Law in a Globalizing World:
Towards 'Good Governance' Through Intercultural Dialogue ?

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Abstract:

Governance and sustainable development are two concepts which contribute to the reshaping of the contemporary socio-economic-political-legal field. They seem to open up the classical state centered legal framework and to allow to take into consideration realities which have been so far ignored through the recognition of various dynamics of coregulation and the dynamics of civil society participation.

If it seems that through these concepts there is an opportunity to take social realities more into account and thus especially to rethink the "rule of law" in more indigenous terms in the former European colonies, one must address the fact that most of the contemporary debates on governance and sustainable development do not really take into account the intercultural challenges and seem to accept the framework of a "good governance" Western, or even "World Bank" style.

The paper will highlight the challenges of an intercultural dialogue on Law, governance and sustainable development in the contemporary world and will outline some pathways to address them. In doing so it will provide a critique of current legal theory and propose steps in order to move to a more intercultural theory of Law.

Introduction : The challenges of Law in a Globalized World

Globalization understood as the more and more explicit "patterning of the world as a whole" (Robertson 1996) is simultaneously pushing forward two trends. On the one hand it highlights the fact that we live in one world (Sachs 1997). Not only are we becoming increasingly aware that we are all on a journey on the same "spaceship earth", but we also start to realize that this spaceship is quite fragile and that we need to take responsibility for it all together. Especially the environmental issues have struck our minds by revealing our interdependence and the need to address these issues together. But the increasingly interlinked global market and finance and its systemic fragility have also drawn our attention … insofar as these issues are not getting hidden by the current ideology of "war against terror" with its "global security agenda"…

But if these global problems do exist and if we are aware of them and if the need for a common approach is felt, it seems equally clear that we are not really ready to map out agendas for action which are shared by all states. The wish for good "global governance" in these fields is at the best an ideal we seek to achieve, or at its worst an ideology that imposes the agenda of the most powerful on the others under the disguise of universal solutions to global problems.

This illustrates the second trend. As we are more and more obliged to look for shared approaches, we are also getting more and more aware of the irreducible pluralism of our human condition. At least two aspects of this pluralism should be highlighted. One is linked to the relative power of the different states in the world order. One can use the centre / periphery frame of de Sousa Santos (1995). There seems to be a division of labour between the core countries and the countries from the periphery. The "core countries" seem to specialize in the "globalization of their localisms", whereas the "countries from the periphery" specialize in the "localization of these globalisms". It is useful to also bear in mind that the "core" and the "periphery" are not homogenous groups, and that in terms of power it seems useful to distinguish between those states who do very actively shape the current globalization, like the USA, those intermediate states who have their say although they are less independent like China, India or Brasil and then small countries who are almost completely at the mercy of global pressures as for example many African countries (see

Randeria 2002). The second aspect is linked to the pluralism of the situations in themselves : countries have different "levels of development", different sizes, different histories so it seems difficult to find one standard model that would fit them all.

The challenge even increases if we dare not to stop at looking at the "official side of the countries" and their official structures, but if we actually look at what is really going on – in many "non-Western" contexts the state and its administration, the formal market represents just the tip of the social, legal, political and economic realities (cf for example Le Roy 1997). But the "informal" sector, which is in some cases the predominant one and is just constructed in opposition to an abstract model which has more or less reality in the concerned countries, is not a void. People do have their own ways of envisaging their living together and have their own "living laws" which are obviously also in relationship with the formal legal and political system … but basically we are in situations of legal pluralism. And it seems that one of the major current challenges is to try to understand this pluralism. Not in order to lead a moral "politics of recognition", but because the promises of the "modern market and state" have not been kept for a majority of human beings (see in that context Moore 2001).

One can discuss about the intrinsic value of pluralism and the need to uphold it and the loss the disappearance of a given culture, language, worldview etc. constitutes. But on an even more pragmatic level – which is probably more accessible to a Westerner who does believe in the "myth of development" (Rist 1996, Sachs 1990) – we must admit that this promise of "development" through the universalization of the Western inventions of the "rule of law" or "État de Droit", the "market" etc. has failed. If at the end of the second world war, underdevelopment appeared as the byproduct of the development programmes launched by the USA and if thus the third world poverty was to a large extent a construction in reference to our "standard of living" (eg : if you do not have electricity or running water you are poor), people were still able to live their lives according to what did make sense to them. Nowadays, as Rahnema (2003) points out, "poverty" has been chased away by "misery" – the living conditions of the masses have deteriorated. And the modern world by colonizing their life spaces but not giving them the means to access this modernity has pushed them more and more to the periphery.

