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## **The Globalization of Law**

### ABSTRACT

The paper is structured in five sections. Firstly, some issues related to the transplanting of legal principles and institutions across legal systems and cultures, as well as from the national to the international, supranational and global levels of regulation, are addressed.

Secondly, the phases and modes of legal globalization are examined by focusing on its two main vehicles: legal theory and the actual transfer of principles and institutions. As for the latter, in particular, emphasis is placed on the impact and implications of the application of principles such as that of mutual recognition in a growing number of legal systems.

Thirdly, the paper discusses how the globalization of law is, itself, governed by laws the nature and operation of which is often counter-intuitive, as is the case with the tension arising out of the simultaneous phenomena of increasing unity and increasing differentiation of legal systems.

Fourthly, it elaborates on the research techniques and methodologies which are most apt to undertake systematic scholarly study of the globalization of law, and outlines some areas deserving further investigation.

Fifthly, the concluding section weaves together the main issues addressed. It argues that evidence that diverse legal systems operating at different levels share some principles and institutions only validates the extraordinary ability of such principles and institutions to coexist and, even, integrate.

Sabino Cassese

## **THE GLOBALIZATION OF LAW \***

Contents:

1. The circulation and spread of legal institutions
2. Phases and modes of legal globalization
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## **1. The circulation and spread of legal institutions**

Can democracy be exported in Iraq by means of military occupation? Can the President of the United States ask Russia to respect democracy, that is “a rule of law and protection of minorities, a free press and a viable political opposition”?<sup>1</sup> Can the World Trade Organization (hereinafter WTO) require that the public administration of Malaysia – like the governments of all other States - meet the obligation to open participation in the tendering procedures for the awarding of government contracts? Can all nations be asked to respect a single, universal catalogue of human rights? Can the United States require that domestic consultation procedures be adopted by international organizations? Can free trade liberalization be used to induce China to introduce the rule of law into its domestic legal system?

These are all controversial issues. In what follows, I shall endeavor to examine each of them and to formulate some additional questions in order to disentangle the complex, ambiguous and multifaceted subject of this paper.

The achievements of occupation forces in Germany and Japan after World War II, as well as the more recent achievements of the UN-authorized, multinational stabilization force in Bosnia and Herzegovina could be repeated. Foreign military forces did indeed import democracy into those three countries. Nonetheless, democracy, in the sense in which we commonly understand it, is a complex set of institutions which have developed over time in the Western world, first in the United States, and then elsewhere. Is it right to consider these

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<sup>1</sup> Declaration of the President of the United States, G. W. Bush, February 24, 2005.

institutions as superior to others, and to transplant them into countries which belong to different traditions? Would it not be desirable that political institutions be indigenous, making them more likely to be accepted by their respective societies? Insofar as history demonstrates the existence of different forms of democracy, which of them should be exported? Or, on the contrary, does the diversity of democratic forms actually facilitate their successful transplant in different social and political contexts? How long can a democratic government last if such conditions as economic development (almost always correlated with democracy) are not achieved?<sup>2</sup> Would the United States, which often demands that other States introduce democratic regimes, ever agree to the abolition of the death penalty – a condition for Turkey’s accession to the European Union?<sup>3</sup>

A similar range of questions has been raised by the “Government Procurement Agreement” signed in 1994 in the WTO framework. Originally conceived as a means for promoting the free circulation of goods and services, this agreement requires that government suppliers be chosen on the basis of open tendering procedures applied in a non-discriminatory manner. Transparency, competition, equal treatment and a reasoned decision on the award of the contract must all be provided. These principles also apply in countries where the awarding of government contracts is aimed at pursuing specific goals, such as the development of disadvantaged areas or the assistance to socio-economically

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<sup>2</sup> These issues are discussed by E. Bellin, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, in “Political Science Quarterly”, vol. 119, n. 4, Winter 2004-2005, pp. 595-608, and A. Sen, *La democrazia degli altri*, Milan, Mondadori, 2<sup>nd</sup> ed., 2004.

<sup>3</sup> The United States actually behaves in the opposite way. On March 7, 2005, it decided to withdraw from the optional protocol to the 1963 Vienna Convention on Consular Relations granting compulsory jurisdiction to the International Court of Justice in disputes arising out of the Convention. The decision was

disadvantaged populations. In Malaysia, for instance, domestic legislation accords the indigenous Bumiputera population a preferential treatment in terms of access to bids, prices and other contractual provisions. How then to reconcile the requirements of global free trade with the need to help the disadvantaged? Can the law governing public procurements be conceived so as to harmonize domestic goals of protection with global demands for free trade? And how should Malaysia behave? Should it not adhere to the agreement altogether or ask for *ad hoc* derogations in favor of the Bumiputera?<sup>4</sup>

The question whether all nations may be asked to respect a single, universal catalogue of human rights refers to the 1948 International (later “Universal”) Declaration of Human Rights, as codified by the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. It has been pointed out that the Declaration both attenuates the monopoly of States, by allowing individuals to become active subjects of global law, and weakens their sovereignty, by enabling judicial authorities to condemn breaches of the supranational legal order.<sup>5</sup> Born as a “common ideal to be pursued,” the Declaration has become a “parameter for evaluating behavior,”<sup>6</sup> thereby also becoming increasingly exposed to criticism. In Islamic and sub-Saharan African

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adopted in response to death penalty opponents, who began to invoke the Vienna Convention to challenge capital sentences imposed on foreign citizens in the United States.

