THE MORALITY OF LAW IN THE ERA OF GLOBALIZATION

Oana Andra NIȚĂ*

Abstract

The principles of law are an area of an interdisciplinary interest. The axiological, praxiological and teleological axes of law involve approaches from the perspective of philosophy and the philosophy of law in particular. The principles of law determine the existence of material legal reality in their capacity, as premises of the positive legal order. The principles of law affirmatively state its presence in the legal framework, precisely in the processes of law development and realization. In the conditions of the globalization of the positive law, with the overwhelming multiplication of the systemic components (norms, institutions, branches etc.), the recipient of the law risks losing its orientation in the normative-legal space. Therefore, the path of the recipient of the law, irrespective of his position, the legislator, the applicant, or the ordinary recipient of the positive right, is illuminated by the principles of law.

Globalization, as a socio-political phenomenon, also has effects on the legal system: there are increasingly visible signs of a legal monialization, the creation of a right world. The national process will adapt to it, precisely because the international courts have grounded the principles of the universal fair trial. Interconditioning between legality and moral principles is the essential part of the socialization of human life, of its potentiation, realizing itself as being necessary to remove a maximum of harm.

The strong manifestation of the effects of globalization has generated anxiety among broad categories of people, states, and civil society organizations. This is because globalization describes a complex and diffuse reality: financial crises, culture standardization, emerging transnational actors (such as international organizations, multinational companies) and increased interdependence of economies.

The article shows how moral principles are compatible with the current trend of globalization and how thinking about globalization and greater international interdependence would benefit from greater attention.

Keywords: *globalization, moral principles, legality, society, economy.*

1. Introduction

The present paper reaches aspects about the phenomenon of globalization and how it challenges many of the traditional hypothesis about International law, its relationship to national law, the ways in which it is created and the methods of its enforcement. We will try to make a brief study of the normative, moral and institutional implications of globalization and of its theoretical and practical branches in a variety of fields ranging from the regulation of trade and investments, the protection of human rights and the international criminal responsibility of corporations or/and states, security and environmental governance and the safeguarding of the diversity of cultural heritage.

Globalization affects us all directly, even if we are individualized. What is important is the evaluation of the opportunities and risks that globalization entails, distancing us from the current tendencies of demonization, or, on the contrary, the exaggeration of the consequences of this phenomenon. The dynamics of globalization is controlled by economic forces, yet its most important consequences are in the political field. Global issues such as the greenhouse effect can not be solved at the level of a single state because they are neither the consequences of the actions of a single state, nor can local problems be solved within the educational system, for example.

The objectives proposed in the study are the following: defining and realizing a transdisciplinary analyze of the concept of globalization, identifying the role and functions of law in the age of globalization, emphasizing the importance of morality in contemporary culture and civilization, proposing a set of normative regulations in the field of globalization. We will try reaching this objectives by using quantitative methods, as well as demonstrative methods.

According to Kant, the moral obligation of the individual to discover and capitalize on the principle of universal law is inherent to our conscience. Herbert Lionel Hart[1] states that justice demands that globalization is to be carried out justly; that is, fairly without any violation of moral rights and justice, different from legality.

In clear and concise terms, Robert Went[2] demythologises globalization. He refutes the myth that globalization is an entirely new phenomenon and that it is an unavoidable process. While recognising that it poses serious strategic challenges to the Left, he argues that these challenges are not insurmountable and that there is hope for advocating real change. Went puts globalization into its historical context. He shows that there is no option of returning to the postwar mode of

* PhD Candidate, The Bucharest University of Economic Studies (e-mail: oana.nita2000@gmail.com)

[1] Hart Herbert Lionel Adolphus, *The Concept of Law*, (Oxford: The Clarendon Press, 1978), 160

[2] Robert Went, *Globalization. Neoliberal Challenge, Radical Responses* (London & Stirling Virginia: Pluto Press, 2000), 2-4

expansion, but that the current trend must be updated. If not, he warns of greater social inequality, levelling of wages, retrogressing the working conditions, life-threatening ecological deterioration and a widespread dictatorship of the market.

2. Interpretation of justice through modern philosophy

The idea of justice will start the individual's morality and will confront his legal feeling by marking human conduct; in other words, the moral law of each person is the determinant of righteous (right) or unfair (unjust) legal laws, in which external conduct is built. Laws of morality and laws of law act in two interrelated dimensions (subjective and objective), based on the same concept and ideal paradigm of justice. The thoughtful subject finds within itself the beginning of the justice, beyond the metaphysical ascension. The moral obligation of the individual is to discover and capitalize on the principle of universal law which, after Kant, is indigenous to our conscience.

Responsibility is trained when man's will is not constrained by internal or external factors and he is "ruled" only by freedom. According to Kant, this is the principle of the autonomy of the will to administer the rational activity of man. Absolutely good will would be the only universal law that any rational being would impose. This Kantian ideal would lead to universal accountability. Good will can be cultivated as a process of liberation from the action of internal factors (thoughts, desires) and external strangers of the proposed desideratum. A person is autonomous to the extent that he succeeds in breaking down his dictated senses, that is, he has rational behavior outside of any constraining way. It is only in this situation that he becomes legally and morally responsible.

According to del Vecchio[3], this duty can also be considered as a principle of law, a perpetual and inviolable prerogative of the person, balanced by the correlative obligation of each one to reflect that limit, beyond which the opposition of the other party would be justified and legitimate. Therefore, the right has its principle in the nature or essence of man, distinguishing itself from morality through the objectivity of the report. All social relations must be measured and constituted according to this principle or the limitation of a universal right to the person inherent in it. This deontological demand remains intangible, keeping its value and meaning untouched, because it is metaphysical, even if the empirical reality does not always conform to the principles of natural law.

