I-1.27: Constitutional Law faced with Globalization's Regulators

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1. Introduction

All researchers are now aware of the role that globalization plays in the construction of modern constitutionalism. This is doubtlessly due to the tension that exists between the traditional, Statist vocation of law (and especially public law), and the centrifugal force of the economy, which in contemporary times, has taken on a global dimension[1].

This tense background requires us to rethink the classical architecture of the branches of law, both from a perspective of constitutional law and international law. As for the former, constitutional law is no longer limited by national borders: public law no longer coincides with States [2]. On the contrary, the law of States is evermore conditioned and contaminated by de jure or de facto rules from an external source. In this perspective, we might say that States are in a crisis that has been brought about by the crisis of State sovereignty[3].As for the latter, the crisis of the State impacts the crisis of international law. Traditionally, international law has indeed been though of as a law of States, and therefore as a law that exists to regulate the external manifestations of State sovereignty. But, as we have said, the contemporary period is characterized by the transformation of international law into global law. One of the semantic perimeters of this fashionable expression is that in global law, there are many more actors than States alone, and even more subjects of law[4].

All of these changes alter the classical formulation of the post-Westphalian law of States, both on a national and international level, and have led to the abandonment of the vision of law as an *ordo ordinatus,* both rational and hermetic. Therefore, one can doubt the relevance of Max Weber's impersonal and abstract theory of law. Instead, we have now entered an era of subjectification, in which law is conditioned by its subjects, who are all involved in the global legal game[5].

Several authors, including Martin Shapiro, address the globalization and standardization of law[6].The idea is doubtlessly interesting, especially because it highlights a tendency in contemporary law. However, this process is complicated and unstable. Indeed, we must expect some surprises, even though in this analysis we have nevertheless chosen to use the typical instruments of constitutional analysis. Therefore, an attempt to identify the multiple actors in this great game shows that non-State regulators are in a position of utmost importance.

2. Who are non-State regulators?

Who are these non-State regulators? This question is highly complex and requires an attempt at classifying, or at least at identifying the various elements that characterize these actors. The idea of non-State regulators is not, in fact, new, and is strictly related to the path of legal pluralism[7]. In its broadest sense, it even includes various regional or local regulators. Taking a different angle, we could even include non-standard regulators, such as Independent Administrative Authorities (IIA) and the various other bodies that are outside classical political dynamics[8].Changing perspectives a second time, we could abandon the classical declaratory fiction and possibly consider that judges possess an abnormal regulatory function, since they are becoming more and more significant actors in global law[9].

The identification of other regulators that are not included in the formal architecture of pure legal doctrine (transnational law firms, professional associations, or sports federations are only a few examples) could be pursued, but we understand that it is impossible to provide a 'universal' definition of 'non-State regulators'. On the contrary, one might even doubt that it is possible to use this expression to describe a legal category.

In order to be able to continue the analysis, it seems necessary to make a choice, and to set semantic limits on this term, which is as attractive as it is obscure. We will therefore focus our attention on those non-State regulators that play a role in the globalization process, and especially on those that the Americans call private setters.

However, the use of English-language terms does not resolve our problems: in the category of private setters, one finds entirely private actors as well as mixed public-private actors, and others who are involved in public decision-making processes[10].

Further reduction of the subject of this study reveals that regulators who operate in an entirely private context (either structural or functional) must be eliminated, because they cannot be considered as being institutional actors in global law. Let us therefore proceed with an analysis of what remains: concerning the structural aspect, one can find both entirely private structures as well as hybrid public-private structures. However, as concerns the functional aspect, one can happen upon complex procedures known as co-regulation, or on entirely private procedures that exist because of a public mandate.

Even if the evolution of the phenomenon of private setters is not clear, we can identify many examples of this phenomenon: is this phenomenon currently expanding, or rather, is it retracting? A relatively well-known example is that of European Union committees, and the complex system of 'comitology', which involves joint action by European institutions, governments, and private interests. But, we could of course mention certain procedures in the World Trade Organization or even the ICANN, a private Internet regulatory body.

There are also various physical industries subject to private setting: these range from fishing to nuclear energy, from technological development to postal services, from the food industry to intellectual property.

