

THE THEORY OF GLOBAL GOVERNANCE, CONSTITUTIONALIZATION AND COMPARATIVE CONSTITUTIONAL LAW

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Abstract: *Globalization – multifactor phenomenon. Dimensions of globalization. The erosion of state power, global integration of the world and of most states result in the removal of barriers between national and international policies. The theory of governance: public power is no longer exercised exclusively by state, but its exercise is participated in significantly by private supranational corporations and nongovernmental organizations. On state and global level governance includes the process of participation, negotiation and co-ordination. Its key instruments are projects, partnership and consensus – in the first place the knowledge of the process leading to the achievement of consensus. There are know founding conditions within the existing international order that represent something like a global constitution. Contemporary transition stage to it is global governance.*

Keywords: *globalization of political culture; constitution, global constitutionalism; comparative constitutional law; erosion of state power; delegation of state functions; governance, meta-governance.*

1. INTRODUCTION

Process of the democratization become universal due to the ever more intensive inter-connection of social events. Their causes and effects condition one another.¹ In this way, social movement arrives at a new phase of interaction with natural movement – natural evolution – and that is what we often fail to realize that natural processes have been always global, long before man has recognized it.

Globalization, is a multifactor phenomenon. It has its economic, technological, information, political, cultural, state, ecological, social, medical, psychic, criminological and numerous other dimensions. Briefly speaking we can say that it covers all phenomens connected with the fact that in the evolutionary process of globalization the closed communities, represented so far by individual states are changing into open communities, open primarily to the geographically and culturally nearest communities, i.e. communities within the region and the world in general.²

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¹ WIENER, A. – LANG, A. F. – TULLY, S. – MADURO, M. P. – KUMM, M. *Global Constitutionalism: Human Rights, Democracy and the Rule of Law, Global Constitutionalism*. Cambridge University Press, Cambridge 2012, Vol. 1, No. 1, pp. 1–15; FIERLBECK, K. *Globalizing Democracy, Power, legitimacy and the interpretation of democratic ideas*. Manchester and New York, 2008, pp. 25 ff., 100 ff. Professor of Legal sociology G. Teubner states: “For constitutional theorists.... a constitution without a state is, at best, a utopia, and a poor one the bargain. But this formula is definitely not an abstract normative demand for remote, uncertain futures, but an assertion of a real trend that can be observed on a world-wide scale today. The thesis is: the emergence of a multiplicity of civil constitutions. The constitution of world society does not come about exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution which overlies all areas of society, but, instead, emerges incrementally in the constitutionalisation of a multiplicity of autonomous sub-systems of world society.” TEUBNER, G. *Societal Constitutionalism: Alternatives to state – Centred Constitutional Theory*. In: Joerges, Ch., – Sand, I. J., – Teubner, G. *Transnational Governance and Constitutionalism*. Oxford and Portland, 2004, p. 8.

² ROBERTSON, R. *Values and Globalization, communitarianism and globality*. In: Mendes, C., Soares, E. (eds.). *Cultural Pluralism, Identity and Globalization, UNESCO, ISSCI/EDUCAM*. Rio de Janeiro 1996, p. 73 ff.

While in the fields of economy, technology, informatics, ecology etc. globalization process in the full meaning of the term and these fields of human activities and, unfortunately, sometimes also criminality, are becoming universal, in the field of the state and constitutionality the globalization manifests itself by regionalization which means, in European concept, the strengthening of regional supranational organizations, in concrete terms the European Union, in other regions the strengthening of the contacts of the states within the region, provided they are states with qualitatively homogeneous systems, by means of such communities as NAFTA, APEC, MERCOSUR. These associations of states differ significantly from the European Union by that they are not of supranational character. The foundations of European regionalization, which we have considered in the constitutional or supraconstitutional field as the first phase of globalization, consist in the principles and values of the 18th and the 19th centuries and/or the first half of the 20th century which were not augmented by any new concepts. Their number includes primarily the personal and political human rights, the principle of political pluralism, the principle of the separation of powers, consensus and limited government.

The assertion of the equivalent concept of human and civic rights, based on the principle of proportionality,³ i.e. civil rights, political rights, economic, social and cultural rights and the rights protecting man and society against uncontrolled economic growth and overtechnicized society, the right to sound environment, protection of nature and natural resources, the right to privacy, the right to information, the right to a different style of living, the right to solidarity, the right to the equalization of personal handicap, the right to health protection, the right to the protection and development of children and young people, the right to the enjoyment of cultural wealth – encounter similar difficulties.⁴

An analysis of all these factors leads to one fundamental conclusion for the Euro-American region and, as I believe with some justification, also for other regions of the world, namely that the political and constitutional systems of individual states, forming organically model foundations of suprastate organizations, have been lagging behind the explosive development of economy, technology, informatics as well as the achievements of chemistry, biology and other technical and natural sciences.

