GLOBALIZATION –NON-GOVERNMENTAL

César A. Rodríguez-Garavito

University of The Andes (Colombia) and University of Wisconsin-Madison

(Entry prepared for the *Encyclopedia of Law and Society: American and Global Perspectives*, edited by David Clark. Thousand Oaks: Sage, 2006)

Processes of economic globalization underway since the early 1970s pose new regulatory dilemmas. The mismatch between global economic processes, on the one hand, and national regulations, on the other, creates what Sassen has aptly called a "regulatory fracture," stemming from the fact that "economic processes diverge from the model for which extant regulations were designed" (Sassen 1998: 155). Debates about how to deal with such a regulatory fracture are today at the forefront of law and society research on globalization and have given rise to a host of regulatory experiments around the world. A growing number of sociolegal analyses and institutional experiments emphasize non-governmental approaches to regulation, that is, forms of economic and political coordination in which private organizations –from corporations to civic associations— take on regulatory tasks that were hitherto reserved to the state. From this perspective, forms of global governance have the potential to solve some of the problems faced by national governments in the global economy.

The growing sociolegal literature on global governance entails a diagnosis of the regulatory dilemma, and a prognosis and a set of proposals to solve it. As for the diagnosis, three economic and political developments are seen to be at the root of the

regulatory problems associated with globalization. First, transnational economic processes operate at a scale that is increasingly at odds with that of national states' laws. In this context, the efficacy of national states' regulation decreases both because of its limited territorial reach and because of the strengthening of capital's "exit" option –that is, the heightened possibility that corporations will move operations to other countries to avoid stringent fiscal, environmental or labor regulations (Trubek, Mosher and Rothstein 2000). Second, states face difficulties in applying their top-down, centralized regulatory logic to a highly decentralized economy dominated by a combination of market and network organizational logics (Ayres and Braithwaite 1992; Jessop 2002). For instance, national labor inspectorates are hard pressed to enforce labor laws in such industries as apparel consisting of flexible global networks of small suppliers and subcontractors producing for major brands that do not directly own any factory. Third, states' enforcement capacity –already very limited in countries of the global South— has been further curtailed by neoliberal policies that have underpinned the process of globalization. In the realm of labor rights enforcement, for example, structural adjustment policies in the global South have entailed considerable reductions in budgets for labor inspectorates.

In light of this diagnosis of the state's regulatory failures, law and society scholars –together with a growing number of theorists of the state, economic and organizational sociologists, legal theorists, and public policy analysts— have explored emerging non-governmental systems of regulation –sometimes called "soft law"—, such as voluntary corporate codes of conduct for labor and the environment (Bartley 2003; O'Rourke 2003; Rodríguez-Garavito 2004) and new forms employment and social policies in the European Union (Trubek and Mosher 2003). The rationale behind these analyses and

institutional experiments is that when the state encounters the above-mentioned difficulties, other governance mechanisms –namely forms of regulation based on cooperation among private organizations such as associations and corporations—may provide an alternative or a complement to top-down state regulation. By enlisting the distinctive capacities of private organizations "to gather local information, monitor behavior, and promote cooperation among private actors" (Cohen and Rogers 1995: 45), such governance mechanisms can help solve each of the three regulatory problems. First, collaborative governance systems that include such global actors as transnational corporations have the potential to operate at the global scale. For instance, nascent systems of monitoring transnational corporations' compliance with codes of conduct for labor aim to regulate those corporations' global supply chains, and thus protect workers' rights in supplier factories regardless of their location (Fung, O'Rourke and Sabel 2001). Second, by eliciting the cooperation of non-state, local stakeholders, they seek to follow the decentralized, network logic of the economic processes they regulate. The most stringent forms of code of conduct monitoring, which give a central role to workers and local communities in monitoring labor conditions in global factories, are a case in point (Rodríguez-Garavito 2004). Third, the most cogent theories of global governance see "soft law" and associative regulation as complementing, rather than substituting, a strong –albeit revamped— state.

