

Law's Ethical, Global and Theoretical Contexts

Essays in Honour of William Twining

Edited by

UPENDRA BAXI, CHRISTOPHER MCCRUDDEN
AND ABDUL PALIWALA

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Towards a socio-legal theory of indignation

Boaventura de Sousa Santos¹

In this chapter, I present a rough draft of a socio-legal theory of law in the light of the newest wave of social protests that took place between 2011 and 2013 in different countries and regions of the world. They were so intense and dispersed in 2011 that Christopher Chase-Dunn (in 2013)² characterized this period as the 'World Revolution 2011', a date equivalent to other important eruptions of popular mobilization and protest, such as 1789, 1848, 1917, 1968 and 1989, leading on to structural changes in the world at large. I start by characterizing these social protests by identifying their different genealogies. I then present the challenges they pose to the critical theories of law in general and specifically to those proposed by William Twining and myself. In the third part I suggest what I call a sociology of emergences³ in order to construct the socio-legal theory of law that might be implicit in the social protests. In the final part, I try to respond to the challenges concerning my own theorizing and speculate on what Twining's response might look like.

1. The indignation revolts

The protests I have in mind are the Arab Spring in North Africa and the Middle East,⁴ the Occupy Wall Street movement, subsequently

¹ This paper was completed in the framework of the research project 'ALICE – Strange Mirrors, Unsuspected Lessons' (alice.ces.uc.pt), co-ordinated by me at the Center for Social Studies (CES) of the University of Coimbra, Portugal. The Project has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013)/ ERC Grant Agreement n. 269807. A first version of this paper was presented to the *World Congress of Sociology of Law*, Toulouse, 3 September 2013. In preparing this version, I benefited from the precious comments of Christopher McCrudden, Upendra Baxi, Abdul Paliwala and Maria Irene Ramalho, and from the research assistance of Margarida Gomes.

² Christopher Chase-Dunn, 'The World Revolution of 2011: Assembling a United Front of the New Global Left', *IROWS Working Paper #82* (2013) irows.ucr.edu/papers/irows82/irows82.htm accessed 8 July 2013.

³ Boaventura de Sousa Santos, *Epistemologies of the South. Justice against Epistemicide* (Boulder-London: Paradigm Publishers, 2014) [hereafter, Santos 2014].

⁴ John R. Bradley, *After the Arab Spring: How Islamists Hijacked the Middle East Revolts* (New York: Palgrave Macmillan, 2012) [hereafter, Bradley 2012a]; and *The New Arab Revolt: What Happened, What It Means, and What Comes Next* (New York: The Council on Foreign Relations, 2012) [hereafter, Bradley 2012b]. See also Lynn Noueihed and Alex Warren, *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of a New Era* (New Haven: Yale University Press,

expanding to many other cities in the USA,⁵ the *indignados* movement in Southern Europe⁶ and finally, in June 2013, the massive

2012); Kenneth M. Pollack, *The Arab Awakening: America and the Transformation of the Middle East* (New York: Brookings Institution Press 2011); K. Seigneurie, 'Discourses of the 2011 Arab Revolutions', *Journal of Arabic Literature* (2012) 43, pp. 484–509; Kurt Weyland, 'The Arab Spring: Why the Surprising Similarities with the Revolutionary Wave of 1848?', *Perspectives on Politics* (2012) 10/4, pp. 917–34; Nirvana Tanoukhi and Ali Mazrui, 'Arab Spring and the Future of Leadership in North Africa', *Transition* (2011) 106 Side A: Fifty Years, pp. 148–62; Randall Kuhn, 'On the Role of Human Development in the Arab Spring', *Population and Development Review* (2012) 38(4), pp. 649–83.

⁵ Jenny Pickerill and John Krinsky, 'Why Does Occupy Matter?', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2012) 11, pp. 279–87; Chris Hedges, 'The Revolutionaries in Our Midst', *Truthdig* (2013) www.truthdig.com/report/item/the_revolutionaries_in_our_midst_20131110 accessed 10 November 2013; Ronald Walter Greene and Kevin Douglas Kuswa, 'From the Arab Spring to Athens, From Occupy Wall Street to Moscow: Regional Accents and the Rhetorical Cartography of Power', *Rhetoric Society Quarterly* (2012) 42:3, pp. 271–88; Lee Edelman, 'Occupy Wall Street: "Bartleby" Against the Humanities', *History of the Present* (2013) 3/1, pp. 99–118; Craig Calhoun, 'Occupy Wall Street in perspective', *British Journal of Sociology* (2013) 64 (1), pp. 27–38; Todd Gitlin, *Occupy Nation, the Roots: The Spirit and the Promise of Occupy Wall Street* (New York: Harper Collins Publishers, 2012); Todd Gitlin, 'Occupy's Predicament: The Moment and the Prospect for the Movement', *British Journal of Sociology* (2013) 64 (1), pp. 3–25 [hereafter, Gitlin 2013a]; Todd Gitlin, 'Reply to Craig Calhoun', *The British Journal of Sociology* (2013) 64 (1), pp. 39–43 [hereafter, Gitlin 2013b]; Bernard Harcourt, 'Political Disobedience', *Critical Inquiry* (2012) 39 (1), pp. 33–55; Janet Byrne, ed., *The Occupy Handbook* (New York: Back Bay Books, 2012); Keith Gessen, Sarah Leonard, Carla Blumenkranz, Mark Greif, Astra Taylor, Sarah Resnick, Nikil Saval and Eli Schmitt (eds), *Occupy! Scenes from Occupied America* (New York: Verso, 2011); Sarah van Gelder, ed., *This Changes Everything: Occupy Wall Street and the 99% Movement* (San Francisco: Berrett-Koehler, 2011); Writers for the 99%, *Occupying Wall Street: The Inside Story of an Action That Changed America* (New York: O/R Books, 2012); Alasdair Roberts, 'Why the Occupy Movement Failed' *Public Administration Review* (2012), pp. 754–62; W. J. T. Mitchell, 'Image, Space, Revolution: The Arts of Occupation', *Critical Inquiry* (2012) 39, pp. 8–32; Michael Taussig, 'I'm so Angry I Made a Sign', *Critical Inquiry* (2012) 39, pp. 56–88; Mignon Nixon, 'Anatomic Explosion on Wall Street', *October* (2012) 142, pp. 3–25; Jenny Pickerill and John Krinsky, 'Why Does Occupy Matter?', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2012) 11 (3–4), pp. 279–87.

⁶ On the protest and mobilizations in Spain, Portugal and Greece, see SuNotissima, Quodlibetat, Axebra, Arnau Monty, TakeTheSquare, Alcazan, Toret and Simona Levi, *Tecnopolítica, Internet y R-Evoluciones. Sobre la Centralidad de Redes Digitales en el #15M* (Barcelona: Icaria, 2012); Ernesto Castañeda, 'The Indignados of Spain: A Precedent to Occupy Wall Street', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2012) 11 (3–4), pp. 1–11; Ángel Calle Collado, ed., *Democracia radical. Entre vínculos y utopías* (2011) Icaria, Barcelona and 'Las naturalezas (ya no tan subterráneas) del 15M', *Viento Sur* (2012) 123, pp. 61–9; G. Charnock, T. Purcell, and R. Ribera-Fumaz, *The Limits to Capital in Spain: Crisis and Revolt in the European South* (New York: Palgrave Macmillan 2014); Marta Cruells, and Pedro Ibarra (eds.), *La democracia del futuro. Del 15M a la emergencia de una sociedad civil viva* (Barcelona: Icaria, 2013); Mayo Fuster Morell, 'The Free Culture and 15M Movements in Spain: Composition, Social Networks and Synergies', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2012) 11 (3–4), pp. 386–92; María José Gámez Fuentes, 'Feminisms and the 15M Movement in Spain: Between Frames of Recognition and Contexts of Action', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2015) 1, pp. 1–7; Sandra González-Bailón, et al., 'Broadcasters and Hidden Influentials in Online Protest Diffusion', *American Behavioral Scientist* (2013) 57 (7), p. 943–65; Kostis Kornetis, 'Is there a future in this past? Analyzing 15M's intricate relation to the Transición', *Journal of Spanish Cultural Studies* (2014), pp. 1–16; Pablo La Parra Pérez, 'Revueltas lógicas: el ciclo de movilización del 15M y la práctica de la democracia radical', *Journal of Spanish Cultural Studies* (2014), pp. 1–19; I. Peña-López, M. Congosto and P. Aragón, 'Spanish Indignados and the evolution of 15M: towards

protests in Brazil around public transportation and public services in general.⁷

It is not my purpose to develop a full characterization of the different revolts and protests, their historical context, social composition, political orientation, forms of mobilization, discourses and narratives of resistance and alternative. I will limit myself to a few analytical observations that may help to ground the main argument of this chapter. In the last forty years, Western-centric theories of social movements have proposed a key distinction between old and new social movements.⁸ Though differing on many issues, such theories tend to

networked para-institutions' in J. Balcells, A. Cerrillo y Martínez, M. Peguera, I. Peña-López, M. J. Pifarré de Moner and M. Vilasau (eds), *Big Data: Challenges and Opportunities*, Proceedings of the 9th International Conference on Internet, Law & Politics. Universitat Oberta de Catalunya (Barcelona: UOC-Huygens Editorial, 2013), pp. 359–86; Carlos Taibo, 'The Spanish *Indignados*: A Movement with Two Souls', *European Urban and Regional Studies* (2013) 20, pp. 155–8; Raimundo Viejo Viñas, 'Indignación. Política de movimiento, nueva ola de movilizaciones y crisis de representación' in Prats Rivas, E. Fermín, María de los Ángeles Mascott Sánchez and Efrén Arellano Trejo (eds), *La actuación del legislativo en los tiempos de crisis* (México: CESOP, 2012), pp. 123–56; José Manuel Mendes, 'Movimentos Sociais e Cidadania Crítica em Portugal: da Reelitização à Emancipação Social?', *Le Monde Diplomatique* (2013) Portuguese Edition, August 2013; Dimitrios Theodossopoulos, 'Infuriated with the Infuriated? Blaming Tactics and Discontent about the Greek Financial Crisis', *Current Anthropology* (2013) 54 (2), pp. 200–21; Carles Feixa, Inês Pereira and Jeffrey Juris, 'Global citizenship and the "New, New" social movements Iberian connections', *Young November* (2009) 2 17, pp. 421–42 [hereafter Feixa, Pereira and Juris, 2009]; Monedero, Juan Carlos, '¿A dónde va el 15M? Viento en las velas del movimiento', *Comiendo Tierra* (2013), www.comiendotierra.es/2013/05/15/a-donde-va-el-15m-viento-en-las-velas-del-movimiento accessed 15 May 2013; Julia Nuño de la Rosa, 'Movimientos sociales y democracia al otro lado del espejo: entrevista a Antoni Aguiló', *Oxímora* (2014) 4, pp. 111–25; Carlos Antonio Aguirre Rojas, 'Las revueltas populares de 2011 en perspectiva histórica', *Rebelión* (2012), www.rebelion.org/docs/146953.pdf accessed 26 March 2012. See also Cristina Fominaya Flesher, 'Debunking Spontaneity: Spain's 15-M/Indignados as Autonomous Movement', *Social Movement Studies: Journal of Social, Cultural and Political Protest* (2014) 14 (2), pp. 1–22 [hereafter, Fominaya Flesher 2014a]; *Social Movements and Globalization: How Protests, Occupations and Uprisings are Changing the World* (Basingstoke: Palgrave Macmillan, 2014) [hereafter, Fominaya Flesher 2014b] and 'España es diferente: Podemos y el 15-MPart', *Público* (2014) blogs.publico.es/el-cuarto-poder-en-red/2014/06/09/espana-es-diferente-podemos-y-el-15-m accessed 9 June 2014 [hereafter, Fominaya Flesher 2014c].

