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Reassessing Social Movements' Position and Normative Force in Constitutional Settings

Abstract: The present article examines the new position of social movements in constitutional settings. It argues that social movements – both structured and unstructured – have rearranged themselves both normatively and spatially to create new means to influence law and politics. The article sketches out new forms in which social movements have understood their ways of organizing and the possibilities for advancing legal and political change in constitutional settings. Using Judith Butler's theory of assemblage and Bruno Latour's concept of terrestriality, the article examines how social movements read constitutional settings, such as domestic constitutional apparatuses and international institutions, to advance their political and legal agendas. The article does not limit itself to a pure public law perspective but also incorporates insights from public international law.

Zusammenfassung: Der vorliegende Artikel untersucht die neue Bedeutung sozialer Bewegungen in verfassungsrechtlichen Kontexten. Es wird argumentiert, dass strukturierte wie auch unstrukturierte soziale Bewegungen sich sowohl normativ als auch räumlich neu aufgestellt haben, um auf Recht und Politik Einfluss zu nehmen. Der Artikel skizziert die neuen Formen, in denen sich soziale Bewegungen organisiert haben, um rechtliche und politische Veränderungen in einem verfassungsmäßigen Rahmen voranzutreiben. Mithilfe von Judith Butlers Theorie der Assemblage und Bruno Latours Konzept der Terrestrialität untersucht der Artikel, auf welche Art und Weise soziale Bewegungen verfassungsrechtliche Kontexte, Instrumente und Institutionen auf nationaler und internationaler Ebene für ihre politischen und rechtlichen Ziele nutzen. Der Artikel beschränkt sich nicht auf eine rein öffentlich-rechtliche Perspektive, sondern bezieht auch Erkenntnisse aus dem Völkerrecht mit ein.

Keywords: Social Movements, constitutional settings, assemblage, terrestriality

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A Introduction

Recently, the world has seen many demonstrations against many things gone wrong (or some right) in different countries. The US and the subsequent global protests against racism were most prominent, initiated by the Black Lives Matter movement. The impact of the movement and the protests has been felt worldwide. If not everywhere, at least in many countries, it has sparked a fierce debate about racism. In the US, cities have begun debating whether they should defund police departments, and the discussions as to what can be done to prevent further racist actions by police at the Federal level have picked up the pace.[1] In the Netherlands, some cities have prohibited using the *Zwarte Piet* blackface during Sint Claus festivities.[2] In Germany, the debate about using the term race in the constitution has again been brought to the fore.[3] Also, during the ongoing Covid-19 pandemic, many have taken to the streets to protest against the various restrictive measures imposed by governments to curb the spread of the virus and safeguard the proper functioning of public health systems. Although not comparable to the Black Lives Matter protests, some of these demonstrations have been enough to generate debates about the legality and constitutionality of specific measures.[4] Environmental movements have also become increasingly active, and protests demanding action against climate change and international institutions have become a typical feat of everyday life.

In this context, constitutional settings appear as prime normative places for understanding movements' existence and activities. In creating, within the public sphere, a debate about issues often left out of or ignored within regular politics, movements become decisive actors in *changing the narrative* (Dryzek et al. 2003: 132–133, Dryzek 2013: 6) in political and legal life. This is a trait shared by both left and right-wing movements and showcases their disregard for various public institutions both at the national and international levels (see D'Almeida 2007: 130, Tarrow 2012: 271).[5]

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1 '*How Black Lives Matter Changed White Voters Mind*,' New York Times, 27 June 2020.

2 'Ook Nijmegen en Arnhem doen Zwarte Piet in de ban', *RTL Nieuws*, 11 June 2020.

3 'Der Abschied vom R-Wort naht' *Suddeutsche Zeitung*, 30 June 2020; 'Die "Rasse" soll verschwinden', *Die Zeit*, 11 June 2020.

4 In Germany, for instance, there was a strong debate about how much these measures would violate fundamental rights of citizens. See J Habermas & K Gunther, 'Kein Grundrecht gilt grenzenlos', *Die Zeit*, 9 May 2020.

5 In Latin-America, both right-wing and left-wing movements take international institutions, such as the World Bank and the International Monetary Fund (IMF) – and not only domestic public bodies – as targets of their actions. For an overview, (D'Almeida 2007).

This article aims to reassess how both structured and unstructured social movements transformed their positions in constitutional settings, both international and national, and how this has impacted the different ways they advance their demands in the political arena. To this end, rather than assessing a specific social movement and how it operates under different constitutional contexts, the article offers an assessment of how social movements generally have rearranged their political and legal positions to adapt to other normative circumstances. This rearrangement has had a significant impact on how one understands the spatiality of movements and the tactics and strategies to move forward their agendas. The article thus presents a socio-legal analysis of how social movements have repositioned themselves to articulate their demands in legal spaces without limiting themselves to domestic constituencies or mechanisms to precisely effect changes nationally (the so-called *boomerang effect*).

