

## **Human Rights and Democracy in the Post-Westphalian/Keynesian environment**

*G. Katrougalos, Prof. of Democritus University, Alt. Minister of Foreign Affairs of Greece*

### **I- Universalism of human rights in theory and practice**

Forget the end of history! The process of globalization, instead of imposing a general institutional uniformity, has released a series of challenges to the dominant conceptualization of human rights and democracy. Look again at the paradox: whereas both of the latter have been enshrined already in late 1970's in the great majority of modern constitutional charters<sup>1</sup> and despite the democratization process of the 1980's, the recent trend is backwards. A number of empirical surveys, such as Freedom House's "*Freedom in the World*" or the annual "*Democracy Index Report*" by the Economist indicate a relative decline of democracy worldwide<sup>2</sup>. In the latter, for instance, of the 167 countries ranked in 2018, 89 of them received lower scores than the previous year<sup>3</sup>.

The essential question, however, goes beyond the political trends of the conjecture. Is there a common understanding of democracy and human rights, especially between "us" in the West and "them" in the rest of the world? It is undeniable that in the Western world, a continuous osmotic procedure between

---

<sup>1</sup> See on that the statistical analysis of *H. van Maarseveen*, *Written Constitutions, A computerized Comparative Study*, Oceana Publications and Sijthoff and Nordhoff, N. York and Alphen aan den Rijn, 1978.

<sup>2</sup> Cf., for instance, the special issue of *Journal of Democracy*, *Is Democracy in Decline? Twenty-Fifth Anniversary Issue*, January 2015, Volume 26, Number 1.

<sup>3</sup> <https://www.economist.com/blogs/graphicdetail/2018/01/daily-chart-21>, published Jan 31st 2018, visited Sep 1 2018..

jurisdictions and legal cultures has resulted to a quasi unification of the fundamental principles of state organization<sup>4</sup>, due both to a uniform cultural and economic background and to the activism of supranational judicial organs, especially in Europe<sup>5</sup>.

In parallel, the political elites of the Third World have initially embraced at least some of these ideas, despite the obvious entanglement of the rule of law with the imperial, colonial rule<sup>6</sup>. It is an expression of the irony of history and the ambivalent character of law, to act both as a instrument for domination of the strong and a weapon at the hands of the weak, that the emulation of the constitutional institutions of the West has become a vehicle of modernization or/and national emancipation for the Others<sup>7</sup>. Already in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, pioneers such as the Egyptians Riffa Al Tahtawi, translator of Montesquieu in Arabic language, or Ali Abd al Razik have been fascinated by the potential of progress that western type secular liberalization could inspire. Later, in

---

<sup>4</sup> The British concept of “Rule of law” had been the basic juridical feature of the liberal state. According to A.V. Dicey (An introduction to the study of the law of the Constitution, Macmillan, London, 1915, pp. 183 ff.), it prohibits the arbitrary power of the government and consolidates the right of every man to be subject to ordinary law, administered by ordinary tribunals. The principle was supposed to be introduced in the Continent by the French Revolution, which was saluted by the words of Michelet, as “l’avènement de la loi” (*J. Michelet, Histoire de la Revolution Française, Paris, 1847, I, xxiii.*) In Prussia, under the influence of the Kantian legal philosophy, scholars like Wilhelm von Humboldt, Robert von Mohl and Rudolf von Gneist have developed the parallel concept of the *Rechtsstaat*, as an aggregate of formal legal guarantees that ensure the absence of arbitrariness of the state, the respect of human rights (especially of property, liberty and formal equality) and the certainty of law (*Rechtssicherheit*).

<sup>5</sup> See, among others, the classical remarks of P. Häberle, *Gemeineuropäisches Verfassungsrecht*, EuGRZ 1991.261, cf. A.J. Arnaud, *Pour une Pensée Juridique Européenne*, PUF, Paris, 1991.

<sup>6</sup> See D. Lino, *The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context*, *Modern Law Review*, 2018, Volume 81, Issue5, 739-764.

<sup>7</sup> See, for instance, G. Conac, *État de droit et démocratie, L’Afrique en transition vers le pluralisme politique*, Economica, Paris, 1993.483.

the fight against colonialism, all liberation movements have included in their programs the introduction of a new constitution protecting human rights. Illustrative is the fact that the national party of Tunisia was named “Destour”, that is “party of the Constitution”.<sup>8</sup>

Subsequently, in the post-colonial world emerged a universal -at least nominal- acceptance of the basic premises of democracy and human rights<sup>9</sup>, which has only been contested by the rival paradigm of the Soviet Union and the other likeminded countries. Even the latter did not dispute democracy or human rights as such, but emphasized the opposition of “real” (=social and economic) and “formal” (civil and political) freedoms. Due to this ideological clash between the two camps, the right to property is practically omitted by the two U.N. Covenants, because of the disagreement on how extended should be its protection.

