

BRAZIL AND THE FIELD OF SOCIO-LEGAL STUDIES: Globalization, the Hegemony of the US, the Place of Law, and Elite Reproduction // *Bryant G. Garth*¹

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Abstract:

This article is about the field of socio-legal studies and the sociology of the field. This division enables working with two dimensions of the author's socio-legal scholarly personality, especially as it relates to Brazil. It is going to try to describe, not prescribe, and the description is very preliminary. It is in part meant to provoke responses and criticisms that will make the description better. Part one examines the rise and to some extent fall of the field of socio-legal studies in the United States. Part two will examine and make a preliminary contrast to a kind of parallel and contrasting story in Brazil. Part three moves to a different approach, a more sociological approach, focusing on lawyers as a point of entry into issues of law and state. Part four is the most tentative part of this talk as it a very preliminary contrast of the U.S. story with what I know preliminarily about Brazil in relation to the same issues of the place of law, elite production, hegemony, and globalization. Finally, it raises a couple of research projects and questions raised by this sociological examination.

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1 Introduction²

My aim is to use the occasion of the annual meeting of the Brazilian Empirical Legal Studies Association (or Network) (*Rede de Pesquisa Empírica em Direito*) to talk both about the field of socio-legal studies and the sociology of the field. One reason for this divided approach is that it enables me to work with two dimensions of my own socio-legal scholarly personality, especially as it relates to Brazil. I am going to try to describe, not prescribe, and the description is very preliminary. It is in part meant to provoke responses and criticisms that will make the description better.

Part one of the talk and now article examines the rise and to some extent fall of the field of socio-legal studies in the United States. Part two will examine and make a preliminary contrast to a kind of parallel and contrasting story in Brazil. I do not mean this exercise as only a comparison. The two stories can be seen as comparative. Both these parts of the article connect to the first part of my career -- studying and promoting access to justice, class actions, and alternative dispute resolution. The ambition of that scholarship was to support progressive legal and social reform. The puzzle and reason for my approach in this talk is that my work on Access to Justice with Mauro Cappelletti forty years ago seems much more alive here in Brazil than in the United States.³

Part three moves to a different approach -- more sociological -- and related to my long collaboration with Yves Dezalay -- a second stage of my career. This work -- especially in "The Internationalization of Palace Wars" (Dezalay & Garth, 2002) -- also focuses direct attention on Brazil. The focus now is on lawyers as a point of entry into issues of law and state. I will suggest that my work on access to justice, funded by the Ford Foundation in the 1970s, can only be understood in relation to the title of this article: globalization, the hegemony of the U.S., the place of law,

and elite reproduction. The story of progressive law and social reform becomes more intriguing if we go beyond the normative program to try to explain the project of access to justice in terms of the sociology of globalization.

Part four is the most tentative part of this talk. It is a very preliminary contrast of the U.S. story with what I know preliminarily about Brazil in relation to the same issues of the place of law, elite production, hegemony, and globalization. It builds on the work that I have done with Yves Dezalay, but tries to make some observations about recent times. The question put bluntly is to try to learn the context for the rise of the group in this room attending the Brazilian Empirical Legal Studies Conference. The approach is in part comparative, but it is more accurate to see the two stories as aspects of a larger narrative involving the relationship between the field of socio-legal studies in Brazil and the field in the United States -- and between the legal fields in the two places.

Finally, just to complete the picture with respect to empirical work, I raise a couple of research projects and questions that draw on and relate to the questions raised by the sociological examination.

2 Part One. A Summary History of Socio-Legal Studies in the United States

The United States in one sense provides the story of the success of empirical or socio-legal studies, but in another sense it is a story of a decline of a progressive agenda. Law professors began to work with social scientists and to conduct some empirical research in the 1930s in the era of the great Depression and Franklin Roosevelt's New Deal. The banner of the reformers was Legal Realism. It represented both an attack on "legal formalism" as narrow and divorced from the social consequences of the law and also an effort to use social science for progressive social reform against the conservative opponents of the New Deal (Shamir, 1995). Socio-legal studies picked up again in the 1960s with the activist state and the culmination of the civil rights movement. The creation of the Law and Society Association (LSA) in 1964 reflected this confluence of events and the rise of socio-

² This is an edited version of a keynote address at the Brazilian Socio-Legal Studies Association Annual Conference, on August 20, 2015, in Rio de Janeiro.

³ See, e.g., Alluisio Gonçalves De Castro Mendes And Larissa Claire Pochmann Da Silva, "Acesso à justiça: Uma releitura da obra de Mauro Cappelletti e Bryant Garth a partir do Brasil 40 anos depois," *Revista Del Instituto Colombiano De Derecho Procesal* (forthcoming).

logy in prestige (Garth & Sterling, 1998). There was a kind of brief golden age of rights, social movements, and empirical social science lasting perhaps through the 1970s.