For this purpose, the first section looks at the normative context under which the rearrangement of social movements' position will be assessed. The following section engages with the conceptual basis for the foundations of modern collective action and how the variety of activities in which movements engage has developed. Section 4 examines how social movements have created new political and legal action geography. It takes stock of such new spatiality and the consequences that can be drawn. The last section looks at how movements have transformed their normative force in domestic and international constitutional settings and how such actions affect their general position in the blurred lines of national and international frameworks.

B What Normative Context for Social Movements?

Before directly engaging with the constituent elements of collective action, it is necessary to clarify certain aspects of social movements' normative potential and their *meaning* within constitutional contexts. Generally, social movements arise from a certain groups' broader sentiment of disenfranchisement. This sentiment is inextricably connected to these groups' conditions of precarity (Butler 2015: 66).[6] Such a precarity is demographically distributed (Butler 2015: 66) and directly relates to how the public and communities are established (Dewey 2011: 176). Yet it is crucial to distinguish the different ways social movements operate normatively

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6 Butler illustrates how precarity can spark fundamental societal changes by referring to the struggle for the rights of gender and sexual minorities as not mere representations of struggle for social justice, but also for a more radical democratic project (Butler 2015: 66–67).

and in which normative orders it seeks to exercise their influence. Claims and demands put forward by movements navigate a wide range of normative contexts and only so often are framed in terms of rights.

Indeed, movements like the *Rebelion Popular* in Chile, aiming at pushing for a new national constitution, or the *Women's Strike*, in Switzerland are good examples of how claims that could be otherwise just taken as moral or social are articulated to be made sense in terms of rights. For as much as movements may articulate moral arguments as the basis for their operations, more often than not, they intend to have practical political and, more importantly, legal impact. Indeed, legal change is not the point of departure for social movements as they are the 'point of arrival,' one that seeks either legislative transformation or the rereading of principles to curb injustices and precarity (see Gardels 2020).[7] Generally, movements indeed organize as a form of resistance to various precarious situations affecting them, making clear the very values for which they struggle (Butler 2015: 75).

One general guiding principle that rests at the origin of movements, be they on the right or the left, is the idea of fairness (Delmas 2018: 109). Such a concept of fairness can be articulated in different ways and by different means, but it often requires that claims and demands are made under the umbrella of legality (Delmas 2018: 111). The various tactics and strategies advanced by movements represent forms of resistance that are still embedded in the game's rules and the practices of a legal system. The fact remains that movements use their 'performative power' to claim things publicly. However, it is not yet 'codified into law' and may never be integrated into a legal system (Butler 2015: 75). Once people transpose ideas from the private sphere to the public and 'speak,' their discourses often challenge and critique the very principles of justice articulated in a legal system, thereby making organization and gathering a decisive form of democratic participation (Butler 2015: 75). The exercise of such capacity to speak and to act is, for example, understood by Judith Butler as a type of exercise of rights (Butler 2015: 75). These are often moments where a legal system is called into question. Still, no replacement has been implemented. The 'assemblage'[8] of bodies 'articulate a new

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7 As Gardels argues: 'Laws are not so much a point of departure as a point of arrival that codifies new rights demanded from within societies awakened to the need for their just confirmation. Such demands don't just arise by themselves off the parchment of hallowed constitutions but are activated by social movements that force the reinterpretation of principles lain dormant by convention and prejudice.' (Gardels 2020).

8 Butler derives her concept of assemblage from Jasbir Puar, more specifically Puar's *Terrorist Assemblage* (Puar 2017), who in turn adapted the concept of *agencement* from Gilles Deleuze (Puar 2017: xiii, xxvi). In this context, an assemblage is not merely a gathering of things, or

time and space for the popular will,' which is defined instead by 'an alliance of distinct and adjacent bodies whose action and whose inaction demand a different future' (Butler 2015: 75).

Other forms of action are legally framed and are taken mainly in respect of certain topical areas, such as human rights. In these cases, the mechanisms used are usually those made available by legal systems to challenge typical interpretations of what constitutes certain fundamental rights (See Kaleck 2021). This has been the case for the longest time in various jurisdictions. Gerald Rosenberg has shown how movements have made valid cases and pushed the US Supreme Court to engage in a significant legal change on multiple issues concerning individual and collective rights (see Rosenberg 2008).