<sup>4</sup> These questions are addressed by C. McCrudden and S.G. Gross in *WTO Rules on Government Procurement and National Administrative Law*, paper presented at the workshop, “Towards a Global Administrative Law? Legality, Accountability, and Participation in Global Governance”, Merton College, Oxford, October 2004.

<sup>5</sup> M. Delmas-Marty, *Le Relatif et l’Universel*, Paris, Seuil, 2004, p. 72.

<sup>6</sup> L. Condorelli, *L’azione delle Nazioni Unite per l’attuazione della dichiarazione universale*, in Società Italiana per l’Organizzazione Internazionale, “Il sistema universale dei diritti umani all’alba del XXI secolo”, Rome, 1999, Acts of the national conference for the celebration of the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights, Rome, SIOI, 1999, p. 32.

cultures, some argue for the rejection of modern Western political values. A Chinese legal scholar highlighted that, in his traditional language, no term fully corresponds to the notion of “individual right” as established in the Western legal tradition.<sup>7</sup> Universality - it has been emphasized – is a myth. The legal protection of human rights varies according to cultural traditions and political structures.<sup>8</sup>

Moving on to the following subject, the U.S. is not surprisingly accused of “legal imperialism,” due to the fact that it demands that international organizations adopt consultation procedures modeled on American ones. Indeed, between the 1970s and the 1990s, the U.S. introduced powerful instruments to promote participation in administrative decision-making procedures. For example, in order to adopt an environmental protection regulation, an administrative authority has to notify the affected industries and environmental associations by sending them a draft of the proposed regulation. The addressees of the regulation and other interested parties may then put forward comments and proposals before the authority issues its decision. On the contrary, when decisions are made not by national authorities but by an international organization, private actors see their domestic law right of participation evaporate. The United States therefore argues that international organizations as well ought to guarantee an analogous right of participation by consulting interested parties. In this regard, is it fair to require that international organizations, within whose framework informality and negotiation prevail, adopt American-style adversarial procedures? And how can such criteria

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<sup>7</sup> D. Zolo, *Fondamento della universalità dei diritti dell'uomo*, in E. Diciotto and V. Velluzzi (eds), “Ordinamento giuridico, sovranità, diritti”, Turin, Giappichelli, 2003, p. 202; J. Yacoub, *Les droits de l'homme sont-ils exportables?*, Paris, Ellipses, 2005.

<sup>8</sup> A. Cassese, *I diritti umani nel mondo contemporaneo*, Rome-Bari, Laterza, 8<sup>th</sup> ed., 2003, p. 51.

be transplanted into a wider context where, considering the interests involved in global decisions, consultation may slow or even paralyze the proceeding? Finally, doesn't the duty to consult interested parties change nature when transferred to the global level?<sup>9</sup>

The following issue has been debated in view of China's participation in the WTO. During the negotiations, China's membership in the Organization was advocated on the grounds that it would promote the rule of law in that country. Yet, is it legitimate to transplant fundamental legal principles developed in some Western countries to the East? Can principles which work in London or Washington work just as well in Beijing? And how may the rule of law take root in legal systems where the authority of the judiciary is constrained and may not extend to areas such as political freedom?<sup>10</sup>

All of the above questions have one thing in common: they all address the circulation of legal institutions among national systems and their spread from the national to the global level, and *vice versa*. Transfers like these are no novelty but their speed has increased as we have left behind the rigid world of 18<sup>th</sup> and 19<sup>th</sup> century nationalism.

This unitary problem takes five different forms. The first is the direct transfer of institutions from one national system to another (for example, American democracy in Iraq). The second is the imposition of a global legal principle upon national public administrations (for example, the tendering rule that

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<sup>9</sup> The literature on this subject is found in S. Cassese, *Il diritto amministrativo globale. Una introduzione*, forthcoming in "Rivista trimestrale di diritto pubblico", n. 2, 2005.

