

Globalizing Regulation : The Issues of Governance and Politics¹

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Abstract : As economic, political and social activities are globalized, issues of global governance and the rule of law in international affairs are of acute concern. Global governance is a field of study that has complex and extensive sub-fields. The nature of international order, institutions and regimes are examined through analyses of the use of force and collective security, international trade and monetary relations, and international human rights. Not only the state but also non-state actors such as NGOs, businesses and international organizations are seen as important actors in global governance. This paper attempts to give an overview of the issues involved in global governance and politics.

Key Words : Global Governance, International Law and Politics, Realism, Rationalism, Constructivism

Introduction

This paper attempts to give an overview of the issues involved in globalizing regulation. Globalization is a matter of daily life. Flows of trade, capital and people across state boundaries and regions speed up and deepen, and expand the scale and grow the magnitude of interactions between countries. The development of world-wide systems of transport and communication increases the potential velocity of the global diffusion of ideas, goods, information, capital and people (Held, et al., 1999). The recent financial turmoil and economic recession are examples of phenomena that clarify the interconnectedness of our economic activities and social life. Wherever social, economic and political

interactions occur, rules matter. In the interdependent world, issues of globalizing regulation, law and governance are of acute concern.

Rapid changes in society facilitate the development of new research agendas related to globalization in all social and human science disciplines including economics, law, politics and sociology. The close relationships between academic subfields are being recognized anew and the potential utility of interdisciplinary approaches is now more widely acknowledged. Law is “not only the product of politics but also constitutive of politics” (Whittington, et al., 2008 : 3). Despite their shared concern with social issues, legal scholars and political scientists often find themselves sitting at “separate tables” when

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exploring social problems. Both law and politics are taught as autonomous fields of study; and students of these disciplines are trained separately for their professional careers.

In the study of international law and politics, dialogue between legal scholars and political scientists has just started.² Many reexamine the concept of international law and politics, try to understand the relationship between the two and ask if such a reconsideration would help us to understand critical global issues. However, since the debates involve broad subfields of academic research and various theoretical issues, it is not easy to engage in real dialogues. In order to understand the broad and complicated issues involved in globalizing regulation and to make fruitful dialogues possible, a brief review of issues relating to global governance and politics could be a useful starting point.

Questioning the Rule of Law in International Affairs: Realism Tradition

If the rule of law in international affairs has been an essential topic from the birth of the study of international relations and politics, it is because it has always been viewed as a means to maintain peace within the international community. Realism, arguably for a long time the mainstream of international relations theory, is hostile to the idea that international law has a central role to play in international affairs. The analytic focus of realism is state power and state interests. International order reflects the power and interests of the states that partici-

pate in its generation. States will make agreements with others on international, economic and political matters only when such agreements are consistent with their national interests.

After the optimism about attempts to establish the rule of law in international affairs during the interwar years was completely eradicated by World War II, legal idealism was severely criticized by many scholars. The decentralized nature of the international legal system was identified as the main cause of the failure to maintain a peaceful international order. Realists claimed that states essentially behave with a view to the promotion of their own national interests. As Hans Morgenthau argued, “international agreements lacked restraining power, since governments generally retain the right to interpret and apply the provisions of international agreements selectively” (Simmons 2008: 192). In the realist view, international law “owes its existence and operation to two factors, both decentralized in character: identical or complementary interests of individual states and the distribution of power among them” (Morgenthau 2005: 285).

Traditional realism had developed in two different directions by 1970. The British English School of international relations stressed the centrality of power and interests in their account of international order, but started to recognize the existence of international society and the role of shared social purposes. Hedley Bull, whom many consider to be the founder of the British English School of international relations, as well as an early precursor to present day construc-

²See, for example, ‘Legalization and World Politics’ (*International Organization* 54: 3, 2000, *Special Issue*), Byers 2000, Reus-Smit 2004, Sim-

mons and Steinberg 2006 and Whittington et al. 2008.

tive theorists, depicted the world order as “the Anarchical Society” (1977). The notion of “society” is meaningful in international order since rules are essentially socially constructed, and what matters is the prescriptive status attached to them by the actors themselves.

