

The Gatt of Law and Democracy: (Mis)Trusting the Global Reform of Courts

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Introduction

To say that we are entering a period of globalization — of markets and institutions as of culture — is today commonsensical. Globalization of democracy and law are also talked about in this context. As with all commonsensical notions, the phenomenon we call globalization is usually rather asserted than critically analyzed. In this paper I shall analyze with some detail the globalization of democracy and law by discussing one of the most puzzling phenomena of sociology and political theory in the 90s, namely, the greater social and political visibility and protagonism of courts in several countries and the global call for the rule of law and the reform of the judicial system. This phenomenon is puzzling because in the modern state, with the possible exception of the USA, the courts have had a fairly uneventful existence. Marginalized by the executive and legislative powers and far more impotent than them, have become a mere accessory of the other branches of government or have paid for its institutional independence with insulation and irrelevancy vis-à-vis society. It is, therefore, hard to understand why, since the late 80s, courts have become so prominent in the daily newspapers of many countries of Europe and Latin America, Africa and Asia, why so many projects for judicial reform have been started in different countries of the various continents, and why multilateral agencies and foundations for international aid have been giving priority to judicial reform programs and rule of law programs in such diverse countries as Russia, Guatemala, Colombia, Sri Lanka, Philippines, South Africa, Mozambique, Nigeria, Uruguay, China, Argentina, Cambodia and so on, and so forth.

Does the fact that this phenomenon is occurring in different countries make it a global phenomenon? Can it be explained in all cases by the same causes? Does it have a univocal political meaning? Is this new global interest on courts part and parcel of hegemonic globalization or rather of counterhegemonic globalization? I shall try to answer these questions focusing on two issues: the extent to which the role played by the courts in the modern state is linked to the transformations undergone by the state; the

prospects for democracy deriving from the worldwide focus on the rule of law and court reform.

The Rule of Law/Judicial Consensus

The rule of law/judicial consensus derives from the other three consensuses: the neoliberal economic consensus; the weak state consensus; the liberal democratic consensus. The neoliberal development model, with its greater reliance on markets and the private sector, has changed the ground rules of both private and public institutions, calling for a new legal framework for development conducive to trade, financing, and investment. The provision of such a legal framework and the responsibility for its enforcement is the new central role of the state which is allegedly best fulfilled in a democratic polity. The rule of law is thus quintessential in development: "the development potential of law lies in that law is not only a reflection of the prevailing forces in society; it can also be a proactive instrument to promote change" (Shihata, 1995: 13). There is, supposedly, no alternative to law but chaos. This, however, will only be possible if the rule of law is widely accepted and effectively enforced. Only then are certainty and predictability guaranteed, transaction costs lowered, property rights clarified and protected, contractual obligations enforced, regulations applied. To achieve all this is the crucial role of the judicial system: "a well-functioning judiciary in which judges apply the law in a fair, even, and predictable manner without undue delays or unaffordable costs is part and parcel of the rule of law" (Shihata, 1995: 14). The judiciary is responsible for delivering equitable, expeditious and transparent judicial services to citizens, economic agents, and the state.

But inasmuch as the role of the state has been reformed to serve the new global consensus, the judicial system must be reformed as well. The judicial reform is an essential component of the new model of development and the basis of good governance, the provision for which is the priority of the non-interventionist state. Administration of justice is essentially a service delivered by the state to the community in order to preserve social peace and facilitate economic development through the resolution of disputes. As the World Bank officials confess (and 'confess' sounds right since they seem to be atoning for old sins), "it has taken failures of government in Africa, the collapse of dictatorships in Latin America and profound transformations in Central and Eastern Europe to manifest that without a sound legal framework, without an independent and honest judiciary economic and social development risk collapse" (Rowat et al., 1995: 2).

Of all the liberal global consensuses, the rule of law/judicial consensus is by far the most complex and ambiguous. If for no other reason, because its

focus is on the institution (courts) which better than any other represents the national character of modern institution-building and which, on this account, one might expect to resist globalizing pressures most effectively. Notwithstanding some high profile international courts in the past, and the European Court of Justice and the European Court of Human Rights today, the judicial system remains the quintessential national institution, and it has been far more difficult to internationalize it than the police or the armed forces¹. Though my initial formulation of the judicial consensus may have suggested that the focus on the judicial system is a high intensity globalization process, the low intensity globalization process is equally important in this area, that is, parallel and partially convergent judicial concerns propping up in different countries across the globe and, in part at least, in response to national needs and expectations. The analysis must therefore be sensitive to the diversity of national developments and their causes, rather than hastily producing monolithic global explanations.

One of the most striking features of the focus on the judicial system is that the attention given to courts lies, now in the recognition of their function as the ultimate guarantors of the rule of law, now in the denunciation of their incapacity to fulfill such function. In other words, the judicial system gains social and political visibility for being simultaneously part of the solution and part of the problem of the enforcement of the rule of law. When it is viewed as part of the solution, the focus is on judicial power and judicial activism; when seen as part of the problem, the focus is on judicial crisis and the need for judicial reform. However, in the latter case, the features or conditions that are now object of criticism and reform were previously tolerated or ignored. The critical attention they now get is a product of the new role attributed to courts as a key instrument of good governance and law-based development.

The Globalization of the Rule of Law and the Judicial Reform

The last decade witnessed the increasing social and political visibility of the judicial systems across the globe, the rising protagonism of courts, judges, and prosecutors in public life and the mass media, and the transformation of the once exoteric judicial affairs and proceedings into frequent topic of conversation among lay citizens. All this has been seen as evidence that we are entering a period of global expansion of judicial power. Is that so? And if so, what is its sociological and political explanation and

¹ The current debate on the autonomy and jurisdiction of the new permanent international criminal court under the initiative of the UN is illustrative of the tensions and constraints confronting the internationalization of the judicial system.

meaning? Before trying to answer these questions, let us scrutinize the empirical evidence at hand. For analytical purposes, I shall distinguish among core, semiperipheral, and peripheral countries, according to their position in the world system even though my analysis will concentrate on core and semiperipheral countries². This criterion will be combined with two others: the different legal cultures and institutional traditions; and the different trajectories through which the various countries entered modernity and thus legal modernity.³

Concerning the core countries of Europe and North America, the most striking fact of the last decade is the large-scale battle of the Italian courts against the political corruption that devastated the political class that had dominated Italian politics since World War II, and indeed shattered the basic foundations of the Italian political regime. This battle, known as *Mani Pulite* (Clean Hands) started in Milan in April 1992. The whole process of corruption cases in the city came to be known as *Tangentopoli* (Kickback-City) and spread to other cities later on. Charges, arrests, and measures of preventive custody were issued against ministers, party leaders, members of parliament (at one time as many as one third of them were under investigation), civil servants, businessmen, financial journalists, and members of the secret services. They were accused of bribery, corruption, abuse of public office, fraud, criminal bankruptcy, false accounting, and illicit political funding. Two years later there had been ordered 633 arrests in Naples; 623 in Milan; 444 in Rome.⁴

The political turmoil was so vast and deep that many saw emerging in its aftermath a new political regime, the Second Republic, a product of an extreme form of judicial activism and of judicialization of politics, derogatorily called by some the "Republic of Judges". However unique in its radicalism, the Italian judicial protagonism does not stand alone in Europe. High-profile abuse of power charges, charges against members of the government, as well as corruption charges against politicians and businessmen have been brought to court in France, Belgium, Holland, Germany, Greece, Spain, and Portugal. In Spain the judicial investigation came very close to the then Prime Minister, Felipe Gonzalez, in a case of

alleged abuse of power, the funding of death squads against the militants of ETA, the armed organization of basque nationalists.

But the expansion of judicial protagonism in Continental Europe is not limited to criminal justice. It occurs in three other instances. First, the new activism of the constitutional courts in Germany, France, Italy, Spain, and Portugal in cases of separation of powers or of distribution of competences among levels of government (local, regional, national), and in cases of human rights guaranteed by the Constitution. Second, an emerging assertiveness of regular and administrative courts against the abuse of administrative power by state institutions in favor of judicial guarantee of individual and collective rights in the field of consumer and environmental protection. Third, the high-profile role played by the European Court of Justice, a key institution in the creation of the European legal system, often forcing member states to change their policies in line with its rulings. At a different level, and on a much smaller scale, the same has also been the case of the European Court of Human Rights.

But the social visibility of the courts in Europe resides as much in their accomplishments as in their failures. Indeed, the high-profile interventions of courts in high-profile and political cases — what I shall call the dramatic justice — has contributed to sharpen the contrast with the everyday functioning of courts — the routine justice — the judicial activity that is most likely to affect ordinary citizens. Particularly in Italy, France, Portugal, and Spain, the courts have been harshly criticized for their inefficiency, inaccessibility, unreasonable delays, high expenses, lack of transparency and accountability, corporatistic privileges, large numbers of prisoners awaiting trial, investigatory incompetence, and so on and so forth. In the study we recently conducted regarding the uses of courts in Portugal, a clear picture emerges of the citizens' great distance and diffidence vis-à-vis the judicial system and their relatively low degree of satisfaction whenever they have been involved in court proceedings (Santos et al., 1996).