Despite sharing the essential elements of the above diagnosis and prognosis, the intellectual sources and specific proposals of sociolegal analyses of global governance are very diverse. The intellectual roots of the concept and of this line of research are to be found both in the law and society field –notably in Teubner's (1983) theory of "reflexive

law" and Nonet and Selznick's (1978) concept of "responsive law"— and in other fields such as economic, political and organizational sociology –notably in the work of Sabel and his associates on collaborative governance (Sabel 1994; Dorf and Sabel 1998), and in theories of associative democracy (Cohen and Rogers 1995; Hirst 1994). The spirit and details of institutional proposals stemming from these theories are equally diverse. For instance, while some studies tend to view collaborative governance as a relatively unproblematic, win-win regulatory strategy capable of solving a broad range of state regulatory failures (Sabel 1994; Fung, O'Rourke and Sabel 2001), others limit their claims about the virtues of global governance to specific policy domains and emphasize the importance of empowered democratic participation and a strong state for non-governmental regulation to work (Fung and Wright 2003; Rodríguez-Garavito 2004).

The deep theoretical and practical problems raised by the regulation of the global economy will likely continue to encourage sociolegal studies of global governance. In this regard, some of the issues at the forefront of the law and society research agenda are the exacerbation of legal pluralism brought about by institutions of global governance (Hunt 2002; Snyder 2002), the social impact and regulatory capacities of "soft law," and the political and legal struggles between social movements, NGOs, states, transnational corporations and multilateral financial organizations to define the content of global governance (Santos 2002).

References

Ayres, Ian and John Braithwaite (1992). Responsive Regulation: Transcending the Deregulation Debate. New York: Oxford University Press.

Bartley, Tim (2003). "Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Product Fields." Politics & Society 31: 433-464

Cohen, Joshua and Joel Rogers (1995). Associations and Democracy. London: Verso.

Dorf, Michael and Charles Sabel (1998). "A Constitution of Democratic Experimentalism." Columbia Law Review 98 (2): 267-473.

Fung, Archon, Dara O'Rourke and Charles Sabel (2001). Can We Put an End to Sweatshops? Boston: Beacon Press.

Hirst, Paul (1994). Associative Democracy: New Forms of Economic and Social Governance. London: Polity Press.

Hunt, Alan (2002). "Legal Governance and Social Relations: Empowering Agents and the Limits of Law." In Law, Regulation, and Governance, edited by Michael Mac Neil, Neil Sargent and Peter Swan. Don Mills, Ontario: Oxford University Press, 54-77.

Jessop, Bob (2002). The Future of the Capitalist State. London: Polity Press.

Nonet, Philipe and Philip Selznick (1978). Law and Society in Transition: Toward Responsive Law. New York: Harper and Row.

O'Rourke, Dara (2003). "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring." The Policy Studies Journal 31: 1-29.

Rodríguez-Garavito, César A. (2004). "Global Governance, Cross-Border Organizing and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Mexico and Guatemala." Beyond Law 28: 23-48.

Sabel, Charles (1994). "Learning by Monitoring: The Institutions of Economic Development." In The Handbook of Economic Sociology, edited by Neil Smelser and Richard Swedberg. Princeton: Princeton University Press, 137-165.

Santos, Boaventura de Sousa (2002). Toward a New Legal Common Sense. London: Butterworths.

Sassen, Saskia (1998). Globalization and Its Discontents. New York: The New Press.

Snyder, Francis (2002). "Governing Globalisation." In Transnational Legal Processes: Globalisation and Power Disparities, edited by Michael Likosky. London: Butterworths, 65-97.

Teubner, Gunther (1983). "Substantive and Reflexive Elements in Modern Law." Law and Society Review 17 (2): 239-285.

Trubek, David, Jim Mosher and Jeffrey Rothstein (2000). "Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks." Law and Social Inquiry. 25 (4): 1187-1210.

Trubek, David and James Mosher (2003). "New Governance, Employment Policy, and the European Social Model." In Governing Work and Welfare in a New Economy, edited by Jonathan Zeitlin and David Trubek. New York: Oxford University Press, 33-58.

ALTERNATIVE LAW

César A. Rodríguez-Garavito

University of The Andes (Colombia) and University of Wisconsin-Madison

(Entry prepared for the *Encyclopedia of Law and Society: American and Global Perspectives*, edited by David Clark. Thousand Oaks: Sage, 2006)

School of legal thought and action that advances the use of law for social transformation. Originated in continental Europe and Latin America in the 1970s, it established itself as one of the leading theoretical and practical loci of criticism of legal positivism in those regions. Given its focus on the links among law, politics, and social context, it has spurred a wide range of scholarly studies and public debates inspired by a sociolegal approach.

