

GLOBALIZATION OF LAW

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■ **Abstract** Globalization of law may be defined as the worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact. We propose that a theory of the global penetration of law will require at least four elements—actors, mechanisms, power, and structures and arenas. A comparison of four approaches to globalization and law—world polity, world systems, postcolonial globalism, and law and economic development—indicates considerable variation in perceived outcomes and gaps in explanation, but with possible complementarities in both outcomes and explanatory factors. Research demonstrates that globalization is variably contested in several domains of research on law: (a) the construction and regulation of global markets, (b) crimes against humanity and genocide, (c) the diffusion of political liberalism and constitutionalism, and (d) the institutionalization of women's rights. We propose that the farther globalizing legal norms and practices are located from core local cultural institutions and beliefs, the less likely global norms will provoke explicit contestation and confrontation. Future research will be productively directed to where and how global law originates, how and when global norms and law are transmitted and enforced, and how global-local settlements are negotiated.

INTRODUCTION

Although often invisible and taken for granted, law is heavily implicated in the process of globalization. Economic globalization cannot be understood apart from global business regulation and the legal construction of the markets on which it increasingly depends. Cultural globalization cannot be explained without attention to intellectual property rights institutionalized in law and global governance regimes. The globalization of protections for vulnerable populations cannot be comprehended without tracing the impact of international criminal and humanitarian law or international tribunals. Global contestation over the institutions of democracy and state building cannot be meaningful unless considered in relation to constitutionalism.

Despite the ubiquity of law in the empirical reality of globalization, law has had an equivocal status in the sociology of globalization, just as globalization has

not received the attention it warrants in the sociology of law. On the globalization side, most scholarly literatures avoid law, with the notable exception of world polity theory. On the law side, scattered pockets of research can be found in interdisciplinary socio-legal studies, but most sociology of law remains bounded by the nation-state. This essay seeks to bring these respective domains into mutually productive engagement.

Several master narratives of globalization directly or indirectly entail law (Boyle & Meyer 2002, Ramirez et al. 1997, Salacuse 2000, Santos 2000, Wallerstein 2002). Yet these narratives are difficult to appraise empirically because the scope of the problem defies easy encapsulation in a manageable research design. Master themes of globalization are voiced by a variety of actors in quite different forums and rarely engage each other. Not only is there no integrated theory that would enable each narrative to refine another, but vague and imprecise core concepts make comparisons across arenas difficult. Researchers gain access more readily to the “globalized” than to the “globalizers.” Global indicators (e.g., financial information, enactments of laws) usually cannot reveal dynamics and processes that are integral to sociological explanation. Indeed, they may be positively distorting, for they can suggest convergence when appearances of law on the books belie the reality of law in action.

Given these challenges, this review presents a conceptual framework for engaging disparate literatures with each other, examines conflicts and complementarities among four sociological and interdisciplinary approaches to globalization and law, and demonstrates how empirical research reveals law to be in play in several global domains. Our analysis of the research and theory in this field leads to the general hypothesis that the farther globalizing legal norms and practices are located from core local institutions and beliefs, the less likely that those norms and practices will provoke explicit contestation and confrontation. Obversely, the closer the globalizing legal norms and institutions are to transformations in core local values and practices, the more likely that contestation will occur around those norms.

GLOBALIZATION AND LAW: DEFINITIONS AND USAGES

Globalization

A plethora of competing and confusing meanings surround the concept of globalization (Freidman 2000, p. 9; Giddens 1990; Held et al. 1999; Mittelman 2000, p. 6; Robertson 1992, p. 8; Waters 1995, p. 3). For our purposes, we distinguish between two elements of globalization in whatever sphere it occurs (Fiss & Hirsch 2005). Structural changes occur (a) through increases in the flows of people, money, ideas, and material objects; (b) through responsive adaptations and adjustments of local institutions; and (c) through alterations in governance structures of global institutions and through some measure of exogenization of control by nation-states or substate governmental actors. Discursive changes occur through alterations in the meaning attached to structural changes. These involve epistemic realignments of

initially contextualized definitions, interpretations, diagnoses, frames, archaeologies, genealogies, and extrapolations in accord with the universality inherent in the globalization discourse.

An arena may be said to be globalized when there is a coincidence of structural and discursive elements. Variation in the advance of globalization occurs in both structural and discursive elements, which may be arrayed along dimensions of extensity (i.e., breadth of inclusion of nation-states, policy domains within states), intensity (i.e., how deeply a global influence penetrates inside states, societies, and consciousnesses), velocity (i.e., how rapid the flow of a globalizing content), and impact (i.e., the degree of change effected directly or indirectly by a global encounter) (Held et al. 1999). Thus, a highly globalized domain includes structural changes that are fast moving and extensive and that penetrate intensively into a society with strong impact. A highly globalized domain is dominated by discourses that are universalized and that obtain consensus deep within adopter societies.

Law

For analysis of globalization, we define law as a combination of formalized norms and organizations (Table 1). Formalized norms within a nation-state take the forms of substantive and procedural statutes, court cases, and regulations that are binding on citizens. Global norms vary from conventions (multilateral treaties), model laws, legislative guides, and international standards to rulings from international tribunals and a vast array of regulatory standards promulgated by global organizations (Abbott & Snidal 2000, Braithwaite & Drahos 2000). Some transnational norms are themselves binding, but most are not and only obtain legal force when implemented by states. Nonbinding norms, however, often carry powerful normative and persuasive value.

Organizations of law within states include government bodies, such as courts and tribunals, regulatory agencies, and enforcement apparatuses, as well as private market entities such as the legal profession and nongovernmental methods of dispute resolution that operate in the shadow of the law. At the global level, there is a vast array of norm-formulating organizations, ranging from the United Nations, international financial institutions (IFIs), and private professions to regulatory bodies, as well as courts, tribunals, and public and private dispute resolution mechanisms such as arbitration proceedings. Many of these organizations and professions are integrated into networks that act as sites for cooperation, sources of expertise, conduits of information, and mechanisms of promulgation. Global organizations generally do not have enforcement arms (although compare UN forces) and must rely on regional forces (e.g., NATO, African Union) but mostly on the cooperation of nation-states and private organizations.