There were classic works associated with this era of interdisciplinary progressive advocacy, including Marc Galanter's *Why the Haves Come Out Ahead* (1975) and Carlin, Howard, and Messinger's *Civil Justice and the Poor* (1967). The message was that formal rights and the formal studies done by traditional law professors were not enough. There was a need to study law in action, and to focus more on implementation in order to make the promises of progressive law come to fruition. The alliance supporting this agenda included law, sociology, political science, anthropology, and social psychology. There was not much economics at that time participating in this work, and indeed economics has continued to be outside of the Law and Society Association.

This was the time when I came in with Mauro Cappelletti and the Florence Access-to-Justice Project -- which we framed as a study of a "worldwide movement to make rights effective."⁴ The general report by Mauro Cappelletti and I drew extensively on all that classic empirical research and movements in legal aid, class actions and alternative dispute resolution. My position with the Access-to-Justice Project -- my first job after law school -- indeed linked me to the stars of the Law and Society Association, including Marc Galanter, David Trubek, and Joel Handler. Access to Justice drew on the core of the work produced in the early days of the Law and Society Association. But events then made LSA much more marginal to political and social developments in the United States.

The 1980s saw the rise of a strong conservative attack on the welfare state and aspects of the civil rights

4 The General Report was published in Mauro Cappelletti and Bryant Garth, eds., *Access to Justice: A World Survey* (Oceana/Giuffre 1978) and was entitled, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective." It was also published as an article in 27 *Buffalo Law Review* 181-292 (1978). The general report was also published as a book in Spanish (Buenos Aires, 1983), Portuguese (Porto Alegre, Brazil 1988) Japanese (1982). The Brazilian translation was done by Gracie Northfleet.

movement, and this accompanied the related rise of economics over sociology, especially an economics of deregulation. Socio-legal studies divided in this context. Those who did quantitative research sought legitimacy and prestige in "science" (and especially mathematics) and research placed in service to established law rather than critique. They moved closer to economics and to the thriving new "law and economics" field. In 2002 Empirical Legal Studies was founded with that agenda, much to the chagrin of law and society. And closely linked to Empirical Legal Studies is the ascending field of "behavioral law and economics," which is a subset of law and economics that draws especially on psychology to supplement the model of the rational actor central to classical economics.

Names associated with Empirical Legal Studies include Lee Epstein, a political scientist who has been affiliated with several law schools, including Northwestern and Washington University, and the late Ted Eisenberg, a law professor at Cornell. This group promotes counting versus the explicit social justice orientation of LSA, and again, as noted, relies more on the legitimacy of mathematics and quantification versus qualitative empirical research.⁵ Behavioral law and economics overlaps but certainly the most famous U.S. scholar is Cass Sunstein of Harvard -- who essentially converted to the new science from a more activist constitutional law.

LSA with its progressive tilt is alive but social movements, social justice, and vindicating rights are much less in focus and in prestige generally within socio-legal studies. The work on rights issues, if any, tends to focus on, for example, the decline of class actions and the conservative and anti-consumer aspects of alternative dispute resolution.⁶ There is not much

5 Examples of recent work from the *Journal of Empirical Legal Studies* are: Christoph Engel, "Tacit Collusion: The Neglected Experimental Evidence," 12 *Journal of Empirical Legal Studies* 537-577 (2015); Gregory C. Sisk and Michael Heise, "Too Many Notes"? An Empirical Study of Advocacy in Federal Appeals," 12 *Journal of Empirical Legal Studies* 578-600 (2015); Alan Marco, Shawn Miller, and Ted Sichelman, "Do Economic Downturns Dampen Patent Litigation?" 12 *Journal of Empirical Legal Studies* 481-536 (2015).

6 For recent examples, see Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights," 124 *Yale Law Journal* 2804 (2015); Stephen B.

vitality in progressive law. The quantitative social scientists tend to say activists aligned with the traditional mission of the LSA are too political and biased. The activists respond that the science is inherently conservative and lacks commitment to justice. Whatever they say, the most prestige today is behavioral law and economics and empirical legal studies, both looking very conservative and focused on method. It is not an accident that the Obama administration drew especially on behavioral law and economics and brought Cass Sunstein from Harvard into the administration to oversee regulation.

Interestingly, however, the LSA is thriving today in large part from developments outside the United States, including within Brazil. This success relates to the internationalization of LSA, which is both global and national, and it even reinforces the progressive side of LSA and socio-legal scholarship. Non-U.S. students come to study both law and social science subjects within the U.S. and link to scholars who maintain their progressive interests. The draw of the LSA and the U.S. certainly is an aspect of the hegemonic influence of U.S. ideas and approaches, but it is important to see that the influence goes both ways and infuses the LSA while diffusing its approaches.

