

Grasping Kaleidoscopic Circumstances - Methodological Considerations for Animating Legal Sensibility

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"The panoramic and the kaleidoscopic imply that an underlying or transcending viewpoint is possible. That is, the very fluidity, the change of perspectives is esthetic, because it implies something beyond" (Wheelock (1969): The Mythmaker).

I gave my paper the very long and perhaps somewhat unintelligible title "Grasping kaleidoscopic circumstances - Methodological considerations for animating legal sensibility" when preparing this conference in 1994, because I had a feeling of not being able to understand and grasp the environment I was part of - mainly the Northern environment.

I had a feeling - perhaps a wrong one but anyway - that I and others had been able to better understand and explain, what we thought were going on less than a decade ago. And I also had a feeling that if we were going to try to make sense of what was going on around us - to grasp the fleeting patterns, changing as with every little move of a kaleidoscope - we could not resort to modern rationality only.

Rather we would need to resort to feelings, to something inside ourselves which we might have to animate or reanimate in

order to find tools and ways to understand the outside world. What I suggest is thus that in order to grasp the fleeting, chaotic circumstances which seem to have become our contemporary condition, we need to animate and cultivate senses and sensibility, and that we as persons who deal with legal systems and their shortcomings and impacts should perhaps try to deal with legal sensibility - to study it in others and to animate and cultivate it in ourselves.

I shall first speak briefly about some of the important legal changes as seen from my Northern perspective - which has now perhaps become so extremely Northern that it is beginning to transcend into a Southern perspective?

Then I shall continue to develop some thoughts about *why* I think that the process of animating legal sensibility is needed, and finally I shall try to indicate *how* I think that it may actually be animated - which methods we - or some of us - might employ for this purpose.

Which Kaleidoscopic Circumstances?

Looking at legal change from a Northern perspective it seems to me that it might perhaps be superficially and briefly described through a number of processes beginning with "de-". There is de-colonization, de-centralization, de-construction (not just of literature but also of for instance the nation state), de-polarization (of the the east-west, capitalist-socialist divide), and there is also a certain de-masculinization of the legal profession and system.

Maybe there are also a number of processes beginning with "re-" which we are witnessing and which together with the "de-processes" form complicated kaleidoscopic patterns. I am thinking of re-colonization, re-centralization for instance in the form of the establishment of the European Union, re-construction of a number of new "nation states", and perhaps re-polarization of the world along North/South lines instead of East/West lines.

To take the Danish example - we have a small nation state, which we from today's perspective may perhaps consider an "intact" nation state a quarter of a century ago. But since then it has been de-constructed as a national unity and become reconstructed as a member of the European Economic Community

Grasping Kaleidoscopic...

from 1972 - a supranational, regional entity developing a new legal realm.

Whether one wants to consider establishment of Home Rule for Greenland from 1979 the final step in a process of decolonization or just a significant step may be a question of taste, but it surely does lead to de-centralization of legal power within a commonwealth.

The idea of a monocentric political and legal power and an according theory is still widely upheld in the North, even though far reaching actual and legal change has taken place. Especially national legal theoreticians often do not seem to notice this. The North considers itself theoretically independent from the South in legal matters - in contrast to the South, where changes in legal conditions and theory have been much more clearly needed and felt.

What is undermining the Northern sense of security and steadiness is probably the de-polarization, the mythological "Fall of the Berlin Wall", which is conceived as a collapse of worldorders. In this respect it may perhaps also be understood as a certain surrender of an important axiological foundation of the modern legal system, linked as it has been to a capitalist and industrialist mode of production.

Nation states are having trouble outside the North, but that has not bothered this part of the world too much. But how to judge what is going on in ex-Yugoslavia? Are we watching the "internal colonizations", upon which the nationstates were also built, becoming a greater political, economic, and military problem and challenge after the process of external decolonization has come to an end?