One of the greatest challenge nowadays seems to get people again to "participate" in their own lives … sadly enough if the word has become one of the core words of "good

governance", "participatory development" etc., it usually seems to mean "getting people to participate in the agenda set by those in power" – it usually does not refer to participating in the shaping of the agendas (Campbell 1997, Parthasarahty 2005, Rahnema 1997). It seems to remain a participation of the "particular" (which de facto is identified with the "periphery") to the "global" or "universal" (which can de facto be equated with the "core"). It should further be noted that the ideology of participation into a de facto imposed model (ex: "development", "good governance") besides subsuming the "particular" to the "universal" also rests on an even more fundamental premise. Feeling that "people need to be empowered" and so on points to the perception that until "we empower them", their lives have had no existence. They seem to having lived up to now in a socio-legal-political vacuum awaiting to be brought "good governance" in order to suddenly start take care of themselves. It is a continuation of the trend "no hope outside religion", then "no hope outside science" backed up by "no hope outside the state, democracy, human rights and development" which has now become "no hope outside good governance and sustainable development".

Or is there some hope ??

It seems to me that the current developments of "globalization" have raised an awareness of pluralism as something which has to deal with the universal AND the particular, the global AND the local. The disillusions of universalist approaches as well as the clear need to overcome relativist approaches seems to provide us with a fertile ground to take the challenges of pluralism – and of the related interculturalism - seriously (Eberhard 2002 & 2006, Panikkar 1990, Vachon 1997). Parallelly the notions of "governance", "sustainable development", "participation" which do increasingly shape the socio-legal-economic-political world, seem to reflect a change of perception which may be channeled into two opposite directions. Through their more totalizing approach they may become even more "oppressing universalisms" than the concepts of "government", "state", "growth" … but they may also open up the paths to take a look at the different aspects making up the "whole". Indeed, contrary to the former universalisms listed above, these new "universalisms" do explicitely point to the necessity to take into account "particularisms". Taking participation seriously, may mean to recognize the role of the state, official law, the market etc. while ALSO realizing that these are not exclusive realities but that their exist other socio-legal-political-economic realities which have also to be taken seriously.

So the current situation may be one which may allow us – if not force us – to little by little engage into what de Sousa Santos (1995) called "heterotopia", "a displacement in the very world we live in – from the center to the margins", or into what Panikkar (1984) calls a "healthy pluralism". Let us now have a look at the limits and potentials of the current "paradigm" before highlighting some of the intercultural challenges.

Good Governance – A Double Edged Sword

Before starting to discuss the implications of "good governance" let me shortly introduce the place where I am speaking from, my *topos*. Indeed as the reader may already have sensed in the introduction, I am a European. I should further add that I am a European who has been trained in continental European law and especially in French law. In this vision the State is a very central notion and law is perceived mostly as a system of norms. The legal theory and legal anthropology in which I rooted myself subsequently is also influenced by this basic continental European legal enculturation. I cannot go further here in the implications of the *topos* but I would already like to point out here the need for any "inter" approach, be it interdisciplinary or intercultural, to be dialogical and diatopical[1].

"Good governance" can be perceived as a double edged sword. It is a quite vague concept – if a concept at all (Baron 2003, Gaudin 2002, Simoulin 2003). It seems to have originated in France many centuries ago. From there it has been exported to Great Britain and then the United States, before becoming a global buzz word through the channel of "corporate governance" (Le Roy 2005). If the present understanding is marked by its managerial connotation, we should not forget that "governance" can be understood in a broader meaning than the one associated with it when we do not look beyond the "corporate governance" for its roots. It can be understood as a shifting from "governement" to "governance" which is echoed in an approach to Law from "pyramid" to "network" (Ost & van de Kerchove 2002). Nevertheless even this kind of approach seems to be biased in a "systemic" or "functionalist" way. As governance and the network paradigm do present themselves as more complex than the classical uniderictional pyramidal, state centered government paradigms by taking into account the different actors and by focusing on their mutual interactions and retroactions they

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[1] See on these issues Eberhard 2001. More precisely on the difficulty for a Francophone / Anglophone dialogue see Eberhard 2002 and 2007.

seem to give a more complete picture of what is going on. Moreover they seem to emphasize "participation" by all the actors, as norms are not seen as being imposed by a rigid top down structure but are perceived as being in perpetual negotiation by all the "stakeholders" for an "optimum management" of the issues to be dealt with.

