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Reduction of statehood and widening of inequalities in the period of neo-liberal globalization

Alfonso Villani*[a]
[a] *University of Molise, Campobaso, Italy*

Abstract
In the contemporary world, sociology must deal with a series of issues that extend into the most diverse spheres of knowledge. This 'duty' objectively places sociology at the center of a series of dynamics that can effectively enhance its reflections and ultimately make it a compulsory part of present-day scientific literature. This analysis will examine the specific implications of globalization at the level of social, economic and legal institutions and highlight how globalization is often presented as a process in continuous evolution whose main effect is a profound change in the social representation of distance and political boundaries of the world (Zolo 2004; Cassese 2009).

Keywords: *reduction of statehood; inequalities; neo-liberal period; globalization.*

1. Introduction

To understand the significant social, economic and institutional transformations that globalization produces, it is necessary to briefly examine the characteristics of institutions, in particular, how nation-state societies have evolved since the modern age in light of the role attributed in the past to the factor of space and borders. One of the most attentive observers in this field was probably Michel Foucault. At the heart of his *Institution-Panopticon*, there is an innovative focus on the spatial dimension, almost an obsession with space, which was traditionally neglected (Barou 1983) but later carefully analyzed, particularly in terms of its role in social and legal spheres. Space, for example, was often used to circumscribe state legislative lordship, in the sense that "territory does not mean an extension of land, but a sphere of lordship: it is the sphere of space in which the state implements its right to rule" (Perassi 1958). An image of law strongly connected with space and its rigid boundaries was vigorously presented by Carl Schmitt in *The Nomos of the Earth*, where law exists in a strong and insurmountable structure

*Corresponding author: Alfonso Villani. E-mail: villani@unimol.it

formed by borders, walls, roads and houses, which "make orders evident" (Schmitt 1991). The relationship between law and space, however, is not resolved in the simple search for the place where a rule is applied, but it is the very essence of law that is unquestionably created to coincide with the spatial location of a people, with all its distinguishing features, social and legislative organization *in primis*, and even more precisely, with the presence of its political and social order on a strictly defined and determined part of the earth's surface. Taking possession of space unquestionably becomes the constitutive foundation of the legal system while the precise definition of the boundaries that subdivide space has, since ancient times, had the fundamental and absolute role of supporting the spatial affirmation of law and of rights, including those of citizenship and social belonging.

2. Globlization

However, it is becoming evident that globalization has inevitably affected this historical scenario, as it has effectively and profoundly restructured the space factor. The objective universalism of economic exchanges, inherent in the foundations of globalization, has come to play a crucial role in this context: "right here, in the field of economics, the ancient spatial ordering of the earth has evidently lost its structure" (Schmitt 1991). The question inevitably becomes if and how law without the earth's physical constraints is conceivable and if and how a world society is possible. The answer, however, cannot disregard the fact that the relationship between law, sociality and space cannot be defined unambiguously, since a radically different approach to what has been described thus far is also possible.

We refer to what was first hypothesized by Georg Simmel and later taken up and completed by Hans Kelsen. If for Schmitt the reference to territory distributed among peoples was the constitutive principle from which laws and legal principles derive (Mini 2006), for Kelsen, territory is merely 'an element of the [...] normative content' (Kelsen 1989). Kelsen presents territory as a completely artificial and arbitrary indication, modifiable according to the democratic will (Kelsen 2010) and legislative will: the 'delimitation of validity to a given territory, precisely circumscribed once and for all' (Schmitt 1991: p. 106) is therefore not essential. Space is therefore datum which is external to law, and the norm becomes positive, imposed by the will of people and therefore artificial. Even in globalization, law, which in this case refers to the 'great spaces' delimited by the degree of technical and industrial development, necessarily has an artificial character. With this approach, the loss of territorial constraint, far from jeopardizing the very existence of law and depriving it of its constitutive foundation, prompts a reconsideration of the relevance of pure Kelsenian normativism. As an exegete of Schmidtian texts, Massimo Cacciari observes that:

> the international economy frees itself of European inter-state law which is based on the existence of effectively sovereign states [...]. The victorious language of economics and technology demands a

> single space, a single concept of space, as an a priori form, free of all differences of place (Cacciari 1994: p. 126).

