regardless of the type of rights in question, subaltern cosmopolitan legality highlights the centrality of sustained political mobilization for the success of grassroots legal strategies. Given the deep power asymmetries between hegemonic and counter-hegemonic actors, only through collective action can the latter muster the type of countervailing power necessary to bring about sustained legal change. Thus, contrary to the depoliticized view of law of the governance approach, subaltern cosmopolitan legality views law and rights as elements of struggles that need to be politicized before they are legalized. This relation between politics and law is at work, for instance, in the political movement for affordable antiretroviral drugs in South Africa which eventually was taken to the national courts (see Klug's chapter), as well as in the national and transnational movement against the construction of the Narmada dam in India, which only at a later phase and after much debate within the movement was brought before the Indian Supreme Court (see Rajagopal's chapter).

Third, subaltern cosmopolitan legality operates by definition across scales. Social movements and TANs embodying this approach pragmatically resort to political and legal tools at every scale. Also, by mobilizing state and non-state legal orders, they exploit the opportunities offered by an increasingly plural legal landscape. For instance, Arriscado, Matias and Costa's chapter discusses the combination of local, national and regional legal strategies through which Portuguese communities have sought to protect their right to a clean environment by creatively exploiting the tensions between Portuguese laws and European directives and regulations. Also, in the struggle against exploitative conditions at the Kukdong factory in Mexico studied in Rodríguez-Garavito's chapter, members of the transnational anti-sweatshop coalition simultaneously

mobilized local courts, threatened to bring the case before the NAFTA panel on labor rights, and targeted, on a global scale, the image of the brands for which the factory produced collegiate apparel.

3.2. The Epistemology of Subaltern Cosmopolitan Legality: The Sociology of Emergence

For all their accomplishments, the experiences analyzed in this book are admittedly fragile. Going against entrenched and powerful interests, ideologies and institutions that are hegemonic precisely because they are seen as commonsensical, experiments in counter-hegemonic uses of law are in constant danger of cooptation and obliteration. Contrary to what the criticisms of theorists of global legal hegemony would suggest, actors and analysts of subaltern cosmopolitan legality are only too aware of these tensions.

With full consciousness of such limitations –and precisely because of them—, theorists and practitioners of subaltern cosmopolitan legality take it upon themselves to interpret these embryonic experiences in a prospective spirit that can be called the sociology of emergence (Santos 2002:465; 2004). This entails interpreting in an expansive way the initiatives, movements and organizations that resist neoliberal globalization and offer alternatives to it. The traits of the struggles are amplified so as to render visible and credible the potential that lies implicit or remains embryonic in the experiences under examination. This symbolic blowup seeks to expose and underscore the signals, clues or traces of future possibilities embedded in nascent or marginalized legal practices or knowledges. The contribution of the approach is to allow us to identify emerging qualities and entities at a moment in which they can be easily discarded (and are indeed discarded by hegemonic actors and mainstream social science) as idealistic, hopeless, insignificant or past-oriented.

The sociology of emergence, as all critical theories, is rooted in an enriched conception of reality and realism. The point of departure of critical theory is the statement that reality cannot be reduced to what exists. From this point of view, a realist analysis is one that offers, together with an exploration of what is real and what is

necessary, a prospective account of what is possible. The sociology of emergence thus avoids the discrediting of budding options brought about by structuralist conceptions of global legal hegemony as well as by the disenchanting and celebratory views of hyper-deconstructive postmodern legal analysis.

In starting “from where we are” –i.e., from the available options, no matter how incipient they may be—subaltern cosmopolitan legality follows the path of counter-hegemonic struggles first theorized by Gramsci (1971). As in Gramsci, counter-hegemonic politics and legality aim to erode the ideology and coercive institutions that sustain and naturalize the hegemony of dominant classes and groups (1971:12). This vital deconstructive task is illustrated by the trenchant critique of regulations and discourses of corporate social responsibility offered by Shamir in his chapter, as well as in Visvanathan and Parmar’s critique of dominant understandings of economic development and constitutional rights in India. Counter-hegemonic politics and subaltern cosmopolitan legality, however, go beyond this deconstructive phase. Indeed, they ultimately seek to offer new understandings and practices capable of replacing the dominant ones and thus of offering a new common sense (Hunt 1993). Driving the undocumented immigrants’ struggles analyzed in Ansley’s chapter, for instance, is not only a critique of xenophobic views of immigration in the U.S., but also a nascent conception and institutional framework of global citizenship. Similarly, behind the rise of international legal regimes of crimes against humanity and the common heritage of humankind studied by Pureza in his chapter lies a radically reconceived, solidaristic understanding of international relations and international law. Finally, behind the experience of participatory budgeting in Tanzania and Brazil documented by Mbilinyi, Rusimbi and Santos is both a critique of dominant conceptions of low-intensity, representative democracy and an ambitious proposal for the radicalization of political and economic democracy.

