

## Private Regulation and Democratic Principle

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In earlier work<sup>1</sup> I tried to show that the basic limitative constitutional rules of privatization are the democratic principle and the social state principle. I am presenting briefly this argument below, in A, before investigating if it is possible to use the same criteria for checking transnational private regulation (below, B).

### A-Constitutional limitations of privatization at national level

The frontiers between the public and private spheres have always been – at least since the beginning of the last century – blurred and porous. Initially, the strict separation of the classical liberal state and market has been fundamentally altered by the direct involvement of the government and public enterprises to the economic activity. Moreover, in Europe, the introduction of constitutional social rights imposed new, positive obligations to public power. Along these lines, Habermas<sup>2</sup> distinguishes two opposite “thrusts” of the “juridification” of the political system: the first is related to the foundation of the liberal state, through the differentiation of the economy from the politics and the guarantee of personal freedom and property. The recognition of constitutional social rights, on the contrary, results in a new de-differentiation of the political and economic spheres: *"a life-world which was at first placed at the disposal of the market...little by little makes good its claims."*<sup>3</sup>

Nowadays there is, once more, a reverse trend. The constraints of the state's regulatory capacity and the removal of barriers to market access are part of the broader process of globalization, as a driving force of both denationalization and extraterritoriality. There is an evolving "disaggregation" of the state<sup>4</sup> through the transfer of public functions both “upwards” to international or transnational entities (EU, WTO) and “downwards,” through the de-centering of the decision-making either to lower state levels (devolution) or by new blends of public and private power at all

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<sup>1</sup> G. Katrougalos, Constitutional Limitations of Privatization in USA and Europe: A Theoretical and Comparative Perspective, Constellations Volume 17, Number 3, 2010.407, Constitutional Limitations of Social Security Privatisation, European Journal of Social Security, vol. 12 no 1, 2010, 16-40.

<sup>2</sup> J. Habermas, Law as medium and law as institution, in G. Teubner (Ed) Dilemmas of Law in the Welfare State, Berlin Walter de Gruyter, 1985.203.

<sup>3</sup> J. Habermas, “Law as medium and law as institution,” 205, n.2.

<sup>4</sup> See A.-M. Slaughter, “The Real New World Order” Foreign Affairs 76, 1997.183 ff..

levels of government.<sup>5</sup> In consequence, states no longer have a real monopoly on the policies they implement. In this new, globalizing environment, the greater mobility of capital entails polycentric relationships between the public/private and national/international/transnational spheres. This gradual demise of state sovereignty results in the blurring of the conventional frontiers between private and public realms. Even functions traditionally believed to be exclusively public and belonging to the hard core of state, such as the public defense or the penitentiary system, are gradually privatized. Therefore, the public-private divide should not be conceived anymore in a binary logic. There is not a dichotomy but rather a continuum in the axis of public-private. In this sense, privatization is the movement on this axis towards the private “end,” through the shifting of a public function or the transfer of public wealth to private sector.

Only apparently, the public space is shrinking and the private sector is expanding. Actually, what is happening is not the “retraction” of government but a new way of governance where the private actors have more substantial (and often democratically unchecked) power, with discretionary authority over public resources.<sup>6</sup> In other words, the withdrawal of the state is partial, as the deregulation of traditional functions is replaced by a new regulatory project in which “the state's role has merely shifted away from redistribution toward the legitimization and enforcement of market outcomes.”<sup>7</sup>

This remodeling of the ‘public’ sphere of politics is not politically neutral, as it constitutes a transfer of power from public to private actors and, at least in Europe, a major ideological shift from the dominant Keynesian policies towards the new economic orthodoxy of market liberalization, unfettered competition and austerity. Private and public sectors are not functionally equivalent. There are some roles, as, for instance, redistribution, that only the State can fulfill. The latter has simultaneously the constitutional authority and the institutional legitimacy to arbitrate the conflicting social interests, as well as the adequate fiscal and administrative instruments to organize transfers of resources. In the words of Lord Beveridge in a letter to Roy Harrod: “while I want to preserve freedom of enterprise, there are some things I am sure which the state must do, because only the state can do them.”<sup>8</sup>

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<sup>5</sup> *J. Black*, Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-regulatory” World.” *Current Legal Problems* 54, 103-145.

<sup>6</sup> All “concessions of public services,” in the European legal terminology or “delegation of public functions,” in the American one, have this characteristic. See G. Metzger, “Privatization as Delegation,” *Columbia Law Review*, 103 (2003): 1367-1502, 1377, 1406.

