The Drift Of the European Economic Functionalism. Is a Common European Public law Still Possible?[1]

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ABSTRACT: In the wider scenario of the internationalization of legal concepts, marked by phenomena of legal transplants, migration of constitutional ideas, constitutional dialogues, [...], the constitutional foundations and their related historical semantics are manipulated by the international process. The "legal flows" have emerged as useful tools to move concepts, cultures and histories through the formal channels of the legislative and judicial processes. Geopolitical relationships of power and especially of economic interest are hidden behind the "dialogues", covered by words that "do not cost" and in the dialogue between courts, fundamental rights are de-socialized, eradicated from their related social context. In this framework, the continuous migration flows have cultural elements suitable to require new forms of local interaction, a new governance for the future sustainability that takes into account changes on the territory, possible socio-environmental conflicts, a new balance between nature and human structures, a new relationship between the local environment, people's movements and human rights. The European constitutionalism of the global era discusses the "culture of rights" by linking the constitutional development of the irreversible conquest of "new" rights, within a "neutral" framework of economic development and apart from the role of the state within the development itself.

RESUMO: No cenário mais amplo da internacionalização dos conceitos jurídicos, marcado por fenômenos de *legal transplants,* migração de ideias constitucionais, diálogos constitucionais, ..., as bases constitucionais e sua semântica históricos são manipulados pelo processo internacional. Os *"legal flows*" surgiram como úteis para mover conceitos, culturas e histórias através dos canais formais dos processos legislativos e judiciais. Relações geopolíticas do poder e, especialmente, de interesse económico estão escondidos por "diálogos" e por palavras que "não custam"; no diálogo entre os tribunais, os direitos fundamentais são deslocalizados, arrancados de seu contexto social. Neste quadro, os fluxos migratórios contínuos têm elementos culturais apropriados para exigir novas formas de interação local, uma nova governança para a sustentabilidade futura que leva em conta as mudanças no território, os possíveis conflitos sócio-ambientais, um novo equilíbrio entre a natureza e estruturas humanas , uma nova relação entre o meio ambiente local, os movimentos das pessoas e os direitos humanos. O constitucionalismo europeu da era global discute a "cultura de direitos", relacionando o desenvolvimento constitucional da conquista irreversível de "novos" direitos, dentro de um quadro "neutro" do desenvolvimento económico e para além do papel do estado dentro do próprio desenvolvimento.

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PALAVRAS-CHAVE: constitucionalismo europeu, soft law, o funcionalismo económico europeo, bens comuns.

INTRODUCTION

In the wider scenario of the internationalization of legal concepts, marked by phenomena of legal transplants, migration of constitutional ideas, constitutional dialogues, [...], the constitutional foundations and their related historical semantics are manipulated by the international process. The "legal flows" have emerged as useful tools to move concepts, cultures and histories through the formal channels of the legislative and judicial processes. These flows become a legal "container" in which, completely opposite cultures, carry and cross; they allow different and distant legal operators to circumscribe international spaces: this way, different countries are united by using the same constitutional semantics which, moving from one place to another, lose their historic and cultural strength[2]. This has in part led to the communitarisation of domestic law through shared values and spaces, and subsequently, to the increased flexibility of state powers; in part it has also led to the creation of a *soft law*, a law which is not binding in its legal strength but sufficiently strong in its programmatic structure to represent a break from traditional laws. Geopolitical relationships of power and especially of economic interest are hidden behind the "dialogues", covered by words that "do not cost" and in the dialogue between courts, fundamental rights are de-socialized, eradicated from their related social context. In this framework, the continuous migration flows have cultural elements suitable to require new forms of local interaction, a new governance for the future sustainability that takes into account changes on the territory, possible socio-environmental conflicts, a new balance between nature and human structures, a new relationship between the local environment, people's movements and human rights. Today, the "local" is the synthesis of socio-legal-economic intergenerational processes, where the compared generations are no longer exclusively those originating in the place but a mixture of culturally different ethnic groups. There is the need for national policies to be not reduced

2 Carducci; Bruno. *Studying the "Legal Flows" as a Multidisciplinary Method to Promote Constitutionalism as a Common Property of Mankind*, in Proceedings of the *Global multidisciplinary eConference-UNESCO's World Science Day Celebration*, vol. 1, ESI, 2013.

to impersonal logic where the universality of human rights risks being merely a constitutional "symbol".

In the first part of this work, attention will be paid to the role of state sovereignty in the "law of the new spaces" delineated by the processes of trans-nationalization of legal concepts where the law is fragmented into "the law of peculiarity" and lost its traditional and historical European unity and logic. In the second part, the issue of human rights is intertwined with that of the financial crisis, embedded within the global scenario where forms of dialogic interaction with the new contemporary sources of law (constitutionalism, internationalism, universalism) are legitimated. The European constitutionalism of the global era discusses the "culture of rights" by linking the constitutional development of the irreversible conquest of "new" rights, within a "neutral" framework of economic development and apart from the role of the state within the development itself. The third and final part of the work focuses on the concept of "common good" that represents an attempt to reconcile the universalist aspirations of human rights and a faithful bond to national constitutions, an attempt to look for a single European public law (instead of a public law of the European Union).