4. Topics and Organization of the Book

Out of the immense variety of movements and experiences in counter-hegemonic globalization, we chose to focus on three thematic areas in which the confrontation between hegemonic and counter-hegemonic actors over the content and the scale of law

is particularly acute: (1) the construction of a global economy of solidarity, (2) the struggle to reform the international human rights regime in a cosmopolitan, bottom-up and multicultural direction, and (3) the radicalization of democratic politics through new forms of participatory democracy. We close this introductory chapter by briefly presenting these topics and the case studies on each of them.

4.1. Law and the Construction of a Global Economy of Solidarity

Over the last few years, legal scholars, activists, government representatives and other actors have been debating innovative ways of regulating the global economy based on principles of solidarity and environmental sustainability rather than profit maximization. Among the signs of the emergence of a “solidarity economy” and a cosmopolitan economic law are myriad proposals to protect labor rights in the face of changing economic conditions associated with globalization –from initiatives to include social clauses in free trade agreements to experiments in monitoring the implementation of corporate codes of conduct concerning labor in factories producing for TNCs—, the rise of a system of “fair trade” supported by legal agreements between corporations in the North and governments and local producers in the South, the inclusion of effective clauses for the protection of the environment in trade agreements, initiatives aimed at eroding the exclusionary economic and social regulations that prevent unskilled workers from gaining the status of legal immigrants, and recent legal challenges by states in the South (e.g., South Africa, Brazil and India) against global intellectual property rights systems that deprive most of the world’s population of access to basic medicines.

The chapters in the first part of the book tackle several of these issues. Based on an examination of the World Social Forum as the most prominent site of articulation of proposals for a global economy of solidarity, Boaventura de Sousa Santos contrasts the counter-hegemonic legality embodied by the WSF (subaltern cosmopolitan legality) with that of neoliberal globalization (“global governance”). César A. Rodríguez-Garavito analyzes the struggle over international labor rights pitting TNCs against cross-border anti-sweatshop coalitions. Focusing on the Americas, he illustrates such a struggle with a case study of the campaign for the unionization of workers at Kukdong, a global apparel

factory in Mexico. The chapter by Ronen Shamir also examines the issue of the regulation of TNCs, but looks more broadly into the construction of the field of “corporate social responsibility.” By carefully dissecting social responsibility discourse and practice, he offers a critical view of strategies aimed to create corporate-friendly regimes of voluntary regulation. Heinz Klug analyzes the clash between the neoliberal intellectual property rights regime (as embodied by the WTO’s TRIPS agreement) and the right to affordable medicines. He illustrates the legal and political issues involved in this struggle with a vivid account of the effort by South African social movements and the state to guarantee access to antiretroviral medicines to the victims of the pandemic in that country. Moving from the global South to the “inner South” in the North, Jane Larson looks into the gray zone, between legality and illegality, that new migrants in the U.S. South have exploited to build informal housing settlements as an economic survival strategy. Based on her work in such *colonias* in Texas, she offers a proposal for a regulatory strategy that imaginatively protects the migrants’ right to housing. In closing this part of the volume, Fran Ansley examines grassroots efforts to put in contact the global South and the North’s inner South. She offers first-hand accounts of worker exchanges between the U.S. and Mexico, anti-NAFTA activism, and solidarity campaigns for migrants’ right to a driver’s license in Tennessee which aptly illustrate both the potential and the difficulties and tensions of subaltern coalitions seeking to establish solidaristic legal frameworks and forms of economic exchange.

4.2. Transnational Social Movements and the Reconstruction of Human Rights

Albeit a quintessential cosmopolitan legal and political project, the construction of an international system of human rights has been weakened by its aforementioned Western- and state-centric biases. Thus, while acknowledging the importance of the existing international legal framework for the protection of civil, political, socioeconomic and collective rights, the global movement for social justice has challenged some of its substantive and procedural tenets. The indigenous movement has called for a multicultural reconstruction of human rights so as to counter the liberal and individualist bias of the latter and incorporate alternative understandings of rights based on collective

entitlements and the inclusion of nature as a subject of rights. Grassroots movements and civil society organizations have contested the traditional status of the state as the sole actor in processes of construction and enforcement of international human rights regimes. The international feminist movement has effectively denounced the patriarchal character of the human rights tradition and pushed forward new legal instruments and conceptions of rights embodying gender justice. Other organizations and movements have continued to challenge the separation between “generations” of human rights and strived to articulate struggles for civil and political rights, on the one hand, with efforts to protect socioeconomic and collective rights, on the other. These and other pressures largely account for the ongoing reconfiguration of human rights in the direction of gender, ethnic, racial and economic justice.

