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Is legal globalization regulated? Memling and the business of baking camels

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In his so rejoicing novel *Water Music*, Teraghessan Boyle conveys to the reader a cooking recipe which is somewhat peculiar: the one for baked camel (stuffed).

This recipe is conceived as follows. The proportions suggested can serve 400 people. In order to follow the recipe, you need: 500 dates, 200 plover eggs, 20 two-pound carp, 4 bustards, cleaned and plucked, 2 sheep, 1 large camel, and some seasoning. Then you are instructed to proceed as follows. '*Dig trench. Reduce inferno to hot coals, three feet in depth. Separately hardcookeggs. Scale carp and stuff with shelled eggs and dates. Season bustards and stuff with stuffed carp. Stuffstuffed bustards into sheep and stuffed sheep into camel. Singe camel. Then wrap in leaves of doum palm and bury in pit. Bake two days. Serve with rice'*.

Soon after reading the book, I got the feeling that this intriguing recipe could be considered as a rather good metaphor for how the political and legal architecture of the world has been arranged in the modern world, but that it could probably not claim to be a good image of what this architecture is becoming in the post-modern world.

We are still living in the modern world, and yet we are progressively entering into another one, of which one prominent characteristic is that it is a globalized one. This is true when politics are in question; this is also true when it comes to law: the world's legal architecture is slowly changing from its modern status to a post-modern status, of which one of the main features is that it is globalized, or at least that it is embarking on a process of globalization.

Among the various questions this change implies, one is particularly disturbing. Is legal globalization regulated? And if it is so regulated to any extent, by which ways and means? This is the question I will try to succinctly address with the metaphorical assistance of Memling and camel cooking.

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This is not the time for a long description, but I think that it is necessary to explain what I mean by globalization and legal globalization. These concepts have not become so mainstream that they could be used without some justification of what one means when one calls them into play.[1]

Globalization is a set of phenomena which is transforming our world by leading it from segmentation to intermingling, from separation to transitivity, from a territory-based organization to despatialization, from a state-centred configuration to a less state-centred arrangement. Its main manifestation is economic and is related to the dramatic growth of international commerce, the development of increasingly powerful transnational economic actors, and the international liberation of various markets, primarily the financial ones.

However, even if the economic aspect is essential, and maybe lying at the very heart of the whole process, I think that reducing globalization to this aspect is an error. The dynamics of globalization are also technical, cultural, social, and political. Technology plays a great part, not least because of the Internet and thanks to the progresses it experienced with FTTP and HTML standards. Something like a cultural globalization is obviously evolving under our very noses, thanks to these various communication networks which make it possible for us to share – while still sitting in our favourite armchair – values, tastes, cooking recipes, and music emanating from all over the world. Globalization has its social dimension, of which the main aspect is probably the high degree of mobility that humanity has attained, from south to north because of economic reasons, for north to south, rather for touristic purposes.

It is, I believe, in a rather mechanical way – more than because of political will – that these various evolutions transform the organization of the world. New actors, such as multinational companies or non-governmental organizations have attained a sometimes high degree of influence on public affairs management on the surface of the globe. A significant number of economic and social activities flourish without needing any territorial attachment, or in ambits which have nothing to do with traditional statal territories. Transnationality is becoming the motto of this post-modern world into which we are entering.

In order to determine how Law is transformed in that world,[2] one must consider the kind of pressure the latter is exercising on the former, and it seems to be threefold. The more activities are transnational, and even despatialized, the more they call for rules, legal devices which would be indifferent to locations. The more various actors straddle jurisdictions, the more they will try to foster a certain level of legal harmonization, in order to reduce their transaction costs. One immediately understands that, some reduction in the states'grasp of the law naturally derives from these factors.