If we turn to the North American countries, the USA has been the motherland of legal and judicial activism (Galanter, 1992), to such an extent that Shapiro refers to the recent judicial trends in Europe as 'Americanization' (1993). Curiously enough, for the last decade such a distinctive feature of American society has been under attack: the so-called litigation explosion, the public and political denunciation of excessive litigiousness and of the costs of litigation, the call for less active court intervention in policy-making, the changes in the Supreme Court etc. Moreover, while the call for the new centrality of the judicial system in social and political development across the globe seems to echo the American experience, in the USA the role of courts in bringing about progressive social

2 On the concept of core, semiperipheral and peripheral states in the world system, see Wallerstein (1974).

3 Elsewhere I deal in great detail with these factors. See Santos (1995: 270-274).

4 For this description I rely heavily on Nelken (1996). On the political impact of corruption in Italy, see Della Porta and Di Tella (1997). On corruption in Europe, see Della Porta and Meny (1997). On the economic and politics of corruption in general, see Heywood (1997).

change has been highly questioned in recent times (Rosenberg, 1991). These developments have led some to believe that the USA "may have passed the peak of judicial policy-making in both constitutional and administrative judicial review" (Shapiro, 1993: 64). In Canada the judicial power seems to be on the rise, particularly after the adoption of the Charter of Rights of 1982, which granted the Supreme Court a major influence on the policies of provincial and cultural autonomy.

The global picture of courts in the core countries is thus one of expansion of judicial power, with a probable counterbalance in the country traditionally with the highest level of judicial power. Though identified in several countries, this process seems to respond to internal specific conditions in each one of them. In all of them, however, the higher visibility of courts has involved heightened criticisms of the courts' limitations and inefficiencies or, in the case of the USA, criticisms of lawyers held responsible for the dysfunctional excesses of litigation. In any case, in all the countries in question, these criticisms have been less harsh than those addressed at government and elected politicians. Indeed, the growing distrust of the latter is believed to have led to the judicialization of politics.

Before engaging in a detailed analysis of this phenomenon, let me briefly mention the recent judicial trends in the semiperipheral countries. Semiperipheral countries tend to be highly unstable polities. Their intermediate position in the world system, their class structure, the conflictual coexistence of an active civil society, however fragmented and poorly organized, with a strong state, often a developmental state varying widely in legitimacy, coercive capacity and efficiency — all these features make social conflicts particularly complex in these societies and social compromises more difficult to achieve. That is why these countries have tended to undergo more or less long periods of authoritarian rule alternating with periods of more or less consolidated democratic rule.

Concerning the semiperipheral countries of Europe, Portugal and Spain lived under an authoritarian regime for four decades and, during that period, the judicial system was either reduced to an appendage of the Government — in politically sensitive areas such as political crimes and labor disputes — or kept a low-profile independence and remained utterly isolated from society. The democratic transitions of the mid-70s brought with them large institutional changes in the judicial system. It took a decade for the courts to vindicate a more active role in society. Today, what distinguishes these two countries from the European core countries is that in them the judicialization of politics coexists with a greater distance and higher diffidence of citizens vis-à-vis the judicial system. The discrepancy between the dramatic justice of

high profile judicial activism and the routine justice of everyday operations of the judicial system is accordingly wider.

The semiperipheral countries of Central and Eastern Europe underwent democratic transitions in the late 80s. During the communist period, and even though the situation varied from country to country, there was very little room for the rule of law or independent judiciary. Probably for this reason, the judicialization of politics through judicial review became a central issue early in the transition period. The Russian case is particularly telling in this respect because the autocratic traits of Russian political culture antedate 1917 and have fostered a deep-seated resistance against a strong independent judiciary. In the late 80s the *glasnost* media started reporting extensively on such a phenomenon as the "telephone law" in which party officials would telephone a judge and "advised" him on what the outcome of a particular case ought to be (Thomas, 1995: 425). In 1989 the Soviet Committee on Constitutional Supervision was established. The committee had the power to declare as invalid laws, presidential decrees and other normative instruments (Kitchin, 1995: 443). In the two years of its existence it struck down many laws and decrees. The political incongruence of this Committee was that it coexisted with the Soviet Constitution of 1977, the Brezhnev Constitution, which was utterly hostile to the idea of the judicialization of politics. Indeed, the same incongruence continued after the coup of August 1991, when the Soviet constitutional committee was replaced by the Russian Constitutional Court. This court had increased powers of judicial review, and its first chairman, Valery Zvorkin, made it clear that the court's dual mission was to create the rule of law and to prevent the relapse into totalitarianism (Kitchin 1995: 446). The not unexpected clashes between the Court and President Yeltsin led to its suspension and to a new Constitution with a revised regime of judicial review that same year.⁵

Other countries in the former communist Europe have been successful in instituting judicial review through the establishment of constitutional courts. The most remarkable example is probably Hungary where the Constitutional Court — established when the parliament adopted a highly revised version of

⁵ The Russian Constitutional Court was suspended for more than a year. It resumed its activities in March 1995 and it was immediately thrust into the public spotlight. According to Pomeranz (1996) one of the most controversial cases that the Constitutional Court has dealt with since its 1995 reinstatement has been the Chechen case, which revolved around President Yeltsin's decision to send federal troops into the Chechen Republic without first seeking legislative consent. For Pomeranz this controversial case on the division of powers represented the opportunity for the new Constitutional Court to dispel the activist image that it had acquired during the previous period, before suspension.

the old socialist constitution in October 1989 — has played a crucial role in shaping the political system of the country and has become the most credible institution of the new democratic regime in light of its advanced human rights jurisprudence (Zifzak, 1996: 1).

Aside from the constitutional court and the judicial review, the other major focus of the rule of law and judicial reform in Central and Eastern Europe has been the creation of a legal framework and a judicial system suited to promote and consolidate the sweeping transition from an administrative-command economy to a market economy. The assumption — a distinctly Western law and modernization assumption — is that privatization of the immense state sector and the consequent massive expansion of contractual relations will both presuppose and induce an increasing reliance on law and judicial institutions (Hendley, 1995: 41). Without this, there will be neither stability nor predictability, which are the prerequisites of a healthy economic environment based on the market and the private sector. These concerns have been paramount in the international assistance provided to Central and Eastern Europe by the World Bank, the USAID, and various American Foundations. In the early 90s the USAID announced its purpose to invest more resources in democracy and rule of law programs in the region, particularly in view of the fact that the countries under consideration were “advanced developing countries,” that is to say, semiperipheral countries (USAID, 1994: 2).

Though the programs are still going on, the most recent assessments of the legal and judicial reforms in this region, and particularly in its most important country, Russia, are now less enthusiastic than before. For instance, Hendley concedes that her hypothesis that the combination of privatization and political differentiation in Post-Soviet Russia might serve as a catalyst for a profound change in Russian legal culture was overly optimistic. According to Hendley, the Soviet past weighs too heavily on the Russian present; managers do not believe in the enforceability of contracts through legal means and try to achieve the basic purpose of contracts (ensuring their supplies) by other means (Hendley, 1995: 63). Under these circumstances, the distrust of law and legal institutions cannot be remedied with quick-fix reform: “The patron-client networks that characterized the prior system [the authoritarian policies of the ruling Communist Party] may be more easily taken over by private law enforcers, namely the mafia, than by formal legal institutions” (Hendley, 1995: 48).

The recent rule of law and judicial trends in Central and Eastern Europe offer two sharp contrasts with the situation in Western Europe. In the first place, the increased judicial protagonism in Western Europe has derived above all from the campaign against political and business corruption. In

Russia, as in other Eastern European countries, the constitutional court has been a major focus of attention; and on the other hand, though corruption has been rampant with the proliferation of mafias filling the void of power and command once exerted by the Communist Party, it has caught little judicial attention. The focus has been rather on the legal consequences of economic reform, privatization, marketization, and contractualization. This has been particularly the case of the foreign legal assistance in which the USA has played a pivotal role. And this leads me to the second contrast with Western Europe. The legal and judicial reforms undertaken by the Southern European countries during their democratic transitions in the mid-70s were carried out with domestic resources, in response to internally defined needs and aspirations, and with the purpose of reintegrating their legal and judicial systems in the democratic tradition and the continental European legal culture. In Central and Eastern Europe, the legal and judicial reforms are being driven by strong international pressures — a form of high-intensity globalization, for which, especially in the economic legal field, American law, rather than continental European law, provides the model.

I turn now to some semiperipheral countries of Latin America. Rule of law and judicial programs in Latin America, as much as in Central Eastern Europe, have a strong international component. They are a domain of high-intensity globalization in which the USA plays the leading role followed at a distance by some countries of the European Union. In some Latin American countries more than in others, there are strong internal energies driving the reforms, at times in tandem with the globalizing pressures, at times in collision with them. There are also strong internal resistances to reform. In the countries that were ruled until the 80s by an authoritarian regime — such as Argentina, Chile, Brazil, El Salvador, Honduras — the internal impulse for judicial reform in the democratic transition focused more on the independence of the judiciary, due process guarantees, judicial review, and far less on access to justice.

During the dictatorship, judges — generally viewed in Latin America as a conservative body who systematically favored the propertied classes and the rulers of the day — were either sympathetic to the military *juntas* (as in Argentina) or easily neutralized by them (as in Brazil) (Osiel, 1995). This was even the case of the Chilean judicial system which had reputation for conservatism but also for probity and seriousness. The activism of the Chilean judicial system against the democratic socialist measures of Salvador Allende in the early 70's, which closely resembled the activism of the US Supreme Court against the New Deal, became a landmark of conservative judicial protagonism in Latin America. The truth commissions that were established to investigate the violations of human rights and the crimes

perpetrated by the *juntas*, such as those in Argentina, Chile, El Salvador, and Honduras, recommended thorough judicial reforms (Popkin and Roht-Arriaza, 1995). Indeed, the first test for the new judicial system — which in most cases remained very much the same as the old one — was the trial of the dictators and the torturers at their orders. The test failed, either because of the political compromises between the outgoing and incoming political class (the cases of Brazil and Chile), or because of the instability caused by the trials forced the government to retreat (the case of Argentina).