1 THE ANYWHERE OF THE LAW AND THE ANTI-STATES EFFECT

With the process of globalization, national law has lost its normative force as a symbol of positive legal order. It has been overtaken by a law whose origin is in the public opinion of members of society, in judges' decisions and in legal science. The legislators' intentions have been substituted by those of the judges, allowing human rights, fundamental individual rights to produce institutional and judicial artifices to effectively safeguard "individualism", in and of globalization against the abuse of the majority. In this sense, a denationalization of states has followed the creation of a global juridical dimension. The states, with the choice of giving way to judges, have legitimized a dialogue which, in recent years, has involved national courts, the Court of Justice and the European Court of Human Rights. This has in part led to the communitarization of domestic law through shared values and spaces, and subsequently, to the increased flexibility of state powers; in part it has also led to the creation of a *soft law*, a law which is not binding in its legal strength but sufficiently strong in its programmatic structure to represent a break from traditional laws which have become too rigid for the logic behind European Union governments[3]. The creation of new

3 The notion of *soft law* was deeply developed during the Seventies by the legal scholar DUPUY René-Jean and his *Droit déclaratorie et droit programmatoire : de la coutume sauvage à la soft law*, in *L'élaboriation du droit international public*, Colloque de Toulouse, Société Française de Droit International, Paris: Pedone. 1975, pag. 132-148. Within the European Community, the existence of a *soft law* was understood as an ensemble of "*rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable), but which according to their drafters have to be awarded a legal scope,*

spaces alternative to national ones, determined both by processes that respond to transnational power and by processes that operate outside of institutionalized political power, can appear physiological in global logic, but shows the absence (or non-activation) of a set of tools with which to generate "antibodies" against external attacks brought about by new situations and the subsequent artificiality of the relationship between the two dimensions (national and supranational)[4]. It is well known that Europe has always sought in the law a tool of unification so as not to yield to the individualist temptation of overseas *case law* and to maintain the culture of *common law* and *civil law* separate out of respect for its different historical origins; but the passage of one "rule" from one legal order (supranational) to another (national) has put an end to the original significance of the rule and the necessary re-elaboration of the same in consideration of the new socio-legal context. This artificial relationship that has arisen between the two systems has given way to something that could be assimilated into a new legal formant, a «legal irritant», to quote G. Teubner, allowing the inclusion of a "rule" from one context to another by using techniques of adaptation (e.g. constitutionally conforming interpretation or *Drittwirkung*) or dynamics, be they social, political or judiciary, which are constantly evolving and thus exposing the internal context to change (e.g. community or international judicial living law)[5]. Furthermore, the processes of internationalization has brought national legal systems up against the same structural problems, producing forms of convergence in the search for solutions which, while different, can be considered "equivalent" in the functional sense[6]. If we consider the European Treaties, it is clear that after the creation of a space without frontiers, a process of "delocalization" and "de-historicization" followed, after which individuals experienced the gap between being an "individual-member" of a political and legal institution and an "individual-member" of the economic space, that is, an active and passive part of the new economic assets.

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that has to be specified at every turn and therefore do not show a uniform value of intensity with regard to their legal scope, but do have in common that they are directed at (intention of the drafters) and have as effect (through the medium of Community legal order) that they influence the conduct of Member States, institutions, undertaking and individuals, however without containing Community rights and obligations", Wellens, Karel; Borchardt, Gustaaf. *Soft Law in European Community law,* in *European Law Review,* vol. 14, 1989, pag. 285; Senden, Linda. *Soft Law in European Community Law*. Oxford: Hart Publishing, 2004, pag. 112; SNYDER, Francis. *Soft law and Institutional Practice in the European Community*, in *The Construction of Europe: Essays in honour of Emile Noël* (S. Martin ed.). Dordrecht: Kluwer Academic Publishers, 1994. pp. 198; TRUBEK, David; COTTREL, Patrick; NANCE, Mark Thomas. "*Soft law", "Hard Law" and European Integration: Toward a Theory of Hybridity*". Jean Monnet Working Paper n. 2*,* New York*,* 2005.

4 PEREZ, Oren; Teubner, Gunher eds. *Paradoxes and Inconsistencies in the Law*. Oxford and Portland, Oregon: Hart Publishing, 2006.

5 Teubner, Gunther. *"Legal Irritants": come l'unificazione del diritto dà luogo a nuove divergenze*, in *Ars Interpretandi. Rivista di ermeneutica giuridica*, 2006.

6 Mitrany, David. *The Prospect of Integration: Federal or Functional?*, in *J. Common Market*, n. 4, 1965.

But globalization is not the result of an attitude of resignation; it is a choice resulting from agreements between states, in full exercise of their sovereignty and thereof real ways revocable. In fact the Union lasts as long as state consent lasts. It is a solution of economic policy, a technocratic solution decided by states, not by renouncing sovereignty, but with its full and safe exercise, exercise that is in the form of self-limitation (as is the case for Article 11 of the Italian constitution in which it appears that the rules of international law always result from an agreement concluded by the states). It is clear that it could also be an artificial solution because it leads to a separation of economy and currency from the national territories to recognize them another spatial dimension[7].

For this reason, the union has the task of creating an area without internal frontiers; and creating it through the artificiality of rules that build a space that is not just a larger area but an artificial dimension of the economy. The antithesis is between territoriality and space, where it designates a pure determination of law; consequently, the European Union is a combination of inter-statehood and normative artificiality. For legal rules to become global phenomena it is necessary to be disconnected from territoriality since the achievement of global goals requires a new "law of spaces" which has to arise from agreements between states and cannot avoid using normative artificiality. The law of the new spaces will be artificial and fragmentary: single legal solutions to individual problems [...] certainly different from the historical unity and logic of traditional European rights. The "anywhere" of the law crosses state territories and assumes a new spatial form; it is an "anywhere" decided through inter-state agreements that determine the place of each single relationship. This is the great virtue of artificiality that does not belong to any place, but may well be in any place, and therefore give a place to global phenomena[8]. It does not obey any *nomos* that can link it to the uniqueness of a place but only to the need for more accurate and effective functioning. Artificiality is the foremost trait of modern law, or rather, of legal modernity: laws are artificial, indifferent to their content, able to determine their own time and space. Enactment of these laws is mere formality: it is just procedure, and procedure becomes the basis of the law. Such artificiality allows the law to detach itself from its place of origin and to be extended as an agreement between states, to any number of territories. It is evident that the

7 Barber, Nicholas. *Legal Pluralism and the European Union*, in *European Law Journal,* vol. 12, n. 3, 2006, pag. 306-329.