In fact, what is profoundly in operation is a multiple transformation of normativity in which law- making is heavily affected, but that also influences the content of norms, as well as their effects. The spectrum of law-makers is widening, since private regulators increasingly interfere, thereby producing self-regulation, or 'decentralized' regulation, while the influence of states correspondingly decreases. Law-making processes are in a process of growing dispersion, while one can perceive that the distribution of roles between national authorities and international bodies, between public organs and private actors tend to blur increasingly. It seems to me that nobody has given a better account of this evolution than Ulrich Beck.[3]

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1 See for example: U. Beck, *What is globalization?*, 2000; J.A. Scholte, *Globalization. A critical introduction*, 2000.

2 J.-B. Auby, *La globalisation, le droit et l'Etat*, 2003, p. 23; J. Basedow & Toshiyn-ki Kono (eds.), *Legal Aspects of Globalization*, 2000; S. Cassese, *La Crisi dello Stato*, 2003; C. Dauvergne (ed.), *Jurisprudence for an Interconnected Globe*, 2003; V. Gessner & A. Cem Budak (eds.), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, 1998; G. Teubner (ed.), *Global Law without a State*, 1997.

3 See Beck, *supra* note 1.

In the globalizing legal world, norms tend to evolve in their substantial characteristics: addressing realities which are less enclosed in traditional boundaries, they shape them differently, and, frequently finding them of a hybrid nature, they adapt in becoming more open-textured, more standard-like. Even more striking are the effects that globalization brings about in the effects and authority of norms. Rather than states, the addressees of international rules are increasingly individuals, and companies, in other words private actors and sometimes infrastatal public institutions. Their hierarchical position shows hesitation between situations in which they enjoy an unusual superiority – European Law provides some of the best examples thereof - and situations in which hierarchies become difficult to work out – European Law also has some examples of this.

It may be, though, that what best characterizes the process of legal globalization is its systemic functioning: I mean the kind of relationship between legal systems that it tends to accommodate. The most obvious move, in this respect, is that legal systems become more and more permeable to external influences; in the vertical sense of internationalization, as well as in the horizontal sense of transnationalization, we will come back to that later. What is also quite visible is that legal systems are more and more frequently in competition:[4] we learn that from the observation of forum shopping, be it the search for the mildest tax system, for the most generous asylum law, for the most convenient divorce law.[5] One easily understands that these trends convey a third one which is linked thereto: a trend towards harmonization, or at least towards convergence.

Among the objections to which the legal globalization theory is exposed, there are especially two which deserve some comments. According to the first one, what the theory describes would be, in fact, a typically European situation, unknown, or at least just starting to exist, in the rest of the world. I do not think this objection can be accepted since, even if the transnationality fabric is denser in Europe, even if all other changes which I have mentioned are more evident here, there is no region of the world in which all of this is absent.

The second objection concerns the character of the real novelty of what the legal globalization theory underlines. Is it not, in fact, the simple follow-up of an internationalization process which started at least a century ago and altered many of the basic features of traditional international law, making it less purely interstatal, enriching its equipment with various sophisticated devices such as direct effect or the most favoured nation clauses, giving birth to an array of international judicial entities?

One cannot deny that, in many aspects, legal globalization is indeed the continuation of what could be called the 'advanced modernity' in the international legal architecture of the world. But there also are strong symptoms that something radically new is emerging, which is not simply a new step in international law development.[6] Among them, two seem to me to be particularly important.

What is in action in the current evolution is not a step further in internationalization: one could even assert the contrary. One of the most amazing contemporary evolutions in international law is that its constructions are more frequently related to domestic issues: no longer focused

4 A. Ogus, 'Competition between National Legal Systems: a Contribution of Economic Analysis to Comparative Law', 1999 *International and Comparative Law Quarterly* 48, p. 405.

5 In some international or European regimes, this competition will be increased by legal mechanisms such as mutual recognition, which expand the competition to transnational situations: e.g. M. Audit, 'Régulation du marché intérieur et libre circulation des lois', 2006 *Journal du Droit International*, no. 4, p. 1333.

6 P. Schiff Berman, 'From International Law to Law and Globalization', 2005 *Columbia Journal of Transnational Law* 43, p. 485; P. Schiff Berman (ed.), *The Globalization of International Law*, 2005.

only on peace, economic development and international spaces, international law now increasingly tries to have its say on how to be a democracy,[7] how to engage in sound public management, how to implement internationally agreed policies properly, and so on. If one adds to that the fact that international law increasingly finds the key to its effectiveness in domestic law, and notably with the help of national judges, one then draws a picture which is not at all one of further internationalization.

