THE GLOBALIZATION OF LAW

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I. SOME MOTIVATING QUESTIONS: THE CIRCULATION AND SPREAD OF LEGAL INSTITUTIONS

Can democracy be exported to Iraq by means of military occupation? Can the President of the United States ask Russia to respect democracy, that is, "a rule of law and protection of minorities, a free press and a viable political opposition"?[1] Can the World Trade Organization (WTO) require that the public administration of Malaysia openly participate in the tendering procedures for the awarding of government contracts? Can all nations be asked to respect a single, universal catalogue of human rights? Can the United States require that domestic consultation procedures be adopted by international organizations? Can free trade liberalization be used to induce China to introduce the rule of law into its domestic legal system?

These are all controversial issues, not to mention complex, ambigious, and multifaceted questions. In this Article, I endeavor to examine and disentangle each of them and to formulate some additional questions. I begin by explaining each of the questions in turn.

A. *Can Democracy Be Exported to Iraq by Military Force?*

The achievements of occupation forces in Germany and Japan after World War II, as well as the more recent achievements of the UN-authorized, multinational stabilization force in Bosnia and Herzegovina could be repeated. Foreign military forces imported democracy into those three countries. Nonetheless, our common understading of democracy is that of a complex set of institutions which have developed over time in the Western world, first in the United States and then elsewhere. Is it right to consider these institutions as superior

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1. Press Release, Office of the Press Secretary, President and President Putin Discuss Stron U.S.—Russian Partnership (Feb. 24, 2005), http://www.whitehouse.gov/news/releases/2005/02/20050224-9.html.

and to transplant them into countries with different traditions? Or, would it be more desirable to allow the indigenous development of political institutions, making it more likely that they would be accepted by their respective societies? Insofar as there exist different forms of democracy, which of them should be exported? On the contrary, does the diversity of democratic forms actually facilitate their successful transplant in different social and political contexts? How long can a democratic government last if conditions such as economic development (almost always correlated with democracy) are not achieved?[2] For example, would the United States, which often demands that other states introduce democratic regimes, ever agree to the abolition of the death penalty—a condition for Turkey's accession to the European Union?[3]

B. *Can the WTO Standardize Government Procurement?*

A similar range of questions has been raised by the Government Procurement Agreement that was signed in 1994 into the WTO framework.[4] Originally conceived as a means for promoting the free circulation of goods and services, this agreement requires that government suppliers be chosen on the basis of open tendering procedures applied in a non-discriminatory manner.[5] It requires transparency, competition, equal treatment, and a reasoned decision on the award of the contract.[6] These principles also apply in countries where the

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2. *See generally* Eva Bellin, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, 119 POL. SCI. Q. 595 (2004-05); AMARTYA. SEN, LA DEMOCRAZIA DEGLI ALTRI, (Aldo Piccato trans., Mondadori 2004).

3. The United States actually behaves in the opposite way. On March 7, 2005, it decided to withdraw from the optional protocol to the 1963 Vienna Convention on Consular Relations granting compulsory jurisdiction to the International Court of Justice in disputes arising out of the Convention. The decision was adopted in response to death penalty opponents, who began to invoke the Vienna Convention in order to challenge capital sentences imposed on foreign citizens in the United States. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005 at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html.

4. *See generally* Agreement Establishing the World Trade Organization annex 4(b), April 15, 1994 (1996) (Agreement on Government Procurement), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf [hereinafter Agreement on Government Procurement].

5. *Id.* arts. 3, 7, 13.

6. *Id.* arts. 3, 10 ¶1, 17, 18 ¶ 3.

awarding of government contracts is aimed at pursuing specific goals, such as the development of disadvantaged areas or assistance to socio-economically disadvantaged populations.[7] In Malaysia, for example, domestic legislation accords the indigenous Bumiputera population preferential treatment in terms of access to bids, prices, and other contractual provisions.[8] How then can we reconcile the requirements of global free trade with helping the disadvantaged? Can the law governing public procurement be conceived so as to harmonize the domestic goal of protection with global demands for free trade? In this case, how should Malaysia behave? Should it not adhere to the agreement altogether or ask for ad hoc derogations in favor of the Bumiputera?[9]

C. *Can All Nations Be Asked to Respect a Single Catalogue of Human Rights?*

The question whether all nations may be asked to respect a single, universal catalogue of human rights refers to the 1948 International (later "Universal") Declaration of Human Rights, as codified by the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.[10] It has been pointed out that the Declaration both attenuates the monopoly of states, by allowing individuals to become active subjects of global law, and weakens their sovereignty, by enabling judicial authorities to condemn breaches of the supranational legal order.[11] Born as a "common ideal to be pursued," the

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7. *Id.* art. 4.

8. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 321 (2004), *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/Section_Index.html.

9. *See generally* Christopher McCrudden & Stuart G. Gross, WTO Rules on Government Procurement and National Administrative Law, 8, 31 (Oct. 16, 2004) (unpublished manuscript, on file with author) (draft presented at the workshop, "Towards a Global Administrative Law? Legality, Accountability, and Participation in Global Governance" at Merton College, Oxford, Oct. 16, 2004).