Inevitably, the conditions under which social movements operate under or against the law indicate that regardless of the original point of departure of their claims – moral, religious, etc. – law and politics are the spheres *par excellence* where change is sought. That has much to do with the fact that the material conditions of precarity can more effectively be transformed by pushing public institutions – through law – to engage with the claims of movements. Inevitably, as a form of exercise of politics – and law – the practice of 'assemblage' makes it clear that politics move beyond procedural mechanisms of representative democracy and indeed establish a bodily relation between those involved, one that indicates a 'being for the other' when appearing in public and making social, political and legal claims (Butler 2015: 76).

C Social Movements Impact on the State: Tactics and Strategies

a) Foundations of Modern Collective Action

Social movements use collective action to advance their agendas, 'coordinating efforts on behalf of shared interests or programs' (Tilly & Tarrow 2015: 8). Charles Tilly and Sidney Tarrow identify four elements that allow one to determine whether a collective action can qualify as a social movement (Tilly & Tarrow 2015: 11). First, it needs to make a 'sustained campaign of claim-making,' together with 'an array of public performances, including marches, rallies, demonstrations,'

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bodies. It also comprises the set of statements, positions, dispositions and enunciations brought together by these things and bodies (Puar 2017: 193).

amongst others, in which it can display 'unity, numbers, and commitment.' In doing so, they rely on 'organizations, networks, traditions, and solidarities' (Tilly & Tarrow 2015: 11).

It is known that social movements organize and structure themselves in different ways. How they are structured, in turn, gives away much of the strategy that they might use to achieve their goals. Such degree of organization and professionalization of movements is essential to understanding the kinds of access to public institutions' structures and the tactics and strategies they will use. For instance, movements that have acquired a significant degree of professionalization within their members will likely accede to political and legal structures that more decentralized movements will not. Intuitively, one thinks of social movements as decentralized and unstructured groups of people taking to the streets to demonstrate, or protest, against, or in favour of something. On the other hand, social movements may take a variety of forms, and for this paper, I distinguish them primarily in two ways: i) institutionalized and ii) unstructured and decentralized.

i) Institutionalized social movements

Institutionalized social movements have acquired a significant degree of professionalization that, instead of working their way out merely through protests, can also use bureaucratic (state or international) apparatuses to make their agendas heard (Staggenborg 1998: 187, Staggenborg 2015: 7,). Although beneficial, it allows for easier access to political and legal institutions. It also facilitates social movements from being co-opted by such institutions (Tsutsui et al. 2012: 383). Examples include labor movements, which organize in labor unions. Although institutionalized, movements of this sort can still act through disruptive tactics. Unions, for instance, still *resist* violations of workers' rights through strikes. They are not only NGOs. These are not the same as social movements, and their international participation has often been problematic for social movements themselves (Sousa Santos 2019: 26 ff).

The more institutionalized or professional a movement becomes, the more it will have to adapt itself to its structures, leaving less room for disruptive strategies, such as protests. To say which movements will likely become more institutionalized or remain mostly decentralized depends mainly on the goals a movement hopes to achieve and the degree of acceptance of current political forms as adequate for achieving such goals. One can, nevertheless, identify certain fundamental elements that lead social movements to form and occasionally maintain themselves during a certain amount of time (see Ogrodnik & Staggenborg 2016).

ii) Unstructured and decentralized movements

Unstructured social movements follow without a specific form of organization and push through agendas mainly by using disruptive strategies (protests, demonstrations, etc.). Such movements are often decentralized and, most times, remain leaderless, a characteristic trait of modern social movements (Harcourt 2019: 281). Despite being very effective in bringing to attention a variety of issues, they often have a very indirect – if not limited – effect on the work of governments and international institutions, for they do not engage with their specific way of allowing for internal contestation. Instead, they offer contestation discourses that indirectly affect the work of such institutions. Although unstructured and leaderless, this does not deprive such social movements of their solid critical potential (Harcourt 2019: 273). Both types of social movements have, in different ways, articulated politics and law to effect changes in the domestic and international spheres. Looking at the recent history of social movements, one can better grasp how social movements became political actors beyond their own local.

b) Social Movements Between Tactics and Strategies: Assessing Movements' Impact on International legal life

There are various ways social movements may operate to achieve their aims. Different kinds of actions have been identified, but broadly, they fall under two general categories: those with a short-term objective and those that aim at long-term results. The former is often referred to as tactics and are often associated with disruptive methods,[9] such as protests and demonstrations. The latter is said to form movements' strategies and achieve their goals. Strategies can often include a variety of tactics, and although these two categories may be distinct, they can often be associated (Knox 2010: 198). Tactics vary and include disruptive methods, such as protests and demonstrations (Kay & Evans 2018: 6), to specific kinds of strategic litigation. Strategies often have a variety of different steps. While they may also incorporate disruptive practices, they usually aim to produce institutional effects, leading to effective participation of social movements in institutions (O'Brien 2000: 14). Each one of these different types of actions has other results at the international level, which will be looked at below.