Based on these descriptive considerations, we must question the opportunity of maintaining a distinction between the private and public sectors. Some authors, in fact, have stressed that such a distinction is no longer justified, and that it is increasingly difficult to draw boundaries between these two conceptual categories. But, closer investigation reveals that the distinction between public and private remains of paramount importance, at least from a constitutional law perspective. The emergence of a public sphere was indeed one of the reasons that allowed for the transition from the medieval proprietary regime to the Modern State of the seventeenth century. And even today, from a global law perspective, we can see that private setters' rules can only be imposed upon citizens if they are recognized by a public authority (be it the nation State or an international organization), or if the rule-making process involves a public authority. On the other hand, anything that takes place exclusively in the public sphere can be considered to be the application of the principle of horizontal subsidiarity, meaning the withdrawal of the State from areas in which private players are able to act better and more efficiently than public ones.

We can therefore take a careful look at the theories of reflexive law and of reflexive regulation [11]. It is true that open regulation, performed by actors themselves subject to that very regulation, can solve many problems linked to the rigidity of classical formal regulation. However, one must not forget—as demonstrated by Ingeborg Maus—that open principles can easily be manipulated by the economically powerful, in order to serve their own purposes[12]. A good example is internal regulation conducted by TNCs: an examination of their codes of conduct reveals that they can be used as pseudo-legal screens that permit the exploitation of workers in underdeveloped countries.

Moreover, reflexive regulation performed by non-State regulators has a fundamental problem, which is their lack of heteronomy. Heteronomy is, in fact, a fundamental element of the concept of rule of law, which is at risk of being abandoned with the advent of the new practices of global regulation. Indeed, most of the time private regulators establish rules that solely favor their own interests, as revealed by the tensions between transnational enterprises and consumers.

3. What are the problems with non-State regulators?

Internationalists, like (but less than) constitutionalists, have developed studies on the dynamics of the new transnational law during the last ten years. Furthermore, experiments to define these new limits, and thereby systematize globalization's actors, are legion. Although it is not possible here to cite all these various attempts at classification, or all the theories supporting the new global space, it is necessary to highlight the limits common to any such form of reconstruction, and the challenges that have not yet been overcome. These are, firstly, questions of legitimacy and accountability. Again, we are faced with two terms in English that are both as fashionable as they are obscure.

In legal analyses, the notions of legitimacy and accountability are often addressed together, as though they were a hendiadys. Indeed, they are different concepts since it is possible that an actor has very strong legitimacy, but is not accountable; and on the other hand, accountable subjects that are without legitimacy. However, both concepts do have some overlap.

What is legitimacy? Does legitimacy mean legality or legitimation? Some researchers have suggested that the legitimacy of private setters is based in law and not in consent. The example has been given of the European Commission's *Codex Alimentarius*, and it has been argued that its legitimacy is based in its respect of due process and thereby of pre-established procedural rules. But upon closer analysis, procedural fairness is an *ex post* solution that does not solve the theoretical problem.

It has even been suggested that the legitimacy of private setters is linked to their independence, and that an excessive attempt at regulation—especially by NGOs—might destroy their sphere of independence, which is the source of their de facto autonomy. However, recent examples demonstrate a different situation. Here, I am especially referring to credit rating agencies in the financial sphere. And so, these rating agencies, which could be considered to be private setters, have recently proven, during the last months' financial crisis, the risks inherent in the phenomenon of independence. The latter should indeed not be confused with the absence of regulation. Instead, rational and functional independence can only be guaranteed using detailed regulation.

Similarly, what is *accountability*? It smacks of the idea of supervision, but of what sort? Can accountability be reduced to the supervision of various interests, or rather, should we consider that democratic supervision resulting from free elections is always required? Some argue that the lack of democratic supervision can be rectified by increasing resources for the defense of individual rights before national and international courts. However, Anne Peters is right when she says that this type of guarantee cannot replace elections and democratic representation. According to me, this is confirmed by TNCs: a very interesting path of study is being explored in the United States, but has not yet caught on in Europe, which is the development of instruments of corporate governance. In particular, several studies have been carried out on the role that minority shareholders should play, and on the instruments that must be placed at their disposal in the governance of large multinational corporations[13]. This is doubtlessly an interesting and important perspective, but we cannot consider it as capable of solving all of accountability's problems: what weight do consumers have in the products sold by TNCs? This subject indeed merits closer study, but it seems to me that this is an example that illustrates the fact that interests are completely represented only during elections.