The challenges of our Northern perceptions and values have been going on over a longer period especially stemming from what has been described as the ecological crisis. The buzzword of sustainability is extremely difficult if not impossible to define - but it does signify an uneasiness in the North with the way we go about things, with our life style and quality or decreasing quality of life to mention other buzz words. We can no longer stick to our old measures of growth. Small may not be beautiful, but bigger and more is certainly no longer undisputedly better. How to combine the plurality of values and make priorities among them?

Hanne Petersen

How are we going to orient or reorient ourselves when the world is in flux, and there is no longer one overriding central perspective? - When "truth" can only be understood in the plural?

What is the role of "law" in this process of internal reevaluation and internal decolonization and political and cultural restructuring? Whose law are we talking about - or whose perception of law?

The discussion about legal cultures, legal pluralism and legal polycentricity contributes to the kaleidoscopic view of law - there is no longer a privileged perspective from which to view law, but the perspectives and approaches may be constantly changing according to movement, content and context - and thus may form new patterns of order, of longer or shorter duration and of differing beauty (Blume & Petersen (eds), 1993; Petersen & Zahle (eds), 1995).

Why is Legal Sensibility Needed

Senses are tools for orientation, recognition, and understanding of the everyday world of which we are part. Science has during the modern period become the prime means for understanding, explanation and control, but we have reached a period where science is seen as creating problems as much as it is solving them. - This goes for legal science as well.

Legal sensibility is needed because the tools for understanding and acting which we have utilized in the West up to now are being worn out, and are no longer serving us well.

We are reaching a point, where we are beginning to understand science not as objective knowledge, but as one cosmology or world view among others (Fischer, 1984). A worldview is a synthesis of a particular people's belief about the place of self within society and cosmos¹.

The worldview which has been dominant in the Western world since the scientific revolution of the 17th Century has been the mechanistic world view. The mechanistic world view viewed nature as dead and matter as passive. However a new world view is slowly emerging to replace the mechanistic world view.

¹ This is Carolyn Merchant's expression in "Ecological Revolutions" (1989:70)

"The universe of classical physics, formulated near the outset of the modern age, was a vast and eternal machine, composed of indestructible particles of matter, propelled by indestructible energy, and governed by changeless mathematical laws.

By contrast, the universe of the new cosmology is an evolving organism. It recalls the mythological accounts of the Cosmic Egg, from which the universal organism grew, forming within itself all that is" (Sheldrake, 1988:79).

With this new emerging cosmology science, including jurisprudence, is facing a severe challenge and will be obliged to scrutinize its cultural and axiological foundations.

Legal science of the West is a child of the modern world view, which offered rationality hegemonic value.

Cultivation of legal sensibility might contribute to an understanding of legal order which is better in agreement with an emerging cosmology. It might perhaps also contribute to a better understanding of the kaleidoscopic circumstances we are part of.

In his recent book, "Toward a New Common Sense", Boaventura de Sousa Santos claims that we are moving from modern science to postmodern knowledge. He describes scientific rationality as a totalitarian model inasmuch as it denies rationality to all forms of knowledge that do not abide by its own epistemological principles and its own methodological rules. (Santos, 1995:12). It is his view that postmodern knowledge will be a "new common sense", and he describes the paradigm we are moving towards as the "**paradigm of a prudent knowledge for a decent life**" (22) - that is a paradigm that is both scientific and social.

When trying to deal with and develop a new legal common sense it should then be one of prudent knowledge of law - as already indicated in the term "juris-prudence" - aimed at contributing to a decent life.

That is we should not just try to understand the kaleidoscopic circumstances of which we are part for pure academic and rational reasons, but in order to contribute to a certain axiological goal - to certain values, which Santos describes as "a decent life".

I think that we might consider whether some of - and which of - the values connected to and protected by the contemporary Western modern legal system should be secured for the next millennium.