Another important circumstance is also the fact that the globalization of economy, finance, technology, informatics, etc. and the interconnection of the whole world arising from it is a process determined objectively by the development and cannot be stopped or abolished by a decision of a political or state power. The protests against globalization as such, therefore, are extremely naive and futile. The fact is that the processes of globalization can be influenced by political and state will and can bring mankind either positive or

³ PERJU, V. *Proportionality and Freedom – An essay on method in constitutional Law, Global Constitutionalism, 2/2012 (Vol.1)*. Cambridge University Press, 2012, pp. 334–341.

⁴ GEARTY, C. *Can Human Rights Survive?* Cambridge, New York 2006, pp. 60–98, 140–157; BLAHOŽ, J. – BALÁŠ, V. – KLÍMA, K. *Srovnávací ústavní právo*. Praha 2011, pp. 190–256, 455–457; HIRST, P., THOMPSON, G. *Globalization in Questions: The International Economy and the Possibilities for Governance*. Cambridge 1999, p. 36; DONNELLY, J. Human Rights in a New World Order; Implications for a New Europe. In: Forsythe, D. P. (ed.). *Human Rights in a New Europe*. Lincoln and London, 1994, pp. 7–32. POJMAN, L. P. *Terrorism, Human Rights and the Case for World Government*. Lanham 2006, pp. 75–91; RUSCIO, K. P. *The Leadership Dilemma in Modern Democracy*. Cheltenham 2008, pp. 97–115; SWEET, A. S. *A cosmopolitan legal Order: Constitutional pluralism and right adjudication in Europe, Global Constitutionalism*. Cambridge University Press, Cambridge 2012, Vol. 1, No. 1, p. 53 ff.

negative results. If globalization of the above mentioned fields is not a product of political and state will, but a product of evolution, then the endeavour to achieve its suprastate and political control – should it be democratic and just, consider the interests of mankind as a whole and not the interests of the strongest states, would be extremely desirable, but it would have to originate as a manifestation of political will. It is not necessary to prove that it would be a desirable phenomenon. The author of the paper is aware of the idealistic ring of this idea. If we want to be realistic, we must admit, that this equality of suprastate control of global processes, while applying the principles of democracy, equality and justice, would have to be moderated in its expression by the consideration of the economic strength of member states and their size, i.e. population. Even with this natural moderation of values the suprastate world institutions, regulating economic (i.e. the movement of supranational capital), technological, ecological globalization etc. would be highly desirable and beneficial.⁵ Should the real goal of the measures of the World Bank and the International Monetary Fund be the achievement of an even greater prosperity of wealthy countries, their suprastate regulative significance for poverty suppression would be doubtful. The World Bank and the International Monetary Fund suggested the intention of both of these institutions to make a fundamental turn in their internal organization by the strengthening of suprastate regulatory elements which should oppose the exclusively profit-making character of the projects for economically strong countries (their investors) and to aim these projects – as it has been proclaimed – at anti-inflation policy, maintenance of currency equilibrium and the struggle with poverty.

2. THE CONTEMPORARY GLOBAL DEVELOPMENT OF DEMOCRACY AND FREE MARKET

Scientific research with the prevalence of postdemocracy, neoliberalism, postmodernism, neorelativism, neoinstitutionalism, neocorporativism, can be characterized very broadly as return to ideological concepts developed in the course of the 19th and 20th centuries which, however, have reached their limits. At present endeavour is made to exceed these limits and present these concepts as something new, characterized by the prefix post or neo. Is this prefix in the denomination of these trends substantiated? Partly it is, partly it is not. The prefix post or neo accentuates the flexibility of the concept and, above all, the flexibility or real and realistic policy.⁶ These trends generally agree in the opinion that

⁵ BROOKS, S. G., WOHLFORTH, W. C. *World out of Balance*. Princeton and Oxford, 2008, p. 60 ff.; FIERLBECK, K. op. cit. note 1, pp. 53–58.