The other major focus of the judicialization of politics in the last decade in Latin America has been the judicial review, that is, the power of the courts to declare a law or other normative decree null and void on the ground that it violates the Constitution. In some countries judicial review rests on the Supreme Court (Argentina); in others it rests on constitutional courts (Brazil and Colombia) or even on lower courts with possibility of further review by the higher court (Colombia). The effective exercise of this power and its contribution to the consolidation of democracy varies widely from country to country.

On one extreme we may find the Argentinean Supreme Court. According to Carlos Nino, since its independence some 160 years ago Argentina has lived under open and genuine democracy for a bit more than 20 years and the Supreme Court has been more than anything else an impairment of the democratic process (Nino, 1993: 317). By way of example, Nino mentions a long-standing judicial doctrine, the “doctrine of the *de facto* law,” the doctrine that ascribes validity to the laws enacted by regimes that come to power by force. The vicissitudes of this doctrine in recent times show how far the political control of the judiciary by the government can go. One of the first measures of President Alfonsín after he took office in 1983 was to send a law project to Congress asking for the nullification of the so-called self-amnesty law, a law which the military had enacted right at the end of their period to cover the abuses of human rights committed under their rule. The nullification was unanimously approved by the Congress, the law was subsequently upheld by the Supreme Court, and thus breaking away from the doctrine of the *de facto* law for the first time in more than a century. After taking office in 1991, President Menem, not happy about the Supreme Court, hastened to pass a law to increase the number of Supreme Court judges and fill the new positions with people loyal to his ideas (Stotzky and Nino, 1993: 8; Nino, 1993: 319)⁶. In the same year, the Supreme Court resumed the old doctrine with the positivist argument that the laws enacted by the Congress

6 With the same purpose of keeping the judicial system under political control, several judges of the Constitutional Court of Peru were dismissed by the Government in 1997 (Pastor, 1998: 22).

should be deemed valid regardless of the “affective or ideological evaluation” that can be made of military regimes. This leads Nino to the conclusion that “the Supreme Court and in fact the judicial system as a whole fell short during most of Argentina’s history of realizing its responsibility as custodian of the democratic system” (1993: 321).

At the other extreme, we might consider the Colombian Constitutional Court created by the Constitution of 1991. The Colombian Constitution has the broadest system of constitutional control. At the request of any citizen, it grants to the lower courts the power to suspend a decision or measure by any public or private authority on the basis of its being unconstitutional and the sentence may be reviewed on appeal by the Constitutional Court. Judicial review is vested upon the Constitutional Court which has had some high-profile interventions in the fields of human rights, and cultural diversity established by the Constitution, and has even nullified two government decrees declaring the state of exception (Villegas, 1993: 139; 1996). In an interview the President of the Court confided that the Court was walking a tight rope, since the government, unhappy about the show of judicial independence and having the majority in Congress, could at any moment propose the revision of the Constitution to abolish the Court or reduce its review powers.⁷

The high-profile interventions or omissions of the highest courts in Latin America have been very controversial and often in collision course with the executive or the legislature. Their contribution to the consolidation of democracy is ambiguous and cannot be established in general. This protagonism of the judicial system has, however, been upset by a kind of negative protagonism: the increased and ever more publicized dissatisfaction of the citizenry with the inefficiency, slowness, inaccessibility, elitism, arrogant corporatism and even corruption of the judicial system in its everyday functioning. The dual image of courts already identified in Southern Europe is much more striking in Latin America. Moreover, the Latin American judicial system seems to be very timid in bringing corruption charges against government officials. Cases of corruption are reported daily in the mass media but very little judicial investigation takes place. In Brazil, President Collor de Mello, who was impeached by the Congress on corruption charges, was acquitted in court. In this regard, and for reasons mentioned below, Colombia seems to be a partial exception. The office of Attorney-General (*Fiscalía*) has been conducting a high-profile battle against political corruption, particularly relating to organized crime and drug trafficking. Ministers and other high ranking party officials have been

7 The interview was given to the author on Sept. 10, 1996, as part of a research project under way on the landscape of justices in Colombia.

arrested and half of the members of parliament are under investigation (process known as the process of the 8000).

The most notorious feature of the focus on rule of law in the developing world from the mid-80s onwards is the high-intensity globalization character of the reformist pressure on the judicial system. In Latin America, the institutions that exert this pressure are the USAID, the World Bank, the InterAmerican Development Bank, the US Justice Department, the Ford Foundation, and the European Union (collectively or through some of its members). I cannot go into great detail here about the multiple features of this pressure. I will limit myself to a brief comment on some of them.

As far as the USAID is concerned, since the early 90s, support for the rule of law has become a major component of its assistance programs. Though USAID investments in law programs date back to the 60s — the first wave of “law and development” — the current resurgence of activities in this area began in the mid-80s with the USAID Administration of Justice program in Latin America. According to a recent assessment, Latin America was the testing ground for the law programs that since the 90s have spread to Asia, Africa, Eastern Europe, and the newly independent countries (USAID, 1994: VII). The USAID distinguishes four generations of law programs since the early 60s. The first generation focused on legal education and law reform; the second, on basic needs legal aid; the third, on court reform. The current fourth generation is the most ambitious and political in the Agency’s terms because it encompasses all the concerns of the three previous generations of programs and broadens their scope while including them in the design and implementation of country democracy programs (USAID, 1994: 4). In the latest generation, unlike in the previous periods, assistance is conceived as political and not merely as technical. The objective is to promote democracy even against the resistance of the host country. In the latter case, resistance must be overcome through coalition and constituency-building strategy to forge elite commitment to law reform (USAID, 1994: VIII). In the Agency’s jargon, such strategy “facilitate host country demand.”⁸ In a recent assessment of six rule of law programs, four of them in Latin America, the Agency concedes that this strategy was successful only in one of them, Colombia.⁹

⁸ One cannot help tracing in this “new” strategy the same imperialistic posture that led in a very recent past the USAID and the USA government to collaborate with military *juntas*, when they were not directly involved in their coming to power.

⁹ Other evaluations of the rule of law and judicial reform movement in Latin America mention Chile and Costa Rica as successful cases and Mexico and Argentina as failures. See Carothers (1998: 101).

The constituency-building strategy is considered the most important of all the strategies used because the most political. Indeed, the approaches adopted in the previous periods are criticized for being narrowly defined as technical assistance conducted by “planners accustomed to thinking bureaucratically rather than politically” (USAID, 1994: 19). And yet, the Agency recognizes that the technical approach was suited to the political conditions of the cold war motivated by the “concern that mobilizing citizen pressure groups for reform might inflame national sentiments over US involvement in a sensitive political area ... and in some instances there was apprehension (particularly in the cold war era) that encouraging grassroots demands for reform might overwhelm fragile democratic institutions and open the way to the ascendance of antidemocratic political movements from either the left or the right” (USAID, 1994: 18). This concern with the danger coming from the right sounds utterly cynical since the USAID cooperated with all the military *juntas*. In any case, the inference is that in a post-cold war period the strategies of the Agency must be overtly political, meaning that the law reforms must be understood as part of a political project for the consolidation of democracy.

The ROL (rule of law) programs are wide-ranging and involve the following strategies: coalition and constituency-building, already mentioned, structural legal reform, access creation and legal system strengthening. A closer look at the deployment of these strategies shows that from country to country they vary in scope and emphasis. Considering some of the semiperipheral Latin American countries — Uruguay, Argentina, and Colombia — the involvement in Colombia far exceeds that in the other two countries both in time and resources. While the program in Argentina extends over the period of 1989-93 and in Uruguay 1990-90, in Colombia it spans 1986-96. The funding provided for Uruguay amounts to less than 1 million dollars (850.000 dollars), for Argentina, 2 million, and for Colombia, 63 million (USAID 1994: A-2). Moreover, while in Argentina and Uruguay the programs have focused on judges and the regular court system, in Colombia they have concentrated on the Attorney-General office (the *Fiscalia*), that is to say, on criminal investigation and prosecution.

The *Fiscalia* emerged in its current format from the 1991 Constitution following, in some important aspects, the American prosecution model. The objective has been to build the coercive capacity of the state mostly against drug trafficking. With the same objective, the Agency has provided funds for the special criminal courts charged with trying organized crime, drug traffic, and guerilla armed struggle cases. These courts, called Public Order Courts and staffed by unidentified judges, referred to as faceless judges, are considered by USAID a successful institutional innovation but have been

strongly criticized in Colombian legal circles. Aside from the fact that the special proceedings violate the due process guarantees, most of the defendants in these courts are not the drug traffickers but rather poor peasants caught in the crossfire among drug traffickers, paramilitary groups, the military and the guerrilla.

The concentration on the fight against drugs resulted in neglecting in Colombia the objective privileged in most other countries, namely the development of an adequate legal climate for business enterprise. This may explain why the World Bank has not funded any law program in Colombia in spite of its investment in judicial reform in many countries of Latin America and the Caribbean. While the USAID proclaims today the political character of its law and judicial reform programs, the World Bank prefers to emphasize the need to foster the legal and judicial environment conducive to trade, financing, and investment, justifying its position with the Bank's charter, which defines the promotion of economic development as the Bank's principal mandate and does not include political reform.¹⁰ This mandate is very broad indeed: "it encompasses everything from writing or revising commercial codes, bankruptcy statutes and company laws through overhauling regulatory agencies and teaching justice ministry officials how to draft legislation that fosters private investment" (Messick, 1998: 2). The increasing interest of the World Bank in court reform is thus justified because "experience has shown that such reform cannot be ignored in the process of economic development or adjustment" (Shihata, 1995: 14). That this interest in the role of law and courts is only apparently apolitical or depoliticized is clearly shown in the philosophy underlying one of the areas of intervention that in previous periods was considered more political, the area of access to justice. In a recent conference organized by the Bank, Brian Garth defends that the constitutionalization of human rights has made possible a more neutral stand on the question of gaining access to justice and, therefore, a "depoliticized" legal aid: "instead of seeing legal aid as the cutting edge of a political movement, it can now be considered a fundamental right of citizenship under the rule of law" (Garth, 1995: 90).