<sup>10</sup> On these problems, G. Silverstein, *Globalization and the rule of law: "A machine that runs of itself?"*, in "International Journal of Constitutional Law", vol. 1, n. 3, 2003, pp. 429-445.

the WTO requires of member states' administrations, including Malaysia). The third is the imposition by a global judicial body of a common legal principle, not only upon States, but also within national legal systems (for example, universal human rights, which everybody at the national level ought to respect). The fourth form captures legal principles which are transplanted from national legal systems to the global level (for example, the duty to consult, from the American legal system to the global one). Finally, one or more institutions may spill over into other contexts at the global level (for example, free trade used to introduce the supremacy of law).

## **2. Phases and modes of legal globalization**

The questions raised above have helped us to focus on the subject of the progressive globalization of law. I would now like to investigate the main phases and modes of legal globalization before turning to the laws governing this process.

Legal thought is the first area affected by the circulation and spreading of law. Here, globalization does not concern positive institutions but rather research approaches, techniques and methodologies. This is the domain of the universality of legal thought. It is limited to legal culture and does not extend to positive law.

As natural law retreated in the 18<sup>th</sup> century (and remained behind the scenes into the 19<sup>th</sup> century<sup>11</sup>), legal thought began to distinguish “local jurisprudence” from “universal jurisprudence” (Jeremy Bentham), or “particular jurisprudence” from “general jurisprudence” (John Austin). The universal or general legal thought

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<sup>11</sup> G. Fassò, *La filosofia del diritto dell'Ottocento e del Novecento*, Bologna, Il Mulino, 1988, p. 306.

draws on principles common to several systems of positive law. Its scope is however quite limited. It includes the writings of Roman jurists, the decisions of English judges, and the provisions of the French and Prussian codes. It is universal, but this universe is narrow and atemporal.<sup>12</sup> Gian Domenico Romagnosi's 1833 "Universal Public Law" illustrates this well.<sup>13</sup>

In the 20<sup>th</sup> century, the universality of legal thought was not under discussion; rather, its scope widened because one no longer distinguished necessarily between particular or local jurisprudence and universal or general jurisprudence. According to Saleilles (1904), "all legal thought is necessarily international and universal."<sup>14</sup>

Twentieth century legal thinkers are, however, positivists and assume that a universal law requires a single sovereign and a single, worldwide legal community.<sup>15</sup> Universality, thus, extends as far as legal thought and does not affect the relativism of positive legal systems.

Nonetheless, in the second half of the 20<sup>th</sup> century, especially in the area of private law, the idea that law reaches beyond a particular positive legal system

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<sup>12</sup> See M. Barberis, *John Austin, la teoria del diritto e l'universalità dei concetti giuridici*, in "Materiali per una storia della cultura giuridica", n. 2, December 2003, pp. 407-427.

<sup>13</sup> G.D. Romagnosi, *Introduzione allo studio del diritto pubblico universale*, Florence, Piatti, 3<sup>rd</sup> ed., 1833.

<sup>14</sup> R. Saleilles, *Le Code civil et la Méthode historique*, in « Le Code Civil 1804-1904 » Livre du Centenaire publié par la Société d'Etudes Législatives, I, Paris, Librairie Edouard Duchemin, 1904, reprinted 1969, p. 127.

<sup>15</sup> On the limits of legal positivism, P. Grossi, *Un diritto senza Stato (la nozione di autonomia come fondamento della Costituzione giuridica medievale)*, in "Quaderni fiorentini per la storia del pensiero giuridico moderno", n. 25, 1996, pp. 267-284; *Il disagio di un "legislatore" (Filippo Vassalli e le aporie dell'assolutismo giuridico)*, in "Quaderni fiorentini per la storia del pensiero giuridico moderno", n. 26, 1997, pp. 377-405; *Il ruolo del giurista nell'attuale società italiana*, in "Rassegna fiorentina", n. 3, 2002, pp. 501-515; *Le molte vite del giacobinismo giuridico (ovvero: la "Carta di Nizza", il progetto di "Costituzione europea", e le insoddisfazioni di uno storico del diritto)*, in "Jus", n. 3, Sept.-Dec. 2003, pp. 405-422; *Dalla società di società alla insularità dello Stato fra medioevo ed età moderna*, Lezioni Magistrali, Series directed by Francesco De Sanctis, Istituto Suor Orsola Benincasa, Naples, 2003. For a critique of the myth of the law and the legislature, see the pivotal work of C. Schmitt (*La condizione della scienza giuridica europea*, Rome, Antonio Pellicani Editore, 1996).

began to take root. While the doctrines and institutions of public law are intimately tied to the State and to the design thereof enshrined in State norms, private law institutions like property, family, contract and tort law may actually have common rules. In the mid-1900's, the Italian lawyer Filippo Vassalli affirmed that private law has never been "a servant of the State". With the codifications, States have indeed taken control over the rules governing private law relationships; nonetheless there is a trend towards overcoming the statist dogma and dismantling the barriers which divide nations.<sup>16</sup>