Responsibility can be examined from the perspective of morality and law. The morale, which directs the universe of thoughts, desires and human feelings, is the field of responsibility for the escape of the inner (psychic) world of the subject. The positive right, which governs human conduct or deeds in action or inaction, is the area of external responsibility, legal responsibility.

T. Mînzală[4] points out that when an individual does not adhere to the system of official norms, especially legal ones, considering them foreign of his appropiation, these rules are imposed on him, however, and he is required to respect them; they impose an accountability to him. In such a situation, the individual is accountable, not responsible in relation to the norms he disagrees with, but he complies with the obligation. If moral responsibility is implemented, as a rule in relation to oneself implying moral coercive measure, then legal liability is a legal relationship of coercion of the perpetrator, by the competent body, to enforce legal sanctions.

Contemporary doctrines contain a plurality of interpretations of justice. Thus, F. Geny[5] defines justice as an order, a balance established on the basis of an idea of harmony, moral in its substance, externally in its manifestations. J. Dabin[6] sees the matter of justice in *suum cuique tribuere* and considers that the respect of the physical and moral faculties of man and of the goods acquired through this faculty falls within the notion of justice. Le Fur[7] also sees justice in the respect of human personality, to which he adds that of social groups. Ch. Perelman defines the concept of justice through equality as a principle of action after which members of the same essential category must be treated equally.

Given the fact that justice implies equity, we should track their connections. According to Romanian Encyclopaedic Dictionary, equity is not interpreted as justice, but as impartiality, honesty, humanity. Though, justice is fairness. The equitable word comes from the Latin *aequitas* which means: match, justice, temperance. According to Plato[8], equity is the state of the one who is ready to yield from his rights and benefits: moderation in business relations; the right attitude of the rational soul to what is beautiful or ugly (good or bad). For the romans, *aequitas* meaning gets close to the meaning of *law*. After Cicero, *aequitas* is confused with civil justice. According to Celsus, law is the art of good and equity (*jus est ars boni et aequi*). Generally speaking, to the Roman *jurisconsultum*, *aequitas* appears as the goal and ideal of law.

N. Popa[9], for example, portrays equity in unison with justice as a whole director. Gh. Mihai and R.

[3] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 128-129
[4] Traian Mînzală. *Studiu asupra principiilor dreptului* (Constanţa: Editura Muntenia, 1996), 48
[5] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 218
[6] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 200
[7] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 75
[8] https://plato.stanford.edu/entries/moral-character/ (accessed 24.02.2018)
[9] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 125-127

Motica [10] argue that the principle of justice is dimensioned in legality, equality, equity and good faith, *a priori*, but have characterized justice as "unmistakable in good faith and equity". To avoid suspicion regarding the statements of the authors Gh. Mihai and R. Motica, we find the rigorous explanations in the same source. Equity is proving to be just one of the three components of justice in the sense of principle that bases any system of law. The other two complementary elements of equity are duty and direction. The principle of equity is no other principle than justice, but justice itself is in consensus with good morals. It blunts formal legal equality, a humanization introducing into the legal systems in force the categories of natural morals, from which the justification is also an intimate and in-freedom doing.

M. Djuvara[11] points out that the logical elements of the idea of justice are: bilaterality, parity (initial equality), reciprocity (initial equivalence), exchange and remuneration. So, justice would involve two elements: the ideal one and the other of practical nature. The ideal criterion is good will. Good will, as a universal and spiritual order, is the greatest virtue, according to M. Djuvara. The universal order is transformed into the human consciousness in the form of a principle of morality that directs everything. The virtuous man is the one who conceives the good intention and, implicitly, the justice, therefore, will conform to the universal order, it will fit into the universal harmony. The practical criterion of justice is equity itself that promotes ideas of balance, proportion, safety and order or, what M. Djuvara called the *logical elements of justice*. Applying the law is centered on the principle of equity, aiming at diminishing the gap between "what is" and "what must be," pushing the real to the ideal. Equity would be the golden means that reconciles the demands of absolute justice with the imperfections of positive justice. The point is that where justice is done, equity is required. Positive regulations, even if the area of coverage, revelation, and attachment do not cope with perfect ideal justice, yet equity is not ignored in the positive law. It must therefore be that justice, without leaving the ideal, seek in fact, in the light of the historical circumstances, the means best suited to perfect society. But as society is far from perfection, this achievement is always a compromise, in which the ideal principle appears to be reduced.

According to I. Dogaru, D.C. Dănișor and Gh. Dănișor[12], the legislative policy is a part of the legal policy that establishes the techniques, methods and principles of normalization in order to achieve the legal system finality. The purpose of the legislative policy and the general legal ideal of the legislator is the common good, respectively, there are no real laws than those which suspect the public good of the state. From the point of view of the legal conscience of the legislator, the purpose of the legislative policy can be transformed. Thus, the rise of the goal is determined by the approximation of legislative policy to high morality. Any better lawmaker proposes to his laws a unique purpose - the supreme virtue, that is perfect righteousness. However, the legislator will take all the trouble to investigate and establish measures to pursue purely the morals of a state. Conversely, diminishing the scope of legislative policy is dependent on minimizing the morality of the legislator. If the laws whose sole purpose is the interest of some individuals and not the state, it means that justice is nothing but a word. To avoid extremes in setting the finalities of legislative policy and to sensitize the legislator's conscience, the great Plato[13] recommends the legislator to ask himself often: "Where do I want to go now?" And "if such a mood occurs, am I not mistaking the purpose?" So, the legislator's activity is three-dimensional: cognitive, axiotheleological and praxeodeonic.