The Bank's intervention in this area is worldwide and may be very wide-ranging in scope. In Laos, for instance, it has addressed the country's legal system as a whole because, since it had embarked on a complete change of its economic and social system, the country "needed a parallel overhaul of its legal system" (Shihata, 1995: 14). In Latin America the Bank has provided, among others, grants or loans for legal and judicial reform in Venezuela

10 The USAID sees itself as an experimental risk taking innovator in developing approaches, with modest funding, that can then be taken over by other donors willing to make more substantial investments (USAID, 1994).

(1992, 30 million dollars)¹¹; in Bolivia (1995, 11 million dollars), in Ecuador (1996, 10,7 million dollars), and Peru (1997, 22,5 million dollars).

The Inter-American Development Bank is a new global actor in this field of judicial reform defining it since 1995 as an important new area. The first loans were made in that year: Costa Rica, 11,2 million dollars; Colombia, 9,4 million dollars, once again targeted to the *Fiscalia* and the fight against drug trafficking. In 1996, the most important loans have been made to El Salvador, 22,2 million dollars; Honduras, 7,2 million dollars and Bolivia, 12 million dollars. Still in 1996, Paraguay received a loan of 22 million dollars "to support the strengthening of the climate of legal certainty and predictability to allow economic and social development and reinforce the rule of law". In 1997, Peru received a loan of 20 million dollars to develop alternative dispute settlement mechanisms¹²

Outside Latin America the concern with the rule of law and judicial reform is also very much present. In peripheral countries, such as Mozambique or Cambodia, and in spite of the abysmal social problems that afflict their populations, this concern is often part and parcel of painful and fragile democratic transitions after years or even decades of civil war and dictatorship.¹³ The problematic nature of these transitions is further compounded by the hardships imposed on popular classes by the neoliberal economic recipes that usually accompany such transitions. In these countries the rule of law/court reforms tend to be extreme instances of high-intensity globalization, in that, the reforms are mainly driven by donor countries,

11 The total investment of Venezuela in judicial reform, in particular, in the reform of penal justice, amounts to 120 million dollars. According to recent official data, of the 23,379 detained in Venezuelan prisons, only 7,945 have been convicted. These and other similarly disquieting data have led the president of the Judicial Council to consider that the judicial and legal reform is a question "of survival of democracy".

12 From 1992 to 1997, the World Bank and the Interamerican Development Bank distributed 300 million dollars in loans and grants in 25 countries (Messick, 1998: 1). The European Bank for Reconstruction and Development, the European Union, and some European countries through their agencies for international cooperation (most prominently, the GTZ, *Deutsche Gesellschaft für Technische Zusammenarbeit*) have also been active in funding judicial reform and rule of law projects.

13 On Cambodia see Lorenz (1995). The Kmer Rouge liquidated literally the judicial system as a whole. Only one judge with legal training remained in the country after that. In the case of Mozambique, after centuries of colonialism and thirty years of war, the few able lawyers of the country are justices of the Supreme Court or practice law in Maputo. In the rest of the country, the judicial system, in the liberal modern sense, hardly exists. The Danish international aid agency (DANIDA) and the Portuguese government have recently provided the funds to rebuilt (or rather to build anew) the judicial system.

international assistance agencies, and international financial institutions. They define the priorities, impose the orientation and the sequencing of the reforms and, of course, provide the resources to bring them about.

Concerning the semiperipheral countries the situation is very different. In many of them the interest in rule of law and court reform runs very high but internal developments, rather than globalizing pressures seem to explain it. In some countries the judicial system is assuming a more prominent role and consequently becoming more controversial and inviting debate on the expansion of the judicial power and the judicialization of politics. In Africa, South Africa is a particularly interesting case. As Heinz Klug has pointed out, having emerged from a long period of authoritarianism and apartheid, South Africa has shown a striking faith in the judicial system to mediate in the construction of a post-apartheid political order (1996). The Constitutional Court, established under the "interim" constitution of 1993, was assigned the role of reviewing the final 1996 Constitution enacted by the Constitutional Assembly. The court performed that role in very concrete terms, nullifying some of the provisions of the document initially submitted to it by the Assembly, and the latter subsequently made the changes according to the court's ruling. The South African, as well as the Russian, Hungarian and Colombian cases, show the extent to which constitutional courts and judiciary review in general have contributed towards the judicialization of politics during the last decade. In the South African case, argues Heinz Klug, the faith in the judiciary to uphold the new democratic order "is particularly striking given the past failure of the judiciary to uphold basic principles of justice in the face of apartheid policies and laws" (1996: 2).

As a matter of fact, the South African judicial system is facing a challenge similar to the one faced by Latin American courts in the aftermath of the democratic transition: the challenge of submitting to trial and punishment the politically motivated murders and tortures committed by the apartheid rulers or at their service. The acquittal in October, 1996 of apartheid-era Defense Minister Magnus Malan and 15 others involved in the death squad massacre of 1987 might indicate that, in this instance, the South African courts will probably not fare better than the Latin American ones. Furthermore, the post-apartheid access to justice is still to be built, and that is another great challenge. What distinguishes South African courts from Latin American courts is the former's greater efficiency in dealing with the judicial affairs of the business world. Probably for this reason, contrary to what is happening in Latin America, the judicial reforms in South Africa are being carried out with internal resources and according to needs and expectations defined domestically.

Two other semiperipheral countries, both in Asia, present interesting trends towards a greater political protagonism on the part of the judicial system. In India, the judicial system is currently right at the center of the political debate, pressed or encouraged by a strong public opinion against political corruption. The indictment of the former Prime Minister P.V. Narasimha Rao on forgery charges and of many other politicians and high state officials on corruption charges may well prove to be the test case of the courts' integrity and independence.¹⁴ In South Korea, the judicial system has traditionally been an appendage of authoritarian government, first Japan's colonial rulers, then a succession of military rulers. Moreover, corruption in the judicial system has been pervasive all along. Today, however, in tandem with the slow ongoing democratization process, the judicial system has begun to assert its independence, starting with a set of proposals put forward by the chief justice of the Supreme Court, Yun Kwan, soon after his confirmation in 1993, which have sparked public attention and political debate (Hoon 1993). Since then two former presidents have been convicted in corruption cases.

State Weakness and the Judicialization of Politics

In the next two sections I shall try to analyze the sociological and political meaning of the rising interest in courts and of the rule of law/judicial reform movement across the globe. I will try to answer two questions: What type of state form is both presupposed and produced by the expansion of judicial power? What are the prospects for democracy? In this section I will try to answer the first question.

One of the striking features of the focus on law and the courts is, as I have already indicated, its global reach. In light of the extreme diversity of concrete instances and conditions, it is highly improbable that they can be brought together under the same causal explanation. In the preceding section, I organized my analytical description according to two main factors: the position of the country in the world system (core, periphery, semiperiphery) and the nature of the driving force behind the increasing role of law and the courts (high-intensity global pressure or mainly internal dynamics). My working hypothesis is that there is an intimate link or correlation between the legal and judicial reform, on one side, and the state, both as political system and as an administrative apparatus, on the other. What this means is that the question of judicial reform, though being a judicial question, is, above all, a

14 The cover story, titled "Steeley Resolve", of *India Today*, October 31, 1996 is dedicated to the courts' determination to uphold accountability at all costs: "A judicial coup d'état? Hardly. The growing assertiveness of the higher judiciary over the past year in meting out corruption in public life has caused near hysteria amongst politicians" (p.20).

political question. By the same token, the judicialization of politics entails the politicization of the judiciary. The way this phenomenon is occurring all over the world is, however, very diverse.

In core countries the rising protagonism of courts, particularly in continental Europe, is above all the symptom of a failure of the state, as a democratic state. This failure is the result of the public perception of a loss of transparency, accountability, and participation in government. Judicial activism against political corruption and the expanded judicial review of the separation of powers and state competences are the responses to such perception. It should be borne in mind that, in the case of corruption, the mass media and civic organizations have performed a decisive role in pressing the judicial system to act. Though the judicial system is considered to be, in general, a reactive institution — that is to say, it waits for citizens to request its services — the prosecutors, who are part of the system, are supposed to be proactive and initiate crime investigation. But the truth of the matter is that, in most countries, prosecutors have acted only after reports from the media, indeed oftentimes limiting themselves to following leads offered by the media. The reasons why some cases are brought to the attention of the media and others not are often mysterious. According to Zaffaroni, behind the media attention are conflicts among powerful economic or political groups in which the losers are publicly exposed (1997: 10).

To a lesser extent the judicial activism is related to the perceived failure of the state as a welfare state. The moderate growth of litigation in the fields of administrative law, social and economic rights, torts, consumer and environmental protection, occupational health and safety has been prompted by a growing distrust of the state, a loss of confidence in the capacity or willingness of the state either to act positively to implement the rights and policies that guarantee the well-being of citizens or to protect them against the wrongdoing of powerful private actors. In this respect, the European countries in the post-war period offered a sharp contrast with the USA. Stronger and more developed welfare states provided efficient protection and reduced the impact on citizens whenever protection failed, thus making litigation unnecessary or keeping it at much lower levels than in the USA. Current legal and judicial changes in Europe, which as I mentioned above some see as the Americanization of Europe, are in part a direct effect of the crisis of the welfare state.

