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Excerpt

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**SECTION I**

**SETTING THE STAGE**

## 1

## An Introduction to Globalization, Lawyers, and Emerging Economies: The Case of India

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This book is the first in a series by the Project on Globalization Lawyers and Emerging Economies (GLEE). GLEE examines how globalization is reshaping the market for legal services in important emerging economies such as India, Brazil, and China and how these developments are in turn contributing to the transformation of the political economy in these countries and the reshaping of the global legal services market. In this first book of the GLEE project, we present original empirical research documenting how India's legal profession is being transformed by the "global shift" that the world's largest democracy embarked on in 1991 when it began the process of moving from an essentially closed state-controlled economy to one that is still state-led, but also increasingly open to foreign investment and influence.

As the book's 20 empirical studies demonstrate, this shift in India's economy has produced a new "corporate legal hemisphere" that is playing an increasingly important role in the Indian legal profession, the development of the Indian economy, the elaboration of its administrative state, and in India's capacity to exert its influence in the new global order. Together with the GLEE project's current work in Brazil and China, and the forthcoming expansion of the project to the Middle East, Africa, and the CIS states of the former Soviet Union, this book begins an important and largely unexplored debate about how the creation of a "corporate legal hemisphere" in emerging economies is contributing to the broader processes of globalization.

This introduction proceeds in five parts. Part I sets out an overview of the GLEE project and locates its historical, theoretical, and methodological commitments in relation to three literatures: the sociology of the legal profession, globalization studies, and law and development. Part II then briefly discusses why we have chosen to focus on India, and the relationship between our project and the other literature on this increasingly important country. Part III describes the organization of the book and summarizes its chapters. Part IV

steps back from the specifics of each study to identify important themes that appear throughout the book that we believe are key to understanding the current state of India's rapidly expanding corporate legal sector and the implications of this growth for the broader theoretical and empirical questions GLEE investigates. Part V briefly concludes by discussing how the pending liberalization of the Indian corporate legal market might shape the future trajectory of India's corporate legal sector.

## I. THE GLEE PROJECT

It is by now common knowledge that globalization is transforming virtually every sector of the world's economy and that this transformation has important implications for the rapidly globalizing market for legal services. Moreover, it is also clear that countries such as Brazil, Russia, India, China, and South Africa (the BRICS) and other emerging powers are playing an increasingly important role in this transformation. In documenting this shift in economic and political power from the traditional centers in the Global North to the emerging Global South, scholars from a variety of disciplines have long debated the role of law and lawyers in facilitating – or undermining – the processes of development in these rising powers. Yet, while there is substantial literature on each of these topics, there has been relatively little attention to the intersection among them – particularly from the perspective of the emerging economies themselves. As a result, the analytical field is ripe for theoretical expansion driven by inquiry into how globalization is changing the broader architecture and dynamics of the legal professions in important emerging economies and how these changes in turn are helping to reshape the global legal services market and the broader economic, political, social, and cultural aspects of globalization in which lawyers play an increasingly important role.

### A. *The Global Shift*

The GLEE project charts the transformation in the legal services market we seek to study from a signal change in how India and other emerging economies relate to the global economy that began in the 1990s. During this period, India, Brazil, and China each made a decision to move from a “closed” economic model to one that is increasingly “open” to both foreign investment and private enterprise, including the privatization of many state-owned assets. This “global shift” has had a major impact on the legal system in each country, fueling a growing demand for new laws, regulations, and administrative apparatus to facilitate this new economic activity and to interface with the broader global

economic and political environment. This, in turn, has created the need for lawyers capable of practicing law within this new legal and regulatory environment, particularly in corporate law fields such as mergers and acquisitions, project finance, securities, and initial public offerings that are increasingly being demanded by the growing number of foreign and domestic companies operating in these jurisdictions. Although each of these countries has, to a greater or lesser extent, called on the international law firms that are eager to serve these new markets to provide this necessary expertise – a subject we return to below – each has also developed an important domestic corporate legal sector as well.

Today, this new corporate legal elite, by which we mean lawyers who work in law firms that serve a clientele composed primarily of foreign and domestic corporations, and lawyers who work in the internal legal departments of the growing number of corporations based in or serving these new markets, has significantly increased in size and importance in many emerging powers in the Global South. Each of the three countries we are currently studying, for example, can now boast several law firms comprised of hundreds – and in the case of China, thousands – of lawyers, as well as corporate legal departments, such as the 500-lawyer general counsel office of India's Tata Group, that are almost as large.

