CHAPTER 1

# LAW, POLITICS, AND THE SUBALTERN IN COUNTER-HEGEMONIC GLOBALIZATION

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## 1.1 INTRODUCTION

This book arose from our puzzlement at the paradoxical state of socio-legal knowledge on globalization. The beginning of the new millennium has witnessed a groundswell 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 US – 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' 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 and 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 work in Latin America, Africa, Europe, and the US. 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

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

[2] The Law and 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.

and the Search 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 US law and society tradition (see, for instance, Munger 1998). 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. Including 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. Secondly, 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.

## 1.2 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 which 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 US 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.

### 1.2.1 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" (MacNeil, 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 2003), 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). Secondly, 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." Thirdly, 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 2003:5). Fourthly, 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.

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"

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

(Simon 2003:26) 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" (2003:23).

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.

### 1.2.2 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.

Secondly, 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, US 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 (and, as we will see, problematic) 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 US 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.