The chapters in the second part of the volume document several such challenges in different parts of the world. Balakrishnan Rajagopal analyzes the role of law in the well-known national and transnational movement to protect the rights of families affected by the Indian government’s plan to construct dams along the Narmada River. Focusing on the role of the Indian Supreme Court, he offers a rich assessment of the potential and the limits of law and human rights for the Narmada Valley struggle and for transnational social movements writ large. Peter Houtzager addresses very similar questions in his study of the way in which the Brazilian movement of the landless (MST) has combined land occupation with the mobilization of local courts and international political pressure to challenge property rights systems that keep most of the land in Brazil in the hands of a small elite. Through a comparative analysis of cases in which the MST has asked Brazilian courts to regularize its possession of occupied lands, he discusses the gradual shift that the movement has promoted in the state’s conception and institutions of property rights. Continuing with Latin America, César A. Rodríguez-Garavito and Luis Carlos Arenas offer a case study of the prominent struggle of the U’Wa people in Colombia against oil drilling in their ancestral land. Vindicating collective rights to territory, nature and cultural difference, the U’wa, in alliance with transnational indigenous rights and environmentalist organizations, have combined direct action and legal strategies to fend off oil exploration, thus illustrating the powerful challenge raised by indigenous people around the world to TNCs, governments, and conventional human

rights conceptions and instruments. Finally, José Manuel Pureza takes the discussion of human rights to the global scale by inquiring into the counter-hegemonic potential of two nascent international legal institutions: the International Criminal Court and the common heritage of humankind regime. By carefully examining their origins and characteristics, he argues that while the former embodies a “defensive” type of counter-hegemonic international legal framework, the latter stands as an instance of “oppositional” international law holding out the promise of a profound reconstruction of the tenets of international law and human rights.

4.3. Law and Participatory Democracy: Between the Local and the Global

At the same time that liberal democracy has spread around the world, the global justice movement has forcefully argued that national and transnational institutions suffer from a deficit of democracy. Thus, liberal democracy and law have become less and less credible in both the North and the South. The twin crises of representation and participation are the most visible symptoms of such a deficit of credibility and legitimacy. In the face of this, two clusters of practices are emerging that aim to radicalize democracy at the local, national and global scales. On the one hand, TANs have launched campaigns and drafted alternative charters to democratize international institutions, from the WTO and the World Bank to the proposed Free Trade Area of the Americas. On the other hand, communities and governments in different parts of the world are undertaking democratic experiments and initiatives –from participatory budgeting to participatory environmental policy— based on legal frameworks and models of democracy in which the tension between capitalism and democracy is reborn as a positive energy behind new, more inclusive and more just social contracts. Albeit generally taking place at the local level, these initiatives have quickly spread throughout the world and thus constitute a dynamic source of counter-hegemonic politics and law.

The contributions to the third part of the volume focus on the latter type of initiative by discussing case studies of local experiments in participatory democracy and law-making that illustrate similar efforts going on in different parts of the globe. Mary Rusimbi and Marjorie Mbilinyi offer a detailed account of their work in a fascinating

experience in participatory democracy —“gender budgeting” in Tanzania. Gender budgeting, promoted by the Tanzanian feminist movement, has not only reclaimed for the citizenry the decision-making power on economic decisions normally reserved for global and national techno-elites, but has also infused budget allocation and legislation with gender justice. Attesting to the global spread of counter-hegemonic local initiatives, Boaventura de Sousa Santos studies another experience in participatory budgeting —the pioneering initiative of the Workers’ Party in Porto Alegre (Brazil) to involve the citizenry in the process of budget allocation. Based on an analysis of the political and legal details of the system, he discusses the factors that account for its success, as well as the tensions and contradictions within it. Moving to the opposite corner of the world, Shiv Visvanathan and Chandrika Parmar take us into an experiment in democratic interpretation and practice of law through an examination of the way in which Indian social movements have articulated progressive understandings of the Directive Principles of State Policy of the Indian constitution. The conception and practice of rights thus emerging from the bottom up, the authors show, stand in stark contrast with those of state authorities and the country’s elites. Finally, João Arriscado Nunes, Marisa Matias and Susana Costa study the struggle over environmental law in Portugal. Grounding their analysis on a case study of a high-profile dispute over waste management, they contrast the limited democratic potential of the dominant understanding of “community consultation” in environmental law with the democratic process of grassroots participation, legal mobilization and production of “expert knowledge” employed by the affected community to contest the government’s decision to dump hazardous industrial waste in its territory.

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