Moreover, we can renew the aforementioned considerations as to the fact that attempts at compensation are unable to solve the theoretical problem.

All of these doubts are focused on a final point: who supervises the private setters? Some authors have written that the question of *quis custodes ipsos custodies* has lost interest. One might agree, provided one does not abandon the question, but rather replaces the 'who' with a 'how'. Thereby, one observes that there is still a long way to go in finding satisfactory supervisory mechanisms. Especially because there does not yet exist a system of liability for private setters, nor a full judiciary system [14] .

4. States faced with the actors of globalization

A constitutionalist's analytical approach causes him to study the problem of private setters from a State's point of view, as well. A number of reasons have caused traditional regulatory approaches to fall out of favor: one of them is surely technological development, which is linked to the social and economic acceleration that has made necessary the application of regulation to a scenario that goes beyond the territorial limits of the traditional State [15] .

But, can one say that the State is in crisis? In order to attempt an answer, we must first clarify what we mean by State. Normally, a State is understood as an entity made up of a territory, a people, and sovereign power. This image describes the traditional, Post-Westphalian State. Most researchers now believe that the State is in crisis because it is no longer possible to identify the elements that constitute it. But are we really sure that the constitutive elements of the State have exploded or imploded? We can try to refute this rather widespread theory, and affirm that the constitutive elements of the State are still there, but they are organized differently.

To better understand, we must focus on sovereignty: what is in crisis is the conception of a compact and dense sovereignty, the type of sovereignty that engendered the European idea of the State in the eighteenth and nineteenth centuries. But, the State can survive perfectly well with other forms of sovereignty, and history has already shown this: the point of reference is the United States' form of federalism, which has organized sovereignty at various vertical levels, without ever abandoning the construction of a strong State [16] .

We are therefore witnessing the crisis of a certain conception of the State, and not of the State itself. The crisis of the traditional Statist dynamic does not mean the death of the State: the State is a young institution, which has not yet said everything it has to say [17] .

So if we want to consider a description of the new features of the State, we can use the theory of disintegration, or of 'borrowing regimes' [18]. So, traditional State structures now operate on different fields, both horizontal and vertical, by networking with corresponding structures in other States, international and supranational organizations, and private entities, such as private setters.

In this new context, we must make a special effort at systematization: the sources of law are one of the areas most affected by globalization's tensions[19]. Because the State is no longer a compact and organized system, it is unthinkable that the sources of law would not follow suit. In fact, we must take into account that the idea of an encyclopedic Parliament is in crisis: it is no longer capable of possessing all legal knowledge. The rules laid down by private setters demonstrate that the material sources of law have an increasingly important place in the system of sources of law, which must be regarded as a pluralistic and multifaceted system. In a way, we are witnessing material sources' revenge on formal sources. All of this obviously leads to the abandonment of an Enlightenment conception of a clear and well-organized system. Rather, we are witnessing interplay between sources of variable geometry, but this is the price to be paid for pluralism and integration. We must therefore resign ourselves to a true crisis of the system of sources. But, we must also be careful, for the crisis is unfolding in two direction. On one hand, we are witnessing the proliferation of sources of formal legal rules: therefore, there are national laws, as well as those of supranational and international organizations. On the other hand, however, legal regimes have de facto been elevated to the level of a source of law, as are most of private setters' rules.

The law, therefore, is no longer the preserve of the legislator, and perhaps is no longer the expression of the general will. But, upon closer examination, we observe that this is bringing us to the brink of a crisis in legal positivism and the Vienna School's pure doctrine of law [20]. Law, on the other hand, is something that is much more complex and complicated than the simple, rational, and formal legal rule, which is part of a binary system of 'wrong' and 'right'. This is why the French Council of State has rightly spoken of 'gaseous law' (*un droit à l'état gazeux*)[21].