The double failure of the democratic and welfare features of the state, which has been associated with the legislature and the executive, has induced a dislocation of the legitimacy core of the state from the legislature and the executive to the judiciary. The extent of this dislocation and its virtuality to avert a crisis of legitimacy of the state as a whole is an open question. But the

very fact that this dislocation has occurred is in and of itself remarkable and intriguing. After all, the judicial system is part of the state and as such should be regarded as part of the problem, rather than part of the solution. On the other hand, as I have already mentioned, the increasing protagonism of courts has also drawn attention to their own inefficiency, particularly in areas in which there is potential high judicial demand on the part of the citizens. That courts can be easily put on the defensive, and that the promises they make may exceed by far what they deliver, adds another element of perplexity to the current dislocation of legitimacy. But the most disturbing element is probably that, by such dislocation, democratic legitimacy may henceforth lie in the only non-elected branch of government.

Since it is far from obvious that a more central role should be assigned to courts, we must ask ourselves why this has happened. In order to find an answer we must go back to nineteenth-century political theory of the liberal state, or perhaps even further back to Montesquieu. Of the three powers or branches of government, the judiciary is by far the least powerful or, as Alexander Bickel would have it, the least dangerous (1962). The judiciary is a reactive institution with no enforcement powers, which must apply the pre-existing law when asked to do so by disputing individuals. American constitutionalism with judicial review by the Supreme Court is the exception rather than the rule.¹⁵

In Europe, the independence of the courts has been premised upon their social insulation and political neutralization. In late nineteenth century, Europe was immersed in unprecedented social disorganization and conflict generated by the capitalist revolution, raising new problems that were bundled together in a new umbrella, the social question: explosive urbanization and the subhuman housing conditions; rampant anomie, crime, and prostitution; degraded health and life conditions of uprooted peasants; industrial child labor and malnutrition. The judicial system stood aloof of all this turmoil, quietly defending property rights and adjudicating contractual obligations among individuals, mostly members of the bourgeoisie.

In our century, collective conflicts, if certainly not solved, were institutionalized via the class compromises promoted by social democracy and leading to the welfare state. The political cleavages remained deep, particularly in the context of the cold war, but this underlying consensus became the basis of governability, which consisted in transforming social problems into rights effectively enforced. Since courts were kept away from all this political process, probably precisely for this reason, their

¹⁵ According to Tushnet, the example set by the United States is itself more ambiguous than has often been supposed since the successes of judicial review are concentrated in the recent past, from roughly 1940 to the present (1993: 506).

independence was not tampered with. On the contrary, it was rather strengthened, in part as a result of the general corporatist defense of professional interests, in part as an indirect result of the contamination of the judiciary by the political cleavages in society, as happened most notably in Italy. Indeed, the highly politicized atmosphere, both inside and outside the judicial system, made corporatist independence the common ground for the very governability of the judicial system.

For the last two decades, the economic and social basis of the class compromises underlying the welfare state have been eroding and with them the nature of the democratic political obligation. Resentful and distrustful citizens have been claiming redress for the violation of their rights and the punishment of an all too promiscuous intimacy between state officials and politicians, on the one side, and the corporate world, on the other. The independence of the judiciary, once premised upon its low profile and passivity, has become the necessary condition of the public pressure on it to become more active and high-profile. For how long, we might well ask. Nobody really knows. The contrast between Europe and the USA should be pointed out again in this context. Granted that it is very difficult to compare patterns of judicial independence, it is unquestionable that political control over the judiciary, particularly as concerns the higher courts, has been greater in the USA than in Europe: courts in the USA are more politically controlled and more active; courts in Europe are less politically controlled and less active. It shouldn't be surprising if the increased protagonism of courts in Europe were to be met by attempts to tighten the political grip on them. In Italy, at least, there are some signs that this may occur.

The phenomenon may be transient but it points to a new state form. In fact, we seem to be heading towards a post-welfare state form — the core countries version of the weak state consensus. It will remain a regulatory and interventionist state, strong enough to produce its weakness efficiently, opening the space for partial replacement of the political obligation with contractual relations among citizens, corporations, NGOs, and the state itself. Because the direct provision of welfare services will diminish, more intermediaries will be at stake and, consequently, the provision will become more controversial. This would explain why the downsizing of the welfare administrative sector may lead to the upsizing of the judicial system, a phenomenon that is indeed already occurring as witnessed, for instance, in the recent explosion of the numbers of judges or courts in some countries.¹⁶ Because they act in individual, not collective, disputes, and because they are ambiguous given the relative unpredictability of their rulings, courts tend to depoliticize public life. The activism of courts in the USA may have

¹⁶ On the Portuguese case see Santos et al. (1996).

something to do with the extent to which real political cleavages have been smoothed out in this country.

By criminalizing certain previously accepted political behavior — I mean the fight against corruption — the judicial system contributes to regulating the turbulence and bouts of state anomie that tend to occur in periods of transition from one state form to another. On the other hand, by becoming more active in the area of administrative law and the protection of rights, courts contribute to diffusing the conflict that may arise in the process of dismantling the welfare state. The judicial system thus injects legitimacy into the democratic social pact of a state enfeebled by the erosion of the conditions that had hitherto sustained it. This judicialization of politics is not without problems: caught in the dilemma of having all the independence to act but no powers to enforce, the promise of court activism may soon prove to exceed by far its delivery. When that occurs, if it occurs, courts will cease to be part of the solution to become precisely part of the problem.

The political nature of the growing focus on the rule of law and the judicial system renders more complex and ambiguous its impact on the form of the state, if for no other reason because the politics and societies we are dealing with are very distinct. Some of them have recently emerged from long-term dictatorships of various sorts and the high profile of courts is part and parcel of the democratic transition. Very often such judicial protagonism is mainly due to the activism of the constitutional courts. Their role is a regime-building role, as by defining the boundaries among the various branches of government, allocating competences among central and regional and local authorities (South Africa, Hungary, Portugal). The ambiguous, relatively unpredictable and piecemeal character of the courts' intervention is particularly functional whenever the political forces have not been able to reach a political compromise. In such cases, the Constitution acknowledges the differences, rather than settling them. It is up to the constitutional court to arbitrate the differences, often by political experiment through trial and error.

Leaving aside the constitutional courts, what has brought the courts into the spotlight particularly in semiperipheral countries is the highly contrasting dual image I mentioned above. Mobilized by the mass media and NGOs, in recent years courts have shown in some countries a greater activism as regards human rights, protection against injuries provoked by powerful actors (consumer and environmental cases), and against corruption. This intervention, however timid, has raised the expectations vis-à-vis courts, and consequently made all the more visible their poor performance. Hence the focus on judicial reform. In this respect, two main contrasts must be noticed between trends in core countries and trends in semiperipheral countries. On the one hand, while in core countries the reforms under way seem to respond

to internal dynamics, even if conditioned by global trends, in some semiperipheral countries of Central and Eastern Europe and Latin America the reforms are being conducted under high-intensity globalizing pressure, a pressure dominated by American institutions and American legal models. On the other hand, while in core countries the focus is mainly on courts, since the rule of law is taken for granted and legal reform is an established political process, in most semiperipheral countries the focus is much broader, contemplating the rule of law and legal reform, as well as judicial reform.

In my view, both contrasts are explained by the more far-reaching political reforms deemed necessary in the semiperipheral countries. What is really at stake here is the creation of the post-structural adjustment state. Most semiperipheral countries have been ruled for the past forty years, for shorter or longer periods, by authoritarian regimes and strong interventionist states. The communist states of Central and Eastern Europe ruled an administrative-command economy; the developmental states of Latin America and Asia based their rule on a strong nationalized economic sector and on a tight, mostly protectionist, regulation of the economy as a whole. Neither the communist nor the developmental states were welfare states, but both developed schemes of social protection in health and social security, far more advanced in the communist states than in the developmental states. In different ways, the neoliberal consensus presiding over the expansion of global market capitalism contributed to the downfall of both state forms. They were to be replaced by weak states, acting as facilitators of the new model of development based on the reliance of markets and the private sector.

In the communist states, and in view of their total collapse, the building of the post-structural adjustment state is an all-encompassing task. It involves not just institution building of different kinds but also the building of a legal culture capable of sustaining the legal reforms called for by the new economic environment. In the developmental states the situation is very different because the democratic transitions though they changed the political regime they did not by themselves change the state institutional structure significantly. These changes were to be carried out within the framework of the existing state. The neoliberal dilemma in this regard became apparent in the early 90s. It can be formulated as follows. Only a strong state can produce its own weakness efficiently but once this weakness has been produced it has spillover effects that go beyond the intended reach, to the point of endangering the performance of the tasks assigned to the state in the new model of development.

One such spillover effect is, for instance, the manner in which the constructed weakness of the state facilitates the public diffusion of a neo-

utilitarian conception of the state that basically sees it as a rent-seeking set of institutions and agents, thus discrediting state action altogether and converting state officials into exemplars of cynical reason. In other words, the weak state cannot control its own weakness. The pathologies of state weakness became apparent in the early 90s: massive tax evasions, widespread corruption, withering away of a public service culture, loss of control over the national territory, the emergence of mafias and paramilitary groups disputing the state monopoly of violence, abysmal mismanagement of development grants and loans, etc., etc.

In recent years the World Bank has started to lament the fact that the state has become too weak to perform the new but equally central role assigned to it by the neoliberal development model. In one of its reports, the Bank emphasizes that the state cannot be just the facilitator of market economy, it must also be its regulator (Rowat, 1995: 17). Significantly, the Bank's World Development Report of 1997 is titled *The State in a Changing World* and is dedicated to rethinking the state, refocusing on its effectiveness and on reinvigorating its institutional capability (1997). The priority the Bank now gives to the rule of law, and legal and judicial reforms stems from the need to restore the regulatory capacity of the state in new terms: the post-developmental state. The state continues, of course, to be involved in development, but because the state has ceased to be the very engine of development, social transformation is not a political problem any more; it is merely the economic and technical problem of bringing about a better life for all citizens. The rule of law and the judicial system are thus conceived of as principles of social ordering, as instruments of a depoliticized conception of social transformation.

