

Dialogue with Jacques Vanderlinden

Part 1

Christoph Eberhard

Laboratoire d'Anthropologie Juridique de Paris

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To start, I would like to thank Melanie Wiber for her invitation to host an open debate on approaches to the anthropology of Law in the Newsletter and Jacques Vanderlinden for the time he has taken to react to my two papers (the second co-written with Nidhi Gupta). I am especially grateful to his open criticisms as I feel that these can permit to deepen our mutual understanding. Indeed, they will permit me in my reply to clarify some points which may not have been very clear in their formulation in the two texts. But they will also be a good occasion to give some further background information which can put these contributions into perspective. The readers will thus be enriched through this *dialogical approach* where our different *topoi* of discourse can better be understood, and thus also Jacques' and my respective *myths*. Hopefully, the dialogue will also contribute to help the readers get aware of their more or less conscious epistemological positionings and be thus an invitation for further dialogical dialogues in the field of the anthropology of Law. In this paper, I will rather take up the general issues raised by Jacques's comments and by his reflexions on « Challenges and Prospects for the Anthropology of Law. A Francophone Perspective » (2002b). But I feel it is important that we make a second response in collaboration with Nidhi Gupta on his comment of our second article related to Women's rights in India. This will be for the next issue of the Newsletter. Before starting now, I would like to add that my intent in my reply is not to minimize imperfections of my contributions. I am aware of some of them, and I agree completely that it was for example a quite big "indélicatesse" and also scientific lack not to mention Raymond Verdier's work in my first paper as the paper could be, and has

been perceived, as a statement on “Francophone anthropology of Law”. But this last point, already introduces us to the core of my reactions.

1) The need to locate our perspectives and discourses, or the need of diatopism, in order to engage in dialogical dialogues

Let me very briefly sum up what Raimon Panikkar means with “dialogical dialogue”, as this is the method which underlies all my endeavours in the field of the anthropology of Law. For Panikkar (1984), “dialectical dialogue” is a dialogue on objects, where we consider that truth is objective and can be approached through the lights of Reason alone. If you are right, I am wrong and it is through eliminating all the inconsistencies of our respective positions that we move little by little closer to “truth”. Thus Reason or *logos*, is seen as the ultimate and sufficient horizon of intelligibility. This method is useful when the premises of the debate are shared, but it becomes counterproductive when this is not the case anymore as in all “inter-situations” like intercultural, interdisciplinary, “inter-traditions of knowledge” situations. In these cases it is important to move to another kind of dialogue, the dialogical dialogue, which is rather a dialogue between subjects. The important thing is to unveil through the dialogue, the respective *myths* of the partners of the dialogue, their unconscious presuppositions. It is through the awareness of the other’s presupposition that one little by little gets aware of one’s own. And by revealing our respective myths, a diatopical approach becomes then possible which consists to try to understand from one *topos* the constructs of another *topos*. Recognition of the dimension of *mythos*, of this horizon of “things we believe so much that we do not believe that we believe them”, puts a safeguard against what we could call the totalitarianism of Reason or *logos*¹. If we take it seriously, it has serious consequences on our way to do research.

As far as I am aware of, Jacques has a tendency to underplay the diversities of epistemological groundings - not that he is unaware of them, on the contrary, but for him the most important thing according to his writings is to stay critical and not to get caught up in sterile fights between “schools” or “traditions”, or even in the definition of what this schools could be². I do agree with him, that all approaches are contextual and that one should not essentialize them and imprison them in some

¹ For further clarifications see Eberhard 2001a.

² See for example his reaction to the first text but also the introduction to his *Anthropologie Juridique* (1996).

artificial cages. Nevertheless, I do think that it is important to also note differences and to render them explicit so that fruitful exchange can follow. When I titled my contribution to the workshop in Halle, “Challenges and Prospects for the Anthropology of Law. A Francophone Perspective”, the subtitle was, in my mind, intended to locate my approach in a context I was more or less the only one to be located in, *in this particular meeting* (except Marie-Claire Foblets who was also present). For me, referring to “a perspective” and not “the perspective” added to the footnote where I explicitly stated that this was but my perspective on what the challenges and prospects of an anthropology of Law, seemed to make clear that I just wanted to hint at my *topos* of speech. And I still feel that on the “macro-level” of comparison between “Anglophone” and “Francophone” approaches, there are differences in approaches which it is useful to remind - although there is obviously a great diversity in both “traditions”. The aim was not to freeze any approach, but rather to ease dialogue by trying to point out what may appear as fruitful differences of perspective when anthropologists from diverse backgrounds come together. In a different meeting, held for example in India, it could have been useful to stress the differences of approaches between anthropologists who carry out research on their own societies and those who do research on different societies.