ELEMENTS FOR A THEORY OF GLOBALIZATION AND LAW

We propose that a comprehensive theory of globalization and law in any of the four domains we have identified will explain outcomes in terms of agents, the

TABLE 1 Instances of formalized norms and organizations in global and national settings

	Formalized Norms	Organizations
National	Statutes Cases Regulations	Courts Out-of-court forums Regulatory agencies Law firms
Transnational	Conventions (e.g., International Labor Organization [ILO] Convention of Equal Pay for Men and Women, IMO Convention for the Regulation of Whaling, UNCITRAL Convention on the International Sale of Goods, Hague Conference Convention on Protection of Children) Model Laws (UNCITRAL) Legislative Guide on Insolvency (UNCITRAL) Principles and standards (e.g., ILO standards on occupational health and safety, ISO 14000, Best Available Technology) UN Resolutions	Courts (e.g., International Court of Justice; International Criminal Court, International Court on Former Yugoslavia, European Court of Human Rights) Tribunals (e.g., WTO Dispute Settlement Body) Arbitration panels (e.g., International Chamber of Commerce arbitration) Regulatory bodies (e.g., International Civil Aviation Organization, World Health Organization, Technology & Economic Assessment Panel of the Montreal Protocol)

mechanisms they employ, the power they exercise, and the structures and arenas through which power is arrayed.

1. Outcomes—A theory of the globalization of law will explain (a) variation in the extensity, intensity, velocity, and impact of structural changes in flow, institutional adaptations, and exogenization of state control; and (b) variation in the universality, strength, speed, and impact of discursive changes in normative or legal scripts and evaluations. It will explain why some potential phenomena or media are highly globalized by these criteria, whereas others are not.
2. Agents—A theory of legal globalization will identify the agents that create, propagate, and receive global norms and organizations. That is, it will explicate where global norms and templates originate and how they are conveyed to sites across the world where they are differentially integrated into local institutions and practices. It is usually assumed that the agents that create global norms are themselves global or transnational institutions. This is manifestly true for IFIs [e.g., International Monetary Fund (IMF), World Bank, regional banks], international governance organizations (e.g., United Nations and its various agencies for health, labor, environment, trade law, etc.), international regulatory bodies (e.g., International Air Transport

Association), and international associations of professionals (e.g., lawyers, accountants, restructuring professionals). But global standards may also be developed by nation-states, corporations, national organizations, or even individuals who then enroll national and transnational institutions to globalize localisms (Braithwaite & Drahos 2000, Santos 2002). Agents that originate global norms sometimes have the capacity to transmit them directly through the United Nations's peacekeeping forces or IMF conditionalities (Babb 2003, 2005). More often, norms propagated by global actors are conveyed through epistemic and advocacy networks, by corporations, and by the media. Local agents act as gatekeepers to admit, sponsor, adapt, or resist exogenous legal norms (Carruthers & Halliday 2006). Whether the agents are global or local, the question of agency compels us always to ask whose norms are being globalized and thus to recognize that any global norm may be some party's globalized localism (Jenson & Santos 2000b).

3. Mechanisms—In their wide-ranging empirical study of global business regulation, Braithwaite & Drahos (2000) identify mechanisms that apply more broadly: (a) military coercion (e.g., colonialism, the U.S. intervention in Iraq), (b) economic coercion (e.g., by IFIs), (c) modeling (e.g., when nation-states conform their laws on the model laws of the UN Commission on International Trade Law), (d) reciprocal adjustment, (e) nonreciprocal coordination, (f) systems of reward, and (g) capacity building. To these should be added (h) suasion (i.e., efforts by global institutions or powerful nations to persuade other nations of the rightness of reforms that converge on global norms) (cf. Boyle 2002; DiMaggio & Powell 1983, 1991).
4. Power—Crossing all these, a theory of globalization of law will offer an account of the asymmetries of power that can be observed in global-local encounters. A selective affinity exists among certain actors (e.g., IFIs), types of power (e.g., capital), and mechanisms (e.g., economic coercion). Actors' power potential depends on the volume of resources they have at their disposal and, consequently, on their ability to compel other actors to act in a desirable way. Whereas using political, economic, and military mechanisms involves a heavy expenditure of resources, mobilizing ideological influence, once established in a hegemonic form, does not involve massive expenditure of resources and is therefore most efficient (Silbey 1997). Having the capacity to enlist or enroll many power incumbents enables an actor to represent its actions as universal (Darian-Smith 2004). Once the claim of universality is successfully accepted, the asymmetric system of power relations becomes effectively enforceable and easily reproducible. Arguably, the most efficacious power, therefore, in the global arena is definitional power—the power to classify, interpret, and label.
5. Structures and arenas—Identifying the outcomes of the globalizing processes (transnational flows, institutional adaptation, and exogenization of control) as well as major actors, mechanisms, and forms of power allows us to outline contours of emergent structuration within the global society.

Structuration occurs when global actors regularly exercise their power through conventional structures in established arenas of normmaking and lawmaking. On the one hand, actors are organized into structures through epistemic communities (e.g., engineers and scientists who collaborate on reducing noxious emissions) (e.g., Canan & Reichman 2001); advocacy networks (Keck & Sikkink 1998); international civil service networks and career paths (e.g., lawyer career paths across international organizations); aid dependency structures (e.g., cooperative coalitions of national aid agencies with international organizations); international relations among countries; and international networks of national legislators, judges, and civil servants (Slaughter 2004). On the other hand, transnational actors articulate and enforce global norms within and through global arenas that correspond roughly to the three branches of domestic government, such as transnational quasi-legislatures (e.g., UN forums) (Merry 2005), global regulatory bodies (e.g., bodies that regulate pharmaceuticals, air transport, banking, the environment) (Braithwaite & Drahos 2000), and global dispute resolution bodies (Shaffer 2003).

