

## Governance in Times of *Globalisation*: the Kaleidoscope of the Legal System

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Scamardella, F., 2016. Governance in Times of *Globalisation*: the Kaleidoscope of the Legal System. *Oñati Socio-legal Series* [online], 6 (3), 816-836. Available from: <http://ssrn.com/abstract=2833940>



### Abstract

In the last few decades, the West has been deeply transformed by globalisation; global markets have been replacing national economies and states have been losing their legislative and executive powers. The global economy is imposing its own standards, such as the so-called *Brazilianisation of the West*, consisting of labour changes inspired by typical Brazilian features (low wages, flexibility and insecurity). In such a context, a question arises: how is the legal system changing? Sociology of law has indicated legal transformations in terms of *soft law*, such as *lex mercatoria*, codes of conduct, etc. This informal system seems to constitute a legal kaleidoscope where global and local players are involved, rather than an effective legal system. From this perspective, globalisation can also be considered the legal premise of governance, based on the participation of social parties to policy and law-making processes. The aim of this article is to focus on legal transformations in times of globalisation, stressing the governance approach as a legal kaleidoscope capable of managing social inequalities, different distributions of power and knowledge and the other perverse effects determined by globalisation.

### Key words

Globalisation; *hard law*; *soft law*; governance; legal kaleidoscope

### Resumen

En las últimas décadas, la globalización ha transformado profundamente Occidente; los mercados mundiales han ido sustituyendo a las economías nacionales y los Estados han ido perdiendo sus poderes legislativo y ejecutivo. La economía mundial está imponiendo sus propias normas, como la denominada *brasileñización* de Occidente, que consiste en implantar cambios laborales inspirados en las características típicas de Brasil (salarios bajos, flexibilidad e inseguridad). En este contexto, surge una pregunta: ¿cómo está cambiando el sistema legal? La sociología jurídica ha apuntado transformaciones legales en materia de leyes "blandas", como la *lex mercatoria*, códigos de conducta, etc. Este sistema informal parece constituir un caleidoscopio legal en el que están implicados actores globales y locales, en lugar de un sistema jurídico eficaz. Desde esta perspectiva, también se puede considerar la globalización como la premisa legal de gobierno, basado en

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la participación de los agentes sociales en los procesos políticos y legislativos. El objetivo de este artículo es centrarse en las transformaciones jurídicas en la era de la globalización, haciendo hincapié en el enfoque de la gobernabilidad como un caleidoscopio jurídico capaz de gestionar las desigualdades sociales, las diferentes distribuciones de poder y conocimiento y otros efectos negativos condicionados por la globalización.

**Palabras clave**

Globalización; leyes "duras"; leyes "blandas"; gobernanza; caleidoscopio legal

**Table of contents**

1. Introduction .....	819
2. Globalisation, we presume: What has changed and what is still changing? .....	820
2.1. Globalisation and the law: hard law, soft law. Governing in the network.....	821
3. Governance as <i>Governamentality</i> : the <i>longa manus</i> of the Neoliberal Economy?.....	825
4. From the neoliberal governance to the kaleidoscope of the legal system .....	827
References.....	832

«The question is», said Humpty Dumpty, «which is to be master — that's all» (Carroll 1872, p. 72).

## 1. Introduction

Processes of regulation have changed and are still changing as the result of economic, political and social side effects of globalisation. If developments in terms of globalisation seem to be clear, thanks to analyses given by sociologists such as Beck, Bauman, Giddens, Castells, etc., the phenomenon of regulation and its transformations due to globalisation deserves a better and deep analysis, both because of its complexity and intensity, and because it is still moving. Sociologists often talk of these legal phenomena in terms of democratic states' incapability to manage and respond to transformations of global society. This is also the effect of a contrast strongly proposed by social scientists in the 1990s and 2000s between *hard law* and *soft law*: by contrasting *hard* forms of law with *soft* sources of law, social scientists have described the transition from the archetype of *government* to the model of *governance*, questioning whether a *global law without state* is possible. The model of *government* represents the typical structure of the modern state, utilising a central authority and based on a system of *command-and-control*. The latter represents a flexible form of auto-regulation, based on *soft* forms of law that challenge the traditional form of state.

Even if these phenomena (globalisation, *soft* and *hard law*, *governance* as a model capable of responding to global transformations better than the *government*) had been central in the past two decades, their effects, in terms of social inequalities, neoliberal power, mobilisation of social movements, resistance groups, etc., are still moving and affecting the regulative process. In actual fact, the question is how can we regulate all of these phenomena? How can we restore democracy and social values? The aim of this contribution is to approach these questions in the perspective of the governance model.

Why a *governance* approach?

I believe there are three main, inter-related reasons. In the first instance, the language of governance is a strong contributor to the reconstruction of the debate around social, political and economic structures, as transformed by globalisation and involving the process of regulation itself. Take, for example, the way that global banks are able to influence the markets<sup>1</sup>, or phenomena such as social mobility, consumer associations, or the way in which citizens are now able to resist inequalities produced by globalisation. In adopting a sociological perspective, governance exists in the afore-mentioned dynamics, with the specific aim of analysing how the presence of these stakeholders, their activities, strategies and interactions are re-defining societies and the structures of governing.

Secondly, since what we are experiencing is not a mere contrast between *hard* and *soft* forms of law but the effect of a neoliberal economy that is limiting *hard law*, categories such as power, capitalism, politics and the economy are changing. If we assume that a neoliberal economy allows global production and global capital, giving a greater power (flexibility and freedom) to multinational companies, we must admit that it is no longer easy to distinguish between political and economic spheres. If we take governance as a form of Foucaultian governmentality, we can have a better understanding of these categories and, consequently, of the relationship between 'politics' and 'the economy' in a neoliberal era. Nevertheless,

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<sup>1</sup> For example, Mario Draghi's (the President of the Central European Bank) speech on July 26, 2012 "Within our mandate, the ECB is ready to do whatever it takes to preserve the Euro", adding: "believe me, it will be enough" (Draghi 2012). Immediately, the speculation on financial markets stopped. Or I can refer to the Troika and the way in which it is driving national economies.

this suggests that such a form of governance is not desirable as it appears as the *longa manus* of a neoliberal and imperialistic economy.

Thirdly, and this is my research hypothesis, by using the metaphor of governance as a legal kaleidoscope, I will try to discuss a new way of governing and recovering some democratic elements, such as participation, resistance, dialectics, etc.

The paper will be organised in three sections. In the first section, I will propose a broad sociological review of globalisation with its main transformations, included those concerning the role of *soft law* and the *lex mercatoria*. I will describe these phenomena as the socio-economic premise of a descriptive governance approach. The adopted paradigm is that of the *governance as network*. The metaphor, in part coming from the concept of *network society* (Castells 2000), in part by Bevir (2013), consents to describe the way in which decision-making processes are moving, including virtual networks where all the stakeholders interested in a question can discuss and decide the outcome.

In the second section, I will focus on these transformations using the governance perspective, i.e. a neo-Foucaultian governmentality, trying to point out why it is not desirable to have such a governance. Finally, in the third section I will propose a model of governance as a legal kaleidoscope, arguing that it could represent a good way to govern the global political, social and economic dynamics that are becoming more and more problematic.