The major point, however, is very simple. It is a story in the United States of a relative rise and fall of progressive socio-legal studies in prestige and influence along with a substantial increase in the importance of social science methods and empirical research in law.

3 Part Two. Brazil

A recent article which seeks to summarize the role of socio-legal research in Brazil for a U.S. audience cites three strands of legal sociology (Lopes & Freitas Filho, 2014). One difference from the U.S., according to the authors, is that the researchers in legal sociology in Brazil mostly “do not rely on firsthand social inquiry.” (Lopes & Freitas Filho, 2014, p. 98) The review thus suggests that the actual empirical side is still limi-

Burbank and Sean Farhang, “Class Actions and the Counterrevolution Against Federal Litigation” (University of Pennsylvania Law School Public Law and Legal Theory Research Paper Series, Research Paper No. 15-12).

ted in Brazil. The authors also suggest that empirical work is not very critically oriented. They say, after describing some empirical studies, that the “*studies concentrate on the efficiency of institutions and possible reforms to their regulatory framework. The studies are said to provide data for remedying failures in the performance of institutions, especially courts and law enforcement agencies.*” (Lopes & Freitas Filho, 2014, p. 100). They further note that this relatively narrow approach was suggested two decades ago by the World Bank. In this respect [they say], the research agenda went “mainstream” as opposed to an earlier critical approach. They explicitly contrast the research associated with the Rede de Pesquisa Empírica em Direito with earlier empirical researchers who focused on the “problem of the overall injustice of Brazilian society.” (Lopes & Freitas Filho, 2014). This criticism suggests that some of the issues involving “science versus justice” in the United States also play out in Brazilian debates. Another author seems to agree: “*To a great extent, the exceptional attention given to empirical legal studies over the last five years in Brazil has been closely related to policy makers’ growing interest in the field. The state aims to understand how the law and the justice system really work.*” (Cunha, 2015) But this second examination also says that part of the impetus is “in order to design public policies to promote access to justice and protection of rights.” (Cunha, 2015).

As it will be noted later, the issue of access to justice provides a major contrast between Brazil and the United States. There is a huge amount of work on access to justice issues and counter-hegemonic law. I cannot help but notice it because every week the Gracie Northfleet translation into Portuguese of the General Report of the Florence Access-to-Justice Project is cited at least a couple of times in a new Brazilian article or book. I note that there is clearly a considerable amount of work on access to justice but also note that most of the work is not very empirical. But still, much in contrast to the U.S., the progressive agenda focusing on access-to-justice issues remains quite strong.

A third data point in addressing the situation in Brazil is the observation that, “*Up until ten years ago,*

Empirical Legal Research was almost unknown to Brazilian scholars.” (Cunha, 2015). Now, the author suggests, there is a relatively strong movement compared to the earlier period. The article also says that the approach in Brazil, in contrast to the assertion of the authors quoted above, is “*closer to what North-Americans understand as being Socio-Legal Studies than to Empirical Legal Research.*” (Cunha, 2015). Still, the author complains of obstacles to advancement of the field -- including problems such as a lack of critical mass of researchers, good records to study, openness to being studied -- and generally “*the challenges it has faced in a very conservative and formalist environment.*” (Cunha, 2015). What appears to be the situation is that there is some empirical research on access to justice and oriented toward the traditional progressive legal agenda of rights and their enforcement, but a general climate where most scholarship, even dealing with a progressive rights agenda, does not rely upon empirical legal research.

Finally, there is also some evidence in Brazil of the larger criticism that the focus on rights and access may be limiting, and that “*institutional changes made during the 1980s and 1990s have modified the traditional low profile of legal professionals, not only helping them to gain more visibility, but also negatively affecting the role of political institutions as loci of public debates*” (Lopes & Freitas Filho, 2014). This is the argument that legalization is not always progressive -- that it may promote too much of a reliance on litigation and rights discourses rather than confronting the issues through robust debates about the use of state power.

In sum, there is definitely something going on in Brazil in the rise of empirical research about law, and law itself appears to be more on the progressive side than in the United States -- although there is certainly a progressive side alive in the U.S. with the Law and Society Association. But there is a questioning of whether the purely empirical side is really legitimated in Brazil in the way as it is in the United States.

One question is why what appears to be the mainstream in Brazil is both less empirical and more progressive than in the United States and at the same time

criticized for a potential over legalization of politics. This takes us to part three. How can we account for differences and for the various positions that we see?

