

GLOBALIZATION: A POLITICAL AND LEGAL DILEMMA

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My intention is to offer a brief description of the historical background of the globalization phenomenon and some of its key traits. I shall use those traits to describe the main changes that have determined globalization in political government institutions and to indicate some of the questions they suggest when philosophising on society and law.

1. A METALEGAL INTRODUCTION

1.1. From Post-World War Two to the Third Industrial revolution

In the area of legal thinking, we are actually very far from the environment that followed World War Two. Suffice it to mention G. Capograssi's unforgettable article, "Il diritto dopo la catastrofe", to evoke the ethical dimension of legal philosophy after the war. However, a keen awareness of what had happened—the war itself, saturation bombing, the extermination camps, Hiroshima, Nagasaki—and the desire for it never to happen again provided the basis for a degree of optimism in the law field. The main point of reference for that optimism is Kelsen, the great 20th century legal philosopher.

Kelsen helped not only to clarify legal concepts on the whole, as well as the juridification of certain power relationships that were still apart from law. He was also a notable promoter of International Law, the search for peace through law, proscription of war, and the institutionalization of the international society of states. The labour of that great jurist during the darkest years of the 20th century crystallised in the international community's new institutions and regulations after the War.

The UN was created, giving great institutional weight to the victors of the World War. The legal optimism following the defeat of fascism found expression in the United Nation's Declaration of Human Rights. The Declaration established the limits of what the Earth's Nomos find admissible, by humanity's common law.

That post-war optimism, which, we must add, was blind to the war crimes of the victors, was brief. It ended abruptly in the sectarian atmosphere of the cold war and its nuclear threat. Nonetheless, perhaps due to the political bipolarity of those days, subsequent years saw the culmination of large-scale decolonisation. Today, however, many former colonial countries remain economically dependent,

in the heteronomy and lack of resources, that is, in the conditions incubated by the far-off legacy of the colonial era.

On the other hand, during the second half of the 20th century, industrial policy, although often controlled by bureaucracies and authoritarian regimes—not only in eastern Europe and in China, but also in Spain, Algeria, Iran and many other countries, albeit less intensely—launched many populations along the path to quantitative economic growth. In other less materially unfortunate societies, Keynesian policies presided over an identical kind of growth, but they facilitated the acknowledgement of worker's social rights immediately after the War.

Economic growth during the first twenty-five years after post-war reconstruction gradually established interdependency between the world's societies. At the beginning of the 1970s, a global problem that expressed that objective interdependency became clearly obvious: that economic growth generates the degradation of the environment; that the industrial civilization based on quantitative growth contrasts with finite conditions of the environment that have made human life possible, by degrading and destroying it. The rise of a serious environmental problem is the first important manifestation of what we have come to know as *globalization*.

1.2. The Great Transformation

Twenty-five years of post-war economic growth set the basis or the conditions for the big and decisive changes that have configured the present. These great changes have been, simultaneously, the third industrial revolution and a conservative social counter-revolution.

At the same time, at the political level, the big bureaucratic systems of social dominance in Europe have collapsed or suffered their crisis in other fields.

As everyone knows, the third industrial revolution is characterised by the introduction of computers in productive activity; by the use of new materials of chemical origin; and, above all, by new ways of organising production institutions, which have been completely transformed. From the latter point of view, the large increase of multinational companies, which in many cases fit into each other like Russian dolls, and their networking are the most notable novelties of this stage.

The conservative counter-revolution has consisted in the introduction of neo-liberal economic and social policies. Huge masses of formerly public goods and services have been privatized in the countries where they existed. Capital has been freed of many of its social, fiscal and political charges (even, for instance, the obligation to invest in concessionary companies providing public services) in the so-called deregulation movement of the last few years. Workers have lost many of their social conquests of earlier years.

The collapse of the systems of bureaucratic domination cannot hide the severe crisis that representative governments are experiencing, which is apparent in the lack of political prestige in many “mature” societies.

Taking into consideration globalization's international division of labour, we can distinguish four types of societies on the basis of the tasks assigned to them by that division:

(a) "Mature" or "key" countries that tend to expel or "outsource" second industrial revolution industries and keeping those that produce more added value. These societies retain certain social benefits but also immense bureaucracies. Complexes of military-industrial interest are located in those countries.

