The Ashes of Law – Book Review;

Franz von BENDA-BECKMANN, Keebet von BENDA-BECKMANN and Julia ECKERT, *Rules of Law and Laws of Ruling: On the Governance of Law*, Burlington, Ashgate, 2009

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"It should still be worth inquiring whether these disorders did not arise together with the laws themselves, for then, even if they could repress them it is surely the very least to expect from them, that they put a stop to an evil that would not exist without them." (**ROUSSEAU**, *Second Discourse*)

I. Introduction and place of the book

The move from a government to a governance or 'governmentality' type of strategy towards political and social ordering brought along important changes. The book under review purportedly re-examines the contention that this shift produced a retreat of the law. Instead, this mixture of theoretical papers and case studies suggests that the *mantra* of governance is after all making *more* use of the law. The difference being, according to the editors' detailed elaboration, that now a plurality of lawmakers deploys a plurality of legalities; in clear opposition to the state's typical monopoly of a single legality: state law. The second line of inquiry that runs throughout the book uncovers the normative issues that this multiplication of legalities generates. Namely, the dilution of the idea of responsibility and accountability of those who exercise governance and the way in which the promise of free mobilisation of the law open to all can more than ever depend on *factual* access to resources. The expansion of the law could well result in exponential power asymmetries. Put simply, the book deals with the intrinsic relationship between law, power and violence.

This book is a useful starting point for those interested in critically assessing some hot topics in contemporary scholarship such as new governance, soft law, the blurring of the distinction between public and private law and authorities, sovereignty and communities' self-government, or legal pluralism. Since most case studies make both explicit and implicit use of Michel Foucault, Giorgio Agamben and Zygmunt Bauman's fundamental ideas, this book

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provides lawyers with an easy and rare introduction to some of the most relevant social theorists who have written on law in the last decades. While this may be sufficient for undergraduate students or lawyer just getting acquainted with critical jurisprudence writings, the book is clearly insufficient for those already familiar with the topics just mentioned; as we shall see throughout this review.

The essay proceeds as follows. In the following section, I spend some words on the structure of the book. Given its breadth and compartmentalisation, I do not analyse each chapter individually. Instead, I first present the most attractive features of the book as a whole (section III). Then, I examine the extent to which the authors' contributions address the different challenges put forward by the editors in their introduction and derive some consequences from it (section IV, A). Turning to the case studies, I identify and analyse three persistent methodological flaws which seriously limit the value of most contributions (section IV, B). Finally, section V provides a brief conclusion.

II. Structure

The book is organised in twelve chapters. The first two are theoretical, whereas the remaining ten are case studies. Unfortunately, however, the chapters are not further arranged according to any specific logic. Given the fact that in *circa* 280 pages the reader jumps from the challenges of critical legal anthropology (II), private military companies operating in war scenarios (III), security policies in Israel (IV), South American and South African land restitution practices (V and VI), fisheries management (VII), children's governance (VIII), and international soft law instruments (IX, X and XI), to appointment procedures in Italian universities (XII), an internal grouping of the contributions according to a common criterion would certainly have made the reading experience less tortuous.

In any event, the scope of the book is simply too large. The chapters are factually so thick that the number of topics involved incessantly forces the reader to go back and forth in order to relate (and remember) them both to the editors' unifying contribution and to the remaining chapters.

III. Law and social sciences

The editors, Franz and Keebet von Benda-Beckmann and Julia Eckert take the bull by the horns by acknowledging the problem of power in the governance of law. This is in stark contrast with the recent new governance and soft law literatures,[1] which tend only to be critical of the lack of legitimacy of these new mechanisms.

Conversely, the editors aptly show that law is not a pure form that works in an impure world. Along the lines of critical jurisprudence, they identify most of the problems depicted in the volume as problems created by law *itself*; that is, problems that would not exist in the absence of law (reflexive or second order problems). Hence, the issue is not merely one of legitimacy but also one of the *extension* and *desirability* of legal intervention. In other words, one -if not the most important- underlying *problématique* of the book is the "fetishism of law"; a term coined by Jean and John Comaroff in their chapter.