After the collapse of the socialist camp, democracy and human rights protection have –in theory- evolved into both supranational principles of universal rank and cultural pro-constitutional standards<sup>10</sup>. In the framework of the UN Conference of Vienna (1993), all the members of the UN have practically reaffirmed their support to the Universal Declaration of Human Rights, which in 1948 has been voted only by the Western world<sup>11</sup>. According to the Vienna

---

<sup>8</sup> Cf. *L. Hamon*, *L’affirmation, l’évolution et la signification du fait constitutionnel*, in *La suprématie de la Constitution*, Casablanca, Les éditions Toubkal, 1987, p. 86.

<sup>9</sup> See, for instance, *Ph. Ardent*, *Institutions politiques et droit constitutionnel*, LGDJ, Paris, 1997, no 22, *J. Chevallier*, *L’Etat de droit*, Montchrestien, Clefs, Paris, 1999, p. 54, *the same*, *La mondialisation de l’Etat de droit*, Mélanges Ph. Ardent, LGDJ, Paris, 1999.325, *G. Kassimatis*, *Commentary of the Constitution*, A. Sakkoulas, Athens, 1999, Article 1, nr. 168 (in Greek).

<sup>10</sup> Cf., however, the para 7 or the article 2 of the UN Charter:

“7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

<sup>11</sup> Actually, not only the former communist states but also countries like Saudi Arabia have

Declaration “all human rights are universal, indivisible, interdependent and interrelated”<sup>12</sup>. Of course, the objective constitutional reality in many countries was and is still in sharp contradiction with these premises. Still, the institutional progress of countries like India or South Africa have showed that the respect of the essence of democracy and fundamental rights is not a privilege of rich, western democracies<sup>13</sup>.

In any case, the acceptance of the universality of human rights did not entail a unified understanding of their implementation, especially regarding their interaction with economic development. After the end of the cold war the axis of confrontation morphed from East-West to North-South<sup>14</sup>. Especially in the rising continent, Asia, strong leaders have consistently claimed that national economic development is a prerequisite for realizing the civil and political rights and, in consequence, the latter should be adapted to the economic reality and not vice-versa<sup>15</sup>.

In tandem, political elites in the Third World put the emphasis on cultural diversity and the existence of peripheral values, not necessarily aligned to the “western” liberties and rights. In this framework, several peripheral declarations of

---

not voted for the Universal Declaration in 1948, but have abstained.

<sup>12</sup> Ibidem, sec. 5. See also the sections 32 (“The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues”).

<sup>13</sup> Cf. *B.O. Nwabueze*, *Constitutionalism in the Emergent States, 1973*, *H. J. Spiro* (ed.), *Patterns of African Development: Five Comparisons*, 1967.

<sup>14</sup> See, eg., *R. Kothary*, *Rights as a North South Issue*, in *In Claude R. P. and Weston B. H.* (eds.), *Human Rights in the World Community*, University of Pennsylvania Press, Philadelphia, 1989, p. 134.

<sup>15</sup> See, for instance, the speeches of Nigeria’s, Pakistan’s and Mexico’s delegates in the U.N. Assembly in 1992, all emphasizing the priority of social rights vis-à-vis the civil rights, in order to create stability and encourage democracy. They all stated that the right to development strengthened individual freedoms and not the other way around. (Quoted in *Human Rights and Development*, Published by the United Nations Department of Public Information, DPI/1275-92868-November 1992.) Cf. *R. Kothary*, *Rights as a North South Issue*, op.cit. (note 14).

rights have seen the light. The most important have been the Universal Islamic Declaration of Human Rights of 1981, the African Charter on Human and Peoples' Rights of the same year, and the 1997 ASEAN proposal to review the Universal Declaration of Rights.

However, it would be a mistake to consider the reassertion by non-Westerners of their own cultures as vindication of a Huntingtonian concept of clash of civilizations<sup>16</sup>. On the contrary, the globalisation, in the interest of unimpeded international trade, needs a global political legal order and, therefore, acts as a great unifier. But not at all levels. The interaction between cultures, through migration and commerce, produces new contradictions and confrontations. There is a dialectic process, in which the expansion of the dominant market paradigm and the subsequent erosion of traditional values trigger opposite forces of reassertion of identities and national projects, sometimes invested in cultural particularism. This is the ideological translation of the conflict between the dominance of the neoliberal global order and the contestation of the hegemony of a unipolar Pax Americana.