⁷ Pedro Fiori Arantes, 'Da (Anti) Reforma Urbana brasileira a um novo ciclo de lutas nas cidades', *Correio da Cidadania* (2013), www.correiodacidade.com.br/index.php?option=com_content&view=article&id=9047%3Asubmanchete091113&catid=72%3Aimagens-rolantes accessed 8 November 2013; Carlos Vainer, 'Mega-Eventos, Mega-Negócios, Mega-Protestos. Uma Contribuição ao Debate sobre as Grandes Manifestações e as Perspectivas Políticas', *ETERN* (2013), www.eterm.ippur.ufrj.br/ultimas-noticias/196/mega-eventos-mega-negocios-mega-protestos accessed 24 June 2013; Marco Weissheimer, 'Não há um "movimento" em disputa, mas uma multidão sequestrada por fascistas', *Carta Maior* (2013), cartamaior.com.br/?/Coluna/Nao-ha-um-'movimento'-em-disputa-mas-uma-multidao-sequestrada-por-fascistas/28748 accessed 21 June 2013; Carlos Porto-Gonçalves and Fernando Luís Monteiro Soares, 'Sejamos realistas, exijamos... que se vayan todos... Pela Reinvenção da Política' *Contrapunto* (Montevideo: Centro de Formación Popular del Oeste de Montevideo Comisión Sectorial de Extensión y Actividades en el Médio Universidad de la República, 2013); Denilson Araújo Oliveira, 'Algumas palavras sobre as manifestações e conflitos sociais no Rio de Janeiro a partir de Junho de 2013', *Ensaio de Geografia* (2013) 2 (3).

⁸ Doug McAdam, John McCarthy and Mayer N. Zald (eds), *Comparative Perspectives on Social Movements Political Opportunities, Mobilizing Structures, and Cultural Framings* (New York: Cambridge University Press, 1996); Doug McAdam, Sidney Tarrow and Charles Tilly, *Dynamics*

agree on labelling the labour movement as old, and the movements that emerged in the late sixties of the past century, in the aftermath of the student movement, as new, such as the women's, ecological, peace, gay and lesbian movements. According to such theories, the old movements emerged from the contradictions of industrial society. They are working-class-or lower-class-based, and are focused on economic or materialistic issues (production and distribution issues). They seek to have an impact on public policy and, thus, on the state as well. The new social movements emerged from the contradictions of post-industrial society. They are old or new middle-class-based (peripheral to or outside of the labour market). They are less interested in politics in the narrow sense of party politics (civil society orientation) and they focus instead on cultural, life style, identity issues (social reproduction and life world issues). Although organized along very different logics, both old and new movements have some degree of institutionalization, even if the new social movements tend to resist bureaucratization. Even though they may organize protests and campaigns of different types, they are not reducible to them.

I have criticized, elsewhere, some of the analytical and conceptual ideas grounding these characterizations.⁹ Here I would like to focus on the double Western-centric character of these theories. Even if the two types of movements may coexist in a given country at a given time, the categories used ('old' and 'new') point to an historical sequence. This sequence may indeed correspond to the sociological and political realities of the global North (Europe and North America) but it has very little to do with the social conditions elsewhere. In the global South – most of which was under European colonial rule until the mid-twentieth century or even the late twentieth century, in the case of countries subjected to Portuguese colonialism – and even in the Southern European countries that were subjected to fascistic dictatorships for many decades, old and new social movements emerged virtually at the same time. Moreover, the distinction between materialistic and non-materialistic issues is highly problematic outside the global North.¹⁰ There are many movements

of Contention (New York: Cambridge University Press, 2001); J. Habermas, 'New Social Movements', *Telos* (1981) 49: 33–37; Alain Touraine, 'An Introduction to the Study of Social Movements' *Social Research* (1985) 52 (4), pp. 749–87; Ernesto Laclau, 'New Social Movements and the Plurality of the Social', in David Slater, ed., *New Social Movements and the State in Latin America* (Amsterdam: CEDLA, 1985); Chantal Mouffe, 'Towards a theoretical interpretation of New Social Movements' in S. Hanninen and L. Paldán (eds), *Rethinking Marx* (Berlin: Argument-Sonderband, 1984), pp. 139–43; Alberto Melucci, 'The New Social Movements: A Theoretical Approach', *Social Science Information* (1980) 19, pp. 199–226.

⁹ Boaventura de Sousa Santos, *The Rise of the Global Left* (London: Zed Books, 2006) [hereafter, Santos 2006].

¹⁰ Referring specifically the case of Brazil, Bernd Reiter affirms that the concept of 'new social movements' characterized by a focus on identity cannot readily be transferred to a Latin American context. Latin America never experienced the postmaterialist turn that led some to call certain European social movements 'new'. In addition, as the case of black organizing in Brazil demonstrates, identity-based Latin American social movements are much older than the literature suggests. What was indeed a Latin American novelty of the 1980s was the massive emergence of nongovernmental organizations (NGOs). In the case of Brazil, these

that, on the surface, by their thematic or type of organization, may be labelled as new movements; yet they are, indeed, involved in political economy issues, issues of production and distribution, which directly confront the capitalist state. For example, ecological movements throughout the global South are struggling against megaprojects, land grabbing, deforestation and the depletion of natural resources; they seek to defend their ancestral rights to water, land and territory. Theirs is an 'ecologism of the poor', as Joan Martinez Alier calls it,¹¹ involving materialistic or economic issues as well as cultural, identity or life style issues.

In the last decade, and following the same sequencing logic, a third category of social movements has emerged: the 'newest social movements',¹² or the 'new new social movements'.¹³ Richard Day¹⁴ has forcefully argued that the radical activism that emerged in late 1990s and early 2000s represents a new type of collective actions characterized by its radical stance, although it has roots reaching back to the new social movements of the 1960s – feminisms, the US civil rights movement, Red Power, anticolonialism, gay and lesbian struggles – as well as further back to 'older' traditions of Marxist and anarchist socialism. He has in mind the protests in Seattle in 1999 against the World Trade Organization (WTO) during the meeting of the G8 countries. According to him, these mark the point at which a new militancy erupted onto the surface of an otherwise serene liberal democratic polity. These were followed in the next decade by many mobilizations of similar and different types but always guided by autonomist, anarchist repertoires of struggle.

organizations emerged in response to new financial opportunities provided by international donors and the coercive and paternalistic actions of states, a reality that the concept of new social movements is unable to capture. Both the long history of identity-based organizing and the emergence of NGOs can be explained by focusing on political opportunities and changing protest repertoires (Bernd Reiter, 'What's New in Brazil's "New Social Movements?"', *Latin American Perspectives* (2011) 38 (1), pp. 153–68).

¹¹ Joan Martinez Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Cheltenham: Edward Elgar Publishing Ltd, 2003).

¹² I myself have used this category, however, in a deviant or heterodox way. Dissatisfied with the cultural turn of critical theory in the 1980s, and particularly with its excessive focus on civil society (a very problematic concept for me), Boaventura de Sousa Santos, *Toward a New Legal Common Sense. Law, globalization, and emancipation* (London: Butterworths, 2002), at p. 457 [hereafter, Santos 2002], and the corresponding abandonment of the problematic of the state, transformed into the privileged topic and target of conservative thinking, I wrote on the 'state as the newest social movement' in the hope of steering critical theory and left politics into the direction of 'rethinking' and 'refounding the state'. See also Boaventura de Sousa Santos and José Luis Exeni, ed., *Justicia Indígena, Plurinacionalidad e Interculturalidad en Bolivia* (Quito: Ediciones Abya Yala y Fundación Rosa Luxemburg, 2012) [hereafter, Santos and Exeni 2012] and Boaventura de Sousa Santos and Agustín Grijalva, ed., *Justicia Indígena, Plurinacionalidad e Interculturalidad en Ecuador* (Quito: Ediciones Abya Yala y Fundación Rosa Luxemburg, 2012) [hereafter, Santos and Grijalva 2012].

¹³ Pereira Feixa and Juris 2009 (emphasis added).

¹⁴ Richard Day, *Gramsci is Dead: Anarchist Currents in the Newest Social Movements* (London: Pluto Press, 2005), at pp. 1–15 [hereafter, Day 2005].