Given that an ideological claim of universality is essential for the reproduction of power configurations within a global system, we hypothesize that actors making claims of universal representation [e.g., international and national nongovernmental organizations (INGOs, NGOs)], appealing to universal transcendental values (e.g., human rights), and employing noncoercive mechanisms (modeling, reciprocal and nonreciprocal adjustments, capacity building, systems of reward, and suasion) will be in the vanguard of the globalizing forces. They are engaged in transnational practices (e.g., economic and financial assistance, disaster relief, advocacy, and educational projects in the Third World) that prepare the groundwork for deployment of other mechanisms of integration.

SOCIOLOGICAL PERSPECTIVES ON GLOBALIZATION AND LAW

We review briefly how four fields of inquiry treat these theoretical elements. Two are integral to sociology and two are interdisciplinary, with strong resonances for sociology.

World Polity

World polity theory, arguably the most prominent sociological theory of globalization, maintains that modern legal norms demonstrate a remarkable tendency toward global convergence. As world civilization evolves, diverse societies adopt increasingly uniform legal norms, standards, and institutional scripts. Meyer and his collaborators explain this process by the fact that modern social actors (individuals, organizations, and nation-states) are constructed by and instituted within

a higher cultural order, a world polity that serves as a primary repository of normative models and standardized institutional scripts. By providing these models and scripts, the world polity shapes national political and legal institutions. A universalistic culture of modernity, according to the world polity perspective, influences law in two fundamental ways. First, modern legal systems are rooted in the nominal sovereignty of the nation-state. This sovereignty principle itself is an integral part of the modern rationalistic culture. Second, universalistic and rational principles apply not only to the state, but also to institutions, organizations, social groups, and individuals (Boyle & Meyer 2002).

Although world polity analysts emphasize a self-enacting power of international norms, they also identify specific social actors who translate universalistic normative scripts into the language of lawmaking, enactment, and enforcement. Scholars point to the key role of international governmental organizations (IGOs) and international nongovernmental organizations (INGOs) in adopting universal norms (Boli & Thomas 1999, Boyle & Preves 2000). This process of an exogenously driven adoption involves the complex interaction of international organizations and local institutions and is successful so far as international organizations successfully enlist assistance of reform-oriented local agencies.

Recurrent interactions of international and national, governmental and non-governmental organizations are institutionalized in transnational advocacy networks that are organized to promote causes, principled ideas, and norms across nations (Keck & Sikkink 1998).

In their efforts to persuade nation-states to comply with normative standards, IGOs tend to rely predominantly on assimilative strategies of cooptation and cooperation, whereas NGOs and INGOs use subtly coercive strategies such as attempts to undermine the legitimacy of the nation-states by showing that inactive national governments are not truly representative of their citizens (Boyle 2002).

An extensive body of empirically grounded research of world polity theorists shows how world culture challenges legal and normative systems within nation-states and, in some cases, generates major changes in national legislation. The studies of global dispersion of normative patterns encompass such diverse fields as nation-states (Drori et al. 2003, Strang 1990, Thomas et al. 1987), international policing (Deflem 2003), human rights (Boli 1987, 1998; Boyle & Thompson 2001), citizenship (Berkovitch 1999, Ramirez et al. 1997, Soysal 1994), environmental policies (Frank et al. 2000, Meyer et al. 1997), and women's rights (Boyle 2002, Boyle & Preves 2000).

World System Analysis

Scholars who identify themselves with a world system perspective have generally minimized issues of normative and legal aspects of global development despite the ubiquity of law in the structuring of the world economy. World system analysts argue that actors operating within the world system (international organizations, nation-states, corporations, social and political movements) are not substantially

bound by normative regulations. Markets and economic transactions, not normative models and standardized scripts, mediate transnational relations. For world system analysts, global law as a normative regulator is too weakly institutionalized to be a major factor in transnational processes (Boswell & Chase-Dunn 2000, Chase-Dunn 1989, Wallerstein 2002).

According to world system analysis, economic and financial power, which is essential for structuring the global economy, is concentrated in a major hegemonic state. World history is a sequence of the long-term cycles of rise and decline of hegemonic empires—Dutch, British, and American—within the world economy (Arrighi 1994; Arrighi & Silver 2003; Chase-Dunn & Hall 1997; Wallerstein 1984, 1991). The current phase of the U.S. hegemony is analogous to the Belle Époque of nineteenth century British domination (Brenner 2002). Like the British hegemony a century before, the contemporary U.S. orchestration of the global economy is leading us toward another period of global turbulence (Arrighi 2005, Arrighi & Silver 2001) that no actor, including the United States, will be able to control or regulate (Wallerstein 2003, 2005). An alternative view of global hegemony argues that the actual locus of hegemony is transnational rather than national (Burbach & Robinson 1999; Robinson 1998, 2001, 2005; Robinson & Harris 2000). Operating through international institutions (the IFIs, transnational corporations, and transnational elite forums), the transnational capitalist class takes over the functions previously appropriated by the hegemonic state. Global law is assigned only a minor role, if any, in either conception of hegemony.

The weak institutionalization of global law, the point that all world system analysts seem to share, results from the reluctance of major global actors (nation-states, corporations) to bind themselves with legal norms. The limited expansion of international economic regulation after World War II was driven by two groups of actors interested in law-like constraining arrangements. The first impulse came from the side of the powerful states and powerful economic agents, who wished to constrain weaker states and reinforce the existing division of labor. Another impulse came from antisystemic social movements that recognized that confining their struggle to the national level rendered them powerless in dealing with the suprastate actors who could circumvent national law. Hence, the antisystemic social movements attempted to create and enforce legal norms by constraining the powerful actors. The two bodies of the global law thus evolved in the opposite direction (Wallerstein 2002).

Despite these incremental changes toward normative regulation, strong states are still ambivalent about creating effective legal structures because of their concern that they will be applied to themselves as states or to large corporations within their territories. Weak states are hostile to such an extension of legal constraints for fear that in the absence of a democratic world government they have no guarantee that such norms would be used equitably. Wallerstein (2002) claims, therefore, that creation and enforcement of legal structures constitute prime political arenas of conflict in the world system. The key problem with global law thus resides in the

conflicting strategies of the major actors involved; the legal system merely reflects the struggles that are underway in the global economic and political fields.