As Asia emerges as a rising global economic power, “Asian values” are presented as alternative to the Western ones, portrayed as individualistic, culturally and ideologically biased<sup>17</sup>. The eternal Prime Minister of Malaysia, Mahathir bin Mohamad, who, in 2018, 93 years old, has made an impressive comeback in power, is the champion of this school of thought. He considers the prevailing definition of human rights “*as formulated by Western nations after World War II*

---

<sup>16</sup> S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Touchstone Books, 1997, the same, *The Third Wave : Democratization in the Late Twentieth Century*, Julian J. Rothbaum Distinguished Lecture Series, Vol 4, 1993, cf. M. Kelley, *The Impulse of Power: Formative Ideals of Western Civilization*, Contra Mundum Books, 1999.

<sup>17</sup> Cf. J.R. Bauer & D. A. Bell (eds) *The East Asian Challenge for Human Rights*, Cambridge Univ. Press, 1999.

*when much of the world was their colonies”*<sup>18</sup>. He alleges that “*developed countries can do with weak governments or no government, but developing countries cannot function without strong authority*”, whereas “*liberal forms prescribed by the West would retard their development and continue the economic dependence*”. In the same vein, other politicians, like Lee Kuan Yew, Prime Minister of Singapore, argue in favour of some kind of “true democracy” contrasting with the standard democratic forms of multi-party systems, liberal guarantees etc.

So, according to these assumptions, not only human rights and democracy could hinder economic performance, but, moreover, they reflect western concepts, antagonist to less individualistic “Asian values, which, eventually, perpetuate cultural and political domination and subjugation of non-western cultures”<sup>19</sup>. These “Asian values” are closely related to the Confucian tradition of order, work discipline, ethic, responsibility and collectivism. President Wee of Singapore describes them as follows: “*placing society above self, up-holding the family as the basic building block of society, resolving major issues through consensus instead of contention, and stressing racial and religious tolerance and harmony*”<sup>20</sup>.

---

<sup>18</sup> See, for instance, his speech at a conference of the Just World Trust in Kuala Lumpur, 6/12/1994, quoted by T. C. Tan, Rethinking Human Rights, University of Technology, Malaysia, Kuala Lumpur, article posted in the Internet list PSRT-L on 8/12/1994

<sup>19</sup> Cf. the Bangkok Declaration of April 1993, where the Asian governments stressed “the significance of national and regional particularities and various historical, cultural and religious backgrounds.” These famous “Asian values” which bring up the connection of duties to rights and the stress of collectivism versus individualism are also reflected on the wording of the Constitutions. For instance, in the Taiwan’s Constitution of 1946 the articles on human rights protection begin with the phrase “The people shall have freedom of...” without reference to the person or the individual.

<sup>20</sup> Quoted by *Huntigton*, op.cit. , p. 319, also 108-109.

However, empirical researches, already in the 90s<sup>21</sup>, have shown that there is a positive correlation of respect for fundamental rights with economic development. According to a comparative study, covering 147 states during the period 1980-1988<sup>22</sup>, the basic precondition for democracy is not primordially the high level of wealth per se, but the relatively equal distribution of resources among the different sections of the population, related to the respect of fundamental civil, political and social rights<sup>23</sup>.

Another survey<sup>24</sup> suggests that the respect for democratic elections, political and individual rights is not a sufficient condition for consolidating a democratic regime, if it is not accompanied by an effort to promote the social ones. In the inverse case, during a first period there is, indeed, an expansion of political rights. However, in a second phase, as the social rights lag behind, enthusiasm about the political participation begins to stabilise and then to drop. Finally, as discontent among the population arises, the regimes tend to take depressive measures that trigger a chain reaction of coercive policies, seriously jeopardising the democratic reforms and the political rights.

In a parallel, but not similar, vein with the “Asian values” narrative, China is seeking a “socialism with Chinese characteristics”, distancing itself of the

---

<sup>21</sup> See *P. Das Gupta*, *Well-Being and the Extent of its realization in poor countries*, Clarendon Press, Oxford, 1993, UNDP, *Human Development Report 1992*, Oxford University Press, N. York, 1992, p. 32 and *A. Bhalla and Fr. Lapeyre*, *Social Exclusion Revisited, Towards an analytical and operational framework*, Paper for the International Symposium “From Social Exclusion to Social Cohesion”, Roskilde University, Denmark, 2-4 March 1995, International Institute for Labor Studies, Geneva, February 1995, tables 3 and 4.

<sup>22</sup> *T. Vanhanen*, *The process of Democratization: A Comparative Study of 147 States, 1980-1988*, Crane Russak, N. York, 1990, see, esp., pp. 48 ff, 167, 195.

<sup>23</sup> Cf. *M. Poppovic, P. S. Pinheiro*, *How to consolidate democracy? A Human Rights Approach*, *International Social Science Journal*, 1995.75, p. 78.