Generally speaking, these mobilizations are of the same type as those that inspired the use of the Spinozian concept of 'multitude' by Toni Negri and Michael Hardt in *Empire*.¹⁵ But Day rejects the concept because, in his view, 'a global proletariat seems very difficult to reconcile with postmarxist critiques of a politics that gives centrality to the struggles of the working class, and with anti-racist feminist calls for the decolonization of theory and the practice of solidarity across all axes of oppression.'¹⁶ According to Day, 'contemporary radical activism does not seek a return to the theory and practice of the Old Left of the nineteenth and early twentieth centuries, or even to the New Left of the 1960s to 1980s. There is something else going on here, something different, which I try to indicate by sometimes using the term *newest social movements* to describe those currents in which I am most interested.'¹⁷

Day argues further that the newest social movements are radical in that they seek fundamental change. They want to address not just the *content* of current modes of domination and exploitation but also the *forms* that give rise to them. Thus, for example, rather than seeking self-government within a settler state, a radical indigenous politics challenges the European notion of sovereignty upon which the system of states is built. Contemporary radical activism, then, pushes beyond the possibilities and limits of liberal reform, while not entirely discrediting attempts to alter the *status quo*. It rejects any politics of integration or inclusion in the existing political and social structures and, therefore, any attempt at reforming or transforming the state. It focuses on small-scale experiments in the construction of alternative modes of social, political and economic organization as they offer a way both to avoid waiting forever for the Revolution to come, and perpetuating existing structures through reformist demands. 'By avoiding making demands in the first place, it offers a way out of the cycle through which requests for "freedom" or "rights" are used to justify an intensification of the societies of discipline and control.'¹⁸ Day echoes John Holloway's¹⁹ manifesto on changing the world without taking power, inspired by the Neo-Zapatistas. Day emphasizes that rather than getting involved in power politics, the new radical activists strive to recover, establish or enhance their ability to determine the conditions of *their own* existence, while allowing and encouraging others to do the same.²⁰

This analysis has been criticized on several grounds.²¹ Although it captures well the autonomist, neo-anarchist nature of some of the collective actions of

¹⁵ Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000).

¹⁶ Day 2005, at p. 5. ¹⁷ Day 2005, at p. 5. ¹⁸ Day 2005, at p. 15.

¹⁹ John Holloway, *Change the World without Taking Power: The Meaning of Revolution Today* (London and Sterling, VA: Pluto Books, 2002) [hereafter, Holloway 2002].

²⁰ For other analyses along the same lines, see, besides Holloway 2002, A. K. Thompson, 'You Can't Do Gender in a Riot: Violence and Post-Representational Politics', *Berkeley Journal of Sociology* (2008) 52, pp. 24–49.

²¹ See, for instance, Patnaik's critique of the critique of the Gramscian concept of hegemony undertaken by Day: Patnaik, Arun Kumar, 'Gramsci is Dead But Resurrected', *Economic and Political Review* (2008) 13, pp. 25–7. See also Ruth Reitan, 'Review Essay. A Global Civil Society

recent decades, it fails to offer an adequate picture of contemporary activism as a whole, a criticism that may equally be made of Negri's and Hart's analysis in *Empire*. In my own work on contemporary social and political struggles and mobilizations, I have adopted a more open-ended, epistemologically self-conscious and empirically-grounded approach, emphasizing the diversity and heterogeneity of the different forms of collective action.²² Indeed, if we focus on the social movements and struggles that have occurred in the global South, many of the analytical categories (materialist versus cultural; old versus new versus newest; state- or community-oriented; autonomous versus power-oriented) are either inadequate or totally irrelevant. In the end, it is the epistemology guiding the analysis that must be subjected to critical scrutiny. This much I have been doing while proposing the 'epistemologies of the South'.²³ Along these lines, I tried to show in my analysis of the World Social Forum, and of the movements and organizations gathered around it, how the celebration of diversity does not prevent the emergence of some forms of convergence and articulation, however limited.²⁴

For my purpose here, it is important at this point to raise the following issues. First, in order to do justice to the different forms of collective action occurring both in the global North and global South, we must understand that they are contemporary only in the trivial sense that they occur simultaneously. At a deeper level, each one of these actions is only contemporaneous with its own historical, social and political context, even if this context may be related in complex ways to other contexts. Different histories cannot sit comfortably with one single way of being in the here and now. A thick conception of contemporaneity must recognize the co-existence of different ways of being contemporaneous. The categories used to describe collective action emerging from different contexts must be used with some caution. As Edward Said²⁵ cautioned us in relation to theories, the categories do travel, but, if we do not pay attention to the conditions of the travel, we may end up with reductionist analyses; the methodological or categorial overload may barely hide the poverty of empirical understanding. If the present of different collective actions responds to different pasts (and probably calls for different futures), the description of action in the present involves also the description of present differences in these actions. An unreflective analysis of a given type of identity-oriented collective action may ignore the fact that identity means different things in different contexts and for different groups of people, and that, accordingly, political economy may be called upon to ground identity as much as culture or religion.

in a World Polity, or Angels and Nomads Against Empire?', *Global Governance* (2007) 13 (3), pp. 445–60.

²² Santos 2006. ²³ Santos 2014. ²⁴ Santos 2006.

²⁵ Edward Said, 'Traveling Theory', *The World, the Text, and the Critic* (Cambridge, MA: Harvard University Press, 1983), pp. 226–47.

The second issue is that we must distinguish between protests and mobilizations, on the one hand, and movements and associations, on the other. The protests and revolts I am dealing with here can hardly be conceived of as social *movements*, since in general they lack the minimal institutionalization that guarantees the sustainability of action over time. Of course, movements, associations and organizations may be behind the protests (be they the Muslim Brotherhood in the Egyptian Arab Spring or the different 'barrio collectives' in the *indignados* movement in Spain). Moreover, protests and mobilizations may *lead* to new movements, association or organizations. Some of the autonomist-anarchist initiatives that Day mentions evolved from or were strengthened by the protests and mobilizations of the early 2000s. These autonomist associations or movements represent one of the paths of resistance against capitalism, colonialism and patriarchy, but they are far from representing the totality of 'contemporary radical activism' (more on this below). In terms of social activism (or lack of social activism, depending on expectations and frustrations), our time is a palimpsest in which different social experiences have been inscribed, one on top of the other; the new or even newest experiences reveal or hide the remnants of old experiences, either by selective recurrence or erasure, or by unrealistic promises of rupture and innovation. Such an accumulation of superimposed experiences should prepare us to be confronted with either the surprising resurrection of the dead or the premature death of hitherto exhilarating possibilities.

I have given the general name of 'indignation revolts' to the protests and mobilizations that took place in different regions of the world in 2011–13. I have designated them as collective presences,²⁶ rather than as movements, to underline several features that characterize them: their extra-institutional character, minimal organization, surprising appearance, real or apparent spontaneity of aggregation, volatility (the immense capacity to move from limited or local demands to ample and national demands) and, in general, ephemeral presence. The words 'dignity', 'indignation' and 'indignity' were used extensively in the protests. As used here, 'indignation' does not refer exclusively to the indignant (*indignados*) movement of Southern Europe. It is, rather, a general designation covering all the protests between 2011 and 2013 mentioned earlier, and it may be used to express the revulsion against an extremely unjust state of affairs ('indignation') and to characterize a state of affairs that deprives a person or a group of her or his basic human dignity ('indignity'). In Spinoza,²⁷ indignation is connected to the revolt of the multitude against unjust laws. Indignation is the anger generated in us by a wrong done to us or to another; there is no indignation without the belief that one has been wronged.²⁸ The register is ethical and mobilizes reasons and passions,

²⁶ Santos 2014, at p. 192.

²⁷ Benedictus de Spinoza, *Political Treatise* (trans. Samuel Shirley) (Indianapolis: Hackett, 2000).

²⁸ Given the frequency with which the idea of indignation appears in the protests and in current political affairs, it may be useful to elaborate on the concept as it is understood by Spinoza, one

both abundantly present in the protests. It puts the emphasis of the collective action on the radical rejection of a given *status quo* rather than on the imagination of a future, better society. It calls for rebellion or revolt rather than for revolution or reform. This negativity is at the core of the conception of law that is implicit in many of the protests, even though the significant differences between them may invite greater specification.

In general, we can identify in the protests the following features with more or less primacy or intensity.²⁹ First, there was indignation at the extreme social inequality in contemporary capitalist societies. The intensity of the denunciation is expressed in the polarization between the 1% society and the 99% society. This is a very old denunciation indeed. Consider the following quotation: 'If a man knew nothing about the lives of people in our Christian world and he were told, "There is a certain people who have set up such a way of life, that the greater part of them, ninety-nine per cent, or thereabouts, live in

of the modern Western philosophers who gave it more weight in ethical and political matters. Though indignation (*indignatio*) only appears nine times in Spinoza's writings (in *Ethics* and *Political Treatise* – see Emilia Giancotti, (1970) *Lexicon Spinozanum* (La Haye: Nijhoff) – it is a crucial concept in Spinozian philosophy. See Ted Stolze, 'Indignation: Spinoza on the Desire to Revolt', *Marxism 2000* (University of Massachusetts: Amherst, 2000); Pierre Macherey, *Introduction à l'Éthique de Spinoza, La cinquième partie: les voies de la libération* (Paris: Presses Universitaires de France, 1994); and Alexandre Matheron, 'L'indignation et le conatus de l'état spinoziste' in Myriam Revault and Hadi Rizk (eds), *Spinoza: Puissance et Ontology* (Paris: Kimé, 1994), pp. 153–65; Alexandre Matheron, *Individu et communauté chez Spinoza* (Paris: Minuit, 1988). According to Spinoza, indignation is a passion that consists in 'a hate toward someone who has done evil to another', Benedictus de Spinoza, *Ethics, and Treatise on the Correction of the Intellect* (London: J. M. Dent, 1993), it is a sadness with the accompanying idea of an external cause. Whenever tyrants or, in general, oppressive regimes, act in such a way that incites general indignation, the latter may lead to revolt and the consequent destabilization of the regime. If it were not for indignation, tyrants could go on committing excesses and feel secure, as subjects would remain more and more afraid and isolated. As justly emphasized by Stolze, indignation is responsible for both the fall and the rise of states. Indignation is thus intimately related to both fear and hope. Being a sad passion, affect or emotion, indignation can only be converted into an active one if submitted to what Spinoza calls 'cognitive therapy' in the *Ethics*. Given the fact that passions contain elements of insight and belief, it is possible to transform them, through reason, into positive, richer or better insights and beliefs. Stolze speculates on how this cognitive therapy might work in the case of indignation: 'We would not so much try to purge ourselves of the effect of indignation as try to use reason to engage in an imaginative reconstruction of indignation's underlying causes in as a complete a manner as possible. Such reconstruction would have the dual effect of (a) transforming indignation as a sad affect into a joyous affect and (b) increasing our power to understand, act on, and perhaps even uproot the source of indignation' (Stolze, at p. 14). This may sound too optimistic, given the limits of rational knowledge in Spinoza. We should remember that the highest knowledge in Spinoza, the 'third kind of knowledge', is the intuitive knowledge of our emotions. On the limits of rational knowledge in Spinoza, see Herman DeDijn, 'Ethics IV: the ladder, not the top. The provisional morals of the philosopher' in Yovel, Yirmiyahu and Segal, Gideon (eds), *Ethics IV: Spinoza on Reason and the 'Free Man'. Papers Presented at the Fourth Jerusalem Conference* (New York, Little Room Press, 2004), pp. 37–56. For a psychological analysis of indignation see, for example, Daniel Kahneman and Cass Sunstein, 'Indignation: Psychology, Politics, Law', *John M. Olin Program in Law and Economics Working Paper* (2007) 346.

