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Governing the World¹

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1. The paradoxes of globalization

“The contemporary, now global Westphalian system—what colloquially is called the world community — has striven to curtail the anarchical nature of the world with an extensive network of international legal and organizational structures designed to foster open trade and a stable international financial system, establish accepted principles of resolving international disputes, and set limits on the conduct of wars when they do occur. This system of states now encompasses every culture and region. Its institutions have provided the neutral framework for the interactions of diverse societies — to a large extent independent of their respective values”².

“The international economic system has become global, while the political

¹ Lecture delivered at the Luiss School of Government, 10 March 2015. Draft. Do not quote.

² H. Kissinger, *World Order*, Penguin, 2014, p. ___.

structure of the world has remained based on the nation-state”³.

“[...] the nature of the state itself — the basic formal unit of international life — has been subjected to a multitude of pressures: attacked and dismantled by design, in some regions corroded from neglect, often submerged by the sheer rush of events”⁴.

These three quotes from the latest book of the political scientist and diplomat Henry Kissinger highlight the basic dilemma of the contemporary world: a process of globalization is developing, a process that is binding on national governments, but that is mainly economic; in the meantime, the old sovereigns, the States, are no longer in command. Thence arises the question: who runs the world – strong multinationals, States, or global regulators? Is there a world government, or there is governance without government, as suggested in a well-known book edited by J. N. Rosenau and E.-O. Czempiel, *Governance without Government. Order and Change in World Politics*⁵?

I wish to recall that this question was asked first by José Ortega y Gasset in 1930, in his famous book “La rebelión de las masas”, in the second part of which he raised the question “¿Quién manda en el mundo?”⁶.

Let me begin with a few examples. In 1453, it took 40 days for the Pope to

³ H. Kissinger, cit., p. ___.

⁴ H. Kissinger, cit., p. ___.

⁵ J. N. Rosenau and E.-O. Czempiel (eds.), *Governance without Government. Order and Change in World Politics*. Cambridge University Press, 1992.

⁶ J. Ortega y Gasset, *La rebelión de las masas*, Madrid, Espasa Calpe, 1930, Italian translation: *La ribellione delle masse*, Bologna, Il Mulino, 1962.

learn that Constantinople had fallen to the Turks. In 2001, by contrast, the Twin Towers of the World Trade Center in New York fell during a live television broadcast⁷. A Nokia telephone is made of 900 parts produced in 40 different countries, and is sold in 80 different national markets. Poliomyelitis, that caused millions of deaths in the last century, was eradicated thanks to the campaign launched by the World Health Organization in 1988; in 2011 and 2012 not a single case of polio was reported in India. It can be concluded that national barriers to economy are being destroyed and that world policies are successful.

However, on the other hand, globalization is not equally distributed. As for the population, only 2% of people live outside their country of birth. Only 2% of students attend universities outside their home countries. Only 7% of the directors of Standard and Poor 500 companies are foreigners. As for trade and investment, exports are equivalent to only 20% of global GDP. Foreign direct investment accounts for only 9% of all fixed investment. Less than 20% of venture capital is deployed outside the fund's home country. Only 20% of shares traded on stock markets are owned by foreign investors. Only 7% of rice is traded across borders. The level of concentration in vital industries has fallen since 1950, and has remained constant since 1980⁸. It can be concluded that globalization should not be overestimated, because we live in an era of semi-globalization, and that the world is not being taken over by a handful of

⁷ N. Chanda, *Bound Together. How Traders, Preachers, Adventurers, and Warriors Shaped Globalisation*, Yale Univ. Press, 2007.

⁸ Pankaj Ghemawat; see also *The case against globaloney*, "The Economist", 23 April 2011.

giant companies.

The internal fabric of globalization is complex. There is “an array of partially overlapping and non-hierarchical institutions governing a particular issue area”⁹. “[R]egime complexes, including different mixes of states, sub-state units, international organizations, civil society organizations and private actors, have in various issue areas replaced more tightly integrated international regimes. Regime complexes have been identified in the areas of climate change, food security, refugee policy, energy, intellectual property and anti-corruption”¹⁰. It can be concluded that what we call “globalization” is in fact a plurality of phenomena.

Another paradox of globalization is that it opens the way to new exploitations: between 15 and 20 million hectares of African land are owned or used by foreign firms, which produce fruit and vegetables for their own markets, for consumption or for bio-fuel (e.g. Korea, Saudi Arabia). This brings financial resources to Africa, but also strips it of natural resources (mainly water), relocates people, has an impact on their customs, and obliges the FAO to provide more food to local populations through the World Food Program¹¹. It can be concluded that globalization is a process that is full of ambiguities.