The issue of justice has been debated in philosophy for millennia and it has remained an elusive concept to define, while putative definitions have proven to be divisive. Michael Boylan, following Rawls, describes justice as fairness. Fairness includes sometimes treating people in the same way and sometimes differently. He gives the example that if everyone in a family loves chocolate cake equally and, other things being equal, the impartial way to divide a chocolate cake in the family is to give each member an equal share[14]. Judith J. Thomson[15] and R. Simon[16] have discussed the issue of preferential hiring as something that could be demanded by justice. Here the argument was whether or not it is fair to hire people on the basis of certain criteria, such as gender (in the case of women), or race (in the case of blacks), because it would be like giving back to them what they have lost on account of the treatment they got because of their statuses in previous social dispensations. Justice is balancing the scales, where each person has access to what they have the right to without impediment.

For Plato, justice is at two levels – in the individual and in society. An individual is in a state of equilibrium when the different parts of their humanity are in harmony with each other, working together for

[10] Dicționar enciclopedic român, Vol. III. K-P. (București: Editura politică, 1965), 131

[11] Mircea Djuvara, Teoria generală a dreptului (enciclopedia juridică): Drept rațional, izvoare și drept pozitiv (București: Editura All,1995), 401

[12] Dicționar enciclopedic român, Vol. III. K-P. (București: Editura politică, 1965), 84

[13] Platon. Legile (București: Editura IRI, 1995), 400

[14] Michael Boylan, *The Future of Affirmative Actio* (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 264

[15] Judith Jarvis Thomson, *Preferential Hiring* in M. Boylan (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 247-252

[16] Robert Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson* in M. Boylan (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 253- 255

the benefit of the person.[17] This is possible when the different parts of the human being do their individual duties, without getting into the way of the others. For example, as a rational animal, a human being must act when reason has deliberated and influenced the will to be drawn towards the reasonable thing and the emotions have also come along as per the dictates of reason. A person who acts from emotions and reasons afterwards, is usually in trouble because he is not behaving *qua rational*, but *qua emotional*, which is not their nature, hence misbalance/disequilibrium that he calls injustice.

Likewise, in society every person has a role to play, for the benefit of themselves and society at large. Disequilibrium will result when the different members of society get in each others way; when leaders steal and rule based on their selfish whims and workers abandon their posts in pursuit of pleasure, and when they value and reward behaviours that have no value to society there would be chaos, which leads to unfair treatment of other members of society and indeed, everybody. Justice is when rulers do what is good for the state and lead the country to a life of fair livelihood.

The theme of justice is also found in Immanuel Kant, who starts by cautioning the question "what is justice?"

Can be just as perplexing for a jurist as the well-known question ―What is truth? - is for a logician, assuming, that is, that he does not want to lapse into a mere tautology or to refer us to the laws of a particular country at a particular time. A jurist can, of course, tell us what the actual Law of the land is (*quid sit juris*), that is, what the laws say or have said at a certain time and at a certain place. But whether what these laws prescribe is also just and the universal criterion that will in general enable us to recognise what is just or unjust (*justum et injustum*) – the answer to such questions will remain hidden unless, for a while, empirical principles and searches for the sources of these judgments in pure reason are abandoned[18].

He goes on to explain that, in relation to obligations, justice is about the relationship of people's actions as they affect each other; people's wills in relation to each other and lastly, the relationship of the two wills as autonomous and accommodative of each other in accordance with a universal law. He concludes that justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom. Justice is a universal principle, according to him. Every action, he argues, is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law. What he means is that every individual has the freedom to act in their own interest and they should be willing to grant that all other free beings like them have the same right. Every person has an equal right to free will. I am free to bind you to what you can bind me to and vice versa. What we are each bound to, can and should never be something we are unable to attain.

3. The phenomenon of globalization

In the last years two phenomena, constitutionalism and globalization, have considerably contributed to changing the appearance of our legal systems. The two are of relatively opposing natures: constitutionalism represents the submission of political power to law, and its scope is that of state; globalization, in contrast, represents the submission of political power to economic power and, as its name suggests, has a scope which goes beyond state borders.

Similarly, with regard to globalization, a distinction between the phenomenon and its legal conceptualization needs to be drawn, that is to say, between the legal changes which arise with globalization and the way these changes are translated into theoretical terms. The notion of globalization is relatively imprecise. As a starting point, one could use a very broad notion, such as Steger´s: "a multidimensional series of social processes which creates, multiplies, gives rise to and intensifies social interchange and interdependence on a global level, while, at the same time it gives rise to an ever growing sense of connection between the local and the distant"[19]. This is, approximately, the notion which many social scientists take as a starting point when they hold that globalization can be described as "the tendency towards a growing interconnection and interdependence between all countries and societies in the world"[20]. It is a process whose engine is international trade and capital flows and which also incorporates aspects "of a social, cultural and, of course, technological nature". If one takes this approach, law can be seen as a recipient of those great changes; not in the scope of causes, but in that of the effects of globalization and, thus, it is claimed, "this dynamic is so strong that it may be provoking a certain degree of obsolescence in legal and political institutions"[21].