²⁹ The following is an interpretive summary of the documentation found in the references mentioned in notes 4, 5, 6 and 7.

ceaseless physical labor and oppressive need, and the rest one per cent lives in idleness and luxury now, if that one-hundredth has its own religion, science and art, what would that religion, science and art be like?" I think that there can only be one answer: "A perverted, a bad religion, science and art".³⁰ Was this written in the aftermath of the Occupy movement? No, it was written by Leo Tolstoy, in his diary on 17 March 1910.³⁰

Second, there was indignation at the rise and endurance of dictatorship, be it in the form of personal dictatorship (in the Arab Spring) or at the impersonal dictatorship (disguised as democracy) of financial markets and global finance capital (Occupy and the *indignados* movements). It dominates a democratic imaginary (not a socialist one), based on the distinction between the ideal of democracy (or 'real democracy') and the low intensity democracies in the *realpolitik* of our time.

Third, there was distrust of state and non-state institutions, and hence a preference for extra-institutional means of struggle. The protestors in democratic societies start from the assumption that democratic institutions have been 'occupied' by non-democratic dominant groups and interests. The institutions are in place but they are not performing the roles for which they were created. In light of this, we are entering a post-institutional epoch, in which political rather than civil disobedience is justified. The protesters take to the streets and squares because they are the only public spaces that have not been occupied by financial capital. Moreover, the deliberations to be made in the process of protesting and resisting must ideally be taken by means of direct democracy, assembly democracy, distrustful of leaders and spokespersons.

Fourth, the protests are in most cases peaceful, even when they have to resist police brutality. The cyberspace social networks were a key instrument for the aggregation and articulation of such resistance.

These general characteristics must not be understood as understating the significant differences among the protests and mobilizations of 2011 and 2013. I distinguish three genealogies: the Arab Spring; Southern European and Brazilian indignation; and the Occupy movements in the United States. The Arab Spring (itself comprising quite distinct protests and mobilizations) emerged out of the ruins of the Arab nationalism, a kind of populist nationalism whose most prominent leader was Gamal Abdel Nasser, President of Egypt from 1958 to 1970. In a Western world dominated by Islamophobia, the demand for democracy on the part of protestors and the associations supporting them was a comforting surprise. The *indignados* movements in Southern European emerged out of the serious crisis (the coming ruins?) of European social democracy. Social and economic rights, which seemed to be part of the DNA of the post-WWII European polity, began to be questioned, particularly after the financial crisis of 2008. In a few years, these were converted from being viewed as a necessity into becoming an unsustainable luxury that left the

³⁰ Leo Tolstoy, *Last Diaries* (New York: G. P. Putnam's Sons, 1960), at p. 66.

old and new middle classes on the verge of poverty and their children, the majority of whom with many years of schooling, without the prospect of a dignified future. In Brazil, the protests were also related to the crisis of the 'rights package' of social democracy. But while in Europe social democracy was older and based on universal entitlements, in Brazil social democracy was ten years old and was based on massive compensatory policies (means-tested bonuses of different types). Through these, some 50 million Brazilians entered the consumer society. But many of them became protesting citizens, once they were confronted with the contradiction between access to consumer products and lack of access to public services (health, education, transportation). In the United States, the protests and mobilizations represented the social and ideological bankruptcy of neoliberalism. Among all the protests and mobilizations, the Occupy movement was the one in which the negative politics of indignation reached its most intense formulation. The radical denunciation of extreme inequality and of the degeneration of democracy into a plutocracy, if not a kleptocracy, was so intense that no demands were made on the state. One may however wonder if, in an insidious way, neoliberalism was present with a vengeance in the protests in the vehement protestors' denunciation of the predator state, as well as their defence, as a core value, of individual and collective autonomy.

2. New challenges to the critical theories advanced by Twining and Santos

Critical theory is any kind of intellectual practice that does not reduce reality to what exists. It is based on the claim that much of non-existent reality is actually rendered non-existent by dominant, and even hegemonic, power-knowledge technologies and practices. Such suppressed reality consists of present and past experiences of unjust suffering, and of resistance against them in the name of alternative modes of being, knowing and living which might lead to putting an end to or minimizing this unjust suffering. Critical theory, to use my own terms, involves always an exercise in a sociology of absences and a sociology of emergences.³¹ It is about memory (and history) as well as anticipation. Concerning memory, critical theory conceives of contemporary societies as more and more divided between two groups: on the one hand, those that cannot forget past wrongs; on the other, those that do not want to remember. (This is at a time of intense contradiction between postcolonial or decolonial thinking and activism, on the one hand, and the relentless reproduction, in old and new guises, of colonial and neocolonial global politics, on the other.) These groups enact, and are enacted by, opposing politics of individual and collective subjectivization of the past as either a solved or as an unsolved part of the present. Concerning anticipation, critical theory conceives of contemporary

³¹ Santos 2014, at pp. 164–87.

societies as divided between two groups: between those that see the current state of affairs as the only game in town (the cynics) or as an irremediably corrupt game (the resigned), and those that either imagine and struggle for other possible games (the revolutionaries) or believe in and struggle for the possibility of fair rules in the existing game (the reformists). (This is at a time of aggressive ideological, political and military technologies aimed at ratifying the past of the present by converting the future in an endless repetition of the present.) These groups enact and are enacted by opposing politics of individual and collective subjectivization of the future as either a given or as a task.

Both in the case of memory (and history), as in the case of anticipation, the contradictory politics of subjectivization are enmeshed in conflicting knowledges and emotions. Concerning these epochal conditions and the politics they give rise to, critical theory distinguishes between objectivity and neutrality.³² It seeks to produce trustworthy knowledge, both as a sociology of absences and as a sociology of emergences, that will potentially promote or strengthen the stances and struggles of those that cannot forget past wrongs, and those who either imagine and struggle for other possible games or believe in and struggle for the possibility of fair rules in the existing game.

I consider that Twining and I are both critical theorists in the broad sense defined above. We are both concerned with suppressed, 'absent' realities, non-Western experiences and 'Southern voices'. By not being recognized, our Western canons of certified reality and knowledge end up being impoverished and we fail to grasp how false the supposed globality or universality of such canons is. Both of us are unreconciled to this 'cognitive injustice', as I would call it,³³ and take an activist stance in giving voice to suppressed, silenced or simply neglected voices.³⁴ Our common ground of inquiry is 'law in society' or 'law in context', even if, in my case, law shares my field of interests with politics and modern science. Our disciplinary loyalties are different: legal theory and jurisprudence, in the case of Twining, and sociology of law, in my case. Our

³² Boaventura de Sousa Santos, 'A Critique of Lazy Reason: Against the Waste of Experience' in Wallerstein, Immanuel, ed., *The Modern World-System in the Longue Durée* (London: Paradigm Publishers, 2004), pp. 157–97 and Santos 2014.

³³ Santos 2014, at pp. 19–46.

³⁴ William Twining, *Globalisation and Legal Theory* (London: Butterworth, 2000) [hereafter, Twining 2000]; William Twining, ed., *Human Rights: Southern Voices* (Cambridge University Press, 2009) [hereafter, Twining 2009a]; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) [hereafter, Twining 2009b]; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) [hereafter, Santos 1995]; Santos 2002; Boaventura de Sousa Santos and César Rodríguez-Garavito (eds), *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) [hereafter, Santos and Rodríguez-Garavito 2005]; Boaventura de Sousa Santos, ed., *Democratizing Democracy. Beyond the Liberal Democratic Canon*. (London: Verso, 2005); Boaventura de Sousa Santos, ed., *Another Production is Possible. Beyond the Capitalist Canon* (London: Verso, 2006); Boaventura de Sousa Santos, ed., *Another Knowledge is Possible. Beyond Northern Epistemologies* (London: Verso, 2007); Boaventura de Sousa Santos, ed., *Voices of the World* (London: Verso, 2010), and Santos 2014.

differences are both substantive and the product of our intellectual and professional trajectories.

As regards our similarities, both of us had a strong extra-European experience (in Africa, in Twining's case; in Latin America, in mine), which helped us to contextualize (relativize) the Western canon of law. We both had a solid training in Western legal theory: Twining at Oxford and myself at the University of Coimbra and the Free University of Berlin; Twining in the common law tradition and myself in the continental law tradition. We both experienced the cultural and scientific shock of North America: Twining at Chicago Law School and myself at Yale Law School. In this respect, we arrived in the USA at crucially different times. I arrived at Yale eleven years after Twining, at the climax of the protests against the Vietnam War and civil rights movements. I had the opportunity of becoming a Marxist at Yale, while Twining had to forget at Chicago the Marxism he had reluctantly encountered at Oxford.

Before I engage in our differences, the question of postmodernism must be set straight. Twining strongly disagrees with what he takes to be my postmodernism.³⁵ In the interview with Manuel Atienza and Raymundo Gama, in this volume, after declaring his 'ambivalences about "post-modernism"', Twining adds: 'I value multiple perspectives, I recognize almost infinite complexity, I believe that imagination is required for understanding, but underneath I am an old-style cognitivist, who distinguishes between epistemology and ontology.'³⁶ The problem is that if I were the 'postmodernist' he portrays me to be, I would not be a critical theorist, since I don't consider postmodernism, in the sense he uses the term, as part of the Western critical tradition. In my work, I have insisted on the distinction between celebratory and oppositional postmodernism, and made clear that only the latter deserves to be included in the critical tradition. While celebratory postmodernism assumes that the modern problems of freedom, equality and fraternity are irresolvable and therefore should not concern us, the oppositional postmodernism affirms the validity and even the cogency of the modern problems, but claims that the modern solutions are not available any more (assuming that they were ever available) and other solutions have to be looked for. That is why, for instance, 'non-state law must be taken seriously'.³⁷ Although Twining acknowledges this difference,³⁸ he apparently gives no value to it. However, this difference is crucial and does not escape Gavin Anderson's attention (in this volume).