Postcolonial Globalism

An interdisciplinary scholarship, strongly influenced by anthropologists of law, juxtaposes globalization with colonialism and seeks to discern continuities and singularities between the two. The old distinction between civilized Western law and savage counterparts is now reprised through a contrast of a free, civilized world with a barbaric, uncivilized world (Darian-Smith 2004). A colonizing state that relied on law as a mechanism of colonial control has been replaced by a disguised global hegemony under dominant narratives of the rule of law and the judicialization of power (Jensen & Santos 2000b).

At the center—the colonizing states—law presents itself as autonomous, reified, universal, objectified, impersonal, and, moreover, superior and transferable. Its universality rests on a claim to modernity and rationality as it presses forward the agenda of the Enlightenment, now refracted through theories that champion private property rights, the subordination of law to markets, and contraction of the political sphere (Silbey & Ewick 2003). Western law is not only available for export, but trade, growth, freedom, and efficiency demand its export. At the center and at the periphery, courts have thrust upon the colonizers increasing powers to regulate markets, to depoliticize fundamental political cleavages (e.g., between capital and labor), to hold the state accountable to constitutions, to promulgate rights, and to pull issues and legislative action out of the political sphere and into the legal sphere. This creeping judicialization of politics leads to a change in the structure of state power such that the executive and legislature are weakened at the expense of the judiciary (Santos 2002). Law defines the minimal rules of the economic and political game.

The successors to the colonial state are now transnational governments (e.g., the European Union), hegemonic nation-states and their aid agencies (United States, U.S. Agency for International Development, United Kingdom under Thatcher), IFIs (e.g., IMF, World Bank, Inter-American Development Bank), courts (e.g., European Court of Justice, World Court), private foundations (e.g., Ford Foundation), and the United Nations (e.g., UN CEDAW). Yet with some important exceptions (Merry 2005), postcolonial scholars seldom extend their research to these sites.

In contrast to world polity theory, the postcolonial disposition and weight of research is toward local subjects who struggle to make meaning of global forces and defend the singularities of particular contexts in the periphery. Here are found legal subjects, who are situated, often simultaneously, in multiple contexts, substate groups, incipient disputants (e.g., capital and labor), disadvantaged groups (e.g., women, lower castes), and local elites, all of whom have their relations redefined by and in response to global actors. Local agents compel their global counterparts to negotiate; they contest wholesale imports of alien forms; they demand

accommodation and ultimately force modifications and adaptations that lead to a hybridization of law (Merry 2004, 2005). When this cannot be done with law on the books, local actors can defend themselves by resisting implementation of law, thereby substantially redressing the imbalance of power with global actors. Yet local agents are often proactive by aligning themselves with global actors to engender national reforms.

Postcolonial globalism proceeds from a premise of fundamental asymmetry of power in the world system. Although globalism's contemporary foundation is ultimately financial, its manifestation is symbolic and cultural. Here, power is "the authority to legitimate certain visions of the social order, to determine relations between persons and groups, and to manipulate cultural understandings and discourses" (Darian-Smith 2004, p. 548). Control over territory is replaced by "colonization of the consciousness" (Silbey 1997, p. 219). Legal technologies enable deepening inequality of social exchanges and a greater concentration of wealth, a process that ultimately undermines justice because market activity disguises the exercise of power (Silbey 1997).

Thus, power is redistributed globally and locally. Global redistribution occurs because dominance of a global cultural frame or discourse or legal technology or model of institution building in fact represents the global triumph of a particular actor's localism that vests advantage in that actor. A given localism, such as the U.S. or Anglo-American concept of the rule of law, extends its reach across the globe and marginalizes rival conceptions as outmoded localisms. Local redistribution of power occurs because a neoliberal hegemony of legalism requires a restructuring of local states in favor of judiciaries over legislatures, a shift in the local mode of articulating interests, and a weakening of the state in reference to the market. Yet pockets of resistance, mechanisms for foiling global powers, and innovations that arise from the periphery show that power in a globalizing world is always subject to negotiation (Carruthers & Halliday 2006, Halliday & Carruthers 2006a, Santos & Rodríguez-Garavito 2005, Silbey & Ewick 2003). Sociolegal scholars are called to the excavation of power, however naturalized it is upon the surface.

Law and Economic Development

In the first wave of law and development, which occurred in the 1960s and 1970s, Third World countries were pressed by leading capitalist countries along paths to modernization that followed a course of state-led development enabled by reliance on the public sector and public law. Powerful executives and one-party legislatures eclipsed the influence of courts. Enlightened state planners employed law instrumentally as a lever of change (Salacuse 2000). With the fall of Central and Eastern European command economies, the collapse of the communist economic model, and the ascendancy of the Washington consensus, with its philosophical commitment to neoliberal solutions to underdevelopment, a second wave of law and development has proceeded substantially (and usually unconsciously) upon the logic of Weber's theory of economic rationality and capitalist development (Carruthers

& Halliday 2005). Private actors through markets, via privatization and deregulation, supersede states as the drivers of economic growth. They rely on private commercial law, property rights, courts, and lawyers to provide the infrastructure or rules of the game by which market actors play. A powerful global movement has been creating an international financial architecture and global norms, model laws, regulatory frameworks, and institutions of dispute resolution to facilitate economic development within countries and across the world (Stiglitz 2002).

Economic development is intended to produce outcomes of an effective transition from command to capitalist economies, economic growth, the ability to weather financial crises, the alleviation of poverty, and sometimes the mitigation of extreme inequality. Strong advocates of law for development posit a causal logic that runs from good law to increased investment and subsequent economic growth in developing or transitional countries. "Good" law guarantees the Weberian minima of rationality, predictability, and certainty for arms-length market transactions, together with expectations that disputes will be handled competently and fairly by neutral adjudicators in courts with binding jurisdictions. Protection of property rights in particular features strongly in writings by law and finance scholars who offer evidence that both foreign direct investment and portfolio investment increase with better protection of property rights (Berkowitz et al. 2003, La Porta et al. 1997, Pistor 2000).