<sup>7</sup> *T. Prosser*, Public Service Law, Privatization’s unexpected offspring, *Current Legal Problems*, 51 (1998). 393.

<sup>8</sup> Letter of September 15, 1944, *The Beveridge Papers*, Archives Section, British Library of Political and Economic Science, London School of Economics and Political Science.

Globalization creates a new regulatory arena, in which public and private parties compete, interact and bargain. In this framework public law faces two challenges: First, how to extend public law remedies to newly privatized areas, in order to maintain accountability, quality and equality of provision of services and respect of other public values<sup>9</sup>. Second, to delimit the areas where privatization is constitutionally forbidden. The definition of non-privatizable governmental functions can no longer be essentialist, as if there were a sacrosanct, immutable core of state functions immune from historical change. There is no such thing as a natural law defining public functions. The dividing line of private and public is always historically determined. The exact demarcation of the frontiers between private and public will be inevitably a political matter of ideological hegemony between competing social interests<sup>10</sup>, juridically based on two fundamental principles: democracy and social state. (Of course, in polities where the latter is recognized. This is one of the major differences between the European and the Anglo-American legal orders<sup>11</sup>.)

In this sense, the social state principle imposes at least the obligation for the existence of a public ‘market-free’ pillar of social security. On the other hand, the democratic principle, imposes to the Government an exclusive “duty to govern”<sup>12</sup> in some state areas which are still part of a “*domaine reserve*”<sup>13</sup>. Along this line, the American Office of Management and Budget defines as “inherently governmental” all activities intimately “related to the public interest, which require the exercise of substantial discretion in applying government authority and/or making decisions for the government. Inherently, governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.”<sup>14</sup>

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<sup>9</sup> Cf. C. Harlow, *The Hidden Path of the State and the Publicisation of Private Law*, A Simple Common Lawyer. Essays in Honour of Michael Taggart, edited by D. Dyzenhaus, M. Hunt and G. Huscroft, Oxford and Portland, Hart, 2009, 75-98

<sup>10</sup> P. Kosonen, *From Collectivity to Individualism in the Welfare State?* *Acta Sociologica*, 1987.281.

<sup>11</sup> See G. Katrougalos *An Ocean Apart?* *European Constitutional Law Review*, 4 2008. 225.

<sup>12</sup> Cf. P. Verkuil, *Outsourcing sovereignty, Why privatization of government functions threatens democracy and what we can do about it*, Cambridge, Cambridge University Press, 2007, J. Freeman and M. Minow (Eds), *Government by contract: Outsourcing and American Democracy*, Cambridge, Mass: Harvard University Press, 2009.

<sup>13</sup> Cf. J. A. Kämmerer, “Verfassungsstaat auf Diät,” *Juristische Zeitung* 1996.1042, 1046; Ch. Gramm, *Privatisierung und notwendige Staatsaufgaben* (Berlin, 2001); I. Ewald, *I. Privatisierung Staatlicher Aufgaben* (Brühl: Rheinland, (2004); R. Thérion, *La privatisation des entreprises publiques dans une économie de marché aspects juridiques* Bruxelles, Bruylant-LGDJ, 2002, at 387.

<sup>14</sup> U.S. Office of Management and Budget (2003), Circular No. A-76 (revised; originally issued in 1983). Washington, DC, section B.1.a..

## **B-The application of democratic principle to transnational private regulation**

Global administrative space is increasingly occupied by transnational private regulators and hybrid bodies involving states, international or inter-state organizations, which are not under the control of the nation states. Because of this trend, global governance implies an increased recourse to informality, as “*many institutions, procedures and instruments escape the grasp of established legal concepts*”<sup>15</sup>. Regulation is not imposed only by “hard law”. Legal subjects can also be conditioned by instruments without deontic operators (e.g. statistical data contained in PISA reports)<sup>16</sup>. The same goes for private standard-setting function, that has initially been adopted either as international soft law, which has then been redeployed by international organizations and implemented later through hard law at international, regional or state level, as it happened with the Codex Alimentarius.<sup>17</sup>

As a result, transnational regulation is very hard to define as either predominantly public or private and the public-private distinction seems to be even more elusive on the international and transnational level than on the national one. Hence, global arena constitutes “*a battlefield. (...) in the hands of multiple political, institutional and economic actors, who struggle, interact and bargain. It’s a place and an instrument of conflict in itself, resulting from the moves of different players*”<sup>18</sup>, who “*coordinate through hierarchy, cooperation and/or competition*”<sup>19</sup>.