But I must concede a point to Twining in this regard. The term 'postmodernism' was so overloaded by the celebratory conception of it that I, frustrated with my incapacity to impose the oppositional conception, decided to abandon

³⁵ For instance, Twining 2009a, at pp. 194–244.

³⁶ See *An Intellectual Journey with William Twining (An Interview)*, Manuel Atienza and Raymundo Gama, in this volume.

³⁷ Twining 2009b, at p. 362. ³⁸ Twining 2009b, at p. 320.

the concept in 2004. This was also the time at which my critique of capitalism was more and more intertwined with my critique of colonialism – my post-colonial turn; hence the title of my piece ‘From postmodernism to postcolonialism and beyond both’.³⁹

The substantive differences between our critical theories of law have been brilliantly laid out by Gavin Anderson (in this volume) and I do not have much to add. I would just like to stress the following points. Concerning globalization, Twining considers that my ‘ideological conception of globalization’ limits my agenda,⁴⁰ in particular, my insistence on the bottom-up approach, and the distinction between regulatory and emancipatory law. For me, the suppressed, invisible or silenced experiences, voices, practices and knowledge are not the product of scholarly inertia or innate myopia or deafness; they are, rather, the direct or indirect result of the systemic contradictions and inequalities caused by capitalism, colonialism and patriarchy throughout the modern era. In particular, colonialism (articulated with capitalism) caused forms of radical exclusion and invisibility grounded on the separation between metropolitan and colonial societies. I have metaphorically described this separation as drawn by an abyssal line according to which the social realities on the other side of the line (colonies) could in no way compromise the universality of the conceptions developed to characterize the social realities on this side of the line (metropolitan societies).⁴¹ This explains why, in the late nineteenth century, labour law could be part of embryonic welfare law on this side of the line (in Europe) and part of penal law (*chibalo*) on the other side of the line (in the colonies), without this discrepancy implying any analytical flaw or contradiction.⁴² In my view, a position is ideological which prefers not to remember this past and the wrongs it caused.

³⁹ The paper was presented at the *Luso-Afro Brazilian Congress of Social Sciences* held in Coimbra on 16 September 2004. The German version was published in 2005: Hauke Brunkhorst and Sérgio Costa, *Jenseits von Zentrum und Peripherie. Zur Verfassung der fragmentierten Weltgesellschaft* (Mering: Hampp Verlag, Buchreihe Zentrum und Peripherie, 2005); the Spanish version in 2008: Boaventura de Sousa Santos, *Conocer desde el Sur. Para una cultura política emancipatória* (La Paz: Plural Editores, 2008); CLACSO; CIDES-UMSA and the English version in 2010: Boaventura de Sousa Santos, ‘From the Postmodern to the Postcolonial – and Beyond Both’ in Encarnación Gutiérrez Rodríguez, Manuela Boatca and Sérgio Costa (eds), *Decolonizing European Sociology. Transdisciplinary Approaches* (Farnham: Ashgate, 2010), pp. 225–42), too late to be considered by Twining in his *General Jurisprudence*.

⁴⁰ Twining 2009b, at pp. 242, 447–8.

⁴¹ Boaventura de Sousa Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’, *Review* (2007), XXX (1), pp. 45–89 [hereafter, Santos, 2007] and Santos 2014, at pp. 118–36.

⁴² Modern Western thinking is an abyssal thinking. It consists of a system of visible and invisible distinctions, the invisible ones being the foundation of the visible ones. The invisible distinctions are established through radical lines that divide social reality into two realms, the realm of ‘this side of the line’ and the realm of ‘the other side of the line’. The division is such that ‘the other side of the line’ vanishes as reality becomes nonexistent, and is indeed produced as nonexistent. Nonexistent means not existing in any relevant or comprehensible way of being. Whatever is produced as nonexistent is radically excluded, because it lies beyond the realm of what the accepted conception of inclusion considers to be its other. What most fundamentally

Concerning the Western legal canon, both Twining and I are critical of conventional understandings. Twining defines his general jurisprudence as critical jurisprudence.⁴³ In this respect, our differences are both substantive and of emphasis. I agree with Twining that the West has a very 'rich heritage of texts and ideas'⁴⁴ and commend him for his brilliant effort to expand, revise and reinterpret the canon and the mainstream, on the basis of a critical assessment of its assumptions.⁴⁵ I think, however, that revising the canon may not suffice, since much of the modern world experience, in particular the one on the other side of the line, never entered the canon. This explains why the canon, no matter how expanded and revised, cannot to this day accept that the understanding of the world by far exceeds the Western understanding of the world, a key assumption of my critical theory since 1995.⁴⁶ My emphasis on the bottom-up approach and grass-roots movements with impact on law is based on my conviction that, in spite of all the much-needed revisions of the canon, so masterly crafted by Twining, in the end it will be necessary to re-found the canon if we want to expand the 'conversation of the world' that John Dewey called for.⁴⁷ One of my most recent empirical studies on bottom-up constitutionalism, a concept that Gavin Anderson so perceptively underlines,⁴⁸ deals with the recent constitutional processes and movements in Bolivia and Ecuador, unfortunately not yet available in English.⁴⁹

This leads me to the final point of difference between Twining and Santos. It concerns epistemology; that is to say, the inquiry into the identification of and the conditions for the production of valid knowledge. Our difference does not lie in whether there is a difference between epistemology and ontology. We both distinguish between epistemology and ontology, but we subscribe to

characterizes abyssal thinking is thus the impossibility of the co-presence of the two sides of the line. To the extent that it prevails, this side of the line only prevails by exhausting the field of relevant reality. Beyond it, there is only nonexistence, invisibility, absence. . . In the field of modern law, this side of the line is determined by what counts as legal or illegal according to the official state or international law. The legal and the illegal are the only two relevant forms of existing before the law and, for that reason, the distinction between the two is a universal distinction. This central dichotomy leaves out a whole social territory where the dichotomy would be unthinkable as an organizing principle; that is, the territory of the lawless, the a-legal, the non-legal, and even the legal or illegal according to non-officially recognized law. Thus, the invisible abyssal line that separates the realm of law from the realm of non-law grounds the visible dichotomy between the legal and the illegal that organizes, on this side of the line, the realm of law (Santos 2007, at pp. 45–89 and Santos 2014, at pp. 118–35).

⁴³ Twining 2009b, at p. 449. ⁴⁴ Twining 2009b, at p. 449.

⁴⁵ I myself have done this with Western philosophy: Boaventura de Sousa Santos, 'A Non-Occidental West?: Learned Ignorance and Ecology of Knowledge', *Theory, Culture & Society Special Issue: Occidentalism: Jack Goody and Comparative History* (2009), 26, pp. 103–25. See also Santos 1995.

⁴⁶ Santos 1995 and Santos 2014.

⁴⁷ John Dewey, 'Common Science and Science' in John Dewey and Arthur Bentley, *Knowing and Know* (Boston: Beacon Press, 1949), pp. 270–86.

⁴⁸ In this volume and also Gavin W. Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism', *Indiana Journal of Global Legal Studies* (2013) 20 (2) pp. 881–906.

⁴⁹ Santos and Exeni 2012 and Santos and Grijalva 2012.

different epistemologies and ontologies. I cannot address this difference in any detail here. Suffice it for me to say that, for me, scientific, scholarly knowledge is a crucially important type of knowledge but not the only one; that most people around the world conduct their lives and conceive of their laws in non-scientific ways. These other knowledges have to be brought into the analysis through two procedures that I designate as ecology of knowledge⁵⁰ and inter-cultural translation.⁵¹ Unless this is done, we, the critical theorists, will face the dilemma of reproducing cognitive injustice in the process of drawing attention to it. In my view, there is no global social justice without global cognitive justice. Of course, mainstream theorists do not even understand the dilemma, much less care about it. According to them, cognitive justice is an obnoxious concept; ignorant people are just ignorant, and it is our duty to teach them about our Western-centric scientific, scholarly knowledge, which is the only valid form of knowledge.

It would be fascinating if Twining and I could have a dialogue on the challenges posed by the 2011–13 indignation revolts to our critical theories. In its absence, in the following I briefly present my own response. In the final section, I venture some speculative notes on what Twining's response might look like. I hope that this will clarify even further our convergences and divergences.

3. Law and the indignation revolts

As one might expect, the protesters were not in the least interested in entertaining a reflection about the law and its role in society. If law, like no other attribute of the modern state, symbolizes the idea of institution and institutionalization (law and order), it is to be expected that the indignation movements would have very little to say about law, even when they had a lot to say about rights. After all, most of the protests were declared illegal and, from the very beginning, there were several attempts to ban them. The protesters' recourse to the direct action of occupation underlined the anti-institutional or extra-institutional impulse behind their protests. Moreover, the justification for recourse to direct action, particularly in democratic contexts, was that state institutions, supposedly at the service of citizens and charged with protecting their citizenship rights, were not performing the functions for which they were designed. They had been taken over by the power elite to serve their interests. What I propose here is, therefore, a hypothetical reconstruction. If the indignation revolts would have had time or interest in developing a critical theory of law underlying their struggles, what would it have looked like? How would they conceive of law? According to them, what would the role of law in society be? What was the concept of law underlying their collective action? In their understanding, how was law related to the state and the civil society?

⁵⁰ Santos 2014, at pp. 188–211. ⁵¹ Santos 2014, at pp. 212–35.

My interest in these questions was both political and analytical. I participated as an activist in some of the mobilizations in Portugal and held several meetings with the protestors in Coimbra, Lisbon and Madrid, and showed my solidarity with them to the best of my ability, including through writing newspaper articles and participating in TV and radio interviews and debates. I shared many of their concerns and struggles and experienced a similarly intense sense of indignation, and for the same reasons. As far as the critical theory of law and the questions formulated above are concerned, I had a specific analytical interest. The indignation revolts seemed to contradict the critical sociological theory of law that I have been developing over the years. One of the main features of such a theory is the idea that, under certain conditions, law can be used to promote progressive social transformation: what I have been designating as the counter-hegemonic use of law. Elaborating on such a possibility, the last chapter of my book *Towards a New Legal Common Sense*⁵² is entitled: 'Can Law be Emancipatory?'⁵³ To this question, the indignation revolts seemed to answer with a resounding 'no'. Reading or listening to their declarations, I sensed that they were confronting me with the idea that I was entertaining a liberal reformist fantasy with no bearing in real life. If they were right, was I wrong?