8 Zumbansen, Peer. *Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism*, in *http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1758&context=scholarly_works* (accessed August 03, 2016); Snyder, Francis. *Global Economic Networks and Global Legal Pluralism*, in *Transatlantic Regulatory Co-operation* (G.A. Bermann; M. Herdegen; P.L. Lindseth eds.). Oxford: Oxford University Press, 2000; TAleinikoff, T. Alexander. *Transnational Spaces: Norms and Legitimacy*, in *Yale Journal of International Law,* n. 3, 2008, pag. 479-490; Sassen, Saskia. *The Places and Spaces of the Global: An Expanded Analytic Terrain*, in *Globalization Theory. Approaches and Controversies* (D. Held; A. McGrew eds.). Oxford: Polity Press, 2007, pag. 79-105.

problem of "where" takes on a great deal of importance; the global phenomena compel socio-political and legal operators to rethink the problem of space since the law has a spatial form. This is true for at least two reasons, because the law always needs an applicative space, and because it requires the receiver to behave in a certain way in a certain place. An attempt to supply the need for topographical determinations through which it would be possible to isolate a field of legal action was made when the territoriality of the states assumed the monopoly of lawmaking, aligning the legal European and state territory. This boundary then determined the point not to be crossed, defining a topographical identity as historical identity (as a set of language, customs, traditions) through its own excluding function. Around the notion of exclusivity, legal scholarship has built several basic concepts, the first of which are sovereignty and ownership; but the actual scenario leads to a question:

> whether we are entering a third historical phase of the concept of sovereignty – the first being characterized by exclusive territorial control, the second by collective self-rule of a multitude through a constitution which constitutes them as a "We the people", and the third by the re-conceptualization of the idea of collective self-rule as the capacity of a collective to interact with other communities and share with them the control of their life conditions on a global scale, irrespective of territorial boundaries.[9]

This indefinite multiplication of sovereignties, where the law is fragmented into the "law of peculiarity", the law of global market exchanges produces not only anti-states but also undemocratic effects. In fact, where the global phenomena does not express any legal criterion, it can happen, as in fact does happen, that the strongest states hold world domination and imperialism moves and plans under the aegis of legal universalism. So wars become humanitarian interventions and human rights become concrete claims to basic human needs that can be protected by judicial authorities: only inter-state agreements, eligible to be applied beyond the borders of individual states, are capable of bringing economic affairs back into conformity with the law of specific spaces, bridging the gap between global space and territoriality of the rules. It is therefore a topographic determination, useful to the validity of the rules and the exercise of coercive power. In this perspective, the existence of a space should be the condition of possibility of concrete phenomena and not a determination dependent on them: agreements between states can challenge the global economy to remove it from the power of imperialism, trying to regulate it…there is never a lack of law. The problem affects only the states that are able to make the law and to impose it.

9 Preuss, Ulrich. *Disconnecting Constitutions from Statehood: is Global Constitutionalism a Viable Concept?* in *The Twilight of Constitutionalism* (P. Dobner; M. Loughlin eds.). Oxford: Oxford University Press, 2010, pag. 39; *Problems of a Concept of European Citizenship*, in *European L. Journal*, 1995, p. 277 ss.

2 THE "NEW CULTURE OF RIGHTS" WITHIN A COMMUNITY WITHOUT STATES

At the end of the twentieth century, the trans-nationalization of legal concepts assumed significantly different characteristics. The process was promoted by lawyers, bureaucrats, international institutions, NGOs and popular movements rather than by an intellectual movement of lawyers and philosophers; it was not a monolithic phenomenon but it combined supranational uniformity with local differences, impositions from above with creative impulses from below, formal statements with the interstates emergencies. Not surprisingly, globalization was defined by A. Giddens as the *intensification of worldwide social relations* which connect different and *distant localities in such a way that local happenings are influenced by events occurring many miles away and vice versa*[10]. It appears as a phenomenon with intertwined and complex economic, social, political, cultural, religious and legal dimensions. Moreover, globalization in the last two decades rather than proceed homogenizing and standardizing different levels of action, wanted to combine worldwide sourcing with local diversity, ethnic and national identities and popular rootedness. At the same time, globalization continues to be linked to other changes such as growing inequality, environmental catastrophes and the search for a *formal democracy as a political condition for international assistance to the peripheral and semi-peripheral countries*[11].

From the European viewpoint, the absence of a *Grundnorm* (Fundamental Law), as an incomplete moment of European integrity-integration, has caused multiple consequences both internally and externally, both at a European and at a global level. On the one hand, this has led to national demands for definition of collective identity: the lack of a common code (in which every individual can identify himself, as this code has been created by everyone) and the consolidation of a supranational public power has caused reactions of delimitation of power among the member states, opposing the protection of fundamental rights and national identity in order to preserve constitutional specificity. On the other hand, each individual, through European legislation, has been emancipated from national restrictions and this has become one of the main pivotal points of the European legal system, bringing about a multilevel judicial constitutional law, a *multilevel protection* which has broadened the judges' scope of intervention in giving greater clarity to the indeterminate nature of precepts.

10 Giddens, Anthony. *The Consequences of Modernity*. Oxford: Polity Press, 1991; *Modernity and Self Identity*. Cambridge: Polity Press, 1991.