This sheds light on a second valuable contribution of the book. If law is intrinsically contradictory, then only *empirical* analyses can tell us concretely which side of the scale prevails. In my opinion, by offering a theory informed by empirical work in line with Jean and John Comaroff's pleading, this book adopts an intellectual attitude that belongs to the forefront of legal scholarship; the unification of legal theory and social sciences.

This becomes very clear when we try to determine how law structures human behaviour. Classical legal theory along the lines of Kelsen but also Hart, *assumed* that law impacts upon human action. While relying on the idea that law constrains behaviour because of its sanctioning potential or the idea that individuals psychologically recognise some rules as legal, legal theory has never assessed the empirical validity of these claims.[2] Acknowledging the existence of multiple normative standards (legalities) places this assumption under stress. Which types of norms impact upon human behaviour, in which proportion and how? However, it also poses difficulties to the legal pluralist. Indeed, it is up to the latter to show that the specific legal form is not disintegrated in the plurality of legalities. Otherwise, we would not be able to identify the *specific* function served by law and

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[1] **G. de BÚRCA and J. SCOTT**, *Law and New Governance in the EU and the US*, Oxford, Hart, 2006.
U. MÖRTH, *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, Cheltenham, Elgar, 2004.
[2] See, on the empirical nature of some of Hart's jurisprudential assumptions: **F. SCHAUER**, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law", *Ratio Juris*, 2010, pp. 1-21.

no other normative orders. Notwithstanding these difficulties, the case studies in this book help to put empirics right in the way of legal theory.[3]

Finally, this approximation of law to social sciences also occurs at the theoretical level, with the deployment of conceptual frameworks developed by prominent social theorists; as mentioned in the opening section.

IV. A critique of the critique

Praising the avant-garde *attitude* of the book does not say much, however, about the merits of the final product. In this section, I make explicit that, at least in science, the old saying "it is all in the attitude" does not suffice. Sub-section A deals with the main substantive limitations of the book, whereas sub-section B exposes some methodological limitations that are apparent in most case studies.

A. Substance: The editorial challenge

When reading the book under review, the central tension lies in the gap between, on one hand, the intentions of the editors and the challenges they identify to be relevant and, on the other hand, the actual contributions assembled. The editors are concerned with showing (i) how multiple legalities intersect, (ii) how law is intrinsically connected to power, and (iii) how recent de-juridification strategies have to be interpreted as actually reinforcing the role of law in society. To which extent do the case studies respond to this editorial challenge? And what are the consequences of a potential failure?

The undoubtedly book addresses the two first points. Every chapter offers a rich description of the ways in which legal frameworks can be mobilised and used by actors to forward their own goals and agendas. A case in point is Bill Maurer's chapter on how soft law is socially constituted and its content is defined by the actors whose voice is *allowed* to enter the debate. Li's chapter on the use of the "law of the project" in Indonesia introduces the reader to a new source of law, designed from scratch by international experts. Moreover, some of the chapters also explore how different normative practices interact with official law. David

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[3] Joining forces with the recent Naturalist turn; see: **B. LEITER**, "Naturalism in Legal Philosophy" in **E. ZALTA**, *The Stanford Encyclopedia of Philosophy*, 2007, http://plato.stanford.edu/entries/lawphil-naturalism/.

Nelken's chapter, for example, analyses at length how the Italian University appointment system is completely corroded by unofficial rules that 'parasite' official law, benefiting from the latter's *legal* form, giving full content to the old expression "in the shadow of law". Griffiths and Kendal's chapter offers an interesting guide to the historical interplay between legal and administrative rationalities in relation to the Scottish governance of children. Finally, Monica Nuijten and David Lorenzo are equally successful in studying how law is enforced differently across one territory and how those abandoned by law interact nonetheless with the absent state law; *e.g.*, by mimicry of state institutions.