Moral justice is important in making philosophy relevant to globalization. In short there should not be any globalization if there is no justice. Justice demands that globalization be carried out justly; that is, fairly without any violation of moral rights. Justice is different from legality, even though the latter

[17] https://philosophynow.org/issues/90/Platos_Just_State (accessed 24.02.2018)
[18] Immanuel Kant, *Critica rațiunii pure* (București: Editura Univers Enciclopedic Gold, 2009), 33-35
[19] Manfred B. Steger, *Globalization: A Very Short Introduction* (Oxford: University Press, 2003), 13
[20] ibidem
[21] ibidem

sometimes is necessary for the former to take root[22]. However, it is clear that laws at local, regional and global levels can be used to circumvent justice as well as to promote it. The major problem with globalization is the possibility of those who are powerful to enact laws that favour them. They would then do things that are legal and yet unjust. The United Nations Organization, for example, can be used by powerful members to do things that are not good for some communities even though they are legal under the organization's regulations and laws. This is very clear in the case of trade. Financial globalization increased the flow of funds across countries, thereby creating linkages that go to capital markets of the world. This would potentially be good for the people, as they may have access to funds, including additional international funds for their countries. Governments of the third world countries are not able to operate, because they are under restrictions exerted by the IMF, World Bank, WTO, OECD and the G8[23].

It is demanded that they globalize; technologize; drive competitors out of business (monopolize) or face the same; liberalise the national market. Any government that does not obey these directives faces dire consequences, such as paying high interest rates on their loans and being denied access to capital. When nation states try to protect their fledgling companies they face international sanctions and the multinational companies can simply decide to pull their investments out of the said countries.

Increased concentration of capital has put excessive, in fact uncontrollable power in the hands of a small group. A few hundred of the world's largest industrial firms control trillions of dollars worth of productive activity. These companies' veto can be enough to hold up all sorts of important political decisions. Financial markets have become the world economy's judge, jury and policeman. National governments themselves have become paralyzed and they can take measures that are not palatable for their citizens in order to honor the requirements of some agreement with an international body, such as the Maastricht Treaty. Globalization becomes, in this way, an alibi for lack of political imagination, abhorrence, social breakdown and antisocial policies.

4. Adapting law to globalization

In relation to obligations, justice is about the relationship of people's actions as they affect each other; people's wills in relation to each other and lastly, the relationship of the two wills as autonomous and accommodative of each other in accordance with a universal law. Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom. Justice is a universal principle. Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law. Individuals have the freedom to act in their own interest and they should be willing to grant that all other free beings like them have the same right.

The idea probably underlying the above approach is that the globalization process moves at different speeds in different spheres of society (and, as a result, the awareness of the phenomenon differs depending on the sphere in which it operates within the social reality). In this way, for example, Laporta[24] states that with respect to ownership law and to criminal law "no or hardly any legal globalization exists (...). Financial capital can fly over borders, but legal entitlement to the property of this capital remains under the wing of domestic law (...) crucial aspects of social life and the economic activities of the huge majority of individuals and corporations which inhabit the globalization planet happen to be still regulated by domestic legal norms. Communicative, economic or social globalization are not sufficiently ruled or subjected to norms". Moreover, in his opinion, "the disconnection between the undeniably global nature of many actions and economic activities, and the prevailing private and state nature of the legal norms which support them, produces many perverse consequences which are at the basis of much of the discontent globalization has created". Is this true? It depends on how you look at it.

It is true if we regard law essentially as state law and international law in the classic sense: a law whose main players are fundamentally states. However, perhaps it is not true (or at least not as true) if instead of focusing on "official law" we focus on the legality coming from informal or more or less informal entities. The fact is that many authors believe that the outstanding feature of legal globalization consists in the privatization of law, in the same way that, in more general terms, globalization has resulted in a trend toward the privatization of what is public. The center of gravity has passed from the law, as a product of the state´s will, to contracts between individuals (even if those "individuals" –or some of those "individuals"- are the big multinational companies). This goes hand in hand with a growing (and relative) loss of state sovereignty, as a consequence of the advance of both supranational and transnational law. An example of the first, which is commonly put forward, is the existence of a European law which implies that a great number of the legal norms in force in the European Union are not state norms or are norms which are significantly conditioned by supra-state norms. And what is often put forward as an example of transnational law, is the existence of a new *lex mercatoria* which regulates

[22] Herbert Lionel Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1978), 56

[23] http://www.worldbank.org/en/topic/poverty (accessed 25.02.2018)

[24] Francisco Laporta, *Law and justice in a global society* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 235-236

international trade and which is not made either by national states or by public institutions of an international nature, but instead by the major law firms. The main figures in globalization law are no longer legislators, but rather judges and experts in law not occupying public office.

It is said, moreover, that a new type of law has appeared with globalization – soft law- in which resorting to coercion is less important than in the case of state law. This can be seen in the tendency to favour conflict solving mechanisms (such as mediation or arbitration) which (in contrast to adjudication) are not of an obligatory nature, since they suppose the acceptance of the parties' (who are the ones that appoint the mediators or the arbitrators). It can also be seen in the importance of legal bodies such as the World Trade Organization, regulated by norms and procedures which are different to those existing in classic state law. In the same way, it is held[25] [Ferrarese 2000] that law (globalization law) no longer consists exclusively in norms (in orders), but instead it is held that many of the behaviour rules contained in this "soft law" seek to guide conduct in a flexible way or without trying to impose themselves through coercion: let us, for example, consider the European directives or the growing importance of ethical codes as auto-regulation mechanisms. All of this leads in the end, to the traditional limits of law losing definition: not only in relation to morality and politics, but also in relation to the traditional distinctions between private law and public law or between internal and external law.

Thus, nowadays, elements of private law, such as negotiation or the concept of private interest, play a role in the context of public law: consider, for example, "plea bargaining" in criminal law or "lobbies" as institutions which articulate private interests in the legislative process. What is more, as we have already mentioned, European law limits the internal law of European states and, at the same time, it is usual to speak about a "dialogue" between European and state jurisdictional and legislative bodies; in such a way that law no longer appears as a result of an imposition laid down by a superior, but rather as an agreement reached "from below". Consequently, the function of law is no longer only (or so much) one of prescribing, directing conduct, but rather that of providing ways of acting; its nature is instrumental more than political.