11 SANTOS, Boaventura de Sousa. *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York:Routledge, 1995, pag. 253. Krugman, Paul; Venables, Anthony J. *Globalization and the Inequality of Nations*, in *The Quarterly Journal of Economics*, n. 4, 1995, pag. 857-880; Bourguignon, François. *The Globalization of Inequality.* Princeton: Princeton University Press, 2015.

Mediation of political will permits the states to construct their own sovereignty by translating the responsibility of decisions into laws. At the same time, political choices are as ever the real creators of economic spaces and the economy is formed around state rules and laws. Therefore, on the one hand, the crisis of normativity is cause and effect of the creation of *contra* or *extra constitutionem* rules which are legitimate because they are consistent with an evolutional process which recognizes the EU as the ideal space in which to embrace the challenges of globalization: a process of positivization that is modulated around a series of operations of recognition and identification, or rather, a continuing and widespread hermeneutic practice of acceptance and use, articulated over all levels, from "technical" levels, recognized by the same system, to non-institutionalized levels of private citizens, who experience the law as valid and favor it over other possibilities. On the other hand, there is the affirmation of a new *aequitas* in the "figurative" path of the modern subject, summoned to reclaim the past in order to preserve it and support it in the future.

The process of globalization has shown its contradictions, apparently just dialectical, often enabling new forms of globalization and localization. If on the one hand social relationships seem de-territorialized, open to new "rights to options", on the other hand, and in apparent contradiction, new regional, national and local identities emerge, claiming the return to the "right to roots". These localism are often adopted by trans-localized groups, such as Islamic fundamentalists in Paris, or those of Latin America in the US. They cannot trace a specific sense of belonging but are based on an idea of territory, symbolic or imagined, more or less real, and that form of re-territoriality occurs at the infra- or supra-state level. A good example is the European Union...[12].

2.1 The European constitutionalism and the culture of "new rights" in the global era

The European Union in the present age is characterized by a strong interaction between states, facilitated, in a certain sense, by the advancement of technology and the speed of the media and the interstate exchange (visible in various spheres, in business as in financial and economic relations, in terms of human rights protection, ...) is not absolutely free from certain restrictions: while internal disputes are resolved by national judiciaries responsible for state actors these national judiciaries were often unable to resolve matters involving international bodies. The problem is compounded when disputes about a particular state may come, at the level of international law, from the claims of another state (see, economic or trade relations, ...) or by private entities belonging to the state involved (the issue of protection of human rights emerges at this

12 Santos. *Op. cit.*, pag. 250 ss.

point). All this has legitimated international law to create specific mechanisms to settle disputes through the Court of Justice and the European Court of Human Rights that interface with the national judges and courts of the states involved, creating a "triangular" and "inter-normative" legal relationship. The main goal will be the axiological need to look for the "right answer" by weighting different values, developing forms of dialogic interaction with the new contemporary sources of law (constitutionalism, internationalism, universalism). In fact, legal rules are understood as a much more complex set of values abandoning the method of subsumption in order to balance all the values involved in the case at hand, relying on the dialogue between all the various sources of law[13]. But this complexity of sources and the interpretation thereof is reflected especially in the field of human rights where the effective protection of a specific guaranteed right is much more important than a possible discussion on the hierarchy of rules to be applied. In Europe, the risk of producing contradictions between different sources belonging to the involved levels and the risk of conflict between different jurisdictions tend to be neutralized through the so-called dialogue between the courts and the acceptance of interconnected hierarchies between (conventional and integrative) European and state sources.

Today globalization brings us up against a never ending round of communications among spaces, where historical and material complexities do not disappear; legal scholars talk about "dialogue" between the courts, about "cosmo-political constitutional law", about legal networks and variegated and conflicting archipelago of global rules, or about constitutional borrowings and migrations of constitutional ideas. The actual dynamics of communication follow the so called "legal flows", new communicative interactions between the legal operators from different parts of the world: these flows can produce "imitations", judicial dialogue, migrations of constitutional ideas, constitutional borrowing between different legal orders; but they also determine informative asymmetries, ambiguities, misunderstanding of the problems at hand[14]. But a constitutionalism based on this particular form of communication produces just a "collage" of "constitutional fragments", faraway from constitutionalism as common property. Global cultural flows shape the local subjectivities making abstraction from the historical and cultural context (especially in constitutional matters with a moral content), reducing the complexity to what is useful – in the past, the "collective singulars" that have a European origin (like "State",

13 The notion of transnational law was developed by Philip Jessup to intend all law which regulates actions or events that transcend national frontiers, involving not only public and private international law but also other rules which do not wholly fit into such standard categories, *Transnational Law*. New Haven: Yale University Press, 1956; van Erp, Sjef. *European Union Case Law as a Source of European Private Law: A Comparison with American Federal Common Law*, vol 5.4, in *Electronic Journal of Comparative Law*, 2001, http://www.ejcl.org/54/art54-1.html (accessed August 08, 2016).

14 Bruno; Carducci. *Op. cit.*, pag. 118-124.

"Nation", "Sovereignty") were imposed, through the colonialist process, on the rest of the world through different histories and languages[15]. "Legal flows" have a socio-linguistic power as emphasized by the techniques of comparison developed by judges: judicial dialogue is based on information which is useful to decision-making but insufficient for a deep analysis of different global realities[16].

Legal flows are natural tools in the globalized era because they are a product of globalization. But globalization is not a neutral phenomenon; it depends substantially on the states, is the result of the world wars of the last century, of the first global economic institutions, the IMF and the World Bank, products of North-American world primacy and the dollar, as well as of GATT that stabilized international payments through the control system of exchange between currencies, according to the liberalization of international trade. The states have defined with their consent the global destiny of development, with their percentage of conditioning between North and South, center and periphery of capitalism and the same process of supranational integration had neither a federalist nor a constitutional nature, but was based on an economic functionalism that needed the artificiality of "general principles of European law", the *primauté,* the "useful effect" of European Law to close the open dimension of states within a single system[17].