<sup>24</sup> *Z.F. Arat*, *Democracy and Human Rights in developing countries*, Lynne Rienner Publishers, London, 1991, pp. 4 ff.

“western” perception of values, portrayed as bearer of capitalist ideology. In the words of President Xi: *“Hostile forces at home and abroad constantly try to undermine our Party, attempting to make us abandon our belief in Marxism, communism and socialism. A number of people, even including some Party members, cannot see the underlying dangers of accepting the “universal values” that have developed in the West over hundreds of years, along with certain Western political dogma. (...) Some even regard Western theories and discourse as the gold standard and thus unconsciously become trumpeters of Western capitalist ideology<sup>25</sup>.”*

The real issue is broader than the traditional confrontation about universalism or relativism of human rights. The pertinent question is not whether all human rights should be understood in the same sense everywhere, as rooted in some transcendent value. It is neither whether there are global, cross-cultural “universals”, although contemporary cultural anthropology has found many essential similarities among different cultures regarding societal ideals and corresponding behaviors<sup>26</sup>.

It is not culture but power the actual determining factor for both the conceptualization and the implementation of human rights. The latter define the balance of forces between dominant and oppressed social actors, who struggle and

---

<sup>25</sup> Speech of President Xi at the National Conference on Party Schools, December 11, 2015, in *Xi Jinping*, The Governance of China, Foreign Language Press, Beijing, 2017, Volume II, p. 355-356. See also his speech on The Socialist Rule of Law, *ibidem*, p. 119 ff. Cf. *Xu Zhangrun*, “Western law in China: transplantation or transformation: four cases and Liang Shuming’s responses.” *Social Sciences in China*. 3 (Fall 2004): 134-15.1

<sup>26</sup> See *A. D. Renteln*, *International Human Rights: Universalism versus relativism*, Sage, London, 1990, p. 61 ff, cf. *D. J. Puchala*, *The Ethics of Globalism*, The 1995 John W. Holmes Memorial Lecture, ACUNS, Brown University, Reports and Papers, 1995, No. 3, L. Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development.* in *T. Mischel*, ed. *Cognitive Development and Epistemology*. Academic Press, New York, 1971.

interact using legal norms as tools and weapons for promoting their conflicting interests. Both the process and the outcome of this struggle is emancipatory, to the extent that it reconfirms and reshapes democracy as rule of and by the majority, combined with the protection of autonomy provided by human rights.

Thus, ideally, a government of the people, by the people and for the people should combine a democratic and a liberal component, the first essentially defined by the majoritarian rule and the latter by rule of law and human rights, especially in their function to protect vulnerable minorities. This is how we should understand the Vienna Declaration and Program of Action<sup>27</sup> (1993), which proclaims that “*all human rights derive from the dignity and worth inherent in the human person*”<sup>28</sup>. (...) *Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing*”<sup>29</sup>.

Globalization exerts a pressure both on Democracy and respect for human rights. It brings, through liberalisation and deregulation, a weakening of the state both in vertical -i.e. transfer of sovereign functions to supranational entities, like the EU or the WTO- and horizontal directions -devolution, privatization-.

## **II- Human Rights and Democracy in the context of globalization**

---

<sup>27</sup> As adopted by the U.N. World Conference on Human Rights on 25 June 1993.

<sup>28</sup> Vienna Declaration, *ibidem*, Preamble.

<sup>29</sup> *Ibidem*, section 8. Cf. also the Draft declaration and draft program of action of the U.N. World Conference of Copenhagen (A/CONF.166/1 of 2 February 1995): “ 4. We are convinced that democracy and transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realization of social and people centered sustainable development.” Cf., among others, *J. Donnelly, Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989

Globalization does not entail only the disembedding of capital from domestic markets but also a parallel, political process of denationalization and extraterritoriality of traditional state functions. There is an evolving "disaggregation" of the state<sup>30</sup> through the transfer of public functions both "upwards" to international or transnational entities 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 levels of government<sup>31</sup>.

In this new, globalizing environment, polycentric relationships between the public/private and national/international/transnational spheres<sup>32</sup> signify a shift away from both the centrality of the state and the historical compromise of regulated markets within the welfare state. The arising "Post-Keynesian-Westphalian" frame<sup>33</sup> undermines the regulatory capacity of nation states and this loss is not compensated by the development of functionally equivalent international regulation. Exactly the opposite: Instead of an emergence of a Kantian cosmopolitan community we see rather the imposition of a deregulating 'fast track' towards an even less fair global economic order.

---

<sup>30</sup> See A-M. Slaughter, "The Real New World Order" *Foreign Affairs* 76 (1997), 183 ff.