Theoretical production and political engagement are intertwined in the history of the alternative law movement. Its theoretical tenets stem from a combination of antiformalist and neomarxist thought. Based on an eclectic reading of a range of antiformalist theories –from European "free law" and "interest jurisprudence" schools to U.S. sociological jurisprudence and legal realism—, its proponents argue, against legal positivists, that law is neither politically neutral nor unequivocal. Instead, rules are open to competing interpretations rooted in contrasting political views. From neomarxism, alternativists take the idea that law embodies the tensions and contradictions of class struggles. Explicitly following Gramsci's contribution to the Marxist tradition, they claim that, although biased in favor of hegemonic classes, law constitutes an arena for political

and ideological struggle in which subaltern classes and their "organic jurists" can advance social transformation and counter-hegemonic understandings of rules and institutions (Ibáñez 1976).

Political involvement characterized the school from its inception. Indeed, judges, jurists and scholars advanced the pioneer alternative law theses and practices in the context of broader mobilizations against authoritarian governments that marked the rise of new social movements and other leftist political formations in the late 1960s and early 1970s. The first signs of the movement are to be found in Italy, where an organization of progressive judges –Magistratura Democratica (Democratic Judiciary), founded in 1969— advocated an "alternative use of law" aimed to realize the civil, political and socioeconomic rights introduced by the 1947 constitution (Accattatis, Ferrajoli and Senese 1971). Through myriad communiqués, conferences, publications, and court rulings, Magistratura Democratica members denounced and sought to counter the abuses committed under the auspices of the remnants of the fascist legal regime, and promoted the "constitutionalization" of law and social policy as a means to promote civil liberties and economic redistribution (Ferrajoli 1994; Barcellona 1973).

A similar movement arose in Spain in the early 1970s, led by judges opposed to Franco's dictatorship and its legal and judicial apparatus. First organized as a semi-clandestine judges' association under Franco's regime (Justicia Democrática, Democratic Justice) , and later on as a legal association established after the transition to democracy (Jueces para la Democracia, Judges for Democracy) , the movement had an important role in the debates leading to and the process of implementation of the democratic constitution of 1978 (Ibáñez 1976; Souza 2001).

In Latin America, the movement entailed analogous judicial actions embodying an alternative use of law but took on a broader scope that, under the more general label of alternative law, included a wide array of law-centered strategies. These comprehended legal advice to social movements, denunciation of human rights abuses by dictatorial governments (e.g., in Brazil and Argentina in the 1970s), provision of legal services to marginalized communities, the development of alternative dispute resolution mechanisms based on the informal laws of such communities, and the promotion of direct participation of citizens in processes of law creation and implementation (Rojas 1988, 1989; Wolkmer 2001). This broader understanding of the movement explains the fact that the theory and practice of alternative law in Latin America since the 1970s has been closely linked to other areas of sociolegal research and practice, such as legal pluralism, public interest lawyering, and judicial activism (Oliveira 2003).

Albeit transformed by internal and external criticisms and the effects of the historical events of the last three decades –particularly those of the fall of the Iron Curtain, the transition to democracy in the pioneer countries, and the rise of globalization— , the alternative law movement continues to be a central component of law and society ideas and practice in continental Europe and Latin America. In Italy and Spain, for instance, the original contributors to the movement have been joined by newer generations of progressive judges and scholars who continue to advocate the effective protection of legal and constitutional individual guarantees (hence the label of garantismo that this trend currently adopts), as well as the judicialization of socioeconomic rights. In Latin American countries at the forefront of the movement, such as Brazil and Colombia, the law and society community is today largely composed of scholars, activists, judges

and NGOs working at the crossroads of the alternative law, human rights and legal pluralism traditions (García and Rodríguez-Garavito 2003; Oliveira 2003; Souza 2001).

Oftentimes working in tandem with jurists, judges, scholars and NGOs that have advanced similar movements in other regions of the world –e.g., "social action litigation" in India (Baxi 1989) or "public interest law" and "cause lawyering" in the U.S. and elsewhere (Sarat and Scheingold 1998)—alternativists currently engage in multifarious forms of transnational advocacy, thus providing legal expertise to the movement for social justice in the global economy (Santos and Rodríguez-Garavito 2005). Some prominent issues for current and future activity on this front are the fight against exclusionary systems of intellectual property rights (Klug 2005), the promotion of an equitable and effective system of international human rights (Rajagopal 2003), and the protection of labor laws in global commodity chains (Rodríguez-Garavito 2005).

César A. Rodríguez-Garavito

Assistant Professor of Law and Sociology at the University of Los Andes (Colombia), and Fellow of the Institute for Legal Studies, University of Wisconsin-Madison

References

Accattatis, Vicenzo, Luigi Ferrajoli and Salvatore Senese (1971). "Per una Strategia Politica di Magistratura Democratica." Paper presented at the First Congress of Magistratura Democratica, Rome, 3-5 December.