The depoliticization of social transformation may, however, prove to be a very problematic endeavor. Concurrent with it is the dramatic growth of poverty and social inequality across the globe, as well as the gradual erosion of the fragile safety nets once provided by the welfare state no matter how incomplete or embryonic. To address this issue with a combination of liberal democracy rule of law and judicial activism seems utterly insufficient. Contrary to European experience, where democracy has always flourished at the cost of economic liberalism, in both peripheral and semiperipheral countries today democracy is offered as the political counterpart of economic liberalism. Not surprisingly a press release on building democracy by the USAID states as being one of the major problems to be addressed by its programs: "misperceptions about democracy and free-market capitalism" (USAID, 1996).

Contrary to the experience in core countries, democracy is being promoted by the USAID and the international financial institutions as the

socially more acceptable version of a weak state. As we have already seen above, the rule of law and judicial reform programs are conceived by the USAID as political rather than technocratic in nature. Without ideological competition, the hegemonic political globalization can thus engender depoliticization without having to compromise the benefits of presenting itself as political.

When we compare these trends in semiperipheral countries with similar trends in peripheral countries, the first contrast is that, in the latter, both the internal demand for and dynamics of the rule of law and judicial activism are very weak. In these countries the reforms are almost exclusively the product of high-intensity globalization pressure. Moreover, notwithstanding regional differences, leverages and linkages varying from country to country, whatever economic growth has been made possible in these countries by the globalization of the economy, it was made possible at the cost of tremendous social inequalities and effective social exclusion of the majority of the population. Namely in Africa, globalization has meant economic decline and general destitution. For the majority of the population of these countries social exclusion is a euphemism for the predatory effects of neoliberal economic globalization. Structural adjustment and foreign debt have pushed some countries to the brink of collapse. Under such circumstances, democracy programs and the rule of law programs have become one more foreign imposition, a political conditionality for assistance which the 'host' countries are in no condition to resist. In some cases, particularly when the countries have been devastated by long civil wars, a democratic transition may correspond to a national aspiration (the case of Mozambique). In other countries, the imposition of democracy may indeed lead to ethnic civil war, as the case of Congo illustrates. At its best, the legal and judicial reform aims at building or restoring the minimal state capacity. Beyond this, it seeks to secure legal stability and predictability for the internationalized sector of the economy by concentrating legal investments in the capital city of the country: mainly through the professionalization of the Supreme Court and the training of a few lawyers in business law.

The Prospects for Democracy

In this section I will try to give an answer to the question of the prospects for democracy deriving from the global reliance on the rule of law and judicial activism. Two cautionary notes. First, in a world increasingly dominated by globalized forms of power and of unequal exchanges, the prospects for democracy will heavily depend on the possibility of democratizing global interactions and social relations. Democracy has always been conceived as a national political form congruent both with the national

economy and the national culture. Consequently, democratic theory assumed, in David Held's formulation, "A 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decisions" (1993:25). Hence, political accountability, transparency, protection, and participation have always been basically national problems. This symmetry and congruence have been shattered by economic and cultural globalization. As long as symmetry and congruence are not reestablished at a global level, national democracy will be an endangered species.

The second cautionary note is that the prospects for democracy cannot be identified without specifying what we mean by democracy. There are different models of democracy. Even liberal democracy may be defined differently. I shall distinguish between two ideal-types of democracy, which, in order to avoid prejudgments, I shall call democracy I and democracy II. Both subscribe to the basic features of democracy stated in the Introduction, but, while democracy I ranks them according to their capacity to deliver governability and gives priority to the value of freedom over the value of equality, democracy II ranks them according to their capacity to empower citizens and achieve social justice, thus seeking a dynamic equilibrium between freedom and equality. Both forms of democracy conceive the national societies as open societies, but, while for democracy I such "openness" is premised upon free markets and the neoliberal economic globalization, for democracy II the fate of the open society is linked to the outcomes, risks and opportunities, emerging from the conflict between hegemonic globalization (transnational greed) and counterhegemonic globalization (transnational solidarity). While democracy I accepts world capitalism as the final and highest criterion of modern social life and consequently accepts the precedence of capitalism whenever the latter feels threatened by democratic "disfunctions", democracy II conceives of itself, rather than capitalism, as the final and highest criterion of modern social life and therefore sees itself as taking precedence over capitalism whenever threatened by it. As discussed below, in concrete political processes the two types of democracy are never present in their ideal-typical forms. Truncated versions, loose combinations of heterogeneous elements, hybrid forms of democracy I and democracy II, make the real life of our polities. For analytical purposes, however, I will start by discussing the possible political roles of courts within the framework of each ideal-type of democracy.

I have argued that after two decades of engendered failure and engendered weakness of the state we are entering a new phase, the phase of the reconstruction of the state suited to the regulatory needs of the new neoliberal development model in the meantime consolidated. Such reconstruction involves the political and institutional design of the post-

welfare state in the core countries and of the post-developmental state in the semiperipheral countries. I have also argued that the focus on the rule of law and judicial system is a major component of the reconstruction of the state underway. Taking democracy I as our model to ask about the prospects for democracy as deriving from legal and court reforms amounts to asking about the contribution of the latter to strengthen the capacity of the emerging state form to bring about the compatibility between economic liberalization and political liberalization, that is to say, between capitalism and democracy. The overarching liberal consensus referred to in the introduction presupposes such compatibility. However, in light of the recent past, the compatibility between capitalism and democracy has become an open question. In their systematic comparison of a series of semiperipheral countries, some of which undergoing democratic transition and/or structural adjustment, Haggard and Kaufman conclude that even if there is support for the compatibility assumption, there are nonetheless important tensions between capitalism and democracy, particularly when the former produces highly unequal distributions of assets and income, abrupt social dislocations and, above all, severe rural inequalities (Haggard and Kaufman, 1992: 342). The effects of these distributional conflicts on democratic stability remain an open question. In fact, this impact is mediated by a complex set of factors, such as the economic performance in itself, the political institutions, the organization of civil society, the capacity of the state to sustain order, etc., etc. The role of law and the judicial system in this context is twofold.

First, it may increase the stability and predictability of economic transactions, promote social peace, improve the administrative capacity of the state. In this case, the rule of law and the courts contribute directly towards the economic performance and indirectly towards the democratic stability. The second role consists in dispersing the social conflicts emerging from social dislocations and the distributive inequalities produced by global capitalism. As the rule of law transforms social problems into rights and courts transform collective conflicts into individual disputes, they tend to discourage collective action and organization. Moreover, the judicial tempo, the relative unpredictability of judicial decisions and even the judicial inefficiency if not too high may have a cooling effect on social contestation, lowering social expectations without however nullifying them altogether. By all these mechanisms, law and courts promote governability by preventing the overload of the political system and expanding the boundaries of public toleration, particularly in those countries in which the rule of law and the independent courts are part and parcel of recent democratic transitions.

This analysis so far fails to consider the effects of the performance of these roles upon the judicial system itself. The prevention of the political

overload may lead to judicial overload. The latter is being anticipated by the agencies in charge of the global court reform, and to prevent it they are increasingly including models of alternative dispute resolutions (ADR) in their reform projects. Another impact of the focus on courts upon the courts themselves is the possible rise of corporatist independence, that is to say, the emergence of a conception of judicial independence less concerned with the democratic potential of independent courts to enfranchise people and bring about honest government than with the unaccountability and the professional privileges that independence secures.

Democracy I is by far the dominant conception of democracy today. It is also the conception that is being globalized in the hegemonic programs of political liberalization across the globe. It is in fact an instrumental conception, a means to stabilize economic liberalization and prevent the complete decay of state institutions and the usual "pathologies" that go with it. Its weakness lies in not guaranteeing its own survival in the case of a conflict with economic liberalization. But short of complete collapse, democracy I may be contracted in different ways in order to accommodate the political needs of global capitalism. Many semiperipheral countries, not to mention the peripheral ones, live under different versions of contracted or restricted democracy. In these situations the rule of law and the judicial system perform ambiguous and often contradictory roles. On the one side, the high-profile interventions of courts function as symbolic amplifiers of the democratic rule in that they dramatize the democratic competition among the political elites or factions, or among state institutions or branches of government. This symbolic amplification of democracy within the inner circle of the political system is usually the other side of the contraction of democracy in the outer circle of the political system, that is, in the relations between citizens and their organizations on the one side, and the state and the political class on the other. Such contraction manifests itself in many different ways, as a deficit of representation, as a deficit of participation, and very often as the emergence of violent and corrupt political actions. Rather than being a countervailing force, the rule of law and the judicial system may reproduce such contraction by reinforcing the distinction between enfranchised and disenfranchised citizens.

But on the other hand the judicial system may find itself in the front line of the struggle between democratic and antidemocratic forces. In Colombia, around three hundred judges have been assassinated since 1978. They were investigating or trying cases involving individuals or organizations that felt powerful enough to attack the system head on rather than using it to their benefit, for instance, by manipulating procedural guarantees and legal loopholes. Colombia is probably the only country in the world with a

philanthropic organization devoted to providing welfare assistance for the widows and children of assassinated judges. This philanthropic organization (FASOL) is an interesting case of internationalist judicial solidarity, in that it is funded in part by German judges, who contribute to it a day's salary per year. In such a situation of contracted democracy, one may well wonder where the protection function of the judicial system lies when the system cannot even protect itself.