## **2. Globalisation, we presume: What has changed and what is still changing?**

In 1999 Richard Rorty (1999, p. 23) wrote:

“the central fact of globalisation is that the economic situation of the citizens of a nation state has passed beyond the control of the laws of that state. [...] We now have a global overclass which makes all the major economic decisions, and makes them in entire independence of the legislatures, and a fortiori of the will of the voters, of any given country”.

The assertion – especially the expression of “a global overclass” – suggests that one of the main features of globalisation has been (and still is) the mix of business and government. The so-called “dominance of economic” (Beck 2001, p. 30) does not exclusively mean the hegemony of the economy on politics; in a deeper way it suggests that a strong separation between these two entities is no longer possible. As a consequence, the governing structure of the state has been deeply transformed. Some scholars, such as Gunther Teubner (1988, 2012), argue that these changes are due to the development of the nation state itself, and not to globalisation; social systems and sub-systems (economy, policy, social spheres, law, etc.) have increasingly become specific and complex, creating the demand for new regulation. In such a fragmented context, the state is not able to follow and rule all of these systems.

The increase of a global economy and a challenging national government is mainly due to the development of a *network society* (Castells 2000), characterised by technology that makes communication and exchanges possible in a virtual space, even if agents are not in physical proximity. Network society has caused the collapse of time and space units; in the net, flows and exchanges are simultaneous (Fortunati 2002, Castells *at al.* 2006).

With respect to these transformations, Rifkin (1987, p. 13) has argued that:

“[...] the computer will help facilitate a revolutionary change in time orientation, just as clocks did several hundred years ago [...] the new computer technology is already changing the way we conceptualise time and, in the process, is changing the way we think about ourselves and the world around us”.

In the network society, the new economy is “global, informational and networked” (Castells 2000, p. 77). This implies that the new economy can be understood in terms of contextual relationships and exchanges realised by people living in different parts of the world, who are likely to be strangers. Technology has increased the speed of the production process. Through technology, the processes of production have been decentralised and the movement of capital, goods and services has been liberalised. “Productivity and competitiveness in informational production are based on the generation of knowledge and information processing” (Castells 2000, p. 124).

The new global economy has replaced national and local economies, creating a demand for deregulation and flexibility in labour standards. The neoliberal economy tries to impose its own standards, such as the so-called *Brazilianisation of the West* (Beck 2001), based on the flexibility of labour standards, the pre-eminence of a system of networks, unequal exchanges and “new forms of subcontracting that offer the prospect of minimising fixed non-wage costs” (Fudge *et al.* 2012, p. 7). As Bauman (1998) has pointed out, the first aim of the new world market is the elimination of every obstacle to the freedom of financial exchanges and the movement of capital. Transnational corporations (the so-called TNCs) look for labour forces in poor countries where taxes are low and where policies of the local governments are not obstructive to the growth of the market, irrespective of human rights’ violations.

If financial exchanges happen in the network space, as a result of new technology, production processes are realised in poor countries - “capital is global, work is local” (Beck 2000, p. 27). Judy Fudge has recently explained, “Commercialisation is a multidimensional process that is transforming labour markets at the local, national, and global level. It refers to the contraction of the standard employment relationship, the disintegration of vertically integrated firms, and the shift in the legal framework for regulating international services” (Fudge *et al.* 2012, p. 5).

### 2.1. *Globalisation and the law: hard law, soft law. Governing in the network*

How do these economic transformations reverberate on state power and law? The fact is that globalisation has eroded the idea of national sovereignty, based on legitimacy by consent, and has established a new politics of markets and networks. The point is not whether governments have disappeared or have renounced their role, becoming less capable of governing, but how the way in which they act (i.e. govern) has been altered.

As Bevir (2013, p. 56) has pointed out, “The process of contracting out fragmented the state by increasing both the range of public agencies involved in public service delivery and the dependence of these agencies on a growing number of private – and voluntary – sector players”. The idea of a *network society*, in terms of regulation, means that state power is dispersed across heterogeneous networks, composed of public, private, and voluntary organisations. The post-war era, characterised by a government model based on hierarchical public authority (i.e. state), seemed to be in decline and replaced by new processes. Therefore, the economic element seems to have replaced the political one of the national states, determining an “economic *world-system*” (Beck 2001, p. 33), “a combination of market and network organisational logic” (Santos *et al.* 2006, p. 7) whose main outcome is profit maximisation. The consequence of these transformations is that new non-state-centred forms of regulation have arisen, showing a capacity of best governing the global economy. As Rosenau and Czempiel (1992, p. 3) point out: “Governments still operate and they are still sovereign in a number of ways; but (...) some of their authority has been relocated toward sub-national collectivities”.

By a broad perspective, these new regulating phenomena determined by globalisation can be described with the word governance, which “evokes a more pluralistic pattern of rule than does government: governance is less focused on

state institutions, and more focused on the processes and interactions that tie the state to civil society" (Bevir 2010, p. 1). It describes the way in which the West, by returning to flexible, adaptive, informal, and networked deliberative processes, is trying to resolve the political and economic crisis.

In the last two decades, these new regulatory phenomena have been described in terms of contrast amongst *hard* and *soft* forms of law. Scholars have argued that unofficial forms of law, based on customs, agreements, corporate acts or codes of conduct, have tried to replace the *hard* legal systems based on the authority of the state's law (Ferrarese 2006, Galgano 2004).

Dupuy (1975, p. 138) argued that the expression *soft law* was first used by the English scholar Lord McNair in his oral interventions. Even if there is no written evidence of the use of these words by Lord McNair, doctrine usually agrees that Lord McNair used this expression meaning *meta-judicial* rules; a set of not *hard* rules, whose force and validity arises from states, international organisations, individuals, public and private sectors' behaviour in recognising and obeying these rules, even if they do not have the force and form of *hard* law. The implication is that it is the spontaneous will of the participants to make these rules effective law, not their intrinsic and formal properties.

Trying to understand the nature of *soft law*, Thürer (2000, p. 454) has identified four features:

- a) *Soft law* does not come from a state's sovereignty.
- b) It comes both from international organisations and private sectors, multinational corporations, NGOs, etc.
- c) The making-*soft law* process doesn't follow formal procedures of production of law, as prescribed by national legal sources.
- d) It produces legal effects when (public and private) agents that used *soft law* spontaneously agree to it, recognising its binding effects.

Scholars agree that *soft law* represents a kind of *graduated normativity* (Weil 1983, pp. 413-415, Fastenrath 1993, pp. 330-332), capable of expressing contribution of different agents moving on the global scene and their capacity to give answers to the dynamics happening in the world. Moreover, it is important to stress that *soft law* does not express a regulatory force for its intrinsic and formal structure, but only because agents spontaneously decide to obey it. Therefore, it is the agents' behaviour to respect and apply it that makes soft law an effective legal system.

*Soft law* originates from medieval times, when merchants, in their avoidance of the application of Roman hard law, returned to alternative legal forms, based on customs and agreements, the so-called *lex mercatoria*, which is defined as a set of private, autonomous and transnational rules that do not come from legislative states. In the global economy, multinational companies have adopted this kind of law, called, because of its origins, *lex mercatoria*<sup>2</sup>.

Is this new phenomenon only a "ghost created by French and Italian Professors"<sup>3</sup> or should we consider *lex mercatoria* as a source of law, *strictu sensu*<sup>4</sup>? Its most

<sup>2</sup> For a clear understanding of *lex mercatoria* see especially De Ly (2001).