From this point of view, what has been missing with globalization is precisely the connection between the dimension of the democratic nation-state and the scope of economic policy choices, while the antithesis between territorial law and planetary economy is lost with the disappearance of the so-called 'telluric foundation' of law. The nation-state no longer has the exclusive or the natural spatio-temporal dimension of law that it had in the past; it is only one of the many points of reference (Cassese 2007: p. 13). Every action is currently framed in at least three different dimensions: local, national, and global, and there may be other dimensions, as in the case of the European Union, as far as the member states are concerned. In other words, modern states are deprived of the monopoly of legislative production, which had distinguished them from their origins, and instead share the national legal sphere with other social and, above all, economic forces and creators of law, which operate simultaneously at an inter-state level and entertain complex and multi-directional relations with the state, intervening on different dimensions and from different interpretative perspectives (Pistor 2021). Natalino Irti states with great clarity that state territory is no longer a measure, at least an exclusive one, of law (nor, obviously, of politics and economics) and that today, through *inter-se* agreements, states attempt to follow global phenomena and frame them in a specific terrestrial position. Ultimately, it is a matter of choosing an artificial location to identify the applicable law and the competent judge. Irti succeeds brilliantly in grasping the implications of this phenomenon:

> Each of us feels that together we belong to two spatial orders: on the one hand, the concrete places of family origins, the native land, the small or large homelands, the exchange relationships defined by borders; on the other hand, we would concur with Hegel, the system of 'universal dependence', the global expanses of technology and the economy, 'telematic navigation', the silent and objective markets. We come and go, with lacerating alternation, between places and non-places, between earthly positions and pure spaces (Irti 2001: p. 88).

Analyzing his work, however, it is not difficult to see that Irti, like other authors who have studied the repercussions of globalization in relation to law, although faced with the major innovations of the legal system, nevertheless holds firm to his positivist legal credo (Irti and Severino 2001).

If we then wish to examine the role of judicial institutions in a globalized liquid society (Bauman 2010), we must verify how globalization, despite the persistence of the legal positivist creed and of strong advocates of legislative *ratio*, has nevertheless produced, as far as we are concerned here, real legal overcrowding

that has deprived national law of its traditional role as the undisputed mistress of the legal scene (Cassese 2009). In addition, there has been widespread emergence of new sources of law, new legal entities, and new institutions with new ways of operating them, in a complex entanglement with the previous order. It is worth noting that while on a formal level the sources remain virtually unchanged, from a substantive point of view they have taken root in transnational terrain. The institutional transformations, in particular, have resulted on the one hand in a loss of rigidity of the institutions, and on the other, in an increasing responsiveness of these institutions to economic reasons: "What is being drawn before our eyes is an institutional horizon that is much more mobile and indefinite than in the past" (Ferrarese 2000). Moreover, a kind of reticular coordination between the sources seems to have developed, guided to a large extent by practical and concrete facts and needs, making it difficult to predict its development. Analyzing legal institutions in more detail, one can detect, firstly, an increasingly accentuated protagonism of the Courts and praetorian law, a disruptive growth of the discretionary power of the judiciary, in the face of the evident erosion of executive power, and its unprecedented activism, resulting in what has been called 'global expansion' (Tate and Vallinder 1995). This new imbalance of power, which should be read against the backdrop of a more general and widespread crisis of representative institutions, represented the end of the 20th century and the beginning of the current century.