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9 Disruptive methods may or may not include certain use of violence. There has been, in history, discussion as to whether the use of armed resistance should be considered as a legitimate form of resisting injustices by social movements. For an interesting example of such a debate within the context of the civil rights movements see (Cobb 2015).

The influence of tactics developed by movements during the 1960s had a strong influence on current social movements. Although they are commonly associated with unstructured and decentralized movements, they are also used by those with a higher degree of professionalization and institutionalization. Protests and demonstrations are tactics that have been used to bring to light specific issues that are often left aside or ignored by official politics and institutions (Nassehi 2020: 37). While some authors see protests as means to *negate* institutions' capacity to critique elites and forms of life, basically setting themselves as 'nay-sayer,' (Nassehi 2020: 12) others see it as a direct reaction and method of resistance against the state or international structures (Delmas 2018: 233, Della Porta 2017b: 4). However, Protests demand that the resources required from each participant in the immediate action resistance be equally divided (von Redecker 2020: 240).

Regardless, protests and demonstrations, although occurring in the short-term, often also aim at long-term objectives. Depending on their scale, they can significantly disrupt the political structures. For example, this happened during the yellow vests protests in France, where protests could change policy and revert laws that would have otherwise further liberalized the French economy and reduced social net safety protection (Stokes 2020: 279). The impact of demonstrations can be felt when one considers the effects of the current Black Lives Matter movement beyond the US borders and the international force acquired by movements such as Fridays for Future or *Extinction Rebellion*. These environmental movements use sustained and relatively organized forms of protest and demonstrations. Although they do not have direct access, they have developed a variety of 'solidarity networks' internationally (Tufecki 2017: xvii) and impacted policy and law-making globally. An example of this can be drawn from the renewed willingness of the EU to engage seriously with environmental protection legislation,[10] especially in the form of a European Green Deal.

In the political and legal sphere, one could say that tactics are born out and respond to 'conjunctural moments,' (Knox 2010: 200) which do not necessarily integrate an organic and institutional space (Knox 2010: 199). Although this may often be the case, movements' tactics, such as protests and demonstrations, in many cases do integrate broader strategic plans to effect long-term changes.

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10 *Fridays for Future* has had an interesting impact already on EU policy-making. See the *Outcome of the Council of the EU* Meeting 3754, at 8 ff (https://www.consilium.europa.eu/media/42888/st06567-en20-edited.pdf), and the subsequent proposition for a European Climate Law from the Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law),' *available at* http://data.consilium.europa.eu/doc/document/ST-6547-2020-INIT/en/pdf.

Therefore, associating them with immediate claims, or short-term demands, may be misleading. However, they offer an analytical tool to better understand movements' actions and operations and how they affect peoples' everyday lives.

In many ways, disruptive tactics focus on the possibilities of overcoming coercive means of repressing movements' actions, primarily when demonstrations assemble too many people and become too mobile (Butler 2015: 74). However, this assemblage of people(s) is more than just the gathering of various subjects. It represents the bringing together of different *bodies*. Bodies that 'act together' (Butler 2015: 74). These 'bodies' set out the different ways movements *appear*. They create the 'space of appearance,' where their action occurs as a 'performative exercise'. Yet, the space within which movements' actions happen is that 'between the bodies,' space between two bodies, where political action effectively happens, both 'binding and differentiating' those in the crowd (Butler 2015: 77). After all, collective mobilization is not only about 'gathering' but also about bringing about such gathering (Butler 2015: 72).

Nothing, however, can be taken for granted in respect of political action, most minor of all the space occupied (Butler 2015: 70). Indeed, much of the public space is disputed by protesters and official structures aiming to refrain from such protests (Butler 2015: 70–71). As Judith Butler explains, collective action rearranges public space's architecture, 'reconfigures' its materiality, and 'produces and reproduces the public character of that material environment' (Butler 2015: 71). Reconfiguring the public space means more than engaging in open contestation and resistance manifestations. It directly impacts how the very idea of politics is operated. Politics, in this sense, is not something that happens only in public arenas but 'crosses the lines' and brings to the sphere of appearance the political drawings of what happens at home, between families, and what is private (Butler 2015: 71). Therefore, exercising protests and demonstrations means bringing together a variety of bodies to lay claim to what is essentially public through such reconfiguration of 'material environments' and thus blur the lines between public and private spaces (Butler 2015: 71). Such an understanding of how collective action operates also lays the ground for reassessing their new geography and uses of legal mechanisms to advance their agendas.