Well, all the above can serve as an argument to show that globalization has indeed had a significant effect on law, transforming many of its institutions, giving rise to new forms of juridicity, modifying the classic functions of law, etc. It is, however, also very important not to lose sight of the fact that law has not only suffered the effects of globalization but has also played a causal role in the process; in other words, all this interchange and interdependence which takes place on a global level –which define globalization- would be impossible if the necessary legal instruments had not been present. Without law (or without a certain type of law) we would not have globalization, and neither would capitalism or market economy existing without the legal institutions which are characteristic of the modern state. So, in relation to globalization, the legal theorists have reacted in different ways, in principle, in accordance with their political tendencies. Thus, those who could be considered to belong to the right political wing spectrum are also those who evaluate the phenomenon (the changes which have taken place in law) in a more positive way. After all, what globalization has meant until now is the victory of neoliberal ideology. One of the most illustrious supporters, Hayek, held that the order which could be found in complex phenomena was of two kinds: created and spontaneous. Spontaneous order is the unsought result of an evolutionary process whose main indicator is the market. The superiority of the market over any other organization of a deliberate type is due to the fact that human beings, in pursuit of their particular desires (whether egoistical or altruistic), make it easier for other people who, generally speaking, will never even meet, to reach their goals. Law´s *raison d´être* is, consequently, an essentially instrumental one: its mission is to contribute to the maintaining of this spontaneous order[26].

Globalization, then, as we said before, essentially means this, the subordination of politics to the market, of the law (or of the treaty) to the contract, which takes material form in the ideal of deregulation: a more globalized economy with fewer ties and, thus, less regulated by legal state norms or by international law norms. It should, however, be clarified that "deregulation" does not exactly mean that rules do not exist or even that fewer rules exist than before. It means, rather, that a type of rules (let us say, those of a public nature) have been substituted by others of a private nature. And this is precisely what causes the phenomenon of globalization to be seen with considerable scepticism from the stand point of a left side ideology.

The liberalization of the economy – deregulation- has gone hand in hand with a lack of measures guaranteeing human rights, particularly, social rights. Perhaps one should remember that, according to Hayek, social justice is one of the greatest threats to western culture, a prejudice of tribal nature, lacking any rational or moral support. Economic globalization has increased world wealth[27], but only at the price of deepening inequalities between countries and individuals and leading to a deterioration of the environment, which could have irreversible consequences for future generations.

Altogether, the law of globalization is clearly an undemocratic law; the loss of state sovereignty has meant a step backwards for democracy, precisely

[25] Maria Rosaria Ferrarese, *Le istituzioni della globalizzazione* (Bolonia: Il Mulino, 2000), 11-13

[26] Caridad Velarde, Hayek, Una teoría de la justicia, la moral y el derecho (Madrid: Civitas, 1994), 261

[27] http://www.unicef.org/mdg/index_childmortality.htm (accessed 25.02.2018)

because the scope it operates within is that of the state. And if this is the situation, then, it is logical that one is rather pessimistic when suggesting a possible solution. After declaring his scepticism regarding global law´s chances of achieving the rule of law, Francisco Laporta, comes to the conclusion that "only processes like the European Union´s seem to meet the precise requirements needed to incorporate the ideal of the rule of law"[28]. Therefore, the solution cannot be found in "transnational private networks in a supposedly anomic world", but rather in "the construction of political units and supranational legal units". However, in his opinion, the legal model to be followed is not exactly that which we previously understood as constitutionalism but, instead, that of a more or less classic state in which the rule of law operates; a law based on rules which derive from a state or a supra-state authority, but which possess coercive backing and allow the advantages of the rule of law to be guaranteed in a broader scope than that of state.

Luigi Ferrajoli, for his part, defines globalization as "a gap in public law" and supports the need for a "world constitutionalism". The "extension of the constitutional state paradigm to international relations" implies, in his opinion, "the greatest challenge posed by the crisis of law and state to legal reason and political reason" and, moreover, represents "the only rational alternative to a future of wars, violence and fundamentalism". According to him, there are no "reasons for optimism", but not because it is a question of a utopic or unattainable program: "it is simply not wanted because it conflicts with the prevailing interests"[29]. Juan Ramón Capella[30] makes an even more pessimistic diagnosis of the situation. As he sees it, what really governs the globalized world is "business, military and political technocracy which takes the role of Plato´s Philosopher King and of his Nocturnal Counsel". Democratic institutions submit and subordinate themselves to this new imperial power [that of the military-industrial conglomeration; that of the big multinationals; that of the experts on financial capital management, on the administration of the big industries, on the creation of public opinion, on the economic, political and military adjustment]. On a daily basis, democratic procedures turn into forms lacking any content, social rights vanish, political rights become increasingly inefficient, except in the submission to global power. In addition, new institutions appear and remain beyond the reach of the exercise of political freedom.

In other areas of law, the incidence of supra-state or transnational regulations derives, simply, from what is demanded by the nature of things. International trade, the internet, migratory flows, ecology or terrorism are phenomena which cannot be regulated (or, at least, not efficiently) in the national scope and which are also not covered by international law understood in its classic sense. It is not, therefore, a question of whether law has ceased to be a state phenomenon but rather one of accepting the fact that juridicity does not only exist in this scope; there is also a suprastate (and infra-estate) juridicity, whose importance is becoming greater every day. Yet, also, insofar as the contract constitutes the typical form taken by juridicity in the scope of globalization, law, logically, tends to be seen less as a product of a political will and, instead, what takes on more importance is a vision of law as a means for obtaining certain ends, as a mechanism of social construction.