Prima facie, the democratic principle does not seem to apply in this environment. Key issues are, indeed, removed from the domestic, or any other, political agenda through “deliberate technocratic depoliticization”<sup>20</sup> on ground of improving efficiency and neutrality. The insulation of the Central Banks, for instance, from political decisions of the legislatures is one of the most indicative examples. It is very doubtful if this trend has enhanced the epistemic quality of decision making<sup>21</sup> or

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<sup>15</sup> A. von Bogdandy, Ph. Dann and M. Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, GERMAN LAW JOURNAL, No. 11, 2009.1376.

<sup>16</sup> A. von Bogdandy, Globalization and Europe: How to Square Democracy and Globalization, 15 EUR. J. INT’L LAW 2004.885, cf. K. W. Abbott, D. Snidal, Hard and Soft Law in International Governance, 54 INTERNATIONAL ORGANIZATION, 2000.421.

<sup>17</sup> J. Kurtz, “A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements”, 30 U.N.S.W.L.J. 2007.504, available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2007/31.pdf>.

<sup>18</sup> G. Napolitano, Conflicts in administrative law: Struggles, games and negotiations between political, institutional and economic actors, Paper for the IRPA-NYU JMC Seminar on “Toward a Multipolar Administrative Law A Theoretical Perspective” New York, September 9-10, 2012.

<sup>19</sup> F. Cafaggi, Rethinking private regulation in the European regulatory space, Working Paper LAW No. 2006/13.

<sup>20</sup> Anne-Marie Slaughter, The Accountability of Government Networks, 8 IND. J. GLOBAL LEGAL STUD. 349 (2001)

<sup>21</sup> R.O. Keohane, S. Macedo, A. Moravcsik, Democracy-Enhancing Multilateralism, in

it has just degenerated important political decisions into "pervasive bureaucratic micromanagement."<sup>22</sup> There is hardly any neutral, value-free technical choice or Pareto optimality of 'one best way'. Any expert decision is founded on political criteria and has redistributive effects which should be politically challenged in terms of their fairness and appropriateness.<sup>23</sup>

Efficiency alone, or any Pareto-optimal technocratic solutions, legitimised by output considerations, cannot be accepted as equivalents to democracy, not only because of their inconsistency with the normative character of the principle but primarily because they are based on a unsound cyclical foundation: in order to identify optimal results, one should first define the public goods and values related to them and their teleology. How can this possibly be founded on non-political, technical fundaments?

Rule of law is not a substitute for democratic decisions, either. The judicial accountability mechanisms may, instead, lead to a 'juridification' of global governance, narrowing further the space for democratic decision making<sup>24</sup>, as it is clearly illustrated by the WTO's recent evolution. This does not so much establish a "juristocracy", but rather isolates further the political decision-making from nationally accountable institutions: we cannot have equation of control by law and control by democratic politics, especially when "law" itself (i.e. the global regulation) is not democratically instituted<sup>25</sup>. Therefore, by the introduction of elements of rule of law, such as, for instance, an improvement of transparency or introduction of some forms of consultation, one might get, at best, what Stewart calls '*administrative law lite*'<sup>26</sup>, not democracy.

Neither exists at supranational level any essential mechanisms of checks and balances, despite the presence of a legion of competing actors. The transnationalisation processes, at least at the level of the transnational economy, are politically one-dimensional: neo-liberal orthodoxy for deregulation of financial and social rules as a necessary precondition to efficiency and economic growth has become the prevailing ideology of global governance, through not only the direct

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«International Organization», no. 63, Winter 2009, 26.

<sup>22</sup> M. Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 2001.369.

<sup>23</sup> Ch. Joerges, *Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance*, in Ch. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics*, Oxford and Portland, Hart Publishing 1999.3, 6 ff., C. Offe, U. Preuss, *The Problem of Legitimacy in the European Polity. Is Democratization the Answer?* Constitutionalism Webpapers, *ibidem*, note **Fehler! Textmarke nicht definiert.**

<sup>24</sup> Cf. C. Harlow, "Global Administrative Law: The Quest for Principles and Values", 17, *European J of International Law* 2006, 187-214, cf., more generally, B. Zangl, M. Zürn (Eds), *Verrechtlichung - Baustein für global governance?*, Dietz, Bonn, 2004

<sup>25</sup> Cf. M. Shapiro, "Deliberative", "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?" (2005) 68:3 *Law & Contemporary Problems* 341.