Short of such a violent intrusion, the contraction of democracy may impinge upon the judicial system in various other forms. The most common one is the judicial reform itself, as a way of tailoring the activity of the courts to the coercive needs of the state or as way of securing the noninterference of the courts in the areas in which the state operates in a distinctly authoritarian way. As an illustration, in Colombia, one of the most successful judicial innovations according to the USAID has been the creation of the so-called public order courts to fight organized crime and terrorism. But, as I mentioned above, these courts, staffed by faceless judges and operating under special procedural rules violate basic due process guarantees, and their activity has been targeted mainly against poor peasants caught in the middle of the struggle among *terratenientes*, drug dealers, the military, paramilitary groups and the guerrilla. On the other hand, the executive has been pressing the legislature to pass a reform that curtails significantly the judicial review power of the Constitutional Court.

Democracy II is a counterhegemonic conception of democracy. In its perspective, democracy I is seen as an incomplete conception of democracy, rather than a wrong one. Democracy II accepts, therefore, democracy I as a starting point. Its difference from democracy I is that it does not believe that the compatibility of world capitalism with democracy can be sustained forever, while maintaining that, in the case of collision between democracy and capitalism democracy must prevail. The core idea of democracy II is that global capitalism inflicts systematic harm upon the majority of the populations of the globe, as well as upon nature and the environment. Only unified opposition to global capitalism can reduce, if not eliminate, such harm. Democratic can be said of any peaceful, but not necessarily legal, struggle that seeks to reduce systematic harm by empowering the populations systematically affected by it. Democracy II is, therefore, less procedural and more substantive than democracy I and its focus is less on governability than on citizen empowerment and social justice.

The criteria for the rule of law and the judicial system to meet the demands of democracy II are, thus, much more stringent than those applying to democracy I. A number of complex issues must be addressed in this regard. Here I mention briefly four of them.

The first one concerns the political orientation of judicial activism. Judicial activism or protagonism is not in itself a good or bad thing for democracy II. It must be evaluated in terms of its substantive merits. For instance, up until recently the best known instances of court activism were politically conservative, if not reactionary. Just think of the German courts in the Weimar Republic and their scandalous double standards punishing extreme right and extreme left violence; the rulings of US Supreme Court against New Deal legislation; the opposition of Chilean Supreme Court to the democratic socialist measures of Salvador Allende. More recently, Italian prosecutors benefitted from special procedural laws that had been approved by the political elites to expedite criminal prosecution of the leftist organization known as the Red Brigades. In Portugal, the first high-profile judicial intervention in the post-1974 democratic period was the indictment of an extreme left organization known as the FPs 25. The punishment of violent political organizations is as much of an asset for democracy II as it is for democracy I. But it is an unconditional asset only to the extent that the extreme right and the extreme left are treated equally. This, however, has rarely been the case.

The second issue refers to the ways the judicial system addresses the large-scale, collective or structural conflicts. Structural conflicts are the social sites of the systematic harm produced either directly or indirectly by global capitalism in its interactions with local, regional or national societies. Their symptoms or manifestations may be very diverse. The massive occurrence of disputes among individuals or organizations is one of them, as, for instance, the exponential growth of consumer bankruptcy cases, consumer or environmental protection cases, or even tort liability cases. The usual responses to judicial overload caused by these types of litigation have been restriction of demand, routinization or simplification of procedure, diversion to alternative dispute mechanisms, etc. In the perspective of democracy II, courts may have here a democratic contribution only if, rather than trivializing such disputes, they make the connection between individual disputes and the underlying structural conflicts. This will involve a far-reaching post-liberal reform in substantive law as well as in procedural law and court organization: class actions, broad standing, proactive judicial system, greater lay participation on the part of citizens and NGOs, radical politics of individual and collective rights, progressive multiculturalism, etc. And none of this will be possible without a vast reform of legal education. In sum, in order to meet the criteria of democracy II the judicial system must see itself as part of a political coalition that takes democracy seriously and gives it precedence over markets and property.

This leads me to the third issue, which concerns the access to law and justice. Contrary to the recommendations of the World Bank, from the perspective of democracy II it is imperative to repoliticize the question of the access to law and justice by questioning not only the pool of citizens, grassroots movements, and NGOs that must have access, but also the kind of law and justice to which access is struggled for.

I mentioned above that one of the common manifestations of structural conflicts is the massive proliferation of individual disputes in a given area of social life. As common, however, is the opposite manifestation: the systematic suppression of individual disputes or their resolution by extrajudicial violent means. By way of example I mention the capital/labor conflict. Such indicators as the growth of structural unemployment in many countries, the declining share of salary incomes in the national income, and the proliferation of the so-called atypical work and of jobs so badly paid that the workers stay below the poverty line, show that the structural conflict between capital and labor on a global scale is intensifying rather than diminishing. Nevertheless, in many core and semiperipheral countries labor litigation has been sharply declining for the last decade. The increased vulnerability of workers and labor unions in the post-Fordist era has acted as a deterrent to resorting to courts to defend labor rights. In my research on Colombia, I have identified five structural conflicts: the land conflict involving *terratenientes*, poor and dispossessed peasants, the guerrilla and paramilitary groups; the capital/labor conflict involving rural and urban workers and employers; the conflict over biodiversity and natural resources involving the state, the multinational corporations, and the indigenous and black communities; the conflict over cultural diversity involving the state, people of European descent and their organizations, and the indigenous and black communities; and the conflict over the state's monopoly of violence, involving the state itself, the guerrilla, the paramilitary groups and the drug cartels. In the project, we are now analyzing the level and content of judicialization in each one of these conflicts.

Whenever the political and social conditions are such that structural conflicts suppress rather than provoke judicial disputes, access to law and justice according to democracy II involves the active promotion of disputes. In other words it must address the suppressed demand of justice. In this case, a post-liberal judicial system must be socially constructed as much as a mechanism of dispute settlement as a mechanism of dispute creation.

Whenever litigation stems from structural conflict and not, for instance, from lawyers' market needs, the struggle against suppressed judicial demand may be a form of political enfranchising of politically excluded populations. Elsewhere I have distinguished among different forms of civil society

(Santos, 1995). Metaphorically we could envisage a civil society consisting of three concentric rings. The central ring is what I would call *bedroom civil society*. It is so intimately close to the state that access to law is never a problem, either because access is taken for granted or because the law is not needed for securing interests. The second ring is what we could call *porch civil society*, composed of social groups and classes with some institutional relation with the facilitative functions of the state. This kind of civil society has been the target of different liberal approaches to access to law. Finally, there is in my metaphor the third, outer ring, that constitutes the *street level civil society*. These are the vast populations of the third world countries and the increasingly more numerous and vulnerable social groups that in core countries have become known as the internal third world. These populations are the hardest hit by the systematic harm produced by global capitalism. They are being excluded from the social contract, and neither the rule of law nor the judicial system is available to them except as part of the coercive, repressive state.

The relative position of countries in the world system (core, peripheral, semiperipheral) tends to be the major cause of the relative size of these different civil societies. They are here conceived as existing in national societies but the systematic harm that is contributing to the expansion of the outer ring is more and more produced globally by the economic and political actors that control the hegemonic forms of globalization. And thus I come to my last issue concerning the conception of the rule of law and judicial system from the perspective of democracy II.

To the extent that the sustainability of democracy at the local and national level will increasingly depend on the democratization of international and transnational political relations, it is conceivable that the democratic potential of the judicial system will increasingly depend on the emergence of forms of international justice more adequate to confront the systematic harm produced by structural conflicts at the level at which it is produced — the global level. One may think of institutions similar to the European Court of Justice, but premised, rather, on the principle of democracy first, and capitalism (markets and property) second and not the opposite, as is the case of the European Court.

The ideal-typical counterposition of democracy I and democracy II is useful only to identify clearly two possible and contrasting political roles to be performed by the courts in democratic societies. In reality the social and political processes are much messier. Partial versions of both types of democracy may be coexisting side by side, supported by different social groups, or articulate, interpenetrate or fuse in complex, hybrid political constellations. Thus, in real social processes the political role of courts is

inherently ambiguous, undetermined, openended and, above all, in itself an object of social struggle. Different political groups will struggle to control the nature, orientation or interpretation of court rulings. The attempt by dominant groups to keep the judicial activism within the boundaries of democracy I — restricting it to promote governability and facilitate economic transactions — will be met with resistance by subordinate groups trying to expand judicial activism into the areas of citizens' empowerment and social justice. The relative strength of these groups will dictate the overall political profile of the courts' roles.

The scale, time frame and context of political struggles also condition the nature of judicial intervention. Taken in isolation at a given point in time, an individual court ruling cannot be said to promote (or hinder) unequivocally either democracy I or democracy II. Let us take the example of judicial rulings against political corruption. It is today consensual that political corruption is detrimental to democracy I. On the one hand, by transforming rights into favors and by engendering inefficiency and unpredictability in public administration, it erodes the confidence in the state, thereby bringing about ungovernability (Della Porta and Vannucci, 1997: 114). On the other hand, by undermining the conditions of market competitions, elevating costs, and having a negative impact on investment, political corruption is an impairment to an efficient and open market economy (Ades and Di Tella, 1997: 98). A few court rulings against political corruption do not necessarily contribute to the end of corruption. They may even function, by its sporadic nature, as a cover up, whitewashing and legitimating the political system that goes on producing political corruption in a systematic fashion. In a time dominated by media politics and by politics as spectacle, the courts' intervention in high-profile cases — usually, the cases involving powerful, high-profile individuals — performs a symbolic function which we could call the judicial carnivalization of politics: a "ceremony" through which, for a brief period, the powerful are treated as ordinary citizens like anyone of us.

