INTRODUCTION: LAW'S TRAVELS AND TRANSFORMATIONS

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INTRODUCTION

The contributors to this volume start from the premise that in the use of law, law transforms those who use it, their understanding of the world, of their conflicts and their normative orientations – in other words, their political subjectivities. At the same time, the essays trace the ways that law itself is transformed in iterative processes. These transformations are historically contingent on the dialectic between the transformations of social relations and subjectivities that law can effect, on the one hand, and the transformations in the meaning of laws produced by the interpretations of those who mobilise law for their particular social, political or economic struggles, on the other hand. This dialectic reflects the two sides of the sociality of law: first, law's formative impact on social perceptions; and secondly, its very constitution in the social. Attention to these dynamics opens our eyes to the creation of new legal understandings – *jurisgenesis*, to use Robert Cover's (1992) term – that result from the active use of existing law.

THE GLOBALISATION OF LAW

Law travels, and there are different ways in which it does so. It matters to normative processes whether law is imposed by colonial rule or imported by a national elite as a component of the modernisation and development project; whether it is propagated by activists to claim rights or by nation-states to legitimise their power; whether it is transmitted via

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rumours among laypersons who hope it might help them attain justice or via networks of experts trying to achieve international standardisation and global 'harmonisation' (Benda-Beckmann *et al.* 2005). These different forms of law's travels rarely come alone. As David Westbrook has elaborated, 'the imperial, the fashionable, the systemic and the tribal' forms of law's travels 'are interrelated' (Westbrook 2006: 504). Law's travels are almost always at one and the same time a matter of export and import, of imposition and adoption, of expert knowledge and lay rumour. These modes of the spread of law and the dynamics between them are central to the phenomenon of 'juridification', a term that refers to a variety of social processes entailed in the proliferation of law.

In recent years, we have been observing an increasing juridification of social and political protest worldwide. The global 'rights discourse' has projected law, particularly human rights law, as the internationally intelligible and acceptable language of voicing demands, providing categories of global scale and linking local concerns with international forums. Analyses of these processes of juridification have often examined governmental and commercial actors who propagate the activation and implementation of legal norms, such as international organisations (e.g. Li 2009), NGOs (e.g. Keck and Sikkink 1998; Merry 2006; Levitt and Merry 2009), law firms (e.g. Garth and Dezalay 1996) and judicial institutions such as the International Criminal Court (e.g. Anders, this volume; Clarke 2010). Considering the economic and political impact that these actors have, analyses of the ways they promote law and the networks within which they operate are indispensable for an understanding of law in current global relations.

Boaventura de Sousa Santos and César Rodríguez-Garavito, however, assert that such 'realist' analyses of law's travels only take into consideration the top-down processes of the globalisation of law, that which Upendra Baxi in this volume and elsewhere has called the politics *of* human rights. Santos and Rodríguez-Garavito hold that such a focus on the top-down processes of the globalisation of law reproduces the silencing of those subjected to the processes in question: 'Missing from this top-down picture are the myriad local, non-English-speaking actors … [T]hese subaltern actors are a critical part of processes whereby global legal rules are defined' (Santos and Rodríguez-Garavito 2005: 11). We argue that such analyses of the top-down processes of globalisation of law, important as they are, do more than just dismiss the voices of those marginalised. They also assume a unidirectional change and thereby render impossible any analysis of the dialectic between the implementation

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of legal norms and the diverse ways that local actors adopt them; they do not take into account the constitutive effects of what Baxi calls the politics *for* rights. In this way, they foreclose a differentiated understanding of normative change.

Santos and Rodríguez-Garavito modestly hold that their notion of 'subaltern cosmopolitan legality' does not quite amount to a theory (2005: 13). Nevertheless, we believe that such an approach is indispensable for a theory of normative change in two ways: firstly, it directs us toward a practice-oriented approach that overcomes assumptions of cultural determinism in the normative realm; secondly, such a perspective opens up the possibility for a radically *social* theory of legal change such as we are espousing here.