Legal theorists later recognized that public law too resorts to imitation, whereby the institutions of one legal system are copied by others. 19<sup>th</sup> century English "self-government," the Napoleonic "Conseil d'Etat," the Swedish "Ombudsman" (1809), the Austrian "fair proceeding" (1925) were all applied and adapted in many other national systems. Very diverse legal systems thus present many similarities. Once the obstacle to the adaptation of public law institutions to foreign legal contexts (in which they would become different from their archetype) had been removed, it was possible to recognize that institutions considered to be specific to a particular legal tradition actually originated elsewhere: for example, the model of the "grandes écoles" and the "grands corps," believed to be typical of the French administrative *élite*, was in fact formed under the influence of the Chinese Mandarinate, which had fascinated Enlightenment philosophers.

The last phase of this development continues to this day and is worth dwelling upon. It is characterized by transfers from one national legal context to

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<sup>16</sup> F. Vassalli, *Estrastatualità del diritto civile*, in "Studi Giuridici", vol. III, book II "Studi vari (1942-

another national legal context, as well as to the universal level (including the repercussions of such transfers in domestic legal systems).

The example of mutual recognition agreements well illustrates the transfer of legal institutions from one country to another. On the basis of such agreements, a product that can be sold in one country can also be sold in another country, on the same conditions; similarly, an accountant from one State may offer his services in other States subject to the law of his country of origin; once authorized to operate in one country, a bank may rely on that same authorization to carry out its activity in another.

Insofar as the product, the accountant and the bank all “carry their national law” with them when they change countries, the recognition of the validity of foreign administrative norms and procedures results in a reciprocal exportation of national laws, as well as in ongoing and evolving cooperation among States.

Mutual recognition agreements do not consist merely in the acceptance by one State of the law that applies to goods, services and businesses in another State in a given moment. They also provide that the other State’s rules may change. They thus require that such changes be notified and that the potentially affected State may comment upon them.

Moreover, if a State concludes a mutual recognition agreement with another State, and the latter enters into one with a third State, the agreements will have a transitive force, favoring the circulation of institutions between national legal systems.

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1955)”, Milan, Giuffrè, 1960, p. 755.

Finally, the recognition not only of products but also of productive processes implies a broader horizontal cooperation between States in areas which intersect with trade, like the environment, working conditions and safety protection.<sup>17</sup>

With mutual recognition, national laws mix together, increasing the need for common standards to be established by multilateral organizations. At the same time, this enables one to choose from among multiple national law regimes.

Three examples of typical state activities – labor protection, criminal justice and government-citizen relations – illustrate the transfer from the national to the universal context: a transfer that, therefore, takes place along a vertical axis rather than a horizontal one.

Some countries export goods that have not been produced in conformity with the internationally recognized standards for labor protection set by the International Labor Organization (ILO). These States not only allow for unfair competition vis-à-vis producers from other countries; they also threaten the labor protection standards in the importing countries, and can trigger a race to the bottom. "Social dumping" may be countered by invoking a provision of international trade law. This provision requires that imported goods be regulated according to a regime that is no less favorable than that governing other "similar" imports. To apply this norm however, the term "similar" must be interpreted to mean goods produced according to procedures, methods and techniques that

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<sup>17</sup> On mutual recognition, K. Nicolaidis and G. Shaffer, *Managed Mutual Recognition Regimes: Governance without Government*, paper submitted to the conference "The Emergence of Global Administrative Law," New York, 22-23 April 2005.

comply with the “Core Labor Standards,” a lowest common denominator for working conditions.

Once the relevant norm has been identified by following the convoluted path outlined above, the issue remains to be resolved as to which authority ought to enforce it. Should it be an individual country, like the United States, which banned trade with Burma on account of serious labor and human rights abuses? Or should it rather be the international community, under the *aegis* of the WTO?<sup>18</sup>

The second example regards criminal law, which traditionally was precisely the kind of “particular law”<sup>19</sup> left up to individual States. But can extremely unjust State laws (“extremes Unrecht”<sup>20</sup>) be accepted at all? If they are not acceptable, crimes carried out in compliance with such norms would have to be defined at the supranational level and a sanctioning authority would have to be conferred upon a supranational judge. This would be all the more necessary bearing in mind that national tribunals tend not to punish genocide, war crimes and crimes against humanity which are generally committed by organs (usually, the military) that State authorities either protect or, in any case, do not wish to judge. It is therefore necessary that international authorities replace domestic judges in the promotion, defense and pursuit of universal values. To these ends, universal criminal law protects peace and security, and defines war crimes, crimes against humanity and genocide as international crimes. The international community holds it to be

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<sup>18</sup> On this question, M.J. Trebilcock and R. Howse, *Trade Policy and Labour Standards*, forthcoming in “Minnesota Journal of Global Trade”.