GLEE maps the terrain of this developing “corporate hemisphere” of the bar in emerging economies, including the new forms of corporate legal practice that are being developed in these jurisdictions, and examines how this sector is influencing – and being influenced by – other parts of the legal, economic, political, and social order in these countries. To do so, the project borrows from existing literature on lawyers, globalization, and development to build grounded theory based on original research on a wide array of topics relevant to the current status and likely future trajectory of emerging economy legal professions in the age of globalization.

### *B. Socio-Legal Studies: The Ecology of the Corporate Hemisphere*

Our theoretical model begins with the “hemispheres thesis” first developed by Heinz and Laumann to describe the social structure of the Chicago bar (Heinz and Laumann 1982). As these scholars, and their co-authors in subsequent work, meticulously document in studies conducted in 1975 and 1995, “The” legal profession is actually comprised of two distinct sectors of the bar, one focused primarily on individuals and small businesses and the other catering to large companies and other similar organizations (Heinz and Laumann 1982; Heinz et al. 2005). At the core of the GLEE project is an examination

of whether emerging economies such as India, Brazil, and China are also developing a separate corporate legal hemisphere and, if so, to what extent its characteristics are similar to, or different from, the corporate sector in the United States.

As indicated above, there are good reasons to believe that aspects of what one of us has previously called “The American Mode of the Production of Law” are diffusing to India and other emerging economies, just as aspects of the model spread to more developed legal markets in Europe and Asia in the 1980s (Trubek et al. 1994). This mode of legal production first emerged in New York City at the turn of the twentieth century when a group of law firms established a set of guiding principles that scholars have come to refer to as the “Cravath Model,” after the law firm Cravath Swain & Moore. Three features of this model are particularly relevant to our inquiry (Swaine 1946). First, the *work* of Cravath Model firms consisted of providing a full range of services to corporate clients. Second, the *lawyers* in these firms were hired exclusively from top law schools, as opposed to laterally from other law firms, and after a six- to ten-year apprenticeship were either promoted to partnership or asked to leave the firm. Third, Cravath Model firms were *governed* as true partnerships, in which all partners shared equally in the firm’s profits and losses through a “lock-step” compensation system, and were entitled to equal participation in firm decision-making.

Socio-legal scholars have tracked the evolution of this model through three distinct periods: the “golden age” circa 1900–1980, in which Cravath Model law firms rose to become the unquestioned market leaders, representing the most important companies, hiring the best law school graduates, and occupying the most lucrative and prestigious position in the American legal profession. The rise of “neo-Cravathism” circa 1980–2008, marked by an exponential growth in the large law firm sector, but also by many – although not all – firms abandoning key elements of the original Cravath structure, particularly around lateral hiring, lockstep compensation for partners, and democratic governance, in favor of more bureaucratic, managerial, and entrepreneurial structures and practices; and an evolving “age of disruption” circa 2008–present following the Global Financial Crisis, characterized by unprecedented instability in the corporate law firm market (including several law firm failures), leading commentators to predict everything from “The Death of Big Law,” to “The End of Lawyers,” to the triumph of traditional Cravathist principles over the apostasy of neo-Cravathist commercialism (Galanter and Palay 1991; Galanter and Henderson 2008; Susskind 2008; Ribstein 2012).

Although there is considerable debate among socio-legal scholars about what has caused these changes in the Cravath Model – and about how

radically this model is likely to change in the coming years – there is widespread consensus that a key element that has and will continue to drive this change has been the growth in the size and sophistication of in-house counsel in large US companies. In the last two decades the lawyers heading corporate legal departments have gone from a position of marginality and subservience – “house counsel” – to being the “General Counsel” (GC) or “Chief Legal Officer” (CLO) overseeing all of the company’s internal and external legal needs. Indeed, many US GCs also oversee a number of other related functions such as human resources, public relations, government affairs, and compliance. And virtually all GCs in major US companies now play a key role in the company’s strategic decision making on par with the chief financial officer (CFO) and other senior corporate officers (Coates et al. 2011; Wilkins 2012).

This “in-house counsel movement,” as the American legal scholar Robert Eli Rosen aptly labeled this transformation to signal the key role that internal lawyers themselves were playing in furthering their growing economic power and professional standing, has been fueled by three interlocking claims:

1. An *economic* argument that taking work inside saves costs;
2. A *substantive* justification that, because of their proximity to the business, the advice inside lawyers give corporate managers is likely to be better than the advice given by outside counsel; and
3. A *professional* argument that because they are the guardians of the company’s long-term interests and reputation, GCs are better able to fulfill the gatekeeping role of insuring that companies comply with both the letter and the spirit of the law than their counterparts in large law firms, who (so the argument goes) have largely abandoned this role in the pursuit of short-term profits per partner.

