

COUNTER-HEGEMONIC WORK AS A LAWYER: THE ROLE OF THE LAWYER WORKING WITH MARGINALIZED GROUPS IN THE AGE OF “GLOBAL GOVERNANCE”

ARTICLE

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I. Introduction 399

II. Tension Between Technocracy and Democracy: The Power of Language and Discourses 400

III. Critical Perspective About the Law/Questioning the ‘Autonomy of Law’ 401

IV. Opening Spaces of Deliberative and Participatory Democracy/ Democratic Legitimacy: Legitimacy Through Participation, Legitimacy Through Democratic Control and Legitimacy Through Discourse 404

V. Conclusion 407

I. Introduction

What should be the role of the lawyer who wants to engage in counter-hegemonic work? In this essay I will discuss some topics of relevance to the lawyer who wants to participate in social justice struggles with marginalized groups against the “hegemonic project of neoliberal globalization” in this age of “global governance.”¹ This counter-hegemonic view “integrates struggles against ‘maldistribution, misrecognition and misrepresentation’ within a dialogical

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¹ William K. Carroll, *Hegemony and Counter-Hegemony in a Global Field*, 1 Stud. in Soc. Just. 1, 36 (2007).

framing of social justice in terms of parity of participation.”² It attacks what Murphy identifies as the dominant ideology of the global polity, which is liberalism, both economic and political.³

II. Tension Between Technocracy and Democracy: The Power of Language and Discourses

Picciotto highlights as a major concern surrounding globalization “the continued growth of technocracy and rule by experts.”⁴ Issues have been delegated to “epistemic communities” of specialists, using professional, scientific and managerial techniques, who allegedly deal with these issues in a depoliticized way and share universal discourses.⁵ According to Brand, this creates the impression that only experts know how to address and solve globalization “problems” and other forms of knowledge are dismissed as “ideological.”⁶

Koskenniemi stresses that “[w]ords are politics and vocabularies are manifestos.”⁷ Also, he claims that “[p]eriods of social transformation often involve clashes of vocabularies.”⁸ Koskenniemi warns us that legal vocabularies do not only frame the world of lawyers, they also inform political struggles.⁹ International Law, he states, has become “a kind of secular faith.”¹⁰ This resonates with Dezalay and Garth’s use of the term “legal missionary” to refer to lawyers from the United States who travel to Latin America to export the discourse of law; of law as a religion.¹¹

Brand challenges the alleged distinction between the economy and politics embedded in neoliberal discourse: “The economic is conceived as the core process of globalization and precisely because of this as being in its core not object of political

² *Id.* at 36-37 quoting Nancy Fraser, *Reframing justice in a globalizing world*, 36 *New Left Rev.* 79, 82-84 (2005).

³ Craig N. Murphy, *Global Governance: Poorly Done and Poorly Understood*, 76 *Int’l Affairs*, No. 4, 792 (2000).

⁴ Sol Picciotto, *Democratizing globalism* in D. Drache, *The Market or the Public Domain: Global Governance and the Asymmetry of Power* 338 (Routledge 2001).

⁵ Sol Picciotto, *Regulatory Networks and Multi-Level Governance* in Olaf Dilling, Martin Herberg and Gerd Winter, *Responsible Business: Self governance and the law in transnational economic transactions* 331 (Hart 2008) citing PM Haas *Introduction: Epistemic Communities and International Policy Coordination* 46 (1) *Int’l. Org. (Special Issue on Knowledge, Power and International Policy Coordination)* 1-36 (1992).

⁶ Ulrich Brand, *Order and regulation: Global Governance as a hegemonic discourse in international politics*, 12 *Rev. Int’l. Pol. Econ.* 167 (2005).

⁷ Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 *Eur. J. Int’l. Rel.* 3, 416 (2009).

⁸ *Id.* at 395-396.

⁹ *Id.* at 415.

¹⁰ *Id.* at 415.

