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 *Working Paper:*

***Observations on the Making of Normative Spaces***

 ***From the Viewpoint of Historical Sociology***

In the following paper, I would like to tackle some considerations on legal normative spaces – as have been discussed by the participants to the conference – from the point of view of historical sociology. Legal transformations in Asia, I assume here, force the sociologist to reconsider some of his most basic and taken-for-granted tenets with regards to one key question that can be roughly summed up as *the relationship between law and the State*, especially in a context where global and transnational issues have grown more and more important.

Let me tell, first, that I have very little empirical data to offer in this paper. My presentation has been conceived as a discussion of the workshop issues from a different viewpoint, namely from a sociological perspective. It is also an attempt at building a theoretical frame for a research we intend carry out in the next months with Isabelle Giraudoux and Gilles Lhuilier. So, in this respect, many assumptions I am making here are purposefully hypothetical or theoretical: they aim at raising questions and triggering criticism; not at drawing any conclusion whatsoever.

Let me return to the question of the relation between the legal normative spaces on the one hand, and the state in a context of globalization on the other.

As has been noticed by many scholars already, the legal transformations we have been witnessing seem to hint at a significant shift of the role States are playing. To put it very roughly, the question has been raised if there is something like a law “outside the State”. Arbitration would be a case in point. It triggered a heated debate as to know whether modern arbitration could be compared to the old merchant law, whether it was a new “*lex mercatoria*” or even, some scholars suggested, “*a new new lex mercatoria*”.

The key points of this debate can be summed up as follows: arbitration laws are not state-based laws in the sense that arbitrators are able to choose various kinds of law: national laws, international laws and even supranational laws. So because they pick and choose and finally make a blend of different laws, the result cannot be considered state laws in the usual sense. For these scholars, the fact that States are not the key players, or at least are not the only players anymore, prove their view that a global law “outside the State” has already developed.

Now I do not want to comment so much on this issue, first of all because it is a question for legal scholar – which I am not; and secondly because it seems to me that many of these very legal scholars have produced a convincing body of texts to say that the issue was slightly more complex that it appears at first sight. States are not out of the game. And state-based laws are still influential, at least in this respect that arbitration significantly use and refer to national laws. Most of the scholars would state that there is nothing like “law outside the state”. Yet some of them – and I think it applies to what has been said during this conference – would more surely state that there is something like *“law beyond the state”* and that processes like normative spaces hint at a conception of law in which the role of the state should be reassessed.

This is actually my starting point. What I would like to do is to say why I find this legal discussion useful for sociologists who try to understand the transformations of states among the current processes of globalization. My point can be stated as follows: from a sociological viewpoint, the question of the “law beyond the state” matters less for what it says about the law but is extremely useful for what it says about the State. I guess legal scholars, when hearing of the expression “law beyond the state” ask: “what is this law we are talking about?”; whereas a sociologist will take exactly the opposite position and ask: “what is this state we are talking about?”.

Let me be more specific. Sociologists and historians have had a hard time trying to make sense of the transformations brought by globalization. One of the most puzzling questions has been this one: why do States seem to abdicate or to delegate some their most legitimate capacities? It has been noticed, for instance, that formerly rather state-controlled economies – both Japan and France would be cases in point – have been growingly privatized in order to open up to global capital and investments. It has also been noticed with extreme perplexity that States have tended to give up a part of what we were used to seeing as their most legitimate monopoly: that is, to quote loosely Max Weber, the monopoly of the legitimate physical violence. And the fact is that, in recent wars like Iraq or Afghanistan, private security companies played a role to an extent probably never reached in the last hundred years at least.

So I think these deep transformations in the realms of the global economy or of warfare could interestingly parallel the ones occurring in the realm of law. And the question could be put in rather similar terms: how does globalization impinge on the states? Does it make them shrink or do we have to think of this process in a more complex way? Or, again, what does this delegation that we now witness consist in?

I would argue here that the processes of globalization actually force us to look at states in a new way. States are not what we thought they used to be. The problem we have in understanding why states seem to accept so readily to have some of their realms taken up by global or and private actors, come probably from the fact that we do not conceive of states in a proper way. We tend to see the State as opposed to the global – or the national as opposed to the global – whereas this relation is more complicated.

To put it more simply, I think there are two different ways to understand the relation between states and the global order. The first one says that states come first and the global comes only in the second place: that is to say, there are states in the first place and, if we want to understand how the global order has been created, we have to understand how and why states lose a part of their power which is taken up by players beyond them.

But there is also a second way to account for the relation between states and the global, and it goes the other way round. Here we say that the global comes first and states are only second. Thus what is historically prior is global circulation – it can be wealth, money, capital but also ideas and people – and it is only in the second place that nationally-based and geographically-confined areas that we call states have emerged.

It is easy to see that these two accounts of the state are just the reverse from each other. For the first one, because states are the primary players, the theoretical mystery is to understand how they can give rise to a global order beyond them. For the second one, the mystery is to understand how, for instance, global capitalism or global empires can give rise to fragmented nations. Needless to say that the first account is probably closer to our spontaneous understanding of things: after all we see the world through national categories and we express it through languages that we learned at national schools and national universities, etc. But actually, the second account could be more accurate historically and more interesting from a sociological viewpoint as well. Also, it could be heuristically more interesting to understand the legal transformations we are busy to make sense of.