On the contrary, a systematic judicial campaign against political corruption, particularly if complemented by a high-profile, aggressive judicial intervention in the public sphere, specially in the mass media will, as has happened in Italy, contribute decisively to eradicate corruption, thus strengthening democracy I¹⁷. In a longer time frame, however, this effect may have very different and contrasting consequences for democracy, depending on the overall political, social and cultural context. Given the curative, rather

17 In Italy, the judges helped to open up the political system allowing for the emergence of new opposition parties but, at the same time, they also contributed to a new wave of populism, a "virtual democracy", using the media to appeal directly to the people.

than preventive, character of judicial action, the political system may find other ways, less amenable to judicial scrutiny, to reconstitute systematic corruption. Or it may design and bring about a judicial reform aimed at reducing the possibility of judicial protagonism in politically loaded cases. In such cases, the positive impact of the judicial activism against political corruption will, in the long run, be neutralized or even turned into a negative impact. But, on the contrary, in a country with an active, well organized civil society, the democratic impulse, provided by judicial intervention, may ignite the initiative of active citizens to develop mechanisms of participatory democracy designed to achieve a corruption-free and redistributive allocation of public funds. In such case, the empowerment of citizens and the social justice made possible by an articulation of representative democracy and participatory democracy will point to a democracy of higher intensity, democracy II. The emergence of democracy II is thus related, even if remotely, to the initial democratic impulse provided by judicial activism.

On the other hand, even though, as we saw above, courts tend to disperse social conflicts and, consequently, to reduce the social mobilization around them, it is not to be excluded that the opposite effect might occur. This will be the case if the social groups systematically harmed by the capitalistic "solutions" of the structural conflicts are strong enough to reorient judicial activism and put it at the service of more advanced social goals. Similarly, though the consolidation of democracy I, as the hegemonic conception of democracy, may tend to render democracy II as either unnecessary or dangerous, it may also unleash democratic energies and impulses which it cannot contain or control, thereby opening up political space for democracy II.

The global focus on the role of law and the judicial system is part and parcel of the hegemonic type of democracy, democracy I, and, as such, it is a form of hegemonic globalization. However, to the extent that subordinate groups across the globe manage to intensify social struggles in such a way as to inscribe the goal of democracy II in the political agenda and resort, for that purpose, among other means, to the intervention of courts, the latter will operate as a form of counterhegemonic globalization. The reason why this possibility seems nowadays remote lies in the fact that the political forces engaged in struggles geared to democracy II have not yet been willing or able to identify the full democratic potential of the indeterminacy and ambiguity of the judicial activism within the confines of democracy I. Such unwillingness or incapacity occurs both because high-profile judicial activism is in most countries a novelty at best and, as such, an unfamiliar political tool, and also because in pro-democracy II social struggles the role of courts tends to be much less central, its political weight being premised upon complex articulations with many other forms of political action. The

constitutional status of the judicial system and its institutional insulation does not facilitate the emergence of constellations of political action in which resorting to courts is part of a broader political strategy. Depending on the circumstances, such an encompassing political strategy may indeed dictate either the intensive use of courts or, on the contrary, the systematic avoidance of courts. Among the circumstances, we can list the political content of the laws to be implemented and the degree of freedom of the judges to interpret them; the patterns of training and recruitment of judges and prosecutors; the vulnerability of courts to political patronage or to corruption, etc.

From another perspective, the determination of the hegemonic or counterhegemonic character of judicial activism is subjected to the same difficulties discussed above in identifying and distinguishing traits of democracy I and of democracy II in concrete political processes. Assuming that hegemonic liberal globalization involves a total priority of freedom over equality, whose social cost is the promotion of unprecedented exclusionary policies, we can establish, as a kind of rule of thumb, that the counterhegemonic value of court activism is premised upon the latter's capacity to block the race to the bottom across the globe. Such capacity is to be tested and exercised against powerful actors (protection of labor, minority, women's, consumer, sexual orientation and environmental rights), against the state (protection of citizens against illegal, discretionary or otherwise unpredictable acts of public administration) or against political power in a broad sense (punishment of abuse of power and of political corruption).

Conclusion

The focus for the last decade on the rule of law and the judicial system across the globe is a major transnational political phenomenon of our time. Now a product of internal dynamics, now a product of high-intensity globalization pressure, now still, more often than not, a product of a combination of both, this trend, known as judicialization of politics or expansion judicial power, is intimately related to the construction of a new state form, which can be characterized as post-welfare (in core countries) or post-developmental (in semiperipheral countries) — an efficient weak state suited to complement the efficient regulation of social and economic life by markets and the private sector. This new model of development, seemingly enjoying a global consensus — how strong or well informed this consensus is remains an open question — is premised upon the idea that social transformation has ceased to be a political issue. The rule of law and the judicial system appear to be the ideal instruments of a depoliticized conception of social transformation.

Concomitantly, democracy has been promoted as the political regime best suited to guarantee the stability, governability, and social legitimacy of an efficient weak state as well as a depoliticized capitalist social transformation. The rule of law and the courts have been called upon to be the main pillars of such a democratic project.

This hegemonic project, the ideal-type of which I have designated as democracy I, is based on the assumption that capitalism and democracy are compatible and even interdependent. Such an assumption has been highly problematic in the past, and nothing has changed in the last decade to make it less problematic now. Nothing has changed in the recent past to eliminate or even reduce, in the framework of this democratic project, the precedence of capitalism over democracy, particularly now that capitalism is global and democracy continues to be national. It is highly improbable that, against past experience, the rule of law and courts will sustain democracy against capitalism.

The vulnerability of this democratic project is twofold. First, democratic stability is dependent upon not letting social inequalities go too far. Now, they have actually been increasing dramatically for the past decade. It is quite an open question, mediated by many political factors, when such dramatic increase will reach the breaking point beyond which turbulence will take over democratic stability. Second, liberal democratic public sphere presupposes the rule-based equality of all citizens and the equal accountability of the government towards them. Under the neoliberal model of development, powerful social agents are emerging in command of such an economic and political leverage that they can easily circumvent the laws or change them to suit their interests. The principle of equality is thereby manipulated beyond recognition. On the other hand, the same development model makes the nation states tightly accountable to global capitalist enterprises, at the same time that it forces them or allows them to be more and more vaguely accountable to national individual citizens. The combination of these two trends may contribute to turn capitalist democratic societies into ever shrinking islands of democratic public life in a sea of societal fascisms¹⁸.

Both vulnerabilities of democracy I project are the product of or are compounded by structural conflicts and therefore can only be effectively neutralized by political action addressed to the democratic settlement of such conflicts. Under democracy I, the rule of law has done little to address structural conflicts, when in fact it has not exacerbated them, while the judicial system, by its very liberal institutional design, has in general stayed away from such conflicts. In this respect, the political role of courts is as

¹⁸ On the concept of societal fascism and the different forms it assumes, see Santos (1998).

determined by the disputes that are selected in to be processed by them as by the disputes that are suppressed or selected out. Thus perceived, the political role of courts is rather disquieting, for courts, by their actions or omissions, tend to hide or negate the very existence of systematic harm; or else, that not being at all possible, they tend to divide those who might otherwise unite to fight against such harm.

The analysis of recent judicial experience shows that the rule of law and the judicial system are a central component of democracy I and crucial to sustain it short of a situation of incompatibility vis-à-vis the accumulation needs of global capitalism. It seems, therefore, that democracy can only be effectively defended in such a situation if the assumption of the taken for granted compatibility between capitalism and democracy is rejected as an assumption, and if democracy is conceptualized as taking precedence over capitalism, should a situation of incompatibility arise. This is the project of what I have called democracy II. In this project, the rule of law and the judicial system are as important as in democracy I. They are, however, less central because they must be conceived as part of a much broader set of participatory institutions and social movements, pluralistically organized and networking around a simple but crucial principle: democracy first, capitalism second.

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Author & Abstract

BOAVENTURA DE SOUSA SANTOS (Universidade de Coimbra, Portugal) focuses on globalization in its many forms and its many impacts on national and subnational societies, cultures, and politics. A distinction between hegemonic and counter-hegemonic forms of globalization is established, and four main modes of production of globalization are analyzed: globalized localism, localized globalism, cosmopolitanism, and common heritage of humankind. Special critical attention is given to the globalization of the legal field and the Western model of democracy. The case studies are drawn from the Americas, Africa, Asia and Europe.

The Influence of Dispute Resolution on Globalization: The Political Economy of Legal Models

Laura Nader

Introduction

The role of legal ideologies in contemporary Euro-American globalization efforts is often passed over by lawyers and anthropologists. In particular, the influence of disputing forums, regardless of the substance of the dispute, is underestimated because professionals are caught by the professional cultures into which they have been socialized. One has to examine the very legal models that appear "natural" or "neutral" in a detached manner even to be able to recognize disputing styles as key mechanisms prefiguring the results of international power plays.

This lecture examines the influence of dispute resolution forums on globalization. The perspective used focuses on the political economy of legal models that encapsulate political stratagems. Both harmony law models and adversarial law models are loaded with value assessment. And both models play an important role in globalization strategies. But of the two, harmony law models, most recently referred to as alternative dispute resolution (ADR), are the least attended to in theoretical discussions. Although theories of conflict encompass adversarial behavior, harmony law models are often taken for granted as benign or normal. Yet, in colonial, national, and international settings, harmony law models (consensus producing models) have been powerful tools of pacification and control.

While state constructions of ADR function to allay fears of class warfare and racial discord, international agencies use ADR techniques to promote world order and "stability". The history of conditions under which dispute settlement preferences are shifting commitments usually involve imbalances in power. The framing of culture by fundamentally dominant groups indicates why dispute resolution ideologies are long used mechanisms for accomplishing the transmission of hegemonic ideas in a dynamic and shrinking world. In the modern context ADR is increasingly standardized to