In this regard, the American jurist Katharina Pistor, believes that it is law firms, especially in the Anglo-Saxon world, that succeed in bending and transforming national legislation in favour of their rich clients, with the obvious consequence of ever-increasing inequality: "the holders of resources, with the best lawyers at their service, can pursue their interests with very few limits" (Pistor 2021). Within this line of argument, we cannot fail to take into consideration the decisive contribution by Thomas Piketty, who points out how, precisely on the basis of the historical fact of the increase in inequality, the confirmation of this trend becomes evident based on the vast amount of research and data. He also attempts to provide indications about reforms that could reduce inequality without sacrificing the welfare of citizens. He explains (Piketty 2014) that the overall lesson of the research is that if left to its own devices, the dynamic process of a market economy and private property fuels powerful and potentially threatening divergence factors for our democratic societies and the values of social justice on which they are founded. Piketty points out how the evolution of income inequality, wealth inequality, and the ratio of capital to income in developed countries follows a U-shaped curve, and how the levels of inequality reached at the beginning of the 21st century are similar to those of the *Belle Époque*.

These results call the Kuznets curve into question. Formulated in 1950 by Simon Kuznets, it underlies the hypothesis that economic development is mechanically accompanied by a decline in income inequality. Reality, on the contrary, shows that capitalism is characterized by powerful intrinsic forces of divergence, based on $r>g$ inequality (return on capital > economic growth rate). In

a society with little growth, past wealth becomes increasingly important and tends naturally to accumulate in the hands of the few. During the 20th century, there was a historical exception, in which for the first time in the history of capitalism, inequality was reversed to $r<g$. *As a* result, gradually accumulated wealth very quickly lost importance as industrialization dramatically increased productivity and in turn the amount of new wealth produced. Piketty suggests several policy and legal measures to limit the increase in inequality including, in particular, the creation of a highly progressive global capital tax, accompanied by greater global financial transparency. In his most recent work, *Capital and Ideology* and *A Brief History of Equality* (Piketty 2021), Piketty goes far beyond economics to a legal-sociological analysis of ideologies of power and of economic history on a global level. He says: 'Inequality is not economic or technological: it is ideological and political'. In *A Brief History*, he focuses on 'content issues, in particular, the property system, the tax, social and educational system and boundaries: that is, the social, fiscal and political institutions which could contribute to the creation of a just society". The work is rich in economic and social data and accompanied by scrupulous historical investigation, starting from antiquity, with particular attention to the forms of inequality (Giancola and Salmieri, 2022) and arriving at the present day. He explains that market and competition; profits and wages; capital and debt; skilled and unskilled workers; local and foreign workers; tax havens and competitiveness, do not exist as such. Rather, they are social and historical constructions, which depend entirely on the legal, fiscal, political, educational and social system chosen by the ruling classes and the categories of thought and justification they decide to adopt.

As the Marxist tradition, among others, has affirmed, ever since agriculture has existed and we are no longer hunter-gatherers, every human society does nothing but justify its inequalities: justifications must be found, otherwise the entire political and social edifice risks inexorable collapse. Every age therefore produces discourses and ideologies that do nothing more than legitimize existing inequality, and those in power do nothing more than try to describe it as natural. The economic, social and political rules that structure societies as a whole are constructed by the ruling classes to justify and implement, as much as possible, their privileges.

In contemporary societies, the dominant narrative is the 'meritocratic' one analyzed by Michael Young (Young, 2014) in the 1950s in a book in which Meritocracy is understood in the opposite sense. Piketty summarizes the *storytelling* of neo-liberalism as follows: modern inequality is fair because it derives from a freely accepted process where everyone has equal access to the market and property, and where everyone spontaneously benefits from the accumulation of the richest, who are also the most enterprising, the most deserving and the most useful. But Piketty accurately retorts that: under the guise of personal 'merit' and 'ability', social privileges are actually perpetuated because the disadvantaged groups do not have the codes and dialectical tools by which merit is

recognized. The student population has increased greatly 'but the working class remains almost completely excluded'. The borderline case is that of agricultural labourers. According to statistics, almost identical in all western states, less than 1% of the children of these workers access university education, compared to 70% of the children of industrialists and 80% of the children of professionals. In short, cultural and symbolic privilege is more insidious, because it presents itself as the result of a freely chosen process in which everyone, theoretically, has the same opportunities. The French economist points out that this view, in theory, is at the opposite extreme to the mechanisms of inequality in pre-modern societies, which were based on rigid, arbitrary and often despotic inequalities of status. The problem, he argues, is that this grand proprietary and meritocratic narrative was first constructed in the 19th century, following the collapse of *Ancient Régime* societies, and had even more radical and widespread confirmation worldwide after the fall of Soviet communism and the triumph of 'hyper-capitalism', yet every day it appears increasingly fragile, and the result of an invention not based on facts.