⁶ Colin Crouch states: “If we have only two concepts – democracy and nondemocracy – we cannot take discussion about the health of democracy very far. The idea of post-democracy helps us describe situations when boredom, frustration and disillusion have settled in after a democratic moment; when powerful minority interests have become far more active than the mass of ordinary people in making the political system work for them; where political elites have learned to manage and manipulate popular demands; where people have to be persuaded to vote by topdown publicity campaigns. This is not the same as non-democracy, but describes a period in which we have, as it were, come out the other side of the parabola of democracy. There are many symptoms that this is occurring in contemporary advanced societies, constituting evidence that we are indeed moving further away from the maximal ideal of democracy towards the post-democratic model. To pursue this further we must look briefly at the use of post-terms in general.

political subjects of any quality in contemporary globalizing world are not merely products of objective circumstances, that the relation between events distinctly separated in time and space can be explained only with difficulty, that a comparison of social units which are products of empirically ascertained specific features cannot lead to correct results. It follows that social and political events in various regions of the world (regionalization as the first phase of globalization) cannot be assessed merely by the methods of social theories of developed Western countries. The negative aspect of our answer points to the fact that the allegedly new theories mean, to a considerable extent, the return to old theories the limits of which had been proved by the development of human society a long time ago. These theories as well as the practice based on them only prove the crisis of the contemporary universal community, its state and suprastate formations. This crisis is due to the lag of the knowledge of social development on the part of the state power which has no feedback or methods of learning from the process of state power implementation and, consequently, the ability to react adequately to this development. It is obvious also from the disputes concerning the very term of globalization and its envisaged social impact. The object of disputes in politology, sociology, comparative constitutional law, theory of state and law and economy is the generation of mechanisms supporting liberalization and open market economy. There is a general consensus that economically the globalization in its substance is a process of integration of national and local markets into a single universal market. The universal market does not include only trade with goods in the traditional concept, but also services, informations, science and partly human resources and above all, and to an ever increasing extent, the flow of capital. The most valuable article are information technologies. Universal free market is considered the most important instrument and simultaneously the target which will solve all global problems of the present. All other so often quoted values, such as human rights, humanity, etc., are considered as something which sprouts from the freedom concentrated in the free market.⁷

Contemporary states the majority of which originated in the 19th and, with the exception of Africa, in the first half on the 20th century are incapable of regulating this economic globalization, as the supranational corporations implementing it are more powerful partners to national states and subordination to the state power, particularly to the state power of minor and small states, is unfeasible. For this reason economic globalization is a process unrestrained to a considerable extent, as the most flexible factor is the flow of speculative capital which causes most frequently economic upheavals. Regional organization, such

The idea of post – is thrown around rather easily in contemporary debate: post-industrial, post-modern, post-liberal, post-ironic. However, it can mean some thing very precise. Essential is the idea mentioned above of an historical parabola through which the thing being attached to the post prefix can be seen as moving. This will be true whatever one is talking about, so let us first talk abstractly about post-x. Time period 1 is pre-x, and will have certain characteristics associated with lack of x. Time period 2 is the high tide of x, when many things are touched by it and changed from their state in time 1. Time period 3 is post x. This implies that something new has come into existence to reduce the importance of x by going beyond it in some sense; some things will therefore look different from both time 1 and time 2. However, x will still have left its mark; there will be strong traces of it still around; while some things start to look rather like they did in time again". CROUCH, C. *Post-Democracy*. Cambridge, Malden 2005, pp. 19–20.

⁷ BURGESS, J. W. *Political Science and Comparative Constitutional Law*. General Books LLC., Danvers 2009, p. 43 ff; HERINGA, A. W., KIIWER, P. *Constitutions Compared*. Antwerp, Oxford, Portland 2009, pp. 13–24.

as EU, NAFTA, ASEAN, AU, endeavour to regulate this process. Economic globalization has brought about the origin of such international institution as the OECD and an enhancement of the position of the WB and the IMF. Until recently their interest had concentrated primarily on worldwide regulative economic measures the priority objective of which it was to assure free market, unconstrained flow of capital, prevention of universal economic crises and maintenance of a certain economic equilibrium on the world scale. The key problems of the ever increasing economic and social gap between the North and the South as well as the ecological crisis appeared on their agenda in a serious form only at the end of the 90s, when the universal social crisis and ecological crisis became a direct threat on global scale and simultaneously the proof that either the WB or the IMF had been unable to deal with it until then.

Nevertheless the development of the free market has remained the principal function of the WB and the IMF, in the first place because they continue to eliminate the obstacles to the activities of supranational corporations and flow of investments. They consider international policy as the management of mutual dependences. We can hear very often from the mouths of the top officials of the WB and the IMF that their projects can be implemented only in co-operation with not only the states, but also – and sometimes chiefly – with supranational private corporations. This fact has its positive and negative aspects. The positive aspects consists in the flexibility of the process of implementation of the most varied activities into WB and IMF projects by supranational private corporations. The negative aspects is the fact at present it is impossible to expect from these corporations anything but the endeavour to achieve maximum profit which is the fundamental demand of the free market.⁸ At the same time this given rise to the questions: will it be always like this? Will not the “private sector”, in its own interest, be forced by the pressure of global threats (ecological, social, exhaust of resources) to target its economic policy at sustainable development and restrict the so far uncontrolled flows of speculative capital (which yields momentary profits, but also potential threats)? Also that is the question of the future. It is necessary to have some institutions on global level capable of developing political culture in all its dimensions.