10. *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* December 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 (1976); International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1976).

11. Mireille Delmas-Marty, *Le Relatif et l'Universel* 72 (Èditions du Seuil 2004).

Declaration has become a "parameter for evaluating behavior,"[12] thereby also being increasingly exposed to criticism. In Islamic and sub-Saharan African cultures, some argue for the rejection of modern Western political values.[13] A Chinese legal scholar pointed out that, in his traditional language, no term fully corresponds to the notion of "individual right" as established in the Western legal tradition.[14] Universality, it has been emphasized, is a myth. The legal protection of human rights varies according to cultural traditions and political structures.[15]

D. *Can the United States Require that Consultation Procedures Be Adopted by International Organizations?*

Not surprisingly, the United States has been accused of "legal imperialism," due to its demands that international organizations adopt consultation procedures modeled on American ones.[16] Indeed, between the 1970s and the 1990s, the United States introduced powerful instruments to promote participation in administrative decisionmaking procedures. For example, in order to adopt an environmental protection regulation, an administrative authority has to notify the affected industries and environmental associations by sending them a draft of the proposed regulation.[17] Those that will be

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12. Luigi Condorelli, *L'azione delle Nazioni Unite per l'attuazione della dichiarazione universale*, in IL SISTEMA UNIVERSALE DEI DIRITTI UMANI ALL'ALBA DEL XXI SECOLO: ATTI DEL CONVEGNO NAZIONALE PER LA CELBRAZIONE DEL 50° ANNIVERSARIO DELLA DICHIARAZIONE UNIVERSALE DEI DIRITTI UMANI 24, 32 (1999).

13. *See, e.g.*, Yash Ghai, *Universal Rights and Cultural Pluralism: Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000); Guyora Binder *Cultural Relativism and Cultural Imperialism in Human Rights Law,* 5 BUFF. HUM. RTS. L. REV. 211, 213 (1999).

14. Danilo Zolo, *Fondamento della universalità dei diritti dell'uomo*, in ORDINAMENTO GIURIDICO, SOVRANITÀ, DIRITTI, 199, 204 (Enrico Diciotti & Vito Vekkyzzu eds., G. Giappichelli Editore 2003); J. Yacoub, *Les droits de l'homme sont-ils exportables?*, Paris, Ellipses, 2005.

15. *See* Antonio Cassese, I DIRITTI UMANI NEL MONDO CONTEMPORANEO 51 (Editori Latzerza, 8th ed. 2003) (1988).

16. Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 388 (2001).

17. Akron, Canton & Youngstown R.R. Co. v. U.S., 370 F.Supp. 1231, 1240 (D. Md. 1974).

affected by the regulation and other interested parties may then put forward comments and proposals before the authority issues its decision.[18] On the contrary, when decisions are made not by domestic authorities but by an international organization, private actors see their domestic law right-of-participation evaporate. The United States therefore argues that international organizations also ought to guarantee an analogous right of participation by consulting interested parties.[19] In this regard, is it fair to require that international organizations, whose frameworks are defined by informality and negotiation, adopt American-style adversarial procedures? And how can such criteria be transplanted into a wider context where, considering the interests involved in global decisions, consultation may slow or even paralyze the proceeding? Finally, does the duty to consult interested parties change when transferred to the global level?

E. *Can Free Trade Induce Rule of Law in China?*[20]

The following issue has been debated in view of China's participation in the WTO. During the negotiations, China's membership in the Organization was advocated on the condition that it promote the rule of law within the country.[21] Yet, is it legitimate to transplant fundamental legal principles developed in some Western countries to the East? Can principles that work in London or Washington work just as well in Beijing? And how may the rule of law take root in legal systems where the authority of the judiciary is constrained and may not extend to ideas like political freedom?[22]

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18. Ogden Chrysler Plymouth, Inc. v. Bower, 809 N.E.2d 792, 803 (Ill.App.-2d. 2004) ("In adopting rules, administrative agencies must comply with the public notice and comment requirement set forth in the Procedure Act.").

19. *See* David A. Wirth, *Reexamining Decision-making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 777-78 (1984).

20. *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (Summer/Autumn 2005).

21. *See, e.g.*, Martin G. Hu, *WTO's Impact on the Rule of Law in China*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM, 101 (Mansfield Foundation ed., 2000).

22. On these problems, *see* Gordon Silverstein, *Globalization and the Rule of Law: "A Machine that Runs Itself?,"* 1 INT'L J. CONST. L. 427 (2003).

II. Phases and Modes of Legal Globalization

In addition to being controversial issues at the forefront of international debate, these questions all have one thing in common: they address the circulation of legal institutions among national systems and their spread from the national to the global level, and vice versa. Transfers like these are not novel, but they have increased quickly as we have left behind the rigid world of 18th and 19th century nationalism.