In *Capital and Ideology*, the analysis is widened to include cultures other than those of traditional Western countries. All the world's societies are studied, using a method that draws on the solid economic-statistical basis of property and income studies, arriving at the present day from as far back in history as possible. The choice of the title *Capital and Ideology* derives from the importance Piketty attaches to the ideological arguments with which the various inequalitarian societies have justified their structure and hypostasized their inevitable 'naturalness'. Piketty does not conceal the fact that the cultural and political objective of his research is to provide tools of interpretation and action for the emergence of what he calls an "egalitarian coalition", which aims to overcome capitalism and move towards a just society for the 21st century based on a democratic deliberative and participatory path. This is increasingly happening worldwide, even in the *civil law* legal system with the consequence that "states are not neutral when it comes to deciding which interests should be given priority: possible future gains are more likely to be supported by the state than claims aimed at self-government or environmental protection".This has spread concern about a profound alteration of the democratic rule of law, even prompting, most notably in Italy, some people to speak of 'judicial democracy' (. Portinaro 2003). However, the success of the judicial institution does not correspond to the formation of a truly strong 'jurisdictional state', as described by C. Schmitt. This type of state is not only based on the centrality of the judge, but also on the fact that "law and justice, without the intervention of norms, maintain unambiguous content and are not merely instruments of power and economic interests" (Portinaro 2003).

Beyond a precise definition, some important considerations must be made. In the scenario outlined, it seems unrealistic, if not highly misleading, to believe that there is a centralization of the judicial function and a consequent hegemonic power at supranational level. In fact, rather than moving in the direction of a 'government of judges', the globalization process seems to be advancing towards

"the affirmation of mercenary, partisan and lawyer expertocracies that strategically exploit the opportunities and resources of a litigation society" (Portinaro, 2003). Wanting to identify a category of jurists who are, in today's context, holders of effective power, it is necessary to refer to the now predominant figure of the so-called 'law merchant' (Dezalay 1995), who is present at the large federal or national centers of executive power, as a specialist in the increasingly important roles of political, economic, business lobbying and business litigation. And it is precisely these large centers, true multinationals of commercial, fiscal and labour law, that dominate today's global scene unchallenged, leading to a dominant return of the *lex mercatoria* (Ferrarese 2000), correctly defined by some as 'the transnational law of economic transactions, the most successful example of stateless global law' (Teubner, 1997). In the absence of either State control or a regulatory authority, the management of business is carried out on the basis of contractual schemes that large law firms supply to international legal corporations (D'Eramo 2020: p. 65), with the consequence that "the judge is nothing more than an aide to the natural process of selection of rules in a market society" (Hayek 1989).

Affirming itself in a distinctly positivist legal and institutional culture as the one in Europe, albeit with differences between the various countries, the protagonism of judicial law, however understood, was undoubtedly a surprising trait. In eighteenth-century literature, as well as in the pages of Kant, it is not difficult to locate a plan aimed at the affirmation of universal rights, rights which were founded on natural law and attributed to humans as such and were apparently created in the great constitutions of the late eighteenth century. However, the consolidation of centralized national states brought this process to a decisive halt. Rights were inexorably framed solely in the light of the specificities of national legislations, consistent with the idea of national sovereignty which had been affirmed from the very beginning of the European nation-states, and therefore specific to each individual state. Even a simple agreement on the search for a common legal language has revealed itself to be a goal that is not easily attainable, the legal issues being precisely that upon which the states have most decisively asserted their legislative autonomy.