What it rather shows, and this is the second argument, is that we find ourselves in a configuration the main feature of which is an unfamiliar process of vertical and horizontal interaction between legal systems.[8] The role of international regimes in the legal organization of the world is widening, but these international regimes are strongly interconnected with national systems as we have just seen: relations are top-down and bottom-up as well. Horizontal interactions between legal systems are becoming more and more crucial: perhaps, the legal 'fabric' of the world is even now predominantly made of them.

In Law, like in some other fields, the world is becoming flat, as Thomas Friedman has demonstrated in a quite vivid manner.[9] In its vertical dimension, it is becoming less Newtonian. Legal apples nowadays spring in various, and sometimes unexpected, directions.

It is against that curious set of transformations that I suggest that the following question should be considered: is it regulated? I certainly owe you an explanation as to what I mean by that. I do not think that it is necessary to engage in a long analysis of the concept of regulation, which, as anyone knows, can easily prove to be quite elusive. What I mean here by 'is it regulated?' is simply: are there, as it were, return springs in the system, are there mechanisms which recall the system to a minimum equilibrium, and if so, what are these mechanisms made of? One could object that it is, per se, a disputable kind of question because we lawyers are quite often of a systemic type, and we always know how to find a subterranean order everywhere. Therefore, I will make my question more precise. What we have to determine is not only whether there are balancing mechanisms in the system, but also: whether or not they are efficient, and, even more importantly, to what kind of equilibrium are they designed to recall the system to, especially in terms of values they serve in that extent, at the end of the day?

Now, why is such a question worth considering? Allow me to come back to camel cooking. What strikes me in the camel recipe is that every piece of the arrangement fits perfectly in the bigger one, without any kind of overlapping: in a perpendicular vision at least, stuffed camel is an order. Such is also the legal architecture of the world in modernity: it has its vertical and horizontal coherence, deriving from state centrality, structured by territorial segmentation and a clear-cut division between what is international and what is domestic.

Legal globalization, in which we are progressively finding ourselves, is another type of cooking. But more in the oriental manner, in which you are served a collection of small plates, containing various ingredients which you are supposed to mix together in an order that is difficult to determine if you are not an expert.

One does not need to look very long at globalizing law to perceive that the way it works raises huge problems of regulation in the sense we have adopted. Even international law in its classical delimitation is nowadays highly fragmented, as was underlined by the International Law Commission in its 2006 report.[10] What about globalized law, in which sources are multiplying,

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7 G.H. Fox & B.R. Roth (eds.), *Democratic governance and international law*, 2000.
8 S. Battini, 'The Globalization of Public Law', 2006 *European Review of Public Law* 18, no.1, p. 27.
9 T. Friedman, *The World is Flat: A Brief History of the Twenty-First Century*, 2005.
10 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/ CN.4/L.682.

through private law-making and self-regulation? What about globalized law, in which domestic law devices become of an increasingly decisive importance, alongside the international law ones, in making the international legal order effective?

There are all kinds of reasons for legal globalization to be a mess. Rules come from a vast spectrum of creators, and they are implemented through a constantly widening scope of ways and means: not only the traditional domestic and international adjudicating institutions, but also more and more frequently arbitrators, informal appeal bodies in international institutions, various disciplining mechanisms in private networks, and so on.

Rules are more and more of a soft law type, or in the standard manner. At a certain level, it is impossible to make a complex system hold together without having recourse to that kind of law: but, to its flexibility is naturally correlated a significant amount of uncertainty.