D The New Spatiality of Social Movements

The space of social movements – here defined as the dimension and reach of such movements – is a powerful feature that determines much of what they can expect to obtain with their actions. Therefore, elaborating on the spatiality of social

movements has a powerful influence on how one sees the articulation of arguments brought forward by movements belonging to different legal orders. At the international level, Balakrishnan Rajagopal had already noted that accounting for the spatiality and social movements 'has serious implications for the spatial boundaries within which international law is conceptualized, elaborated upon, argued over' (Rajagopal 2003: 237). Accounting for the space of social movements can fundamentally change the geography of what ought to be considered the constitutional setting, especially given that elements belonging to other legal apparatuses, such as those from international law, may also be read and rearranged according to the spatiality of movements. As Rajagopal further argues, 'social movements contradict one of the central tenets of current liberal orthodoxies, that increasing globalization leads inexorably to a marginalization of the 'local' as the agent of social-political change in developing countries' (Rajagopal 2003: 237). Inevitably, such geography of social movements is profoundly impacted by the new ways in which networks of solidarity are constructed. With the increasing use of social media and new technologies, how such solidarities have been built in the past decade have decisively changed the way one reads the position and the spaces of social movements (Tufecki 2017, von Redecker 2020: 210 ff).

a) The Limits of Considering Social Movements between the Local and Global Legal Spheres

Generally, social movements have been considered in a relationship between local and global. Such a relationship has provided for the common analytical distinction regarding their spatiality. But, of course, social movements may act differently, and it is essential to distinguish between social movements at the domestic, transnational, and international levels. However, the distinction has inevitably become ever more blurred. As local movements begin to share the minimum in their struggles, they may transnationally join – rearrange forms of solidarity – and transnationally each aid the other in local conflicts (Vieira 2018, Ogrodnik & Staggenborg 2017).[11] This phenomenon has not escaped theory, and many have proposed different ways to look at how movements – or potential legal actors generally – ought to consider the spaces in which they act. Bruno Latour, for instance, argues that, in the context of what he calls the new climate regime (Latour 2017: 10), the categories of 'local' and 'global' are now insufficient to grasp the complexities

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[11] Alfinito Vieira's gives a highly topical example (see Alfinito Vieira 2018). But suffices to look at the various local environmental movements to have a more 'northern' take on this issue.

of different actors in the world scene (Latour 2017: 39). Created to deal with the increasing process of economic globalization, to oppose the modern from the archaic, the future to the past, these categories in different ways failed to account for other forms of what could be considered local or global often discussed in other social sciences (Latour 2017: 42). Yet, he argues that even such categories used elsewhere are faulty and do not grapple with the current complexities of various actors' politics, including social movements (Latour 2017: 54). Instead, he suggests the category of the 'terrestrial' as the place for politics and as a political actor (Latour 2017: 58). Such a category would allow different political complexities to be best grasped in ways that the 'moderns' have not yet done (Latour 2017: 62).

For social movements, aiming to have local, transnational, or global reach becomes irrelevant. The idea is to effect changes on the political space that is the 'Earth.' This terrestrial approach reorganizes the political space within which social movements act and significantly alters how they organize and operate. Movements such as Extinction Rebellion, Black Lives Matter, and various human rights movements will no longer see themselves working in a well-defined territorial space in which specific legal and institutional structures can be articulated. The world – the Earth – becomes the political and legal space *par excellence,* and negotiating between different legal orders becomes not a matter of tactics or strategy but an essential characteristic of social movements to operate their activities to achieve their goals. Although somewhat debatable, thinking about blurring the territorial lines to create analytical distinctions to understand the operation of social movements and erase such lines altogether gives us a better understanding of the political and legal role of social movements nowadays. This somewhat guarantees that social movements' relationship between the local and global is not based on simple cut dichotomies. The analytical distinction previously made between local, transnational, and international, although crucial as a point of departure for understanding how social movements determine their scope of actions, becomes, in the end, insufficient. The consequences of different kinds of solidarity networks being formed will not allow one to point to a movement that is merely local. Solidarity in this context will mean that political and legal goals are shared, as well as motivations, strategies, and ideas of how to effect proper changes in the Earth as a political space.

b) Rearranging Categories for Understanding Social Movements New Legal Geography

The impact of social movements in law must be accounted for, considering that local, global, transnational, or international categories have impacted the legal

space. But this also has been essentially problematized. For example, if global law was a space of overlapping legal orders, there is a recognition of their failure to capture the different ways collective action happens. Such categories limit the possibilities of understanding how other actors can jointly act to affect various legal orders, national or international. Instead, as Hans Lindahl suggests, what previously would be considered the localities for normative struggles, should be regarded as a variety of 'ought-places' (Lindahl 2012: 174) and, in this context, the joining of different efforts happening in other normative spaces would finally constitute a 'network of ought-places' (Lindahl 2012: 175). Therefore, it becomes clear that networks of solidarity, also taken as networks of ought-places, redesign the normative space within which social movements act and reveal the very limitation of categories such as local and international to properly apprehend the impact movements can have on specific legal orders.