<sup>3</sup> Famous expression used against Italian Professor of the Universities and against their colleagues of the Sorbonne. Expression used by Galgano (2004) and by Teubner (2005) too.

<sup>4</sup> For Teubner, it does not matter: *lex mercatoria* is law. The national legislative frame has been broken, national governments are isolated, the Internet is fighting for generating its own legislative regime. What are the consequences? For Teubner, legislative processes have transferred from the centre to the periphery, and this movement legitimates new forms of normativity that will be recognised as judicial processes. The phenomenon of *soft law* shows us how boundaries of law are not so resistant and rigid. No-legislative processes legitimate new forms of law. That's the paradox, for Teubner! However, if we veer away from the Kelsenian and positivist perspective, we can see how new social processes, in their quest for regulation (and in the inability of the old law to manage them with the usual central legislative

important aspect is *flexibility*, which gives rise to the possibility of concluding financial operations in real-time (facilitated by virtual technology), even if the parties involved are in disparate geographical locations and, in all likelihood, completely unknown to each other. *Soft law* and *lex mercatoria* represent a *transnational* legal framework. Rising from the ground up (from the TNCs, MNCs, unions, organisations, law firms, etc.), they avoid the state's legal presence, transcending national boundaries, and challenge formal law by fighting against the national legal framework.

Alan Boyle claims an alternative way to define *soft law*, not based on the contrast with *hard law*. He defines *soft law* as a set of norms or principles, "which, being more open-textured or general in their content and wording, can thus be seen as soft" (Boyle 2002, p. 26). Adopting this definition, we can fully include *soft law* in the law-making process; what distinguishes *soft law* from *hard law* is not the form (since, as Boyle (2010) observes, *soft law* can assume different non-binding forms, including declarations of intergovernmental conference; guidelines of international organisations; codes of conduct; resolutions of the UN General Assembly<sup>5</sup>) but the circumstance that *soft law* instruments are carefully negotiated. In this sense, WTO understandings, guidelines, Secretariat technical notes can also be considered as forms of *soft law*.

In such a context, an urgent question must be answered: is it both possible and desirable to have a global *soft law* without government?

As I have previously discussed, according to Boyle (2010), the main point of the contemporary regulating issue is not the contrast between *hard law* and *soft law*, in terms of binding/non-binding capacity, nor if it is possible to govern without *soft law*. The point is that *soft law*, through *lex mercatoria*, is shifting law beyond the state:

"The main problem of *lex mercatoria* is not whether it is state or non-state law. The main problem is whether its structure, its internal differentiation, reflects that of the political system or that of the economic system. The global political system still represents a segmentary differentiation: it consists, primarily, of states, every one of which must perform essentially the same functions. The economy, by contrast, represents a functional differentiation: the boundaries that matter within the global economy are those between different sectors of the economy, not those between different states. International trade has made the boundaries between states irrelevant – if not for the economy as such, then certainly for the definition of its subsystems" (Michaels 2007, p. 446).

The previous assertions seem to me to be very important for two reasons: (i) Michaels points out the effective moving regulatory target: state is only one of the possible regulatory performers ; (ii) how the global political system is related to the economy. The relationship is ambivalent: on the one hand, politics and the economy still continue to represent different functions; on the other hand, the interdependence of politics on the global economy (and vice versa) cannot be denied.

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processes), new peripheral, informal processes will regulate the new social reality. For more, see Teubner (2005).

Also the Italian Court of Cassation has recognised the *lex mercatoria* a degree of formal sources of law with the sentence nr. 6339 pronounced in 1986 (29, October). The Italian Court has motivated its decision, arguing that the *lex mercatoria* is able to collect international norms, usages and commercial customs and traditions.

<sup>5</sup> Some scholars, such as Mary Footer, also consider WTO practices as forms of *soft law*: "In the WTO context, various forms of non-legal *soft law* include Ministerial Declarations, decisions taken by Members in one of the Councils or committees, recommendations, guidelines, reports, statements, programmes of action and so on. They may also include informal arrangements in the management of the WTO treaty regime, for example 'off the record' meetings, informal sessions and 'non-papers' for discussion among the Members. Such informal arrangements may be used for a variety of reasons such as strengthening Members' commitments to agreement, reaffirming a common understanding about basic WTO treaty obligations, establishing the basis for subsequent treat texts, or other forms of rule-making, or simply as a means of achieving consensus ahead of rule-making" (Footer 2010, p. 5).



The issue is not that the global economy needs more regulation, nor that it should be freed from the public political system. What is of concern, and requires a deeper analysis, is the global political/economic struggle caused by new hegemonies, greater powers competition and the different global distribution of opportunities. We should best address these questions by thinking of politics and the economy as strictly related, and the solutions do not simply come from the widely publicised proposals of a need for better regulation, or re-enforcement, of states' power and functions. It is the consideration we take to deal with these dynamics amongst different participants that can provide a resolution: the way in which individuals, states, agencies, associations, multinational companies and social movements interact across the world by using different "powers and vulnerabilities arising from diverse political and economic arrangements" (Kennedy 2013, p. 8).

A specific theoretical-descriptive governance approach, based on the idea that governance is [and works as] a network, can be useful to describe these new political and economic dynamics, because the metaphor of network allows for a better understanding of interaction, coordination and, in general, relationships amongst all of these participants.

By defining network as "(...) a common form of social coordination, and managing inter-organisational links is as important for private-sector management as it is for public-sector management. Networks are a means of coordinating and allocating resources. They are an alternative to, not a hybrid of, markets and hierarchies, for they rely distinctively on trust, cooperation, and diplomacy" (Bevir 2013, p. 93). Bevir argues that "(...) networks only policy consultation are characterised by many participants; fluctuating interactions and access for the various members; the absence of consensus and the presence of conflict; interaction based on consultation rather than negotiation or bargaining; an unequal power relationship in which many participants may have few resources and little or no access; and a concept of power as a zero-sum game. (Bevir 2013, pp. 91-92)".

Nevertheless, the main limit of this model (governance as a network) is the unequal power relationship within the network: players could have different resources or a variable degree of access to information, technology, etc. What are the practical effects of these inequalities; the different distribution of power and resources? And, how should the law deal with them?

In 2009, Strauss-Kahn, the IMF's Managing Director, when pointing out the strict relationship between the global economic system and the political one, observed that "The crisis has exposed some clear fault lines: inconsistencies in regulatory systems across countries and clear conflicts of interest". Strauss-Kahn declared his strong opposition to the practice of regulatory arbitrage. Fisher defines regulatory arbitrage as "a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs. Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision" (Fleischer 2010, pp. 2-3)<sup>6</sup>.

The idea is to create an international rulemaking that is capable of promulgating the uniform application of international rules. Is this desirable?

From a financial perspective, this practice aims to increase the efficiency of markets by eliminating price differences and connecting markets to each other. The strategy adopted by the arbitrageur is to operate in the market of lowest regulatory cost. Cornell explains the way in which arbitrage works as follows:

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<sup>6</sup> Frank Partnoy (1997, p. 227) uses a narrower definition: "Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulation or laws".

"In brief, an arbitrage opportunity consists of two elements: (1) a functional (or economic) similarity among products such that one can substitute for another, and (2) a (relatively) stable formal difference of some kind that accounts for a difference in price among functionally equivalent products. This difference must be great enough that, once the arbitrageur subtracts the cost of arbitrage itself, buying in one market and selling in another yields a profit" (Riles 2014, p. 71).