(b) An "economic periphery" (China, India, Brazil and some Asian countries) around the centre, whose industries have scant perspectives of improving their productivity and whose localization is determined by low salaries combined with adequate training and perhaps strong social control, as well as weak fiscal —and, in general, state pressure— on capital.

(c) The "forsaken" world on the "outer edge": such as certain parts of Africa and Latin America, where there has been no investment.

(d) Countries that are in between the above categories, such as many big Arab countries: with strong social cohesion, historic and cultural density, but in which there are no conditions to attract capital investment and whose situation is unsustainable in the mid-term within the commercial logic of globalization.

1.3. Great tensions in a globalized society

The principal tensions world-wide have to do with the international division of labour, environmental issues (particularly where power is concerned), with the organisation of labour and the new institutionalization of political power.

1.3.1. International division of labour:

Some societies *forsaken* by globalization's division of labour suffer internal conflicts derived from poverty. They may assume these conflicts culturally; for example, inter-ethnically (i.e. in them, certain discriminatory differences gain considerable cultural relevance). They can also lead to an inability to maintain an order of any kind in these conditions of aggravated abject poverty. Tensions of these kinds can only be marginally exported to other societies and therefore they are not very relevant on the political level, although they still deeply offend humanity's moral conscience. Earth's Nomos only knows how to mediate in these conflicts *post festum*, by genocide trials. Most non-governmental humanitarian organisations' work is carried out in these kinds of societies.

It cannot be said that the so-called *right to humanitarian interference* is a development of International Law: in any case, it is its arguable and shaming *state of necessity*, on which there can be little theorising. Interferences decided without the *forsaken* societies, which in fact turn out to be *societies with no voice before*

international society. “Humanitarian” interference can even be something else: *soi disant* “humanitarian” military intervention, such as that which Serbia had to support regarding Kosovo, legitimated with false data before international public opinion¹.

The countries here called intermediate countries, which have socio-historic density but without clear perspectives in the international division of labour, as opposed to the *forsaken* countries, can export their problems (large quantities of population, scant job opportunities and therefore difficulty in surviving) principally towards the system’s centre, either in the way of migrations or in that terrible form of political impotence: terrorism.

In the 17th century, Hobbes pointed out that in “humanity’s natural condition” —a theoretical model that is somewhat similar to the globalized international order— not even the strong are safe, for they too must *sleep*. He saw in this a reasonable foundation for accepting a sovereign who is above any other community member, whether weak or strong. If Hobbes’ argument holds, globalization should opt for one of the following: either search for an international order that everyone can accept or the strong will have to implement a permanent and one-sided state of watchfulness.

The “state of watchfulness” currently implies a substantial reduction of people’s rights and guarantees in general. In reality, it means specific developments such as “the enemy’s criminal law”, the triumph and resurrection of Carl Schmitt and his logic, by virtue of which people’s rights exist or disappear according to the distinction between “friend” and “enemy” made by the sovereign of the moment. This is the first lesson to learn from Guantanamo’s law faculty.

1.3.2. The environmental issue

The contradiction between Earth’s finite resources and the demands of production in necessarily quantitative growth has been known for decades. The problems generated by an increasingly accelerated population growth —with its subsequent increase of needs, resources and waste— are also well known.

The huge productive potential of certain contemporary technologies that are used to face growing needs make the problems generated by those very technologies increasingly unmanageable. Such technologies are ontologically dangerous, since their use has the same potential for destruction as it has for production. Obviously, we are thinking of nuclear, chemical and biotechnological industries.

1. The 500,000 Kosovars who are supposed to have disappeared in April 1999, according to United State’s Department of State, were supposed to be 10,000 at the end of the war, according to Britain’s Foreign Office, to end in the 2,018 actual corpses found by The Hague’s International Court of Justice (*Le Monde Diplomatique*, Spanish edition, March 2000, page 12).

The effects of environmental damage are not only serious. Above all, in many cases they are decisive and distant, both in space and in time. In significant instances, they make attributing legal liability equally unmanageable, since the individuals involved either can not be determined or, which is practically the same, are not in a position to assume their responsibility.

The value of the environmental damage caused can be higher than the commercial value of the agent that caused it. This elementary truth makes Law's legal-commercial remedies unviable in many cases in which, in fact, the damage is objectively *socialized*, with or without the intervention of Law.