From this viewpoint, the European constitutionalism of the global era discusses the "culture of rights" by linking the constitutional development of the irreversible conquest of "new" rights, within a "neutral" framework of economic development and apart from the role of the state within the development itself. All this ignores the European constitutional path where the "rights culture" is not simply an individual achievement, but a condition of social development of the person, that founded this social bond to work. Work makes the person a "social subject" with rights and not just a "social element" of an economic exchange, neutrally "calculable"; it is only work that gives a social effectiveness to human dignity and it is the "right to work" that makes the state responsible for not only "respecting the rights" but for taking care to remove the obstacles that prevent "equal social dignity" from being a fundamental right. This way, the struggle *for* constitutional rights is transformed in this way into a fight *between* constitutional rights. The Treaty of Lisbon on the one hand proposes a multilevel constitutionalism with a simple assertion of rights (Art. 6 TEU), while on the

15 Santos. O*p.cit.*, pag. 271. Bruno; Carducci. *Op.cit.*

16 Mitrany, David. *The Functional Approach to World Organization*, in *International Affairs*, vol. 24, 1948, pag. 350-363; Ümit, Kurt. *Europe of Monnet, Schumann and Mitrany: A Historical Glance to the EU from the Functionalist Perspective*, in *European Journal of Economic and Political Studies*, n. 2, 2009.

17 Carducci. *Il "quadrilatero dello sviluppo" e i postulati "perniciosi" per il futuro del costituzionalismo*, in *Direito Constitucional nas Relações Econômicas: entre o cresci mento econômico e o desenvolvimento humano* (G.M. Pompeu; M. Carducci; M.R. Sánchez eds.). Rio de Janeiro: LumenJurís, 2014.

other hand, it balances the goals of social justice, solidarity, generational and gender equality with the contents of economic "neutrality" of "sustainable development" in an open market economy with free competition" (Art. 119 TFEU). The vocabulary used by the European treaties speaks equally about: workers, citizens, consumers, entrepreneurs, as if they were "different but comparable" elements of development; in this perspective, work is reduced to a variable that feeds a subjective expectation to be reconciled with other equally subjective and fundamental expectations of profit, consumption, [...][18].

The recent economic and financial crisis is not just a crisis of regulation of the financial markets but underlines a traumatic transition of the process of de-constitutionalization of economic and social relations; and it is the "cause" rather than the "effect" of globalization, the European states (*in primis*) want to believe that a "community of rights" can survive within a "community without states". The state is no longer a constitutional subject and guarantor of social development, we should now believe that the guarantor is the market and the neutrality of the science that analyses and legitimates it[19].

3 LOOKING FOR A COMMON EUROPEAN PUBLIC LAW

The basic principles of the dominant paradigm are that of property, on which the capitalist world system is based, and that of sovereignty, which is the reference point of the interstate system[20]; but alongside these principles, the doctrine of the common heritage of humankind adopted by international law in recent decades has underlined the need for a new development model, a new social contract between the earth, nature and future generations. As clearly evidenced by B. de Sousa Santos, the *jus humanitatis* expresses an aspiration to a new governance of natural or cultural resources which, due to their extreme importance for the sustainability and quality of life, should be considered as property and management for the interest of mankind[21].

This new model is carrying the idea of globalization over, representing the privileged field of conflicts between capitalist forms of globalization (globalized localisms and localized globalisms) and forms of globalization that look to the emerging paradigm (cosmopolitanism and the common heritage to mankind). The development of *jus humanitatis* would find immediate support in the doctrine of the common heritage of humankind, originally formulated in 1967 by A. Pardo, the Ambassador for Malta, for the international regulation

18 Cantaro, Antonio. *Il secolo lungo: lavoro e diritti sociali nella storia europea*. Roma: Ediesse, 2006.

19 Carducci, *Op. cit.*

20 Irti, Natalino. *Norma e luoghi. Problemi di geo-diritto*. Roma-Bari: Laterza, 2001.

21 Santos. *Op. cit.*, pag. 365.

of the oceans and deep water[22]. As B. de Sousa Santos highlights, since then, the concept of the common heritage of humankind has been applied to areas such as the moon, space and Antarctica in order to recognize humankind as the owner of natural entities, in order to make it possible for everybody to express their opinion on the management and allocation of resources[23]. Five elements are usually associated with the concept of the common heritage of humankind: non-appropriation, management by all, international sharing of the benefits from the exploitation of natural resources, peaceful use (which includes the freedom of scientific research for the benefit of all), and preservation for future generations. But the concept of the common heritage of humankind goes further, wanting to recognize humankind as a subject of international law with the right to its own property and to the autonomous prerogative to manage the space and the resources included in the "global commons"; what is required is a commitment from the member states (already assumed in the nineteenth century) to sign agreements that do not contain any implication of reciprocity (as happened in the past for the prohibition of slavery, freedom of navigation, regulation of working conditions, ...) , with the aim of protecting *a global benefit that can be achieved only through international cooperation and the acceptance of obligations by all governments, even if they do not receive an immediate return*[24]. The need of a

> new *jus humanitatis* breaks with the basic premises both of nation-state law and traditional international law in many ways. To begin with, it creates a new spatiality. Beyond local, national and international, it creates global legal spatiality…*jus humanitatis* is transtemporal; it is grounded on the idea of intergenerational responsibility. The unilateral rights of the global commons are proclaimed in the name of the continued sustainability of the earth. The basic principle of *jus humanitatis* is the principle of sustainability, rather than the principle of expansionism … *Jus humanitatis* represents the reemergence of the principle of the community in a new mold. This is a highly conflictual process. The principle of the market has prevailed in the restrictive interpretation of the common heritage of humankind, as witness the extension of the entitlement to mine the moon to private entities, and the commercialization of the outer spaces in general[25].