The spatiality of social movements also impacts the movements' temporality. As something that does not anymore merely connect with the global and local categories, movements can syncretize the experiences of peoples who belong to various traditions: their pasts, presents, and futures communicate with other pasts, presents, and futures. In this case, the civil rights movement of the 1960s acquires as much meaning, and normative significance for the Black Lives Matter movement in the United States as it does for all the other similar movements elsewhere in the world. The shared experiences acquire different meanings both in space and time. This new form of looking at the space – and time – of social movements required, therefore, that legal scholarship be adapted to consider movements as decisive actors in constructing the international legal space. This is what we will look at in the following section.

An alternative way of understanding the rearrangement of movements' spatiality requires recognizing that the various tactics and strategies used in a distinct space are often unseen or taken for granted by the public and official institutions. Movements, as mentioned before, create what has been termed a 'space of appearance' (Butler 2015: 72). This space indicates that politics between movement members occur 'between the people', meaning that irrespective of *where* the action takes place, every action creates a space for the bodies, peoples, or all those involved in the movement that cannot be situated easily in physical space (Butler 2015: 73). Understanding the spatiality of movements in a way that displaces the concept of the physical place allows one to distinguish between space and location of movements' operations (Butler 2015: 73). Both are effectively created through the action of those involved, but only to the extent that there is enough room for the proper exercise of freedom and power, which is manifested through the acts of the body (Butler 2015: 73). Yet, creating such spaces and locations does not entirely separate action from the localities where it happens.

Indeed, it profoundly connects action, locality, and space in such a way to allow for movements to be taken as acting in one place but everywhere simultaneously, considering that the creation of space is the creation of plurality itself (Butler 2015: 77).

Accounting for how movements' spatiality can be reorganized allows for a better understanding of how they can navigate different legal contexts between the national and international levels. It also provides elements to examine how other forms of social movements – professionalized or unstructured – operate in different ways, using their tactics and strategies to better advance their political and legal agendas.

E Social Movements between Politics and Law from the International to the National

a) Social Movements' Strategies to International Institutions: on International Constitutionalism

The history of social movements also shows that movements will push through specific agendas of change whenever political or legal opportunity appears (see Berger & Nehring 2017). However, if a change is not possible, social movements can increase mobilization and resources (Vanhala 2011: 11 ff, Staggenborg 2015: 19–22).[12] This has been seen most notably in the case of the so-called *new social movements*, which, different to movements until the mid-20th century – based mainly on class demands – are primarily founded on new forms of identity politics (Arato & Cohen 1992: 493. Dryzek 2013: 208–209). These *new social movements* (Arato & Cohen 1992: 493 ff)[13] constitute a fundamental break from movements

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12 Lisa Vanhala is critical of such a distinction arguing that none of them can explain the complexity of social movements' strategies and actions integrally. Instead, she proposes a more integrated approach where one looks at the defining elements of individual subjectivities together with a social movement's organization agenda – or intention – to define what leads a movement to take action in a certain moment in time (Vanhala 2011: 24 ff). While her arguments are indeed strong, the analytical distinction between *political opportunity* (Tilly & Tarrow 2015), *legal opportunity* (Andersen 2006), and *resource mobilization*, when taken together to justify movements' actions, can still have a powerful explanatory force. For a brief, yet excellent explanation of resource mobilization theory in social movements' studies, (Staggenborg 2015).

13 Andrew Arato and Jean Cohen are critical of this concept, for they see the difference between these *new* and the *old* social movements as being one of degree. While old social movements had more of a revolutionary purpose, new social movements have more 'limited radicalism'. Though

before the 1960s. More specifically, the decisive event that influenced the foundation or appearance of *new* social movements was the civil rights movement in the United States throughout the 1950s and 60s. It provided a new and very sophisticated model for collective action (see Staggenborg 2015: 62 ff).

One important aspect that emerges then, besides the different ways to collectively organize, is movements' use of international legal jargon and participation in international institutions to the extent possible. However, no distinction is made between international organizations and international courts. The difference in the involvement will likely depend on the kind of *opportunity* that appears. Whether a *legal* opportunity – one that allows social movements' organizations to appear before courts (often under the condition of *amicus curiae*) – or a *political* opportunity – one that grants such organizations access to debates, policy, and law-making process internationally – will likely depend on the kind of organization such movements have.