⁸ DONNELLY, C. M. *Delegation of Governmental Power to Private Parties: A Comparative Perspective*. Oxford 2009, pp. 3–15; One of the leading military ethicists, Louis, P., Pojman (professor of Philosophy at the U.S. Military Academy at West Point, New York) says: “Corporations are powerful artificial persons. Unlike real persons, who eventually die, they can go on indefinitely growing in wealth and power. Although they cannot vote, they can influence and mobilize the votes of thousands. Unlike powerful people in a democracy, corporations are not accountable to a specific state. They are accountable only to their shareholders, who seldom are involved in day – to – day decisions. ... They are highly decentralized, irresponsible, mobile, global powers like nothing that has appeared on earth before. The ideal transnational corporation produces products where costs are lowest, sells them in the more affluent markets, and shifts the profits to where tax rates are lower or nonexistent. This ability to move from country to country weakens the bargaining power of the local workers, shifting it decisively to the corporation, ...

The state is like a tree, essentially immobile ... Like omnivorous animals, corporations are mobile, able to move from tree to tree taking shelter in the branches, deriving benefits both from the trees, which protect them, and from the other members of the ecosystem, exploiting resources to maximize profits. The exploitation has now become so great that most of the trees in the forest appear to be suffering from what environmentalists call die – back”. POJMAN, L. P. *Terrorism, Human Rights and the case for World Government*. Lanham 2006, pp. 41–42.

3. PUBLIC POWER AND THE CONCEPT OF GOVERNANCE

The function of public power has been invaded by new factors not existing previously. On the one hand these factors weaken the traditional state power, on the other hand, however, they enhance the actual regulative function. These factors include primarily the effect of supranational corporations and governmental and non-governmental organizations of a new type. This fact exerts enormous influence on the exercise of governmental power. It deletes the difference between public power and private power.⁹ The growth of strong groups of interest within civic society, particularly those which exist in all most modern states, results in the amalgamation of these groups in nongovernmental organizations crossing the state borders and their practical significance in the decision – making process increases.

The theory of state and the political science have created a category based on the French term of *gouvernance* which propagated explosively into other languages and was adopted generally by social sciences in the second half of the 90s. It was initiated by the often very difficult decision-making process in the European Union.¹⁰ In this situation a Commission on Global Governance was set up which presented to the public in 1995 the definition of Governance as the cognition category of contemporary suprastate and global processes. According to this definition “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 cooperative 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 their interest.

At the global level, governance, has been viewed primarily as an intergovernmental relationship, but it must now be understood as also involving nongovernmental organizations (NGOs), citizen’s movements, multinational corporations, and the global capital market. Interacting with these are global mass media of dramatically enlarged influence”.¹¹

Since the end of the 80s we have been encountering various concepts of global governance in theory of State, political science and science of international relations. I consider the above mentioned definition most accurate. At the same time governance is a category enabling the cognition of the present situation of the function of constitutional, political and economic systems. This definition reveals clearly the concept of global governance as

⁹ According to C. Donnelly “The definition of governmental power ... might be described as an organic definition, focusing on the powers that have evolved as governmental and reflecting the increasing complexity of the modern state. ... Thus governmental power is capable of describing a broad range of activities from delegated law – making, the setting, monitoring, and enforcement of regulatory standards, the operation of private prisons and the conduct of private policing, to the more mundane discretionary activities of management of governmental resources and benefits, control over expenditure of public funds, and performance of certain government – funded services”. DONNELLY, C. M. *Delegation of Governmental Power to Private parties; A comparative Perspective*. New York 2009, p. 6; Colin Crouch states “As more and more state functions are subcontracted to the private sector, so the state begins to lose competence to do things which once it managed very well. Gradually it even loses touch with the knowledge necessary to understand certain activities. It is therefore forced to sub-contract further and buy consultancy services to tell it how to do its own job”. CROUCH, C. op. cit. note 6, p. 41.

¹⁰ LECA, L. *De la Vème République a République a l'Europe, Homage to Jean-Louis Quermonne*. Paris 1996, p. 260.