4 Part Three. Back to the U.S. and the Role of Hegemonic Power

Drawing on my work with Yves Dezalay, which is in the tradition of the sociology of Pierre Bourdieu, we can go at this analysis through a different way. We have been working on the transformation of the role of law within the United States, which allows a telling of the story of a rise and decline in a more sociological way. The story of the rise and decline is not just about a change in ideology or politics. It is a story about law, power, and the reproduction of the elite in the United States. The more sociological account, in my opinion, is a key to understanding what happened and why both in the U.S. and in Brazil.

A starting point for the United States is that the most prestigious lawyers since late in the 19th century have been corporate lawyers in large law firms. They remain at the top of the profession. They are very close to corporate power, the state, elite law schools, and the elite foundations such as Ford and Rockefeller. Part of their rise to power in the United States and their continuing claim to power is that they have sought to promote and control moderate social change. Their leadership and social role safeguards their clients and also allows the elite corporate lawyers to thrive. Elite law in this way safeguards an establishment connecting private and public power and the law (Dezalay & Garth, 2010).

This elite law in the United States relates to international strategies and foreign policy as well (Dezalay & Garth, 2010). When the United States governed the Philippines, for example, U.S. colonial administrators sought to promote lawyer statespersons and corporate lawyers to govern within what was to be a moderate democracy open to free trade and investment. This approach became the model for U.S. foreign aid and influence abroad more generally, especially after the Cold War (when there was no longer a threat of communism that could be used as an excuse not to support democracy and a strong role for law and

lawyers). This approach, which was embedded in the philanthropic foundations and the government, helps explain why there was so much focus on legal education reform outside the United States by U.S. agencies and organizations, including with the program of law and development in Brazil.⁷ The overt mission was to build up the position of lawyers displaced in particular by economists in state power so they could assume their role as keys to moderate social change consistent with social stability.

The relative failure of Access to Justice -- the decline of progressive law and society within the United States -- is related to the success of that project. The activist state of the 1960s was in retrospect tied to the U.S. establishment, which at that time could be depicted as a "liberal establishment" associated closely with the world of elite law firms, elite public interest law firms, leading corporations, and especially the leading philanthropic foundations like the Ford Foundation. It was not radical. This powerful establishment favored moderate reform to contain the left and maintain the legitimacy of U.S. capitalism under a challenge from the left. The progressive legal agenda looks very progressive in retrospect, but we must also see how closely connected the mainstream progressive activism was to corporate power. We forget, for example, that every leading public interest law firm promoting "law and social change" had a governing board of corporate lawyers. The position of progressive lawyers and law was strong because it was so close to corporate power and corporate lawyers.

Economic crises in the 1970s led key parts of corporate power to conclude that the moderate progressive reform was too expensive. They used the growing importance of neo-liberal economics to support that position. Initially the opposition was anti-law and opposed to elite law and foundations, because law was identified mainly with progressive social reform. The liberal establishment tried to keep reformist approaches alive, seen in progressive foundations including Ford and more recently the Soros Foundation. They had many allies among elite lawyers and academics. But elite law did not stand still when power shifted

toward the conservatives and their supporting economists. Much of elite law and lawyers -- seeking to maintain their position of power at the top of the legal hierarchy and near the top of the social hierarchy -- shifted gradually to support the positions that much of the corporate power now favored. Law followed power closely. The result was a divided elite -- two sets of foundations, conservative and liberal corporate lawyers, conservative and liberal public interest law firms, and a conservative and liberal divided Supreme Court. The liberal establishment remained important, and allies such as the LSA are very much alive, but the weight of power tipped substantially to a far more conservative political agenda and conservative establishment. Just as lawyers moderated the left in the 1960s while adopting a progressive agenda, they also moderated the conservative right while serving it.

From one perspective, therefore, the winners again were the elite corporate lawyers and those they serve. Indeed, that was the story all along! The very strong corporate power of those opposed to the activist state explains why legal and interdisciplinary scholars favored law and economics, empirical legal studies, and behavioral law and economics. It was not a shift in ideology as such or in academic "fashion" as such. It was a shift in power away from the liberal establishment, and law and lawyers reinvented themselves in order to maintain their social position. The new breed put the progressive side on the defensive -- now also looking for foreign allies and reducing their hopes for progressive reform domestically. And the key point of continuity was that elite corporate lawyers and lawyers generally kept or reestablished their position of strength in governance -- in the field of state power.

The Access-to-Justice project based in Italy and funded by the Ford Foundation is part of the story (Garth, forthcoming). Cappelletti (with my help at the time) imported legal and academic approaches from the United States and repackaged them in ways that might be absorbed in civil law countries with different traditions, all the while seeking to build up the position of law, lawyers, and courts in state power. As noted above, this project represented at the same time the progressive side of law and an effort to build

⁷ The programs are critically discussed in James Gardner, *Legal Imperialism* (University of Wisconsin Press 1980).

up the position of elite law and lawyers. Cappelletti was both an importer and an exporter of U.S. approaches to law and legal rights. We see the same kind of progressive and lawyer building activity outside of the United States in the key role of the Ford Foundation and the MacArthur Foundation in supporting the international human rights movement as a well to challenge authoritarian governments by building up the position of law.