More equivocal views about law and economic growth proceed along two lines. On the one hand, there are those who are skeptical that law is necessary for economic growth. They point to counter instances, such as the dramatic growth of the Asian Tigers (Taiwan, South Korea, Indonesia, Malaysia, Thailand) and China that occurred in the manifest absence of widely used commercial law, and to alternative ways of organizing markets through informal ties, relational capitalism, and the like (Ginsburg 2000, Ohnesorge 2003). On the other hand, there are those who consider law to be clearly implicated in some economic development, but following and expressing economic policy rather than driving it (Pistor & Wellons 1998).

The global actors driving development have remained relatively constant over both waves of law and development, although their philosophies, products, and programs may have changed. Major financial powers (e.g., United States, Germany, France, Japan, United Kingdom) and their coordinating organizations (G-7, G-22) stand behind IFIs (e.g., World Bank, IMF, Asian Development Bank, Inter-American Development Bank) and private financial institutions and alongside leading foundations (e.g., Ford Foundation) to channel capital and law into developing countries. They sometimes compete among each other over development strategies and leadership. A handful of metropolitan countries exert their influence as heads of legal families that supply law, especially to former colonies (e.g., German civil law, French civil law, English common law, U.S. law).

States mediate the flow between international and national markets. In some accounts, these states are mere ciphers that either serve as conduits for foreign capital or are by-passed with direct investments in local markets. In other accounts,

states act as intervening structures that determine the degree of legal (versus administrative) regulation of markets and thereby limit global convergence (Ginsburg 2000). More generally, the flow of legal imports and exports depends on the local field of power and the role of law in that field (Dezalay & Garth 2002). Private actors—firms and enterprises as well as the legal professionals—are critical for an effective system of commercial law (Pistor et al. 2000).

An extensive literature debates the prospects of legal transplants under different conditions (Nelken & Feest 2001). Research indicates that transplants will be more effective when (a) they are chosen voluntarily after consideration of alternative solutions, (b) there is affinity between the legal systems of the exporting and importing countries, (c) there is demand from the recipient country, (d) legal intermediaries are in position that understand the law and can adapt it to local conditions, (e) institutional infrastructures are already in place, and (f) the population has some familiarity with the principles of the law. When these conditions are missing, there is a transplant effect that essentially rejects or sidelines a law (Berkowitz et al. 2003).

For the most part, power is veiled and invisible in theories of law and development. Power is implied in the asymmetries that result in certain countries being suppliers of law and capital and other countries being their recipients. The asymmetry of power is quite visible in the class of cases in which IFIs demand reforms as a condition of financial support. The locus of power clearly resides in the global center. But because legal transplants and market development are mediated by the politics that surround states at the global periphery, again globalization is contested and negotiated such that major developing countries, such as China, India, and Brazil, may obtain significant degrees of freedom from the global center, whereas small, vulnerable, and highly dependent states have little capacity to resist global powers, although the resistance of Malaysia and Argentina to the IMF since 1997 indicates that they may have more resources than has been previously recognized.

Despite the diverse provenances of these theories and the variation in their predicted outcomes, agents and mechanisms recur across theories, as Table 2 indicates, even if the modes of expressing power in different arenas are differentiated by domain. A contrast appears between those theories that emphasize ideology (world polity, postcolonial globalism) and those that emphasize economic, political, and military power (world system, law and economic development). By the same token, the Table indicates implicit critiques of one theory by another—the ordering power of law that is at the center of law and development theory contrasts with the relative absence of law in world systems theory. The contestation of global normmaking by local agents in colonial postglobalism accounts stands in tension with the powerful model of global agency in world polity theory. And yet the latter also demonstrates powerful homogenizing outcomes of law in many domains across the world over the long-term in the face of the efforts at local resistance and adaptation well attested by postcolonial globalists. Systematic comparison and contrast thereby signals to each theoretical cluster where implicit critique might lead to theoretical engagement and complementarity.

TABLE 2 Conceptual analysis of sociological perspectives on globalization and law

	Outcomes	Agency	Mechanisms	Power	Structures/arenas
World polity	Legal convergence and isomorphism Local adaptations of global standards	World culture IGOs, INGOs, and NGOs Nation-states Mass media Local actors	Modeling Nonreciprocal adjustment Capacity building Suasion	Ideological	International normmaking arenas (e.g., the UN) International advocacy networks and professional communities
World system	Weak institutionalization of global law	Nation-states Corporations Anti-systemic movements	Economic, political, and military coercion	Economic, political, and military	Economic and political relations among global actors
Law and economic development	Convergence of commercial legal rules Law-enabled facilitation of economic growth	IFIs Aid agencies Nation-states International organizations Professions Civil society groups	Modeling Nonreciprocal adjustment Systems of reward Capacity building Suasion Economic coercion	Economic and ideological	Legal regulation of economic relations among global actors International networks of economic and legal professionals
Postcolonial studies	Hybridization of law	Nation-states Local elites Local social movements and disadvantaged groups	Economic coercion Modeling Nonreciprocal adjustment Systems of reward Suasion	Ideological, economic, and political	International normmaking arenas Legal and advocacy networks Aid and dependency structures

SITES OF GLOBAL CONTESTATION

Contests over the norms and practices of globalization occur within and between centers and peripheries at different levels of intensity. We comment on four sites of primary research that are treated in descending order of global penetration: (a) the construction and regulation of global markets; (b) crimes against humanity and genocide; (c) the diffusion of political liberalism and constitutionalism; and (d) the institutionalization of women's rights, most particularly in violence against women. We observe contests between the global centers and peripheries, conflicts within the global centers and peripheries, and struggles between alliances of one global/periphery faction and another global/periphery faction.