<sup>31</sup> See G. Katrougalos, *Democracy, Privatization, and the Rise of Non-state Regulatory Power*, in *Indian Yearbook of Comparative Law* 2016, Oxford University Press, 2017, cf. J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-regulatory" World," *Current Legal Problems* (2001) 54, 103-145.

<sup>32</sup> See, among others, the interventions at the Symposium, "Public Values in an Era of Privatization," *Harv. L. Review*, 116 (2003), 1212, 1218, cf. A. Aman, Jr., "The Globalizing State: A future-oriented perspective on the Public/Private Distinction," *Federalism and Democracy*, 31, 1998, *Vand. J. Transatlant'l L.* 769.

<sup>33</sup> N. Fraser, *Reframing Justice in a Globalizing World*, 36 *New Left Review*, 69m 2005, M. Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in Sujit Choudhry (ed.) *The Migration of Constitutional Law*, Cambridge Univ. Press 2006, pp.256 – 293, N.Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, *I•CON*, Volume 6, Number 3 & 4, 2008, pp. 373–396.

The neo-liberal understanding of deregulation as a necessary precondition to efficiency and economic growth has become the prevailing ideology of global governance, through not only the direct interventions of the World Bank and the International Monetary Fund, but also by the free-trade treaties of WTO<sup>34</sup>. This supranational economic constitution is based on a coherent set of constituent principles such as monetary stability, open markets, freedom of contract, liability and “policy coherence”<sup>35</sup>. This “*policy coherence*” is far away from the Keynesian compromise that most of the modern constitutions outside the Anglo-Saxon world endorse.

I had the odious privilege, as minister of Labor, to conduct the negotiations of the Greek Government with the IMF in the framework of the adjustment program of the so-called “Third Memorandum”. I have been impressed by the impermeability of the IMF to any argument related to human rights, recognized by international instruments, such as the European Social Charter or the ILO treaties. For instance, in a series of collective complaints<sup>36</sup> the European Committee of Social Rights found a number of the obligations imposed to Greece by its international creditors contrary to the European Social Charter. According to the Committee, the cumulative effect of the austerity measures brought about a significant degradation of the standard of living, in violation of the rights protected

---

<sup>34</sup>Cf. *D. Nicol*, *The Constitutional Protection of Capitalism*, Hart Publishing, Oxford and Portland, Oregon, 2010.

<sup>35</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>36</sup> *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011, decision on the merits of 23 May 2012, § 18, cf. also Complaints 78-80/2012.

by the Charter<sup>37</sup>. The IMF, with the tacit compliance of the European institutions, totally neglected these decisions, considering that economic priorities, understood under the light of its neoliberal postulates, prevail over obligations of international law.

More generally, the aforementioned transnationalisation process has significantly restricted domestic policy choice of national democracies, even those outside the onerous “safety programs” of the IMF. The neoliberal “rule-oriented” landscape<sup>38</sup> does not merely affect internal economic policies but results to the supersession of the keynesian public values by the global setup of the Washington consensus. It is notable that the economic forces, which promote deregulation at national level, may be hostile or indifferent to human rights instruments but they

---

<sup>37</sup> The argumentation of the Committee was the following: “*Even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organizations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue. (...) In general, the Committee thus concludes that the Government has not established, as is required by Article 12§3, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperization of a significant segment of the population, as has been observed by various international organizations Paragraphs 75-76, cf. also paragraphs 36 and 47 of the Collective Complaint 80/2012 Pensioners’ Union of the Agricultural Bank of Greece (ATE) v. Greece. The Committee held, consequently, that due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place, contained in the laws Nos. 3845 of 6 May 2010, Act No. 3847 of 11 May 2010, Act No. 3863 of 15 July 2010, Act No. 3865 of 21 July 2010, Act No.3896 of 1 July 2011, Act No. 4024 of 27 October 2011, Act No. 3833 of 15 March 2010, Act No. 3866 of 26 May 2010, Act No. 3986 of 1 July 2011, Act No. 4002 of 22 August 2011, Act No. 4051 of 28 February 2012 and Act No. 4093/2012 of 12 November 2012, this statutory legislation constitutes a violation of Article 12§3 of the 1961 Charter*”. Cf. G. Katrougalos, Social security in the “case law” of the Social Rights Committee, in Frans Pennings, (Ed.), Research Handbook on European Social Security Law, Elgar Publisher, 2015, 84-102.

<sup>38</sup>J. Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law Cambridge University Press, Cambridge, 2006, 205-6

are not against international legal norms friendly to the new, liberal order. And this is not only because they don't want to operate in a legal vacuum, but, above all, it is because they seek to superimpose international legal norms for unimpeded markets to those of the old Westphalian-Keynesian paradigm.