To sum up this point : I do not share the view that we can all just do “science” and that staying “critical” on a dialectical plane is enough for being “scientific”. For me a major requirement, especially in all fields where we have to deal with “inter-situations”, is the requirement of diatopism which is the basis for any - in my eyes - truly dialogical approach. And I would even add, that if this is “especially” important in these fields, it is more generally in all our endeavours to understand the others and the world surrounding us. To give an example : for a few years I could not explicitly differentiate Robert Vachon’s (for example 1990) and Étienne Le Roy’s (for example 1990) use of the diatopical and dialogical method - they were using the same terms but at the same time obviously did something quite different with them, but which again did not really seem to be in an opposition. As for me, I was somehow attracted to both usages, but at the same time it really got on my nerves not to be able to identify what both were doing, what these different usages in fact consisted in, and so to get clear with my own positioning. It is only after lots of “dialogical endeavour” that I managed to understand that Robert Vachon was using the method more in order to move to an intercultural approach to Law, whereas Étienne Le Roy was more interested in the striving for an intercultural theory of Law³. I give this example as for me I do consider both Étienne Le Roy and Robert Vachon as my masters, and as

³ For the reader who may be interested, further developments are available in Eberhard 2001a and 2002a, 124 ss.

Jacques Vanderlinden even has a tendency to perceive Le Roy as “my God”. Just to say that we do definitely share many things and from an external point of view are without doubt part of the same “tradition”. And nevertheless inside of this “tradition” I could only further understanding in some respects through the diatopical and dialogical endeavour. A purely dialectical approach could not have brought me further in that respect.

2. Law with a capital “L”

Here we find another issue, where it is important to differentiate approaches inside a same tradition. Interestingly, as I have started to be trained at the Laboratoire d’Anthropologie Juridique de Paris in 1995, almost a dozen of years after Alliot’s presentation of a theory of legal archetypes (1983), for me it always seemed clear that when Alliot or le Roy wrote *Droit* (Law) with a capital “D” it was in order to refer not to state linked *droit*, but to the *Droit* as phénomène juridique (“legal phenomenon) or *juridicité*, of which state law is but one aspect. It is only little by little that I realized that this was not the case, and that Alliot for example wrote about “*Droit*”, *mit einem grossen D*, as Jacques likes to write, before coming up with his non-ethnocentric science of Law and the legal archetypes⁴. It is not my role to try to justify their choices and their evolutions but I thus nowadays usually mention in my writings that whenever I write “Droit”, I very consciously use this spelling in order to refer to the larger “legal phenomenon” and not just to law, “modern style”⁵. In that perspective “Law with a capital L”, does not at all refer to “a single abstract entity which stands isolated from society” (Vanderlinden 2002 : 70). Ironically, instead of putting “Law” apart from society, the capital “L” in my usage is intended to link it more closely to society : it is this mystery which permits putting into forms the reproduction of our societies and which can only be approached from the point of view of society as whole, necessitating in our modern social sciences’ framework an interdisciplinary approach similar to the one developped in Le Roy’s *Jeu des lois*. Indeed, as all societies do not know our distinctions which therefore have no universal validity (eg. into politics, law, economics etc.) the mystery of the reproduction of your societies must be asked from the point of view of the society as a whole, and not from the point of view of one perspective on it. But here again it remains clear, that even an

⁴ On some not very explicit shifts of terminology in Alliot’s writings at the beginning of the eighties see Eberhard 1999.

⁵ I must admit that I have not inserted a footnote with this clarification in « Challenges and prospects for the anthropology of Law » as I thought things would become very clear on page 51 where I did explicit what I meant by « Law ». I will be more cautious in the future.

anthropology of Law as *anthropologie de la juridicité* or *anthropologie du phénomène juridique*, remains firmly rooted in its Western modern *topos*. Indeed, the search for homeomorphic equivalents, to functional equivalents to our “law”, in other societies has led to the definition of “Law” as *juridicité*. But it is obvious that had we started from another culture’s point of view where there is no *problématique* of “law” as such, we would not be talking about *juridicité*, nor, by the way, of for example *legal* pluralism, which Jacques advocates. Further, besides the “ethnocentricity” of an analysis in terms of “Law”, the whole approach is also biased by our whole social science framework which is fundamentally logo- and anthropocentred (see for example Vachon 1990). But these critiques do not in my mind render this kind of comparative approach useless. If we want to compare, we need models of comparison. They can further our understanding on how the diverse societies of our world put into forms their reproduction and can contribute to a more general legal theory which can also give us a better understanding of modern societies where the “law” is also only one aspect of the “Law”. But obviously all models have their limits and that is something we should always be aware of. Recognizing where they are rooted and what their purpose is helps to assess their usefulness or their non-usefulness and helps articulating it with other approaches. In my own work for example, I see this endeavour towards an intercultural legal theory as complementary to the endeavour towards intercultural approaches to Law, which can in the process emancipate themselves from a reference to “law” or the “legal”⁶.