Now, the problem is that first of all there is an assumption that there can be one "optimal way of management" of given situations. This is a denial of the essence of politics, which consists in the fact that not everybody agrees on what is "good" or "optimal" for our living together and that if there is often no consensus on the goals, there is also not always consensus on the means to put in place to achieve these goals even if there is agreement on the goals. The crumbling down of the communist block and the parallel "disappearence" of the non-aligned nations at the end of the 1980's seems to have blinded as on the global scale to the fact that the idea of ONE good governance is an illusion. By assuming or positing a priori that there is a "good governance" which will emerge spontaneously through the participation of the stakeholders, what is in fact promoted is the non questioned supremacy of the ones who implicitly frame the rules of the game. This leads to a second bias. Not only does the holistic and interactive character of "good governance" or "network" approaches downplay the question of political choices, but it also evacuates the question of the differing power between actors in the social-legal-political-economic game and it even seems to approach all the actors as quite abstract individuals whose embedding in diverse networks, semi-autonomous social fields (Moore 1973, 1983) etc. is ignored[2].

Nevertheless, despite these problems, one positive aspect cannot be denied : the state, state law and the normative pyramid loose their centrality. In Griffith's words (1986) we could say that the move from government to governance approaches does illustrate a move away from legal centralism to more pluralistic approaches to Law. This is welcome news for the legal anthropologist or more generally speaking for the socio-legal scientist. The reason for optimism has nothing to do with an agreement to a neoliberal ideology celebrating the disapearence of the state and the taking over of the "organization of our living together" by the "invisible hand" of the "market". On the contrary, I guess most socio-legal scholars are aware of the unavoidable role the state continues to have to play and are conscious of the dangers of an ideology of "economicisation" of the world to use Serge Latouche's term

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[2] For a development of these critiques and illustrations through various fieldworks see Eberhard 2002b.

(1998). The reason to be optimistic is that little by little socio-legal insights move from the edges to the core of our thinking about Law, if we understand the latter as the larger legal phenomenon which puts into forms our living together in view of its reproduction and the solving of conflicts and which in French is often termed as "juridicité" (Le Roy 2004 ; 2006). This starting recognition of non-state Law, of phenomena of coregulation is good news as it finally permits to open up a window towards the immerged part of the "legal iceberg", the "hidden part of the normative complex" of our societies (Le Roy 1997). It may allow to start to rethink Law from a broader perspective … The way to "heterotopia" seems finally to have opened up. Maybe one of the most prominent fields which illustrate the trend towards a recognition of phenomena of coregulation today are the dynamics of "corporate social responsibility". Codes of conduct of corporations which started out as voluntary charters are getting increasingly standardized all over the world and start to have more and more legal impacts ... but not from above (the state or international law), but from below (through civil society activism and the courts). The "Global Compact" proposed by Koffi Annan has well illustrated the issue : in a global world where there is no superstate able to impose its regulation, the only way to regulate is to appeal to voluntary participation of the corporate sector. It is then the civil society, as illustrated by the Nike case, who turned the moral into legal obligations through legal actions conducted against the companies by holding them accountable for their "publicité mensongère" (see Berns et al. 2007). If we still remain here in very Western ground – and if we do not think that this trend is a new miracle solution – it nevertheless is clear that non-state normativity starts to gain prominence. So why not look also at different kinds of normativities that were until recently largely ignored by the "legal centralists" ?? And why not try to understand the implications of taking these different normativities and their interplay seriously ??