In this sense, there is a latent revision of the fundamental principles regulating the relations between the State, the market and the citizen, without direct public consent and under minimal political control. For instance, the empirical research shows that in almost all jurisdictions the ex post legislative scrutiny of negotiated rules of WTO's Uruguay Round Agreements was largely perfunctory<sup>39</sup>. In front of the unified logic of unleashed markets, the national *demos* do not have any substantial influence.

Hence, not only internationally protected rights are neglected but also domestic law, including constitutional norms, is facing itself a sideline through the mutation of modern capitalism from a normatively "embedded" to an "unleashed" version. A new legal landscape is emerging, characterized by a redefinition of what is public and what is private, what should be determined by democratic procedures and what by the markets<sup>40</sup>. In other words, globalization has changed the nature of the relationship of market to the state and the individual at all levels of political and societal life. The process of conciliation of democracy and capitalism, which

---

<sup>39</sup> *J. Jackson / A. Sykes* (eds.), *Implementing the Uruguay Round*, Oxford, 1997, cf. *R. 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>40</sup> See *G. Katrougalos*, *Constitutional Limitations of Privatization in USA and Europe: A Theoretical and Comparative Perspective*, *Constellations* Volume 17, Number 3, 2010, 407-425. cf. *A. C. Aman, Jr.*, *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, 31 *Vand. J. Transnat'l L.* 1998, p. 769, the same, *Globalization, Democracy and the Need for a New Administrative Law*", 10 *Indiana Journal of Global Legal Studies* 125, 2003.

became possible in last century's welfare state by the democratic, political control of national markets, is completely absent at the level of international transactions.

The inexistence of a democratic regulation of the international markets does not only entail full inability of political power to rein the private global players. It signifies also a progressive upset of the domestic balance between market and state, capital and labour and is producing a huge internal democracy deficit. In Rodrik's words, globalization "*gets in the way of national democracy*"<sup>41</sup>, as the national "economic constitutions" are gradually trumped by a supranational one. Hence, the transnational economic governance is not only producing new rules, but also implicitly "amends" domestic rules through reconceptualization and reinterpretation.

Many authors consider a transnational democratization of governance impossible<sup>42</sup>. The justification of this view is not so much normative as pragmatic, claiming the impossibility of transportation at supranational level of the constitutional principle of democracy, which is historically associated with nation-

---

<sup>41</sup> D. Rodrik, *The Globalization Paradox*, Norton, N. York, 2011, p. 190.

<sup>42</sup> See, for instance, C. Harlow, *Accountability as a Value in Global Governance and for Global Administrative Law* in Gordon Anthony, J-B. Auby, J. Morison and T. Zwart (eds), *Values in Global Administrative Law*, Hart Publishing, 2011, pp. 167-185, G. de Búrca, 'Developing Democracy Beyond the State', *Columbia J Transnat'l L* (2008) 101. R.O. Keohane, 'Global Governance and Democratic Accountability', in D. Held & M. Koenig- Archibugi (eds), *Taming Globalization: Frontiers of Governance, Polity*, Oxford 2003 T. Macdonald & K. Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry', *17 European Journal of International Law* 2006, p. 89; A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', *15 European Journal of International Law* (2004) 885A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions*, 2010, R. B. Stewart, 'U.S. Administrative Law: a Model for Global Administrative Law?' *68 Law and Contemporary Problems* 2005, 63, R. Wolfrum and V. Roeben (eds), *Legitimacy in International Law* (2008), at 899, D. Dyzenhaus, *Accountability and the concept of Global Administration*, *Global Administrative Law Series ILLJ Working Paper 2008/7*, N. Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht*, 2009.

states, in the absence of a global state or a global demos. Realisation of narrower political ideals, especially accountability or rule of law, has often been proposed as a substitute.

Accountability is usually identified with the introduction of due process of law guarantees and institutions of good governance, such as transparency, judicial review or, in the best case, with some form of political representation through participation of global NGOs, as representatives of the “stakeholders”. Still, by any valid constitutional benchmarks, this is not democracy, but a postmodern version of the confrontation of the miller of Sans-Souci with Frederick the Great: in other words, rule of law in a non democratic environment.

However, the concept of democratic legitimacy is essentially idiosyncratic in comparison with other forms of legitimization (legal, procedural/formal, output or results oriented)<sup>43</sup>. First of all, democracy is a normative principle that defines not only the outputs and methods of an administrative process, but also its source, its ethos and its functional modes. Since the Enlightenment, the predominant source of legitimacy of any official authority has been always linked with the principle of democracy, and the abandonment of this linkage risks to undermine the liberating process of two centuries of constitutionalism. Therefore, as it is cogently remarked, democracy may not be the only source of legitimacy for public power, but other sources are likely to serve as complements, not substitutes for it<sup>44</sup>.