¹¹ The Commission on Global Governance, *Our Global Neighbourhood*, Oxford University Press, Oxford 1995, pp. 2–3.

a process, not as a set of institutional solutions. Governance both on national and international levels cannot be considered a stabilized form of government, but a highly variable interaction of public and private factors. Governance is not based on the state of subordination and superiority, but on delegations, influencing and negotiations. C. Donnelly states: “The term delegation is also not intended to imply a hierarchy, whereby power is transferred vertically downward from executive, legislative or judicial actors with the monopoly of legal force to private agents. In an era of governance, which entails selforganizing, inter organizational networks, exchange, dialogue and flow, and interdependence between public and private actors, such an implication would be highly problematic. A hierarchical vision on of delegation would also suggest hierarchy in state – individual relationships, rather than reflecting the heterarchy of different spheres of society and the increased fragmentation of society more generally. Thus, for present purposes, the focus is on the sharing of authority between public and private, and if a private actor, pursuant to a measure of implementation, acts as a substitute for government, a private delegation can be considered to have taken place.”¹² It is a factual function of public power with the understanding that public power is that power which practically acts as public power and not that which is derived from the Constitution and statutes as such. This is determined also by the fact that since the beginning of the 90s the private sector has begun influencing the institutionally and organizationally backward state and international sector so much that it factually has taken over numerous fields formerly administrated by state power and the power of international institutions generated by the states. In this way private sectors has acquired numerous attributes of public power. The same applies to nongovernmental organizations.

Consequently, governance on state level consists in a heteroarchy of 1) state institutions, 2) private corporations, and 3) international nongovernmental organizations. Well known scientist Gerry Stoker, professor of local government says that the discussion of governance is structured around five propositions:

1. “Governance refers to a set of institutions and actors that are drawn from but also beyond government.
2. Governance identifies the blurring of boundaries and responsibilities for tackling social and economic issues.
3. Governance identifies the power dependence involved in the relationships between institutions involved in collective action.
4. Governance is about autonomous self-governing networks of actors.
5. Governance recognizes the capacity to get things done which does not rest on the power of government to command or use its authority. It sees government as able to use new tools and techniques to steer and guide”.¹³

¹² C. DONNELLY, C. M. op. cit., note 8, pp. 3–4.

¹³ STOKER, G. Governance as theory: five propositions. *International Social Science Journal*. UNESCO, March 1998, p. 18; “The traditional use of governance and its dictionary entry define it as a synonym for government. Yet in the growing work on governance there is a redirection in its use and import. Rather governance signifies a change in the meaning of government, referring to a new process of governing. There is however a baseline agreement that governance refers to the development of governing styles in which boundaries between and within public and private sectors have become blurred. The essence of governance is its focus on governing mechanisms which do not rest on recourse to the authority and sanctions of government”. STOKER, G., op. cit., note 13, p. 17.

On global level it is a heteroarchy of 1) states, particularly great powers, 2) international organizations generated by the states or by these international organizations themselves, if authorized by their statutes (U.N.O.), 3) supranational corporations and, 4) supreme bodies of nongovernmental international organizations.

The concept of governance¹⁴ originated as a reaction to the fact that global society was unable to solve urgent problems in the existing constitutional and international (institutional) organization and was trying to solve them by directing the cooperation of states, supranational corporations and nongovernmental organizations. The erosion of state power, global integration of the world and of most states result in the removal of barriers between national and international policies. It must be stated that public power is no longer exercised exclusively by the state, but its exercise is participated in significantly primarily by supranational corporations and nongovernmental organizations. That is why the formerly so distinct difference between public (state) and private sectors is becoming increasingly hazy. With reference to the process of factual exercise of state power numerous fields of public life are no longer governed by an explicit superiority of state power over private sector, but by their partnership based on negotiations. That is why very model organization of the constitutional system (parliamentary, presidential, neo-presidential, directorial, etc.) no longer plays such an important role in the exercise of state power as it did in the past. That can be characterized as the crisis of classical statehood in the present time. In this framework the governance process emphasizes the multiplicity and diversity of interests in society and the methods of their solution. It does not solve the problems of policy by national and international activities, but by an interactive negotiating process of highly heterogeneous participants. However, they also gave rise to the negotiations with state institutions, international institutions, supranational corporations and nongovernmental organizations.

Let us examine now the contents of global governance and its possibilities and limits in the development of global political culture. On state and global level governance includes primarily the process of participation, negotiation and co-ordination. Its key instruments are projects, partnerships and consensus – in the first place the knowledge of the process leading to the achievement of consensus. That is why state and global governance is an enormous challenge for politicians and their political culture. Only a politician capable of negotiating and of learning from the complex process of negotiations can be successful in the governance process. A politician asserting ruthlessly his own viewpoint regardless of the context in which he is acting can never be successful. The glorified image of such politicians of recent decades belong to the past today. Global governance, consequently, is an interaction of the process of fragmentary subsystems trying to find ways to joint action in global interest. When they succeed, the result is the generation of new subsystems and new procedures the purpose of which it is to offer new approaches to the given problem, new services and co-ordination with other subsystems. Flexibility of governance is its both strong and weak point, as global governance is a process and system which is very flexible, but also very fragile and vulnerable.