The contributions achieve much less in relation to the third challenge. The editors' thesis, according to which processes widely held as countering the juridification phenomenon are actually reinforcing it, betrays their strong concern with the desirability of society's current degree of juridification. The chapters, however, systematically fail to *notice* and *problematise* this normative issue. As I will show until the end of this section, such failure deeply compromises the quality and reach -both technically and audience wise- of the book under review.

First of all, there is no single reference to the juridification literature or the problems it deals with.[4] Secondly, any juridification thesis needs to distinguish the different legalities that bind social life. Otherwise, the juridification thesis becomes nothing else than a tautology. In this respect, the chapters provide a systematic illustration of the lack of elaboration of an operative concept of law and legality.[5] Consequently, the book offers nothing to overcome the question that *killed* legal pluralism; namely, what is law. Additionally, the failure to preserve the specificity of *legal* legality makes it very difficult to understand the exact medium through which power is exercised. Finally, it also prevents any assessment of the editors' interesting *re-juridification* thesis, which still remains to be explored.

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[4] **J. HABERMAS**, *The Theory of Communicative Action - Life World and System: A Critique of Functionalist Reason*, Boston, Beacon, 1989, Vol. 2; **G. TEUBNER**, "Juridification: Concepts, Aspects, Limits, Solutions" in **G. TEUBNER**, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law*, Berlin, Walter de Gruyter, 1989; **P. ZUMBANSEN**, "Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law", *American Journal of Comparative Law*, 2008, pp. 769-808.

[5] I am assuming with Tamanaha that it is probably impossible to define law in a unitary way and therefore law should be conceptualised according to the specific problem at stake; see: **B.Z. TAMANAHA**, "Understanding Legal Pluralism: Past to Present, Local to Global", *Sydney Law Review*, 2008, pp. 375-411.

Cotterrell supports a rigorous definition of law if legal sociologists are to enter the realm of lawyers; see: **R. COTTERRELL**, "The Sociological Concept of Law", *Journal of Law & Society*, 1983, pp. 241-256, at p. 244.

The lack of engagement with the existing literature is dramatic in Jean and John Comaroff's chapter, in which they plead for the development of a critical legal anthropology. Indeed, since they ignore the *critical jurisprudence* movement as advanced by Costas Douzinas and his collaborators,[6] they fail to realise that their agenda has already been fully developed in the last decade.[7] Even more seriously perhaps, the critical jurisprudence of Douzinas and *al*. does not limit itself to state the current legal fetishism but is also striving to find ways out. The same could be said of those authors who are working in the framework of the *crisis of law*.[8]

To a large extent, this volume merely offers a power critique of law along the lines of the critical legal studies movement. This contributes to leave the educated reader with a strong impression of *déjà vu*. It is not surprising anymore to say that law is connected to power, notwithstanding the factual richness of the accounts offered. One could simply ask: so what? And yet, if this were the case, the reader would have to respect the lack of normative advice and prescriptive writing in the book. Still, by questioning the desirability of legal intervention, the editors chose to legitimate differently a different critique: there is practically no attention paid to *alternatives to law*.[9] Law creates power relations and problems of its own, but we advocate even more law and legal procedures to deal with the former; the contributors paradoxically say! Yet, as one of the contributors -Kelly- aptly shows, this prescription creates an endless vicious circle that permanently calls for more and more law.

The failure to address alternatives to law also stems from the content of the different contributions. The authors, with the remarkable exception of Griffiths and Kendal and to a lesser extent of Nelken, do not perform any comparative analysis of the *statu quo*.[10] Furthermore, the authors almost never deal explicitly with the intrinsic limits of law to operate

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[6] Among the already significant existing literature, the clearest work is: **A. GEAREY and C. DOUZINAS**, *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford, Hart, 2005.

[7] Be it content -legal fetishism, politics of identity, legal violence, post-colonial paradoxes, politics of disorder and fear- or approach wise.

[8] **P. PRODI**, *Una storia della giustizia: Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna, Mulino, 2000.