This unitary problem takes five different forms. The first is the direct transfer of institutions from one national system to another—for example, American democracy in Iraq. The second is the imposition of a global legal principle upon national public administrations—for example, the tendering rule that the WTO requires of member states' administrations, including Malaysia. The third is the imposition by a global judicial body of a common legal principle, not only upon states, but also within national legal systems—for example, universal human rights respected by everyone at the national level. The fourth form captures legal principles that are transplanted from national legal systems to the global level—for example, the duty to consult going from the American legal system to the global one. Finally, one or more institutions may spill over into other contexts at the global level—for example, free trade as used to introduce the supremacy of law.

The questions raised above have helped us to focus on the progressive globalization of law. I now investigate the main phases and modes of legal globalization before turning to the laws governing this process.

Legal thought is the first area affected by the circulation and spread of law. Here, globalization does not concern positive institutions but rather research approaches, techniques, and methodologies. This is the domain of universal legal thought. It is limited to legal culture and does not extend to positive law.

As natural law retreated in the 18th century—and remained behind the scenes into the 19th century[23]—legal thought began to distinguish "local jurisprudence" from "uni-

23. Guido Fassò, La filosofia del diritto dell'Ottocento e del Novecento 306 (Il Mulino 1988).

versal jurisprudence" (as per Jeremy Bentham's idea),[24] or "particular jurisprudence" from "general jurisprudence" (according to John Austin).[25] Universal or general legal thought drew on principles common to several systems of positive law. Its scope, however, was quite limited. It included the writings of Roman jurists, the decisions of English judges, and the provisions of the French and Prussian codes. It was universal, but this universe was narrow and atemporal.[26] Gian Domenico Romagnosi's *Universal Public Law*, written in 1833, illustrates this well.[27]

In the 20th century, the universality of legal thought was no longer discussed; rather, its scope widened because people no longer distinguished between particular (or local) jurisprudence and universal (or general) jurisprudence. According to Saleilles, writing in 1904, "all legal thought is necessarily international and universal."[28]

Twentieth century legal thinkers were, however, positivists and assumed that universal law requires a single sovereign and a single, worldwide legal community.[29] Universality, thus, ex-

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24. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 294 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1789).

25. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 10, 15-16 (Wilfrid E. Rumble, ed., Cambridge Univ. Press 1995) (1832).

26. *See generally* Mauro Barberis, *John Austin, la teoria del diritto e l'universalità dei concetti giuridici*, *in* MATERIALI PER UNA STORIA DELLA CULTURA GIURIDICA 407 (Dec. 2003).

27. *See generally* GIAN DOMENICO ROMAGNOSI, INTRODUZIONE ALLO STUDIO DEL DIRITTO PUBBLICO UNIVERSALE (Piatti, 3d ed., 1833).

28. RAYMOD SALEILLES, LE CODE CIVIL 1804-1904, 127 (Librairie Edouard Duchemin 1964) (1904) (translation by author). The French jurist Raymond Saleilles (1855-1912) played a pivotal role in criticism of legal positivism and the isolation of legal thought.

29. On the limits of legal positivism, see generally Paolo Grossi, *Un diritto senza Stato (la nozione di autonomia come fondamento della Costituzione giuridica medievale)*, *in* 25 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 267 (1996) (discussing the link between law and state sovereignty); Paolo Grossi, *Il disagio di un "legislatore" (Filippo Vassalli e le aporie dell'assolutismo giuridico) in* 26 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 377, 377-405 (Giuffrè 1997); Paolo Grossi, *Il ruolo del giurista nell'attuale società italiana*, *in* 3 RASSEGNA FORENSE 501, 501-515, (Giuffrè 2002); Paolo Grossi, *Le molte vite del giacobinismo giuridico (ovvero: la "Carta di Nizza", il progetto di "Costituzione europea", e le insoddisfazioni di uno storico del diritto)*, *in* 50 JUS:RIVISTA DI SCIENZE GIURIDICHE 405, 408-09 (2003); PAOLO GROSSI, DALLA SOCIETÀ DI SOCIETÀ ALLA INSULARITÀ DELLO STATO FRA

tended far as legal thought and did not affect the relativism of positive legal systems.

Nonetheless, in the second half of the 20th century, the idea that law reaches beyond a particular positive legal system began to take root, especially in the area of private law. While the doctrines and institutions of public law were intimately tied to the state and to the design thereof enshrined in state norms, private law institutions like property, family, contract, and tort law may have had common rules. In the mid-1900s, the Italian lawyer Filippo Vassalli affirmed that private law had never been "a servant of the State." With the codifications, states had taken control over the rules governing private law relationships; nonetheless there was a trend towards overcoming the statist dogma and towards dismantling the barriers between nations.[30]

Legal theorists later recognized that public law resorted to imitation, whereby the institutions of one legal system were copied by others. Nineteenth century English "bicameralism,"[31] the Napoleonic "Conseil d'Etat,"[32] the Swedish "Ombudsman" (1809),[33] and the Austrian "fair proceeding" (1925) were all applied and adapted into many other national systems.[34] Very diverse legal systems then presented many similarities. Once the obstacles to adapting public law institutions to foreign legal contexts (in which they would become different from their archetype) had been removed, it was possible to recognize that institutions considered to be specific to a particular legal tradition actually originated elsewhere. For example, the model of the "grandes écoles" and the "grands corps," believed to be typical of the French administrative *élite*, was in

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MEDIOEVO ED ETÀ MODERNA (Istituto Suor Orsola Benincasa 2003). For a critique of the myth of the law and the legislature, see generally the pivotal work of CARL SCHMITT, LA CONDIZIONE DELLA SCIENZA GIURIDICA EUROPEA (Antonio Pellicani ed., 1996).