The direction in which globalization is causing laws to develop seems to go against a positivist conception of law. It seems to me that law tends to shape itself and to be seen by those who practise it, not so much, or not only, as a system, as a set of preexisting norms, but rather as a practice, as a procedure or a method used in order to reconcile interests, to solve conflicts, etc. This means that the limits of what is juridical disappears to a certain extent, and also implies a new way of understanding the function of science, of theory and of law: it is a question not so much of describing an already completely determined object (in a more or less abstract way), but rather of taking that (certain previously existing materials) as a starting point and showing how they can be used to carry out this practice to achieve certain goals.

5. Morality – in antithesis with "the deity" of globalization

The globalization phenomenon clearly shows the growing juridification of our societies and how wrong it is to take an interpretation scheme of social reality in which law is made to play a subordinated role as a starting point. As we know, this is what happened with the classic Marxist scheme[31], in which law belonged to the superstructure and not to the social base (which is considered to have a determining role), and this is, very probably, a prejudice which remains active in the minds of many social scientists. The result is an undervaluing of the role of law, which implies risks of both a theoretical and a practical nature. Theoretical, because it is impossible to understand our societies, including the globalization phenomenon, if one lacks a certain type of legal education. Practical, because law is, at the very least, a premise for the achievement of the most essential values in social life; to not take legal aspects sufficiently into consideration implies seriously putting at risk the achievement of these values. It is, naturally, not a question of not knowing the social conditioning (which is particularly economic) of law. It is a matter of understanding that economic, legal, cultural, etc.

[28] Francisco Laporta, *Law and justice in a global society* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 25
[29] Luigi Ferrajoli, *La crisis de la democracia en la era de la globalización*, (Granada: Anales de la Cátedra Francisco Suárez, 2005), 50-51
[30] Juan Ramón Capella, *La globalización: ante una encrucijada político-jurídica* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 23
[31] https://www.britannica.com/topic/Marxism (accessed 24.02.2018)

elements constitute a complex unit in which a constant interaction takes place. Thus, law –or certain legal instruments- has contributed to what we call the globalization of our societies but, at the same time, globalization is causing legal systems and the conception of law to change.

A consequence of this way of seeing things consists in recognizing the ambiguous role played by law in our societies: law is equally essential in processes of exploitation and in those of emancipation. The alternative to the so called "deregulation" is not simply the legal regulation of a certain kind of relationships (which are, in fact, regulated legally: by means of private law –contractual- schemes), but rather its legal regulation according to a certain kind of moral and political standards. In other words, we are, one could say, "condemned" to live in legal societies, but the law of our societies (and, as a result, society itself) can take many different forms[32].

And it is here where the concept of human rights, understood as a set of criteria which inspire legal practices, plays a fundamental role. Human rights are founded on morality, yet not on just any morality, but on one of universalistic nature. To deny that certain universal moral principles of an objective validity exist is, in my opinion, a serious error which has been made by a certain left side school of thought, influenced perhaps by two circumstances. Firstly, because in Marxist tradition (a tradition set in motion by Marx himself) morality (and law) was considered to be a part of ideology, in such a way that moral truths could not be said to exist and neither could any "rational" discourse on morality consisting in anything other than the "unmasking" of its deceptive nature. Secondly, because the language of moral truths and of absolute moral values is the language of religion, of the churches: secular, enlightened and rationalist thought – it is believed- leads inevitably to relativism in moral scope.

Even before the current surge of globalization, moral considerations have had a strong foothold in societal problem arenas that were largely "forgotten" by official and regular politics: protection of the natural environment, poverty, injustices within the justice system (e.g. small action groups against Transnational Corporations, the predicament of homeless or stateless people, illegal immigrants etc.), animal rights, protection of minorities and many other issues of "corruption" in the border zones between the regular operating modes of the sub systems of society. These moral issues have a strong case when they are carried forward by individuals for individual reasons. They turn problematic when they become entangled with the standard operating procedures of modern society, for these procedures demand the transformation of moral issues into legal cases. The crucial argument is that no individual, no hero nor villain, however urgent or singular he or she perceives their individual causes to be, can stand above the common man - as represented in the democratic legislature.

The situation is different on the global level. Here moral arguments and moralities play a prominent role because there is no overriding political and legal system providing binding decisions for a global constituency. Hence there is ample room for other ways and means to influence public opinion and frame collective action against all kinds of perceived evil in moral terms.

In spite of its paradoxical constitution, the global moral regime has real effects and consequences for global governance. It highlights the fact that there is no global "modern" politico-legal regime, so a regression to premodern forms of moral governance seems less offending. It points to the predicament of heterogeneous and even clashing religious and moral fabrics of different communities/societies in the world that somehow are joined or coupled together to form a global level of moral reasoning. Of course that underneath this broad umbrella, the differences and their under lying conflicts of interests persist. They impose dynamics upon the moral regime that lead to generalizations on the verge of self-evidence and banality - global justice and freedom for all or similar formulas that necessarily are deprived of any specific meaning. These over-simplified formulas depend on equally simplified images of evil. After the fall of the "empire of evil" the current culprits are perceived to be, once more, imperialism, neo-liberalism or capitalism at large. This self-propelling trivialization seems to be unavoidable since the idea and the regime of global morality conjoins two entities that contradict each other. On the one hand morality is having its legitimate function as a premodern form of integrating close communities like tribes, clans, villages or ethnic groups along the lines of simple, self-evident truths handed down from creator-gods or ancestors. On the other hand, globalization forces this elementary mode of governance on a level that has long lost all the constituent ingredients of a "community" and is even beyond the scope of modern national society.

