

GLOBALIZATION, STATE LAW AND LEGAL PLURALISM IN BRAZIL.

Arnaldo Sampaio de Moraes Godoy¹

RESUMO: O artigo relaciona globalização e Direito estatal no Brasil. Alavanca a hipótese de que a globalização simultaneamente fortalece e mitiga o poder tradicional do Estado, na medida da intensidade de poder fático em país periférico. Indica-se que há tendência de se oxigenar práticas de pluralismo jurídico, em âmbitos institucional e negocial, desenhando-se o que em âmbito conservador pode se matizar como um *assalto ao direito tradicional*.

PALAVRAS-CHAVE: Globalização. Direito do Estado. Pluralismo Jurídico.

ABSTRACT: This paper deals with the relation between globalization and State law in the present Brazilian context. It assumes that there is tendency that 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 that could be filled by legal pluralism, representing what somewhat can be read as an assault of traditional law.

KEYWORDS: Globalization. State Law. Legal Pluralism.

TABLE OF CONTENTS

1. Introduction (Globalization, Economics and Politics)
2. Globalization: Effects and Perspectives.
3. Globalization, State Law and Legal Pluralism in Brazil
4. Conclusions
5. Bibliography

1. Introduction (Globalization, Economics and Politics)

Globalization surprises, enchants, scares², somehow implementing

¹ Professor pesquisador do Programa de Mestrado em Direito da Universidade Católica de Brasília. Hubert Humphrey Fellow na Universidade de Boston 2002/2003.

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 subjectivity³.

Globalization may be seen as the consequence of a process of evolution, if one adopts this 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 Benjamin had suggested with the image of the tiger's leap into the past⁴. Within this same cultural milieu, Francis Fukuyama announced the end of History and the twilight of the last man⁵. 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

² Jean-François Lyotard, *The Postmodern Condition: a Report on Knowledge*, p. 37.

³ Adam Schaff, *História e Verdade*, p. 111.

⁴ Walter Benjamin, *Illuminations*, p. 261.

⁵ Francis Fukuyama, *The End of History and the Last Man*.

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*, as a formulation of political power in a globalized world⁶. *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 a 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 that would govern the world. 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

⁶ Michael Hardt and Antonio Negri, *Empire*.

who watches over us as over a prison-house⁷. Globalization would be a euphemism for Americanization, as formulated by Unger, who 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. 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 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 centred on neoliberalism as a herald of the power of the market, in spite of much criticism within the mainstream itself, as suggested by Joseph Stiglitz⁸. Globalization and neoliberalism demand a cluster of economic reforms in the international scenario⁹. *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, centred in the perceptions of freedom¹⁰, of criticism of totalitarianism¹¹, and of dichotomies between capitalism and socialism¹², as if human society were the result of a mere association of people searching mutual cooperation.

⁷ Roberto Mangabeira Unger, *Knowledge and Politics*, p. 3.

⁸ Joseph Stiglitz, *Globalization and its Discontents*, p. 23.

⁹ Michael Chossudovsky, *A Globalização da Pobreza*, p. 11.

¹⁰ Thomas L. Friedman, *Capitalism and Freedom*, p. 22.

¹¹ F.A. Hayek, *To Road to Serfdom*, p. 199.

¹² Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, p. 232.

2. Globalization: Effects and Perspectives.

The world lives a perennial crisis of financial instability. International competition demands a relation between capital and work within the frame of the cheap labour 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 that they are presumptively obliged to render. This is the curse of the fiscal crisis.

There is also a structural crisis that 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 that 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, Labour Law, Tax Law, Procedural Law, Consumer Law, Environmental Law and so on.

3. Globalization, State Law and Legal Pluralism in Brazil

Constitutional Law is the main target that 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 affairs in the present scenario are the liberalization of prices, the collapse of the 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 of 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 to the multiplication of regulatory agencies, a juridical feature which Brazil until recently did not know very well and which has somehow been copied from the North-American agencies.