30. 3 FILIPPO VASSALLI, *Estrastatualità del diritto civile*, *in* STUDI GIURIDICI,, pt. 2, 753, 755 (Giuffrè 1960).

31. *See* Donald Shell, *The History of Bicameralism*, 7 J. LEGIS. STUD. 5, 7-9 (2001).

32. *See, e.g.*, Elisa T. Beller, The Headscarf Affair: The Conseil D'Etat on the Role of Religion and Culture in French Society, 39 TEX. INT'L L.J. 581 (2001).

33. *See* Walter Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965).

34. *See, e.g.*, *id.*

fact formed under the influence of the Chinese Mandarinate, which had fascinated Enlightenment philosophers.

The last phase of law development continues to this day. It is characterized by transfers from one domestic legal context to another domestic legal context, as well as to the universal level, and it includes the repercussions of such transfers in domestic legal systems.

Mutual recognition agreements illustrate well the transfer of legal institutions from one country to another. On the basis of such agreements, a product that can be sold in one country can also be sold in another country under the same conditions. Similarly, an accountant from one state may offer his services in other states subject to the law of his country of origin; once authorized to operate in one country, a bank may rely on that same authorization to carry out its activity in another.

Insofar as the product, the accountant, and the bank all "carry their national law" with them when they change countries, the recognition of the validity of foreign administrative norms and procedures results in a reciprocal exportation of national laws, as well as in ongoing and evolving cooperation among states.

Mutual recognition agreements do not consist in the mere acceptance by one state of the law that applies to goods, services, and businesses in another state in a given moment. They may also provide that the other state's rules change. They require that the potentially affected states be notified of possible rule changes and have an opportunity to comment upon them.

Moreover, if a state enters into a mutual recognition agreement with another state and the latter enters into one with a third state, the agreements will have a transitive force, favoring the circulation of institutions between national legal systems. Finally, the recognition not only of products but also of productive processes implies a broader horizontal cooperation between states in areas that intersect with trade, such as the environment, working conditions, and safety protection.[35] With mutual recognition, national laws mix together, increas-

35. On mutual recognition, see Kalypso Nicolaidis and Gregory Shaffer, *Managed Mutual Recognition Regimes: Governance without Government*, (Inst. for Int'l Law and Just., 2005).

ing the need for common standards implemented by multilateral organizations. At the same time, this enables one to choose among multiple national law regimes.

Three examples of typical state activities—labor protection, criminal justice, and government-citizen relations—illustrate the transfer from the national to the universal context: a transfer that takes place along a vertical axis rather than a horizontal one.

A. *Labor Protection*

Some countries export goods that have not been produced in conformity with internationally recognized standards for labor protection set by the International Labor Organization (ILO).[36] These states not only allow for unfair competition vis-à-vis producers from other countries, but they also threaten the labor protection standards in the importing countries and can trigger a race to the bottom. This form of "social dumping" may be countered by invoking a provision of international trade law that requires that imported goods be regulated according to a regime that is no less favorable than that governing other "similar" imports.[37] To apply this norm, however, the term "similar" must be interpreted to mean goods produced according to procedures, methods, and techniques that comply with the "Core Labor Standards," a lowest common denominator for working conditions.

Once the relevant norm has been identified by following the convoluted path outlined above, the next question is: which authority ought to enforce it? Should it be an individual country, like the United States, which banned trade with Burma on account of serious labor and human rights abuses? Or should it be the international community, under the aegis of the WTO?[38]

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36. Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z., art. 16, ¶¶ 1-2, May 10, 1993, 1819 U.N.T.S. 360 (entered into force on May 20, 1994).

37. S. Bluefin Tuna Case (Austl. & N.Z. v. Japan), 13 I.L.M. 1359, 1391 (Arb. Trib. Constituted under Annex VII of the UNCLOS 2000).

38. *See generally* Michael J. Trebilcock and Robert Howse, *Trade Policy and Labour Standards*, 14 MINN. J. GLOBAL TRADE 261 (2005).

B. *Criminal Justice*

Criminal law traditionally was precisely the kind of "particular law"[39] left up to individual States. Can extremely unjust state laws ("extremes Unrecht"[40]) be accepted at all? If they are not acceptable, crimes carried out in compliance with unjust laws must be defined at the supranational level and enforced by a supranational judge. International enforcement is all the more necessary when considering that national tribunals tend not to punish genocide, war crimes, and crimes against humanity because these crimes are usually committed by domestic organs—likely the military—that state authorities either protect or, in any case, do not wish to judge. Therefore, it is necessary that international authorities replace domestic judges in the promotion, defense, and pursuit of universal values. To these ends, universal criminal law protects peace and security, and defines war crimes, crimes against humanity, and genocide as international crimes. The international community considers it legitimate to investigate and punish such crimes independently of where they are committed, and independently of who the victims and the perpetrators are.[41] Special courts have been established, from the Nuremberg and Tokyo tribunals to those for Yugoslavia and Rwanda, to the International Criminal Court.