And now that the law and economics and more conservative legal positions are even more strongly represented in the United States, they too are being exported to try to build influence abroad and at home. Detailing these activities would take this paper too far from its main themes, but the result was aptly summarized recently by Fernanda Nicola. She says, *"In either case, U.S. law schools and their professors became important agents of legal change exporting either the mainstream or the critiques to U.S. legal thought to the rest of the world."* (Nicola, forthcoming). Both sides disagree vehemently with each other but also promote a strong role for law and lawyers versus a stronger role of the state. They agree on the appropriate position of law, lawyers, and courts.

5 Part Four. Is there a Brazilian parallel to the story of the reproduction of the US legal elite in relation to a shift in power? How does it relate to empirical research and law and society?

This section is more open and tentative. I would not dare try to tell a more sociological story in Brazil without much more research, but here are some items that would be relevant to a more developed analysis.

In Brazil we can point to the rise of economists and a perceived decline in the importance of law and lawyers after World War II. The perception of a decline in law and lawyers was part of what the first law and development responded to in Brazil in the 1970s -- a "displacement of lawyers" from power. The ambition of the U.S. and some of its Brazilian allies in law and development at the time, however, was not just a comeback, but also a challenge to the perceived model of the legal elite. The top of the Brazilian hierarchy,

according to the critique, was a "jurist" who practices law, teaches very formally with uninspiring lectures about codes, requires little class preparation, draws on legal family connections, is only part-time a faculty member, produces little and not very systematic scholarship, and is involved in many other activities. The law and development challenge to that legal elite and its mode of reproduction through the traditional law schools failed. That particular failure is why James Gardner and others pronounced law and development a failure in Brazil (Gardner, 1980). But there is a somewhat related and complicated story of human rights, the activities of the Brazilian Bar Association (the OAB), and the adoption and impact of the 1988 Constitution, which gave a greater role for law and courts and especially for the Ministério Público. These changes were both global and local (Dezalay & Garth, 2002). A generation later, some new schools -- especially those linked to the Getúlio Vargas Foundation in São Paulo and Rio de Janeiro -- also begin to challenge that model with new teaching models.

The question is how to examine these changes sociologically and to relate them to what is happening with empirical legal research in Brazil. For me the starting point for sociological research is an examination of the elite jurists just described -- just as we started with the elite corporate lawyers at the top of the profession in the United States. The elite jurists especially at the traditional law schools led by University of São Paulo are still the most important group in the legal profession in Brazil, which is another way of saying also that they are closely connected to political and economic power in various ways. The question is how have the jurists maintained their power in recent decades. How have they changed in response to challenges such as new legal education, U.S. inspired neo-liberalism, the rise of economists, and globalization, and where if at all does empirical research enter this picture? Did the jurists at one point seem out of date and "behind the times" when economists became so important? Corporate lawyers and elite law schools in U.S. responded to the new power of neo-liberal economics and conservative politics by converting much of the legal establishment to serve it. Certainly there is some evidence of change in the same direction in Brazil, notably with the rise

of corporate law firms. But Brazilian jurists clearly did not make the same conversion that the legal establishment made in the United States.

Here are some stories of importing, retooling and adaptation of jurists in particular from the literature. They can be looked at as preliminary data for a more fully developed analysis.

First, Fabiano Engelmann, a sociologist, specifically questions how the establishment retooled. He argues that the rise of “critical” perspectives on legal education and law in the period after the end of the military regime in the 1990s, which drew on *critiques de droit* from France and the *magistratura democratica* in Italy, inspired efforts to build up the political role of courts. This process began in the south in Porto Alegre among judges (including Gracie Northfleet who translated access to justice) and extended into the legal academy there and later among the traditional schools such as the University of São Paulo. Critical legal approaches became dominant in graduate dissertations and brought life to “legal theory” in the traditional faculties of law. The orientation of the legal theory also connected law graduates to the social movements that could be brought into the courts and litigation. This new knowledge and the new constitution of 1988 helped, he suggests, to retool the legal establishment and a new generation of judges and members of the Ministério Público for an active role engaged with but also opposed to economists and “neo-liberalism” -- “justice opposed to neo-liberalism.” (Engelmann, 2007; 2011).