Legal Construction of Global Markets

Globalization has advanced furthest in the economic domain. Law underwrites economic globalization in all three of its institutional manifestations: in statutory forms by efforts to harmonize laws that will facilitate global trade, in regulatory forms by a vast enterprise of constructing transnational regulatory regimes to constrain global business, and in judicial or dispute resolution forms by the proliferation of forums to resolve disputes that occur in global trading regimes. The legal arena reflects and expresses the conflict in competition among nation-states and market actors for economic advantage.

A global movement, energized by the G-8, is quickening its momentum to harmonize laws to facilitate trade, investment, and economic growth among all nations (G-22 1998). UNCITRAL (United Nations Commission on International Trade Law), the most influential international organization to promulgate model commercial laws, brings together nation-states and expert organizations to thrash out agreements that will carry the stamp of universal consensus. For example, at the outset of its successful completion in 2004 of a Legislative Guide on Corporate Insolvency Law, UNCITRAL confronted sharp differences of interests among professions, legal traditions, financial interests, and rich and poor countries. After four years of deliberations, UNCITRAL resolved these differences in a guide that reflected trade-offs, mutual accommodations, flexible alternatives, a raising and lowering of the specificity of principles versus rules, and the adoption of a product that is advisory rather than binding. Significantly, the IFIs who contributed to this process did so in part to overcome the significant resistance in developing countries (Block-Lieb & Halliday 2006). For example, the nation-states of Indonesia, Korea, and China showed great ingenuity in foiling the financial hegemony through outright refusal, decisions not to accept contingent aid, symbolic compliance, delaying and stalling, failure to implement, institutional incapacity, and building in backdoor escape hatches (Halliday & Carruthers 2006a).

As a result, national lawmaking in the context of global normmaking frequently displays the recursivity of law (Halliday & Carruthers 2006b). Global iterations of normmaking set contexts for national cycles of lawmaking, each in some respects

influencing the other. Episodes of lawmaking may begin with a crisis or precipitating event, such as the Asian financial crisis in 1997, and they continue until a settlement occurs. Cycles of national lawmaking are driven by (a) the indeterminacy of law on the books; (b) diagnostic struggles to determine which actors will get to define the situation that is to be reformed; (c) contradictions built into the formal law that were necessary to satisfy conflicting constituencies; and (d) actor mismatch, as actors involved in practice are excluded from policymaking.

Braithwaite & Drahos's (2000) magisterial work on global regulation of 13 domains of business shows that an integrated transnational and national regulatory order emerges from contests among actors and contests among principles. In the case of environmental regulation, for instance, a fundamental clash occurs between the principle of sustainable development (protecting ecology and natural resources, eco-sufficiency, polluters-pay, etc.) and the principle of economic growth. On the side of sustainable development are progressive states (e.g., Sweden, Norway, Denmark, and Netherlands), green INGOs (most notably Greenpeace and the World Wildlife Fund); mass publics in reaction to disasters such as the *Torrey Canyon* oil spill in the United Kingdom and France; networks such as the Pesticides Action Network, which mobilized effectively following the 1984 Bhopal disaster; and international organizations, including the UN Food and Agriculture Organization on agriculture and the International Maritime Organization on pollution from ships. The United Nations has a Commission on Sustainable Development that is charged with developing treaties after the Rio summit in 1992, and the OECD performs a monitoring role by conducting reviews of member states' environmental programs. Even development banks sometimes champion sustainable development. Arrayed against these supporters of sustainable development in the past 20 years has been the United States; a potential veto coalition of the United States, Germany, and Japan; and most developing nations.

The role of business is complex, for business is not necessarily against environmental regulation. On the Kyoto Climate Change Convention in 1997, the hard line taken by the International Chamber of Commerce contrasted with the Business Council on Sustainable Development, which advocated a free market-based ratcheting up of environmental standards. The insurance industry has been allying with environmentalists in response to their fear that huge disasters could cripple them financially (Braithwaite & Drahos 2000). A dramatic example of business support for environmental regulation is the progressive absorption of business into the development and implementation of the Montreal Protocol in 1987 (Canan & Reichman 2001). The movement to ban CFCs (chlorofluorocarbons), which were widely used in a range of products from refrigeration to insulation and cleaning, was greeted initially with suspicion by many major corporations and countries (e.g., Japan, Russia). The epistemic communities of government officials, industry engineers, and scientists that formed around this issue led to the invention of environmentally friendly and cheaper alternatives for cleaning electronic equipment and ultimately to a global agreement that has subsequently been expanded several times to ban other substances. Although the earlier division between

advanced and developing countries appears resolved in the compliance panels and the United Nations, developing countries remain resistant to its potential to slow economic growth.

Adjudication of trade disputes is now well institutionalized in the Dispute Settlement Body of the World Trade Organization (WTO) (Shaffer 2003). The WTO has effectively created a body of law that is enforced through judicial judgments that in principle have the capacity to be enforced by sanctions against noncompliant nations. Nations fighting over trade barriers can bring other nations before the WTO tribunal for judgment. In practice, this frequently takes the form in the United States of private firms or industries lobbying the Office of the U.S. Trade Representative to bring a case on their behalf against countries whose barriers appear to breach the rules. Although an asymmetry of resources for research, economic analysis, and legal advice favors the rich countries, especially the United States and European Union, a series of recent rulings in favor of Brazil, Canada, and other smaller or developing countries indicate that some redress of economic imbalance may be found in this adjudicatory institution.

Crimes Against Humanity and Genocide

In the past decade, the world community has witnessed energetic efforts of legal and human rights activists to extend international sanctions to crimes against humanity and genocide in wartime that until recently fell predominantly under the jurisdiction of nation-states (Hajjar 2004a). The first episode of international cooperation in punishing such crimes goes back to the period immediately following World War II when a short-lived and fragile consensus among the victorious powers enabled the political and military leaders of Germany and Japan to be brought before the Nuremberg and Tokyo War Crimes Tribunals for their crimes against humanity. When the Cold War fractured that consensus, the prospect of a global enforcement of crimes against humanity in war disappeared. The power of international institutions to prevent or punish genocide during the Cold War years (e.g., Cambodia in the 1970s) was limited. After the collapse of communism, elements of a new consensus emerged, centered on the United Nations, that have sought to restrict the principle of sovereignty (i.e., leaders can do what they like with their citizens) by that of principles of international law.