These arguments, in turn, have helped to spur six important changes in the organization of internal counsel offices in the United States – and the relationship between these offices and other key constituents both inside and outside the organization – that are consistent with the basic tenets of the inside counsel movement (Wilkins 2012). We summarize these six changes below:

1. *Size*. Since the 1980s, GC offices have grown rapidly, with many now rivaling the size of major law firms (Baker and Parkin 2006; Coates et al. 2011).
2. *Credentials and identity*. Internal law departments are now a premier employment destination for top associates and partners from large law firms, especially among women (Dinovitzer et al. 2009).

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3. *Control over the legal function.* Inside lawyers now act as the primary diagnostician of the company's legal problems and the chief purchasing agent for outside legal services (Gilson 1988; Coates et al. 2011).
4. *Expanded responsibility and membership in senior leadership.* Most GCs report directly to the CEO, overseeing functions adjacent to the legal department (e.g., public relations, government affairs, human relations, compliance) and serving on senior leadership teams with jurisdiction over strategy and other major corporate decisions (Morrison 2006; Coates et al. 2011).
5. *Professional status.* GCs are increasingly viewed as equal – and in many respects dominant – members of the legal profession who exercise significant authority over the profession's norms and practices (Wilkins 2012).
6. *Influence over public policy.* GCs in the United States exercise important influence, both individually and through collective action by the Association of Corporate Counsel and other similar organizations, over important public policy issues, both domestically and globally (Rostain 2008; Coates et al. 2011).

It is against this background that we investigate the development of the corporate legal hemisphere in India and other emerging economies. Experiences in other countries that have developed a distinct corporate legal sector indicate that the Cravath Model and other US innovations are likely to be influential. Prior to the 1980s, there were virtually no large law firms outside of the United States. Today, such firms are found throughout the developed economies of Europe and Asia (Wilkins and Papa 2013). Moreover, in all of these developed legal markets, one can now find in-house legal departments of increasing size, scope, and sophistication (Wilkins 2012). And just as their US counterparts have done, these sophisticated and price-conscious clients are unbundling and repackaging the legal services they consume and arranging them across an increasingly global supply chain of providers, many of which are not traditional law firms.

The fact that the “American Mode of the Production of Law” has spread throughout the developed world, however, does not mean that this is a simple story of diffusion and mimesis (Trubek et al. 1994). Although corporate lawyers in Europe and Asia have clearly looked to US precedents, there has also been considerable resistance to the importation of the Cravath Model and other innovations linked to American-style legal practice, as well as considerable adaptation of these forms to fit local regulatory and cultural conditions (Trubek et al. 1994; Quack 2012; Dezalay and Garth 2013). Even in the United Kingdom,

where the evolution of the corporate legal hemisphere most resembles the US model, there are important variations – variations that have become more apparent as the Cravath Model upon which the large English solicitor firms were originally based has been transformed in the second and third phases of the development of the Cravath Model (Flood 2013).

GLEE's original empirical research investigates whether there is similar complexity in the diffusion of Anglo-American models of corporate practice in newly emerging powers such as India, Brazil, and China. Not surprisingly, when a more sharply defined corporate sector began to emerge in these countries following the global shift in the 1990s, the initial response of the lawyers who created the first generation of large law firms in these jurisdictions was to look to Anglo-American models to meet the growing demand for corporate legal services (Krishnan 2007; Liu 2013). Thus, there was a conscious effort to assimilate global lawyering styles and organization modes. Firms that looked like the Cravathist or neo-Cravathist Model firm began to grow in all three countries. Great emphasis was put on overseas legal education and local lawyers flocked to LLM programs in the United States and Europe. To one degree or another, local systems of legal education, both those based in the academy and otherwise, were upgraded along global lines. In China and Brazil, foreign lawyers were allowed to practice albeit with clear limitations. In India, they were formally banned but, as we will see, have managed to maintain a role in the Indian market.

While processes of diffusion and mimesis have therefore been very important in the growth of the corporate legal hemisphere in India and other emerging economies, lawyers in these jurisdictions found that simple copying was neither feasible nor desirable. It was not feasible because the models they might copy – even the neo-Cravathist model of the 1980s and 1990s – were themselves undergoing rapid change by the time emerging economy law firms and corporate legal departments began to grow rapidly in the early 2000s. As a result, corporate lawyers in emerging economies have found themselves chasing a moving target whose final resting place is increasingly uncertain. Moreover, even if diffusion and mimesis had been feasible, many in the new corporate legal elite in these countries have recognized that it might not be desirable to do so given that conditions in the Global South differ significantly from those in the core countries from which the models emerged.