As globalization connects people, it also raises associated responsibilities between them. Until recently, the interests in justice among political philosophers and social ethicists was mainly focused on the nation state. However, this is no longer feasible. Since economic globalization affects how wealth and power are distributed globally – and the gaps between the global rich and the global poor widens - it has become indispensable to discuss social ethics in a global context and to develop principles of global justice. Global justice, therefore, entails an assessment of the benefits and burdens of the structural relations and institutional arrangements that constitute and govern globalization.

Kant's explanation of the freedom enhancing nature of the law says if freedom means individual autonomy and self-determination, namely, recognizing

[32] https://www.oxfam.org/sites/www.oxfam.org/files /file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf (accessed 25.02.2018)

only the authority of one's own will, there must be a technique for communicating that will between individuals on the one hand, and between individuals and the public power on the other. Law is needed for legislation to exist, and legislation is needed for self-determination to be possible. Law's virtue does not lie only in law-application. It resides equally in legislation as the expression of a community's self-determining will.

The predictability or stability brought by law is not what made Kant a legalist. Clearly, the ancient regime had been stable and had acted predictably for a long, indeed too long a time. It may have acted arbitrarily too, but that was not the main problem. The problem was its consistent reliance on social hierarchy, and the suppression of freedom from the bulk of the population. This is what resonates in the current experience of globalization, and in the sense in which fragmentation, deformalization and empire seem to undermine individual autonomy and communal self-determination. In fragmentation, law emerges from expert-guided "regimes"; in deformalization, it transforms into administrative compromises between powerful stakeholder groups, and in "empire," it collapses into domination. The worry about new global law reflects concerns about the absence of structures of political representation, contestation, and accountability, of a public sphere institutionally linked to global power. The present concern about freedom spells worries about autonomy, understood as self-legislation. Whatever the managerial mindset has to say about the difficulties of effective governance today fails to address the sense that these difficulties are undermining freedom, in the sense of leading one's life only under the authority of one's own (good) will.

Thousands of people have had their lives destroyed by the activities of multi-national corporations. Oil spills in Nigeria and gas leaks in India have killed, maimed and caused lasting environmental damage. Yet, these people and their families have struggled to hold the perpetrators to account and receive damages to ameliorate their suffering. This lamentable situation could be addressed by consensus between states around the world to develop a treaty that ensures human rights violations do not go unpunished (or, at least uncompensated). In the 21st century such a treaty is both a legal and moral necessity.

After the devastation of the Second World War and the horrors of the Holocaust, the mood was ripe to create an international order with certain basic moral principles at its core. Human rights were the key concept that created a bridge between law and morality. The intrinsic 'dignity' or worth of the human person was seen to give rise to certain entitlements that protect the most basic interests of people: the right to free speech, bodily integrity, food and housing. These protections could only be effective, however, if they created obligations for other actors. The focus at the time was on the obligations of states for realizing human rights.

Since then, the world has changed. Trade has exploded across international borders as have multi-national corporations with a common identity operating in multiple states. The wealth and power of some corporations is said to rival that of states. A legal paradigm of fundamental rights that ignores these significant development will lack the power adequately to protect the rights of individuals. Difficult problems, however, arise in holding corporations to account for rights violations.

First, international law has traditionally been built on the idea that each state is sovereign within its own domain and responsible for holding accountable those who commit wrongs within its domain. It is less well equipped to address wrong-doers who cross borders: where, for instance, an environmentally destructive strategy is planned in one country and executed in another. Suing a corporation in the country where a wrong is committed may thus fail to affect the real center of power or wealth.

This problem is compounded by a second difficulty in that, in law, each corporation is regarded as a separate legal person. As such, a multinational corporation does not in fact exist: it is rather a network of different entities all formed in terms of the laws of different countries. When a corporation in one country commits a wrong, the related corporations in other countries can disavow responsibility for its actions as they are distinct 'persons' in law.

Countries can be ruined economically because some big multinational companies do not like the government. A very vivid example is Palestine which had a democratically elected government that the West did not like. Israel blockaded the country with the support of the West and all the funding was stopped. The Palestinian territory was in a state of war until 2007 when the government co-opted the party that appeared to be acceptable to the West. Israel on the other hand has enjoyed the support of the West, in spite of the many occasions that it did not yield to international law, including numerous United Nations resolutions.

There are many international mergers of companies resulting in more use of technology-based instruments that change the face of assembly lines that produce goods without the benefits going to the workers or local small businesses. High profits and lower production costs usually come at the cost of employee wages and job cuts. In short, the profits of globalization are not necessarily for the benefit of the poor – both as individuals and as nation states.

The so-called developed countries are protectionist when it comes to their national economies and companies. For example, the United States and Western Europe are distorting the agricultural market by subsidizing their farmers. Even amongst themselves they are routing for narrow nationalist interests. For example, the major reason why the British are not using the Euro is because they have been arguing that it is not in their national interest – thus, whatever is not in their

national interest must give way even if it is in the interest of the European Union.

One other evil brought about by globalization is the faith in privatization, whereby public institutions have to be auctioned off to the highest bidders, who in many cases do not pay the due rate for it. The companies can then decide to reduce or increase the workforce, increase or reduce production, depending on whether they will get the maximum profit. Went[33] gives the example of a company that reduced production in France, Holland and Belgium where laws were more favourable to employees, and increased production in China, Vietnam and Czech Republic where laws were unfavourable to employees. For example, they would pay an employee in these countries $1 per day when they could pay $31 in Japan. In poor countries, companies can just threaten to shut down production to force workers to accept slave wages, whilst they themselves make huge profits.