Kenneth Waltz (1979) advanced “neorealism” and “stripped the essential political structure down to the bare bones of power relationships among states” (Simmons 2008 : 192). They were still very skeptical about the ideas of international cooperation through rule of law or of sharing norms and values. At the core of realism is the clear separation between politics within states and among them. Within states political community exists but among states politics is characterized neither by community nor hierarchy, but only by anarchy (Waltz 1979).

Legal scholars often shared the realists’ view of international law. “International law can be thought of as the set of rules that are intended to bind states in their relationships with each other” (Simmons 2008 : 187). One debate, a philosophical discussion among legal scholars, concerns the question of “whether these agreements among states constitute ‘law’ properly understood, and whether the set of such agreements can be characterized as an international ‘legal system’” (Ibid. : 189). John Austin (2006) argued that “enforcement was integral to the conception of law ; without it, agreements were little more than expressions of intentions” (cited in Simmons 2008 : 189). H. L. A. Hart (1961) also expressed the idea that legal systems “were composed not only of primary rules (substantive proscriptions or prescriptions for behavior) but also secondary rules (rules about how substantive rules should be created, amended,

terminated, adjudicated, and enforced)” (Ibid.). Hart argues that international law not only lacks the secondary rules of change and adjudication which provide for a legislature and courts, but also a unifying rule of recognition specifying ‘sources’ of law and providing general criteria for the identification of its rules (Hart 1961 : 214). The question “Is international law really law?” can hardly be put aside (Ibid.).

Goldsmith and Posner (2005 : 3) summarize the view of international law long accepted by scholars : “that it lacks a centralized or effective legislature, executive, or judiciary ; that it favors powerful over weak states ; that it often simply mirrors extant international behavior ; and that it is sometimes violated with impunity”.

The Emergence and Growth of Issues related to Global Governance

The post-World War II period unleashed some of the harshest scholarly criticism on the rule of law in international affairs. However, this was also a period of expanding economic activity and deepening interdependence across state borders and regions. As Simmons (2008 : 188) points out, “international law was ever more deeply woven into the texture of international affairs in such areas as the use of force and collective security, international trade and monetary relations, and international human rights”. The rapid increase in the number of multilateral and bilateral treaties bears witness to this trend. According to the United Nations Treaty Series (UNTS), there are currently about 3,500 multilateral treaties and 50,000 bilateral treaties (Ibid. : 188-9).³ International organizations that have their own mandates

also play a critical role in dealing with international affairs (Barnet and Finnemore 2004).

As economic, political and social activities are globalized, issues of global governance and the rule of law in international affairs are called into play. We are witnessing sweeping social changes in the context of globalization: greater interdependence is occurring; capitalism is tottering; the nature of state power is being transformed; conflict, violence, poverty and environmental degradation are widespread. As uncertainty prevails, anxiety about the way in which governance is exercised becomes more acute. Interest in global governance has been growing rapidly and the literature has become voluminous.⁴ In the great debates on global governance, the existence of some form of law and rules is broadly accepted as a prerequisite.

Global governance is a field of study that has complex and extensive sub-fields. The nature of international order, institutions and regimes are examined through analyses of the use of force and collective security, international trade and monetary relations, and international human rights.

Not only the state but also non-state actors such as NGOs, businesses and international organizations are seen as important actors in global governance. This demanding aspect of the discipline is rooted in the concept of global governance itself: the dynamic process involved in diverse and multi-level actors.

The UN Commission of Global Governance defines governance as follows.

“Governance is the sum of the many

ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It 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 of Global Governance, 1995: 2).

As the UN Commission explains, the involvement of diverse and multi-level actors is an indispensable feature of global governance.

“A wide range of actors may be involved in any one area of governance. To cite just one example, those with a role in bringing order to international trade in sugar and sweeteners include transnational firms, national and international authorities in charge of competition policy, a global group (the International Sugar Council) with specific responsibilities for trade, and a host of smaller private associations, including plantation workers, beet farmers, and dietitians. An international organization may easily develop an interest in a local issue, as when the World Bank finances an agricultural project in a country. A local voluntary association may just as easily become a participant in an international regime” (The Commission of Global Governance, 1995: 3).