¹¹ See generally Yves Dezalay and Garth, Bryant, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (University of Chicago Press 2002).

regulation. It is intended to promote a specific understanding of the political, i.e. to frame the globalization process, to avoid or smooth crises.”¹²

To address these concerns, lawyers engaging in counter-hegemonic work should become translators of technical legal jargon for marginalized and oppressed groups. They should help to craft discourses together with these groups to attack the discourse of neoliberals and help to invent new vocabularies in collaboration with members from the marginalized groups to address their aspirations. Lawyers should constantly question the division between economics and politics, aim to democratize information, and help people from marginalized groups to become “experts” so that their language and knowledge will be highly valued.

III. Critical Perspective About the Law/Questioning the ‘Autonomy of Law’

The discourse of the ‘autonomy of law’ has been used to confer legitimacy to globalization processes.¹³ Counter-hegemonic work as a lawyer involves working in strategic and pragmatic ways that can both question the ‘autonomy of the law’ discourse, when it is used to sustain neoliberal claims, and use it to confer legitimacy to counter-hegemonic claims against neoliberal globalization (e.g. the discourse of human rights). This is particularly difficult since using the discourse of the ‘autonomy of law’ can legitimize neoliberal globalization.¹⁴

Carroll, quoting Ford, states that from a neo-Gramscian perspective global civil society appears as a “terrain for both legitimizing and challenging global governance.”¹⁵ Social movements must be aware of the risk of reproducing, rather than challenging global hegemony in the global discursive space.¹⁶

Since the publication of Lucie White’s article *To Learn and Teach: Lessons from Driefontein on Lawyering and Power* in 1988, and Gerald Lopez’s book *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* in 1992, many progressive lawyers in the United States were challenged to focus on empowering the communities with which they worked as opposed to focusing on result oriented legal strategies.¹⁷

¹² Brand *supra* n. 6, at 165.

¹³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* Ch. 9 (Northwestern University Press 2002).

¹⁴ In a parallel manner, Samhat and Payne warn against this risk regarding inclusion of N.G.O.’s in the global polity, which can legitimize international regimes. However these authors believe that participation of N.G.O.’s is the most effective means in contemporary world politics to give voice to marginalized groups Nayef Samhat and Rodger A. Payne, *Regimes, Public Spheres and Global Democracy: Towards the Transformation of Political Community*, 17 *Global Society* 3, 285 (2003).

¹⁵ Carroll, *supra* n. 1, at 39.

¹⁶ *Id.* at 39.

¹⁷ Lucie E. White, *To Learn and to Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *Wis. L. Rev.* 699; Gerald López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Westview 1992).

White and López suggest that legal strategies should be used as part of a broader strategy of organizing marginalized communities and helping to support an empowerment process.¹⁸ They embrace the ‘critical legal studies’ theory’s vision in which law is indeterminate, another arena where political battles are being fought.¹⁹ A main challenge of lawyers is not dominating the process in a way that can co-opt the possibilities of social mobilization.²⁰ It is important to be creative with the law since the grievances that marginalized communities have are not easily translated into legal claims.²¹ Litigation has its limitations and should be used as an option of last resort; as part of a larger social mobilization campaign, as “public action with political significance.”²² Focusing on pedagogy based on dialogue and strategic work to promote client empowerment, and engaging in multidisciplinary work is of vital importance.²³ Strategies such as organizing, lobbying, holding press conferences, and protests are crucial. Finally, it is helpful to link struggles with other local, national and international struggles.²⁴

This is an advocacy model that centers on process instead of results.²⁵ López has described this model as one where the focus is on “process oriented client empowerment”.²⁶ Traditionally lawyers that work with marginalized groups have concentrated on developing legal strategies in order to obtain results, “result oriented legal strategies”.²⁷ López prefers a model more focused on the process, one that will allow the low income ‘client’ to take control of his or her situation and that will promote empowerment and self-help.²⁸

White has written extensively about this type of advocacy model, which has been called by some commentators “law and organizing”.²⁹ Pedagogical work, based on a dialogue with the community, is of key importance.³⁰ The theory and methodology of popular education developed by the Brazilian educator and lawyer, Paulo Freire, are particularly useful in this type of lawyering work.³¹ Freire critiques

¹⁸ *Id.*

¹⁹ Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1998).

²⁰ White *supra* n. 17.

²¹ *Id.*

²² *Id.* at 758.

²³ White, *supra* n. 17.