When between 1890 and 1990 there was a transfer of goods and capital from the state to the private sector, the effects were devastating: in the last thirty years, inequalities have grown; the wealth of the richest has increased; specu-

22 Santos. *Op. cit*.

23 Santos. *Op. cit.*, pag. 367.

24 Dardot, Pierre; Laval, Christian. *Commun. Essai sur la révolution au XXIe siècle*. Paris: La Découverte, 2014.

25 Santos. *Op. cit.*, pag. 373.

lation has accelerated the process of urban segregation[26]. The need for a new policy based on co-obligation of all those who are engaged in the same activity to produce legal and moral norms would encourage forms of democratic control over common resources: it would be a social movement developed on the scientific and normative dimensions that would allow the rethinking of political action in order to redefine the goals. The question of the commons is placed at national and local level and it is necessary that the constitution regulates the "right to the commons" as a fundamental right of citizens, in order to avoid possible fragmentations (between localism and regionalism), useful to pursue opposite interests[27].

Looking for a common European public law (instead of a public law of the European Union), it is interesting to underline that J. Stiglitz has identified five global public "goods": world economic stability, international security, the international environment, international humanitarian aid and knowledge; he also added that the economy itself should be considered a global public good, subject of a democratic governance that takes into right account all the economic policies to avoid crises[28]. In order to realize the binomial "global commons – participative democracy" and to avoid the persistence of a political system based on predation and corruption, various sectors should not be part of the market; furthermore, this previous goal should be followed by the creation of accountability mechanisms and support that will allow public and private actors to participate in the reproduction and conservation of global public goods.

As a political principle, the commons should be required, as a foundation of political obligation, to participate in the same activity: in this sense, the basis of the political obligation that binds those who have drawn up the rules of their activity is not the belonging to the same ethnicity, nationality, humankind, [...] Nothing is "common" in itself but collective practices can decide the common character of a specific thing putting it into an institutional space through the production of specific rules.

Concerning the theme of global commons, a hint of reflection comes from Latin America, in particular from the new constitution of Ecuador which, in 2008 strengthened the role of the state in the economy, providing a national system of economic and social planning (Articles 275, 279, 280), articulated

26 On this theme, the website *www.oxfam.org* is particularly interesting because show us a wide and detailed scenario about inequalities around the world.

27 Mitrany. *Op. cit*.

28 Stiglitz, Joseph E. *Knowledge as a Global Public Good*, in *Global Public Goods: International Cooperation in the 21st Century*, (I. Kaul; I. Grunberg; M. Stern eds.). Oxford: Oxford University Press, 1999; *The Theory of Local Public Goods Twenty – Five Years After Tiebout: A Perspective*, NBER Working Paper n. 954, August 1982, pag. 1.ss.; *Public Goods in Open Economies with Heterogeneous Individuals*, NBER Working Paper n. 802, November 1981.

and well defined on different levels of government, with the responsibility of a National Council and the producing of a National Development Plan. The new constitution of Ecuador develops the content of many rights already covered by the previous constitution of 1998 by providing for new, binding social rights related to the Andean concept of *Sumak Kawsay* or *buen vivir*. The new constitution eliminates the traditional classification of rights (for example, between civil, political, economic, social and cultural rights) with the aim of emphasizing the complementary nature and the same hierarchy of all constitutional rights, proposing a purely thematic division, in order to understand collective rights as the "rights of communities, peoples and nationalities", that belong to individuals, communities, peoples and nationalities (arts. 10 and 11). Article. 283 defines a number of principles and statements that help to differentiate the Ecuadorian economy from other economic systems: the Ecuadorian economic system is social and based on solidarity; it recognizes the human being as subject and goal of the whole system; it favors a dynamic and balanced relationship between society, state and market, in harmony with nature; and it has for objective the production and reproduction of the material and immaterial conditions that make "buen vivir" possible[29].

The so called Ecuadorian "buen vivir" (literally "good living") requires that individuals, communities, peoples and nationalities have effective enjoyment of their rights and responsibilities under the principles of multiculturalism, respect for diversity, and harmonious coexistence with nature. This way, the good life is the "value" and the "horizon" that encompasses respect for all the constitutional rights, including the right to peace with oneself and with all the physical and human environment in which human life operates. An economic system based on solidarity and with a social approach proposes a new relationship between economics and rights, where the rights are elements of the good life, and the economy is a means to give effectiveness to it. The new constitution realized a subordination of the economy to rights, considering them as subtracted to the market, in order to ensure their effectiveness and universality[30]. Rights such as health or education are negated when they are reduced services available only to those who can afford them. These provisions of the constitution of Ecuador can be particularly interesting also in the European contexts. An example of this is the Italian context because in Italy, constitutional law No. 1 of 20 April 2012 amended Article 81 of the constitution, introducing the so-called "balanced budget"[31]. This new "rule" was introduced in accordance with the

29 Grijalva Jiménez, Agustín. *Constitucionalismo en Ecuador*. Quito-Ecuador: Corte Constitucional para el Período de Transición, Centro de Estudios y Difusión del Derecho Constitucional, 2012.

30 Prieto Méndez, Julio Marcelo. *Derechos de la naturaleza*. Quito-Ecuador: Corte Constitucional del Ecuador, Centro de Estudios y Difusión del Derecho Constitucional, 2013.