In light of the differences between the three types of revolts and mobilizations I identified above, there is no monolithic conception of law implicit in them. There are, however, some 'elective affinities'⁵⁴ among various elements present in all of them, albeit with differing intensity. Central to the conception of law underlying the indignation revolts is the configuration of power relations prevailing in society. The law of the state is a crucial component of such configuration. Law is not autonomous in relation to prevailing power relations in society in any relevant sense. Law is politics by other means. But the embeddedness of law in power relations and politics (and *vice versa*) may be viewed from three different perspectives. In order to identify them,

⁵² Santos 2002. I conceive of globalization as an internally fractured and indeed contradictory process, not only because it generates processes of localization (for example, the globalization of English Language localizes the German language, as much as the globalization of Hollywood filming 'ethnicizes' French filming) but also because globalization itself mirrors the contradictions of capitalist development. Concerning the latter, side by side with the by far dominant and hegemonic globalization of capital (neoliberal globalization), there is a globalization from below which I designate as counter-hegemonic. I define as 'counter-hegemonic globalization' the vast set of networks, initiatives, organizations and movements that fight against the economic, social and political outcomes of hegemonic capitalist globalization, challenge the conceptions of world development underlying the latter, and propose alternative conceptions. Boaventura de Sousa Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' in Boaventura de Sousa Santos and Rodríguez-Garavito, César (eds), *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge University Press, 2005), p.29. See also Santos 1995 and Santos 2006.

⁵³ Santos 2002, at pp. 439–66.

⁵⁴ The well-known title of Goethe's novel was later adopted by Max Weber in analyzing the elective affinities between the rise of capitalism and the protestant ethics: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (London & Boston: Unwin Hyman, 1930).

I distinguish among three types of law: configurative law, reconfigurative law and prefigurative law. 'Configurative law' is law as it reflects a given configuration of power relations. If these power relations are unequal and bound to produce injustice and oppression, law will be equally unjust and oppressive. 'Reconfigurative law' is law in the process of being resorted to in order to change power relations, and to reconfigure the correlation of forces in society. Reconfigurative law is law underlying what I have been calling the counter-hegemonic use of law. 'Prefigurative law' is expressive or performative law, law that expresses in its practice the anticipation of a different society based on a totally different set of power relations. In the following I will refer to them separately.

4. Configurative law: the abyssal duality of law⁵⁵

According to the indignation revolts, in current capitalist societies there is an abyssal legal duality, a kind of legal pluralism that legal scholars have failed to recognize. Rather than being a duality between state and non-state law, it is an entrenched duality at the core of capitalist state law. To conceive it as the discrepancy between law in books and law in action, as conventional sociology of law does, implies that we face a contingent deviation and that the discrepancy could be overcome. For the indignant, both assumptions are wrong. The official state law has been pre-occupied by the power elites, the oppressors, whoever they are. This pre-occupation operates through a radical divide between two legal systems: the law of the 1% and the law of the 99%, the law of the oppressor and the law of the oppressed. This divide is both radical and invisible. They are incommensurable and intrinsically bounded together. They are bounded together not just because they coexist in the same geopolitical space. They are, indeed, produced by the same legislative power and adjudicated by the same judicial system. They both operate through systematic deviations from the general principles in which they are supposed to be grounded. And yet they remain incommensurate. The discrepancy between law in books and law in action, rather than a deviation or aberration, is constitutive of this type of pre-occupation. By negating the constitutive character of the discrepancy between law in books and law in action and, on the contrary, by proclaiming the unity, neutrality, autonomy and universality of the law, dominant political ideology and expert legal knowledge cannot possibly imagine the coexistence of the two legal systems. Any attempt at alternative ways of occupying the law by those excluded from power – the oppressed, by far the large majority of the population – is thus neutralized as unintelligible or simply outrageous.

However, the invisibility of such legal duality is not an exclusive product of the still-strong hegemony of legal liberalism. It has been favoured by the

⁵⁵ On the concept of the abyssal line, see note 42 above.

tendency of people to underestimate the signals of a major incoming destructive event or disaster only because they have never experienced it and have difficulty in figuring out its full consequences. We can call this 'a normalcy bias', and it is strongly reinforced by the corporate media.⁵⁶ Intoxicated by the promises of infinite progress, people tend to view as irreversible any improvement whatsoever that they experience in their life histories.⁵⁷ They tend to interpret in the most optimistic possible way any warnings that reversibility may be on the horizon, let alone that it is already taking place. Against evidence to the contrary, they go on believing that law represents a sovereign project and that it defends the common good through democratic government. As far as the duality between the law of the 1% and the law of the 99% is concerned, people have tended to view the changes occurring (above all, the concentration of wealth and the 'pre-occupation' of the state and its law by minoritarian powerful interests) as not compromising the fundamental unity of law. Indeed, the normalcy bias leads common citizens to believe that, in spite of all its shortcomings, democracy still works to the benefit of all the citizens, and that law is still behind David whenever Goliath tries to impose his rule. This belief is reinforced by a companion one, which I will call 'pre-emptive damage bias': this is the idea that more serious evils and disasters will be prevented from occurring tomorrow if people agree to endure today comparatively minor damage to their welfare.

The abyssal line that divides the two legal systems bears some similarities with the one that divided the metropolitan law from the colonial law in the period of historical colonialism, except that now the two laws are exercised in the same geopolitical territory. In the play of legal mirrors prevalent in society, there is no way that law could be reflected in its entirety. As a result, it remains invisible that 'law and order 1' is the other side of 'law and order 2' (which the 99% consider to be the disorder imposed on them by the 1%), and that in our societies 'the rule of law 1' goes side by side with 'the rule of law 2' (which the 99% consider to be the illegality imposed on them by the 1%).

⁵⁶ The concept of 'normalcy bias' has been developed in the theories of risk and disaster. The normalcy bias, or normality bias, refers to people entering a mental state when facing a disaster. It causes people to underestimate both the possibility of a disaster occurring and its possible effects. This often results in situations where people fail to prepare adequately for a disaster, and on a larger scale, the failure of governments to include the populace in its disaster preparations. The assumption that is made in the case of the normalcy bias is that, since a disaster never has occurred, then it never will occur. It also results in the inability of people to cope with a disaster once it does occur. People with a normalcy bias have difficulty reacting to something they have never experienced before. People also tend to interpret warnings in the most optimistic way possible, seizing on any ambiguities to infer a less serious situation. As a tragic example, see the normalcy bias at work in the case of the cyclone of 1991 that claimed the life of 140,000 people in Bangladesh. See Iware Matsuda, 'Loss of Human Lives Induced by the Cyclone of 29-30 April, 1991 in Bangladesh', *Geo Journal* (1993) 31 (4), pp. 319-25.

⁵⁷ As I hope it will be easily understood, I am here reconstructing the implicit discourse of the indignant on these issues.

In the last sixty years, the abyssal divide at the heart of law in capitalist societies has never been as radical and damaging for the vast majorities of our societies as it is today. It is the result of a thirty-year-long counter-revolution of the 1% against the social gains the 99% had obtained in previous decades through struggles carried out within the boundaries of the liberal democratic process. Through such struggles, some measure of social redistribution was achieved, partly through the expansion of enforceable social and economic rights. Prevailing power relations were thereby changed in the core countries of the world system; the best expression of such change was the creation of European-style social democracy and the Welfare State. In the last thirty years, the power elites, seconded by the global financial capital, have managed to reverse this historical process, hijacking democracy and putting it at the service of their exclusive interests. As a result, we live today in societies that are politically democratic but socially fascist.⁵⁸ This political split is the mirror image of the legal split.

The workings of dual legality

Let us now examine in greater detail the duality between the law of the 1% and the law of the 99%. In spite of its radical nature, this split has been achieved without any suspension of the Constitution, and without any declaration of the state of exception.

The law of the 1% is a status law, a personal law in the Weberian sense.⁵⁹ The law of the 99% is territorial law; it is the way of operation of the law when it addresses the needs and the aspirations of the 99%. The law of the 1% is conceived by the powerful as its own; as a consequence, the application of law is ruled by the idea of who does what against whom, rather than by the idea of what is done against no matter whom. According to the indignation conception of law, the balanced articulation among the three structural elements of modern state law – rhetoric, bureaucracy and violence⁶⁰ – is today completely absent, if it ever existed. On the contrary, there is now a structural imbalance between the three components. The law of the 1% operates almost exclusively through rhetoric. In recent years, the proliferation of soft law and forms of

⁵⁸ The present fascism is not a political regime. It is rather a social and civilizational regime. Rather than sacrificing democracy to the demands of capitalism, it trivializes democracy to such a degree that it is no longer necessary, or even convenient, to sacrifice democracy in order to promote capitalism. It is a type of pluralist fascism produced by the society rather than by the state. The state is here a complacent bystander, if not an active culprit. We are entering a period in which democratic states coexist with fascistic societies. This is, therefore, a form of fascism that never existed (Santos 2002, at p. 453).

⁵⁹ Referring to the patrimonial monarchical codification of Central Europe, Max Weber writes: 'essentially constituted merely the status law of the small privileged strata and left untouched the special institutions of the other estates, especially the peasantry, i.e., the great majority of the subjects'. Max Weber, *Economy and Society. An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), at p. 858.

⁶⁰ On the three structural components of modern state law, see Santos 1995 at p. 430.

governance based on voluntary compliance has dramatically shown the prevalence of rhetoric in the law of the 1%.⁶¹ On the contrary, the law of the 99% operates through bureaucracy and violence, and in recent times more through violence than bureaucracy, as illustrated by the criminalization of social protest.⁶² Rhetoric is at most used to induce resignation by those faced with the excessive use of bureaucratic violence⁶³ by state bureaucracies or physical violence by the police.

Two illegalities

As there are two laws, there are two illegalities: the illegality of the powerful and the illegality of the powerless. The illegality of the powerful operates in two ways: first, through impunity or, in a few cases, through resort to the granting of immunity, and, second, through the adoption of illegitimate legal changes to suit their interests. In the first case, they use their overriding interpersonal, financial and organization resources to twist legal adjudication to their advantage; in the second case, they manipulate the legislative process either by engaging in illegal corruption (bribes, traffic of influences) or in legal corruption (lobbying). Only when an illegality committed by some powerful person or group affects the interests of some other powerful person or group, is it treated according to the principle of equality before the law. On the contrary, the illegality of the powerful committed against the powerless remains largely without punishment, be it, for example, wage theft, salary and pension cuts in violation of contracts and agreements, excessive credit commissions or overcharging, illegal foreclosures or excessively long prison sentences for minor offences.