On the other hand, in terms of the global political system, since the financial markets are characterised by an asymmetry amongst their participants (for example, banks do not share information and their behaviour may not always be considered moral) and since the processes of formulating prudential regulation is influenced by global banks, we will also have a socio-political asymmetry. What happens, for example, in developing countries? Accords prescribe the same rules for banks of different countries but the English banking system, for example, could be different from the Italian or Indian systems. Banks are different and countries are at different levels of development. This suggests that it is not desirable to have a homogeneous regulatory structure across heterogeneous countries.

Again, the model of governance as a network does not seem capable of managing issues related to inequalities, asymmetric distribution of resources and power. In a recent contribution (Scamardella 2015) I have argued that the use of *soft* law by multinational companies, banks, financial agents, etc. is still eroding state sovereignty. In actual fact, regulatory instruments given by *soft* law and practices such as regulatory arbitrage are weakening *hard* law and states' powers. This is the clear strategy played by the neoliberal economy to increase multinational companies' profits: by avoiding limits imposed by national legislation, these companies can utilise convenient contracts based on low wages, no-security for workers and flexible labour standards. In other words, the application of a global, flexible legislation in a transnational context has become a non-eliminable element for the success of the transnational companies' production strategy.

When Western multinational companies (e.g. Benetton, Primark, Nike, Reebok or Microsoft) decide to invest in Bangladesh or in Pakistan or in India or in Colombia, they take advantage of local governments' weaknesses in order to gain concessions on labour and working conditions, thereby increasing their profit margins. Alternative regulatory instruments are shaped with the absence of the enforcement of national *hard* law: the result is the increasing of perverse effects of globalisation in terms of social injustices and inequalities, "unemployment system" (Beck 2000, p. 77), deregulation, poverty across countries, and environmental disasters.

### **3. Governance as *Governmentality*: the *longa manus* of the Neoliberal Economy?**

In the previous section I described legal transformation as one of the main consequences of globalisation and I tried to analyse new phenomena such as decision-making processes, financial regulation, policy formulation with the metaphor of governance as network.

However, I have also argued that this model can be useful for a theoretical understanding of the new regulating target; revealing some problems in terms of managing and solving economic inequalities and social injustice.

In this second section, I will use the governance approach as a form of Foucaultian governmentality. My attempt is to investigate 'political' and 'economic' categories as they operate in the contemporary era as features of a new neoliberalism. Foucault's governmentality expressed a style of governing not exclusively devolved upon the state. The problem of government is defined by Foucault as [the problem of] "how to govern oneself, how to be governed, by whom should we accept to be governed, how to be the best possible governor" (Foucault 2007, p. 88).

The problem of government is a problem of *governmentality*. It means that government does not only refer to political structures or to the organisation of the state; government designates the way in which the conduct of individuals or groups might be directed. In so doing, governmentality concerns the relationship between the *subject* and the *power* and by this perspective, government does not only refer only to the state (the Prince) but also to souls (pastoral doctrine) and to oneself (to govern oneself)<sup>7</sup>. Government can be observed as the practice of governing, as a relation of power/resistance between the governors and the governed.

Besides answering the question "Why govern?", governmentality also applies to the question "How to govern?". It expresses the art of governing by a double paradigm: governing oneself/governing the other. It goes beyond the concept of the authority (Prince, King, State) that governs a community, because if by one side it includes this kind of power, on the other side it also refers to individuals themselves. Governmentality is both the art of governing *people* and the art of governing *oneself* (Foucault 2007)<sup>8</sup>. The power relation that governmentality expresses is twofold: to govern (oneself)/ to be governed. The transition from the medieval era to the modern one has determined a transformation: the individual is no longer the object of power (exercised by the authority), rather, he is constituted by power; his existence and identity are affected by power. "The individual", argues Foucault, "is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its effect" (Foucault 1980, p. 98).

Governmentality reveals its *liberal* and *discursive* character. Liberal because it represents power as a relationship. The art of governing expresses both the idea of governing someone, limiting his own autonomy, and the idea of governing through someone's autonomy. Governmentality is discursive because, as Williams Walters (2001, p. 61 ss.) has suggested, "Governmentality does not employ as *a priori* categories of analysis of the economy, the social, psychological, public and private systems etc., as the social science disciplines tend to. Instead, it is interested in the manner in which governing mentalities and frameworks involve a characterisation of processes and variables as "economic", "social", etc.

*Liberal* means that governmentality deals with economic logic, self-autonomy and the principle of optimisation that every individual follows, choosing freely and autonomously his own aims.

A liberal and discursive governmentality expresses both the governing of self and the governing of the others. In the space of such a governmentality, what is interesting to observe is the relationship of power between the governor and the governed.

Why should this idea of the Foucaultian governmentality be fascinating in the contemporary global context? The answer goes back to the question of 'how' of government, because if we *cut the king's head* then we also should ask how to govern society, how to mediate amongst different interests, and how to protect human rights. One of the possible answers could be to perform *the art of not being governed quite so much* and to accept a neoliberal economy or a financial technocracy.

<sup>7</sup> By using the concept *governmentality*, Foucault means three things: (i) the sum of the institutions, procedures, analyses, reflections, strategies that consent the concrete exercise of this kind of power; (ii) the tendency, diffused above all throughout the West, to call all the forms of power with the word *government*; (iii) the process by which the state gradually has been governmentalized. When Foucault talks about government as the art of governing, he also mean the circumstance of be governed.

<sup>8</sup> See also the interesting contribute by Laura Bazzicalupo (2013, p. 397 ss.) where the author, talking about the governmentality, writes: "I define governmentality the meeting amongst dominion techniques exercised upon the others and the self techniques". Personal translation from Italian: "Chiamo governamentalità l'incontro tra tecniche di dominio esercitate sugli altri e tecniche di sé".

A re-reading of the Foucaultian governmentality interprets the contemporary governance as a continuous performance. Basically, the Foucaultian governmentality, with its liberal and discursive character, has stressed the issue of self-government, reducing the state's power. Therefore governance, promoting (and promoted by) a neoliberal economy, determines the end of the state's exclusive power (in legislation, making public decisions, organising the bureaucracy, etc.). Through inclusive forms of participation of stakeholders, governance could warrant both the governing of self (because in the network every stakeholder should represent his/her own interests) and the governing of others (as the final result of the decision-making process). The role of state is liberalised and marginalised; its power is partially replaced by the power of the network, which expresses the art of governing by returning to participative and more efficient modalities of decision.

We don't have a law without state (that would not be plausible) but a relevant opposition to the state through the perspective of a New Economy, based on flexible relations, commerce and exchange of capital. Here, law is not a non-state law but a non-political law. Is this desirable?

I think that the perspective of governance as governmentality has the same limits of the descriptive approach, discussed in the previous paragraphs. The decentralisation of the decisional power and the emergence of informal decision-making procedures are altering the relationship of power. In this sense, the main problem is the power of self-governance within the networks. If the art of governing is detracted by a state who warrants that every individual and group have the same possibilities of representing his/its own interests? Who will manage democratic mediations amongst opposite interests? As Santos (2005, p. 31) has argued "since the mid-1990s, governance has become the political matrix of neoliberal globalisation"; the *longa manus* of the global economy spectrum.