If the extent of globalization is limited and its internal fabric is composite, can

⁹ K. Raustiala and D. G. Victor, *The Regime Complex for Plant Genetic Resources*, in “International Organization”, 2004, vol. 58, pp. 277 – 310.

¹⁰ G. de Búrca, R. O. Keohane and C. Sabel, *Global Experimentalist Governance*, in “British Journal of Political Science”, 2014, vol. 44, p. 481.

¹¹ International Food Policy Research Institute. [da integrare il riferimento]

one say that national governments are still in command? This aspect too is contradictory. Europe is attempting to transcend the Member States by means of the Union (and the same may happen soon in Africa, North America, South America and Southeast Asia). Parts of the Middle and Far East and of Africa have dissolved into ethnic components conflicting with one another, producing the well-known phenomenon of “failed States”, with ungoverned territories (think of Libya). Most States are self-established, but some are not: they are the product of international action, and were established not from below, but from above. It can be concluded that it is not the State as such, but only a few States (today mainly the United States, Russia, and China) that play a dominant role in the world; and that many States are experiencing a period of crisis.

2. Globalization as shared governance

In this context, it can no longer be said that the world is run by national governments according to the Westphalian model, nor that the rulers of the world are to be found beyond the States, in the global space. It can only be concluded that power is shared between national and supranational rulers.

I will now give a few examples from the fields of environmental protection, oil and gas exploitation in the Arctic, and global health security, to demonstrate this conclusion.

To control global warming, the 1997 Kyoto Protocol (which entered into force

in 2005), conferred upon the United Nations Framework Convention on Climate Change the power to set caps for each nation, which are basically limits on the amount of pollutants that can be emitted. Countries that emit less than their quota of greenhouse gases can sell emission credits to polluting countries. This system requires the collaboration of global regulators, national governments (acting as co-regulators and implementers) and civil societies (i.e. polluters that buy or sell emission credits). Soon after this program started, managing emissions became one of the fastest-growing specializations in financial services.

The Arctic, the region around the Earth's North Pole, is surrounded by five States: Russia, the United States, Canada, Norway and Denmark. When a country ratifies the United Nations Convention on the Law of the Sea, it enjoys special rights over the exploitation and use of marine resources in the Exclusive Economic Zone (EEZ), which extends to a distance of 200 nautical miles (370 kilometers) adjacent to their coasts. The five countries launched projects to establish claims over parts of the Arctic, but in 2008 met and pledged to strive for "the orderly settlement of any possible overlapping claims".

The "World Health Report 2007 – A Safer Future: global public health security in the 21st century" notes that "new diseases are emerging at the historically unprecedented rate of one per year. Airlines now carry more than 2 billion passengers annually, vastly increasing opportunities for the rapid international spread of infectious agents and their vectors". "Vulnerability is universal". "A more secure

world [...] requires global partnerships that bring together all countries and stakeholders in all relevant sectors”¹². This requires global cooperation in surveillance, sharing of knowledge, and cross-sector collaboration.

These examples share some features. In all three cases, they present global problems that cannot be solved nationally. They require the establishment of global rules and regulatory bodies. However, these are not sufficient: national cooperation is also necessary, both among States and with global regulators, because global regulations cannot be implemented or enforced without local/national cooperation. New regulatory machineries are established, but without a constitutional basis.

3. The “marbled” structure of global administration

In this new context, States cooperate by signing treaties and establishing global regulators, but are also obliged to cooperate as implementers and enforcers of global regulations. This occurs not only in the area of global warming, Arctic exploitation, or health security, but in many other areas too, such as the fight against global terrorism, the control of the fishing of highly migratory sea species, and the regulation of nuclear waste transportation.

The interaction between States and global regulators is very complex. National governments negotiate, establish global regulators, confer upon them public tasks, control them, but at the same time are controlled by them, and act as their agents,

¹² WHO, *A Safer Future*, pp. 2, 6, 8 and 19.

implementers or enforcers. Therefore, States have a triple role *vis-à-vis* global regulatory regimes. They are fragmented: they are both masters and servants.

Another factor contributing to the fragmentation of national governments is the result of their contradictory behaviours: upon pressure from their multinational corporations, countries such as the United States fostered the establishment of the World Trade Organization, to impose upon other States obligations to lower trade barriers; however, they thus become obliged to submit to the World Trade Organization Dispute Settlement Body.

Principles of global law percolate into national legal orders and are, as a rule, limited to a specific area (health, trade, labour). However, they can, and are, easily transplanted to adjacent areas (pursuant to the impact of the equal treatment standard) and influence the entire national legal order. States are masters of their own competences, but they cannot avoid shaping them according to global standards.