<sup>19</sup> G. Carmignani, *Elementi del diritto criminale*, Naples, Printing Press of P. Androsio, 1854, p. 8.

<sup>20</sup> On this expression used by Gustav Radbruch, see G. Vassalli, *Formula di Radbruch e diritto penale*, Milan, Giuffrè, 2001, especially p. 281; by the same author, see also *La giustizia internazionale penale*, Milan, Giuffrè, 1995.

legitimate to investigate and punish such crimes independently of where they are committed, and independently of who are the victims and the perpetrators.<sup>21</sup> Special courts have been established, from the Nuremberg and Tokyo tribunals to those for the ex-Yugoslavia and Rwanda, to the International Criminal Court.

Two important changes characterize this new environment; the first has to do with the norms, the second regards the judicial bodies. As for norms, “[i]n claiming that these actions are wrong, we put aside the purely parochial interests of particular nations”<sup>22</sup>. With respect to the judges, “global” crimes could be judged by national courts. The choice of establishing non-State tribunals responds to the objective to overcome national legal systems by providing the global one with the panoply of instruments that national judges usually have at their disposal. A “universal” criminal law thus integrates or sometimes counters “parochial” criminal law.<sup>23</sup>

The third and final example regards the law governing the relationship between citizens and the government and, in particular, the due process of law. This principle traces back to a 1354 Statute of Henry III, and was also included in the American Constitution. It refers to both the right to be ruled by law and the right to a fair trial. In national legal systems it has been applied widely to the relationship between citizens and the government. Understood as the right to “procedural fairness”, in Italy the application of this principle requires the public

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<sup>21</sup> G. Werle and F. Jessberger, *Concetto, legittimazione e prospettive del diritto internazionale penale, oggi*, in “Rivista italiana di diritto e procedura penale”, vol. 3, July-September 2004, p. 743.

<sup>22</sup> G.P. Fletcher, *Parochial versus Universal Criminal Law*, in “Journal of International Criminal Justice”, n. 3, 2005, p. 4.

<sup>23</sup> In these terms, G.P. Fletcher, cit. See also O. Höffe, *Globalizzazione e diritto penale*, Italian translation, Turin, Comunità, 2001.

administration to give notice and hearing to the citizen.

The principle is now applied also globally. Three cases decided by three different international courts provide evidence of this. In the first case, the Appellate Body of the WTO held that a State, when limiting imports from other countries, has to give exporting countries the chance to be heard, must provide a reasoned decision and recognize the right to defense.<sup>24</sup> In the second case, the International Tribunal for the Law of the Sea (ITLOS) decided that a government which sequesters a ship and takes away the crew's passports must respect the due process of law and the principle of fairness, informing the ship's owner and the crew and giving them the chance to be heard.<sup>25</sup> Finally, in a more specific area, the European Court of Human Rights (ECHR) held that administrative decisions affecting individual rights can be taken only after the interested parties have been heard.<sup>26</sup>

As to the application of the due process of law in the global legal order, three features are worth emphasizing. First, the principle of "procedural fairness" is not always declared by international treaties, but is often developed by judicial bodies. These bodies derive it from provisions of sectoral regulation which prohibit arbitrary decisions and require reasonableness (like in the areas of trade and the law of the sea), or from clauses requiring due process and the right of defense (as in the European Convention of Human Rights). As it has been pointed out, the generation of "constitutional" principles by judicial bodies leads a process

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<sup>24</sup> WTO-A.B. "United States – Import prohibition of certain shrimp products", 12 October 1998, on which see, among others, S. Cassese, *Gamberetti, tartarughe e procedure. Standards globali per i diritti amministrativi nazionali*, in "Rivista trimestrale di diritto pubblico", n. 3, 2004, pp. 657-678.

<sup>25</sup> ITLOS, "Juno Trader Case", 18 December 2004, n. 13.

of constitutionalization<sup>27</sup> Secondly, the growth of global law through lateral connections, especially with trade, is open to further expansion because of its many ties to such related issues as the environment, working conditions, human rights, health protection, security, and other sectors in which “constitutional” principles developed by global judges may be easily transported. Finally, under global law, both the State and private actors enjoy the right of participation in their relationship with public administrations.

There is an increasing number of areas in which a body of relatively uniform rules of universal application is developing. Actually, the growth of world trade requires common standards for product conformity, consumer protection and product liability;<sup>28</sup> States’ inability to control such phenomena as financial crises, global warming, the use of the seas and maritime resources and migratory fish species mandates that these universal public goods be protected at the global level.<sup>29</sup>

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<sup>26</sup> ECHR, “Credit and Industrial Bank v. the Czech Republic” – Case n. 29010/95 of 21 October 2003.