#### **4. From the neoliberal governance to the kaleidoscope of the legal system**

The two models of governance proposed in the previous sections are very fascinating but they present difficulties in managing problems related to social and economic issues. The hypothesis of this contribution is to try to solve these dilemmas, proposing governance as a legal kaleidoscope, working not as a coherent legal system but as a box where heterogeneous normative elements (*hard law*, *soft law*) and various players (states, individuals, groups) can be shaped. With their communication, action and strategy, they can regulate social, political and economic instances. Here I will not pose governance as an opposition to government; nor as a legal order replacing the state's authority and legislative power, but only as a way of governing by shaping divergent structures through a legal kaleidoscope, rather than a coherent system of formal rules. In order to make this vision possible, we need to decentralise and democratise the law-making processes involving all the relevant stakeholders.

The idea of a legal kaleidoscope derives both by the definition that social sciences give to the governance word and Santos' theoretical proposal. Since its first official use (World Bank 1989)<sup>9</sup>, governance has indicated a new style of governing that "includes the formal institutions of the government but also informal arrangements" (Suárez *et al.* 2009, p. 19).

The Commission on Global Governance has defined governance as "the sum of the many ways individuals and institutions, public and private, manage their common affairs" (Commission on Global Governance 1995, p. 22). From this perspective, governance is not only a socio-political and economic phenomenon, but a

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<sup>9</sup> The term *governance* was first used by the World Bank (1989) in its report, *Sub-Saharan Africa. From Crisis to Sustainable Growth. A long-term Perspective Study*. Here the Bank mentioned the word governance as a political requirement for approaching Africa's economic and social problems.

regulatory order that demands to govern the transformations of the global era (Palumbo and Vaccaro 2007, p. 15), with or without the command-and-control system based on a state's power authority. Governance is invoked as a regulatory model that works in absence of the central authority: the state is not meant as the necessary authority making law, but only as a possible player of the law-making process (Arienzo and Lazzarich 2012). The point is how to include other players (the so-called stakeholders) in the law-making process.

The idea of the legal kaleidoscope was first developed by Santos and García (2001) and then by de Sousa himself with Rodríguez-Garavito as an arrangement of the legal pluralism that contemporary societies are experiencing. Santos and Rodríguez-Garavito (2005, p. 65) have argued: "In the absence of effective institutions of transnational governance, working conditions in global commodity chains are regulated through myriad public and private arrangements that constitute a legal kaleidoscope rather than a legal system".

The legal kaleidoscope involves MNCs, NGOs, national governments, consumers, unions, movements and systems of *hard* law, as well as systems of *soft* law created by private players. It arises from the social arena where tensions, rights and domains of the global economy, and opportunities, shape each other, asking to be ruled<sup>10</sup>. A good example of this new legal pluralism, where *soft* legal elements are shaped with *hard* legal ones, comes from the labour law: "the struggle for worker rights takes place in a context of legal pluralism in which national labour laws, ILO conventions, corporate codes of conduct, social clauses in bilateral and regional trade agreements, and unilateral sanctions overlap and clash" (Santos and Rodríguez-Garavito 2005, p. 65).

Nevertheless, as I have showed in the previous sections, the main dilemma of governance comes from the way in which the stakeholders are selected and involved in the law-making process, and how to warrant the democracy of the procedures of selection. It is quite peaceful to see that the governance approach shows the inadequacy of the *command-and-control* state model with respect to global transformations. It is widely known that under the pressure of a global economy "the impact of multinational enterprises is growing. Important decisions concerning investment, jobs, employment (...) are taken by a few often in far away headquarters, aiming at maximising their interests world wide" (Blanpain and Colucci 2004, p. 119).

Trying to manage all these transformations, governance promotes an alternative horizontal policy based on the idea of a deliberative space, where individuals, groups, agencies and civil society are democratically involved, participating in the discussion, definition and decision of social issues (Rufino 2009, p. 75).

If a neighbourhood has to decide about waste collection, the participation of citizens and local associations in the deliberative process will probably ensure a better choice than a decision coming from the central local authority. However, despite this asserted democratic and open nature, some of the governance aspects still remain ambiguous: "We say «governance» because we don't really know how to call what is going on" (Finkelstein 1995, p. 368).

To propose governance as a legal kaleidoscope means to manage all of these ambiguities in terms of governing social, political and economic dynamics through a legal pluralism, rather than a coherent set of rules. After all, a reflection of social conflicts, political complexity and hegemonic economy involving contemporary Western communities (but also traditional communities in South America or South-East Asia) shows us how these dynamics can be read in terms of legal pluralism, re-structuring dialectics power/resistance, nationalism/internationalism/localism

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<sup>10</sup> As Sousa and Rodríguez-Garavito point out (2005, p. 65 ss.) the use of plural legal fields by social movements shows us how it is anachronistic to focus exclusively on the national legal scale, missing "the novel forms of legal pluralism and transnational political mobilisation associated with globalisation".

that are determining socio-legal stratification within our societies. Forms of being governed generate counter-conduct as resistance: this is the political struggle in today's age.

Recently, Arianto Kurniawan (2014) has given a very good example of these dynamics in terms of legal pluralism, power/resistance and internationalism/nationalism/localism, analysing the specific context in Indonesia and local resistance to the process of industrialisation. He argues that from the concept of legal pluralism, "there is an insight that any normative order established and maintained in any social institution must also be seen as law as well as we see the state law. Thus, if Sedulur Sikep community as a social institution takes a firm opposition against the plan of cement industrial establishment due to particular norms determining such position, according to legal pluralism perspective, it can be said that it is their law regulating them to do so" (Kurniawan 2014, p. 99).

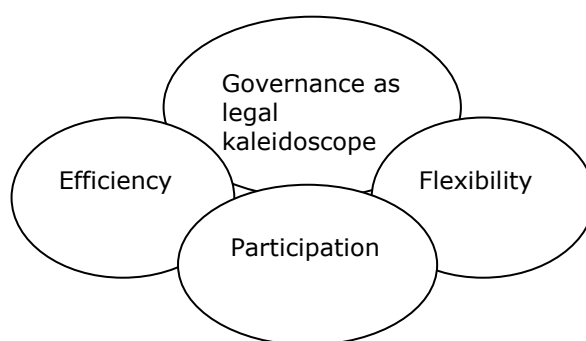
O'Malley, analysing the genealogy and key elements of "governmentality", argues that "The process in much, if not most, governmentality work concerned with advanced liberalism/neo-liberalism becomes one primarily of identifying new settings in which it appears, uncovering new forms in which it becomes manifest, locating new processes whereby it operates, and so on" (O'Malley 2001, p. 18). Resistance is never something allocated outside of power; it arises within power in a role of adversary and opponent.

Analysing the role of social movements as forms of resistance against the neoliberal economy, Karatzogianni and Robinson (2010, p. 177) write: "Anti-capitalist and other rhizomatic groups have constructed many new forms of political action, and also new forms of communication. In contrast to the closure of space, the violence and identity divide found in ethnoreligious discourses, these movements seem to rely more on networking and grassroots organising, to a greater extent than the hierarchical structures states and their followers. (...) The movements in question are able to take action without the need for a leader and without any individual having a privileged insight, or even being able to conceptualise the characteristics of the whole. The more radical among them define themselves in terms of 'direct action' or 'do-it-yourself', as a systematic, autonomous alternative to taking power or making demands on those in power. Across the various newer social movements, there is an emphasis upon participation, antipathy to hierarchy, alternative processes of decision-making such as consensus decision-making and direct democracy, respect for difference and an assertion of unity in diversity. The project which unites these movements is less the capture of the state apparatus and more the construction of an open and transnational public sphere and a rhizomatic extension of struggles which are linked through weak ties".