[9] I take seriously the challenge encountered by Fischl in an article on the question that apparently had killed critical legal studies (henceforth, "CLS"); that is, what would you put in the place of law? Fischl argued, at the time, that this question fundamentally misunderstood the CLS enterprise because it was premised on (i) the need to do normative theory and (ii) the need to have an alternative vision; see: **R. M. FISCHL**, "The Question That Killed Critical Legal Studies", *Law & Social Inquiry*, 1992, pp. 799-820, at p. 808.

[10] See, on the general importance of comparative institutional analysis: **N.K. KOMESAR**, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, Chicago, The University of Chicago Press, 1994.

social change; tough, here again, Kelly and Griffiths and Kendal are exceptions to the rule.[11] Consequently, the means / ends adequacy of law to solve some problems is not questioned at all. The chapters on land restitution are great examples of the authors' naiveté. Can we really expect judges to decide on land restitution without thinking about the economic and social problems that this could bring for the country as a whole? Can a decision that compromises farming productivity, land values, foreign investments, gender equality and many other aspects of social life be taken simply according to *strict* legality and the property rights question? For a useful comparison, take the example of class actions in the US that are routinely decertified by judges mostly because the latter cannot accept taking a decision whose social effects alone could bankrupt an entire industry. In other words, perhaps some decisions *cannot* be made and the authors simply fail to provide the reader with any relevant thoughts on these matters.

As a result, in spite of the laudable attitude already praised, the book cannot contribute *substantially* to the most pressing questions facing the academic (and social) debate. By failing to take into account and communicating with the state of the art, the book also does a poor job in introducing newcomers to the debates mentioned.

B. Method: Selected problems of case studies

Setting aside for a moment the substantive issues discussed in the last section, we still have to examine whether the case studies fulfil the promise of a theoretically informed legal anthropology. Despite being factually and informatively extremely rich, I will suggest that most case studies suffer from shortcomings that affect the *validity* and *relevance* of the descriptions offered. I focus on three particular methodological problems.[12] The following sub-sections also offer a more detailed account of some chapters of the book.

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[11] See, for two different accounts: **N. LUHMANN**, *Law as a Social System*, New York, Oxford University Press, 2008; and **F.H. HAYEK**, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960 [reprint, London, Routledge, 2008].
[12] I am not suggesting, however, that each chapter suffers from the three limitations mentioned or that some of them do not manage to avoid all three.

1. Normative bias and complexity

Too frequently, the case studies of the book under review are heavily dominated by strong normative assumptions. Since discussing the possibility of conducting value-free inquiries is futile, I want to focus instead on the effects that unexamined and undiscussed normative assumptions can produce. The closely related adoption of an insufficiently complex conceptualisation of society also greatly affects the framing of a case study, conditioning the questions to ask and thus the conclusions that are taken.

Let us take as an example Marie-Claire Foblets' study on the modes of governance behind the management of immigration and integration of third country nationals.[13] She uncovers the nexus between EU law and member states (henceforth, "MS") policy. In this respect, she identifies the paradox of MS committing to the harmonisation of migration policy with the Amsterdam Treaty and then shunning away from the announced and formalised compromise after its enactment. She predicts that only the adoption of qualified majority voting (henceforth, "QMV") can bring about the desired changes in immigration policy.

The problem is that there is no argument or analysis in this chain of propositions. First of all, there is no discussion of why the harmonisation of immigration policies is desirable - namely, why is a higher level of protection of human rights always better?- or MS still avoid doing it. We simply learn that harmonisation is not being pursued without being provided with any explanation capable of giving the reader a better grasp of the situation as a whole. This lack of explanation repeats itself when the author advocates QMV instead of the open method of coordination (henceforth, "OMC") to forward her agenda. Here again, she simply states that the former is far more *effective* to reach harmonisation as soon as possible without defending QMV as a fairer or better policy-making tool. In a nutshell, politics are simply thrown out of the window and replaced by the author's naked normative preferences.