²⁴ Lucie E. White, *African Lawyers Harness Human Rights to Face Down Global Poverty*, 60 Me. L. Rev. 165 (2008).

²⁵ Myrta Morales-Cruz, *Community Lawyering in Puerto Rico: Promoting Empowerment and Self Help*, Int’l. J. Clinical Leg. Educ. 83-94 (2007) citing White *supra* n. 17. and López, *supra* n. 17.

²⁶ López, *supra* n. 17.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. Rev. 443 (2001).

³⁰ White *supra* n. 17.

³¹ *Id.*

traditional education by labeling it “banking education” since it assumes that there is an “empty brain” where the educator “deposits” information.³² For education to be truly transformative it should start from the experience of the participants and be based on dialogue and action; it must be a participatory experience, aiming to generate a process of “consciousness raising”.³³

As early as 1970, Steven Wexler, in an article published in the Yale Law School Law Review, had remarked that since the problems of the poor were fundamentally problems of a social nature and not individual problems, poor people had to organize and act for themselves. To support this process, poverty lawyers had to radically depart from the traditional lawyering role and do work similar to that of a teacher, turning each moment into an occasion for poor clients to practice skills and establish networks that would allow them to make change.³⁴

Lobbying can be a good strategy for promoting empowerment among marginalized groups.³⁵ In court, lawyers are in control of the process. Lobbying makes it easier for lawyers to work side by side with marginalized groups. They gain power as they speak and argue about their situation, about the law and about how the law should be. Their voice is independent from the voice of the lawyers. Focusing on lobbying, as opposed to litigation also makes it easier for marginalized groups to gain access to the press and to make alliances with other marginalized groups, which helps to create more public discussion about their issues.³⁶

Law should not be the exclusive mechanism used in any counter-hegemonic struggle. Political mobilization has to increase even if there is resort to law.³⁷ This is very difficult. Once law enters into a political struggle, litigation in particular, it tends to demobilize people. Lawyers need to be aware of this and make sure that marginalized groups never place their hopes only in law.³⁸

To conclude, lawyers attempting to do counter-hegemonic work in the global field should question the ‘autonomy of law’ and embrace legal indeterminacy. This should lead them to envision law as another arena where political battles are being fought and to be more creative with the law. Law should be perceived as one small piece in a larger political struggle. They should embrace lobbying as a strategy and not be limited only to courts. Lawyers should use the discourse of human rights in a critical, careful and pragmatic way. Avoidance of work as “legal missionaries”³⁹ is crucial. They should strive to make people become atheists or maybe, even better,

³² Morales-Cruz, *supra* n. 24 citing Paulo Freire, *Pedagogy of the Oppressed* (1970).

³³ *Id.*

³⁴ White, *supra* n. 17 citing Steven Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049 (1970).

³⁵ Morales-Cruz, *supra* n. 24.

³⁶ *Id.*

³⁷ de Sousa Santos, *supra* n. 13.

³⁸ de Sousa Santos, *supra* n. 13.

³⁹ This term is used by Yves Dezalay, Dezalay, *supra* n. 11.

agnostics about the law. The power to provoke counter-hegemonic change lies in the capability of people to organize politically, not in the law, or the work of lawyers. Finally, lawyers should try to remain invisible and mute⁴⁰ so that the voices of marginalized people can come out. They should only selectively and exceptionally speak to validate claims/arguments with the power of the legal discourse.

IV. Opening Spaces of Deliberative and Participatory Democracy/ Democratic Legitimacy: Legitimacy Through Participation, Legitimacy Through Democratic Control and Legitimacy Through Discourse⁴¹

The crisis of representative democracy at the national level has brought about appeals to other conceptions of democracy such as participatory and deliberative democracy. Boaventura de Sousa Santos has urged for a radicalization of democracy by creating more spaces of participatory democracy.⁴² Picciotto has argued for the incorporation of deliberative democracy principles into global governance.⁴³ He is critical of the domination of international elites in the construction of global governance.⁴⁴

Deliberative democracy theorists highlight the importance of deliberation, of public discussion. They favor “a deliberative democracy in which citizens address public problems by reasoning together about how to solve them-in which, at the limit, no force is at work, as Jurgen Habermas said “except that of the better argument.”⁴⁵ They reject Carl Schmitt’s view that deliberation belongs to parliament and not to mass democracy.⁴⁶