---

<sup>43</sup> Cf. *J. Black*, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ *Regulation & Governance* 137, 2008, p.145.

<sup>44</sup> *A. von Bogdandy*, ‘Globalization and Europe: How to Square Democracy, Globalization, and International Law’, 15 *European Journal of International Law*, 2004, p. 885, *J. Black*, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ *op.cit.*, p. 145-146

Efficiency alone, or any Pareto-optimal technocratic solutions, legitimised by output considerations alone, 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 an unsound cyclical foundation: in order to identify optimal results, one should first define their finality, in other words the public goods related to them and their teleology. How this can possibly be founded on non-political, technocratic fundamentals?

Rule of law is not an equivalent, either. The judicial accountability mechanisms may, instead, lead to a ‘juridification’ of governance, narrowing further the space for democratic decision making<sup>45</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 decisions 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>46</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>47</sup>, not democracy.

Hence, the asymmetry between transnational capacities for political action and social participation results to a disjunction between global socioeconomic and political processes, on the one hand, and national processes of democratic

---

<sup>45</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>46</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>47</sup> R. B. Stewart, ‘U.S. Administrative Law: a Model for Global Administrative Law?’, ibidem.

participation, on the other<sup>48</sup>. In this sense, the basic political problem is not the absence of global democracy, as this has been always the state of the art in international law and transnational governance. It is the absence of effective regulation and oversight, over economic power at all levels, national, international and transnational.

Facing the impossibility to normatively reconcile the conflicting demands of democratic accountability and economic efficiency, it is often advised that one should look for pragmatic solutions<sup>49</sup>. So, Cassese suggests that the lack of democratic accountability before a representative body “*actually increases the pressure on global administrative law towards greater openness, participation and transparency*”, features which “*may make up for the democratic deficit caused by the absence of a constitutional foundation to global administrative law*”<sup>50</sup>.

Actually, participation of the stakeholders in the decision process could be a weak equivalent for democracy, but only if all the stakeholders could be fairly represented. Of course, lacking a quasi-federal structure of the global order, the participation by all those affected by a particular issue is still utopian, if not overall impossible<sup>51</sup>. Keohane and Nye have very rightfully described the networks of the

---

<sup>48</sup> Cf. J. Habermas, The Crisis of the European Union in the Light of a Constitutionalization of International Law EJIL, 23, 2012, No. 2.

<sup>49</sup>N. Krisch, ‘The Pluralism of Global Administrative Law’, 17 The European Journal of International Law 2006, p. 247, 248.

<sup>50</sup>S. Cassese, ‘Administrative Law Without the State? The Challenge of Global Regulation’ 37 New York University Journal of International Law and Politics 2005 663, pp. 687-8, 669. 31

<sup>51</sup> D. Held, Democracy and the Global Order, Cambridge: Polity Press, 1995, especially ch. 10, cf. M. G. Schmidt, Demokratietheorien, Eine Einführung, Wiesbaden, 2008, I.M. Young, Inclusion and Democracy, Oxford, Oxford University Press, 2000.

few stakeholders powerful enough to be represented in international fora as emblematic of the “club model” of international institutions<sup>52</sup>.

Other authors 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<sup>53</sup>. According to this argumentation, one should “*eschew constitutionalism’s emphasis on law and hierarchy*” for “*more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders*”<sup>54</sup>.

However, if we don’t have a guiding normative principle for resolving extreme tensions between international, transnational and legal orders, then the issue will be simply settled according to the prevailing balance of power. The international legal order is far from being egalitarian. It reflects the existing global power relations<sup>55</sup> and it is often irresponsive to the concerns of the poor, the developing countries and its peoples<sup>56</sup>. If we ignore this fact, voluntarily or involuntarily, we risk to perpetuate this inequality and to legitimise its outcomes.

---

<sup>52</sup> 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.

<sup>53</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, Oxford, 2010, the same, *The Pluralism of Global Administrative Law*, *ibidem*.

<sup>54</sup> N. Krisch, *Beyond Constitutionalism*, *op. cit.*, p. 14–17

<sup>55</sup> Cf. on that again N. Krisch, ‘More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law’, in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law*, 2003, p. 135.

<sup>56</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*

It should be clear that if we leave the issue of the relationship between domestic and transnational rules open, without any previous normative delimitation, to the “dialogue” between international and domestic courts or other international fora, inevitably we will have the complete supersession of national constitutions by the emerging transnational neoliberal legal order. Hence, instead of ensuring that international markets will be embedded in a system of international regulation similar to the democratic economic governance of nation states, we will have full deregulation of the latter.