Despite this, an attempt is made to use mechanisms based on market economy, such as the ones established by the Kyoto Protocol, at least to contain the pace of environmental disaster. However, precarious solutions of this type, emergency solutions, actually show that existing economic and government systems are not in a position to provide lasting solutions to the degradation of the human environment, precisely when political philosophy has discovered that we have some responsibilities towards future generations.

The environmental crisis demands a redefinition of the *scale of admissible decisions* in terms of democratic doctrine. Democratic decisions are characterised by their reversibility: in principle, they must be taken by the social groups that are affected by them, and those same groups must be able to annul them. However, certain decisions made by current generations can affect future generations with irreversible effects. Therefore, from a democratic point of view, environmental issues oblige us to redefine the action in terms of scale: in any case, we ought to leave future generations a world that can be managed.

Therefore —and without entering the important issue of the organisation of labour in neo-liberal globalisation, which raises social dumping to the status of model behaviour in *human resources*—, we need to draw attention to the political aspects of globalization, to its new institutions. Today, they are the institutions that articulate the actions of human beings so they can face the social issues posed by globalization itself.

2. THE MUTATION OF POLITICAL INSTITUTIONS

At the level of public bodies, the broadest consequence of the combination of the new industrial revolution and the conservative counter-revolution that has led to globalization is a profound mutation in the order of political institutions.

2.1. The urge to take part in politics

From the mid-19th century to the last quarter of the 20th century, more and more people were attracted to politics in the key countries. The working classes started to take part in politics, creating and sustaining intermediate bodies to

that effect. In the key countries, some of the secular exclusions from political participation tumbled: women in the first place. The same occurred with other excluded people, such as Native Americans and Afro-Americans in the 1960s, who had lacked effective rights in the United States. The political age of majority was lowered, reducing the exclusion of young people. The secular movement was increased by a number of human beings who were attracted to the political sphere. In reality, it could be seen as a democratisation process in the institutions of power in advanced societies. The decolonisation process can also be interpreted in a similar, although much more restricted manner.

2.2. Reduction in the distribution of power

In its deepest sense, ‘democracy’ means ‘government by the people’, that is, the distribution among the people of ultimate social power. The various institutions by which the expression of that power is articulated, or is supposed to be articulated, cannot cancel that primary and profound significance. Different historical societies—and, at different times, even different groups, such as religious orders—have institutionalized, in formally diverse ways, that relationship between group power, distributed among community members, and decision-making bodies: from direct democracy to representative democracy, from the random systems of Pericles’ Athens to the most diverse electoral systems.

However, from the last quarter of the 20th century and coinciding with the above-mentioned great transformation, we can observe several inter-related phenomena: a notable reduction in political participation, the appearance of government institutions and the increasingly disconnected power of the *demos*, the invasiveness of a discourse that legitimises this exclusion.

In 1975, the Trilateral Commission, with its *Report on the governability of democracies*, sustained that in the future, representative political systems would not be able to meet growing social demands without reinforcing government executive power and without bringing about the depoliticalisation of society. This conclusion, whose implicit suppositions need not be studied now, is profoundly pessimistic about the feasibility of democratic systems and the rationality of the *demos* that operates in them. Since then, it has been instrumented in several ways which we shall mention later.

2.3. The axiom “The private is not political”

Furthermore, between 1975 and our day, one of modernity’s fundamental principles of political thought has collapsed: the supposition that what is produced in the private sphere, what is private, is not political; the supposition that what is private has no political significance.

The anti-patriarchal movement, sustained mainly by women, has unequivocally proved that this basic axiom of the theoretical construction of representative democracy and our self-concept of free citizens cannot be sustained since, for women to be able to enjoy effective citizenship, thereby escaping from the discriminatory situation of male tutelage, they not only had to be made equal before the law, but situations previously considered as private had to be eradicated and transmuted. Something as private as the domestic sphere had to be reconsidered.

The axiom of the apolitical nature of the private sphere has been eliminated from theoretical consideration, at least in its generic formulation. Certain phenomena arising in the sphere conceived of as private have turned out to have overall political relevance.

Thus, an important mutation experienced by modern productive institutions—companies—also belongs to the private sphere. Companies have given rise to the so-called multinational companies: companies that have expanded to several countries and which formally submit to several state legislations. In many cases, they manage more economic resources than many states and they are in a permanent and occasionally opaque process of absorbing each other. Responsibility for their management is diluted by control mechanisms and management in the hands of the changing minorities of the social capital.