Similar problems are also very obvious in Hellum and Derman's chapter, which deals with the inbuilt tensions within land restitution and compensation processes in South Africa. In this context, the law has the difficult task of reconciling land restitution with contemporary race, gender and class inequalities. The land restitution procedure consisted in the creation of a joint venture between those who had been expropriated and agro-firms, instead of a simple

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[13] This analysis equally applies to Sidakis' article and Wiber and Bull's contribution.

transfer of property to the original owners. The government's purpose was to avoid handing out highly productive farms and lands to communities with no technical expertise to run them; this way preventing loss of productivity and lower land values, as well as sending to foreign investors a signal of economic stability. In exchange, the expropriated benefit from a share in the profits and are employed in the joint-ventures, while gaining at the same time future training opportunities.

The authors suggest that, with this formula, the state discreetly converts a problem of justice into a problem of economic growth. Their critique assumes that land restitution is a *purely* juridical problem. The classical juridical therapy mandates to give back the lands. This statement, however, contributes nothing to an understanding of the magnitude of the problems at stake. In fact, the passage of time and the complexification of the social order[14] brought new elements to the equation. Even if the expropriators acquired their land illegally, their use created *legitimate* expectations on uncountable *third parties* to the dispute. These expectations work and have an impact upon many other social systems than the legal one. A strictly legal solution would have disastrous consequences for other goals, such as *economic* and *political* goals (see the description in section IV, A), as well as for such a value as *gender equality*; a fact incidentally recognised by the authors. We should keep in mind that, beyond systems, persons are also at stake here. And a strict legal decision would, most likely, affect negatively a far higher number of human beings than those to whom it benefits. At this point, one should remember Hayek and his visceral contempt for the idea of *social justice*.[15] What does doing justice mean in this situation once captured in its entirety and, even more fundamentally perhaps, justice for *whom*?

The point here is not to take side with the land restitution procedure as it was devised. The purpose was to show that, if we do not represent social reality in its full complexity and if we do not conceptualise it with an equal degree of complexity, we will end up replacing one ideological view by a new one without increasing our understanding of the problem we are addressing.[16] Taken together, normative biases and a lack of complexity preclude a better

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[14] I am not suggesting that the world is now more complex than before. In this context, one only needs to say that the way in which we (discursively) conceptualise our world is more complex.

[15] **F.A. HAYEK**, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, Vol. 2, London, Routledge, 1982.

[16] This lack of complexity in the *look* that framed the description and mapping of the problems is also obvious in Monica Nuijten and David Lorenzo's contribution.

understanding of the phenomenon under analysis, by hiding fundamental features of the phenomenon under scrutiny or keeping them hidden.

2. First and second order problems

A distinct methodological issue lies in the authors' conflation of the critique of the law with the description of its *ineffectiveness*. The lack of awareness of this distinction only limits our grasping of the different orders of problems to those surrounding the use of the legal form. Furthermore, it makes the lack of complexity in the way we approach social phenomena all the more obvious.

A general problem of laws is their lack of effectiveness. As a matter of fact, we frequently say that the quality of a law matters less than the extent to which it is actually applied and observed. Indeed, if laws are not applied, sociological inquiry should find out *who* is not doing its job -the courts, the police and so on- and *why*? Sometimes the answer resides in the lack of institutional capacity of the law to tackle them. At other times, it will be the law's means-ends unsuitability. Finally, it may also have to do with the legal actors' own preferences and values. The important thing to remember is that, when an existing law is violated, legal action has to follow. In a sense, it refers to the role of the legal *system* to uphold the normative expectations it has created.

An ideological critique of the law addresses a different problem; generally, the one encompassed by the statement that law *legally* fuels asymmetries of power and reinforces existing relations of domination. This has much more to do with the normative and social content of the law than with its legality or illegality. Of course, the application of laws by institutions can be normatively questionable but that is not the point I want to stress here.

The chapter by Wiber and Bull on fisheries management perfectly illustrates my point by conflating these dimensions. They argue that a new participatory governance structure led to the privatisation of fisheries management, due to the political priority given to corporations, the lack of information publicly available and the blackmail strategies employed by companies against their workers. In order to improve things, they suggest that more information should be made publicly available.