Our approach is thus inspired by the observation that people demonstrate a startlingly persistent faith in 'the law', as evidenced by their ever-increasing recourse to legal means to settle conflicts, alleviate suffering and further their causes. The contributions to this volume explore the effects of people's legal choices, trials and errors in eclectic situated processes of juridification. While other notable anthropologists have also dealt with such processes of 'juridification', they have generally focused solely on one body of law, such as Dembour and Kelly (2007) and Clarke (2010) on international criminal law, and Merry (2006), Goodale (2009, 2010) and Wilson and Mitchell (2003) on human rights law. They critically examine the effects of such legal processes on the construction and regulation of particular types of crimes and identities. While we agree with these approaches, our starting point is different: we explore how such legal mobilisations articulate with other practices of negotiating conflicts, sometimes replacing non-legal means of protest, sometimes forming mutually reinforcing interdependent strategies with them. This implies following the hopes and practices of people into whatever arenas happen to become relevant. In our view, juridification entails not only the application of state law against the state, but also the mobilisation of different legal orders, such as international human rights law, customary law and 'travelling' models of conflict resolution. People tend not to be trained in the finer distinctions of bodies of law and their jurisdictions, and many make their claims with reference to a certain body of law (e.g. human rights) even though their specific cases would not fall under the purview of that particular body of law as traditionally understood. By not focusing on a single body of law we attempt to highlight the heterogeneous geography of law and the ways boundaries between different legal bodies are blurred in the struggles for rights.

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DEPOLITICISATION

From its very origins in debates on labour law in the German Weimar Republic, the term 'juridification' has critically described processes of depoliticisation that are concurrent with the relocation of issues into legal arenas. Kirchheimer (1972 [1933]; cf. Anders, Chapter 4 in this volume) deployed the term as a polemic against the legal formalisation of labour relations, which he saw as severely restricting the possibilities for workers and unions to engage in more militant actions. In this way juridification drastically depoliticised labour relations (cf. Teubner 1987: 9).[1] The concept gained prominence in academic debates after Habermas observed that the development of modern law closely corresponds to wider social developments, and showed how they shape each other. Habermas distinguished four thrusts of juridification (*Verrechtlichung*) in his theory of legal evolution. The first thrust reflects and moulds the development of the bourgeois state, separating the economy from politics and constituting the legal person as a subject free to enter into contracts, acquire and dispose of property (Habermas 1985). Habermas's second thrust entails the development of a legal constitutionalisation establishing the notion of 'the rule of law'. The third thrust refers to the democratisation of the constitutional powers of the state by the introduction of universal franchise and the freedom of organisation for political associations. Finally, the fourth thrust marks the constitutionalisation of the economic system or the establishment of labour laws guaranteeing collective bargaining and the welfare state.[2]

Blichner and Molander (2008) further refine the concept of juridification according to five dimensions of socio-legal processes. The first dimension they call 'constitutive juridification', which simply describes the establishment of a legal order such as a formal constitution. The second dimension of juridification they define as law's expansion and differentiation, i.e. its expansion into 'life-worlds' it had hitherto not regulated. The third dimension is marked by the tendency to solve conflict increasingly by reference to law, both in the sense that citizens take recourse to courts and in the sense that citizens outside the judiciary also

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[1] This concept of juridification has been criticised for the voluntarism inherent in its preoccupation with strategic choices of conflict or cooperation of labour unions, and for the fact that its use has been limited to the politics of organised labour, and thus to only one segment of society (Teubner 1987: 10).

[2] The latter three thrusts thus all aimed at protecting the 'life-worlds' that the first thrust endangered by placing them 'at the disposal of the market and absolutist rule' (Habermas 1985: 206).

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refer to laws in their attempts to settle disputes.[3] Blichner and Molander's fourth dimension of juridification refers to a process by which judicial power increases, owing to the indeterminacy and non-transparency of law and its applications. The fifth dimension distinguishes processes where juridification occurs as legal framing, i.e. the 'increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order' (Blichner and Molander 2008: 47). This dimension describes the development and the internalisation of legal cultures without which – as Blichner and Molander argue – complex legal orders can barely gain stability. It gets at law's power to shape subjectivities, as is illustrated in a number of the chapters in this volume (e.g. Biner, Chapter 9; Eckert, Chapter 6; Englund, Chapter 3; and Evren, Chapter 10). All of Blichner and Molander's dimensions are represented to one degree or another in the case studies collected here; however, our focus corresponds most closely to Blichner and Molander's third dimension of juridification, referring to the process whereby law is employed to further hopes and express aspirations or protest.[4]