Second, authors suggest that the reforms in addition to the Constitution of 1988 went with this retooling. In particular, the Brazilian class action, according to a recent article, traces its origins to papers delivered in Italy in the 1970, written among others by Mauro Cappelletti, Michele Taruffo and Vincenzo Vigoriti. It links therefore to what the Access-to-Justice Project could re-export from the U.S. in order to build up the position of courts and lawyers. In Brazil, José Carlos Barbosa Moreira, Ada Pellegrini Grinover and Waldemar Mariz Oliveira Júnior, according to one study, were the pioneers who facilitated this reform (Lehfeld & Carvalho, 2010; Oliveira & Cappelletti, 2007). Along

with this new focus on a broader role of courts in social regulation came, interestingly from many of the same people, a Centro Brasileiro de Estudos e Pesquisas Judiciais ostensibly with a focus on empirical research. There is a suggestion worth further research that this was a local change that helped retool and reinforce the position high up in the hierarchy of the “Paulista procedural school” epitomizing the legal elite of jurists (Almeida, 2011). There is a symbiosis perhaps in the relationship of the movement of critical scholarship, the activities of the judges, and the move to build more activism in the courts in part through class actions.

Third, it would be interesting to examine the new constitutionalism, which is again both local and also an import from the United States and Europe. Recent research suggests that Yale’s Seminario en Latinoamérica de Teoría Constitucional y Política (SELA) and in general education within the U.S. played a role in encouraging constitutional activism. Javier Couso, writing about several countries, cites the Europe influence and also says: “the inspiration came from the scores of Latin American legal academics who started to pursue graduate training in law in the United States in the late 1970s, where they were socialized by their liberal North American law professors into the virtues of the legendary Warren Court.” (Couso, 2013). He further notes also that “a final indicator of the rising influence of neo-constitutionalism in Latin America can be seen in the enormous interest that public interest law has sparked in some of the most prestigious law schools of the region ... financial support from U.S.-based foundations ...built a powerful network.” The enhanced role of law and lawyers that travels with this new constitutionalism is clear, he notes, from a shift among groups of scholars from citing Hans Kelsen to citing Ronald Dworkin as the relevant source of legal theory on law and the state. Interestingly, as noted, there is a critique that this is just an elite matter with a new legitimacy. One well known inside critic, Robert Gargarella, says “the old power structure was not disturbed.” (Gargarella, 2015). It was re-legitimated with consequences but still re-legitimated.

There is also evidence of a retooling in relation to the changing global agenda and rise of corporate law fir-

ms as well. These examples do not relate so much to empirical research or access to justice, but I provide them as indications of other trends within notable jurists that also link up to the business side. I use a few examples strictly from web sites to provide hints of what might be happening. One example of a new breed of jurist is Pierpaolo Bottini of USP. From the website in English: “Pierpaolo Cruz Bottini is Ph.D. Professor, Department of Criminal Law, Criminology and Forensic Medicine, Faculty of Law, USP; he is also coordinator of the criminal law course at the Institute of Public Law (Brasília - DF). He has completed a Masters and a Ph.D. at the same University. He is director of economic criminal law of the Brazilian Institute of Criminal Sciences, director of the International Association of Penal Law - Brazilian section, a member of the Jury Prize Innovare. He headed the Department of Judicial Reform of the Ministry of Justice (2005-2007) and the Department of Judicial Modernization of the same Department (2003-2005). He was a member of the National Council of Criminal and Penitentiary Policy and consultant for the Ford Foundation in a project to improve the Brazilian judicial system. Author of books in the area of criminal law such as “Money Laundering”, (with Gustavo Henrique Badaró, São Paulo, RT, 2012), “Crimes of abstract danger and precautionary principle in risk society”, (2nd edition, São Paulo, RT, 2008) and coordinated the works “Judicial Reform” (with Sergio Renault), “Contemporary Criminal Law” (Gilmar Mendes and Eugenio Pacelli), and the “New titles judicial execution”. He has also authored articles and publications in specialized criminal law journals.”⁸ Clearly he exemplifies a classic jurist succeeding in the new global agenda of money laundering and similar issues.

The leaders of the Brazilian arbitration organization (CBAR) seem also to fit a potential profile of adapting to shifts in the economy and state. One scholar in Brazil said that arbitration with notable jurists serving as arbitrators may provide “a substitute for opinions” that have long been key parts of the jurist profile and link to business. The classic kind of opinions reportedly have less value in an internationalized market with sophisticated corporate firms. But serving as an

arbitrator is one way to substitute.