3. Modernity, postmodernity, transmodernity and their usefulness as analytical tools

Here again, I think the main reason for using this terms is to locate our approaches to Law. I would not mind calling the “modern approach to Law” differently. But I find for example André-Jean Arnaud’s (1998) or Peter Fitzpatrick’s (1992) work in the field of law, or Zygmunt Bauman’s (1987, 1989, 1991) work on modernity and postmodernity very useful to work out the originality of this worldvision. This does not imply for me any value-judgement. I do also not agree with Jacques when he sees the usage of this terms as well as the use of the term “globalization” merely as jargon. Maybe that other words could have been chosen, but I think what is important is the realities to which they refer and also the implications this words have in our perceptions of the reality we live in. I do think, following Roland Robertson (1996) or André-Jean Arnaud (1998), that globalization as the “structuration of the world as

⁶ For further developments see especially Eberhard 2002a, 98-182.

a whole” is a quite recent and original phenomenon which cannot be equated to the previous colonizations or intercultural exchanges in history. Nevertheless, I do agree with the fact that we should not get trapped in pure rhetorics ... I feel that often it is not very appropriate to talk in terms of “postmodernity”, “transmodernity”, “premodernity” or whatever in intercultural settings. If, in my mind, it does make sense to use this terms when analyzing societies where one part of its history and its characteristics are termed as “modern”, it may be inadequate, and even oppressive, to describe situations in areas where “modernity” never was a core referent as in most non-Western cultures⁷. As far as “postmodernity” or “transmodernity” are concerned, I feel that the aim of Boaventura de Sousa Santos (1995) or of André-Jean Arnaud (1998) for example, is to work out the differences of the “emerging paradigm” in relationship to the modern one, whereas Le Roy’s (1999) aim, who uses the term “transmodernity” is more praxis oriented : he advocates an approach to Law nowadays in the Western contexts which should be transmodern in the sense that it articulates the useful premodern and modern available resources with maybe some “postmodern” ones which are still to be invented.

4. The tripodic Law and *multijuridisme*

Above, I have already tried to clarify some aspects of what the researchers of the Laboratoire d’Anthropologie Juridique de Paris, mean with “Law”. I hope to have conveyed that this approach is but one which seems to provide a useful working definition in order to build models of intercultural comparison and of a general Western social sciences’ approach to the putting into forms and putting forms to human reproduction in the domains societies consider as being vital. Let us now say a few words on the “multilegal” (*multijuridique*) approach advocated by Le Roy.

For Le Roy, the major requirement to understand the mystery of Law in given situations is to start the analysis from the totality of the situation, starting with the identification of the actors and their statuses, continuing with the identification resources they can use, the conducts they put in action, the logics which they follow, the spatial and temporal scales (processes) of their actions, the forums of interaction, the valued forms of patterning the relationships, or “orders” (imposed, negotiated, accepted, contested), and the stakes of the different parties. This then finally leads to the working out of the *rules of the game* which are observed in the situation and which can be formalized in general and impersonal norms, models of conduct and behaviour and habitus corresponding respectively to more

⁷ For further developments on this question see Eberhard 2002a, 221-253.

imposed, negotiated or accepted orderings of social relationships⁸. These three feet of Law are in le Roy's view in no hierarchy. On the level of a comparison between different cultures it appears that all cultures seem to know this three feet. But for example European Western legal culture values general and impersonal norms followed by custom (based on models of conduct and behaviour) and then habitus, whereas for example traditional African societies rather value custom, before habitus and then general and impersonal rules and Asian cultures marked by confucianism rather value habitus and an accepted ordering of social relationships followed by custom as a process of negotiation based on models of conduct and behaviour over the imposing of general and impersonal norms (see Le Roy 1999 : 202). It is important to note that these three feet refer to ways of "putting into form" social reproduction and conflict resolution. *Multijuridisme* thus rather points to the formal pluralism of Law, rather than to the substantive "legal pluralism" of the coexistence of diverse possibilities of regulation to which an individual may have access. It is a way to direct our attention to processes which are not taking the form of what we usually identify as "law", such as written down rules, well identified institutions for conflict resolution etc. The aspect of substantial legal pluralism is nevertheless not absent in the multilegal approach : it is dealt with in the analysis while dealing with the forums to which the actors access, while dealing with their resources, their strategies etc. To emphasize the point of "formal pluralism" : even if we would imagine a completely homogenous situation, where the habitus of people would completely correspond to the models of conduct and behaviour which would be vehiculated in the society and which in turn would be perfectly reflected in a written law organizing general and impersonal rules, even then if conflicts would arise, they could be solved according to these three different ways, either by appealing to a tribunal and asking for a decision, or by negotiating a solution among each other, or by acting in accordance with social expectations without even a need for negotiation. Also, the rules of a game in a given situation may for some of them belong to one category or to another. So the point of *multijuridisme* is to recognize the fundamental plural nature of Law, not only as far as its contents are concerned but also in reference to its mechanisms and to their complex interplay in given situations.

We will leave our dialogue here today, with this opening to field study. We will come back to the *praxis* of legal anthropology as it cristallizes in its relationship to fieldwork in our second reply to

⁸ For a more detailed presentation in English of such a dynamic anthropology of Law in the form of a *jeu des lois* or « game of laws » see Eberhard 2001b, 113-118.

Jacques Vanderlinden and which will focus more specifically on the questions arising from the paper we wrote with Nidhi Gupta on women's rights in India.

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