Juridification has since the coining of the term thus pointed to a process of depoliticisation; with juridification, a vast array of social conflicts that were once sorted out by political means – in bodies of elected representatives or through strikes, boycotts, protests and demonstrations – are ever more often mediated through the judicial system (cf. Blichner and Molander 2008: 45). In this perspective political decision making is reduced to the application of existing law, thereby increasing the power of definition and decision making of the judiciary and legally trained experts (Bourdieu 1987).[5]

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[3] Blichner and Molander (2008: 44) emphasise that this lay legal reasoning does not necessarily correspond to law 'by the book', and may even refer to laws that do not actually exist, an insight that is supported by Julia Eckert's analysis of rumours of rights (Chapter 6, this volume).

[4] As Blichner and Molander point out, these dimensions are not exclusive. They are all closely bound up with one another, and all of them are relevant to a greater or lesser degree to our case studies.

[5] Juridification is also often accompanied by a proliferation of institutionalised legal arenas. With their overlapping jurisdictions and competencies these new arenas likewise remain largely unintelligible to the citizenry, thereby increasing legal uncertainty rather than strengthening citizens' rights and enforcing the accountability of governmental institutions. For a good example, see Shalini Randeria's (2011) ethnographic study of the dynamics of juridification around the forced displacement of residents of a Mumbai slum for a World Bank-funded development project. It addresses the disorienting proliferation of 'quasi-judicial arenas of mediation, arbitration and inspection at various scales' (Randeria: 188) that comes along with contemporary development projects.

In this manner, '[p]olitics itself is migrating to the courts', where 'ordinary political processes [are] held hostage to the dialectic of law and disorder' (Comaroff and Comaroff 2006: 26). Therefore, the widespread 'culture of legality' is often nothing more than 'lawfare', defined by Jean and John Comaroff (2006: 30) as 'the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion'. These legal instruments often serve powerful political elites and corporate capital to further their predatory interests in 'plundering' natural resources (Mattei and Nader 2008).

Nevertheless, the 'culture of legality' has also come to underpin claims of marginalised people everywhere in the world. It is 'not uncommon nowadays to hear the language of jurisprudence in the Amazon or Aboriginal Australia, in the Kalahari or the New Guinea highlands, or among the poor in Mumbai, Mexico City, Cape Town, and Trench Town' (Comaroff and Comaroff 2006: 26).

Whether law can actually serve as a 'weapon of the weak' (Scott 1985) is, however, an empirical question. While law has the inherent characteristic of legitimating and reproducing the status quo, it can also serve to bind those who impose it (Thompson 1975: 266–68; Lazarus-Black 1994: 257). Donahoe's case studies (Chapter 2) show how legal instruments are often selectively implemented to allow national and international oil and gas companies in Russia to gain access to lands historically inhabited by indigenous peoples. This, however, does not stop Russia's indigenous peoples from trying to use the courts to protect their interests. Stuart Kirsch's examination of the juridification of indigenous politics (Chapter 1) exemplifies how recourse to the courts can serve the interests of indigenous peoples. Kirsch notes that the gap between indigenous people's claims and the expression of those claims in legal language can in fact create new political opportunities by yielding 'legal precedents which generate change' and facilitating 'the critique of power by providing glimpses of alternative ways of being human'. Julia Eckert (Chapter 6), too, demonstrates how law 'gave an [institutionalised] name to hopes; it made specific vague ideas of entitlements and the grounds on which they were based', and thus made possible their communication and enforcement.