Rosenau (1995: 1) summarizes the nature

³These numbers are originally provided by the UN Office of Legal Affairs, Treaty Section.

⁴Many publications provide a good guide to the voluminous literature on global governance. See,

for example, Held and McGrew 2003, Kahler and Lake 2003, Wilkinson 2005, Held and Koenig-Archibugi 2005 and Lechner and Boli 2008.

of global governance: “global governance is conceived to include systems of rules at all levels of human activity—from the family to the international organization—in which the pursuit of goals through the exercise of control has transnational repercussions”.

International Institutions and Regimes: Rationalism vs. Constructivism

In the study of global governance, the theme most familiar to students of international relations has emerged out of long-established research programs: the role of international regimes and institutions that are closely related to the nature of international order. International regimes are defined by Krasner (1983: 1) as “principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area”.

The increasing interest of scholars in regimes and institutions is the result of a dissatisfaction with the way in which cooperation between states has been commonly understood in the realist tradition, the main stream of international relations theory. Robert Keohane, who is one of the scholars most closely associated with the development of the study of institutions in international politics, notes that “the theoretical analysis of international regimes begins with what is at least an apparent anomaly from the standpoint of Realist theory: the existence of many ‘sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge,’ in a variety of areas of international relations” (Keohane, 1982: 325).

Keohane explores “international order, and international cooperation, through an interpretation of international regime-formation that relies heavily on rational-choice analysis in the utilitarian social contract tradition” and seeks to explain “why self-interested actors in world politics should seek, under certain circumstances, to establish international regimes through mutual agreements” (Ibid.). Keohane and other rationalists essentially see international politics as a form of utility-maximizing strategic actions undertaken by states seeking the most effective and efficient means available to realize their individual and collective interests. Since states are rational, their interests are often achieved through mutual cooperation. States have motives for working together to create institutions, and sets of rules, that constrain activities and shape expectations.

The above cited rationalist claim that politics is simply power or utility-maximizing action, and that international law is a set of functional rules, has been criticized over the past decade by a new wave of constructivists (Reus-Smit 2004: 21). The debates between rationalists and constructivists are most heated on the theoretical issues relating to international politics and law.⁵ Constructivists see international politics, like all politics, as an inherently social activity. “Through politics states and other actors constitute their social and material lives, determining not only ‘who gets what when and how’, but also who will be accepted as a legitimate actor and what will pass as rightful conduct” (Reus-Smit 2004: 3). “International politics takes place within a framework of rules and norms, and states

⁵See, ‘Legalization and World Politics’ (*International Organization* 54: 3, 2000, *Special Issue*),

Reus-Smit 2004 and Simmons and Steinberg 2006.

and other actors define and redefine these understandings through their discursive practices” (Ibid.). For constructivists, international law is more than a formal, treaty-based law (Finnemore and Toope 2001). Constructivists see it as “a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies” (Ibid. and Glenn 2000).

A sharp cleavage between the rationalist (or functionalist) and constructivist views overshadows the debates in many subfields of global governance study including security, and economic and environmental issues.

John Ruggie and others (1993) analyse the form and function of one particular kind of international institution: multilateralism. It is important to note that the influence of US foreign policy is a very controversial issue in the study of regimes, institutions and governance. With respect to the international economic order, Ruggie argues that the economic liberalism of US foreign policy was influential in forming an international economic order of free trade and investment, “embedded liberalism”.

Anne-Marie Slaughter (2000) offers a view of the governance of the global economy through government networks. She argues that, contrary to the myth of the unitary State, the State is currently disaggregated. She sees economic regulators of states as critical actors in international and domestic economic policy-making. “Steadily growing economic interdependence, at both the macro and micro levels, has forced economic regulators to work with one another transnationally in order to perform their domestic jobs more effectively” (Ibid.: 178-179). Financial regulators such as central bankers, security

regulators, insurance commissioners, and antitrust officials are thus at the forefront of transgovernmental initiatives to govern the global economy. She stresses the importance of the transgovernmental aspect of globalizing law and institutions as they are international or supranational.