Postmodern approaches to democracy such as radical democracy reject that a consensus will be found as a result of deliberation. They value difference and

⁴⁰ The following quote from bell hooks highlights the oppression that lawyers and other professionals inadvertently engage in when attempting to speak for marginalized groups: “No need to hear your voice when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you I write myself anew. I am still author, authority. I am still colonizer the speaking subject and you are now at the center of my talk.” bell hooks, *Marginality as a Site of Resistance* in R. Ferguson *et al.*, *Out There: Marginalization and Contemporary Cultures* 241-243 (M.I.T. Press 1990).

⁴¹ Klaus Dingwerth, *Democratic Governance beyond the State: Operationalizing an Idea*, GLOGOV.org Working Paper No. 14. (2004). In the following discussion Dingwerth’s concern regarding different aspects of democratic legitimacy are taken into account. Legitimacy by democratic control is the one aspect that is more indirectly addressed.

⁴² Boaventura de Sousa Santos, *The Postmodern Transition: Law and Politics in Lloyd’s Introduction to Jurisprudence*, 1208-1209 (6th ed., Sweet and Maxwell 1994).

⁴³ Picciotto *supra* n. 4, at 342.

⁴⁴ *Id.* at 339.

⁴⁵ Joshua Cohen, *Philosophy, Politics and Democracy: Selected Essays* 328 (Cambridge: Harvard University Press 2009).

⁴⁶ *Id.* at 329 citing Carl Schmitt, *The Crisis of Parliamentary Democracy* (1985).

highlight antagonism and plurality.⁴⁷ Radical democrats reject that “truth” can be found after deliberation. Participatory democrats value the direct participation of people in the democratic process. They believe that participatory democracy has to radicalize our democracy due to the crisis of representative democracy. Boaventura de Sousa Santos stresses the importance of “the proliferation of political interpretive communities” and the need to expand the concept of democracy by incorporating direct or base democracy.⁴⁸

For authors such as Picciotto, it is key to foster broad participation in deliberative decision-making, rather than merely elite or expert deliberation.⁴⁹ Samhat and Payne discuss Linklater’s concern regarding the fact that “societies which tolerate extreme inequalities, which practice exclusion on any number of criteria, such as race, religion, or ethnicity, are not capable of participating in the dialogic ideal.”⁵⁰

Regarding global civil society, Samhat and Payne refer to the work by skeptics who have noted that most organizations work in only a limited number of issues, such as the environment and human and development rights, for example, and in many instances have become “elitist organizations that effectively reproduce relations of social and political power.”⁵¹ Carroll observes that global civil society is “tilted to the right by the dominance of capital in national politics, in international relations, in global governance and in mass communications.”⁵² This presents a formidable challenge for counter-hegemonic movements.⁵³

⁴⁷ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* 176-193 (2nd ed., Verso 2001).

⁴⁸ “The proliferation of political interpretive communities represents the postmodern way and, indeed, the only reasonable way of defending the accomplishments of modernity. I mentioned earlier, among such accomplishments, a fairer distribution of economic resources and a significant democratization of the political system in the conventional sense. As with all processes of transition, the postmodern transition also has a dark side and a bright side. The dark side is that, as the reification of class and the state are further exposed, the modern tools used until now to fulfill and consolidate those promises, that is, class politics and the welfare state, become less reliable and efficient. The proliferation of political interpretive communities will broaden the political agenda in two convergent directions. On the one hand, it will emphasize the social value of extraeconomic goods or postmaterialist goods such as ecology and peace: on the other hand, it will expand the concept and the practice of democracy in order to incorporate direct participatory (or base) democracy. The success of the struggle for extraeconomic goods will be conditioned by the success of the struggle for economic goods and for a fairer distribution of economic resources. The struggle for participatory democracy will prevent the emasculation of representative democracy. It is in this sense that the promises of modernity can only be defended, from now on, in postmodern terms.” de Sousa Santos *supra* n. 42, at 1208-1209.