However, in this context of globalization, it is important to reread the institutionalist theories developed in Italy by Santi Romano and in France by Maurice Hauriou[22]. There is more than just positive law, and the institution—even the global institution—is the place of *"la redemption des institutions sociales",* (the redemption of social institutions) to use the words of Hauriou.

We must therefore wonder whether the crisis of the system of sources and of legal positivism implies a crisis of the rule of law. Max Weber had theorized that there was an elective affinity between the rule of law and capitalism. But, why then is the rule of law being called into question in this era of hyper capitalism? A closer look shows that globalization's form of capitalism is much more rapid (almost instantaneous) than the capitalism of the last century. Some academics have imagined that the instantaneousness of the economy and finance has made the rule of law useless, because the legal uncertainty inherent to long delays in transaction is reduced [23]. This is certainly defendable, but one might also think that there is still demand for the rule of law, even if it must be overhauled and adapted to the global context [24] .

A very important aspect of the deformity of State structures and of the new balances of power is that of the crisis in representation, a concept upon which modern democratic constitutionalism was built. The crisis of representation is reflected upon the crisis of citizenship, as shown by the discourse of non-State regulators. This means that the concept of citizenship is in crisis, both from the perspective of belonging to a group, as from the perspective of participation. On the other hand, we are witnessing a surge in forms of representation of interests, which are perfectly well embodied by TNCs and NGOs.

5. Does a global constitutional dimension exist?

In conclusion, we must consider whether it is possible to recognize a few of legal constitutional orders' typical characteristics in the new 'global legal area'. In other words: is it possible to speak of a global constitutional law?

This issue is complex and might lead to misleading answers. We must therefore proceed gradually, step by step. We must first enquire as to whether a global legal architecture can be identified, which would be something close to a global State. The answer should be obviously a negative one, whether we observe the future situation, or predict the near future. The theme of global regulators and private setters is ample proof of this: whatever their nature or structure, all of these bodies have specific purposes and participate in rule-making (with all of the problems and limits mentioned above), but only in their specific areas. In this global context, a player with general goals, such as the Nation State, is lacking.

The bold theories that Immanuel Kant developed in the late eighteenth century[25]are as seductive as they are impracticable, as clearly demonstrated by many constitutionalists. So, since it is not possible to imagine a global or worldwide State, we must therefore ask ourselves if it is possible to imagine a global constitution or a global constitutional law [26]. Even from this point of view, we must distinguish between various hypotheses: first of all, we cannot imagine a written global constitution, since the Constitution must be an expression of sovereignty, and—at the global level—there is no sovereignty distinct from that of States, who are the territorial actors of international law. From this point of view, global law shows to retain a strong internationalist connotation. Moreover, a glance at the European Constitutional Treaty suffices to understand all of the difficulties and contradictions inherent to a constitutional document that is not the expression of sovereignty.

Since we have abandoned the idea of a written constitution, can we still, at least, speak of constitutionalism? In order to answer this question, we must ask ourselves whether constitutionalism should be built on sovereignty or on democracy. Reading Article 16 of the Declaration of the Rights of Man and of the Citizen shows that constitutionalism must be built upon democracy, and therefore upon the separation of powers and the guarantee of rights. Let us analyze these elements.

In classical theory, the separation of powers leads to the attribution of various powers to different bodies. It is therefore clear that, because there is no formal structural architecture on the global level, it is impossible to imagine this type of distribution of powers on such a scale. However, it is possible to seek out new forms of power distribution and new applications for the principle of the separation of powers: one of the most interesting examples is that of a functional separation[27].It seems to me that this idea might also be applied to the current method of formulating global law: additional efforts are required—even within individual subjects—to separate rule making functions from adjudication and other para-juridictional functions, as necessary.

Regarding guarantees of rights, things are more complicated: in the current context of the global legal order, it is possible to identify two types of guarantees that must be respected.These two guarantees are first and foremost applicable to the activities of non-State regulators. The first is that of ex-ante protection: it seems to me that the most effective means to guarantee rights during the initial rule-making process and to enable all interested parties to participate, according to the American interest representation model, or even according to procedural theory, is that of deliberative democracy [28]. Ex-post intervention, on the other hand, demands the pre-establishment of para-jurisdictional remedies for those who are unfairly hurt by non-State regulators' and other global law actors' actions. There are two different ways to go about this: firstly, via the creation of dispute settlement chambers within global organizations, or via the use of national judges to guarantee individual and corporate rights faced with global regulators. It seems to me that this last perspective is currently the most attractive, especially because of national judge's renewed interest in general clauses, such as *bona fide*, *neminem laedere*, and guardianship by a trustworthy person [29] .