The concept of global governance excludes by definition any idea of centralized organization or control. It asserts the permeation of organizational modes and decision-ma-

¹⁴ FIERLBECK, K. op. cit. note 1, p. 210 ff.

king authorities. According to Oran Young¹⁵ global governance expresses the total complex of institutions (national, international), statutes, stably observed processes and standards of conduct which enable people to articulate their interests and wishes and permits them to seek the ways of how to secure these interest to their satisfaction. This involves the states in global governance, but in connection with other networks, such as international governmental organizations, nongovernmental international organizations and supranational corporations. Moreover, this connections is a process partly formalized, partly originating on the basis of experience in the form of conduct standards. It should be noted that supranational corporations are eluding increasingly the possible control of all other networks because of their dynamic development.

Global governance brings about new procedural techniques of solution of global problems. It introduces the idea of flexible non-standard mechanisms aimed at the in solution. It is not a model of some accurately defined institutional solution. It provides space for informal exchange of opinions, negotiations and reciprocal regulation. In this respect it is an enormous potential source of global political culture. Global governance does not act on the basis of international standards, but on the basis of flexible patterns which are in the process of formation and alteration at present. The modern young generation of politicians, businessmen, managers as well as administrators, intimately acquainted with the theory of games and – we can say – global political culture of the computer age, probably will become the decisive factor of the global governance process. According to Mary Claude Smouts “Governance ... is born of the interaction of fragmented subsystems which it seeks to integrate for purposes of collective action in the public interest. In so doing, it constructs subsystem whose purpose is to offer a particular service, the feasibility and modalities procedures of which are determined by the very persons rendering it. The question of the coordination of these various functional subsystems, of what happens to those not involved in them, and of the “Global” aim of governability thus established remains unanswered. The flexibility of governance is both its strenght and its weakness”.¹⁶

4. THE CONCEPT OF META-GOVERNANCE AND GLOBAL CONSTITUTIONALISM

Governance applied on global scale is something transitory in the period when the international institutions created after the Second World War are becoming increasingly non-funtional – the will not only for their reform, but even for their conservation is absent. At the same time there is no will to create entirely new institutional solutions of global regulation, either. This transitory state of gradual decline of the existing institutional organization of international organs and the quest for new models in the governance process has a dual face when considered from the viewpoint of the formation of global political culture. The gradual decline of stabilized United Nations Organization, based on the principles created in the end of first half of 20th century, is undoubtedly a negative feature. On

¹⁵ YOUNG, O. R. *International Governance, Protecting the Environment in a Stateless Society*. Ithaca 1994, p. 160.

¹⁶ SMOUTS, M. C. The proper use of governance in ernational relations. *International Social Science Journal*. 1998, Vol. 50, No. 155, p. 87.

the other hand the continuous variability of attempts at finding the solution of various global problems creates a great amount of experience in the field of political culture which may result in the generation of new effective international institutions for the solution of global problems. This context comprizes also the considerations of B. Jessop on the “organization of self-organization” resulting in the proposal to consider, because of the fragility, instability and possibility of failure of the present state of global governance the generation of so-called meta-governance: “Meta-governance has institutional and strategic dimensions. Institutionally it provides mechanisms for collective learning about the functional linkages and the material interdependencies among different sites and spheres of action. Strategically it promotes the development of shared visions which might encourage new institutional arrangements and/or new activities to be pursued to supplement and/or complement existing patterns of governance ... States have a major role here as the primary organizer of the dialogue among policy communities, as an institutional ensemble charged with ensuring some coherence among all subsystems, as the source of a regulatory order in and through which they can pursue their aims, and as the sovereign power responsible “in the last resort” for compensatory action where other subsystems fail (e.g. where markets, unions, or the science policy community have failed).

Meta-governance does not amount to the installation of a monolithic mode of governance ... markets, hierarchies and heterarchies still exist; but they operate in a context of “negotiated decision making”. Thus, on the one hand, market competition will be balanced by co-operation, the invisible hand will be combined with a visible handshake. On the other hand, the state is no longer the sovereign authority. It becomes but one participant among other in the pluralistic guidance system and contributes its own distinctive resources to the negotiation process. As the range of networks partnerships, and other models of economic and political governance expand, official apparatuses remain at best *primus inter pares* ... The state’s involvement would become less hierarchical, less centralized, and less dirigist in character”.¹⁷

Sometimes the opinion is voiced that such international institutions as the WB and the IMF are the principal actors of the global governance proces because they assure the function of the free market on global scale. Although their role in this respect is irreplaceable, it does not cover by far all fields the regulatory measures should assure on global scale. Therefore they can be considered merely the components of the global governance mechanism.