⁶¹ I have addressed this issue in Santos and Rodriguez-Garavito 2005 at pp. 29–64.

⁶² In the last fifteen years many countries have promulgated anti-terrorism laws that have often been used to repress and punish peaceful social protests. For instance, throughout Latin America indigenous peoples have been punished under the severe anti-terrorism laws for blocking roads in protest against the transnational corporations, thus impeding the trucks of mining or timber companies from entering their ancestral territories. On the criminalization of social protest see, among many others, 'TADA: Hard Law for Soft State', *Economic and Political Weekly* (2000) 35 (13), pp. 1066–71; Paula Abal Medina and Mariana Ortega Breña, 'Thoughts on the Visual Aspect of the Neoliberal Order and the Piquetero Movement in Argentina', *Latin American Perspectives* (2011) 38 (1), pp. 88–101; Xavier Flores Aguirre, 'Criminalización de la Libertad de Expresión: Protesta Social y Administración Local en Guayaquil', *Iconos. Revista de Ciencias Sociales* (2007) 27 Quito, pp. 65–75; Paula Daibert, 'To Protect or Punish: New Anti-Terrorism Law Proposed in Brazil Could Curb Right To Protest', *Witness* (2014), blog.witness.org/2014/06/proposed-anti-terrorism-law-brazil accessed 14 June 2014; CONAIE, 'Ecuador Indigenous Leaders Charged with Terrorism and Sabotage Correa Administration Seeks to Criminalize Dissent and Peaceful Protest', *Amazon Watch* (2010), amazonwatch.org/news/2010/0701-ecuador-indigenous-leaders-charged-with-terrorism-and-sabotage accessed 1 July 2010; 'Pakistan protest leaders charged under anti-terror act', *World Bulletin*, www.worldbulletin.net/nawaz-sharif/143513/pakistan-protest-leaders-charged-under-anti-terror-act accessed 1 September 2014.

⁶³ As in the case of using the rhetoric of the war on terror to justify secret laws, disproportionate punishments, restriction on defendants rights, secret detention camps, Guantanamo etc.

By contrast, the law of the 99% treats the illegality of the powerless with excessive harshness. Minor violations of the criminal, civil or administrative law tend to be severely punished. The outstanding example in recent years is the criminalization of social protest.⁶⁴ The application of severe anti-terrorism laws against political dissent or social activism has become the norm, involving not only severe punishment for minor disturbances of public order, but also police brutality and the grotesque violation of privacy through the most intrusive forms of surveillance. Moreover, in many instances, the protesters act in self-defense, resisting illegal acts of the powerful, which the law of the 1% leaves unpunished. This is dramatically illustrated in the cases of peasants and indigenous people blocking roads to prevent the devastation of their forests by agri-business or timber industries, or resisting expulsion from their lands and territories by promoters of large-scale mining, industrial agriculture, dams or other megaprojects being carried out without their consent or consultation, as required by international law and, in most cases, with the complicity of corrupt governments.

The legal, the illegal and the alegal

Configurative law also has a propensity to engage in forms of social control that do not fit the conventional legal–illegal dichotomy. These are forms of social control in which the only effective behaviour is considered to be unbounded discretionary behaviour and, indeed, the more arbitrary the more effective. This is the field of alegality. Just two examples from different areas of social control will suffice. While managing the financial and budgetary crisis, the power elite may resort to emergency measures of dubious constitutional legality, imposing immense sacrifices on the 99%, while exempting the 1%, even when a minor sacrifice on the part of the latter would have diminished considerably the overall negative effects of the crisis.⁶⁵ The other example is taken from the so-called war on terror.⁶⁶ In this case, the controls on behaviour introduced in its name may become so arbitrary that to consider them illegal does not capture the full extent to which they are completely

⁶⁴ See note 62.

⁶⁵ This has been most notably the case of the ‘austerity measures’ imposed by conservative governments in Greece, Portugal and Spain since 2011. See, on this, Boaventura de Sousa Santos, *Portugal. Ensaio contra a Autoflagelação* (Coimbra: Almedina, 2012).

⁶⁶ There is an immense bibliography on the topic. See, for instance, Patrick P. Garlinger, ‘Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters’, *New York University Law Review* (2009) 84 (4), pp. 1105–47; Susan Herman, ‘The USA Patriot Act and the Submajoritarian Fourth Amendment’, *Harvard Civil Rights-Civil Liberties Law Review* (2006) 41 (1), pp. 67–132; X. Besar, *Journal of International Commercial Law and Technology* (2012) 7.2, pp. 121–35; Alan Rubel, ‘Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy’, *Law and Philosophy* (2007) 26 (2), pp. 119–59; Mark Fenster, ‘The Implausibility of Secrecy’, *Hastings Law Journal* (2014) 65 (2), pp. 309–62; Michael Sall, ‘Classified Opinions: Habeas at Guantanamo and the Creation of Secret Law’, *Georgetown Law Journal* (2013) 101 (4), pp. 1147–70.

outside legal controls. Secret laws and secret interpretation of the laws result in the accused before a secret court not being allowed (and his or her lawyer likewise) to know the law on the basis of which he or she is being accused and eventually condemned. The secret services are able to access much of the electronic communications of most people, whether they are suspected of any wrong-doing or not, as recently exposed by Edward Snowden. The cyberspace, Guantánamo, and the transit lounges of international airports all seem to be privileged sites and spaces of a legality, twilight zones beyond the legal-illegal dichotomy that grounds modern legal principles. These alegal spaces and courses of action are bound to expand as democracy gets hollowed out, the state of exception gets normalized, and citizenship slides into servitude.

International law and international relations

In the field of international relations, the law of the 1% is the law of plundering and dispossession. International law is the most blatant and violent instance of the abyssal division between the law of the 1% and the law of the 99%. As far as international law is concerned, the law of the 1% is the law that protects at the transnational level the interests of the power elites of the core countries and their satellite elites in the periphery and semi-periphery of the world system. This law operates by underwriting the particular forms of capital accumulation that Marx called primitive accumulation.⁶⁷ According to Marx, these forms of capital accumulation were particularly violent and illegal, consisting of actions such as taking over communal lands followed by the expulsion of peasants in order to expand the nineteenth-century textile industry in England, thus creating the conditions for the more normal, peaceful, legal and sustainable reproduction of capitalist economic relations. Marx, therefore, conceived these as part of an initial phase of capitalism.

It is now evident, however, that such primitive accumulation, rather than merely a phase, is a constant feature of capitalism when analyzed on a global scale, and it continues today under different forms.⁶⁸ First, and foremost, neocolonialism and imperialist warfare guarantee access to natural resources. Second, land grabbing throughout Africa and Latin America, and the massive expulsion of peasants and indigenous peoples from the land they had cultivated for generations, pave the way for the unprecedented (in both scale and intensity) exploration of natural resources. These consist of mega infrastructure projects (huge dams and highways), large-scale open pit mining and new plantation industrial agriculture for agro-fuels and animal feed. Third, there is the unprecedented transfer of wealth from impoverished middle and popular

⁶⁷ Karl Marx, *Das Kapital I* (New York: International Publishers, 1970), at part VIII.

⁶⁸ This argument was presented initially by Rosa Luxemburg, *The Accumulation of Capital* (London: Routledge & Kegan Paul, 1951 [1913]). In recent times it has been elaborated upon most cogently by David Harvey, *The Limits to Capital* (London and New York: Verso, 2006) and *A Companion to Marx's Capital* (London and New York: Verso, 2010).

classes to the 1% by stealing salaries and pensions, cutting social benefits and forcing people out of their foreclosed homes, all in order to 'solve' the financial crisis; that is, by bailing out banks and remunerating speculators – the same ones that caused the crisis in the first place by their irresponsible, if not criminal, behaviour.

From the perspective of those taking part in the indignation revolts, law is basically configurative law; law is split in two with the purpose of oppressing majorities in the name of the common good, which in real terms is the exclusive good of the 1%. Configurative law is thus intrinsically a hostile ground for protesters who should have no illusions about the possibility of resorting to it to further their causes.

5. Prefigurative law

The indignation revolts have generated prefigurative law, the law of the occupation, which is self-given and thus not imposed. This is bottom-up law generated in the exercise of occupation itself.⁶⁹ The occupation of the public space involves the creation of an alternative conception of that place, during a certain period of time, by a sizeable number of people. Such an occupation requires the adoption of some regulation and ordering, rules facilitating legitimate behaviour and punishing the illegitimate one, as well as some kind of law enforcement mechanism in order to guarantee the implementation of such rules. To the extent that they involved occupation or sustained resistance, the indignation revolts tended to generate these rules in assembly-based forms of participation and deliberation brought about by consensus. However, in order to prevent small minorities from transforming their dissent into a veto power, some movements have adopted majority rule and even secret voting. Such rules and rulemaking are the foundational social contract of the occupation. Like the law of the 1%, this occupation law is self-given – it is a self-rule – and operates on the basis of rhetoric; it is almost devoid of bureaucracy and violence.

This law is prefigurative in the sense that, in both its design and its exercise, it bears witness to a real preview or anticipation of an alternative law in an alternative society where democracy, justice and equality are actually living experiences.⁷⁰ This is the only form of legal pluralism to which the indignation

⁶⁹ Inspired by Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958), I have defended throughout my work a broad conception of law: first formulations in Boaventura de Sousa Santos, *Law against Law: Legal Reasoning in Pasargada* (Cuernavaca, México: Centro Intercultural de Documentación, 1974) and Santos, 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada Law', *Law and Society Review* (1977), 12, pp. 5–126. Referring to a more recent period, Twining 2009b, at p. 362 says, 'Recently some jurists interested in the implications of "globalisation" – including Glenn, Santos, Tamanaha, and Twining – have advanced arguments in favour of broader conceptions of law that include at least some examples of "non-state law".' As he rightly adds: 'this, not surprisingly, has met with some resistance.'