<sup>26</sup> R. B. Stewart, 'U.S. Administrative Law: a Model for Global Administrative Law?', *ibidem*.

interventions of the World Bank and the International Monetary Fund, but also the free-trade treaties of WTO<sup>27</sup>. Moreover, rule-conforming behavior is not produced only by “legal” instruments but also by “policy” documents or other “soft law” means. This “rule-oriented’ landscape”<sup>28</sup> does not merely affect internal economic policies but results to the supersession of the national public values of administrative and constitutional law by a new global ideological setup of very different nature.

It corresponds to a supranational economic constitution, based on a coherent set of constituent principles such as monetary stability, open markets, freedom of contract and liability<sup>29</sup>. This “policy coherence” is far away from the Keynesian compromise of social states. In this sense, there is a latent revision of the fundamental principles regulating domestic economic activity, without direct public consent and under minimal political control.

At domestic level, the freedom of market actors has been controlled by public regulation for reasons of general interest. Whereas the conciliation of democracy and capitalism became possible in last century’s welfare state by the democratic, political control of national markets, something similar has never been established at the level of international transactions. The inexistence of a democratic regulation of the international markets at ecumenical level, does not only mean inability of political power to rein the private global players. It signifies also a progressive upset of the domestic balance between market and state that is creating an internal democracy deficit. Hence, the crucial normative dilemma for transnational regulation turns to be the choice between recognition of some overarching principles of constitutional character (especially rule of law, democratic principle) or the acknowledgment of a fully open-ended pluralist global order.

It is clear that at the present state of international affairs a coherent, hierarchically structured transnational order cannot exist. Therefore, many scholars consider that postnational realm constitutes a “heterarchy”<sup>30</sup>. Before this assertion and the impossibility to normatively reconcile the conflicting demands of accountability of national, international and global audiences, it is often advised that we should look for pragmatic and pluralist solutions.<sup>31</sup>

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<sup>27</sup> Cf. *D. Nicol*, *The Constitutional Protection of Capitalism*, Hart Publishing, Oxford and Portland, Oregon, 2010.

<sup>28</sup> *J. Jackson*, *Sovereignty, the WTO and Changing Fundamentals of International Law* Cambridge University Press, Cambridge, 2006, 205-6

<sup>29</sup> *E.U. Petersmann*, *European and International Constitutional Law: Time for Promoting ‘Cosmopolitan Democracy’ in the WTO* in G. de Burca / J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford 2001, 81-110, p. 88, cf. *B. Hoekman and M. Kosteki*, *The Political Economy of the World Trading System*, 2nd edn (Oxford University Press, Oxford, 2001, 1 ff.

<sup>30</sup> Etymologically speaking, instead of “heterarchy” one should use the term “polyarchy”. The former means in Greek not lack of hierarchy, but a hierarchy imposed by above, by an external or alien factor (heteros –ἕτερος- is the «other” in Greek).

<sup>31</sup> *N. Krisch*, ‘The Pluralism of Global Administrative Law’, 17 *The European Journal of*

Along this line, others argue that instead of seeking an impossible hierarchical “constitutional” settlement of the issue of democratic governance, we should opt for a pluralist, heterarchical model, more adequate to the context of the global space. An additional argument for pluralism is that even without overarching principles, the actors involved in global governance are expected to keep each other in check through mutual contestation<sup>32</sup>. Vertical accountability will be combined to horizontal accountability (inter-institutional accountability)<sup>33</sup>, in order to ensure factual mechanisms of control. However, this pattern does not fulfill the same function as democracy, because the result of concurring and opposing forces does not necessarily keep power under *democratic* control.

The division of powers inside the State functions to check and balance powers, which all have as higher input popular sovereignty. This is not the case with transnational entities, which can easily be captured by special interests. In this sense, the fragmentation of global regulatory regimes could result to a feudal equilibrium, favoring the strongest actor, either politically or economically. Thus, Benvenisti and Downs remark that “powerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created<sup>34</sup>.”

It is, nevertheless, undeniable that designing a global constitutional frame, destined to embrace universal substantive and procedural principles, would be an impossible project, not only due to the lack of a global demos but because of the vast multitude of prevailing conflicting values in various parts of the world, especially outside the Western world. Still, this divergence and the development of a plurality of governance’s loci does not infer impossibility of the recognition of global overarching principles, emerging from the common constitutional tradition of nation-states

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International Law 2006, p. 247, 248.