Earlier in this study, I referred to the often-occurring conflation of NGOs with social movements (Rajagopal 2003: 260, Sousa Santos 2019: 105).[14] Some non-governmental organizations indeed grow out of the process of institutionalization and professionalization of social movements. Still, many become something else and indeed 'privatize' agendas that otherwise belonged to movements (Kamat 2004: 159). Much of the relationship between NGOs and their constituencies is guided by market logic. Such logic is strictly opposed to social movements (Kamat 2004: 159). NGOs have taken different forms and created relationships with their constituencies (Fisher 1997: 447), on which their legitimacy depends. Often NGOs are in a relationship with states that can be both ambiguous and problematic and which would, therefore, run counter to the *resistance* purposes of social movements' actions. However, this does not mean that organizations accurately representing social movements do not act in a significant way before international institutions. Many social movements find international institutions essential for advancing their purposes. They make important use of them – both judiciary and administrative – to try and force domestic institutions to follow their claims. This is what has been referred to as the 'boomerang effect' (Keck & Sikking 1998: 43). Transnational advocacy networks and social movement organizations have consistently used this strategy to advance agendas beyond national jurisdictions.

Also, social movements have pressured governments to make international institutions, such as international courts, available for use again, for they see

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a very much valid critique, for the purposes of the current analysis, the distinction seems to be useful (Arato & Cohen 1992)

14 Both Rajagopal and Sousa Santos refer to this as the 'NGOization' of international politics and representation of civil society (Rajagopal 2002: 260; Sousa Santos 2019: 105)

unique mechanisms to put forward their claims in such institutions. For example, in both South Africa and Tanzania, organizations brought cases before the constitutional courts against the state, asking the court to rule over the decision of governments to suspend the Southern Africa Development Community Tribunal (SADC).[15] The relationship between social movements and international institutions, although not always clear, has proved somewhat beneficial to increasing institutions' legitimacy while providing social movements with increased political and social capital domestically to produce their proposed changes. For example, other organizations such as the OAS, the Inter-American Commission of Human Rights (Laplante 2007: 220, Gómez 2004: 174–175), the European Court of Human Rights (ECtHR) (Chichowski 2011: 81), or the International Labour Organization (ILO), for instance, through its Commission on the Freedom of Association, provide the mechanisms for movements to, at the international level, reinforce their own political and social position within states, to push these into protecting their rights and freedoms (La Hovary 2013: 340–341). In this respect, international institutions can also act as apparatuses that aid in articulating social movements' agendas within states' constitutional contexts. Therefore, although many social movements feel estranged from global governance structures, others still believe that such structures are the best suited to effect proper political and legal change domestically.[16] And in taking the international route, movements have helped promote modifications locally (Tsutsui et al. 2012: 368). They articulate more than just national and international politics but find ways to ground their position on legal rules belonging to different legal orders.

Much of what is done through these *opportunities* can sometimes be tactical interventions but often form a large part of a broader strategy to effect global and domestic changes, especially when such strategies are articulated through international legal arguments and institutions. It is known that results and changes from such interventions do not come at once and take long to affect peoples' lives – when they do directly. Nonetheless, as has been illustrated, movements have been successful in achieving their goals through such strategies. However, a note is needed on the topic of social movements' successes. A movement's failure

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15 See for this, Constitutional Court of South Africa, Case CCT 67/18, Law Society of South Africa et al vs. President of the Republic of South Africa (Southern Africa Litigation Centre, *Amicus Curiae*); High Court of Tanzania, Miscellaneous Civil Case 23 of 2014, Tanganyka Law Society vs Ministry of Foreign Affairs of the United Republic of Tanzania. Also, for a general debate on the issue, see (Alter et al. 2016).

16 A practical example comes from *Fridays for Future*. Although grassroots and directed initially at governments, there is great hope that its actions will impact – as they have in a certain way already done – international or regional institutions. See, for a description of the movement and its intents (Wahlström 2019), also (Braw 2019).

to directly produce changes in politics and law through either tactics or strategies should not be ignored. Even when movements' fail, their actions can still impact institutional and political structures in a meaningful way, paving the way for further action.

b) Social Movements in Domestic Constitutional Settings

Traditional structures of liberal democratic constitutionalism – with constitutions as the normative spaces for resolving social struggles (Frankenberg 2018: 195) – are continually being rearranged. Social movements are very aware that many of the issues against which they speak resist or contest ought to be resolved nationally and internationally. This is no surprise since social movements often target international institutions as protests and institutional challenges (Tarrow 2012: 237). In many cases, they have been successful. In others, not so much. For instance, movements' 'austerity protests'(Wood 2013: 1) – with the IMF, World Bank, and WTO as targets (D'Almeida 2007: 127–128, Tarrow 2012: 243, Dryzek 2013: 123–124) – have been successful in including in these organizations' agendas issues related to the safeguard of general social and economic rights (Dryzek 2013: 127), despite the yet vast predominance of neoliberal policies and conditionalities pushed on states by such institutions.