Let me exemplify this idea by referring briefly to two books before returning to the case of arbitration through a third book, written by Dezalay and Garth and called *Dealing in Virtue*.

This idea that we must see the global before the State, has been convincingly expressed by Immanuel Wallerstein. Drawing on Braudel and the Ecoles des Annales, Wallerstein shows that global capital began circulating widely in Europe round the 16th century, as people and ideas had always done before. Yet he shows as well that this global process triggered another apparently opposite process, which is the progressive buildings of nation-states, with boundaries, centralized structures of authority, unified legal frames and so on. This process was second and started slightly later: if important steps took place at the 17th century, it is only at the 19th and 20th century that nation-states became the absolute norm in Europe.

We see that Wallerstein teaches us to conceive of global capitalism and nation-states formation as deeply intertwined projects. The reason, according to him, is that global circulations do need local and constricted frames in order to be fully operative. When the circulation of capital, trade and money reach a certain amount, it needs to follow channels that can be shaped by local authorities only: it needs roads, seaports, unified banking or legal systems or more recently airports and regulated stock markets. All this gave an impetus to the structuring of states and nations: in order to continue developing and to become truly global, capitalism so to say gave rise to localized nation-states. Or, to quote Fernand Braudel, “capitalism only succeeded there where it could identify with the state”.

Let me now turn to another recently published book and called *Empires in World History* by Burbank and Cooper. There the authors offer a fresh account of world political history, starting with the Roman Empire until today’s American Empire, analysing other famous Empires as well, such as the Chinese Empire, the Muslim Empire or the 19th century European colonial Empire.

The book is quite impressive in this respect for it spans more than twenty centuries of political history. This wide account allows Burbank and Copper to draw one conclusion that can be interesting to us: Nation-states, they say, are very recent political phenomena. It is only at the 19th century – and most of the time at the 20th – that they became the norm in world politics. Overall nation states are therefore not older than one or two centuries, sometimes just a few decades. On the other hand, Empires are much older political organizations: they were the most common political organization for centuries. This implied that, for centuries, men have lived in political organizations that were global in scale: for Empires – as opposed to nation-states – were made of various people, each of them had their own customs, beliefs and laws; because their geographical scale, also, was wide, they allowed for wealth and trade to develop and to circulate on several thousands of kilometres. The conclusion drawn by Burbank and Cooper is then twofold: first of all humanity has lived during the largest part of its history in Empires of a global scale; secondly global political organizations existed much before national ones. This conclusion is on line with Wallenstein’s argument, albeit from a different point of view, and forces us to look at today’s nation-states from a different point of view. As said before, we usually tend to consider that nation-states come first and that the global order is so to say the rest, something rather indefinite that come in the second place only. This might be true in terms of the current political legitimacy but, if we follow Burbank and Cooper, this is much more complicated in terms of history. For them, the global comes first and nation-states are a recent outcome only.

This long historical account might at first sight appears remote from the main issues of our workshop; nevertheless, as I would like to show now, it could be important to keep it in mind to understand the historical setting that later gave rise, among other, to international arbitration or legal normative spaces. I took Wallerstein as well as Burbank and Cooper today to build a strong case for this idea that the relationship between the nation-states and the global should be reconsidered. I think that three main ideas should be kept in mind from this discussion:

1. What we call “global” or “transnational” is not something new, a recent outcome of the 21st century process of globalization. The global, on the contrary, has a rather long history, be it in the form of Empires or, for instance, the five centuries old history of the rise of capitalism;
2. Nation-States are rather recent outcomes of human history: no more than one or two centuries, sometimes just a few decades. In this respect, we cannot take fully for granted their claim to be the first and chief locus of political or legal authority.
3. The relation between nation-states and the global must be carefully assessed. It would be misleading to view the national and the global as being opposed to each other. Rather, we should say that the global and the national have been in a constant relation: the global shapes the national as well as the national shapes the global. It is therefore important to acknowledge the complexity and the reciprocity of the relations between the national and the global orders.

I would like to illustrate these various points by briefly tackling some of the findings of one of the few sociological books written on the question of arbitration, Yves Dezalay and Bryant G. Garth’s *Dealing in Virtue, International commercial arbitration and the construction of a transnational legal order.* What I found interesting in this book is that the authors pay a close attention to the ways national and transnational orders are permanently interacting with each other. For instance, they account for the growing importance of arbitration in the past decades in terms of global capitalism and global power relationships, that is to say events that took place in the political and economic fields, such as the decolonization, the oil crisis, the petrodollar megaprojects (and more recently, we could add, the new boom of global trade). They show how national laws appeared powerless to handle the disputes created by international trades and how, consequently, this gave rise to arbitration as a new transnational legal order. They show also how this new global law has impinged on national laws and has pushed many states, sometimes reluctantly, to revise their existing systems of law. So in this respect we can say that the global shapes the national

But, at the same time, Dezalay and Garth show that this new legal order is not disconnected from national orders. That is to say, the transnational is also the outcome of processes that take place inside national frames. Let me take a few examples analysed by the authors. They show, for instance, how arbitration developed following two opposite conceptions. The first conception was the principles promoted by arbitrators that began working in the 1970s and 1980s, the most famous of them being probably Pierre Lalive, a swiss-born arbitrator. These arbitrators were mainly European – continentals we should say – and they created arbitration from the scratch. They had a rather particular approach which was non-confrontational: that is to say, arbitration was conceived as a tool to accommodate both parties as much as possible, to find an agreement that each of them could deem satisfying. Dezalay and Garth named these first arbitrators the “Grand Old Men”.