Human Rights : Common Moral and Ethical Concerns

In a departure from the long-held view that there was a lack of any “real” international law, legal scholars concerned with human rights issues have started to explore the common moral and ethical concerns of the globalised world.⁶ For example, Richard Falk (2000) considers the possibility of the development of a more humane system of world governance through the knitting together of normative principles expressed in widely accepted instruments of international law.

These normative principles include : (1) a renunciation of force in international relations ; (2) the protection of human rights ; (3) the common heritage of mankind ; (4) the pursuit of sustainable development ; (5) the protection of the global commons ; (6) the preservation of the Earth’s resources for future generations ; (7) the rule of law and personal responsibility ; (8) a redress of grievances ; and (9) the promotion of democracy on a global scale. These principles provide a platform for a widely acceptable, legitimate system of governance. Falk contends that a system of governance refashioned in this way would also enable the building of cultural and ideological bridges.

⁶For a review of human rights law and political issues, see, for example, Mutua 2000.

Non-state Actors: NGOs, Businesses and International Organizations

Non-state actors including NGOs (or Civil Society Organizations), businesses and international organizations have been recognized as critical to global governance. Oran Young's work moves beyond a concentration on the regularization of state behavior dominant in the early literature on regimes (Wilkinson, 2005: 4) to an examination of the increasing involvement of non-state actors in the creation, maintenance and functioning of regimes. Young stresses that the state remains the central actor in international regimes. However, the involvement of non-state actors has been striking in environment-related areas such as endangered species, hazardous waste, climate change, and ozone depletion (Young 1997). As Jan Scholte (2002) points out, civil society does not offer a panacea for democratic deficit in global governance. Civil society involvement in global governance "should be neither romanticized nor demonized" (Ibid.). However, the civil society issue has been identified as one of the main issues of global governance.

The issue of the role of international business in global governance is eagerly examined by political scientists who are concerned with private business power in global policy-making.⁷ The issue of cyber space governance has become one of the main areas the study of the relationship between business and governance. The internet has influenced and formed many of society's core functions (Purra 2008: 1). Internet regulation includes

issues which are crucial to the global economy such as intellectual property rights, data privacy protection and jurisdictional questions relating to E-commerce. These issues reflect "commercial interests and individual rights on freedom of speech and expression, as well as the right for privacy protection" (Purra 2008: 3). The power and interests of the US and the EU surely matter in the making of policy concerned with internet regulation. However, international businesses play an essential role in the process of policy making. For example, Sell (2000) shows that an American-based private business association was very influential in the making of policy regarding intellectual property rights in foreign countries.

In the realist tradition, international organizations had been simply seen as the products of powerful states and a means by which these states pursued their own interests in international affairs. However, the role of international organizations that pursue their own mandates in areas such as collective security, international trade and monetary relations and human rights have become an acute concern of international legal and political studies. Extensive studies of international organizations including the UN system, EU, WTO, IMF and the World Bank have been produced over the past decade.⁸ Barnett and Finnemore (2004) argue that international organizations do much more than simply broker international agreements between states. They also make authoritative decisions that affect the outcomes of humanitarian crisis, environmental issues, trade matters and financial crises. One

⁷See, for example, Mueller 2002, Sell 2003, Fuchs 2005, McDowell, et al. 2008 and Purra 2008.

⁸See, for example, the Routledge Global Institu-

tions series of introductions of international organizations (Thomas Weiss and Rorden Wilkinson, eds.).

aspect of global governance identified by Barnett and Finnemore (2004) is that of the bureaucratizing of world politics.

Concluding Comments

As Fred Halliday (2000) observes, “in the 1990s special attention is being paid to the questions of global governance”. “This is a term almost no one used a decade ago, but which is now generally held to refer to the institutions for managing relations between states across a range of issues, from security to human rights and the environment” (Ibid.). Once it is accepted that global governance matters, few can claim that political society among states is characterized only by anarchy. Informal and/or formal rules exist in all societies. “The question is how to make this governance system more effective, more just, and more responsive to the changing international situation” (Ibid.). In this context, questions relating to the implementation and effectiveness of, and the compliance of states with, international law are currently being explored by legal scholars and political scientists.

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