

GLOBALIZATION, STATE LAW AND LEGAL PLURALISM IN BRAZIL

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This paper deals with the relation between globalization, State law and legal pluralism in the Brazilian context. It assumes that there is tendency which simultaneously increases and reduces the power of the traditional State, depending on the aspect of peripheral politics which is taken into account, thereby opening a gap which has been filled by legal pluralism.

Globalization surprises, enchants, scares (Lyotard 1999: 37), somehow implementing several forms of alienation, to adopt Marx's concepts. Globalization surprises us by the velocity with which it rearticulates our lives. Globalization enchants us with the promises that it brings, proclaiming a world free of poverty. Globalization scares us, for it shows the actual circumstances in which we can recognize our boundless fallibility.

From an economic standpoint one could admit in Globalization the triumph of the market. Such perception indicates an explicit pragmatism, a subtle rationalism, as if globalization would be the only vehicle to progress. But globalization is also a discursive practice and in that sense its supporters develop an appropriation of History in order to justify their truths. I mention presentism, a way of looking to the past as the key to the present, with today's eyes, performing a radical subjectivity (Schaff 1995: 111).

Globalization may be seen as the consequence of a process of evolution, if one adopts the so-called historical approach. There is a tendency to manipulate History, taking from the old times only what makes sense to our days, as Walter

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Benjamin suggested with the image of the tiger's leap into the past (Benjamin 1985: 261). Within this same cultural milieu, Francis Fukuyama announced the end of History and the twilight of the last man (Fukuyama 1992). With the apparent victory of democracy and neoliberalism, especially after the collapse of the Berlin wall, all the utopias are gone, still according to Fukuyama. From the Hegelian philosophy, which also recognized the end of History, and from its historiographical tradition, as appropriated by Marx, for whom History would come to an end with the dictatorship of proletariat, Francis Fukuyama set the epistemological anchors of his theory. Fukuyama took Marxist tools to combat Marx himself. The end of History would not be the dictatorship of proletariat, for the end of History would be the dictatorship of the market.

Globalization has been also understood with suspicion. Michael Hardt and Antonio Negri brought us the concept of Empire (Hardt and Negri 2001), as a formulation of political power in a globalized world. Empire would be different from Imperialism. The latter has been subject to a permanent state of war, an endless conflict among the nations. The former would be an hierarchical structure capable of incorporating the United States, the European Union, Japan, the big international corporations, and other protagonists of political power under the guise of 'global players', as for instance the IMF and the WTO. According to Hardt and Negri, Empire would be a sovereign power which would govern the world (Hardt and Negri 2001: xi). The United States would have an important position in this web: the Americans would have the police power in this new world order. The contemporary wars the world has faced could confirm this image. Today's wars are fought under the flag of *just wars*.

Globalization and its intellectual counterpart, liberalism, are also the target of some criticism from Roberto Mangabeira Unger, a Brazilian scholar and political activist who teaches at Harvard. For Unger, liberalism is the guard who watches over us as over a prison-house (Unger 1984: 3). Globalization would be a euphemism for Americanization (Unger 1984: xxxviii). Unger has a radical project, an alternative to Marxism, to social democracy and to neoliberalism. Unger insists that his political project is not a third way, as for instance conceived by Anthony Giddens (2001), Unger's project is a second way, softened or not, given the fact that there is only one alternative presently offered to the world (Unger 1984: xviii). Unger defends what he names an empowerment to democracy, the radicalization of a concrete and constructive popular participation, fighting all the given patterns, imbued with determinism, which enchain us under the rules that enforce the abstract idea of market.

Globalization is theoretically centered on neoliberalism as a herald of the power of the market (Boxberger and Klimenta 1999: 9), in spite of much criticism within the mainstream itself, as suggested by Joseph Stiglitz (Stiglitz 2002: 23). Globalization and neoliberalism demand a cluster of economic reforms in the international scenario (Chossudovsky 1999: 11). Empire manipulates the global players, such as the IMF and the World Bank, in order to guarantee optimal conditions for the development of the capitalism that it defends, centered in the perceptions of freedom (Friedman 2002: 22), of criticism of totalitarianism (Hayek 1994: 199), and of dichotomies between capitalism and socialism (Schumpeter 1975: 232), as if human society were the result of a mere association of people seeking mutual cooperation.

The world lives a perennial crisis of financial instability. International competition demands a relation between capital and work within the frame of the cheap labor force. Pressured and monitored by the IMF and its programs, the Nation States are under a demand to increase their tax burdens and to decrease the amount of social service which they are presumptively obliged to render. This is the curse of the fiscal crisis. There is also a structural crisis which affects the governability of the Nation State. The neoliberal political agenda has the effect of separating the State from its citizens, especially within the South American context. The endless search for monetary stability is the goal which moves the conservative forces. Brazil exemplifies quite well this situation.

In South America traditional law has been under assault as a consequence of globalization. In Brazil this can be easily seen if one considers the various branches of normativity, such as Constitutional Law, Administrative Law, Labor Law, Tax Law, Procedural Law, Consumer Law and Environmental Law.

Constitutional Law is the main target which the forces of globalization are trying to hit. Because there is a widespread assumption that the Nation State has to be immediately changed, all the Brazilian Constitutional conquests are under siege. Citizenship and its actual meaning is a concept that lacks operability in Brazilian daily life. The disenchantment with the left wing government is a manifestation of this perception. There is a common belief that the State is no longer able to provide justice or security. The constitutional text has become a mere symbol, as the flag or the national anthem. The entirety of the fundamental rights that the Brazilian constitution had assured, typical in an old-fashioned Welfare State, are no longer provided, as a result of the diminution of the State and its traditional

responsibilities.