The current explosion of rights is, at last, concerned primarily with the transnational dimension. However, it certainly does not fail to influence states, thanks to the potential contrast created with traditional conceptions of sovereignty and might therefore appear to be a revival of the old Kantian project. However, it would be misleading not to take into consideration all the changes imposed, in our panorama of reference, by the experience of the European Union and, more generally, of globalization. The prominence of rights, especially human rights, translates into the presence of legal entities that are difficult to locate in the legal positivist system, as they tend not to be ascribable to the sole source of state legislation. Back in 1965, having fully grasped this issue, Norberto Bobbio stated that the expression 'human rights' was rather vague, asking, a few years later,

numerous questions about the actual juridical or non-juridical character of human rights. Bobbio had warned of their fragility, noting that while they certainly lend themselves very well to being the subject of solemn declarations, they turn out to be precarious when they are violated or disregarded, especially when the violation is attributable to states. The almost undisputed conclusion is that we are faced with a sort of new 'imperialism of rights' (Gambino 2001), which inevitably, unquestionably, reshapes the concept of the sovereignty of states and which, while enjoying considerable success, has not been exempt from major criticism, both recently and in the past. Edmund Burke, for instance, understood the salient aspects of human rights as the new protagonists of the post-revolutionary legal universe and, first and foremost, their enormous dynamic capacity. He wrote the following in 1792:

> examples from antiquity, precedents, statutes, parliamentary acts, hold ready underground a mine that will blow them all up in one immense explosion. This mine is called 'the rights of man'. Against these there is no custom that retains its prescriptive value, there is no treaty that obliges; every small detraction of the absoluteness of their claims constitutes fraud and injustice. In the new light of the rights of man, no government should consider itself protected by its long existence or by the justice and mildness of its administration (Burke 1963).

The explosion of the "mine" foretold by Burke was avoided in Europe by bringing rights back to the ratio of legislation, i.e., endowing them with their Enlightenment characteristics of certainty and predictability. Today, with globalization, rights tend to regain new strength, their proliferation, in fourth- and fifth-generation rights, which seem to respond to the increasingly widespread cosmopolitan needs of a world with uncertain borders, cannot but recall that 'mine', and impose on the European-continental legal culture, centered on the primacy of legislation, changes in the old legal structures and a 'deviation' in a judicial sense of the law, as mentioned earlier. In the European context, but more generally in the context of globalization, several supranational and international courts identify themselves as sources of substantive and procedural law, often autonomous and independent of states (MacCormick 1993).

The affirmation of judicial power as a legal source has implied not only a growing production of praetorian law, but also a series of perspective changes affecting the area of law in the sense that law and legal institutions tend to take on a judicial aspect. In particular, we can identify three important changes in perspective which are linked to the growing affirmation of rights: from the national level to the preponderant transnational level; from a normative approach to a 'promotional' approach; from a typically objective perspective to a substantially subjective one. These changes betray a more general transformation of the legal and social landscape that involves not only the spatial and cultural

parameters of law, but also the structure of sources, which becomes, as mentioned, increasingly mobile and effectively uncertain. Considering what has been described thus far, with reference to the changes brought to the social and economic world by globalization, particularly from the perspective of the legal world, the following consideration by Paolo Grossi seems particularly significant:

There are layers and dimensions of the legal universe to be unearthed and enhanced [...]. Law, in its autonomy, strong in its roots in social custom, has lived and lives, has developed and develops even outside that cone of shadow, even outside the obligatory tracks of so-called official law: an inevitable consequence of not being a dimension of power and the state, but of society as a whole. This is not an anarchic discourse, but rather the recording of the actual reality that is the plurality of legal systems (Grossi, 2001: pp. 62-63).