How should governance as a legal kaleidoscope work, with the involvement of these new players and managing these social facts? What should the main element of this arrangement be capable of, in terms of legal pluralism and the analysed dynamics?

I propose three constitutive elements:

- Participation;
- Flexibility;
- Efficiency.



- Participation: the legal kaleidoscope involves all agents in the issue to be discussed and decided.
- Flexibility: procedures inside the network are informal and unofficial. They are based on communicative flows amongst stakeholders whose circumstances, strategies and opinions can be changed, negotiated and/or re-defined.
- Efficiency: governance is not legitimised by a democratic consent *a priori* through elective procedures. Its legitimacy is derived from its capacity to achieve the fixed outcomes, anticipating the state's intervention in the context of complexity and uncertainty (Ciaramelli 2013).

In other words, governance as a legal kaleidoscope indicates a style of pluralistic governing based on policies coming from the ground up, whose legitimacy arises from their capacity to solve social problems, without waiting for the state's intervention (Peters 2007).

If we accept this model, two main questions arise, deserving answers:

- (i) who authorises the participation of stakeholders?
- (ii) how is the decision-making process justified?

Both questions try to capture the democratic nature of governance that – actually – is only asserted and not demonstrated.

As Koskenniemi (2009) pointed out some years ago, recalling his own contribution of 20 years prior (1990) that dealt with the issue of the international legal language, the point is “the way in which patterns of fixed preference are formed and operate inside international institutions” (Koskenniemi 2009, p. 9). Global governance shows us how hard it is to give official justifications for decision-making processes, where contrary positions or outcomes, divergent players and their strategies can be supported: “Through specialisation – that is to say, through the creation of special regimes of knowledge and expertise in areas such as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘security law’, ‘international criminal law’, ‘European law’, and so on – the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. The point of creating such specialised institutions is precisely to affect the outcomes that are being produced in the international world” (Koskenniemi 2009, p. 9).

Governance accepts the democratic equation: *there is no benefit without participation; there is no participation without benefit*. The condition of this equation is the idea that “the right to determine benefit is vested in those who participate” (Santos and Rodríguez-Garavito 2005, p. 36) in the sense that the equation works if the self-determination of participation is possible. It means that participation should be autonomous, but not the criteria by which participants are chosen. If we question the criteria of participant selection, it may be possible that “those who are selected in may benefit, but always at the cost of those who are selected out” (Santos and Rodríguez-Garavito 2005, p. 36). The selected could concede to the selected out some benefits, but on the condition of non-participation, or could concede the possibility of participating but on the condition of not self-determining their benefits.

To follow this train of thought, let us take two players that cannot be involved in the process of governance: the state and the excluded. What does this mean? The transition from government to governance has re-defined some concepts: “rather than social transformation, problem-solving; rather than popular participation, selected-in stakeholders’ participation; rather than social contract, self-regulation; rather than social justice, positive sum games and compensatory policies; rather than power relations, coordination and partnership; rather than social conflict, social cohesion and stability of flows” (Santos and Rodríguez-Garavito 2005, p. 35).

Even if these concepts are not negative, they become negative when used by governance in opposition and not in a complementary fashion. The state, for example, has not been deprived of its role as the central authority, but it is incapable of working as a social regulator.

Are we able to verify the governance-asserted democratic nature? Could its promise of co-operation lead to a new legitimate order or only a new chaos? This new legal representation proposes a new process of governing that "includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest" (The Commission on Global Governance 1995, p. 23)<sup>11</sup>. This representation can be read as a movement from the government model to a multi-level governance that transcends the constitutional-national state crisis and the need to return to "more «inclusive» and participatory forms of *governance* [that] are replacing traditional «top-down» rule-driven systems" (OECD 2000, p. 6).

Therefore, the question can be re-formulated as follows: how does the governance approach point out a new kind of inclusive and co-operative action that, at the same time, could also be defined as democratic?

Firstly, we can answer this question by re-analysing the main differences between government and governance. Government was based on a hierarchical relationship: citizen-subject/state (Foucault 1980). Governance claims to "cut the king's head" (Foucault 1980, p. 121). It requires three kinds of relationships to replace the hierarchical model inspired by the sovereignty:

- a. relationships (or inter-connections) amongst individuals and groups;
- b. communication of information through language or other symbolic mediums; and
- c. capacity to modify the action.

Secondly, governance is seemingly considered to be a democratic process because of the use of the net as an arrangement to collect and discuss preferences and wills. It alludes to be "a system of rule that is dependent on inter-subjective meanings as on formally sanctioned constitutions and charters" (Rosenau and Czempiel 1992, p. 4). It gives structure and practices in order to satisfy individuals' and organisations' needs. According to these assumptions, does it mean that the governance approach is able to work as a filter amongst institutions, civil society, individuals, associations and organisations? Above all, does it additionally mean that the net is open to all individuals interested in the issue, even if they are immigrants, employees, foreigners or members of cultural minorities?

Can the governance approach warrant a legal and democratic recognition of all these stakeholders? Or does the governance approach hide strong economic powers behind the illusion of the net, horizontal participation and the involvement of civil society (Andronico 2012, Scamardella 2013)?

The governance approach shows the transition from an era based on state sovereignty to the one based on a multilevel institutional structure, where the state is called to a dialogue with civil society.

Some scholars (Maffettone 2003) have argued we need a new kind of *governmentality*, capable of representing "this new globalised scenario, where the control does not come from the centre of the system, but from the whole of the peripheries, more or less relevant" (Maffettone 2003, p. 108). Its legal narrative assigns a central role to the peripheral authorities and to the stakeholders whose

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<sup>11</sup> For more see also Rosenau and Czempiel (1992), Maffettone (2003), Callahan (2007), Palumbo and Vaccaro (2007), Arienzo and Lazzarich (2012). These authors point out how governance is the whole of the processes by which public institutions, private stakeholders, associations and, common citizenships participate in decision-making. However they also try to focus on some critical aspects, such as the problem of accountability, control of corruption, government effectiveness, equity and transparency.



aim is to individuate social issues from the ground up, and to implement them via inclusive participation.

How can we extend the social basis in order to obtain better participation of individuals and groups in the policy-making process (Jessop 2004, 2007, 2008, Peters 2007)? Governance as a legal kaleidoscope promotes "interaction amongst players are not based on relationships of command coming from a central authority, nor on decentralised equilibriums produced by logics of maximisation directed to the expected utility" (Palumbo and Vaccaro 2007, p. 23). Nevertheless, for some scholars (Castells 1998), the weakest identities (immigrants, ethnic minorities, employees and consumers) will be marginalised in the network, defined by Castells (1998) "of resistance". Other scholars (Ansell 2000, Yee 2004) view governance multilevel policies as possibilities to realise pluralistic contexts, reflecting global interconnections in spite of strong social differentiations (MacCormick 1996).