Barcellona, Pietro (1973). L'uso Alternativo del Diritto. Scienza Giuridica e Analisi Marxista. Bari: Laterza.

Baxi, Upendra (1989). "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India." In Law and Poverty: Critical Essays, edited by U. Baxi. Mumbai: Tripathi, 387-405.

Ferrajoli, Luigi (1994). "Per una Storia delle Idee di Magistratura Democratica." In Giudici e Democrazia: La Magistratura Progresista nel Mutamento Istituzionale, edited by N. Rossi. Milan: Franco Angeli, 65-98.

Ibáñez, Perfecto Andrés (1976). "Para una Práctica Judicial Alternativa." Anales de la Cátedra Francisco Suárez 16: 134-167.

García, Mauricio and César A. Rodríguez-Garavito (2003). "Derecho y Sociedad en América Latina: Propuesta para la Consolidación de los Estudios Jurídicos Críticos." In Derecho y Sociedad en América Latina: Un Debate sobre los Estudios Jurídicos Críticos, edited by M. García and C. Rodríguez-Garavito. Bogotá: ILSA and Universidad Nacional, 15-66.

Klug, Heinz (2005). "Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDS and TRIPS." In Law and Globalization from Below: Toward a Cosmopolitan Legality, edited by B. Santos and C. Rodríguez-Garavito. Cambridge: Cambridge University Press, 118-139.

Oliveira, Luciano (2003). "Pluralismo Jurídico y Derecho Alternativo en Brasil: Notas para un Balance." In Derecho y Sociedad en América Latina: Un Debate sobre los Estudios Jurídicos Críticos, edited by M. García and C. Rodríguez-Garavito. Bogotá: ILSA and Universidad Nacional, 199-222.

Rajagopal, Balakrishnan (2003). International Law from Below: Development, Social Movements and Third World Resistance. Cambridge: Cambridge University Press.

Rodríguez-Garavito, César A. (2005). "Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas." In Law and Globalization from Below: Toward a Cosmopolitan Legality, edited by B. Santos and C. Rodríguez-Garavito. Cambridge: Cambridge University Press, 64-91.

Rojas, Fernando (1988) "A Comparison of Change-Oriented Legal Services in Latin America with Legal Services in North America and Europe." International Journal of the Sociology of Law 16: 226-288.

Santos, Boaventura de Sousa and César A. Rodríguez-Garavito, eds. (2005). Law and Globalization from Below: Toward a Cosmopolitan Legality. Cambridge: Cambridge University Press.

Sarat, Austin and Stuart Scheingold, eds. (1988). Cause Lawyering Political Commitments and Professional Responsibilities. Oxford: Oxford University Press.

Souza, Maria de Lourdes (2001). El Uso Alternativo del Derecho. Génesis y Evolución en Italia, España y Brasil. Bogotá: ILSA and Universidad Nacional de Colombia.

Wolkmer, António (2001). Pluralismo Jurídico: Fundamentos de uma Nova Cultura no Direito. São Paulo: Alfa-Omega.

COLOMBIA --LAW AND SOCIETY ACTIVITIES

César A. Rodríguez-Garavito

University of The Andes (Colombia) and University of Wisconsin-Madison

(Entry prepared for the *Encyclopedia of Law and Society: American and Global Perspectives*, edited by David Clark. Thousand Oaks: Sage, 2006)

Law and society activities took off in the 1980s and have experienced a boom since the 1990s. They involve numerous university research centers, think tanks and NGOs, and cover such topics as the administration of justice, the legal profession, law and political violence, human rights, and legal pluralism.

Three developments converged to spur the growth of empirically grounded, interdisciplinary studies of law since the 1980s –which hitherto had been slowed down by the grip that legal formalism and abstract theorizing have traditionally had over legal education and practice. First, in the late 1970s and early 1980s alternative legal services organizations –notably the Instituto Latinoamericano de Servicios Legales Alternativos (ILSA)—were established that combined advocacy and sociolegal research. Second, as elsewhere in Latin America, the first wave of law and development programs promoted diagnostic sociolegal studies as a preliminary step towards the reform of legal institutions (Rodríguez-Garavito 2001). Participants in the law and development and the alternative legal services initiatives collaborated closely and produced some of the pioneering sociolegal studies of the legal profession (Lynch 1981), popular legal services (Rojas 1988) and labor law (Moncayo and Rojas 1978). Third, the rise of an anti-formalist

movement within legal academia in the early 1990s –the so-called nuevo derecho (new law)— and the concomitant adoption of a new constitution in 1991 that was heavily influenced by such a movement, created the requisite intellectual and political conditions for law and society activities to take off (García-Villegas 1993).