⁴⁹ Picciotto *supra* n. 4, at 344.

⁵⁰ Samhat and Payne, *supra* n. 13, at 284, citing Andrew Linklater, *The Transformation of Political Community* ch. 3 (Polity Press 1998).

⁵¹ *Id.* at 286, citing Emery M. Roe, *Critical Theory, Sustainable Development and Populism*, 103 *Telos* 149-164 (1995); Mustapha Kamel Pasha and David L. Blaney, *Elusive Paradise: The Promise and Peril of Global Civil Society*, 23 *Alternatives* 4, 417-451 (1998).

⁵² Carroll, *supra* n. 1, at 39.

⁵³ *Id.*

When evaluating the possibilities of incorporating deliberative democracy approaches to global governance, postcolonial theorist Gayatri Chakravorty Spivak's question "can the subaltern speak?" highlights the difficulties of attempting to use this type of framework with marginalized groups.⁵⁴ She posits that subaltern groups cannot speak since they can only do so in the language and discourse of Western civilization. Additionally, the fact that there is such an unbalance of power between hegemonic and counter-hegemonic groups and pervasive inequalities between the Global North and the Global South should make us not be too hopeful of deliberative democracy approaches to global governance.

"Think globally, act locally" is a well-known slogan used within counter-hegemonic social movements. But counter-hegemonic social movements are increasingly trying to also act at a global level.⁵⁵ Murphy, citing Rosenau, refers to "the glocalization of politics", when "new social alliances find new political opportunities in spaces above and below existing states."⁵⁶ White highlights the value of linking local struggles of marginalized groups with other local, national and international struggles.⁵⁷ Additionally, Carroll, citing de Sousa Santos, emphasizes the importance of translation, "from language to language", from culture to culture, from local to global, and highlights the difficulty of engaging in this type of counter-hegemonic work due to lack of resources.⁵⁸

Lawyers engaging in counter-hegemonic globalization work should help in the construction of arguments to counter arguments put forward by neoliberals and help to create spaces where a new language by subaltern/marginalized groups can emerge. They should help marginalized groups to construct political identities using 'strategic essentialism'⁵⁹ (e.g. 'low income urban dwellers facing the threat of eviction' or 'indigenous women'). Finally, it is of great value to link local and global struggles (e.g. link local campaigns against eviction of low income urban dwellers to global campaigns such as the 'Zero Evictions' campaign of the International Alliance of Inhabitants).

⁵⁴ See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* (Turia and Kant 2007).

⁵⁵ As Carroll correctly points out, it will be important to evaluate if in the long term the World Social Forum can constitute more than an 'open meeting place' for counter-hegemonic movements to come together, itself a 'global social justice movement' Carroll, *supra* n. 1, at 50.

⁵⁶ Murphy *supra* n. 3, at 796.

⁵⁷ White, *supra* n. 17.

⁵⁸ Carroll, *supra* n. 1, at 53, citing Boaventura de Sousa Santos, *The future of the World Social Forum: the work of translation*, 48 *Development* 2, 15-22 (2005).

⁵⁹ The term 'strategic essentialism' has been associated with Spivak's work. Spivak, as a postcolonialist, believes that subaltern groups should simplify their differences and create a political identity only for strategic purposes.

V. Conclusion

Murphy has stated, in a pessimistic way, that:

Global governance is likely to remain inefficient, incapable of shifting resources from the world's wealthy to the world's poor, pro-market, and relatively insensitive to the concerns of labour and the rural poor, despite the progressive role that it recently may have played in promoting liberal democracy and the empowering of women.⁶⁰

He asks: “must globalization inevitably be accompanied by the anti-democratic government of ‘expertise’ or by the non-government of marketization at ever more inclusive levels?” and whether “‘globalization’ and ‘governance’ [are] simply two inseparable aspects of the modern project of elite control.”⁶¹

In this essay, I have attempted to propose the role that lawyers can play in the struggle for counter-hegemonic globalization. It is an extremely challenging and difficult task, almost quixotic to undertake, but we remain hopeful that, as the World Social Forum slogan states, “another world is possible.”

⁶⁰ Murphy *supra* n. 3, at 789.

⁶¹ *Id.* at 800.