Undoubtedly, governance can appear as a *panacea* for the political and institutional crisis we are experiencing, increased by the stagnation of the bureaucratic law-making process. But governance must demonstrate that its own asserted democratic capacity to represent all voices of civil society is effective. We are still experiencing this third way now and it is not possible to give univocal and certain responses. The governance approach (as a legal kaleidoscope) can work only if it is able to mediate amongst various and heterogeneous players and issues, successfully trying "to «situate» the judicial answers in specific contexts, taking into account the specifics of the context itself" (Ferrarese 2010, p. 204).

Governance must assume a reflective character; in order to ensure the democracy of its selective procedures and decisional processes, it has to constantly reflect on the dialogue between agents, transforming legal decisions as communication flows (Scamardella 2015). The second element that is needed, strictly linked to the initial one, is the idea of a meta-governance that warrants a "reflective redefinition of the organisation; the creation of agents of mediation; and the re-order of inter-organisational relationships (...). Thirdly, a reflexive organisation of the self-organisation condition through dialogue and deliberation" (Jessop 2008, p. 1974 ss.) is also needed. Meta-governance should work as a structure capable of controlling the boundary between strategic action and communicative action of the stakeholders.

No market (following the logic of the profit model), nor state (following the logic of the *command-and-control* model) can solve, on their own, the regulatory dilemmas posed by globalisation. The third way of governance, with its reflective approach based on continuous dialogue amongst agents in the network, has the potential to rule globalisation, reducing its aggressive effects with a horizontal policy, a decentralised and peripheral deliberative process where all the stakeholders are involved. Only history will tell if the governance approach will allow us to live in a *global society* and not only in a *global economy*<sup>12</sup>.

## References

- Andronico, A., 2012. *Viaggio al termine del diritto. Saggio sulla governance*. Giappichelli: Torino.
- Ansell, C., 2000. The Networked Polity: Regional Development in Western Europe. *Governance*, 13 (2), 279–291.
- Arienzo, A., and Lazzarich, D., eds., 2012. *Vuoti e scarti di democrazia. Teorie e politiche democratiche nell'era della mondializzazione*. Napoli: Edizioni Scientifiche Italiane.

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<sup>12</sup> "Today we live in a global economy, but not in a global society": Tarya Halonen, 17 November 2003 (ILO 2003).

- Bauman, Z., 1998. *Globalization: The Human Consequences*. New York: Columbia University Press.
- Bazzicalupo, L., 2013. Governamentalità. Pratiche e concetti. *Materiali per una storia della cultura giuridica*, 2, 395-414.
- Beck, U., 2000. *The Brave New World of Work*. Cambridge: Polity Press.
- Beck, U., 2001. *What is Globalization?*. Cambridge: Polity Press.
- Beresford, A.D., 2003. Foucault's Theory of Governance and the Deterrence of Internet Fraud. *Administration & Society*, 35 (1), 82-103.
- Bevir, M., 2000. Postfoundationalism and Social Democracy. *Danish Yearbook of Philosophy*, 25, 7-26.
- Bevir, M., 2010. *Democratic Governance*. Oxford: Princeton University Press.
- Bevir, M., 2013. *A Theory of Governance*. Berkeley, Los Angeles, London: University of California Press.
- Blanpain, R., and Colucci, M., eds., 2004. *The Globalization of Labour Standards. The Soft Law Track*. The Hague: Kluwer Law International.
- Bovaird, T., 2005. Improving Performance Measurement. *International Review of Administrative Sciences*, 71 (2), 217-228.
- Boyle, A., 2002. Some Reflections on the Relationship of Treaties and Soft Law. In: V. Gowlland-Debbas, ed. *Multilateral Treaty-making*. The Hague, Cambridge (MA): Kluwer Law International, 25-38.
- Boyle, A., 2010. Soft Law in International Law-making. In: M.D. Evans, ed. *International Law*. Oxford University Press, 122-140.
- Callahan, K., 2007. *Elements of Effective Governance: Measurement, Accountability and Participation*. Boca Raton: Auerbach.
- Carroll, L., 1872. *Through the Looking-Glass*. Raleigh, NC: Hayes Barton Press.
- Castells, M., 1998. *The Power of Identity*. Oxford, New York: Blackwell.
- Castells, M., 2000. *The rise of the network society. The Information Age – Economy, Society and culture*. 2<sup>nd</sup> ed. Oxford: Blackwell Publishing.
- Castells, M., et al., 2006. *Mobile Communication and Society: A Global Perspective*. Cambridge, MA: MIT Press.
- Ciaramelli, F., 2013. *Consenso sociale e legittimazione giuridica. Lezioni di filosofia del diritto*. Torino: Giappichelli.
- Commission on Global Governance, 1995. *On Our Global Neighborhood. Report of the Commission on Global Governance*. Oxford University Press.
- De Ly, F., 2001. Lex Mercatoria (New Law Merchant): Globalization and International Self-Regulation. In: R.P. Appelbaum, W.L.F. Felstiner and V. Gessner, eds. *Rules and Networks. The Legal Culture of Global Business Transaction*. Oxford: Hart, 159-188.
- Draghi, M., 2012. *Verbatim of the remarks made by Mario Draghi* [online]. Frankfurt: European Central Bank. Available from: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> [Accessed 2 August 2016].
- Dupuy, R.J., 1975. Droit déclaratoire et droit programmatore: de la coutume sauvage à la «Soft Law». In: *Colloque de la Société Française pour le Droit International, L'élaboration du droit international public*. Paris: Pédone, 132-148.

- Esmark, A., 2003. *Network Governance Between Publics and Elites*. Roskilde: Denmark.
- Fastenrath, U., 1993. Relative Normativity in International Law. *European Journal of International Law* [online], 4 (1), 305-340. Available from: <http://www.ejil.org/pdfs/4/1/1205.pdf> [Accessed 2 August 2016].
- Ferrarese, M.R., 2000. *Le Istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*. Bologna: Il Mulino.
- Ferrarese, M.R., 2006. *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*. Roma-Bari: Laterza.
- Ferrarese, M.R., 2010. *La governancetra politica e diritto*. Bologna: Il Mulino.
- Finkelstein, L., 1995. What Is Global Governance?. *Global Governance*, 1 (3), 367-372.
- Fleischer, V., 2010. *Regulatory Arbitrage* [online]. Available from: <http://ssrn.com/abstract=1567212> [Accessed 2 August 2016].
- Footer, M.E., 2010. The (Re)turn to 'Soft Law' Norms in Reconciling the Antinomies of WTO Law. *Melbourne Journal of International Law* [online], 11 (2), 241-276. Available from: <http://www.austlii.edu.au/au/journals/MelbJIL/2010/10.html> [Accessed 2 August 2016]
- Fortunati, L., 2002. The Mobile Phone: Towards New Categories and Social Relations. *Information, Communication & Society*, 5 (4), 513-528.
- Foucault, M., 1980. *Power/Knowledge: Selected interviews & other writings. 1972-1977*. London: Longman.
- Foucault, M., 2007. *Security, Territory, Population: Lectures at the Collège de France 1977-1978*. Basingstoke: Palgrave Macmillan.
- Freeman, J., 1997. Collaborative Governance in the Administrative State. *UCLA Law Review*, 45 (1), 1-98.
- Fudge, J., McCrystal, S., and Sankaran, K., eds., 2012. *Challenging the Legal Boundaries of Work Regulation*. Oxford: Hart.
- Galgano F., 2004. *La globalizzazione nello specchio del diritto*. Bologna: Il Mulino.
- ILO – International Labour Organization, 2003. *ILO Governing Body concludes 288th session* [online]. Genève: ILO. Available from: [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_005300/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_005300/lang--en/index.htm) [Accessed 3 August 2016].
- Jessop, B., 1998. The rise of governance and the risks of failure: the case of economic development. *International Social Science Journal*, 50 (155), 29-45.
- Jessop, B., 2004. Multi-level Governance and Multi-level Metagovernance. In: I. Bache and M. Flinders, eds. *Multi-level Governance and Multi-level Metagovernance*. Oxford University Press, 49-74.
- Jessop, B., 2007. Governance e meta-governance: riflessività, varietà ed ironia. In: A. Palumbo and S. Vaccaro, eds. *Governance. Teorie, principi, modelli, pratiche nell'era globale*. Milano: Mimesis, 77-94.
- Jessop, B., 2008. *State, Power*. Cambridge: Polity Press.
- Karatzogianni, A., and Robinson, A., 2010. *Power, Conflict and Resistance: Social Movements, Networks and Hierarchies*. London and New York: Routledge.
- Kennedy, D., 2013. Law and the Political Economy of the World. *Leiden Journal of International Law*, 26 (1), 7-48.