In conclusion, we can say that the global legal order possesses instruments of guarantee. In any case, no doctrine has been able to remedy the lack of representation clearly demonstrated by an analysis of private setters and non-State regulators.

International law is perhaps not yet mature enough to be considered a constitutional order: there are many other bodies in the international and global context that demonstrate a democratic deficit (States, non-State regulators). This is why we must attentively examine the theory of compensatory constitutionalism, even though it demonstrates axiological ambitions for constitutional law [30]. It is necessary to build a common ethical dimension in order to speak of global constitutional law. However, all of this reveals rather paradoxical consequences and risks that require careful thought. Building global constitutional law will spread—perhaps by force (not military force, but rather economic force)—the values that are considered to be the 'truest' values of constitutional law, meaning the values of Western democratic constitutionalism.

[1] B. Hibou, *De la privatisation des économies à la privatisation des Etats: une analyse de la formation continue de l'Etat*, in B. Hibou (ed.), *La privatisation des Etats*, Karthala, Paris, 1999, 11.
[2] S. Cassese, *Il diritto amministrativo globale. Un'introduzione*, in *Riv. Trim. Dir. Pubbl.*, 2005, 331.
[3] S. Sassen, *The State and Globalization: Denationalized Works And Internal Power Shifts*, Global Jean Monnet Conference - ECSA World Conference, Brussels, 23-24 nov. 2006, in www.ec.europa.eu/education/p...
[4] S. Cassese, *Lo spazio giuridico globale*, Roma-Bari, Laterza, 2003, 18 ss.; S.S. Ostry, *The Changing Scenario in International Governance*, in G. Paquet, D.M. Hayne (eds.), *Governance in the 21st Century*, University of Toronto Press, Toronto, 2000, 23.
[5] On normative consumerism, cf, M.R. Ferrarese, *Il diritto al presente - globalizzazione e tempo delle istituzioni*, il Mulino, Bologna, 2002, 29.
[6] M. Shapiro, *The Globalization of Law*, in *Indiana Journal of Global Legal Studies*, 1, 1993, 7.
[7] B. Dupret, *La nature plurale du droit*, in AA.VV.,*Les pluralismes juridiques*, Karthala, Paris, 2003, 81.
[8] Cfr. B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Wiener (eds.), *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 68, 2005; R.B. Stewart, *Il diritto amministrativo globale*, in *Riv. Trim. Dir. Pubbl.*, 2005, 633 ss.
[9] M.D. Rosen, *Nonformalistic Law in Time and Space*, in *Univ. Chicago Law Rev.*, 1999, 633; M.R. Ferrarese, *Il diritto al presente*,cit., 75.
[10] R.B. Hall, T.J. Biersteker (eds.), *The Emergence of Private Authority : Forms of Private Authority and Their Implications for Global Governance*, Cambridge University Press, Cambridge, 2001; R.B. Hall and T.J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge University Press, Cambridge, 2002; R.A. Higgott, G. Underhill, A. Bieler (eds.), *Non-State Actors and Authority in the Global System*, Routledge, New York, 2000; D. Josselin, W. Wallace (eds.), *Non State Actors in World Politics*, Palgrave, New York, 2001; S. Strange , *The Retreat of The State. The Diffusion of Power in The World Economy*, Cambridge University Press, Cambridge, 1996; G. Sorensen, *The Transformation of the State: Beyond the Myth of Retreat*, Palgrave, New York, 2004; K. Ronit and V. Schneider (eds.), *Private Organizations in Global Politics*, Routledge, New York, 2000; M. Delmas-Marty, *La refondation des pouvoir. Les forces imaginantes du droit (III)*, Seuil, Paris,2007, 165.
[11]G. Teubner, *Substantive and Reflexive Elements in Modern Law,* in *Law and Society Review*, 1983, 17, 2, 240 ss.
[12] I. Maus, *Sinn und Bedeutung der Volkssouveranität in der modernen Gesellschaft*, Kritische Justiz, 24/1991, 148.
[13]J. A. VanDuzer, *To Whom Corporations Should Be Responsible? Ideas For Improving Corporate Governance*, in G. Paquet, D.M. Hayne (eds.),

Governance in the 21st Century, cit., 81.