It is thus not a question simply of the effectiveness of law for those de-privileged by it, but also one of the particular structuring qualities of different arenas in which issues are negotiated. As Olaf Zenker and Zerrin Özlem Biner discuss in their contributions (Chapters 5 and 9), the question of how law relates to more overtly political means of social

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transformation is an empirical matter that requires ethnographic scru-
tiny. Zenker (Chapter 5), referring to Luhmann (1995), argues that

> representing [an issue] either in 'political' terms that overstate the agency
> and power of the involved actors to define collectively binding rules
> largely at their discretion *or* in 'legal' terms that understate such agency
> and power (as well as the indeterminacy of law) … seems to be more a
> matter of switching between two different and ultimately incommensur-
> able codes than an issue of differential ontology … Switching from one
> code to another opens up a limited range of new potential consequences,
> while simultaneously precluding an equally limited set of others. Against
> this backdrop, it becomes an empirical question whether a certain phe-
> nomenon is being processed by actors in terms of the political or legal (or
> any other) code.

DISTANCES

We started by asking what effect law's travels have on law itself and on
the understanding of the world, of the conflicts and the normative ori-
entations of those who use it. This is because attention to the dialectic
between the two is necessary to understand normative change that occurs
as law travels and produces situations of legal pluralism (see, e.g., Benda-
Beckmann *et al.* 2005). Several dimensions of this have been addressed
in the debates of legal anthropology. First, legal scholars have shown how
so-called universal norms as expressed in the legal language and pro-
cedures of Western law often fail to adequately capture the understand-
ings of situations, relationships and conflicts of those they are meant to
protect (Felstiner *et al.* 1980/1981; Merry 1990). Anthropologists in par-
ticular have pointed to the increasing hegemony of a Western notion of
the person, with its ideological baggage of autonomy, free will and the
primacy of the individual and individualistic 'interests', which is prom-
ulgated by the spread of (Western) law (Collier *et al.* 1995). Scholarly
works increasingly focus on the legal classifications that are used to cat-
egorise people on the basis of their experiences of subjugation, exclu-
sion, deprivation and other forms of suffering (Ross 2002; Hastrup 2003;
Wilson 2003). Notions of community (e.g. James 2006), indigeneity (e.g.
Donahoe *et al.* 2008), gender (e.g. Merry 2003) and 'victimhood' (e.g.
Mamdani 1996; Borneman 1997; Wilson 2001, 2003; Ross 2002; Hastrup
2003; Biner 2007) become embedded in law and are transmitted by vari-
ous discourses of rights and justice. This can lead to the transformation
of the self-understanding of persons and groups who are recognised as

belonging to certain legal categories. For example, Wilson argues that human rights discourse 'draws upon Manichean dualisms (violated/violator; powerless/powerful) to construct its subjects as innocent victims', and how it presents images of its subjects 'as in "need" and inhabiting a social and global position of marginality' (2009: 215). This has the effect of homogenising the category of victim by removing subjects from their social, family and class backgrounds, and thereby decontextualises and depoliticises human rights violations (Wilson 2009: 224).

This process is clearly illustrated in Zerrin Özlem Biner's analysis (Chapter 9) of a law designed to compensate people for losses incurred as a result of the military conflict between Turkish armed forces and militants of the Kurdistan Workers' Party (PKK). The manner in which the law was implemented reduced the traumatic experiences of applicants to a cost-benefit calculation. In their well-intentioned efforts to help people take advantage of the compensation law, human rights activists and lawyers instructed them to frame their highly personal experiences in terms of a standardised narrative of violence, which had the unintended effect of homogenising applicants and lumping them into a single undifferentiated category of 'victims'.

Secondly, and in a more general way, Biner's case throws into high relief the fundamental gap between people's aspirations for justice, on the one hand, and the legal interpretation of 'justice', on the other hand; between the 'experience-near' formulation of personal, localised understanding and awareness of a situation, and the 'experience-distant language of jurisprudence', as Stuart Kirsch (Chapter 1) describes it. In many ways, this gap is asymptotic; it can never be completely closed. Many of the contributions in this volume show that it is impossible ever to seamlessly translate the innumerable diverse experiences of people's everyday lives into a legal language of any kind. This is particularly evident in Gerhard Anders's case (Chapter 4 in this volume), in which the Special Court for Sierra Leone, established to prosecute war criminals, not only imposed specific narratives of violence and conflict, but raised and ultimately disappointed ordinary citizens' expectations for a more encompassing vision of justice that they located in development and distributive justice.

