HIERARCHIES AS LAW

My dissertation addresses the role of legal thought in social transformation and in reproduction of hierarchies in today’s globalized society. Why do the “haves” keep coming out ahead? Where do we start when thinking about law and social transformation, how do lawyers from the periphery address our concerns, and how do we articulate and address resistance to the reproduction of the concentration of power, wealth, authority, and prestige in the world?

I argue that analytical clarity and vision of social transformation are needed for social change. However, contemporary legal argument still too often relies on theories and on conceptual thinking. Alternatives are sought in contradiction and in conceptual oppositions. Alternatives are presented as anti-neoliberal, anti-capitalist, anti-efficiency, anti-free-movement, anti-autonomy, anti-economics, and anti-law. Alternatives are likewise sought in affirmations of perceived totalities, such as economic theories or stages of integration.

I critique the Third World legal scholarship for its lack of an adequate picture of subordination, for misrepresenting power and the center-periphery relationship. I critique the Third World legal scholarship for relying on neoliberalism and capitalism in its critiques, and I respond to the critics who argued that my proposals are neoliberal or further the interests of capitalism. Economic theories, neoliberalism, and capitalism are mere signifiers for the (hierarchical) reality that needs to be constantly constructed and reconstructed. Theories are not mirror images of reality. Theories are timeless abstractions, rationalizations that can never adequately describe reality except as a partial ex post facto rationalization.

The rhetoric of justice can also contribute to the reproduction of existing hierarchies. “Justice” should not be understood in terms of any theory, but as a constant change of the present unjust reality by our daily work. I argue that no theory of causation, social theory, or economic theory can properly describe injustice or reality. I further argue that democratic theory is unable to adequately address social change and that both constitutional theory and critical legal thought often misrepresent power relationships.

Reliance on false distinctions is too often a part of scholarly endeavor. Several scholars make the mistake of relying on Karl Polanyi’s distinction between politics and economics. Polanyi’s followers are looking for a separation of political freedom from the brutality of our daily lives and our own daily actions—in their understanding, a separation from economics. In other words, they are looking for a liberal ideal of political freedom outside power, coercion, and struggle. The focus on either “the economic” or on “the political” aspect of our society is a typical example of conceptualism of contemporary legal thought that distinguishes between
social/altruist/protectionist and autonomy/individualist/laissez-faire claims, considerations, doctrines, and theories. Rather than pursuing one or the other type of claim, the question should rather be whose social/protectionist and whose economic/autonomy claim are we are pursuing.

Furthermore, switching between domains of thought in view of social transformation is based on the artificiality of intellectual boundaries between economics, politics, and law. Law is often understood as the problem, and political capacity and contestation as the solution to social problems. David Kennedy’s project of expertise, for example, mistakenly perceives political incapacity as the central problem of global governance. I argue that the claim of political incapacity is analytically incorrect, does not adequately address structural subordination, and misrepresents governance. Global governance is what each of us does in any moment in time, and we already are politically capable.

The problem of today’s globalized society is not “economic interests,” nor is the central problem the lack of the political. Nor can critique be the goal of our work. Instead of a pursuit of “the political” or challenging “the economic,” we need to challenge the existing reality. Rather than resisting theories or constructing new theories of justice, we need to resist an unjust reality of subordination that must be constantly constructed and reconstructed in order to be properly addressed and challenged. In other words, what needs resistance is not one or the other economic or social theory or type of claim, but unjust—hierarchical—reality.

How do we construct and reconstruct reality, and what is the role of law in social transformation? In order to understand the self-perpetuation of hierarchies, we need an understanding of law that is not based on an emanation of the spirit or the will of the people. We need an understanding that is different from law as a system of primary and secondary rules or from law as integrity. Law should not be understood as a simple embodiment of background rules and enforcement institutions that condition the social struggle, or as a background to another phenomenon such as political economy. Our understanding of law should be different from our understanding of the interplay between individualist and altruist considerations. We need an account of law that accounts for our daily lives, power, and passage of time.

I argue that law and governance should be understood as a plethora of hierarchies, as a constant hierarchical struggle. Each of us is constituted and constitutes others (hierarchically) in any moment in time. There are three elements of the legal structure: hierarchies (constituted by injury and recognition), ideology, and tools. Injury and recognition are the lowest common denominator of the legal structure and of global governance. Left and right policies, human rights, legal rules, and principles are mere tools for the construction of reality.

Social change should be understood as a reversal of the existing global hierarchical structure. The hierarchical structure of society as a constant relationship of struggle—of domination and subordination between people—is set as the starting point of legal analysis. Those in a hierarchically privileged position have more privileges to injure those in a hierarchically
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unprivileged situation. The former constantly appropriate the work, labor, and experience of those in a structurally subordinate position, which contributes to the reproduction of hierarchies in the global society. Tools need to be constructed that reflect and resist the injuries we have not yet unearthed or those we simply disregard.

Portraying the hierarchical structure of society unravels three alternative ways of thinking about its construction: the mode of contemporary legal reasoning that balances social and autonomy considerations through a dualism of left and right politics; a constitutional analysis focused on the construction or legitimacy of the existing order or on interactions between legal orders; and the economic theory of integration that demands stages of legal and economic regimes. Those three approaches fail in their conceptual emphasis on hierarchies between ideas, missing the ineradicable and constant struggle among people in different positions in society.

I further argue that existing accounts of the center-periphery relationship do not adequately address power relationships. In David Kennedy’s account of center and periphery, economic theory and domination are confounded and power relationships are misrepresented. The center-periphery relationship cannot be understood in terms of economic theory. It needs to be understood as a constant reality of subordination—as a macro perspective of micro hierarchies.

The proposed analytical scheme can be used in any area of law and in any social context. However, the main focus and example of my portrayal of the reproduction of hierarchies and structural subordination is the European Union. There is a repetitive structure to the constant struggle. The ideology of the EU legal profession is one of the center of the EU, and this importantly determines how injury is understood in EU law.

The EU center’s views concerning free movement and social considerations are conceived of as being natural or unproblematic, whereas the periphery’s claims are often perceived as harmful. This is reflected in doctrines such as social dumping. However, doctrines that reflect injuries to the actors of the periphery are not a part of the professional vernacular. I argue that any tool can be used for resistance to reproduction of hierarchies, including economic theory and neoclassical economics. As an example of tools to be built to address the hierarchical structure of society and previously invisible injury, I construct a new doctrine of goods dumping on the internal market and challenge several assumptions of trade law, antitrust law, and international business transactions.