Alongside international corporations, an ever-increasing number of public but also private legislators, other than national ones, operate in multiple transnational sectors and at different levels, making a moist and uniform conception of law totally inadequate. All of this means that trade and finance can flourish everywhere often without considering the laws of the various nation states (Beck 2016.). At this point, the interests of the ruling classes have no need "to bend the hand of the state" to obtain the best legal protection. All they need are good lawyers capable of fully mastering the law of capital, with the experts, i.e., lawyers in law firms, making choices without interference regarding the law that best benefits their very rich clients. One prime example within the European Union is that any private company can choose the state where it pays its taxes, therefore all the major industrial groups and multinationals choose the most convenient tax system. This occurs without any consideration for the infrastructures they benefit from or the national funds they draw on at every opportunity, which are paid from the general taxation of the state where they operate, produce or sell their goods; without any advantage for the state, and its citizens, and above all, without any compunction on the part of the capitalists and entrepreneurs of the moment who take advantage of these laws, or regulations which allow them to do what suits them best, to the detriment and cost, of the general public, and therefore of the majority of the population (Urbinati 2021: p. 11). In other words, the positivist notion of a single legal system, rationally ordered and hierarchically divided, must necessarily leave room, in fact it has already left room, for the plurality of legal systems, whose coexistence is normally ascribable to four spheres: a) the enormous global expansion of the market economy; b) the consequences of this expansion at the level of the eco-system, migratory flows and the socio-economic system of poor countries; c) the question of human rights; d) international criminal law.

If legal pluralism was considered by anthropologists to be a peculiarity of primitive societies, many authors believe, however, that it is also present again in modern societies. It is a phenomenon that can be read from different angles, thus focusing now on the existence of different codes of conduct, both social and

economic, as well as of law, derived from the hybrid nature of a given culture, now on the coexistence in the same space of several partially autonomous regulatory systems, especially the economic order, and now finally on the consequences of a distorted application of law by the state. These three perspectives are the result of a cultural, socio-legal or institutional approach respectively. The main sociology and anthropology of law research on the subject, dating back in particular to Leopold Pospisil (Pospisil 1972), describes the law existing within the state as something heterogeneous, inconsistent, almost a *bricolage* of different social norms with unexpected effects compared to the original intentions of the national legislator. The studies of Sally Falk Moore play a fundamental role in the development of this school of thought. Alongside the so-called 'internal plurality' of legal systems, she identifies the presence of an 'external plurality': different social actors are producers of valid norms, and thus, various normative systems exist not only within a society, but continuously interact with other normative systems, giving rise to what has been defined as 'law as process' (Moore 1978).

However, we are indebted to Boaventura de Sousa Santos for the formulation of a real theory to explain the strongly transnational character of legal systems. He emphasizes that "modern societies are regulated by a plurality of legal orders, interrelated and socially distributed in different ways" (de Sousa Santos 2002), thus clearly and unequivocally raising the issue of legal pluralism, although he prefers to speak of a plurality of legal orders, as an expression of the idea that more than one legal order operates in the same political unit of reference.

The concept of legal pluralism is, as we know, rather ancient. Generally defined as the coexistence of several legal systems in the same geo-political space, it was the subject of study by many jurists, who adopted a purely sociological approach in their research. Of fundamental importance is the reflective itinerary of the jurist Santi Romano and his well-known work aimed at rediscovering the complexity and articulation of the legal universe (Romano 1969). In his concise and fundamental critique of monist representations of the legal system, he tends to relativize the principle of state sovereignty, giving prominence to numerous other actors, hitherto confined and hidden behind the scenes of the legal scene (Grossi 2000). The recovery of an effective reality, truly more flexible and indefinite, but clearly more adherent to historical and social reality, was a clear demonstration that "the various theories on the plurality of legal systems [...] do not emanate from the brains of the authors who formulated them more or less happily but emanate immediately from the reality of things". It is also possible to include, for example, Gurvitch, who focused his attention on the identification of a plurality of 'promulgating centers' of law, both supra-state (international organizations) and infra-state (trade unions, associations). From his reflections, however, a so-called 'false pluralism', transpires, since the phenomena described, far from constituting a different kind of law, different law, were nevertheless absorbed into the dominant legal system, making it in a sense possible to unify. Finally, the sociological study of law cannot avoid facing new and pressing questions that will soon infringe in an

increasingly devastating way, towards those realities which today seemed defined, albeit fluid.

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