- Koskenniemi, M., 2009. The Politics of International Law – 20 Years Later. *The European Journal of International Law*, 20 (1), 7-19.
- Kurniawan, J.A., 2014. Contested Land, Contesting Laws. A Context of Legal Pluralism and Industrialization in Indonesia. *Sortuz. Oñati Journal of Emergent Socio-legal Studies* [online], 6 (2), 93-106. Available from: <http://opo.iisj.net/index.php/sortuz/article/view/541/542> [Accessed 2 August 2016].
- MacCormick, N., 1996. Liberalism, Nationalism and the Post-sovereign State. *Political Studies*, 44 (3), 553-567.
- Maffettone, S., 2003. Il re è morto. Viva il re! Saggio sulla governance della globalizzazione. In: L. Bazzicalupo and R. Esposito, eds. *Politica della vita*. Roma-Bari: Laterza, 106-119.
- Michaels, R., 2007. The True Lex Mercatoria: Law Beyond the State. *Indiana Journal of Global Legal Studies*, 14 (2), 447-468.
- O'Malley, P., 2001. Genealogy, Systemisation and Resistance in "Advanced Liberalism". In: G. Wickham, G. Pavlich, eds., *Rethinking Law, Society and Governance. Foucault's Bequest*. Portland: Hart, 13-26.
- O'Rourke, D., 2003. Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards Monitoring. *Policy Studies Journal*, 31 (1), 1-29.
- OECD Territorial Reviews and Governance Division, 2000. *Metropolitan Governance in OECD Countries* [online], presented by L. Kamal-Chaoui. Available from: <http://www.oecd.org/governance/regional-policy/6100078.pdf> [Accessed 2 August 2016].
- Palumbo, A., and Vaccaro, S., eds., 2007. *Governance. Teorie, principi, modelli, pratiche nell'età globale*. Milano: Mimesis.
- Partnoy, F., 1997. Financial Derivatives and the Costs of Regulatory Arbitrage. *The Journal of Corporation Law*, 22 (2), 211-256.
- Peters, B.G., 2007. Governance e anarchie organizzate. In: A. Palumbo and S. Vaccaro, eds. *Governance. Teorie, principi, modelli, pratiche nell'età globale*. Milano: Mimesis, 35-54.
- Rifkin, J., 1987. *Time Wars: The Primary Conflict in Human History*. New York: Henry Holt & Co.
- Riles, A., 2014. Managing Regulatory Arbitrage: A Conflict of Laws Approach. *Cornell International Law Journal* [online], 47 (1), 63-120. Available from: <http://www.lawschool.cornell.edu/research/ILJ/upload/Riles-final.pdf> [Accessed 2 August 2016].
- Rorty, R., 1999. *Philosophy and Social Hope*. Harmondsworth: Penguin.
- Rosenau, J.N., and Czempiel, E.-O., eds., 1992. *Governance Without Government: Order and Change in World Politics*. Cambridge University Press.
- Rufino, A., 2009. *Norma e conflitto. Cultura giuridica e regole sociali, dallo Stato moderno alla società globale*. Milano: Franco Angeli.
- Santos de Sousa, B.S., and García, M., eds., 2001. *El Caleidoscopio de las Justicias en Colombia*. Bogota: Colciencias, Instituto Colombiano de Antropología e Historia, Universidad de Coimbra CES, Universidad Nacional de Colombia, Siglo del Hombre Editores.
- Santos de Sousa, B.S., and Rodríguez-Garavito, C.A., eds., 2005. *Law and Globalization from Below New York*. Cambridge University Press.
- Scamardella, F., 2013. *Teorie giuridiche della governance. Le ragioni e i limiti di una nuova narrazione*. Napoli: Editoriale Scientifica.

- Scamardella, F., 2015. Law, Globalisation, Governance: Emerging Alternative Legal Techniques. *The Journal of Legal Pluralism and Unofficial Law*, 47 (1), 76-95.
- Strauss-Kahn, D., 2009. *Crisis Management and Policy Coordination: Do We Need a New Global Framework?*. Speech hold in Oesterreichische Nationalbank, Vienna, May 15 [online]. Washington: International Monetary Fund. Available from: <https://www.imf.org/external/np/speeches/2009/051509.htm> [Accessed 2 August 2016].
- Suárez, S.M., Osorio Marques, L., and Langford, M., 2009. *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure. Civil Society Perspective*. [online]. Roma: FAO. Available from: [https://www.un.org/ruleoflaw/files/civil\\_society\\_report\\_on\\_fao\\_guidelines.pdf](https://www.un.org/ruleoflaw/files/civil_society_report_on_fao_guidelines.pdf) [Accessed 11 August 2016].
- Teubner, G., 1988. After Legal Instrumentalism? Strategic Models of Post-Regulatory Law. In: G. Teubner, ed., *Dilemmas of Law in the Welfare State*. Berlin: De Gruyter, 299-325.
- Teubner, G., 2005. *La cultura del diritto nell'epoca della globalizzazione*. Roma: Armando.
- Teubner, G., 2012, *Nuovi conflitti istituzionali*. Milano: Bruno Mondadori.
- Thürer, D., 2000. Soft Law. In: R. Bemhardt, ed. *Encyclopedia of Public International Law*. Amsterdam: North-Holland Publishing, 452-460.
- Walters, W., 2001. Governing Unemployment: Transforming "the Social". In: G. Wickham, G. Pavlich, eds., *Rethinking Law, Society and Governance. Foucault's Bequest*. Portland: Hart, 61-68.
- Weil, P., 1983. Towards Relative Normativity in International Law? *The American Journal of International Law*, 77 (3), 413-442.
- World Bank, 1989. *Sub-Saharan Africa. From Crisis to Sustainable Growth. A Long-Term Perspective Study*. Washington, DC: The International Bank for Reconstruction and Development, The World Bank.
- Yee, A., 2004. Cross-National Concepts in Supranational Governance: State-Society Relations and EU Policy Making. *Governance*, 17 (4), 487-524.