Moreover, problems of legal certainty are not the only ones we are driven to confront by the process of legal globalization. One must not ignore the fact that, underlying this process, there is constantly the potential issue of a democratic deficit. The more law is made, and implemented, outside traditional statal or interstatal institutions, the less citizens have supervision over it: global bodies raise the problem of accountability, well emphasized in some theoretical accounts, among which is the 'global administrative law' theory.[11]

There could be some even more worrying phenomena. One realizes that, in some situations, it is becoming difficult to discern who is doing what, on behalf of whom. EU and member states' law had to answer the following question: for whom are national administrations acting when implementing EC law? WTO bodies had to decide whether the European states were acting on behalf of the European Community when they broke WTO rules.[12] Where, as is becoming frequent, national armed forces take part in international humanitarian and peace missions, for whom are their military personnel acting, who assumes liability when they cause damage, and when they themselves suffer damage, what kinds of remedies, national or not, can they rely on in the latter case?[13] In other words, legal globalization can be suspected of making more difficult a process which can be considered as crucial in any legal arrangement, namely imputation – rules and principles through which acts, procedures and forms of behaviour are attributed to one legal entity which is in charge, and which is potentially challengeable, liable, etc.

E pure si muove, Galileo said! And still, legal globalization is regulated! Globalization is a curious reality. Even when it seems to become pure anarchy, it turns out to be capable of reacting to serious crises, and to return to a more balanced situation. Is this not what the recent events concerning the financial markets have shown?

The same is true for legal globalization. If it were pure anarchy, it would not have lasted for at least several decades – there is a debate about when it really started, but we can say several decades ago at a minimum: when international trade, and the financial markets in particular, started to open up dramatically.[14]

Not only does it last, but it also manages to deal with serious situations. Crises in law are not similar to political or economic ones. They arise where legislators, judges, citizens, or other stakeholders cannot find a solution to a legal question they are facing because of the complexity of the rules, a lack of correspondence between legal systems or subsystems, difficulties in

11 B. Kingsbury *et al.* (special eds.), 'The Emergence of Global Administrative Law', 2005 *Law and Contemporary Problems* 68, no. 3-4.

12 The answer was positive: Panel Report, 15 March 2005, *European Communities – Protection of Trademarks and Geographic Indication for Agricultural Products and Foodstuffs*, WTO Doc. WT/DS174/R.

13 The existence of such problems is shown, for example, by a recent case before the French Conseil d'Etat (*Droit Administratif*, March 2007, *Repère*).

14 J.R. Harper (ed.), *Global Law in Practice*, 1997.

imputation, the absence of enforcement devices, etc. Then a tension leading to a real crisis appears when all possible paths have been closed, because of the sheer incompatibility between segments of law, because of absolute constitutional obstacles, and so on.

It seems to me that legal globalization has shown on various occasions that it has been able to overcome very difficult issues which could have easily been the origin of a crisis, if not effectively generating one. In particular, European law, which is at the crossroads of so many legal constructions and flows, managed to deal with the worst conundrums resulting therefrom. With the help of the Strasbourg Court, the European Court of Justice found a way of avoiding a possible situation of conflict with the European Convention on Human Rights by placing it in the position of a top ranking complement to EC law as one source of its general principles. In the recent cases of *Yusuf* and *Kadi*,[15] the Tribunal of First Instance managed, with great ingenuity, to conciliate the allegiance which all international institutions owe to the United Nations, whose Charter is 'the mother of all treaties', with the European rule of law, which requires that all decisions taken by European authorities be subject to a possible minimal review, even where they are the pure implementation of decisions taken by the United Nations organs.[16]

That having been said, it is not because legal regulation seems to be somewhat regulated that it is regulatedin the same way as the legal world previously was. And it is not because it seems to be somewhat regulated that it is regulated in a satisfactory way. These are the subsidiary but crucial questions we must now consider.

Is legal globalization regulated in the same way as legal modernity? We can admit, I believe, that it is partly regulated through new processes, and partly thanks to traditional means, but transformed by the context in which they operate.

Obviously, tensions created by legal globalization often find their solution by the traditional means through which law has been regulated since the developing period of international law. If, suddenly, trade relations between two countries are affected by legal difficulties, concerning, for example, the enforcement of judicial decisions, one day or another a solution will probably be found in a diplomatic way out, leading to the most traditional instrument of international regulation, a convention. Cross-border cooperation between local governments raises many legal issues, whose solution is found by a mixture of traditional public international law and private international law tools.