As Derrida (1992) argues in his essay 'Force of Law', while law is an authorising, legitimising form, justice as it is *imagined* carries the 'messianic promise' of setting wrongs right, a promise that can only be imperfectly, if ever, captured, contained or actualised. This points us to the hope that is invested in law – and at the same time towards the

unbridgeable hiatus between this messianic promise and law's mundane translations of hope into procedures. To what degree and under what circumstances this gap is actually experienced as problematic is an empirical question; it depends on law's promises in different legal fields and the expectations that it raises. There are many situations in which nobody expects legal representations of a situation, a relation or an issue to fully express their hopes and aspirations (see e.g. Zenker, Chapter 5). In other cases, particularly those dealing with social processes that fall under the rubrics of 'reconciliation' and 'transitional justice' (e.g. Anders, Chapter 4; Biner, Chapter 9), law is overburdened with expectations and is therefore necessarily experienced as deficient and inadequate.

TRANSLATIONS

Notwithstanding the fundamental hiatus between law's representations and people's experiences, a third question – that of the degree to which it is possible to 'translate' legal concepts and terminologies from one socio-politico-cultural milieu into another (Watson 1974; Legrand 1997) – has remained contentious. Several authors have proposed theories of what actually happens when law travels and is, for better or for worse, transported, transplanted, transmitted or translated from one context to another. One example of such a vision is the notion of 'vernacularisation'. Vernacularisation suggests that a specific norm is transformed to fit into a specific cultural order – and is thus changed. Levitt and Merry (2009) distinguish situations in which only the name of an imported norm or institution is changed in order to create the semblance of conformity with existing norms, while the content remains for the most part unaltered. This is a 'replication'. At the other end of the spectrum is 'hybridisation', a merging of imported transnational norms or institutions with local ones. An extreme form of hybridisation is subversion, in which the recognised 'global name' is adopted, but it is applied to a practice that is fundamentally in keeping with existing cultural practices. In such cases, while the name is retained the transnational institution or norm is fundamentally transformed (Merry 2006: 44).

Merry (2006) uses the notion of translation, originally adopted from Actor Network Theory, to analyse the networks of translators, namely the members of NGOs who 'translate' legal norms between the vernacular notions of their clients and the legal language of the wider arenas. The focus on such translators points our attention to the structured interaction between different arenas: local concerns and international

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forums in which these local concerns are connected to particular norms and thereby attributed relevance. The view on translators thus provides an insight into the power relations in which these networks relate to each other. What is translated by the translator is determined also by fashions and agendas set in arenas different from those whose concerns are negotiated.

While attention to translators can elucidate the power relations in which legal norms are negotiated, this use of the notion of translation suffers from the problem that the process of translation is cut short. Translation does not stop at professional translators: users, clients, subjects of law themselves make meaning of legal norms, and thus extend the chain of translations. One way to extend this chain, according to Harri Englund (Chapter 3), would be to actively engage in a process of reverse translation, in which the claims that are expressed through local interpretations of law would be translated back in such a way that they have the possibility of influencing the global rights discourse. Referring to Anna Tsing (2005), Englund concludes: 'If "globalization" is to have any other meaning than the diffusion of ideas and institutions from centres into peripheries, it must include the possibility that those ideas and institutions may encounter friction that propels fresh travels.'

Moreover, vernacularisation, in as much as it assumes the convergence (in whatever way) of two distinct normative systems as the relevant process of legal pluralism, assumes a great deal of overlap between a social group and a delineated normative order, with the group being defined by shared norms and values. It must perceive people (particularly those 'with culture' and 'without history' – cf. Wolf 1982) as primordially norm-bound, and their societies as normatively integrated and homogeneous. Such a perspective abstracts from the heterogeneity of normative orientations within social groups; it excludes from its analysis the struggles over the meaning of norms *within* normative orders that are a defining feature of all social interaction.

The concept of culture that lies at the base of such notions has in many ways long been problematised. The ontological concept of coherence and in this sense of normative integration disappeared with functionalism – and with this a fundamental change of the concept of culture was developed. With a 'pragmatic notion of culture' (Schiffauer 2004: 252) we can analyse culture as a continuing process of synthesis, distinction, differentiation and articulation within structured figurations. Such a perspective could inform our thinking about normative processes