Moreover, as the chapters in this volume demonstrate, the corporate sector that has emerged in these jurisdictions forms an interrelated “system” or “ecology” where actions taken in one sector interact in complex ways with those taken in another. Thus, the scope of action by external firms will depend on the role played by in-house legal departments, the availability of specialized

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firms, and the potential for outsourcing in a particular field or transaction (Liu 2016). Similarly, the role of in-house offices in the ecology will be affected by the nature and capabilities of outside providers. Finally, the more alternatives to traditional law firms are available, the easier it becomes for in-house legal departments to unbundle parts of complex legal transactions, thus bringing about more change within the system.

The chapters in this volume explore this complex interaction. In so doing, we also offer a fresh perspective on the processes of globalization.

### *C. Globalization Studies: Diffusion, Hybridization, and Glocalization*

GLEE builds on and extends theoretical frameworks from globalization studies. Specifically, we follow the work of scholars who theorize globalization as a multidimensional set of social processes, rather than as a single process focused solely on a narrow set of actors or purely on economic activity (Scholte 2000; Steger 2003). Within this framework, we examine three social processes commonly identified by globalization scholars which help to explain the changes currently taking place in the market for legal services in countries such as India, Brazil, and China: economic globalization, globalization of knowledge, and globalization of governance. GLEE investigates how each of these three forms of globalization is helping to frame the ecology of the corporate legal hemisphere and how the newly emerging corporate elite is in turn promoting or impeding globalization in each domain.

Economic globalization refers to the increasing interdependence of national economies across the world and their progressive integration into the global economy through trade, investment, and capital flows. At the heart of economic globalization is the case for free trade, which rests on claims about the efficiency of the market-determined allocation of resources, and on the belief that opening markets will in turn produce economic opportunity that is widely shared throughout society (Bhagwati 2004). GLEE engages this broader debate on two levels.

First, we investigate the conflict over the opening of the legal services markets in emerging economies around the world – one of the final frontiers of globalization. This conflict is currently playing out in India, China, and Brazil amidst concerns over how best to protect and develop the domestic legal services sector, and broader criticisms of the effect of neoliberal global capitalism, unregulated corporate political power, and unrestricted profit maximization on economic development and social justice (Cavanagh and Mander 2004).

Second, GLEE examines what role the rising corporate elite in emerging economies is playing in economic globalization generally. As indicated above, the emergence of this elite is expressly tied to the creation of a new corporate

sector in these countries and the greater integration of their markets into the world economy. Given this connection, will these new actors simply become agents of corporate globalization, contributing to the growing corporatization of the legal profession itself and the privatization of governance? Or will they instead act as a mitigating force on corporate power, championing the profession's traditional socially minded ideals through pro bono, corporate social responsibility, or other similar practices? GLEE contributes to an understanding of these broader impacts by examining whether organizational structures and professional norms created in the Global North to promote law as an independent and public regarding profession are present – whether as a result of diffusion, local traditions, or hybridization – in the various parts of the corporate ecosystem in the Global South, and if so how they are being experienced by lawyers in these jurisdictions.

In turn, this inquiry has implications for – and is affected by – the globalization of knowledge. As globalization increases the flow of people and information across borders, it inevitably leads to the interchange of knowledge traditions (Held and McGraw 2003, 2007). This is particularly relevant to law since as economies adapt to globalization, law can no longer be constrained within national boundaries. Legal systems influence each other, boundaries blur, and international law extends its coverage to more subjects. GLEE contributes to the understanding of this complex process by focusing attention on the role that lawyers – particularly corporate lawyers – are playing in the globalization of knowledge about Anglo-American norms of legal practice, and, just as importantly, in promoting resistance to these norms. GLEE therefore examines how the growing importance of a new corporate elite is influencing key debates about the formal structure of legal education in emerging economies and the value placed on foreign educational credentials and experience. GLEE also investigates how the corporate hemisphere is contributing to the tacit diffusion of new ideas about the appropriate norms and practices of lawyers, and the adaptation of these global norms to local conditions. Finally, since lawyers have long used bar associations and other similar organizations to present their views on public policy issues and to promote their collective interests, GLEE investigates the role that local and transnational networks of lawyers are playing in shaping express and tacit understandings of what it means to be a lawyer in countries such as India, China, and Brazil.

This last point underscores the importance of a third framework developed by globalization scholars: the globalization of governance. This framework focuses on the transformation of the state's regulatory power when international and transnational regulation increasingly governs many policy arenas, and non-state actors become more engaged in policy decisions (Karns and Mingst 2004; Drezner 2007). Given the global shift that has led countries such as India,