3. Towards Good Governance Through Intercultural Dialogue ?

The recognition of the variety of situations and ways of approaching the putting into forms of our living together and the solving of arising conflicts lies at the core of the approaches of anthropology of law. It seems to me that legal anthropology evolves within three poles which are all relevant for the contemporary rethinking for "another world" (Eberhard 2006). It is deeply rooted in the recognition of alterity, of otherness, of the existence of different worldviews which are related to different ways to think and act out "juridicité" or "Law" with

a capital "L" in contrast to "law" understood as only state related law, be it national or international. This recognition of differences which reflects a more structuralist comparative approach to human societies' reproduction, this pole of **alterity**, is then complemented by the pole of complexity. Indeed legal pluralism is not a static reality. It is a dynamic interplay an ever ongoing process (see Moore 1983, Le Roy 1999) which necessitates dynamic approaches that analyze the **complex** processes of the "game of laws" ("jeu des lois") to refer to Le Roy's metaphor. A third pole would be the pole of **interculturality**, the recognition that opening up one's own window on the world wider in order to see things to which our attention is drawn from the sight of another culture, is not equal to the look of the other culture. The translation of a different cultures' perspective into one's own, necessarily translates the latter. To give just one example. In the case of the recognition of indigenous people's rights the predominant Western world view transforms their claims into anthropocentred claims on collective rights. It is not able to deal really with the cosmic aspect of these approaches to life and to "Law" (see on this question as exemplified by a contrast between modern legal-political culture and Mohawk legal political culture : Vachon 1992). So one of the questions that has to be addressed beyond the opening up of socio-legal sciences to alterity and complexity is how to deal with the more radical intercultural pluralism which can never be unified in any system. As Panikkar (1990) notes : if we break down all the walls between windows, there would be no structure left anymore. No perspective is global and our human condition is thus always an "in-between" where we share a world but from different point of views which are also part of this same world. It is fundamentally pluralistic.

What are the implications of these insights of legal anthropology for our question on "global governance" ? It seems that if we want to take heterotopia, or the search for alternatives seriously (see for example Cavanagh & Mander 2004, de Sousa Santos & Rodriguez-Garavito, 2005, Kothari 1990), we have to emancipate ourselves from the predominant, "Western" approaches.

The first requirement is to pay attention to the translation of the global concepts. How are "governance", "sustainable development" translated into other languages ? To what does it refer in these other cultural contexts ? What realities does it evoke ? What are equivalent concepts but with to some degree different implications and consequences, as for example the Chinese concepts of "harmony society" and "recycling economy" that can be seen as equivalents to Western "good governance" and "sustainable development" ? What are we

talking about when we talk about "alternative governance" ? Do we make a critique from within the Western paradigm, or do we at least partly base it outside or do we even completely change the frame of reference ? In an international research dynamic that I am coordinating at the Facultés universitaires Saint Louis in Brussels on "Law, governance and sustainable development"[3] has for example appeared that in a broader, "global", comparison Brasilian alternative approaches seem much less alternative than for example Indian ones, as they rather remain inside a Western paradigm, whereas a lot of Indian critiques do refer to Indian conceptions as is exemplified in the well known works of Vandana Shiva (see for example Shiva 2001 – see also Eberhard 2005).

Then we should distinguish the official from the unofficial spheres as well as the underlying basic assumptions that do influence them (see Chiba 1987). Indeed as pointed out above, the "formal sector" which is already quite different from one context to another often only represents the tip of the political-normative complex. In order to open up to "good governance" understood as the "organization of a living together in which everybody can participate" it is paramount to move beyond the state or "formal sector" centred approaches. Teachings such as those of the Laboratoire d'Anthropologie Juridique de Paris, that have in the 1980's modellized different "legal archetypes" understood as fundamental perspectives on the world and of the human being's place in it, which are related to the way these human beings organize their living together (Alliot 2003) which have then be complemented by more dynamic approaches and led to the vision of a tripodic Law, a "juridicité" based not only on general and impersonal norms and an imposed ordering of society, but also on models of conduct and behaviour and a negotiated order, and on habitus in Bourdieu's sense and an accepted order (Le Roy 1999) seem to provide promising paths of exploration (for a short presentation of these approaches in English see Eberhard 2001).

I hope that this short presentation will permit to open up some spaces for our common reflexion and I will be very happy to deepen one or the other aspect to which I have only made a hint here. For those who are interested and have a little time, I would like to mention that this contribution can be put into perspective through the many contributions available on **http://www.dhid.org**.

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[3] A first collective publication is Eberhard 2005. An international conference touching on this issues, « Law, Governance and Sustainable Development. The New Paths of Responsibility » will be held at FUSL in Brussels end of october 2007.

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