The turning point in the consolidation of sociolegal research and the insertion of Colombia in international networks of law and society activities was an ambitious study on the multifarious forms in which justice is administered in the country, directed by Santos and García-Villegas (2001). Drawing on international law and society literature, the study documented both official mechanisms of dispute resolution like civil and labor courts (Rodríguez-Garavito, Uprimny and García-Villegas 2003) and nonofficial ones like those used by indigenous communities (Sánchez 2001) and by guerrilla groups in the territories they control (Aguilera 2001).

Today, the leading actors in the sociolegal field include pioneers like ILSA and newer research centers like the Centro de Estudios de Derecho, Justicia y Sociedad (DJS), as well as the Nacional, Los Andes and Externado universities. Given the insertion of these and similar organizations in international sociolegal networks, the topics at the cutting-edge of the research agenda today have affinities with those that are salient elsewhere. For instance, the debate between law and economics (Kalmanovitz 2001) and sociolegal (Rodríguez-Garavito and Uprimny 2003) approaches to the study of institutions has become pointed and will figure prominently in the future. Together with the continuing study of classic sociolegal topics like the legal profession (Silva 2001) and of issues that are specific to the Colombian social and political context –for instance, the effects of civil war on the legal field (Aguilera 2001; García-Villegas and Rodríguez-

Garavito 2003)— such new debates will likely consolidate Colombia as one of the countries at the forefront of law and society activities in Latin America.

References

Aguilera, Mario (2001). "Justicia Guerrillera y Población Civil." In El Caleidoscopio de las Justicias en Colombia, edited by B. Santos y M. García-Villegas, Vol. 2, 389-422.

García-Villegas, Mauricio (1993). La Eficacia Simbólica del Derecho: Examen de Situaciones Colombianas. Bogotá: Uniandes.

-----and César A. Rodríguez-Garavito (2003). "Derecho y Sociedad en América Latina: Propuesta para la Consolidación de los Estudios Jurídicos Críticos." In Derecho y Sociedad en América Latina: Un Debate sobre los Estudios Jurídicos Críticos, edited by M. García-Villegas y C. Rodríguez-Garavito. Bogotá: ILSA and Universidad Nacional, 15-66.

Kalmanovitz, Salomón (2001). Las Instituciones y el Desarrollo Económico en Colombia. Bogotá: Norma.

Lynch, Dennis (1981). Legal Roles in Colombia. Uppsala: Scandinavian Institute of African Studies and International Center for Law in Development.

Moncayo, Víctor and Fernando Rojas (1978). Luchas Obreras y Política Laboral en Colombia. Bogotá: La Carreta.

Rodríguez-Garavito, César A. (2001). "Globalization, Judicial Reform and the Rule of Law in Latin America: The Return of Law and Development." Beyond Law 23: 13-42.

-----, Rodrigo Uprimny and Mauricio García-Villegas (2003). "Justice and Society in Colombia: A Sociolegal Analysis of Colombian Courts." In Legal Cultures in the Age of Globalization: Latin America and Latin Europe, edited by Lawrence Friedman and R. Pérez-Perdomo. Stanford: Stanford University Press, 134-183.

-----and Rodrigo Uprimny (2003). "¿Justicia para Todos o Seguridad para el Mercado?: El Neoliberalismo y la Reforma Judicial en Colombia y en América Latina." In La Falacia Neoliberal, edited by Darío Restrepo. Bogotá: Universidad Nacional, 415-452.

Rojas, Fernando (1988) "A Comparison of Change-Oriented Legal Services in Latin America with Legal Services in North America and Europe." International Journal of the Sociology of Law 16: 226-288.

Sánchez, Esther (2001). "Aproximación desde la Antropología Jurídica a la Justicia de los Pueblos Indígenas." In El Caleidoscopio de las Justicias en Colombia, edited by B. Santos y M. García-Villegas, Vol. 2, 159-200.

Santos, Boaventura and Mauricio García-Villegas, eds. (2001) El Caleidoscopio de las Justicias en Colombia. Bogotá: Uniandes and Siglo del Hombre.

Silva, Germán (2001). El Mundo Real de los Abogados y la Justicia. Bogotá: ILSA and Universidad Externado de Colombia.