The conglomeration of interests represented by multinational companies, with their influence over several governments at the same time and certain inter-state institutions, has acquired a recognisable amount of power over groups, although it is impossible to classify this power as public. Rather, breaking the inherited theoretical categories, it should be seen as a conglomeration of private centres of political power, since they adopt clearly political decisions, although they do so from private decision-making institutions.

Multinational companies impose their political power, of government, partly through a new *lex mercatoria*: norms privately created, of private law, the only law that experiences notable growth under globalization conditions.

This conglomeration of the *private political power* of large multinational companies can be considered one of globalization's great institutional novelties. Paradoxically, deregulation policies encourage the normative capacity of multinational companies: they regulate themselves and they regulate other companies. Certain forums, such as the Davos Forum, and certain organisations, such as the above-mentioned Trilateral Commission, ensure the connection between the policies of conglomerates of multinational companies and public policies.

2.4. Transmutation of state sovereignty

States have also lost important aspects and areas of their sovereignty.

2.4.1. In European Union States, complex areas of state sovereignty have been handed over to the EU's institutions. These institutions—whose principal legis-

lative power is the council of heads of State and of government, that is, a body made up of institutional delegations with no legislative power within the member States— assume the supreme, formal public political willpower in many decision-making areas (economic and productive, police and military spheres). In monetary policy, States have transferred their sovereignty to an institution considered to be “independent”, the European Central Bank, which is completely outside formal political control.

2.4.2. The transfer of States’ sovereignty has also taken place less formally, but no less effectively, to the benefit of several international institutions with a great deal of weight in economic policies: the World Bank, the International Monetary Fund, and the World Trade Organisation. Other international organisations, such as the Group of Most Industrialized Countries, have a decision-making power that certain States can hardly resist over economic and industrial policies, which in turn have a bearing on many other policies.

2.4.3. There are two other spheres in which most states —these institutions that have appeared in modernity— have ceased being *non superiores recognoscetes* bodies, to refer to the main trait that characterises sovereignty, according to Althusius.

One is the military sphere: the existence of an imperial military power —the armed forces of the United States of America— with bases on all continents and multilateral and complex alliances, a power higher than any other deployed globally, questions the very idea of state sovereignty in this state of affairs.

The permeability of states’ will —or, if we take them into account, plural-state institutions such as the European Union— to the policies decided by conglomerates of multinational companies referred to above, constitutes a final limiting factor on state sovereignty.

2.4.4. To conclude: the great novelty of globalization in the sphere of real institutions consists in having constituted a *new sovereignty, supra-state, diffuse and polycentric*, that limits the sovereignty of States and their public institutions. This is also a relevant novelty for theorizing, for philosophical-political and philosophical-legal reflection, since it causes the core of citizen’s modern theorization to enter into crisis.

2.5.

The reverse side of state sovereignty externally restricted by the new supra-state sovereignty, diffuse and polycentric, is the diminishing of domestic popular sovereignty; in the limitation, therefore, of representative democracy.

The restriction of state sovereignty at the decision-making level, subordinated to decisions coming from what we have called diffuse suprastate sovereignty, clearly

means that the *demos*, the end holder of sovereignty in a democratic conception of political government, cannot decide against the supra-ordered willpower of diffuse sovereignty.

In effect, the *demos* of globalization is not called to formulate its will on matters decided by the supra-ordered will. At the most, it can formulate its acquiescence to the higher authority.

Not everything can be decided democratically; not if diffuse political will opposes it. Therefore, the *demos* must spontaneously refrain from interfering.

For this to occur, previously there needs to be a progressive transformation of functions in the key institutions for political mediation: the main political parties and public opinion.

When the democratization process went furthest, political parties —historically a vehicle for transmitting social will to the core where state will is formed— opened public institutions to social demands in some societies. However, political parties have now become an instrument to filter and select those demands. They are a selective instrument that only allows access to public decision-making authorities to those expressions of the people's will which are compatible with those of the diffuse sovereignty or that do not draw its attention.

Professionalized politics and the conversion of political parties into semi-public bodies (due to their financing, in many countries; in other cases they become politically indebted with private capital), as well as their conversion into an apparatus that specialises in the management of political adjustment, have created the conditions for the specific political adjustment of globalization. Mainly, it is an adjustment between the will of the diffuse suprastate sovereign and the restricted popular sovereigns.