Hagan (2003, 2005) shows that the establishment by the United Nations of an International Criminal Tribunal for the Former Yugoslavia (ICTY) enabled President Milosevic, his top political advisors and generals, and even ordinary soldiers to be indicted, convicted, and punished for the crimes that accompanied ethnic cleansing in Serbia, Bosnia, and Kosovo. In addition to the precedent-setting indictment of a sitting head of state, the ICTY prosecuted the Foca rape case in a manner that for the first time established rape as a “wartime form of enslavement,” and, by elevating it to the level of a crime against humanity, the ICTY endowed rape with a new gravity as a crime in war and a constituent part of genocide (Hagan 2003, p. 201). Yet the tribunal has not been successful in bringing to trial

in a timely way Mladic or Karadzic, the still-at-large former Bosnian Serb military and political leaders.

The ICTY's substantial successes of extending, establishing, and enforcing criminal norms in war grew out of major conflicts. A diplomatic "old guard" in the United States and Europe tussled with human rights advocates over a political, diplomatic, and cooperative approach to dealing with Milosevic; the former favored following norms of international law, whereas the latter favored the coercive modes of criminal law and enforcement. The Canadian chief prosecutor had to fight for support from leaders of NATO nations, the UN secretary general, and leaders in the White House and Pentagon to indict Milosevic. And, of course, Serbia resisted enforcement by the ICTY, refused to cooperate in investigations, blocked the handover of indicted suspects, and prevented the collection of potentially incriminating evidence. ICTY prosecutors were compelled to build alliances with INGOs, nation-states, and supranational bodies and to exploit the media to enforce the global norms they articulated (Hagan 2003). Similar evidence of fights to apply and enforce global norms can be witnessed in the reluctance of the international community to act against the Sudan government and the crimes against humanity perpetrated in Darfur (Hagan et al. 2005, Hagan 2006).

The struggle to globalize the norms of the ICTY and similar bodies in Rwanda and Sierre Leone can be seen in the deep rift between, on the one side, the United States and, on the other side, Europe and more than 60 other countries, over the establishment of a permanent International Criminal Court with global jurisdiction to institutionalize the rule of law through the enforcement of international humanitarian and criminal law. In contrast to its globalizing activities for the market and rule of law, the United States is working hard against global integration on war crimes. Not only has the United States steadfastly resisted ratification, but it is also pursuing values of ad hoc legalism and legal exceptionalism to undermine the legal liberalism that most of its allies advocate (Hagan 2003, pp. 204–7, 239–43).

Political Liberalism and Constitutionalism

With the eras of the Enlightenment and revolution in Europe and the United States in the seventeenth and eighteenth centuries, governmental forms emerged that had, as a defining characteristic, the restraint of the monarch's power by law. Since World War II, an "old constitutionalism," resting on the separation of powers and a negative concept of judicial restraint, has been succeeded by a "new constitutionalism" that is considerably more expansive (Arjomand 2003). With the writing of the post-World War II constitutions of Germany, Italy, and Japan, a broad movement toward postcolonial constitution building occurred throughout Africa and Asia. This was succeeded by another wave of constitutional reconstruction after broad political changes in southern Europe following the fall of fascist governments in the 1970s, in Latin America following the collapse of military dictatorships beginning in the 1980s, in Eastern Europe following the dissolution of the Soviet Empire, and in South Africa in the wake of its apartheid regime (Scheppele 2003b).

The new constitutionalism builds on the rights revolution as it has progressed from the 1948 UN Universal Declaration on Human Rights and through the constitutionalism embodied in the expanding powers of the European Court of Justice, whose rulings echo far beyond continental Europe. An unexpected impetus comes from the World Bank and IMF, which have been pressuring and inducing developing nations to institute the rule of law through aid programs for training of judges, improving courts, and facilitating access to justice.

The tenets of this rise in world constitutionalism conventionally include the separation of powers, a strong and independent judiciary, a constitutional court that appeals to higher-order norms than statutes, the expansion of human rights that are protected or expanded by courts, a separation of religious and secular power, and some kind of majoritarian or popular democracy (Scheppele 2003a). But Arjomand (2003) contrasts a legal approach to constitutionalism, which focuses on the judicialization of politics, with a macrosociological approach, which incorporates a “politics of reconstruction” and a “moral definition of democratic political community” that aids modernization and a transition to democracy.

Liberal constitutionalism is not, however, uncontested. The new constitutionalism confronts ideological constitutions, which incorporate particularistic religious (for example, Iran) or even secular (Turkey) ideologies and survivals of authoritarian constitutions from the past in the Arab Middle East and Russia. Local political elites, “Big Man” regimes in Africa, authoritarian rulers, military dictators, and religious hierarchies rightly discern that political liberalism requires a radical distribution and limiting of arbitrary use of power in a society. Because of these requirements, the globalization of a political liberalism anchored in constitutions, law, lawyers, courts, and other legal institutions will continue to precipitate struggles with entrenched elites. Fights to establish and protect these legal elements of political liberalism invariably involve not only the most powerful political players in a society (the crown, nobles, political elites, state agencies) but also the capacity of lawyers to mobilize collectively, to ally with judges, to lead civil society, and to be prepared to confront executive authority in defense of basic legal freedoms. But lawyers are limited liberals and their willingness to mobilize collectively depends on sets of macrosociological factors not yet adequately discerned either comparatively or historically (Halliday & Karpik 1997).

Women’s Rights: Violence Against Women

One of the critical ideological conflicts in the global arena occurs between a Western rights’ ideology, which claims universality, and ideologies of the South, which defend their practices on grounds of tradition, identity, and religion. Protections of women starkly exemplify this confrontation.