As rich as their analysis is, they still fail to understand the different order of problems at stake. It is not because more information is made publicly available that participation will be improved. This is so, because participation is being curtailed due to illegal behaviour, restricting the freedom the use of part of that information by workers. Ironically, because of the authors' bias in favour of participatory decision-making, they ignore the material conditions needed to exercise it. Two points must be raised. First, their conclusion is anything but radical or critical. Secondly, by framing the question in such terms, they fail to seriously inquire on the reasons why the courts and law enforcers do not fulfil their mission; that is, the legality question, which could be the stepping stone for the normative ideal question of a broader reception of participatory governance ideals.[17] Furthermore, this chapter clearly shows that the illegal behaviour of companies is not an effect of the law of participatory governance. If second-order problems are to be solved, first order issues are to be dealt with in the first place. Finally, we can clearly see, on the basis of what was said so far, that different therapies apply to problems of a different order.

In his chapter on the Israeli security policies after the first Intifada, Tobias Kelly offers a solid application of the distinction between first and second order problems.[18] As he cogently argues, Israel and Palestine are both economically and territorially integrated. This is the first order level of the problem. The second order level is constituted by the security laws adopted in recent times in order to superimpose upon these integrated territories and populations a system of checkpoints, controlling Palestinians freedom of entry and circulation in Israel. As the author claims, since no security law aims at dealing with the first order level, the former only creates tensions and civil unrest due to daily burdensome procedures. In order to control the latter, more restrictive laws have to be applied, as actually happened and is still happening. Still, these laws only solve problems created by the previous laws, thus leaving untouched the first-order problem; namely, economic and territorial integration.

In this sub-section, I tried to demonstrate how being able to identify distinct orders of problems is fundamental to be able to use the law in a more informed way.[19] More important

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[17] This limitation is patent in Sidakis' chapter on the use of violence by private military companies. David Nelken's chapter suggests that broader cultural values like group loyalty can help to explain the inaction of citizens and courts in the face of illegal behaviour.

[18] Likewise, Griffiths and Kendal's chapter on the historical evolution of child care in Scotland rigorously takes into account this distinction.

[19] **E. PERUZZOTTI**, "Modernisation and Juridification in Latin America: A Reassessment of the Latin American Developmental Path", *Thesis Eleven*, 1999, pp. 59-82.

for the economy of this essay is the conclusion that conflating them compromises the *understanding* of the multiple dimensions at play in social phenomena. As in the previous sub-section, we have to conclude that sharing the right *attitude* to legal scholarship is not sufficient; it has to be complex enough to avoid becoming a type of *faits divers*.

V. The ashes of law

This is a sad book. The defects and contradictions of the law are crudely exposed, as if we were observing a doctor ripping off the thorax of a patient on the surgery table. Law is on fire and is fire. Since most chapters echo unexamined normative preferences, the reader is left in a delicate position. First, he is told that there are a set of undisputed goals that society should reach. But, then, no exit strategy is provided and most contributors still go on to advocate more law to remedy the problems created by law itself. This is probably the greatest unfulfilled promise of the book: *so what* and *where to*?

When closing this book, law appears to be nothing more or less than an exposed fracture. The overall feeling is one of non-fulfillment; that only the easy part of the job was delivered and that the large questions identified by the editors remained largely unexplored. For this reason, the book is best suitable as an introduction to the way power and law are interwoven in the contemporary world. How much that satisfies other readers -at the normative and descriptive levels- is left to the following parable:

> "This wanderer is no stranger to me; he passed by here many years ago. He is called Zarathustra; but he has changed. Then, you carried your ashes into the mountains; would you now carry fire into the valleys? Do you not fear the punishment for arsonists?"[20]

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[20] **F. NIETZSCHE**, *Thus Spoke Zarathustra*, 1891; New York, Barnes & Noble Books, 2005, p. 8.