Nevertheless, whenever their claims were passed unattended, movements maintained their turn against global governance structures. Moreover, the lack of discursive access to international structures has led to an association between social movements and populist parties that have proved harmful to international institutions and constitutional democracies (see Roberts 2015). Many domestic structures, such as political parties, play along with social movements' actions and pull them to their side in this political context.

Building on the lack of access (see Beijerman 2018)[17] social movements have to international institutions, domestic populist groups have relied on specific national movements to internally increase their political capital by negating international law and global governance (de Wilde 2019: 89). Such a reaction against the international is illustrated, for instance, by the widespread protests

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17 To be clear, the point here is that there is lack of *discursive access*, rather than only direct institutional access. Many would claim that, recently, more and more, international institutions have given a variety of different accesses to NGOs to put forward claims on behalf of social movements (examples may range from the UN human rights system, to the WHO or the ILO. Nevertheless, NGOs and social movements are not necessarily the same thing and the role NGOs play in international institutions cannot be directly conflated with that of social movements.

in Europe against the Transatlantic Trade and Investment Partnership (TTIP) or the Canada-EU Comprehensive Economic and Trade Agreement (CETA) (Rone 2018: 234). In all these examples, central to the movements' position was their criticism of national and international institutions' disregard of such legal instruments' social and environmental impact (see Kay & Evans 2017).[18] The lack of a proper bridge between social movements and the international favors, amongst other things, the cooptation of social movements by populist parties interested in pushing away international law and institutions (Borbath & Hutter 2020: 899 ff, Dryzek et al. 2003: 127).[19]

Such phenomenon has led to the development of what one calls *movement parties* (see Prentoulis & Thomassen 2019). These parties grow out of social movements and follow a similar path of professionalization and institutionalization. However, they choose to formalize themselves as active participants in official politics (Prentoulis & Thomassen 2019: 347). Or, as Kitchel puts it, a movement transitions to a party when 'political entrepreneurs change the institutional setting in which they operate and make investments in an organizational infrastructure of collective action, as well as procedures of social choice that create collective preference schedules ('party programs')' (Kitschel 2006: 278). Examples of such parties, nowadays, are the Greek SYRIZA, or the Spanish PODEMOS, on the left, with *Law and Justice*, in Poland, and the AfD, in Germany, on the right. However, the latter two could better fit the definition of 'protest parties' offered by Swen Hutter, which is, in fact, parties that coopt social movements in general by sponsoring specific domestic protests (Borbath & Hutter, 2020: 896). Generally, when parties engage in such sponsoring, they envisage precisely to capitalize electorally on the members of a particular protest (Borbath & Hutter 2020: 899). This kind of association is strongly associated with a lack of popular subjectivity (Roberts 2015: 688), which brings parties with populist agendas, claiming to represent the totality of those with claims against institutions – both nationally and internationally (Roberts 2015: 684). In Latin America, a similar move could be seen on both the left – with the example of Chavez's ascension in Venezuela – and the right – with Bolsonaro's election in Brazil. Both shared a rejection of international institutions as proper mechanisms for attaining social agendas.

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18 Tamara Kay and Richard Evans also offer a powerful explanation of how social movements were able to articulate their agendas and decisively influence the shape of the Transpacific Partnership (TPP), (generally Kay & Evans 2018)

19 At the national level, a common way of identifying such moves of cooptation is to look at those parties that often *sponsor* protests by certain social movements. To be sure, this can also be done by 'mainstream parties', but it has become an increasingly used strategies of those parties leaning towards more populist positions.

F Concluding Remarks

This article has shown how social movements have, in recent times, wholly redesigned their spaces of organization and action. Modern social movements, heavily impacted by the development of new technologies, have reasserted their position in the terrestrial political and legal space and ought now to be taken seriously as agents for change. Looking at social movements alters our understanding of the content and form of legal orders previously based on local, international, or global categories. It has a decisive impact on international legal scholarship. Rather than considering social movements as potential legal subjects in one or another legal system, legal scholarship should reassess how it recognizes movements' interaction in different contexts. Doing away with the necessity to *formalize* movements' position complicates international legal scholars' role with their very object of study and work. Even if constitutions are vague, they express the political philosophy of each country in a certain period in history (Bastid 1985: 184). It becomes less of a space for formalistic resolution of normative conflicts in this context. Instead, it becomes the prime designator of spaces to integrate social and on-the-ground problems into everyday legal operations. This is further illustrated and complicated by how social movements nowadays articulate national politics with international positions.

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