Therefore, I strongly argue that parallel to any measures aimed to remedy the existing democratic deficit of global governance, it is even more important to introduce political and juridical means for containment of the most extreme intrusion of transnational rules to the national legal orders, when there is not an explicit previous popular consent.

It is true that we cannot, yet, have a global constitutionalism, based on a universal Grundnorm, or even a generally accepted rule of recognition. This does not mean that we should abstain from promoting global accountability mechanisms. As the emergence of a global demos is not possible in the foreseeable future, one should try to identify functional equivalents of democratic control and oversight at two levels (by retaining, however, awareness of their limited scope regarding to the fulfillment of the democratic principle): a) how to reinforce the democracy in transnational governance, b) how to mitigate the impact of the globalization to democratically instituted forms of national regulation.

Short of the impossibility to have genuinely democratic governance at global level, it is still possible to increase openness and transparency<sup>57</sup>. Concrete measures towards this direction could be a) the democratic reorganisation of major international organizations, especially these of economic governance<sup>58</sup>, b) the legal reinforcement of political control over non state entities, such as multinational corporations, c) Inclusion of concrete constitutional provisions concerning delegation of competencies to transnational or global private bodies, ensuring some form of democratic accountability.

A first step towards a democratization of transnational governance should be the improvement of the representation of less powerful countries in international organizations<sup>59</sup>. Shifts in quota shares to developing and to under-represented countries have been for longtime under discussion in the IMF, but the reform is far from remedying the existing inequalities<sup>60</sup>. Of even greater importance would be the reintroduction of some form of minority blocking mechanism to a panel or

---

<sup>57</sup>As Weiler suggests, at the supranational level “*democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed*” 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.

<sup>58</sup>Cf. the resolution passed in the 55th Session of the UN Third Committee for the promotion of a democratic international order A/RES/55/107, cf. A/RES/56/151.

<sup>59</sup> See, for instance, J. S. Nye Jr. “Globalization’s democratic deficit: How to make international institutions more accountable” *Foreign Affairs* July/August 3, 2001, R.O. Keohane, ‘Global Governance and Democratic Accountability’, in D. Held & M. Koenig- Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Oxford: Polity, 2003) 130, 145, M. de Bellis, *Global standards for domestic financial regulations. Concourse, competition and mutual reinforcement between different types of global administration*, 6 *Globaljurist Adv.* (2006), available at <http://www.bepress.com/gj/advances/vol6/iss3/art6/>

<sup>60</sup> Cf. G. Napolitano, *The Two Ways Of Global Governance After The Financial Crisis Multilateralism vs. Cooperation* Jean Monnet Working Paper 16/10

Appellate Body decision in WTO, preventing that decision from becoming binding WTO law.

It should be clear that globalization cannot be fenced out, but it is neither a natural phenomenon, impervious to political decisions. It can be shaped by national policies, defined by democratic means. For instance, it has been suggested that the outcome of the WTO's Doha Round of negotiations should be the object of a referendum at national level<sup>61</sup>. In the EU every modification of the Treaties should be subject to a similar popular ratification, even in countries that do not have similar explicit constitutional obligation. Besides the reconfirmation of the democratic character of constitutional settlements, similar procedures could contribute to the gradual formation of a global (or regional) democratically regulated public space, since the related political issues would be discussed horizontally in all involved countries. The establishment of a similar common public space, overlapping the national ones is a functional prerequisite for the emergence of any possible democracy.

Any realistic reaction to the post-Westphalian-Keynesian environment should not regard the new globalized conditions as given and immutable, but rather as a battleground between competing international and domestic political, economic and social forces<sup>62</sup>. It is important that the core of the democratic principle, i.e. preserving an ultimate link between the decision making and the will of the people, through their representative governments, can and should be

---

<sup>61</sup> R. Howse, How to Begin to Think About the "Democratic Deficit" at the WTO, *ibidem*.

<sup>62</sup> M. Rosenfeld describes this position as "ordered pluralism". See M. Rosenfeld, Rethinking constitutional ordering in an era of legal and ideological pluralism, I • CON, 2008, pp. 415 – 455, the same, Just Interpretations: Law between Ethics and Politics 200 – 201 (Univ. Calif. Press 1998, inspired by Mireille Delmas-Marty's expression, in *Le pluralism ordonné*, Hart 2006). Cf. the cosmopolitan view of J. Habermas, *The Divided West* (Polity 2006) and its critical overview, by Michel Rosenfeld, Habermas' Call for Cosmopolitan Constitutional Patriotism in an Age of Global Terror: A Pluralist Appraisal, 14Constellations 159 (2007).

respected. Of equal importance is sustaining a worldwide commitment to human rights protection, accommodating competing national values, to the extent that they do not put into question established interpretation of the related international instruments.