Hanne Petersen

I have just read six lectures by the Italian author, Italo Calvino, which were supposed to be given at Harvard University in 1985, where Calvino deals with important literary values for the coming millenium, and I want to mention them for you as perhaps a source of inspiration of values which might be kept - or cultivated - also in legal cultures. They are lightness, rapidity, meticulousness, visibility/visualization, diversity. - I think that these values can perhaps be perceived as more general values for a postindustrial future. If that is so, some of the present conditions may be understood as demands for such values, and some of the challenges for legal sensibilities may be to protect and secure them.

How do we - as legally trained or interested in legal matters - develop methods which contribute to an increase in the quality of life of people also but of course not only in the North in the contemporary period? How do we secure lightness without prosaic and bureaucratic health systems? Access to rapid, non-polluting, democratic information and communication? How do we secure meticulousness in matters concerning cultural and legal order without a monocentric hierarchic legal system to "rely" on - do we have to develop methods securing meticulous participation? What does the value of visibility or visualization imply in a legal context - is it something to be sought and secured, and if it is then how? Diversity as a cultural and legal value has been discussed at length over decades. Human rights can be seen as one proclamation and perhaps also a means to secure diversity - to integrate it in the normative fabric, in the normative actions and percpetions of different societies.

Boaventura de Sousa Santos writes about the principle of community, which he sees as part of one of the two modern pillars, that of regulation. The other pillar is that of emancipation. The principle of community consists of three elements: participation, solidarity and pleasure - elements which have not totally been colonized by modern science, and which a new common sense should build upon. In relation to the pillar of emancipation the aesthetic-expressive rationality has been left unfinished by modernity, and must be cultivated further by the new common sense.

I think that in our processing of grasping what is going on around us we are already evaluating. But with the change of paradigm we are witnessing now, we are also loosing or have

Grasping Kaleidoscopic...

already lost some of our measures or yardsticks for measuring. The emergent paradigm or paradigms may offer us ways of grasping and evaluating contemporary conditions.

Is what is going on contributing to participation, solidarity, pleasure including aesthetic pleasure, perhaps as lightness, to rapidity, meticulousness, visibility and diversity?

Are the legal systems which are under development contributing to securing these values? Are we as participants of our societies and as persons with a developed (or developing) legal sensibility contributing to development and protection of such values?

How is Legal Sensibility Animated?

How are we going to develop and cultivate our legal sensibility in order that we might contribute to a change of paradigm - if that is what we want. I think that is at least what I want at the moment.

Which shifts of methods are required as a result of shifts of values?

Baxi claims that **comparative studies of legal cultures will help us to remove the continual impoverishment of our sensibility, and that increased legal sensibility aims not just at understanding or critiquing - it aims also at "taking suffering seriously" - and to a contribution to the process of minimizing the suffering and crisis (Baxi, 1991).**²

I think that that clearly implies that when studying legal cultures in the North, we cannot limit ourselves to studying positive law, especially not if our goal is also to grasp the kaleidoscopic circumstances under which we are living.

To animate legal sensibility - to enable us to take the conditions and changes, under which we are living, seriously we must **widen our approach.**

Legal cultural studies must include other "material" and other approaches than dogmatic jurisprudence. The legal culture of a society - its legal common sense - cannot be grasped by studying legislation or administrative or judicial decisions alone. We are dealing with something which is much more fluid

² I have written more about this in another forthcoming article, "The cancellation of gender and nature in legal cultures".

and in flux, as the recent important discussions about ethics in many fields demonstrate.

We must learn to analyze and understand other material, which may better than legislation reveal to us what changes in normative perceptions are taking place in the societies of which we are participants. The emerging legal sensibility of a culture may be grasped through myths, drama, rituals, religions, and their presentation, which in today's contemporary Western world is expressed mainly through the audiovisual media (movies, tv-series, Lion King).

"Myths are not true, but there is something like them that is true..."