However, it is very important to realize that these traditional devices tend to be transformed by the globalizing context in which they operate. If many international problems are currently solved using the traditional intergovernmental method, it is often in new configurations of administrative networks[17] or comitologies. A large part of international regulation is carried out by international – interstatal – organizations, but among them, the primary role is no longer assumed by the worldwide political ones: it belongs to the economic ones, and to the regional ones. Moreover, within international organizations in general, the greatest practical influences tend to be placed in the hands of bodies which are more of an administrative nature than traditional political organs.[18]

No one can deny that private international law plays a very important role in the regulation of legal globalization: in itself, the sole dramatic growth of transnational legal relations ensures

15 TFI, 21 September 2005, T-315/01.

16 On both problems: J.-P. Jacqué, 'Droit constitutionnel national, Droit communautaire, CEDH, Charte des Nations-Unies. L'instabilité des rapports de systèmes entre ordres juridiques', 2007 *Revue française de droit constitutionnel* 69, p. 3.

17 A.M. Slaughter, *A New World Order*, 2004 J.-C. Alli Aranguren, *Derecho administrativo y globalizacion*, 2004, p. 351.

18 *The Emergence of Global Administrative Law*, *supra* note 11; S. Cassese, 'Le droit administratif global: une introduction', 2007 *Droit administratif*, May, p. 15.

that this is so. But it seems to be progressively transformed by its constant upgrading. Not only is this traditionally national business becoming more and more internationalized, and, notably, more and more Europeanized, but, according to some of its best experts, its very function is in a process of transformation: while it was purely devoted to dealing with private law issues, it is becoming a context in which national public regulations are put in competition with one another. I borrowed this analysis from Horatia Muir Watt.[19]

Legal globalization is regulated by traditional means; it is also regulated by new mechanisms, or at least mechanisms which have contributed very little to the regulation of legal modernity. A prominent role is nowadays undertaken by domestic institutions and, in particular, by national judges. Just a glance at national case law shows how frequent it is that national judges refer to international or European norms, and, in this way, have a share in international regulation. Besides, by their increasingly intense international dialogue, they contribute to nourishing what Sabino Cassese has called the 'conjunctive tissue' of legal globalization.[20]

We have already diverted our eyes towards private regulation, and noticed its current importance. It is commonplace to mention that the Internet is mainly regulated in as self-regulatory way, its discipline being mainly ensured by the operators themselves, through purely internal processes. Private regulation is sometimes carried out by networks, in which national private regulators are gathered: such as, for example, the International Standardization Organization (ISO), or the International Organization of the Securities Commission (Iosco).[21]

Let me now turn to Memling. In the Bruges Memling Museum, there is a famous painting which depicts a maiden. Apart from the fact that it is very beautiful, this painting has something special: the maiden lays part of her hand on the painting's frame. I allow myself to suggest that she is not too bad a metaphor for what I am talking about. She is both inside and outside: in a sense, she is a 'multilevel' maiden, if I may say so without offending Memling's admirers, of whom I am one. She is also public and private at the same time, since she is in her world, and also in ours.

Then, I am conscious of the fact that characterizing the new regulations as a mixture of traditional processes and new ones, of international and domestic ones, of public and private ones may be felt to be a little disappointing. What are the fundamental logics of theses regulations, one can ask? I must confess that I find it difficult to go much further than metaphorical apprehensions of this point.

The most accurate theoretical approach I seem to have become aware of comes from the nice neighbouring country where Memling lived and worked. In their *De la pyramide au réseau*,[22] François Ost and Michel van de Kerchove demonstrate that it is not possible to understand the organization of law in post-modernity if one does not get rid of the Kelsenian vision of legal systems arranged in a pyramidal way. Post-modern law is no longer pyramidal, they assert: it is based upon networks.