Classic issues of the women’s movement, such as suffrage, equality, and discrimination, have mobilized activists for close to a century (Berkovitch 1999). Yet only in the past 20 years have women’s rights melded into the legal discourse of human rights, and only in the past 10 years has violence against women been

assimilated into the frame of human rights with its expression in international law (Keck & Sikkink 1998). Violence against women can be manifested as “rape and domestic battery in the US and Europe, female genital mutilation in Africa, female sexual slavery in Europe and Asia, dowry death in India, and torture and rape of political prisoners in Latin America” (Keck & Sikkink 1998, p. 171). The institutionalization of these manifestations of violence as universal problems that demand global solutions occurred in the 1990s through several vehicles. Mobilization by international organizations (e.g., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women), platforms of international conferences (e.g., UN Women’s Conference in Copenhagen in 1980, Declaration on the Elimination of Violence Against Women in 1993, UN Conference on Women in Beijing in 1995), global advocacy networks (e.g., International Network Against Violence Against Women), and the responses of international organizations and nation-states with legal or regulatory measures to induce compliance (e.g., the Organization of American States, which introduced tougher enforcement mechanisms against state-based abuses of women) are some examples, although persuasion and modeling remain the primary mechanisms to induce change. The legitimating universal authority of the United Nations and its organization infrastructures have been integral to these changes (Keck & Sikkink 1998, pp. 165–98; Hajjar 2004a).

The campaign against violence directed at women expresses itself perhaps most visibly through the actions of the UN Convention on Eliminating Discrimination Against Women (CEDAW). CEDAW’s lawmaking has produced a set of global norms in which it names problems, offers solutions, provides resources to activists, and employs mechanisms to aid compliance. CEDAW’s monitors expect regular reports from nations that have ratified the convention. The monitors scrutinize country reports, may solicit NGO parallel reports, often ask for more details, and indirectly or directly press countries to correct manifest deviations from the norms. To the extent that nations comply, they do so for a mix of reasons, including response to shaming or moral pressure, a desire to appear modern, or a pragmatic move in the hope of obtaining access to finance and trade. Yet nations also have a panoply of weapons they employ to evade compliance, ranging from refusing to file or delaying reports, promising changes that do not happen, or enacting formal changes that are not implemented in practice. CEDAW therefore serves as a site of global culture production, offering universal norms in the guise of modernity, and seeking to have them implemented through weak mechanisms for compliance (Merry 2003, 2005).

Global normmaking and national lawmaking on violence against women can manifest themselves as a cultural conflict: a contest between Western countries and international organizations in the global center (and its sympathizers among elites in the South), which emphasize the universality of human rights, and a culture of the periphery and margins, where values of family, village, community, ethnic culture, or religion contest the generality and specificity of Western values (Merry 2003). Indeed, laws protecting women’s rights in the family and laws

against domestic violence in particular may “constitute the quintessential challenge to the ‘universality’ of human rights” by emphasizing the values of social stability, male authority, and adherence to tradition or religious custom. Yet even in the Muslim world, the effects of Islam’s religious impact on the national penetration of global norms varies systematically by variations in state formations—whether religion is communalized (e.g., Israel, Nigeria, India), nationalized (e.g., Pakistan), or theocratized (e.g., Iran) (Hajjar 2004b).

Perhaps nowhere is cultural conflict more pronounced over women’s rights than in the global campaign against female genital cutting (FGC). This practice affects some 130 million mostly Islamic women in 25 countries. The global campaign against FGC springs from the mobilization of international actors to propagate a universal norm based on scientific, moral, and legal claims consistent with broader universal ideals. Boyle (2002) shows that contradictions arise in global standards between universal human rights standards and sovereignty. Conflicts also arise for national actors as nation-states adopt anti-FGC policies yet must also maneuver around local pressures, most of which oppose the anti-FGC laws. Boyle finds that the symbolic conformity of nations through the enactment of national statutes does not usually reach the level of implementation, illustrating the classic gap between law on the books and law in action (Boyle 2002, Boyle & Preves 2000).

THE CONTINGENCY OF GLOBALIZATION

The overview of global/local contestation and the uneven advance of globalization across these four arenas suggests a general hypothesis: The farther globalizing legal norms and practices are located from core local cultural institutions and beliefs, the less likely those norms and practices will provoke explicit contestation and confrontation, whether in the center, periphery, or in between. Obversely, the closer that globalizing legal norms and institutions are to transformations in core cultural values and practices at the local level—gender, ethnicity, religion, family, class, sovereignty—the greater the contestation is likely to be around those norms. For instance, we should expect considerably greater local resistance to norms about radical changes in gender relations and women’s rights than over the regulation of business relationships. It follows that different fields of law will be differently susceptible to globalization.

The state of the loosely integrated fields of globalization and law permits three concluding caveats. First, empirical researchers need to maintain a studied skepticism about excessive claims made of globalization and its impact. The criterion of impact must be law in action, not law on the books. Second, despite evidences of global convergence in particular domains of law, empirical research demonstrates the rampant contingency of globalization. The road to promulgation of universals clearly involves conflicts over principles by powerful actors who struggle among themselves for ascendancy in setting global standards and for advantage in global dispute-resolution forums. And the power of local actors cannot be minimized as

they variously adopt and adapt, resist and reject globalizing initiatives. Finally, we do well to heed a methodological caution of consistently posing the question of veiled power or hegemony, that is, asking whether any supposed universalism or globalism is in fact a reified globalized localism (Santos 2000, 2002). This question stimulates empirical research to dig beneath ideologies, however self-validating they may seem (Silbey 1997). Like the other caveats, this methodological caution also demands close empirical inquiry into the agents, mechanisms, and power structures that seek to institutionalize global legal norms and, not least, the local actors who contingently sponsor, adopt, adapt, or reject them. Legal change in global contexts is a recursive process, a series of dynamic engagements within and between global and local actors that stimulate cycles of reforms between global scripts (law on the books) and national practices (law in action) (Halliday & Carruthers 2006b). Whether the settling of a recursive episode of lawmaking results in convergence between global centers and peripheries remains substantially contingent, not least on the area of law and the degree it disturbs entrenched local culture and the political configurations that reproduce it.

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