Recently Brazil underwent a constitutional reform, brought about by several constitutional amendments. The main function of these was the reformulation of the traditional state under the pressures of globalization forces. The Brazilian economy has been opened to international capital. Under the command of the IMF 'shadow program', the main features of the present scenario are the liberalization of prices, the collapse of State investment, the liberalization of trade, structural reforms, the divestiture and privatization of State enterprises and land tenure, and the privatization of agricultural land.

Telecommunications, gas and petroleum exploitation, banking, the whole economy has been opened to international operations and interests. For instance, social security has also undergone extensive normative changes, especially as to the minimum age of retirement.

Constitutional Amendment No. 5, from 1995, provided that "the states shall have the power to operate, directly or by means of concession, the local services of piped gas, as provided for by law, it being forbidden to issue any provisional measure for its regulation", thus ending the monopoly of the State over the distribution of piped gas. Constitutional Amendment No. 6, from 1995, ended the monopoly of Brazilian companies over the prospecting and mining of mineral resources. Constitutional Amendment No. 7, from 1995, ended the predominance of domestic ship owners and ships with the Brazilian flag and registration, related to the regulation of air, ocean and ground transportation. Constitutional Amendment No. 8, from 1995, ended the state monopoly of telecommunications services. Constitutional Amendment No. 9, also from 1995, ended the state monopoly of the supply of petroleum, as well as the conditions for contracting the distribution of gas.

Administrative Law has effected a reformulation of the traditional role of the State. Aside from a massive selling of the public enterprises (in the fields of communication, transportation and banking), there is a widespread tendency towards the multiplication of regulatory agencies, a juridical feature which in Brazil was unfamiliar until recently and which has somehow been copied from the North-American agencies.

Labor Law has witnessed a social dumping which was never seen before. Under the flag of 'flexibility of labor rules' there is a marked diminution of social and

labor rights, some of which, such as the minimum wage and the limitation on working hours, were the achievements of years of struggle. The Brazilian Constitution has been criticized for the many labor rights it seeks to assure, such as the protection of employment against arbitrary dismissal or dismissal without just cause, unemployment insurance against involuntary unemployment, a severance-pay fund, and a nationally unified minimum monthly wage, established by law, capable of satisfying workers' basic needs and those of their families in respect of housing, food, education, health, leisure, clothing, hygiene, transportation and social security, with periodical adjustments to maintain its purchasing power. All these rules are purely rhetorical.

Tax Law has seen the enlargement of the State presence with the consequent increase in the national tax burden. There is a general increase in the tax rates as well as the creation of new taxes, related to income and to financial transactions. There is a general tax reform under way. Indirect taxation has been dramatically increased and as the outcome the actual tax burden is concentrated on the shoulders of the have nots, who pay the same rates as the better off.

Procedural Law is demanding new forms of operability, as a result of the general use of the internet and of other cybernetic resources. There is also an emergence of collective rights, as opposed to individual rights, which are the main features of a law system still imbued with Roman law. The judiciary has a heavy load of cases to decide. Forensic services are very expensive in all categories, from court fees to those of lawyers. Recent denunciations of corruption have also helped to increase the distrust that people have towards the judiciary.

Civil Law faces a myriad of new problems, from bioethics to virtual contracts, from new models of marriage to cybernetic infidelity, as well as the apparent confusion between public and private spheres. A new form of judicial person is on the rise, in the form of the NGO, the non governmental organizations.

Consumer Law tries to shape a new pattern of citizenship, whose main feature would be based on consumption power. However, because of the social inequalities in Brazil, that model of citizenship is reserved to a small proportion of the country's population.

Environmental Law tends to oppose the Economy to Ecology, making the latter a hostage to the concept of sustainable development. Albeit the Brazilian Constitution indicates that

all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations,

what one sees in reality is the degradation of the natural resources of Brazil, especially in the rain forest and in the overpopulated urban areas such as Sao Paulo and Rio de Janeiro.

The present, general lack of confidence in the State and the legal rules it tries to enforce brings to reality the

theoretical possibility of more than one legal order within one social-political space, based on different sources of ultimate validity and maintained by forms of organization other than the State (Benda-Beckmann 2003: 275),

that is to say, legal pluralism, in spite of the State law's claims to integrity, coherence and uniformity (Griffiths 2002: 296). Whatever the theoretical debates around a definition of legal pluralism, either as a non-state law recognized by the state, or as a non-state law independent of recognition, Brazilian social reality pragmatically confirms the existence of many layers of normative power, outside the state and far beyond the perception of *asphalt law*, as announced by Santos (1995).

The increase in the drug business as well as the growth of corruption have dramatically changed the reality of the sites visited by Santos when he did his research in Brazil in the 1970s. If one were to visit *Pasargada* today (as Santos named the *favela* he studied), one would find a totally different normative reality. This provides a negative feature of legal pluralism, as depicted by Santi Romano, an Italian law professor who described the *mafia* as a source of legal power, in the early days of theorization about legal pluralism. It is about time to revisit *Pasargada*.

Within the Brazilian state, the coexistence of many sources of normative power transcends Woodman's idea, for whom there can be no map of law (Woodman 2003: 383), albeit it must be well understood that legal pluralism in this context exists within a major state order, that is, legal pluralism in a weak sense, as also

defined by Woodman (2003).

The general distrust towards the new Brazilian state as shaped by globalization is the main reason which determines people's drive to new patterns of power, in order to solve conflicts of daily life. Because solutions to real problems can be achieved outside the traditional domain of the State, there is indeed a contemporary tendency to promote the utilization of alternative sources of dispute resolution, as a result of the weakness of the State. Therefore there is an unexpected relationship between globalization, State law and legal pluralism in Brazil, which tends to increase as the globalization of poverty continues apace.

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