<sup>32</sup> B. Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY 98, 2005.68, N. Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 2006.247

<sup>33</sup> G. O’Donnell, *Horizontal Accountability in New Democracies*, in Andreas Schedler, Larry Diamond, & Marc F. Plattner eds, *The Self-Restraining State, Power and Accountability in New Democracies 1999*. 29.

<sup>34</sup> E. Benvenisti, G. W. Downs: *The Empire’s New Clothes. Political Economy and the Fragmentation of International Law*, in “Stanford Law Review”, 2007 – 2008, vol. 60, pp. 595 – 631. Cf. the remarks of Keohane and Nye on the –now obsolete– “club model” of international governance in the framework of international organizations. R. O. Keohane and J. S. Nye, Jr., “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy,” Paper for the American Political Science Convention, Washington, D.C., August 31-September 3, 2000, available at <http://www.ksg.harvard.edu/cbg/trade/keohane.htm>, cf. C. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, AEI Press, 2001.

and the need of legitimization of the transnational order<sup>35</sup>.

As we cannot have a global constitutionalism, based on a universal Grundnorm, or even a generally accepted rule of recognition, our constitutional arrangements will be, inevitably, pluralistic. This does not preclude the recognition of some common constitutional ‘jus gentium’. In this line, Kumm’s proposal for a ‘cosmopolitan constitutionalism’ does not seek to construct hierarchies between different levels of law but puts forward the affirmation of some fundamental overarching norms, such as rule of law and democracy, that are meant to direct the solution of conflicts<sup>36</sup>.

I share the idea of a constitutional pluralism, which *”is not monist and allows for the possibility of conflict not ultimately resolved by the law, but it includes common constitutional principles that provide a framework that allows for the constructive engagement of different sites of authority with one another.”* I have, however, a different understanding of the democratic principle, as a foundational value of constitutionalism. Kumm’s paradigm *“takes as basic a commitment to rights-based public reason and interprets acts by the democratic legislator as an attempt to spell out what that abstract commitment to rights amounts to under the circumstances addressed by the legislative act”*<sup>37</sup>.

I still consider that the liberal element of democracy remains very weak if it is dissociated from its republican counterpart and above all of the idea of self-government<sup>38</sup>. Self-government presupposes the existence of a Demos, but not necessarily of a traditional, national pre-political “Volk”, within state boundaries. Demos, in my understanding, is a public body constituted by a political decision, on the basis of an overlapping consensus over some basic supporting values and choices, capable to reach majoritarian decisions, after an informed open discourse. In this framework “public reason” (contrasting with pure reason”) is a product basically of conflicts of

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<sup>35</sup> R. Hülse, ‘Even clubs can’t do without legitimacy: Why the anti-money laundering blacklist was suspended’ (2008) *Regulation & Governance* 459

<sup>36</sup> M. Kumm, *The cosmopolitan turn in constitutionalism: on the relationship between national constitutional law and constitutionalism beyond the state* in J.L. Dunoff & J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge: Cambridge University Press, Cambridge, CUP 2009. In this sense of “constitutionalization” beyond the state see also M. P. Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, in D. Lewis (Ed), *Global Governance and the Quest for Justice*, 2006A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *HARVARD INTERNATIONAL LAW JOURNAL* 2006.223-242 the same, *Globalization and Europe: How to Square Democracy and Globalization*, 15 *EUR. J. INT’L LAW* 2004.885, J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford, OUP 2009, E.-U. Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in Christian Joerges and Ernst-Ulrich Petersmann eds. *Constitutionalism, multilevel trade governance and social regulation*, 2006.5.

<sup>37</sup> M. Kumm, *The cosmopolitan turn in constitutionalism: on the relationship between national constitutional law and constitutionalism beyond the state*, *ibidem*.

<sup>38</sup> Cf. D. Miller, “Democracy’s Domain, *Philosophy and Public Affairs* 37/3, 2009.201.

interests, rather than of conflicts of arguments. It should be clear that in the foreseeable future, any feasible supranational demos would be possible only as a federation of national demoi, which would make the international democracy to be rather a demoi-cracy<sup>39</sup>.

Further on, what I consider as a basic problem for a liberal, “rights-based public reason” as a constitutive material for a cosmopolitan constitutionalism that integrates national and international law, is the asymmetrical character of national and international legal orders. They are not based on the same fundamental principles, with more striking difference the complete lack of the social state principle at supranational level. In its absence, globalization processes are resulting to a complete different conceptualization of rights and the relationship between the political and the economic spheres than in national democracies. Therefore, I don’t consider as a core concern “*the capture of the international jurisgenerative process by states, in particular the state’s executive branches*” but rather the unchecked politically economic power that redefines traditional concepts of constitutional law.