<sup>27</sup> D.Z. Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, in “European Journal of International Law”, vol. 12, n. 1, 2001, pp. 39-75. On proceduralization and its functions in the global legal order, A. von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization*, in S. Griller (ed.) “International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order”, Wien-New York, 2003, p. 128. On “procedural fairness” as a principle of global law, G. della Cananea, *The EU and the WTO: A “Relational” Analysis*, paper presented at the Vienna Conference on “New Foundations for European and Global Governance”, 29-30 November 2004, p. 9. On the development of domestic jurisdictions, N. Picardi, *La vocazione del nostro tempo per la giurisdizione*, in “Rivista trimestrale di diritto e procedura civile”, n. 1, 2004, pp. 41-71.

<sup>28</sup> M. Shapiro, *The Globalization of Law*, in “Global Legal Studies Journal”, vol. 1, 1993, p. 59 and following section.

<sup>29</sup> On legal globalization see M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, Il Mulino, 2000; A. von Bogdandy, *Democrazia, globalizzazione e futuro del diritto internazionale*, in “Rivista di diritto internazionale”, n. 2, 2004, p. 317-344; E. Denninger, *L’impatto della globalizzazione sulle democrazie contemporanee*, in “Rassegna parlamentare”, n. 1, 2004, pp. 25-41; J. V. González García, *Globalización económica, Administraciones públicas y Derecho administrativo: presupuestos de una relación*, in “Revista de Administración Pública”, May-August 2004, p. 7-39; S. Kadelbach, *Ethik des Völkerrechts unter Bedingungen der Globalisierung*, in “ZaöRV”, n. 64, 2004, pp. 1-20.

### **3. Laws governing legal globalization**

We have thus far examined the evolution of principles, norms and institutions that we can regard as “common,” because they have either developed simultaneously, been transplanted from one national context to another, been exported from domestic to global law, or emerged directly in the global legal system to address specific needs. It is now worth investigating the laws governing this process of legal globalization.

We must now address the following question: is there a mechanism driving this process of mutual penetration and harmonization, or does this process depend on the uncertain and contradictory policies of national governments?

The answer – or the attempt at an answer – will touch upon three points: the cohabitation between legal unity (of the world) and differentiation (of its parts); the process and the growth factors of the universal legal patrimony; the balance that emerges between domestic laws within the global arena.

With reference to the first point, the most striking feature is the contrast between a universal legal patrimony, which reinforces the legal unity of the world, and the extreme variety of local legal systems. On the one hand, there are some common principles and institutions that no domestic legal system can do without; on the other hand, one notices a marked differentiation.

This gap tends to widen. The number of international organizations dealing with issues of uniformity or, at least, harmonization grows in a parallel way with

the growth in the number of States.<sup>30</sup> Insofar as the States are the main causes of differentiation, the gap is a permanent feature of the new legal order.

This tension between increasing unity and an increasing differentiation lends itself to rival interpretations. Those who believe in the central role of the States see this as a confirmation of their theory. Those who argue, by contrast, that the global legal order has taken root, emphasize unity over differentiation. The real challenge is to interpret these apparently contradictory elements in a holistic way.

Relativists, who believe that every society has its own State-created law, underestimate the ability of legal systems to adapt, to live together, and thus to change. At the other end of the theoretical spectrum, a smaller group of universalists, who believe that legal globalization is now dominant, overestimate the unity and uniformity of the global legal order, as well as its ability to compel domestic legal systems.<sup>31</sup>

It is hard to analyze the vertical and horizontal concatenation of national, supranational and global law because we still do not know the (incomplete, however quite developed) global legal “grammar”, while our native national legal grammar we know all too well. We can however draw one safe conclusion: legal globalization allows for the diversity of national laws, and in fact leaves them the right to be different,<sup>32</sup> either by leaving entire fields uncovered, to be regulated by State law, or by providing special derogatory measures, or else by applying

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<sup>30</sup> A. Alesina and E. Spolaore, *The Size of Nations*, Cambridge-London, The MIT Press, 2003, and A. Caffarena, *Le organizzazioni internazionali*, Bologna, Il Mulino, 2001.

<sup>31</sup> One area in which these two perspectives particularly clash is over regulation of Internet, according to D.W. Drezner, *The Global Governance of the Internet: Bringing the State Back In*, in “Political Science Quarterly”, vol. 119, n. 3, Fall 2004, pp. 477-498.

<sup>32</sup> M. Delmas-Marty, op. cit., p. 65.

techniques that leave spaces, margins, and interstices, weave networks, establish balances and create compensations.

The emerging legal order appears as a binary order, in which differences coexist with a set of common principles: on the one hand, an extreme and even growing variety of national or sub-national regimes; on the other hand, an ever stronger fabric of universal principles and procedures. The resulting system is not so fundamentally different from other historical examples: pre-State law, like Roman law, with a universal vocation and a tolerance for diverse internal rules; Common Law, which in the Middle Ages lived together with local laws, and in fact made them into communicating systems;<sup>33</sup> imperial systems, which even include indigenous nationalities and public powers governing by “indirect rule.”