Two important changes characterize this new environment; the first has to do with norms, the second with regard to judicial bodies. As for norms, "[i]n claiming that these actions are wrong, we put aside the purely parochial interests of particular nations."[42] With respect to judges, "global" crimes could be judged by national courts. The choice of establishing nonstate tribunals overcomes national legal systems by providing global ones with a panoply of instruments that national judges

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39. G. Carmignani, ELEMENTI DEL DIRITTO CRIMINALE 8 (Naples, Printing Press of P. Androsio 1854).

40. On this expression used by Gustav Radbruch, see GIULIANO VASSALLI, FORMULA DI RADBRUCH E DIRITTO PENALE 281 (Giuffrè, 2001); *see also* GIULIANO VASSALLI, LA GIUSTIZIA INTERNAZIONALE PENALE (Giuffrè 1995) (evaluating the need for a global criminal justice system).

41. Gerhard Werle and Florian Jessberger, *Concetto, legittimazione e prospettive del diritto internazionale penale, oggi*, 3 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 733, 743 (2004).

42. George P. Fletcher, *Parochial versus Universal Criminal Law*, 3 J. INT'L CRIM. JUST. 20, 23 (2005).

usually have at their disposal. A "universal" criminal law thus integrates or sometimes counters "parochial" criminal law.[43]

C. *Government-Citizen Relations*

The third and final example regards the law governing the relationship between citizens and the government and, in particular, due process of law. This principle traces back to a 1354 Statute of Edward III[44] and was also included in the American Constitution.[45] It refers to both the right to be ruled by law and the right to a fair trial. In national legal systems it has been applied widely to the relationship between citizens and the government. Understood as the right to "procedural fairness"[46] in Italy, the application of this principle requires the public administration to give notice and hearing to the citizen.[47]

The principle is now applied globally. Three cases decided by three different international courts are evidence of this trend in procedural norms. In the first case, the Appellate Body of the WTO held that a state, when limiting imports from other countries, has to give exporting countries the chance to be heard, must provide a reasoned decision, and recognize the right to defense.[48] In the second case, the International Tribunal for the Law of the Sea (ITLOS) decided that a government that sequesters a ship and takes away the crew's passports must respect due process of law and the principle of fairness, informing the ship's owner and the crew and giving

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43. *Id* at 23. *See generally* OTFROED HÖFFE, GLOBALIZZAZIONE E DIRITTO PENALE (Sergio Dellavalle trans., Edizioni di Comunità 2001) (1999) (elaborating on the effects of globalization on the birth of international and intercultural criminal law).

44. *See* 28 Edw. III, c.3.

45. U.S. CONST. amend. XIV, § 1.

46. THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 217-19 (Eugene W. Hickok, Jr. ed., 1991).

47. The Constitution of the Italian Republic, art. 13.

48. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). For commentary, see, for example, Sabino Cassese, *Gamberetti, tartarughe e procedure. Standards globali per i diritti amministrativi nazionali*, 54-3 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO, 657 (2004).

them the chance to be heard.[49] Finally, in a more specific area, the European Court of Human Rights (ECHR) held that administrative decisions affecting individual rights can be taken only after the interested parties have been heard.[50]

As to the application of due process in the global legal order, three features are worth emphasizing. First, the principle of "procedural fairness" is not always declared by international treaties, but is often developed by judicial bodies. These bodies derive it from provisions of sectoral regulation that prohibit arbitrary decisions and require reasonableness (as in the areas of trade and the law of the sea),[51] or from clauses requiring due process and the right of defense (as in the European Convention of Human Rights).[52] The generation of "constitutional" principles by judicial bodies leads to a process of constitutionalization.[53] Second, the growth of global law through lateral connections, especially with regard to trade, is open to expansion because of its many ties to related issues such as the environment, working conditions, human rights, health protection, security, and other sectors in which "constitutional" principles developed by global judges may be easily transported. Finally, under global law, both the state and private

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49. *See* The "Juno Trader" Case (St. Vincent v. Guinea-Bissau), 2004 Case No. 13 (Int'l Trib. L. Sea 2004), *available at* http://www.itlos.org/case_documents/2004/document_en_249.pdf.

50. *See* Credit and Indus. Bank v. Czech Rep., 2003-XI Eur. Ct. H.R. 44.

51. United Nations Convention on the Law of the Sea Annex VII, art. 8, Dec. 10, 1982, 3 U.S.T.R. 1833 (entered into force on Nov. 16, 1994), *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/.

52. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

53. Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J.INT'L LAW 39, 41-42. On proceduralization and its functions in the global legal order, see Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization*, *in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 105, 128-29 (Stefan Griller ed., 2003). On "procedural fairness" as a principle of global law, see Giacinto della Cananea, *The EU and the WTO: A "Relational" Analysis*, at 9 (paper presented at the Vienna Conference on "New Foundations for European and Global Governance" Nov. 29-30, 2004). On the development of domestic jurisdictions, see Nicola Picardi, *La vocazione del nostro tempo per la giurisdizione,* 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE, 41, 44-45 (2004).

actors enjoy the right of participation in their relationship with public administrations.

Bodies of relatively uniform rules of universal application are increasing in a number of areas. The growth of world trade requires common standards for product conformity, consumer protection, and product liability.[54] States' inability to control such phenomena as financial crises, global warming, the use of the seas and maritime resources, and migratory fish species mandates that these universal public goods be protected at the global level.[55]

III. Laws Governing Legal Globalization

We have thus far examined the evolution of principles, norms and institutions that we can regard as "common," because they have developed simultaneously, been transplanted from one national context to another, been exported from domestic to global law, or emerged directly in the global legal system to address specific needs. I now consider the laws governing this process of legal globalization.

I first address the following question: Is there a mechanism driving this process of mutual penetration and harmonization, or does this process depend on the uncertain and contradictory policies of domestic governments?

The answer—or my attempt at an answer—will touch upon three points: the cohabitation between legal unity (of the world) and differentiation (of its parts); the process of universal legal patrimony and the factors leading to its growth; and the balance that emerges between domestic laws within the global arena.

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54. Martin Shapiro, *The Globalization of Law*, 1 Ind. J. Global Legal Stud. 37, 61-64 (1993).

55. On legal globalization see Maria Rosaria Ferrarese, Le istituzioni della globalizzazione 101-225 (Il Mulino 2000); *see generally* Armin von Bogdandy, *Democrazia, globalizzazione e futuro del diritto internazionale*, 2 Rivista di diritto internazionale 317, 326-27 (2004); Erhard Denninger, *L'impatto della globalizzazione sulle democrazie contemporanee*, 1 Rassegna Parlametare 25 (2004); Julio V. González García, *Globalización económica, Administraciones públicas y Derecho administrativo: presupuestos de una relación*, 164 Revista de Administración Pública (2004); Stefan Kadelbach, *Ethik des Völkerrechts unter Bedingungen der Globalisierung*, 64 Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht, 1, 19-20 (2004) (F.R.G.).

The most striking feature of the relationship between legal unity and differentiation is the contrast between a universal legal patrimony, which reinforces the legal unity of the world, and the extreme variety of local legal systems. On the one hand, there are some common principles and institutions that no domestic legal system can do without. On the other hand, there are marked differentiations across domestic (or local) systems. And this gap tends to widen over time. The number of international organizations dealing with issues of uniformity or, at least, harmonization grows in proportion with the number of states.[56] Insofar as states are the main causes of differentiation, the gap is a permanent feature of the new legal order.

This tension between increasing unity and increasing differentiation lends itself to rival interpretations. Those who believe in the central role of the states see this as a confirmation of their theory. Those who argue, by contrast, that the global legal order has taken root emphasize unity over differentiation. The real challenge is to interpret these apparently contradictory elements in a holistic way.

Relativists, who believe that every society has its own state-created law, underestimate the ability of legal systems to adapt, to live together, and thus to change. At the other end of the theoretical spectrum, a smaller group of universalists, who believe that legal globalization is now dominant, overestimate the unity and uniformity of the global legal order, as well as its ability to compel domestic legal systems.[57]

It is hard to analyze the vertical and horizontal concatenation of national, supranational, and global law because we still do not know the (incomplete, despite being quite developed) global legal "grammar," while we know our native domestic legal terminology all too well. We can draw, however, one safe conclusion: legal globalization allows for diversity of national laws and leaves them with the right to be different,[58] either by

56. *See generally* ALBERTO ALESINA & ENRICO SPOLAORE, THE SIZE OF NATIONS 220-01, 223-24 (2003); ANNA CAFFARENA, LE ORGANIZZAZIONI INTERNAZIONALI (Il Mulino 2001).

57. One area in which these two perspectives particularly clash is over regulation of the Internet. Daniel W. Drezner, *The Global Governance of the Internet: Bringing the State Back In*, 119 POL. SCI. Q. 477 (2004).

58. DELMAS-MARTY, *supra* note 11, at 65-66 (referring to the European Convention on Human Rights as an example). R

leaving entire fields uncovered—to be regulated by state law—by providing special derogatory measures, or else by applying techniques that leave spaces, margins, and interstices, weave networks, establish balances and create compensations.

The emerging legal order appears as a binary order, in which differences coexist with a set of common principles: on the one hand, an extreme and ever growing variety of national or sub-national regimes; on the other hand, an ever stronger fabric of universal principles and procedures. The resulting system is not fundamentally different from other historical examples: pre-state law, like Roman law, with a universal vocation and a tolerance for diverse internal rules;[59] common law, which in the Middle Ages lived together with local laws and put them into communication with each other;[60] imperial systems, which include indigenous nationalities; and public powers governing by "indirect rule."