For this reason, the basic priority is to impose democratic limitations to the development of global space. Teubner, better than others, has shown that the basic constitutive function of transnational regimes was to promote the institutional conditions for their autonomy vis-à-vis the national states. “*To dismantle such nation-state boundaries has become the primary constitutional aim of transnational regimes. Today’s global constitutionalism thus aims to accomplish two things: to break down the close structural coupling between the function systems and nation-state politics and law and to enable function specific communications to become globally interconnected. (...) It has produced not only specific political regulations but also fundamental constitutional principles. In the economy these have aimed at giving global corporations unlimited options for action, abolishing government shareholdings in corporations, combating trade protectionism and freeing business corporations from political regulation (...) Limitative constitutional norms are now needed, rather than constitutive ones.*”<sup>40</sup>

Hence, the main issue for the emerging global constitutionalism is to democratically control the transnational economic power. Now that globalization “*gets in the way of national democracy*”<sup>41</sup>,

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<sup>39</sup> Cf. K. Nicolaidis, *Our European Demoi-cracy: Is this Constitution a Third Way for Europe?* in K. Nikolaidis and S Weatherill, *Whose Europe? National Models and the Constitution of the European Union*, European Studies at Oxford Series, 2003, F. Cheneval, F. Schimmelfennig, *The Case for Demoi-cracy in the EU*, Paper presented at EUSA Conference Boston, March 2011, [http://euce.org/eusa/2011/papers/8h\\_cheneval.pdf](http://euce.org/eusa/2011/papers/8h_cheneval.pdf).

<sup>40</sup> G. Teubner, *Constitutional Fragments: Societal constitutionalism and globalization*, Oxford, OUP, 2012, p. 76-78, emphasis added

<sup>41</sup> D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World*, New York: W.W. Norton & Co., 2011, p. 190, 200 ff.

the re-politicization and re-democratization of the global economic relations, even if they acquire a private or semi-private form, is imperative. By neglecting to face the challenge as it is, we risk to bypass the basic political problem posed by globalization, what Rodrik calls the "Globalization Trilemma": From the tension between national democracy and global markets stem three options: We cannot have (1) hyperglobalization, (2) democracy, and (3) national sovereignty all at once, although we can have any pair of them. In this sense, the possible political outcomes are a) to have 1 and 3, by restricting national democratic legitimacy, b) to have 2 and 3, by limiting globalization or c) to have 1 and 2, i.e. "globalize democracy" by moving the forum of democracy from national to global level<sup>42</sup>.

Globalization is inevitable, but not linear. It can be shaped and transformed by political rules, although not by extrapolation of the nation-state model of democracy but rather along two principal directions: a) Introducing limitative procedures for the incorporation of transnational regulation at national level and b) Constituting democratic decision-making and enhancing accountability at transnational level. In this sense, rules and standards should be constructed at the transnational level so as to ensure the optimal provision of global public goods, such as climate or environmental protection<sup>43</sup>, after deliberation in horizontal networks between national demoi or more partial stakeholders.

This horizontal dimension is what distinguishes a global democracy both from a national democracy and a federation, where the relationship between central state and a federal unit are basically vertical. But deliberation and horizontal networking cannot translate themselves into authoritative decisions, without final approval of their outcome by the self-governing demoi, or the entities of the international law acting upon delegation of the latter.

Hence, at the present state of affairs, the basic yardstick for qualifying the democratic quality of transnational policies remains their impact on national democracies<sup>44</sup>. Still, the actual asymmetry between capacities for political action and social participation at national and transnational levels results to a disjunction between global socioeconomic and political processes, on the one hand, and local processes of democratic participation, on the other<sup>45</sup>. The governance of global space is

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<sup>42</sup> D. Rodrik, *The Globalization Paradox*, ibidem, note 41

<sup>43</sup> D. Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, *The European Journal of International Law* Vol. 23 no. 3, Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJ* 2006.1490.

<sup>44</sup> Cf. 107 See A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press 2004, p. 219 ff..