Again, an example from a web site is: “Luiz Olavo Baptista has practised law for almost 50 years and has acted as lawyer, counsel and arbitrator both in Brazil and abroad. He advised international corporations, governments and individuals in matters related to international investments and negotiations, and participated in the drafting of international agreements. He is a member of the ICSID Panel of Conciliators, the Association Française d’Arbitrage and the ICC Commission on Arbitration. He has acted as arbitrator in commercial and investment disputes, in proceedings at the United Nations Compensation Commission, under the MERCOSUR Protocol for the Resolution of Controversies, before ICSID and the ICC International Court of Arbitration both as arbiter and chairman. He also participates in the leading Brazilian arbitration organisations. Mr. Baptista was a member of the WTO Appellate Body (2001-2009), which he chaired in 2008. He was a member of the Permanent Court of Arbitration in The Hague (1996-2002) and in 1998 was designated Special Representative for Brazil in a fact-finding and mediation mission related to trade issues. He is a former president and board member of the São Paulo Bar Association, member of the Federal Council of the Brazilian Bar Association (1981-1983, 1986-1987) and chaired the São Paulo Lawyers Assistance Fund (1983-1985). Mr Baptista received his law degree from the Catholic University of São Paulo in 1964 and his PhD from Paris II University in 1981. He is Doctor Honoris Causa (Lisbon University, 2009). He is a retired full professor of international law at the University of São Paulo Law School. Mr Baptista is fluent in English, Spanish, French, Italian and Portuguese.”⁹

Fourth, the Brazilian Empirical Legal Studies Association (or Network) is a complex mix of challenge to Brazilian tradition, international import, a response to the rise of economists, a desire for international credibility, and perhaps also a retooling of legal elites. Not much more can be said at this point except that the group’s existence, composition, and status remain part of what needs to be explained. I hope that my preliminary framing of the context in

8 <http://whoswholegal.com/profiles/44476/0/olavo%20baptista/luiz-olavo-baptista/>

9 <http://whoswholegal.com/profiles/44476/0/olavo%20baptista/luiz-olavo-baptista/c>

this article will contribute to a better sense of this organization's possible trajectories.

In sum, there is a kind of re-legitimation that these examples suggest which is in part a reorientation to imported approaches that make sense in the Brazilian economic and political context. But the Progressive side remains alive, high in prestige, and resists aspects of neoliberalism. Still, even if a successful retooling, it still seems that empirical approaches are not mainstream within faculties of law of traditional universities (even if there are some counter examples). For example, as one individual noted, the *"infrastructure of the traditional law schools is theory"* -- in contrast perhaps to the infrastructure of Getúlio Vargas at least in São Paulo, which could be more oriented towards empirical research. The research at most traditional law schools remains largely national in focus and theme, consistent with what Engelmann reported as the educational profile and orientation for the judiciary, the Ministério Público, and the OAB (Brazilian Bar Association). Not surprisingly, even though the standards for evaluating publications have tightened and increased in recent years, the criteria remain tilted toward the traditional hierarchy best equipped for theory.

We can tell a kind of story of the retooling of the legal establishment to find another role consistent with largely a domestic focus, some shift in legal theory, more focus on rights, access to justice, and class actions with a niche that in certain ways is against the neo-liberalism perceived to be coming still from the north -- and some retooling toward neoliberalism. It can be seen therefore in one sense as counter-hegemonic even if not really challenging the position of the economists. But not surprisingly, it is also connected to the north through NGOs and public interest law and foundations -- and the circulation of elites attending institutions of higher education. It may therefore also be hegemonic and global in the sense of the focus on legalization and judicialization against the state -- but, again, it is in some sense counter hegemonic as well. The explanation here as elsewhere is that the global and local are two sides of the same coin.

This tentative story may help to explain that the so-

cial movement side of law and society is doing very well in Brazil compared to the U.S. It also helps explain within law why it is relatively hard to find a place in Brazil for detailed empirical research. The approach of jurists even if retooled does not leave much time to produce or much opportunity for reward from empirical research.

What is interesting is that it appears the retooling of jurists in Brazil is very different from U.S. side of corporate lawyers and academic allies that in large part embraced the conservative movement, neo-liberal economics, law and economics, and empirical research strictly related to economics -- experimental studies and behavioral economics in particular. And others do try to keep the progressive side of the legal establishment in the fight, but without the success we see in Brazil.

The story in Brazil is still more complex. But there also is -- partly within new law schools like FGV and perhaps more generally -- a competing and perhaps complementary approach that is not neo-liberal but embraces international -- including international standards, international credibility, and seeking to build an empirical research infrastructure, which arguably requires full-time faculty so pushes against the traditional jurist. The challenge here is to operate within global markets as compared to strictly local scholarly markets, including neo-liberal issues, in the sense that those are the transnational rules and hierarchies, but they are also seeking to be counter hegemonic in two ways. One is seeking to get space in the global market by playing by and modifying rules -- international standards, even legal theory, WTO law, corporate law perhaps -- to take Brazilian perspectives and interests -- and the south more generally -- into account. It is also potentially counter hegemonic in the sense of challenging the hierarchy of jurists perhaps -- maybe at some point raising the stakes for what a law professor must be to succeed.