This binary system is particularly evident in the two-level area of criminal law. At the first level, universal courts exercise an absolute jurisdiction over specific subject matters in defense of universal values. At the second level, national criminal courts exercise a conditional universal jurisdiction: they are assigned to be guardians of global law, but only within the limits set by the higher level.<sup>34</sup>

The cohabitation between world legal unity and local differentiation requires a vast and complicated system of enabling rules. These rules often appeal to scientific criteria in order to prevent the criticism that they come from

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<sup>33</sup> F. Calasso, *Medio Evo del diritto, I, Le fonti*, Milan, Giuffrè, 1954; P. Grossi, *L'ordine giuridico medievale*, Rome-Bari, Laterza, 1995.

<sup>34</sup> For this distinction, A. Cassese, *Y a-t-il un conflit insurmontable entre souveraineté des Etats et justice pénale internationale?*, in A. Cassese and M. Delmas-Marty (eds.), “Crimes Internationaux et Juridictions Internationales”, Paris, Puf, 2002, pp. 1-29; on the role of national judges as guardians of global law, see also M. Delmas-Marty, *op. cit.*, p. 204, and R. Stewart, *U.S. Administrative Law: A Resource for Global*

international negotiations or global regulators in which representatives of the Northern world dominate, and that the rules are thus made to favor industrialized countries.<sup>35</sup> This is indeed a subject that deserves further investigation.

The second point regards the dynamic growth of the global legal patrimony of institutions, rules and principles.

I have already mentioned that legal globalization is a consequence of the emergence of problems that no national legal order can solve on its own: the expansion of trade and the need for a “corpus” of rules to accompany it; the need to exercise control over some of the sources of environmental pollution; the need to regulate phenomena that escape the control of individual States, from air traffic to the use of the seas, postal transport, financial crises; the need to establish international criminal tribunals to compensate for the inertia of local judges in pursuing crimes that the whole international community regards as deserving punishment.

An additional factor characterizes the last quarter of the 20<sup>th</sup> century, and explains the recent acceleration of legal globalization. A circle has been established, whereby the more communication there is, the more we apprehend the world, the more differences become manifest, the more global instruments are applied to resolve these differences, the more we care about the democracy and accountability of these instruments, the more we seek to strengthen the ties between global institutions and civil society, and the greater is the frustration with

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*Administrative Law?*, Discussion Draft, January 17, 2004.

<sup>35</sup> There is thus less deference to governments and more faith in the impartiality of science. On this, see J. Peel, *Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?*, Jean Monnet Working Paper n. 02/04, New York University School of Law, 2004.

a world that has a “governance” without having a government.

This is ultimately a cumulative process, marked by both the ongoing development of a global legal order and the growing dissatisfaction with it; this dissatisfaction in turn drives further developments. Even the no-global movements have been important vehicles of globalization, because they have attracted the world’s attention to local inequality and to the uneven effects of globalization itself, and have triggered correction mechanisms. We thus live in a world that is more unified, while also being more aware of its fractures, and driven by this awareness to reconcile national differences.

The third and final point regards the balance being established among national legal systems within the global legal order. The global legal order features several sectoral imbalances: it is more developed in some areas, while embryonic or inexistent in others. The variability of “international regimes”<sup>36</sup> thus produces a different form of relativism: sectoral, rather than national. These asymmetries also provoke reactions. They are contagious: an institution or principle introduced in one sector quickly spreads into others, under the pressure of interests which do not accept sector-dependant treatment.

The greatest asymmetry comes from the different weights and calibers of States in the global legal order. In 1947, the Italian lawyer Vittorio Emanuele Orlando wondered whether what he called “world revolution” would lead to a single dominant State or to a network or association of States<sup>37</sup>. Today, Orlando’s

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<sup>36</sup> S. Krasner (ed.), *International Regimes*, Ithaca, Cornell Univ. Press, 1983 (3<sup>rd</sup> ed. 1995).

<sup>37</sup> V.E. Orlando, *La rivoluzione mondiale e il diritto*, in “Studi di diritto costituzionale in memoria di Luigi Rossi”, Milan, Giuffrè, 1952, pp. 777–778.

question would receive a twofold answer: at present, *both* the processes of globalization and Americanization are under way.<sup>38</sup>

#### 4. Studying the global legal order

We must finally consider how to study the new universe created by legal globalization. Although in different ways, at the end of World War I and II, a number of legal scholars (Santi Romano, Gustav Radbruch, Filippo Vassalli and Vittorio Emanuele Orlando) signaled that this process was advancing. Afterwards, however, scholarly treatment of this phenomenon languished, and has been resumed only in the last decade, particularly in the United States. Some grand themes do emerge and, yet, the focus of these studies is somewhat dispersed by excessively detailed analyses.