<sup>45</sup> Cf. J. Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law* *EJIL*, 23, 2012, No. 2.

especially democratically deficient when it comes to private regulatory mechanisms<sup>46</sup>. For example, procedural mechanisms such as the Basel II, which may be used primarily by organized business and financial interests result may to an even greater disregard of weaker and more vulnerable strata. In other contexts, there is the danger of bias and capture, as stronger and better organized actors exert greater sway in the informal, opaque, negotiation-driven networks of transnational decision making than more weakly organized general societal interests.

Therefore, parallel to any measures aimed to remedy the existing democratic deficit of institutions of global governance, it is even more important to introduce political and juridical means for containment of unchecked intrusion of transnational rules to national legal orders, without an explicit previous popular consent. In this sense, it will be necessary to re-center regulation<sup>47</sup>, not in the sense of returning to national governments a control monopoly, but so as to ensure a democratic oversight on diffused regulatory strategies<sup>48</sup>. Such oversight may be deemed higher in the case of sensitive areas, as core labour standards<sup>49</sup>, or in transnational regimes that involve the privatization of functions that traditionally have been regulated within the public sphere<sup>50</sup>.

The establishment of procedures and devices for containment of superimposition of norms lacking democratic legitimacy is not unfeasible or unrealistic. For instance, it has been suggested that the outcome of the WTO's Doha Round of negotiations and any consecutive treaties should be the object of a referendum at national level<sup>51</sup>. (The empirical research shows that in almost all jurisdictions the ex post legislative scrutiny of negotiated rules of WTO's Uruguay Round Agreements clearly was largely perfunctory<sup>52</sup>. In front of the unified logic of unleashed markets, the

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<sup>46</sup> L. A. Dickinson, Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law, in William and Mary Law Review, 2005, vol. 47, p. 135; J. Aart Scholte, Civil Society and Democracy in Global Governance" CSGR Working Paper No. 65/01.

<sup>47</sup> Cf. J. Black, Decentring regulation: Understanding the role of regulation and private regulation in a postregulatory world, Current legal Problems, 54, 2001.103 ff, *the same*, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, in Regulation & Governance, , vol. 2, 2008. 137.

<sup>48</sup> Cf. S. Benhabib, The Rights of Others, Cambridge: Cambridge University Press, 2004, p. 217-221.

C. Scott, Analysing regulatory space: Fragmented Resources and institutional design, Public Law, 2001, 329 ff.; State recentered as vital actor

<sup>49</sup> T. Macdonald and K. Macdonald, Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry, 17 European J. of International Law 2006.91, J. Salzman, Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development, 21 Michigan Journal of International Law 769, 2000.805.

<sup>50</sup> J. Freeman, Private parties, public functions and the new administrative law, in D. Dyzenhaus, Redrafting the rule of law, Oxford, Hart, 1999. 331

<sup>51</sup> R. Howse, How to Begin to Think About the "Democratic Deficit" at the WTO, *ibidem*.

<sup>52</sup> J. Jackson / A. Sykes (eds.), Implementing the Uruguay Round, Oxford, 1997, cf. R.

national demois do not have any substantial influence and their citizens have any reason to feel politically dispossessed.)

Besides the reconfirmation of the democratic character of constitutional settlements, similar procedures could contribute to the gradual formation of a global (or at least regional) public space, since the related political issues would be discussed horizontally in all involved countries. The creation of a similar public discourse arena, overlapping and complementing the national ones, is a functional prerequisite for the emergence of an eventual cosmopolitan deliberative democracy and a global “demos”, in the sense of “demoicracy” I described above<sup>53</sup>.

Finally, another dimension of unequal power relations created by global governance is the “attenuation of sovereign equality” of poorer and developing countries. The existing international legal order remains broadly irresponsive to the concerns of developing countries and its peoples<sup>54</sup>. Problems of democratic accountability may occur either on the absence of efficient control mechanisms but also due to “*substantive disregard, an exercise of power that unjustified harms or unjustly treats some of those affected*”<sup>55</sup>. As Stewart remarks, “*the appearance of procedural legitimacy may veil and further entrench that disregard (...since) The problem is (not so much lack of accountability but) rather disproportionate accountability to (...) and well organized economic interests, to the detriment of less cohesive societal interests.*”<sup>56</sup>

Shifts in quota shares to developing and to under-represented countries are already under discussion in the IMF, but the reform is far from remedying the existing inequalities<sup>57</sup>. Of even greater importance would be the reintroduction of some form of minority blocking mechanism to a panel or Appellate Body decision in WTO, preventing that decision from becoming binding WTO

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Howse, How to Begin to Think About the “Democratic Deficit” at the WTO, 2003, *M. Fakhri*, Reconstruing WTO Legitimacy Debates, *Notre Dame Journal of International & Comparative Law*, Vol. 2, No. 1, p. 64, 2011.