31 Bruno. *L'ipotesi italiana della costituzionalizzazione dell'"equità intergenerazionale" nel confronto col diritto costituzionale del Brasile*, in *Direito Constitucional nas Relações Econômicas: entre o crescimento*

Fiscal compact, to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, ratified in Italy with law n. 114 of 23 July 2012. Article. 3, paragraph 2 of the Treaty declares: "The rules set out in paragraph 1[32] shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisi.ons of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes". The mentioned article considers the "constitutionalisation" of the bond "preferable", as a guarantee of stability and durability of the economic-political choices; this constitutionalisation is therefore taken as a guarantee of financial stability. Following the amendment of Art. 81, those constitutional constraints called "reserves of justice", should have been introduced into the constitution, but in fact were not. These reserves of justice would represent a percentage which could not be touched by political majorities and would be aimed at guaranteeing a minimum standard of living and managing social rights ,which would remain and would continue to be fundamental[33].

Globalization has not only depended on states but has affected the relationship between state constitution (and its related intended rights) and the economy in different ways, depending on the context, so that in Europe, in the USA and "elsewhere" we had different ways of interrelation between the two spheres, the constitutional and the economic. In Europe, at least until globalization upset the structure, the "change between the states" and the "constitutional change within the states" has developed in respect of "intrastate common constitutional standards" that, in fact, have remained unchanged

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econômico e o desenvolvimento humano, (G.M. Pompeu; M. Carducci; M.R. Sánchez eds.). LumenJurís, Rio de Janeiro, 2014.

32 The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law: (a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus; (b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact; the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3; (d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1,0 % of the gross domestic product at market prices; (e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

33 O' Gorman, Roderic. *ECHR, the EU and the Weakness of Social Rights Protection at the European Level*, in *German Law Journal*, vol. 22, n.10, 2011, pag. 1833 ss.

despite the constitutional and territorial changes; and they would have remained unchanged like the relationship with the economy in the well known formula of "rationalization" proposed by B. Mirkine-Guetzévitch (1931)[34], drawn up in the overcoming of the Weimar experience, for which the state would exercise a promotional role in the economy until its legalization[35]. But when globalization was marked by the dominance of the international doctrines of the U.S. whose interference was in the whole world, interested as they were to achieve what C. Schmitt called the *highly modern reversal*, *cujus economy, ejus regio*, the new rule of the world, not in order to turn it into a place of constitutional cosmopolitan citizenship but to manage it as a space of global consumption[36]. One of the main consequences, was the "simplified revision" of the European treaty by the European Council (in March 25th, 2011) to amend Art. 136 TFEU, adding the following rule: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". The stability of the currency and the related exchange is the only "intrastate constitutional standard" to be preserved. But the need to combine constitutionalism with reality, to hold together the constitutional "normative" and "normality" has signified, in the course of European constitutionalism, the possibility of a "state development" – a "constitutional development" – an "economic development" all of which should have come together as a single culture of constitutionalism, outlining a social constitutionalism that today would have allowed the recoup of a European constitutional normativity (rather than just an economic one)[37].

CONCLUSIONS

The modern state is characterized by its being fully rooted in a process of globalization that, under the influence of a multitude of forces and trends, has undermined its own forms and limits that were, until some time ago, evolutive "acquisitions" of a constitutional democracy and, as such, of a common heritage. The absence of democratic constitutionalism denounced by scholars are particularly evident in the process of disintegration of the welfare state, where social rights are so evanescent as to weaken the very foundations of

34 Mirkine-Guetzévitch, Boris. *Comparazioni teoriche e razionalizzazioni costituzionali*. Lecce-Cavallino: Pensa, 2009.

35 Carducci. *Op. cit*.

36 Schmitt, Carl. *Il Nomos della Terra* (1950), Italian translation. Milano: Adelphi, 1991; Carducci. *Op. cit.*; Bruno. *A Space without Frontiers and the New* Nomos *of the Earth,* in *Eunomia*, n.1, 2013, pag. 195.

37 Guarino, Giuseppe. *Un saggio di verità sull'Europa e sull'Euro:1.1.1999 il colpo di Stato; 1.1.2014 rinascita?*, available at www.giuseppeguarino.it, 2013 (accessed August 03, 2016); Heisbourg, François. *Le fin du rêve Européen*. Paris: Stock, 2013; Carducci. *Op. cit*.

democracy[38]. Indeed, the constitutional state is characterized, on the one hand, by an unstructured sovereignty and the weakness of the social state; and on the other hand, by a reduced power to control economy. This last characteristic has deprived political parties and trade unions, as well as national parliaments, of the ability to manage the economic growth through which operate (as the main characteristic of the rule of law) the appropriate balancing with the founding values of a constitutional state. In this framework, the political crisis has emerged as a crisis of relations and interactions between actors and institutions of representation, and therefore as a crisis of what could be the heart of a model of participatory democracy[39]. Last but not least, the judicial function has contributed to the destabilization of the constitution, at least as a constitutional model of the European historical experience. The judiciary power seems to be transformed into a guarantee of the last claim, with the role of mediator in socio-cultural conflicts within the new constitutionalism, as a new legislator, parallel and complementary to the parliamentary one[40].