The new world order brings together components that originated as different and separate. Now, they are combined and interpenetrated. Therefore, shared power is the rule. The overall picture is not hierarchical, because there are no multiple layers, in which fields are exclusive and interference between two arenas does not exist. Rather, it resembles a marble cake, in which global and national powers mix.

The global legal space is not an additional layer with respect to the national level. The two “levels” are not distinct, but are, rather, intertwined. States are not the only subjects, but combine with other subjects and thus lose their unity.

States are at the same time both stronger and weaker: stronger, because they operate in the global space, beyond their own territory; weaker because, within international organizations, they must share power with other States and with non-State institutions, and because global rules directly impact national legal systems, without any need for State intermediation.

How can the combination of national and supranational be explained? Along which lines are national and global governments divided? One is the high politics/low politics split. The first remains under the control of the States, while the second is delegated to global regulatory regimes. As an example, refer to the situation in Ukraine. The European Union and the Organization for Security and Cooperation in Europe have been active, imposing standards and economic and financial sanctions upon Russia. However, once when the military aspect emerged, it was not the Union, but rather the French and German national governments to take the lead. At this point, States return to the stage. Therefore, the conferral of national competences to supranational bodies is area-sensitive.

Another is the economics/politics line. There is a division between the former and the latter, with economics in the domain of global regulators, and politics in the hands of the States. This produces responses: “The international order thus faces a paradox: its prosperity is dependent on the success of globalization, but the process produces a political reaction that often works counter to its aspirations. The economic managers of globalization have few occasions to engage with its political

processes”¹³ .

4. The global space

At the centre of national public powers is the government, also known as the executive power. In the global legal space, there is no one supreme authority, nor the hierarchy peculiar to States, nor a body of general rules that can endow uniformity upon its structure and operation. So how can the global administrative machine operate?

The first condition of its very existence and operation is transnationalism. The global legal space did not only develop along vertical lines – from the national to the global level – but also along horizontal lines, connecting national authorities and global agencies, and global agencies to each other. The system is based largely on cooperation at both inter-state and global levels. Cooperation between national authorities is an essential element of the global system. Two examples are the consultative and deliberative committees of international organizations, and mutual recognition agreements.

As occurs in the European Union, in which the strictly European component is accompanied by a multinational one, the global legal space presents several committees of international organizations, with representatives of national administrations. These representatives perform a three-fold role: they are an

¹³ H. Kissinger, *World Order*, *cit.*, pp. 5119-21.

instrument for informing global bodies, a conduit for transmitting the decisions of the latter to the national level, and a means to ensure dialogue and negotiation between national administrations.

The transnational component of the global legal space originates from the very limitations of legal globalization. The more national markets open to one another, the more conspicuous the asymmetries and contrasts become. To reduce them and level the playing field, global rules establish general principles, but cannot govern every detail: this leaves room for mixed transnational committees and mutual recognition agreements to develop.

This component of the global legal space reduces its verticality, as the *superioritas* of global authorities is based on a dense network of horizontal relations of a contractual nature. The network facilitates the transfer or transplant of institutions from one national legal system to another, and stimulates the quest for the functional analogies concealed by the formal differences between national systems. Finally, the transnationalism of the global legal order suggests the need for caution before proclaiming the crisis of the State and a flight towards the global level: the dynamics of the global administrative system are largely dependent on the State or its fragments.

The multi-national component of the global space is connected to two of its characteristics, the first related to its mode of operation, and the second to its decision-making processes. The first characteristic is that of transactionalism,

meaning that the global system's operation is based on transactions. For example, several international treaties prescribe that conflicts between national administrations must be solved through negotiations, inquiries, mediation, conciliation, arbitration, judicial decisions or other peaceful means of dispute resolution. In other words, treaties establish other contractual or semi-contractual means to solve conflicts.

A strict application of the transnational principle would require global decisions to be taken unanimously. However, although expressly required in certain treaties, unanimity is tempered in various ways. International norms establish that collegial organs must make every effort to reach an agreement through "consensus". Should this not be possible, the decision can be taken through a two-thirds or simple majority vote of the parties present.

The horizontal relations that compose the global system are accompanied by vertical ones. However, these too are not hierarchical and are not based on a strict separation, but rather on the logic of collective action.

First, vertical relations are established in the case of concurrent competences, which require mixed procedures. For example, the Patent Cooperation Treaty of 1970 provides for the possibility to request a preliminary international examination, which is undertaken jointly with the requester. The request results in an investigation that is transferred to the national authority; this authority then takes the final decision. The proceedings are, therefore, half-global and half-national. The two "levels of government" share powers.