This binary system is particularly evident in the two-level area of criminal law. At the first level, universal courts exercise absolute jurisdiction over specific subjects in defense of universal values. At the second level, national criminal courts exercise conditional universal jurisdiction: they are assigned to be guardians of global law, but only within the limits set by the higher level.[61]

The cohabitation between world legal unity and local differentiation requires a vast and complicated system of enabling rules. These rules often appeal to science, in order to prevent accusations that they originate from international negotiations or global regulators in which representatives of the Western world dominate, and which in turn, enact rules favor-

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59. See generally, Salvatore Riccobono, Outlines of the Evolution of Roman Law, 74 U. PA. L. REV. 1 (1925); Leon R. Yankwich, Aspects of Roman Civil Law, 26 S. Cal. L. Rev. 292 (1953).

60. For a historical reference, see generally FRANCESCO CALASSO, MEDIO EVO DEL DIRITTO, LE FONTI (Giuffrè 1954); *see generally* PAOLO GROSSI, *L'ordine giuridico medievale*, (Laterza 1997) (1995) (discussing the legal approach of medieval society).

61. For this distinction, see Antonio Cassese, *Y a-t-il un conflit insurmontable entre souveraineté des Etats et justice pénale internationale?*, *in* CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES 13, 18-25 (Antonio Cassese & Mireille Delmas-Marty eds., 2002). On the role of national judges as guardians of global law, see also DELMAS-MARTY, *supra* note 11, at 204; Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law* 37 NYU J. INT'L L. & POL. 695 (2005). R

ing industrialized countries.[62] This is indeed a subject that deserves further investigation.

My second point concerns the dynamic growth of the global legal patrimony of institutions, rules, and principles. I already mentioned that legal globalization is a consequence of problems emerging that no domestic legal order can solve on its own—for example, the expansion of trade and the need for a "corpus" of rules to accompany it; the need to exercise control over some of the sources of environmental pollution; the need to regulate phenomena that escape the control of individual States, from air traffic to the use of the seas, postal transport, and financial crises; and the need to establish international criminal tribunals to compensate for the inertia of local judges in pursuing criminals that the international community agrees deserve punishment.

Another factor explains the last quarter of the 20th century and the recent acceleration of legal globalization. There exists a circle: the more communication, the more we apprehend the world, the more differences are manifest, the more global instruments are applied to resolve these differences, the more we care about the democracy and accountability of these instruments, the more we seek to strengthen the ties between global institutions and civil society, and the greater the frustration with a world that has "governance" without having a government.

This is ultimately a cumulative process, marked by both the ongoing development of a global legal order and the growing dissatisfaction with it; this dissatisfaction in turn drives further developments. Even the no-global movements have been important vehicles of globalization because they have attracted the world's attention towards local inequality and to the uneven effects of globalization itself. Additionally, anti-globalists have triggered correction mechanisms. As a result, we live in a more unified world, while also being more aware of its frac-

62. There is thus less deference to governments and more faith in the impartiality of science. On this, see Jacqueline Peel, *Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?* 98 (The Jean Monnet Program, Working Paper No. 02/04, 2004), *available at* http://www.jeanmonnetprogram.org/papers/04/040201.pdf (referring to rule-making bodies such as the WTO).

tures, and we are driven by this awareness to reconcile national differences.

The third and final point concerns the emerging balance among domestic legal systems within the global legal order. The global legal order features several sectoral imbalances; it is more developed in some areas, while embryonic or nonexistent in others. The variability of "international regimes"[63] thus produces a different form of relativism, one that is sectoral, rather than national. These asymmetries also provoke reactions. They are contagious: an institution or principle introduced in one sector quickly spreads into others under the pressure of interests that do not accept sector-dependent treatment.

The greatest asymmetry comes from the different status of select states in the global legal order. In 1947, the Italian lawyer Vittorio Emanuele Orlando wondered whether what he called "world revolution" would lead to a single dominant state or to a network or association of States.[64] Today, Orlando's question would receive a twofold answer: at present, the processes of *both* globalization and Americanization are under way.[65]

IV. Studying the Global Legal Order

Finally, I consider how to study the new universe created by legal globalization. Although in different ways, a number of legal scholars at the end of World Wars I and II—Santi Romano, Gustav Radbruch, Filippo Vassalli, and Vittorio Emanu-

63. *See, e.g.*, Donald J. Puchala & Raymond F. Hopkins, *International Regimes: Lessons from Inductive Analysis*, *in* International Regimes 61, 61-67 (Stephen D. Krasner, ed., 1983).

64. Vittorio Emanuele Orlando, *La rivoluzione mondiale e il diritto*, *in* 4 Studi di diritto costituzionale in memoria di Luigi Rossi 777-78 (Giuffrè 1952).