Labour Law has witnessed a social dumping that was never seen before. Under the flag of '*flexibility of labour rules*' there is a marked diminution of social and labour rights, hardly conquered, such as minimum wages and the amount of working hours. The Brazilian Constitution has been criticized for the many labour 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 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 some other cybernetic resources. There is also an emergence of collective rights, as opposed to individual rights, which are the main feature of a law system still imbued with Roman law. The judiciary power 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 NGOs, 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 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 really sees is the degeneration 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 that 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 State¹³, that is to say, legal pluralism, in spite of the State law's claims to integrity, coherence and uniformity¹⁴. 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 way beyond the perception of the *asphalt law*, as announced by Boaventura de Sousa Santos¹⁵.

However, the increase in the drug business as well as the growth of corruption has 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*

¹³ Franz von Benda-Beckman, *Who's Afraid of Legal Pluralism?*, p. 275.

¹⁴ Anne Griffiths, *Legal Pluralism*, p. 296.

¹⁵ Boaventura de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*.

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*.

4. Conclusions

Within the Brazilian state, the coexistence of many sources of normative power transcends Gordon Woodman's idea, for whom there can be no map of law¹⁶, 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 Gordon Woodman.

The general distrust towards the new Brazilian state as shaped by globalization is the main reason that 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 could be 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.

5. Bibliography

BENDA-BECKMANN, Franz von. 'Who's Afraid of Legal Pluralism?' Pp. 275-

¹⁶ Gordon Woodman, *Why there is no Map of Law*.

298 in Rajendra Pradhan (ed.), *Legal Pluralism and Unofficial Law in Social, Economic and Political Development: Papers of the XIIIth International Congress of the Commission on Folk Law and Legal Pluralism*, Vol. III. Kathmandu: International Centre for the Study of Nature, Environment and Culture. 2003.

BENJAMIN, Walter. *Illuminations*. New York: Schocken Books, 1968.

BOXBERGER, Gerald, and Harald KLIMENTA. *As dez mentiras da globalização*. Tradução de Inês Antônio Lohbauer São Paulo: Aquariana, 1999.

CHOSSUDOVSKY, Michel. *A globalização da pobreza: impactos das reformas do FMI e do Banco Mundial*. São Paulo: Moderna, 1999.

FRIEDMAN, Milton. *Capitalism and Freedom*, 4th ed. Chicago and London: The University of Chicago Press, 2002.

FRIEDMAN, Thomas L. *The Lexus and the Olive Tree*. New York: Anchor Books, 2000.

FUKUYAMA, Francis. *The End of History and the Last Man*. London: Penguin Books, 1992.

GIDDENS, Anthony. *A terceira via: reflexões sobre o impasse político atual e o futuro da social-democracia*. 4th ed. Rio de Janeiro: Record, 2001.

GRIFFITHS, Anne. 'Legal Pluralism.' Pp. 289-311 in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory*. Oxford and Portland Oregon: Hart Publishing, 2002.

HABERMAS, Jürgen. *Legitimation Crisis*. Boston: Beacon Press, 1975.

HARDT, Michael, and Antonio NEGRI. *Empire*, 10th ed. Cambridge MA: Harvard University Press, 2001.

HAYEK, F.A. *The road to serfdom*. 50ed. Chicago: The University of Chicago Press.,1994.

HELD, David and Anthony MCGREW (eds.) *The global transformations reader: an introduction to the globalization debate*, 2nd ed. Cambridge, UK: Polity Press, 2003.

LYOTARD, Jean-François. *The Postmodern Condition: A Report on Knowledge*. Minneapolis: University of Minnesota Press, 1999.

SANTOS, Boaventura de Sousa. *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York and London: Routledge, 1995.

SCHAFF, Adam. *História e verdade*, 6th ed. São Paulo: Martins Fontes, 1995.

SCHUMPETER, Joseph A. *Capitalism, Socialism and Democracy*. New York: Harper Perennial 1975.

STIGLITZ, Joseph E. *Globalization and its Discontents*. New York and London: W.W. Norton & Company. 2002.

UNGER, Roberto Mangabeira. *Knowledge and Politics*. London and New York: The Free Press. 1984.

WOODMAN, Gordon. 'Why there can be no map of law.' Pp. 383-392 in Rajendra Pradhan (ed.), *Legal Pluralism and Unofficial Law in Social, Economic and Political Development: Papers of the XIIIth International Congress of the Commission on Folk Law and Legal Pluralism, Vol. III*. Kathmandu: International Centre for the Study of Nature, Environment and Culture, 2003.