I adhere to this vision (which I would simply complement with a piece of legal pluralism, in the Santi Romano manner[23]). It seems to me that nothing can give a better account of our legal globalizing world, in which hierarchies give way to circularities, in which top-down legal effects

19 H. Muir Watt, 'Globalisation des marchés et économie politique du droit international privé', 2003 *Archives de philosophie du droit* 47, p. 243.

20 S. Cassese, *La fonction constitutionnelle des juges non nationaux. De l'espace juridique global à l'ordre juridique global*, lecture given in the French Cour de Cassation, 11 June 2007.

21 E.g. D. Kingsford Smith, 'Networks, Norms and the Nation State: thoughts on Pluralism and Globalised Securities Regulation', in: C. Dauvergne (ed.), *Jurisprudence for an Interconnected Globe*, 2003, p. 93.

22 F. Ost & M. van de Kerchove, *De la pyramide au réseau*, 2002.

23 S. Romano, *L'ordre juridique*, 2002.

combine with bottom-up ones, in which vertical legal relations, intermediated by the state, leave room for more horizontal ones.

I will not try to deal with this extremely difficult theoretical issue today. But there is one last question on which I want to briefly comment upon. That question is the following: if legal globalization is effectively regulated in the way I have described, can we consider that it is regulated in a satisfactory manner?

It is probably wise to answer this in the negative. I now come back to the way in which I proposed to consider the problem. We could acknowledge that legal globalization's regulations are satisfactory if, firstly, they are efficient; secondly, the kind of equilibrium for which they are designed to recall the system to is what we can expect, especially in terms of protected values.

Are they efficient? I suggested earlier that they are capable of dealing with quite complex issues to find solutions for very tense situations. I still believe that, but this is not sufficient. There seem to be, all the same, numerous contexts in which the complexity of legal globalization makes it very difficult to find a way through. When France wanted to ban from its territory Nazi sites accommodated by Yahoo, the solution was very difficult to reach, and proved to be fragile enough since some American tribunals declined to enforce the related French judgments.[24]

One of the strongest challenges that the regulation of legal globalization faces here is certainly the rise of private actors. How can we attract them into the basic framework of regulation, which remains all the same – and must surely remain – public? It is sometimes quite difficult: authors have referred to this problem as the 'empirical challenge of private political powers'.[25]

Is the equilibrium to which legal globalization is, more or less efficiently, recalled by its regulations itself satisfactory, especially in terms of protected values? Not totally, that is certain. I have mentioned the democratic deficit from which many global bodies suffer. When considering the more purely legal principles of the rule of law, many clouds can also be observed in the sky: how many decisions taken within the large spectrum of global bodies cannot be subject to any kind of review while they may have quite harmful consequences for various interests?

Furthermore, one must not ignore the strong difficulties which derive from the fact that values recognised at the different levels of legal globalization – global, regional statal, infrastatal, the one of private regulations – are not identical. We live in a world where conflicts of values are not uncommon, and sometimes express themselves in the law itself: suffice it to mention, here, how difficult it is to combine, in WTO law, to a lesser extent in EU law, free trade, free competition and the protection of the environment as well as social rights.

Each step we can take in improving all of this will be welcome; this goes without saying. But, if I may confess my final mood, I will add that if we do not give up certain dreams, the one of a great unified law of humanity in particular, we will be disappointed, and increasingly so. Legal globalization is not a mess, it is rather, as two fellow citizens of mine wrote, a 'vast normative do-it-yourself'.[26] It is clear that one can only find comfort in that kind of legal world if one accepts, as it was nearly suggested by Lou Reed, taking a walk on the pluralistic side. '*Kelseniens s'abstenir*' if I may switch briefly to my mother tongue which is, I know, frequently understood in this country, as Professor Hondius' fluency shows.

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24 Conseil d'Etat, *Internet et les réseaux numériques*, Paris, La Documentation Française, 1998.
25 G. Anderson, *Constitutional Rights after Globalization*, 2005.
26 '*un vaste bricolage normatif*': J. Allard & A. Garapon, *Les juges dans la mondialisation. La nouvelle révolution du droit*, 2005, p. 91.