The concept of global governance is exclusively pragmatic. It aims at understanding the content of contemporary international and global activities which can no longer (whether we say it with regret or satisfaction) be measured by the present set of standards of international law and international institutions established on its basis.

The pragmatic concept of global governance results primarily from the fact that all authors dealing with global governance emphasize that in the analysis of global governance the object of examination is not what should be, but what is. At the same time the analysis discovers the positive and negative features of that what is! The research intends to ascertain the power relations among the subjects acting in collective action, particularly the

¹⁷ JESSOP, B. The rise of governance and the risks of failure: the case of economic development. *International Social Science Journal*. 1998, Vol. 50, No. 155, pp. 42–43.

mutual dependence and conditioning of suprastate and state institutions. The centre of interest of global governance theory and practice is the autonomous self-management of individual governance subjects. Theory and practice of global governance want to ascertain how the instruments of power could be used independent by of state power and examines the possibilities of using new state instruments for directing the world community towards sustainable development.

Well known constitutionalist G. W. Brown states:

“As climate change, global infectious disease and the global financial crisis continue to highlight, there are difficult global crises that need to be managed or resolved. Furthermore, as is often pointed out, these crises transgress the jurisdiction of state boundaries and reach beyond the sovereign capacity of individual nation states. In response to these global challenges, many scholars of International Relations, International Law and Global Governance have argued for the increased constitutionalization of international law and for the creation of more robust global institutions. It is often claimed that without robust global institutions and the corresponding constitutionalization of a global rule of law, then unilateral policies will continue to prevail and that this will hinder efforts for a coordinated response to global collective action problems. In relation, an argument is also often made that the international order is already constitutionalized in some meaningful sense and that there are founding conditions within the existing international order that represent something like a global constitution”.¹⁸

According to professor G. Teubner: “Grotius’ famous proposition *ubi societas ibi ius* has to be reformulated in the conditions of the functional differentiation of the planet in such a way that, wherever autonomous social sectors develop, autonomous law is simultaneously produced, at a relative distance from politics. Law-making also takes place outside the classical sources of international law, in agreements between global players, in private market regulation by multi-national concerns, internal regulations of international organisations, inter-organisational negotiating systems, world-wide standardisation processes that come about partly in markets, and partly in processes of negotiation among organisations. In addition, legal norms are not only produced within conflict regulation by national and international official courts, but also within non-political social dispute-settling bodies, international organisations, arbitration courts, mediating bodies, ethical committees and treaty systems. If it is true that the dominant sources of global law are now to be found at the peripheries of law, at the boundaries with other sectors of world society, and no longer in the existing centres of law-making – national parliaments, global legislative institutions and inter-governmental agreements – then, this simultaneously also means that norms of constitutional quality are always being produced there.

Thus, the new phenomena of global juridification imply the possibility that constitutionalisation processes, too, may be played out outside national and political institutions.”¹⁹

The generation of the concept of global governance and the endeavour to define its contents is aimed at understanding the originating new global political culture. At the

¹⁸ BROWN, G. W. *The Constitutionalization of what? Global Constitutionalism*. Cambridge University Press, Cambridge 2012, Vol. 1, No. 2, pp. 201–202.

¹⁹ TEUBNER, G. op. cit., note 1, pp. 16–17; PŘIBÁŇ, J. Ranní červánky globálního konstitucionalismu: o radostné právní vědě v post-nacionální společnosti. *Právník*. 2013, roč. 152, č. 2, pp. 112–123.

same time it is possible to say that numerous methods and standards of conduct appearing in the present global governance process will have to be rejected in the interest of the originating global society, because they have originate by trial and error, are often short-sighted and aimed only on instantaneous achievement of short-term success, profit or effect, while others form a solid base of global political culture. Although particularly the specialists in theory of state may not like the characteristic of global governance as “... a set of regulation mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority”.²⁰ This characteristic defines the most substantial feature of global governance; although it does not replace, by far definition elaborated by the Commission on Global Governance it does contradict it, either.

The examination of the process of global governance simultaneously reveals two fundamental shortcomings of contemporary global governance political culture. They are: 1) the fact that the states are becoming increasingly vulnerable because of mutual dependence of global society, and 2) the fact that the existing international mechanisms are no longer capable of solving adequately the arising problems.