⁷⁰ This idea of real preview or anticipation is similar to the concept of real utopia put forward by Erik Ohlin Wright, *Envisioning Real Utopias* (London: Verso, 2010) to refer to really-existing

movement grants some positive value. In spite of its precarious, inchoate or embryonic appearance, this prefigurative law belongs to the same type of prefigurative law that existed in some liberated zones during the anti-colonial liberation movement⁷¹ and has been in force for some years in the autonomous territories of the neo-Zapatistas.⁷²

6. Reconfigurative law: can law be emancipatory?

In previous writings I have claimed⁷³ that the counter-hegemonic use of law presupposes, among other conditions, that legal mobilization must be part of a broader political mobilization. Legal mobilization involves going to courts to advance demands rather than to defend against criminal charges, putting pressure on the state bureaucracies in charge of implementing rights or mobilizing for legislative change. Political mobilization may involve different kinds of peaceful political activism, including direct action to advance causes in the political agenda. What the indignation revolts are saying is that the conditions for *legal* mobilization either do not exist or are deteriorating to such an extent that political mobilization must take unequivocal precedence over legal mobilization. According to the protestors, the impossibility of legal mobilization is the result of the rise of authoritarianism that has led to top-down extra-institutionalism or deinstitutionalization, disguised by the invisible split between the law of the 1% and the law of the 99%. As a result, social transformation through legal and judicial activism cannot be achieved under the current conditions of global capitalism.

According to the protestors, the conditions for a counter-hegemonic use of law, if they ever existed, have deteriorated to such an extent that nothing is left but a sad liberal fantasy, a hollow hope. Liberal democracy has proved impotent to neutralize the impulses of neoliberal capitalism to ever greater

practices that deviate in fundamental ways from conventional or hegemonic modes of conceiving of the economy or politics.

⁷¹ For the case of the liberated zones in Guiné-Bissau in the struggle against Portuguese colonialism conducted by Amílcar Cabral, see Boaventura de Sousa Santos, *A Justiça Popular em Cabo Verde* (Coimbra: Almedina, 2015).

⁷² For the case of the neo-Zapatistas see Subcomandante Marcos, *Nuestra Arma es Nuestra Palabra. Escritos Selectos* (New York: Seven Stories Press, 2001); Subcomandante Marcos, *Ya Basta!: Ten Years of the Zapatista Uprising: Writings of Subcomandante Insurgente Marcos* (Oakland, CA: AK Press, 2004).

⁷³ The counter-hegemonic conception of the law involves a search into subaltern conceptions and practices, of which I distinguish three types: 1) conceptions and practices that, though being part of the Western tradition and evolving in Western countries, were suppressed or marginalized by the liberal conceptions that came to dominate; 2) conceptions that evolved outside the West, mainly in the colonies and later in the postcolonial states; 3) conceptions and practices that are today being proposed by organizations and movements that are active in advancing forms of counter-hegemonic globalization. In sum, in a period of paradigmatic transition away from dominant modernity, subaltern modernity provides some of the instruments that will allow us to travel along in a progressive direction; that is, in the direction of a good order and of a good society that is not yet here (Santos 2002, at p. 446). See also Santos, 1995.

concentration of wealth and undemocratic political power. Citizenship and human rights are being eroded, even in the core countries of the world system; surveillance destroys privacy beyond recognition; elected governments respond to rating agencies rather than to citizens; corruption seems endemic; transfers of wealth from the poor to the rich reach scandalous levels that were previously thought to be possible only under dictatorship; and imperialist wars are being reinvented incessantly. All this takes place without constitutional rules and guarantees being formally suspended. Under these conditions, no significant reconfigurative law is possible.

Law can only be recovered as an emancipatory tool if democracy is refounded and, in a sense, reinvented. This explains the centrality of the calls for 'real democracy' in the indignation movement.⁷⁴ Essentially, 'real democracy' means a political regime that effectively promotes political, social and economic equality and respect for equal difference, by transforming unequal power relations into relations of shared authority in society at large and not just in the political realm. In other words, without profoundly reconfiguring power relations in a more equitable and democratic way, no reconfigurative law is possible. The appeal is not, therefore, to constitutional lawyering as usual, but rather to a radical democracy and a profound state reform brought about by a bottom-up, participative, political process through which the 99% will exercise a robust constituent power. Some have called this process 'transformative constitutionalism', having in mind some recent constitutional processes in Latin America, such as in Ecuador and Bolivia.⁷⁵

7. Conclusion: is it possible to occupy the law? Challenging Twining and Santos

In the preceding sections I outlined the main traits of the conception or conceptions of law and legal transformation that were implicit in the 2011–13 indignation revolts. I presented them as a challenge to the critical theory of law I have been proposing over the years. In order to refine the challenge, I offered a rough comparison between the critical legal theory formulated by Twining (as I understand it) and my own. Would these theories be equally disproved or challenged by the implicit understandings of the law present in the discourses and practices of the protestors?

⁷⁴ According to the *Carta por la Democracia* (Letter for Democracy), the framework proposed by the politics of austerity is, therefore, not to be accepted. Quite the opposite. There has never been so much wealth, but never has it been so badly divided and according to such antidemocratic and unfair criteria. This is why a complete reconsideration of the role of economic policies is needed in order to establish the principle of the populations' well-being above private, financial and corporate interests. At stake is the real, and not just formal, recognition that the laws of the market must be subordinated to the social role of the economy (movimientodemocracia.net). See also, *Objetivos Políticos del 15M Barrio del Pilar* (Madrid) barriodelpilar15m.wordpress.com/2014/06/28/objetivos-politicos-del-15m.

⁷⁵ See Boaventura de Sousa Santos, *Refundación del Estado en América Latina* (Bogotá: Siglo del Hombre Editores, 2010) [hereafter, Santos, 2010] and the bibliography cited there.

In his insightful comparative analysis of Twining and Santos in this volume, Gavin Anderson offers two possible readings: one that underlines the opposition between the two theories and one that shows the complementarity between them. Anderson opts for the second reading and convincingly shows the potential of such reading in guiding our analyses of the current transformations undergoing law and legal theory as a result of globalization and the emergent visions of cosmopolitanism. According to this reading, the top-down, sub-paradigmatic, statist (reformist) legal cosmopolitanism, defended by Twining, and the bottom-up, paradigmatic, grass-roots (revolutionary) legal cosmopolitanism, defended by me, complement each other in offering powerful – even if partial – accounts of current socio-legal transformations. As Anderson emphasizes: ‘Crucially, on this approach, each possesses an implicit awareness of the limitations of their own perspective, and so we can see their respective accounts of cosmopolitanism as the result of a mutual exploration of those limits.’ Moreover, Anderson suggests that the methodological consonance presupposed in the complementarity ‘should not hide the political divergence between the two: whereas Twining is content to join Santos in beginning to examine the implications of a bottom-up approach, his political commitment to the utility of modern law as a solution to globalization means that they part company as Santos ventures further into the territory of “uncivil and strange society” which sees modern law as part of the problem to be overcome.’

I agree with Anderson’s favoured reading and go further in the hypothesis of complementarity. I see it not only in the dialogue between Twining and me (external complementarity), but also among the different dimensions or layers of my own critical theory (internal complementarity). What I mean by the latter is the following. I have been defending in recent years the idea that we are in need not so much of alternatives to the *status quo* but rather of an alternative thinking of alternatives.⁷⁶ If this is true, we should envisage ways of overcoming the old distinctions between reform and revolution, or between sub-paradigmatic and paradigmatic and social transformation. As the 2011–13 protests show, social struggles are becoming more volatile and less structured in their organization, goals and means of struggle. They may combine limited reformist objectives and broad revolutionary ones, and may rapidly move from one type to another. Moreover, however extra-institutional in their initial impulses and forms of mobilization, some protests’ mobilizations have evolved towards forms of institutional political action. This is most notably seen in the case of the political party *Podemos*, formed by some groups within the *indignados* movement in Spain, and considered today one of the most successful political parties in Spain, poised to win the next legislative elections.⁷⁷ In both

⁷⁶ Santos 2014, at p. 42.

⁷⁷ According to the public opinion poll published by the daily newspaper *El País* on 11 January 2015, if the elections were held now, the party *Podemos* would get 28.2% of the vote, beating the socialist party (PSOE) with 23.5% and the conservative party (PP) with 19.2%, available at www.publico.pt/mundo/noticia/partido-podemos-a-frente-das-sondagens-em-espanha-ciudadanos-ganha-expressao-nacional-1681857 accessed 14 January 2015.

my recent empirical studies⁷⁸ and in my theoretical work (developed in greater detail in my chapter 'Can law be emancipatory?'),⁷⁹ I try to account for both possibilities, however sceptical I may increasingly be in relation to small-scale, reformistic, subparadigmatic legal transformations. Someone that lived part of his life under dictatorship will never fail to recognize that, depending on the circumstances, the most limited reformist moves may take revolutionary energy and involve the risk of illegal behaviour, if they are to be brought about successfully.⁸⁰ Different historical contexts may also explain why, in the Arab Spring, the protestors were fighting for a Western-type democracy, while the *indignados* movement, and especially the Occupy movement, viewed the practice of this type of democracy as irremediably corrupted and unusable for progressive purposes.

What mostly distinguishes my work from Twining's is my emphasis on the grass-roots, bottom-up movements of excluded groups in society as the prime movers of social transformation, be it paradigmatic or sub-paradigmatic. As far as I am concerned, such movements are bound to comprise more and more extra-institutional and even illegal forms of mobilization. In the end, it was this characteristic of the 2011–13 protests that attracted my attention. It is difficult for me to imagine that Twining might have been attracted in a similar way. Our differences are probably not only theoretical and political, but also temperamental and affective.

Coming back to my conception of the counter-hegemonic use of law, I do not view the indignation revolts as evidence of a complete rebuttal of my theory, but rather as demanding a critical revision: without effectively changing the most political dimension of the law – constitutional law, founding both the state and the political system – no other progressive social transformation through law is to be expected. In the end, the indignation revolts, rather than supporting the counter-hegemonic use of law in general, focus their struggles on one specific counter-hegemonic use of a specific branch of law: constitutional law. The goal of transformative constitutionalism is premised upon such counter-hegemonic use. Only a reconfigurative constitutional law, combined with the continued bottom-up pressure that led to it, will reinstall in society the general possibility of a counter-hegemonic use of law.

⁷⁸ Santos 2010 and Boaventura de Sousa Santos and Flávia Carlet, 'The movement of landless rural workers in Brazil and their struggles for access to law and justice' in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Abingdon: Routledge, 2010), pp. 60–82.

⁷⁹ Santos 2002, at pp. 439–66.

⁸⁰ I spent part of my adult life in Portugal under the dictatorship of Salazar, which lasted for 48 years and only ended in 1974 in the aftermath of the Carnation Revolution.