One major theme concerns the legal concepts that operate at the global level, but remain rooted in positive law.<sup>39</sup> How are we to study them? What is their relationship with national law? For example, the right to be heard by the administration before it makes its decision is by now widely recognized, both in national legal systems and in the global legal system. We must therefore study due process in a new way, by comparing national legal systems among each other and with the global one, whose innovative components require further analysis (the

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<sup>38</sup> M. Shapiro, op. cit., p. 48. On American legal imperialism, U. Mattei, *The Rise and Fall of Law and Economics. An Essay for Judge Guido Calabresi*, paper per the Symposium in honor of Judge Guido Calabresi, and *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, in "Indiana Journal of Global Legal Studies", Winter 2003, pp. 383-447. On the balance between globalization and Americanization see also M. Bussani, *Funzioni e limiti del diritto globale*, in P. Annunziata, A. Calabrò and L. Caracciolo (eds), *Lo sguardo dell'altro. Per una governance della globalizzazione*, Bologna, Il Mulino, 2001, p. 117-137; U. Mattei, *Il diritto giurisprudenziale globalizzato ed il progetto imperiale. Qualche spunto*, unpublished.

<sup>39</sup> My attention was drawn to this by M. Delmas-Marty, op. cit., p. 25.

fact, for example, that, under global law, the right to be heard extends to both States and private actors).

A second theme is the role of the rule of law in the global legal order: can we say that the rule of law is “a machine that runs of itself”<sup>40</sup> in the global legal context? Domestic systems feature the recognition of rights, formalized conflicts between the State and the bearers of individual rights, the right of defense and the presence of a judge which ensure the conditions for a mechanical process, so that the rule of law is to law what the market is to the economy. But do the conditions exist for a similar development outside and above the States?

A third theme is the role of judges in the global legal system. Almost every sector of this legal order has witnessed a judicial “explosion.”<sup>41</sup> Many parties are admitted to proceedings before global judges, making them choral in character. The sanctions that these judges can impose contain a mix of top-down interventions and countermeasures by the offended party. Thus we may ask whether, in the global arena, legal proceedings and trials are becoming a surrogate for democracy.

A fourth theme asks to what extent can globalization tolerate governance without government? Above the States there is now a network of sectoral governments. This network has developed incrementally and has been facilitated by the lack of a center (or by the presence of a center – the UN – operating as a “forum”). How long can this precarious, structurally incomplete balance last?

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<sup>40</sup> According to the famous expression of James Russell Lowell (1888), cited in G. Silverstein, cit., p. 429.

<sup>41</sup> M.R. Ferrarese, *Inclusion, no “Exit-Option” and Some “Voice”*: “Democratic” Signals in International Law, paper presented at the Vienna conference on “New Foundations for European and Global Governance”, 29-30 November 2004, p. 11, and A. Garapon and C. Guarnieri, *La globalizzazione*

The rupture of the equation between law and State ultimately requires a new approach to research and new forms of communication. For the former, I will limit myself to pointing out the need for international scholarly societies, numerous in many areas other than law.<sup>42</sup> For the latter, I note the need to use the most widespread linguistic vehicle, English (in this respect, at least in Italy, legal scholarship is more backwards than all other fields<sup>43</sup>).

## 5. Conclusion

I now wish to return to the title of this paper: the globalization of law.

This is an ambiguous formulation. It assumes a reality that does not and may never exist. A unitary cosmopolitan legal system is not on the horizon nor is it perhaps among current ambitions. Instead a process is under way that affects certain positive principles and branches of law. Recognizing the existence of shared principles in some sectors is useful not for “drafting cosmopolitan legal codes, but only for demonstrating the fundamental ability of all cultures to communicate.”<sup>44</sup> It helps to show the extraordinary ability of legal instruments to coexist, overlap, order themselves and, even, integrate. Moreover, when shaping the tools of harmonization, it helps in highlighting the importance of appreciating the differences among legal systems. To acknowledge that common research approaches, methodologies and criteria are being developed is not aimed at

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*giudiziaria*, in “Il Mulino”, n. 417, n. 1, 2005, p. 165.

<sup>42</sup> The establishment of European-wide organizations is a recent phenomenon, an example of which is the newly-formed “European Society of Public Law” ( see the notice in “Revue française de droit constitutionnel”, n. 59, July 2004, p. 671).

<sup>43</sup> This statement draws on data collected by the Italian Committee for Research Evaluation (CIVR) and based on information provided by all Italian research centers and universities.

emphasizing the successes of an already established academic “koinè,” but only at valuing the stable ties that already exist among different national legal cultures.

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<sup>44</sup> F. D’Agostino, *Pluralità delle culture e universalità dei diritti*, Turin, Giappichelli, 1996, p. 45.