<sup>53</sup> See *J. Cohen and Ch. F. Sabel*, “Global Democracy?”, 37 *New York University Journal of International Law and Politics* 2005.763, *J. Delbrück*, Exercising public authority beyond the State: transnational democracy and/or alternative legitimation strategies?, in *Indiana Journal of Global Legal Studies*, vol. 10, 2003.29, *R. Falk, A. Strauss*, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty (2000) 36 *Stanford J. of International Law* 191.

<sup>54</sup> *B. S. Chimni*, ‘International Institutions Today: An Imperial Global State in the Making’, 15 *EJIL* 2004, p. 1, the same, ‘Cooption and Resistance: Two Faces of Global Administrative Law’, *IILJ Working Paper* 2005/16, available at [www.iilj.org/papers/2005.16Chimni.htm](http://www.iilj.org/papers/2005.16Chimni.htm). Cf. also *N. Krisch*, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *European Journal of International Law* 2005.369

<sup>55</sup> *R.B. Stewart*, Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance, *IILJ International Legal Theory Colloquium Interpretation and Judgment in International L* <http://iilj.org/courses/2008IILJColloquium.asp>.

<sup>56</sup> *Ibidem*, p. 12, p. 56.

<sup>57</sup> Cf. *G. Napolitano*, The Two Ways Of Global Governance After The Financial Crisis Multilateralism vs. Cooperation *Jean Monnet Working Paper* 16/10

law.

In hybrid, semi-public institutions, the creation or expansion of participation rights could be an alternative solution. In some cases where the addressees of transnational regulation could be delimited and specified with accuracy, one could claim that they constitute, in a minimal sense, a specific micro-demos, although not the kind of demos we have become accustomed to in national democracies<sup>58</sup>. Along this line, Held envisions a quasi-federal political structure in which all those affected by a particular issue have a right to participate in decisions on it, combined with a principle of subsidiarity<sup>59</sup>.

However, it is not easy to establish international structures of democratic participation as thick and representative as those of the national level. Providing groups or diffuse societal representatives of interests with participation prior to decision-making, eg. by granting them voting membership in a collegial authority or rights of questioning decisions is enhancing the democratic function of transnational institutions, to the extent that a majority of the stakeholders could be efficiently and fairly represented.

Nonetheless even where global bodies purport to provide representation, there is the danger of bias and cooption in the selection process to the detriment of less cohesive societal interests. Besides, hierarchies of social power operate in civil society no less than in other political spaces. Civil society is itself a site of struggles to be heard and its inadequate representation can reproduce or even enlarge structural inequalities and arbitrary privileges connected with class, gender, nationality, race, religion, urban versus rural location, and so on.<sup>60</sup> There is evidence, for instance, that NGOs working as monitors for non-governmental systems of labour standards in Central America have been unduly supplanted the trade unions in discussing wages and working conditions with factory managers, a process that objectively helped companies to avoid union organizing and enforcing collective agreements or public regulation.

As Weiler suggests, at the supranational level “*democracy can be measured by the closeness,*

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<sup>58</sup> Cf. D. Curtin, L. Senden, Public Accountability of Transnational Private Regulation Chimera or Reality?, Amsterdam Centre for European Law and Governance Working Paper Series 2011 – 06.

<sup>59</sup> D. Held, Democracy and the Global Order (Cambridge: Polity Press, 1995, *the same*, Democratic Accountability and Effectiveness from a Cosmopolitan Perspective 39 Government & Opposition 2004.365, 382.

<sup>60</sup> J. Aart Scholte, Civil Society and Democracy in Global Governance, CSGR Working Paper No. 65/01.

*responsiveness, representativeness, and accountability of the governors to the governed*<sup>61</sup>. Hence, the core of the democratic principle, in the sense that there must be an ultimate link between the decision making and the will of the people can and should be promoted also at the international level.

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<sup>61</sup> *J. H.H. Weiler*, *The Constitution of Europe*, "Do the new clothes have an Emperor? and other essays on European Integration", Cambridge University Press, 1999, p. 81, cf. also *J. H. H. Weiler and I. Motoc*, *Taking Democracy Seriously: The Normative Challenges to the International Legal System*, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns-New Challenges for the International Legal Order*, Wien, Springer, 2003, p. 68-69.