The very logic of the political task of excluding social demands that are incompatible with the demands of the diffuse sovereign by filtering them, has facilitated and reinforced one of the operation's requirements: in the first place, the de-politicalization of large masses of citizens, their political apathy, the diminution of their participation, since their exclusion is perceived as an inefficiency of participation as such.

On the other hand, by turning politics itself into a show, into a story, thereby losing —as far as citizens are concerned— the nature of an activity which composes the wills existing in the *demos*, while at the same time preserving its legitimizing public value, that endorses the decisions of the diffuse sovereign's government by endorsing those of the representative government.

Public opinion has experienced a parallel transformation. The public agora has become full of messages given industrially by companies that produce conscience content, a sector of the industry that generates feelings of want that match the kind of production that will cause the system to expand economically at any given moment. Information is centralized, selected and disseminated by a few multinational companies in that kind of industry. Freedom of expression is completely useless in that kind of polluted agora, because the agents operating in it are very unequal. The few and diverse messages produced by various fractions of the *demos* must

concur with the industrial messages, repeated millions of times, that dictate the duty of “consume in this way” and that describe the system’s critics as having good intentions but lacking realism. This new type of agora can only generate the autonomous public opinion of the *demos* sporadically, because the sphere of public communication —the so-called mass media— is actually the sphere where heteronomy is produced.

2.6.

The final legitimacy of globalization’s new political system, its ability to be accepted by large masses of human beings in key countries, will not come about through regulated methods, but through the industrial dissemination of the ideology of efficiency. The implicit discourse of efficiency, of the technological capacity of public and private institutional bodies to realise large supra-individual enterprises, becomes increasingly credible in the collective imagination. The economic-political system is, above all, *efficient*. That is the appropriate discourse for political *spectators*, for those who wish to hold on to their private relationships and expect nothing from the public sphere.

The efficiency discourse is partly real and partly ideological. Therefore, its analysis should make some distinctions. It is true that the hegemonic socio-economic system has proved effective for resolving a number of human issues. Life expectancy has risen considerably in the key countries, where, furthermore, the work-hours needed to produce basic goods has been reduced by ten in the past one hundred years. This is an “efficiency” that has little to do with ideology. However, the efficiency discourse is not limited to these truths. For one part, it is more complex. For the other, it hides or minimizes another kind of efficiency: efficiency in destruction and pollution. It is a discourse that presents the economic policy that best fits the maximum expansion of the large multinational companies as the *only possible* logic. The logic of *one* modernization as the logic of *the* modernisation. It presents the *market* as separate from the political conditions of its existence. It presents the projects of the diffuse suprastate sovereign as the only ones that are rational.

This legitimizing discourse of efficiency, implicit in the omnipresent industrial publicity discourse, is itself efficient. Its logic can impose itself above the logic of democratic discourse, which —it should not be forgotten— is a self-supported discourse whose fragile support does not come from complex social structures but merely consists of the will of human beings.

3.

The philosophical legal, political and social reflection is now in a position to look at the dilemma posed by globalization at the institutional level. It is a

dilemma raised by key issues that do not appear to be a dilemma from a purely formal perspective.

While emphasis is now placed on representative government as never before, that is, on the institutional instrumentation of democracy, of government by the people, the world's technocratic government is stronger than ever. That is, the actual government over a world globalized by the military-industrial conglomerates, the large multinational companies, the experts in handling financial capital, in the management of the large industries, in the creation of public opinion, in economic, political and military adjustment.

An entrepreneurial, military and political technocracy has come to fulfil the role of Plato's Philosopher-King and his Night Council in the government of a global Republic.

Democratic institutions submit and subordinate themselves to the new imperial power. Day by day, democratic procedures become void of content, social rights vanish, and political rights become increasingly ineffective, except to acquiesce to global power. New institutions appear that are out of reach of the exercise of political freedom. Systematic power practices prior to modernity reappear, as can be seen by the way defeated soldiers are treated, prisoners are tortured, wars are not even declared, the ill and hungry in the poor countries are abandoned without remedy.

Perhaps this is only a temporary phenomenon. The '30s and '40s of the 20th century were also dark years, just as these years are for many peoples in the world. However, the regression of democracy seems to go hand in hand with everything that is politically and socially new in the globalized world. There are no new counter-examples that can oppose this tendency. If it continues, this tendency may end by turning the institutions created in the past by a secular process of democratization into fossils (like magnificent but empty shells).