These transformations have reduced constitution to a document where it is possible to find solutions to problems that arise along a constitutional path, as if it was a historical-ideal archive able to provide information and indications of origin and direction[41]. "The concept of constitution today generally refers to a formal contract drafted in the name of "the people" for the purpose of establishing and controlling the powers of the governing institutions of the state … This modern idea of the constitution results from a basic shift that took place in conceiving the relationship between government and people: rejecting traditional ordering based on status and hierarchy, it expressed the conviction that government, being an office established for the benefit of the people, must be based on their consent"[42]. In the recent governmental changes (liberalization, marketization, globalization) "an increasing range of public life is being subjected

38 For example, the notion of EU citizenship 'is determined by citizenship in the member states, despite widely varying definitions of who is and who may become a citizen' (2012, 130); and if the Eu citizenship involves important legal elements such as the right to property to conclude valid contracts or to take part in elections in EU member states, it does not show its own civic fundamental side: "there are no programmes for social provision at the European level. Thus, social rights continue to be claimed at the national level", Schall, Carly Elizabeth. *Is the Problem of European Citizenship a Problem of Social Citizenship? Social Policy, Federalism, and Democracy in the EU and United States*, in *Sociological Inquiry*, vol. 82, 2012, pag. 123 ss.

39 Anne Rasmussen highlights the complex role of the Members of the European Parliament strictly linked to both national and EU-level parties in her *Party soldiers in a non-partisan community? Party linkage in the European parliament*, in *The Role of the political parties in the European Union* (B. Lindberg; A. Rasmussen; A. Warntjen eds.), in *Journal of European Public Policy*, 2008, pag. 1164 ss.

40 Crisham, Catherine; Mortelmans, Kamiel. *Observations of Member States in the Preliminary Rulings. Procedure before the Court of Justice of the European Communities*, in *Essays in European Law and Integration* (D. O'Keefe D.; H.G. Schermers eds.). Boston: Kluwer-Deventer, 1982, pag. 43 ss.; Portinaro, Pier Paolo. *Dal custode della costituzione alla costituzione dei custodi*, in *Democrazia, diritti, costituzione. I fondamenti costituzionali delle democrazie contemporanee* (G. Gozzi ed.), il Mulino, 1997.

41 Zagrebelsky, Gustavo, *Storia e Costituzione,* in *Il futuro della Costituzione* (G. Zagrebelsky; P.P. Portinaro; J. Luther eds.). Torino: Einaudi, 1997.

42 Loughlin, Martin. *What is Constitutionalisation?*, in *The Twilight of Constitutionalism?*, See note 9, at 48.

to the discipline of the norms of liberal-legal constitutionalism [...] the norms of right conduct prescribed in these texts acquire their authority from precepts of reason rather than approval of "the people". It is the authority of these norms that is being asserted and these norms acquire the status of fundamental law not because they have been authorized by a people but because of the self-evident rationality of their claims"[43].

In the path of transformation, European legal scholars today aim to revise the traditional legal-constitutional categories of law that represent the conceptual instruments of constitutionalism, creating "constitutional yards" of political-institutional decision making. In this sense, it is possible to distinguish at least three issues under review by the scholars: the system of sources of law, with particular reference to the role of the constitution and state law – the latter being overcome in favor of judge-made law and soft law, where the court has the authority to decide as the final interpreter; the relationships between public institutions and between these and private institutions – relationships that affect the identification of some basic "mobile" notions, such as those of general interest, public interest, private interest, community interest, common good, fundamental rights and human rights, ...; the third object of the revision is also the issue of political representation, as a fundamental prerequisite of any democratic structure of public and private powers. These transformations in the "European yards" affect not only the issue of the form of the state, but also the forms of government (especially with reference to recent forms of technocracy and growing populism). The framework has recently been complicated by the international financial crisis that has engulfed much of the crisis of the state in the management of public debt, as the government of the EU. The crisis of the state understood as a crisis of the deficit and the public debt of the states, is a result of the current forms of technicalization of policy, closely linked to the crisis of governance in the EU, in the context of the global financial crisis. In this broad and complex framework of analysis, sovereignty suffered a process of erosion that is consequential to the crisis of the nation state; but it seems equally true that the same international and supranational institutions have operated with constitutional roles, functions and nature. As regards the end of sovereignty, during the ordinary operations of the markets, the anti-sovereign is made up of the financial markets and technical powers; while, in times of crisis, it is technocracy[44].

43 Loughlin. *Op. cit*.

44 Gambino, Silvio; Nocito, Walter. *Crisi dello Stato, governo dell'economia e diritti fondamentali: note costituzionali alla luce della crisi finanziaria in atto*, available at *www.astrid-online.org* (accessed August 11, 2016).

The crisis of sovereignty is not only a problem for states; it is a problem primarily for the people. Without sovereignty, their political rights (and not only these) are not guaranteed and redistributive policies cannot be implemented[45]: fundamental questions arise from this scenario and involve those "eternity clauses" of the European constitutionalism of the second post-war period that, within the outlined framework, seem to be evanescent; and again, involve the process of European integration that would have to find its foundation in the "European constitutional heritage" and on an "unequal balance" between social interest and market interest.

The crisis in Europe has seen the loss of trust in three things: the Euro as a tool to reach a greater geo-economic and geo-political role for Europe in the globalized scenario (monetary integration); in the integration process as a primary form of foreign policy which seeks to ensure the stabilization of the Continent (spatial integration); in the construction of an internal market as a permanent engine to build a "sense of community" (economic and legal integration)[46]. Last but not least, this loss of trust extends to the European social model as a distinctive sign of the "European way of life" (social integration). In brief, the existential crisis of Europe can be identified with the deconstruction of that *ever closer union among the peoples of Europe* already postulated in the Preamble to the EEC Treaty of 1957 and wanted by the founding fathers of the Community and the Union, who have always looked to a common economic and legal framework for the whole of Europe[47].

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45 Luciani, Massimo. *Sovranità*, in *ItalianiEuropei*, n. 7, 2011.

46 Cantaro. *Op. cit.*

47 Spitzer, Leo. *Classical and Christian Ideas of World Harmony: Prolegomena to an Interpretation of the Word «Stimmung»*, Baltimore: The John Hopkins Univ. Press, 1963.

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