[14] G. Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, in *Modern Law Review*, 2006, 69, 327 ss.

[15] J. Stiglitz, *Making Globalization Work*, Norton & C., New York, 2006; R. Boyer, D. Drache (eds.), *States against Markets. The limits of globalization*, Routledge, New York, 1996; H.M. Schwartz, *States versus Markets: The Emergence of a Global Economy*, St. Martin's Press, New York, 2000; M.-A. Frison-Roche, *Les nouveaux champs de la régulation*, in *Revue Française d'Administration Publique*, 109/2004, 53 ss.

[16] W. Reno, *La privatisation de la souveraineté et la survie des Etats faibles*, in B. Hibou (ed.), *La privatisation des Etats*, cit., 133.

[17] Cfr. R.B. Stewart, *Il diritto amministrativo nel XII secolo*, in *Riv. Trim Dir. Pubbl.*, 2004, 21 ss.; F. Galgano, *La globalizzazione nello specchio del diritto*, il Mulino, Bologna, 2005, 52.

[18] Developed by Anne-Marie Slaughter, *A New World Order,* Princeton University Press, Princeton, 2004; but see also R.O. Keohane, *Power and Governance in a Partially Globalized World* Routledge, New York, 2002; A. Barabási, *Linked: The New Science of Networks,* Perseus, Cambridge, 2002; J. Mathews, *Power Shift,* in *Foreign Affairs* , 76, 1997, 50 ss.

[19] G. Iudica, Globalizzazione e diritto, in *Contratto e impresa*, 2008, 867 ss.

[20] J.-B. Auby, *La globalisation, le droit et l'Etat,* Montchrestien, Paris, 2003.

[21] Cfr. *Sécurité juridique et complexité du droit* - Rapport public 2006 du Conseil d'Etat, sur www.ladocumentationfrancaise....

[22] Cf. especially S. Romano, *L'ordinamento giuridico*, Sansoni, Firenze, 1918, and M. Hauriou, *Précis de droit constitutionnel*, Sirey, Paris,1923.

[23] C. Chavagneux, *La montée en puissance des acteurs non étatiques*, in *Cahier du GEMDEV n. 29 – Développement durable: quelles dynamiques?*, in www.gemdev.org.

[24] J.-B. Auby, *La mondialisation, la loi et l'Etat de droit*, in *Les grands enjeux de l'état de droit*, E-colloque de la Fondation mémoire Albert Cohen, in www.ecolloque.fondationmemoi...; A.-J. Arnaud, *De la régulation par le droit à l'heure de la globalisation. Quelques observations critiques*, in *Droit et société*, 35, 1997, 20 ss.

[25] Cf. I. Kant, *Per la pace perpetua*, Feltrinelli, Milano, 2007, 59 ss.. See also – from a critical perspective – M. Delmas-Marty, *La refondation des pouvoirs*, cit., 99 ss.,

[26] Cfr. S. Cassese, *La crisi dello Stato*, Laterza, Roma-Bari, 2001, 185 ss.; M.R. Ferrarese, *Il diritto orizzontale. L'ordinamento giuridico globale secondo Sabino Cassese*, in *Pol. Dir.*, 2007, 639 ss.;

[27] B. Ackerman, *The New Separation of Powers*, in *Harvard Law Rev.*, 113, 3, 2000, 642 ss.

[28] J. Habermas, *Between Facts and Norms*, MIT Press, Cambridge,1996.

[29] Cf. also M.R. Ferrarese, *Il diritto al presente*,cit., 75 ss.

[30] A. Peters, T. Förster, L. Koechlin, *Towards Non-State Actors as Effective, Legitimate, and Accountable Standard-Setters*, in A. Peters, L. Köchlin, T. Förster, G. Fenner (ed.), *Non-State Actors as Standard Setters*, Cambridge University Press, Cambridge, 2009, 544.