Globalization has also increased migration of millions of poor people who get exploited in the industrialized countries. Mexicans and people from other nations are exploited in the United States. They are illegal aliens who work for slave wages and can be dispensed with without any hassle. Of course this situation is experienced in developing countries, where one country is worse off economically than its neighbours.

The industrial West is currently experiencing shortages in medical personnel. It has now embarked upon a campaign to price away medical personnel from the developing world. We find nurses, doctors and other important medical personnel being recruited to work in the West. The poor countries where these personnel originate are not in a position to match the salaries offered by the rich north. The devastation of malaria, HIV/AIDS inevitably follow in places like Africa. This, of course, is not a new phenomenon, as a lot of brain drain has been going on from Africa and other third world societies to the Western world – the best professors in many academic fields have been transplanted to the West leaving their countries barren, without good academic leadership.

The above account shows the unjust nature of globalization as practised today. Our argument is that even though in many cases the West can point to the fact that they are not violating any international treaty or law, they are, all the same, behaving unjustly. It is the task of ethics to show not only that such injustice is immoral but also to agitate for change in the positive direction.

The possibility of justice for victims of human rights violations diminishes even further when we consider that multi-nationals often commit violations in countries with weak legal systems and where the independence of the judiciary is in doubt. The likelihood of successful prosecutions or claims for compensation is very limited in these jurisdictions.

Taken together, these three challenges create opportunities for multinationals to evade responsibility for wrongs they commit. To address them, it is necessary to devise an international solution which requires the collective action of states.

The second and most ambitious solution would be to establish an international court that could adjudicate cases where corporations violate fundamental rights across international borders. Such a court would be truly global in nature and be able to address the lacunae that arise in international law from the challenges discussed above. It would allow for the development of specific case law in this area and enable a deeper understanding of the obligations corporations owe in relation to fundamental rights. Its construction would need to be thought about carefully to ensure that it is not swamped by cases and that it does not replace the role of national courts.

There are many good reasons for a global treaty on business and human rights: one of the most significant is its ability to ensure that a remedy is found for victims of human rights violations by corporations. The current initiatives at the global level – such as the United Nations Guiding Principles on Business and Human rights[34] – lack the necessary legal status to offer a clear solution.

Objections thus far have been largely pragmatic, recognising significant division between developed and developing states on the need for such an international instrument. In June 2014, the Human Rights Council, in an initiative spearheaded by Ecuador and South Africa, agreed to commence discussions surrounding the possibility of such a treaty. The **first meeting of this inter-governmental working group** occurred in July in Geneva and drew in a range of experts from across the world. The treaty initiative has also stimulated many NGO initiatives across the world which are engaging directly with the people are affected by human rights violations of corporations. It is a great shame, however, that the United States and European Union countries – which profess to take human rights seriously – oppose this initiative. Their opposition increasingly strikes one as simply based on the self-interested expediency of their business interests and displays a callous disregard for the very real suffering of individuals that arises from inadequate regulation at the international level.

In the face of such strong division, it is necessary to stand up quietly and forcefully for why such a treaty is needed. Many visionary international developments – such as the formation of an international criminal court – have emerged in the face of initial division between states because they fill a clear moral and legal vacuum. A new global consensus needs to be forged too on business and human rights: the starting point is to recognize the moral and legal necessity for a treaty in this area. Expediency of the powerful should not be allowed to trump the basic principle of justice: anyone

[33] Robert Went, *Globalization. Neoliberal Challenge, Radical Responses* (London & Stirling Virginia: Pluto Press, 2000), 28-29

[34] http://www.un.org/millenniumgoals/ (accessed 25.02.2018)

whose fundamental rights are violated by the effects of the globalization must be able to ensure the perpetrator is punished and compensates them for their loss.

Conclusions

Taken as a whole, these contributions show that when it comes to the globalization of law, the conventional questions and oppositions are rapidly becoming obsolete. And that legal knowledge is indeed a constellation of theories and practices far more complex and nuanced than legal theorists and practitioners may have acknowledged up to now. If there is any "global legal theory" to look for, it should be understood not as a new grand, single and uniform theory on global law, but as a theory made global through its common objects and new methods. From the above, we can conclude that globalization, philosophy and justice are related. There are possible mutual benefits from globalization for all concerned. Justice demands that globalization be pursued for the benefit of all, rather than being used as a tool to perpetuate the hegemony of the strong North. Justice seen from a moral point of view, rather than a legal, one is based on ethics of human action. The moral philosophical view of justice does call for certain behaviours, some of which are attested to in the many indigenous philosophies which have to be taken seriously at a global level, as competent and useful tools of philosophizing and understanding globalization.

In other areas of law, the incidence of supra-state or transnational regulations derives, simply, from what is demanded by the nature of things. International trade, the internet, migratory flows, ecology or terrorism are phenomena which cannot be regulated (or, at least, not efficiently) in the national scope and which are also not covered by international law understood in its classic sense. It is not, therefore, a question of whether law has ceased to be a state phenomenon but rather one of accepting the fact that juridicity does not only exist in this scope; there is also a suprastate (and infra-estate) juridicity, whose importance is becoming greater every day. Yet, also, insofar as the contract constitutes the typical form taken by juridicity in the scope of globalization, law, logically, tends to be seen less as a product of a political will and, instead, what takes on more importance is a vision of law as a means for obtaining certain ends, as a mechanism of social construction.

The impact of this paper is aimed at any person, academically or not, interested in the evolution of societies worldwide from a moral, economic or legislative point of view. For further research work, we propose to analyze the legitimacy of the law in democratic societies, and especially the legally paradigms as a contemporary way of studying and understanding the law.

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