In effect all thinking is mythic thinking; but what we now call mythic thought as opposed to rational thought is ideation that is no longer conventional - the arrangement of reality in mental categories which current usage does not consider useful, perhaps not even intelligible"

"thinking ceases to be rational and becomes mythic (imaginative) when it dispenses with the conventional as a part of the metaphor and forms its ideas out of Gestalten which are not "true" - i.e. when it forms both elements of the metaphor out of unconventional but not unintelligible hypostatizations" (Wheelock, 1969:66 & 67)

The need to secure diversity and perhaps also solidarity may require that we develop and cultivate, what I have in another article called "juridical tact"³. We may need more empathy and care about the needs and demands of others to be able to participate constructively in diverse contexts and to be able to express active and productive solidarity.

How to develop methods which secure or at least contribute to pleasure or pleasurable conditions? I don't really know, but I am sure that much of the work which has been done by many of the participants here has been done also because it has given pleasure and fun. If pleasure is accepted as a goal to be achieved through societal order, conditions have to be organized in a way

³ "Reclaiming Juridical Tact. Observations and Reflections on Customs and Informal Law as (pluralist) Sources of Polycentric Law", In Petersen & Zahle (eds) (1995): Legal Polycentricity.

which bring about pleasure for the individual participants. That may mean more flexibility at some times and less at others. Speed and rapidity with some tasks and contemplation with others.

In order to grasp kaleidoscopic changes I think that rational thought and rational method is not sufficient. **We need to combine methods of rationality and of emotion.** We need to acknowledge and cultivate intuitive methods or "emotional" methods, we need to be able to know and recognize the diverse expressions of feelings and senses of justice and injustice, and not just discard such expressions as irrational or irrelevant, as it seems we are often prone to do in the North.

Legal sensibility may perhaps be animated through a combination of openness and of intimacy - concerns of love and desire (*le desir d'être ensemble* - for instance in a community) and care might perhaps coexist with concerns of metaphysical equality in legal thinking.

According to Santos, postmodern knowledge as common sense is not just a way to understand but also a way to achieve emancipation. Common sense is characterized by elements which are probably relevant if we want to grasp both the cognitive, the emancipative, and the aesthetic elements of contemporary kaleidoscopic circumstances.

Common sense collapses cause and intention, it is practical and pragmatic, it is self-evident and transparent, it is superficial, and **common sense knowledge is nondisciplinary and nonmethodic.** Common sense is rhetorical and metaphorical, it does not teach, it persuades or convinces, and it fuses use with enjoyment, the emotional with the intellectual and the practical (Santos, 1995:47).

Even though Santos underlines the nonmethodic element of common sense knowledge, I think that we ought nevertheless consider how we animate a legal sensibility that might contribute to protection of "post-modern values".

A **kaleidoscopic method** employed for this purpose could perhaps be characterized by the fact that it brings together elements which seemingly do not belong together - which may not be causally related, but which may nevertheless form a pattern (see also Geertinger, 1995, chapter 30). They may be

held together by what has also been termed "synchronicity" (Jung, 1973)⁴.

Through an awareness of, and an **embracing of the fluid and the unpredictable** information, of common sense knowledge and wisdom, we might perhaps not just animate and cultivate legal sensibility but also common responsibility for the conditions under which we are living.

Viewing law and science as art (Feyerabend, 1984) rather than as technique might help in this process as might increasing awareness of non-verbal normativity and communication.

A cultivation of our ability to bear insecurity, chaos and change is also needed. Santos claims that **we need a reassessment of chaos as a form of knowledge rather than ignorance**, and a recognition that rather than transcending chaos, order coexists with it in a more or less tense relation (Santos, 1995:26).

Perhaps we are in a period where the qualities of the Greek god, Kairos, will become again more important? Kairos is one, who grasps time. He is presented with wings both on his back and on his heels, thus visualizing both lightness, quickness, and signifying accuracy in dealing with diversity.

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⁴ Jung uses the "general concept of synchronicity in the special sense of a coincidence in time of two or more causally unrelated events which have the same or a similar meaning. Synchronicity therefore means the simultaneous occurrence of a certain psychic state with one or more external events which appear as meaningful parallels to the momentary subjective state - and, in certain cases, vice versa" (Jung ,1973:25).

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