There is an abyssmal difference, in our opinion, between the proces of globalization and its conceptual elaboration in the framework of individual scientific disciplines. Globalization as an intensive multidimensional process is not accompanied by far with globalization of cognition, experience and education, science and culture of the same intensity which results in oversimplification of the process of globalization.

Global governance imposes extraordinary emphasis on scientific expertise which has become one of its highly significant instruments. Opinions have been voiced that it is particularly social sciences that are becoming, through their renowned experts, one of the independent and relatively autonomous components of global governance. At the same time it is necessary to ask what concept of social sciences should be involved. Whether they are expertises from the field of constitutional law, international law, international relations, politology, sociology, ecology, natural sciences, medicine, pedagogy, psychological or any other fields, they cannot be merely monodisciplinary if they are to contribute to globalization; on the contrary: they must be multidiciplinary or transdisciplinary which means that the expert or a team of experts preparing an expertise for the global governance process cannot be merely a politologist, lawyer or sociologist, but must have also some knowledge or biology, natural history and medicine. Thus the concept of a Renaissance scientist or universal education appears again on a new level and in a new phase of development, because a narrowly educated specialist or even a group of narrowly educated specialists cannot work effectively in the process of global governance.

The role of scientific expertise is assessed very correctly in the study by the known comparativist Ali Kazancigil who shows both the positive features and the limits of scientific expertises entering the decision-making process in the global governance framework.²¹ The same author gives also a very apt characteristic of the status of science in the present globalization society: “As regards science, the institutional, cognitive and epistemological

²⁰ ROSENAU, J. – CZEMPIEL, O. E. (eds.), *Governance without Government, Order and Change in World Politics*. Cambridge: Cambridge University Press, 1992, p. 5 and p. 88.

²¹ KAZANCIGIL, A. Governance and Science: Market-like modes of managing society and producing knowledge. *International Social Science Journal*. 1998, Vol. 50, No. 155, pp. 72–74.

directions it takes the context of co-ordinative governance, powerful market forces and reflexive, fragmented postmodernity, are cause for concern. Here two, representative democratic institutions should live up to their responsibilities and generate, through public debates new ethical principles, as well as social and professional norms to protect independent science and the production of knowledge as a public good, while continuing to support the utilization of science and technology in the service of socio-economic development. A predominantly privatized/instrumentalized research and commodified knowledge would keep producing profit – making technologies, but science would not survive for long under such conditions”.²²

5. CONCLUSIONS

In this study we have dealt with the present state, negative and positive aspects and particularly the contemporary and potential sources of the generation of global political culture, global governance and global constitutionalism. The study presented the markedly changed role of the state (Crises of the contemporary state)²³ both on national and particularly international (global) levels and examines global and state governance and its individual components (networks) and procedural mechanisms which it qualifies as a source of global political culture originating with great difficulties at present. The study assesses also the role of science in general and social sciences in particular asserting themselves in this process and so contributing significantly to the generation of global political culture.

The conceptual solution of the institutional globalization will remain one of the most important tasks of the 21st century. With reference to democratically oriented intentions (which are the only intentions acceptable) the global suprapstate institutions or a sort of world association of states (based on the theory of global constitutionalization)²⁴ should be generated from below, using all constitutional and political culture of the individual states. Simultaneously the elasticity of such organization based on extensive initial autonomy of individual member states, should be a guarantee against any sort of global suprapstate dictate. Global supranational²⁵ organization, in our opinion, is the only way of the management of public affairs at which the world civilization will arrive in the future. Whether it will happen by conflict free evolution or as a result of same big economic, ecological and social quakes is a question of the ability to predict and learn from the process of global governance of contemporary states and particularly also the suprapstate regional communities which should develop into global constitutionalism.

It is very difficult to predict when this global constitutionalisation of the world will take place. Contemporary transition stage to it is global governance.

²² Ibid, p. 77.

²³ HOLLÄNDER, P. Soumrak moderního státu. *Právník*. 2013, roč. 152, č. 1, pp. 9–12, 26–28.

²⁴ According to G. W. Brown “... global constitutionalization is defined as phenomenon occupying the legal spaces that result from various transformations associated with globalization ... in an increasingly interdependent world ...” BROWN, G. W. *The Constitutionalization of what? Global Constitutionalism*. Cambridge University Press, Cambridge 2012, Vol. 1, No. 2, p. 206.

²⁵ On the concept of supranationality cf. MALENOVSKÝ, J. 60 let Evropských Společenství: od francouzského “supranacionálního” smluvního projektu k jeho německému “podústavnímu” provádění. *Právník*. 2012, roč. 151, č. 7, pp. 674–693.