65. Shapiro, *supra* note 54, at 48. On American legal imperialism, see generally Ugo Mattei, *The Rise and Fall of Law and Economics. An Essay for Judge Guido Calabresi*, (Oct. 4, 2003) (unpublished article), *available at* http://jus.unitn.it/dsg/ricerche/dottorati/materiali/mattei04.pdf; Ugo Mattei,, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Legal Stud. 383 (2003). On the balance between globalization and Americanization, see generally Mauro Bussani, *Funzioni e limiti del diritto globale in* Lo sguardo dell'altro 117 (Paolo Annunziato et al. eds., Il Mulino 2001); Ugo Mattei, *Il diritto giurisprudenziale globalizzato ed il progetto imperiale. Qualche spunto*, 36 Politica del Diritto 85 (2005). R

ele Orlando—signaled that globalization was advancing. After the world wars, however, scholarly treatment of this phenomenon languished, and it has resumed only in the last decade, particularly in the United States. Some grand themes do emerge from this scholarship, yet the focus of these studies is somewhat dispersed by excessively detailed analyses.

One major theme concerns the legal concepts that operate at the global level, but remain rooted in positive law.[66] How are we to study them? What is their relationship with national law? For example, the right to be heard by an administration before it makes a decision is now widely recognized, both in national legal systems and in the global legal system.[67] This requires us to study due process in a new way, by comparing national legal systems with each other and with the global one, whose innovative components—for example, the fact that under global law, the right to be heard extends to both states and private actors—require further analysis.

A second theme is the role of the rule of law in the global legal order: Can we say that the rule of law is "a machine that runs of itself"[68] in the global legal context? Domestic systems feature the recognition of rights, formalized conflicts between the State and the bearers of individual rights, the right of defense, and the presence of a judge. Together, these ensure the conditions for a mechanical process, so that the rule of law is to law what the market is to the economy. But do the conditions exist for a similar development outside and above the states?

A third theme is the role of judges in the global legal system. Almost every sector of this legal order has witnessed a judicial "explosion."[69] Many parties are admitted to proceedings before global judges, making them choral in character.

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66. See generally Delmas-Marty, *supra* note 11, at 25, who drew my attention to this issue. R

67. *See* Appellate Body Report, supra note 48; Credit and Indus. Bank v. Czech Rep., 2003-XI Eur. Ct. H.R. 44. R

68. Silverstein, *supra* note 22, at 427 n.2 (citing James Russell Lowell). R

69. *See* Maria Rosaria Ferrarese, *Inclusion, no "Exit-Option" and Some "Voice": "Democratic" Signals in International Law*, at 11 (paper presented at the Vienna conference on "New Foundations for European and Global Governance," Nov. 29-30, 2004) (on file with author); Antoine Garapon & Carlo Guarnieri, *La globalizzazione giudiziaria*, *in* 1 IL DIBATTITO SULLA GLOBALIZZAZIONE 165 (Il Mulino 2005).

These judges impose sanctions that contain a mix of top-down interventions and countermeasures by the offended party. Thus we may ask whether, in the global arena, legal proceedings and trials are becoming a surrogate for democracy.

A fourth theme asks to what extent globalization can tolerate governance without government. There is now a network of sectoral governments above the states. This network has developed incrementally and has been facilitated by the lack of a center (or by the presence of a center—the UN—operating as a "forum"). How long can this precarious, structurally incomplete balance last?

The rupture of the equation between law and state ultimately requires a new approach to research and new forms of communication. For the former, I limit myself to pointing out the need for international scholarly societies, numerous in many areas other than law.[70] For the latter, I note the need to use the most widespread linguistic vehicle—English. (In this respect, at least in Italy, legal scholarship is more backwards than in all other fields.[71])

V. CONCLUSION

I conclude with the title of this paper: The Globalization of Law.

It is an ambiguous formulation. It assumes a reality that does not and may never exist. A unitary cosmopolitan legal system is not on the horizon, nor is it perhaps among current ambitions. Instead, a process is under way that affects certain positive principles and branches of law. Recognizing the existence of shared principles in some sectors is useful not for "drafting cosmopolitan legal codes, but only for demonstrat-

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70. The establishment of European-wide organizations is a recent phenomenon, an example of which is the newly-formed "European Society of International Law." European Society of International Law, Welcome to ESIL, *available at* http://www.esil-sedi.org/english/ (last visited January 25, 2006); s*ee also* David Prosser, *Scholarly Communication: The View from Europe, Creating Internatioal Change,* 65 C. & RES. LIBR. NEWS 265 (May 2004) (highlighting the need for new forms of scholarly communication).

71. This statement draws on data collected by the Italian Committee for Research Evaluation (CIVR) and based on information provided by all Italian research centers and universities. *See generally* Center for Research Evaluation, http://www.civr.it/ecivr/meet_civr.asp (last visited January 25, 2006).

ing the fundamental ability of all cultures to communicate."[72] It helps to show the extraordinary ability of legal instruments to coexist, overlap, order themselves, and even integrate. Moreover, when shaping the tools of harmonization, it highlights the importance of appreciating the differences among legal systems. To acknowledge that common research approaches, methodologies, and criteria are being developed is not aimed at emphasizing the successes of an already established academic "koinè," but only at valuing the stable ties that already exist among different national legal cultures.

72. FRANCESCO D'AGOSTINO, PLURALITÀ DELLE CULTURE E UNIVERSALITÀ DEI DIRITTI 45 (G. Giappichelli ed., Universita di Roma 1996).