Second, the heterogeneity of the various sector-based regimes and the inherent complexity of relations within the global space require the establishment of functionally different relations depending on the sphere of activity (defence, the environment, or food safety) and, often, on the nature of the national parties involved (for example, the States' degree of development), also in relation to the existing structures at the global level.

This latter variable is extremely interesting. Contrary to the traditional description, there are several different types of global administration. In addition to the bodies formally constituted as international organizations which employ their own staff, there are those which consist of networks of national authorities, and which operate collectively through national officers; distributed administrations led by national regulating bodies and based on cooperation and mutual recognition agreements; hybrid, semi-public administrations founded on private-type structures; and private administrations performing regulatory functions that are recognized as public.

In conclusion, while national governments are unitary and have an executive body at their centre, in the global space there are several different regulatory regimes, and there is no single executive.

In national legal orders, a central executive is accompanied by a body of general rules, which is then divided into sector-specific norms. The former confer coherence and uniformity to the latter. At the global level, the situation is different.

Almost all human activities are regulated by global norms. The latter are highly diverse. Some establish only framework legislation, for States to flesh out through regulatory activity; some provide guidelines for national authorities; others directly impose certain obligations upon private parties; others may rely on global authorities for implementation or to control their implementation; some rely on national authorities for these activities; some provide instruments for judicial conflict resolution, while others yet do not have such mechanisms and resort only to negotiation or national judges. However, they do present a common trait, outlined above: these normative entities are all sector-based; there is no general set of rules (or meta-rules) that operates as a unifying element.

The global legal space compensates for the disadvantages of this sectoralism in several ways. The first and most common course is a process of accretion and accumulation of legal principles, as highlighted by the first decision issued by the Arbitral Tribunal established by the Convention on the Law of the Sea.

The second is the establishment of horizontal connections between different normative bodies. For example, prior to 1995, the standards established by the *Codex Alimentarius* Commission were voluntary, but have since acquired legal force because the WTO required the parties that did not wish to observe them to prove their capacity to guarantee an adequate level of protection. These connections are usually established starting from, and surrounding, the most important global normative

bodies, such as that on trade; these, due to their scope, exert a strong gravitational pull on other sector-based regulations.

Thus, the various regulatory bodies are distinct but not separate. As established by the first decision issued by the Appellate Body of the WTO, the global laws on trade are not to be interpreted in isolation, separate from general international law. This gave rise to the ever-closer interconnections between rules on trade, on one hand, and those on environmental protection, worker protection standards etc. on the other.

The rules produced by global institutions address national administrations or national civil societies directly. In the former case, global institutions take on the task of keeping national administrations in check. For example, the WTO imposes various obligations upon national administrations, such as that of transparency and equivalence, and of introducing consultation procedures.

When global norms address private subjects, compliance with global standards is ensured in various ways. The national administration can be used as a tool for implementation through coercion or sanctions. Otherwise, spontaneous implementation can occur, prompted by market-based incentives.

Although the global legal space does not possess a set of general and common rules, is it nevertheless subject to general principles, such that the global governance system cannot be considered a system of absolute government? In other words, is there a global rule of law?

5. Looking to the future

In the final pages of the work of an American intellectual historian, Mark Mazower, one may read a skeptical and critical evaluation of the present situation of the globalized world: “That international institutions may not be internally democratic in their workings has been known for some time and does not appear particularly surprising. They are, after all, chiefly executive bureaucracies, [...] What does seem novel, in historical terms, is the collapsing importance of the public bodies that give national sovereignty meaning and the way that organs of international government and regulation have come to assail the internal legitimacy, capacity, and cohesion of individual states. [...] international institutions and norms have developed into means of curtailing sovereignty rather than enhancing it, trends that could not but affect the standing of international bodies themselves and undercut their ability to command continued support”¹⁴. “Our representatives continue to hand over power to experts and self-interested self-regulators in the name of efficient global governance while a skeptical and alienated public looks on. The idea of governing the world is becoming yesterday’s dream”¹⁵.

I do not share this point of view, which cannot free itself from the Westphalian approach to international law as a rule for a community of sovereign States. The

¹⁴ M. Mazower, *Governing the World. The History of an Idea, 1815 to the Present*, New York, Penguin, 2012, pp. 421-422.

¹⁵ M. Mazower, *cit.*, p. 427.

reality has changed and Henry Kissinger is correct in noting that “[a] reconstruction of the international system is the ultimate challenge to statesmanship in our time”¹⁶ and that a new culture is necessary “to translate divergent cultures into a common system”¹⁷.

¹⁶ H. Kissinger, *World Order*, *cit.*, pp. 5142-43.

¹⁷ H. Kissinger, *World Order*, *cit.*, p. 5179.