Younger arbitrators, who began working in the field in the 1990’s, exemplify the second conception of arbitration. They are often British and American or, at least, they work in Anglo-American law firms. They have a more confrontational approach of arbitration, which is less understood as the search for a common solution, than as a way to have one party’s claims to win over the other.

According to Dezalay and Garth, some recent developments in the field of arbitration can be traced back to the oppositions between each of these groups’ vision of what arbitration is. More precisely, contemporary arbitration, they say, is more and more American style, more technical and more confrontational. This can be explained by the fact that the younger generation came to have more symbolic capital and could therefore shape the legitimate tenets of arbitration according to its own practices and understanding of arbitration. To put it differently, they manage to make everybody agree that arbitration should be the way they make it and understand it.

So let me conclude on this last example tackled by Dezalay and Garth. What is interesting is that it shows how a transnational legal order such as arbitration is also shaped by national factors. Being a Swiss arbitrator educated in the 1950s, for instance, does not lead to the same conception of arbitration than being an American-born lawyer educated in the 1990’s. This simple fact should prompt us to ask further questions: how does one become an arbitrator in today’s Japan or in today’s France? What and where did arbitrators study? How did they manage to convert their national expertise into a transnational one? One could ask, also, why is Egypt the leading place of arbitration in the Muslim world? Why are Hong Kong or Singapore so important? Etc.

All this, I think, show sufficiently clearly that the relationships between national and transnational orders are manifold: each of these orders both shape the other and is shaped by the other. The global impinges on the national and, conversely, the national impinges on the global. In this respect, I think that sociologists draw the same conclusion than many legal scholars: there is a law “beyond the State” in the sense that transnational legal orders do exist; but there is no “law outside the State”, in the sense that the global would be antithetical to the national, or that States would be fully out of the game. Quite the contrary, I think, we can understand the global only insofar as we keep in mind the role states continue playing inside it.

This will finally allow me to return to my first question. As said before I think that when we talk of “law beyond the State”, legal scholars will ask first and foremost: what kind of law are we talking about? Whereas sociologists like me will ask: what kind of state are we talking about. Again, this is why these global normative spaces are so fascinating, despite their technicalities, for a sociologist or an historian interested in understanding globalization: they allow us to have a fresh look at what a state is and – maybe – allow us as well to provide new definitions of this state.

At this point I have no clear-cut or definitive answer to give but just a guess. It seems more and more difficult to rely on a conception of states such as the ones given or inspired by Weber. In the Weberian view, the state is always this human organization that successfully claims the monopoly of legitimate physical violence; it can also be according to the definition given by Bourdieu recently, the monopoly of symbolical violence: that is to say, for instance, the state has the ultimate monopoly to say what is right or wrong, legitimate or illegitimate, legal or un-legal and so on.

What is interesting with all these definitions is that they all give a view of the state as being entities that concentrate some forms of power: they gather it, they put it together, they turn the outside into the inside. My guess would be that it is precisely this type of understanding of the state that leaves us puzzled when facing transnational phenomena such as the ones we name legal normative spaces, for instance. Because we are having a hard time understanding that states also do the reverse: they “de-concentrate”, they “de-monopolize”, they are willing to grant private or hybrid actors with formerly states prerogatives, etc.

So this is why our understanding of states is complicated: they seem to do one thing and the contrary. They cling to their monopoly on legitimate violence but they use private security companies. They can put billions of dollars to jugulate the financial crisis but, at the same time, they need the technicalities of modern finance, they need shadow banking, etc. As for the legal realm, it seems: States have their own and clear-cut systems of law; but on the global level, they let a completely different system to develop, where things are blurred, where laws are various and even contradictory.

So let me finish with this question of the state by saying two things:

1. Global legal realms force us to reassess our categories: the national and the global should not be seen so much as fully antithetical, but rather as partly intertwined realms. The global has made the national as well as the national has made the global. In this respect the puzzling question of why states delegate their power to transnational actors should not puzzle us so much: we can assess that there are deep and retroactive connections between the two.
2. Another way to say the same thing but slightly differently would be to say that we should not grant the state with any substantive reality. There is no “being” of the state, there is no stable and enduring reality of the state. Rather states are always changing and moving configurations of power. That there can be a switch or a swing between the national and the global – for instance national and global laws – could be understood in line with this idea that states are nothing but changing configurations of power, located between the global and the national.