To conclude, we can compare the rise of socio-legal studies and its orientation in the two places, which I have tried to do in parts one and two; and/or we can try to relate these developments to challenges and responses to a structure of power where the role of

law is linked to a hierarchy in which in the U.S. elite corporate law is on top and in Brazil where elite jurists are on top -- and each of the elites is embedded in the structure of legal education, economic, state, and even familial power.

students.



Adaptive and entrepreneurial responses to globalization as a largely neoliberal project have ultimately modified and likely strengthened the role of legal establishments in both places. But also, to oversimplify, combinations of global and local have served to privilege progressive law and society in Brazil but not so much empirical research, while in the United States privileging the empirical side but not so much progressive law and society.

6 Epilogue

I could not resist closing with a few suggested avenues for Brazilian empirical research in addition to the ones implicit in my own tentative efforts. They reflect my own interests but I mention them for what they are worth.

- 7. Legal education can be examined as a potential battleground that stretches at least back to law and development in the 1970s. The challenges to the traditional law schools and responses to that challenge are worth studying.
- 8. How is the empirical legal studies movement and its allies developing a body of work -- how courts operate, access to justice, etc.? And what are the institutional ways to encourage it given that it is certainly not mainstream in law in Brazil. What is the infrastructure for activities including think tanks and alliances with economists and others?
- 9. What is happening not just at the top of the legal profession but below -- the questions that link to the After the J.D. study of the careers of a sample of all U.S. lawyers -- a project that I have worked with for more than 15 years? Issues include: satisfaction versus race and social class, law school, corporate jobs. In the U.S. the project reminds us both of elite reproduction and legitimacy and a slow opening up that provides both legitimacy and change. I wonder how this would apply to Brazil with 1200 law schools and some 736,000

7 References

- Dezalay, Y. and Garth, B. G. (2002). *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. University of Chicago Press.
- Shamir, R. (1995). *Managing Legal Uncertainty: Elite Lawyers in the New Deal*. Duke University Press.
- Garth, B. G. & Sterling, J. (1998). From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State. *Law and Society Review*, 32, 409-472.
- Galanter, M. (1975). Why the 'Haves' Come Out Ahead: Speculations on the Limits of Law and Social Change. *Law and Society Review*, 9, 95-160.
- Carlin, J., Howard, J & Messinger, S. (1967). *Civil Justice and the Poor*. Russell Sage.
- Lopes, J. R. de L. & Freitas Filho, R. (2014). Law and Society in Brazil at the Crossroads: A Review. *Annual Review of Law and Social Science*, 10, 91-103.
- Cunha, A. dos S (2015). *Empirical Legal Research in Brazil*. Presented at Law and Society Annual Meeting, Seattle, May 2015.
- Dezalay, Y. & Garth, B. G. (2010). *Asian Legal Revivals: Lawyers in the Shadow of Empire*. University of Chicago Press.
- Garth, B. G. (forthcoming). *The Florence Access-to-Justice Project in Law and in Context: Mauro Cappelletti as Importer, Exporter, and Academic Entrepreneur*.
- Nicola, F. G. (forthcoming). The Global Diffusion of U.S. Legal Thought: Waning Influence, National Security and Legal Education in Crisis. In D. Bonilla (Ed.), *Constitutionalism in the Americas*, New York: Cambridge University Press.
- Gardner, J. (1980). *Legal Imperialism*, University of Wisconsin Press.
- Dezalay, Y. & Garth, B. G. (2002). *The Internationalization of Palace Wars*, University of Chicago Press.
- Engelmann, F. (2007). Diversification de l'espace juridique et invention de la "critique du droit" au Brésil dans les années 1990. *Ed. jurídicas associées*, 65(1), 153-169.
- Engelmann, F. (2011). O espaço jurídico brasileiro e as condições de uso do capital internacional.
- Lehfeld, L. de S. & Carvalho, N. C. B. de (2010). Ativismo Judicial na Execução da Sentença Coletiva. *Diritto brasiliano*.
- Almeida, F. de (2011). Inherited Capital and Acquired Capital: The Socio-Political Dynamics of Producing Legal Elites. *Brazilian Political Science Review*.
- Couso, J. (2013). The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America. In J. Couso and A. Hunees (Eds.), *Cultures of Legality: Judicialization of Political Activism in Latin America*. New York: Cambridge University Press.
- Gargarella, R. (2015). Too Much "Old" in the "New" Latin American Constitutionalism, <http://www.law.yale.edu/intellecualife/SELA.htm>

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