

LOSING THE EUROPEAN IDENTITY: THE NEW CHALLENGE OF TTIP *PERDENDO A IDENTIDADE EUROPELA: O NOVO DESAFIO DO TTIP*

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Abstract: This article tackles the crisis of the state and of state sovereignty such as the results of the process of globalization. In fact, following the process of globalization, national law has lost its normative force as a symbol of positive legal order. The legislators' intentions have been substituted by those of the judges and a denationalization of the states has followed the creation of the global juridical dimension. 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. The globalization of the *lex mercatoria*, overcoming the state dimension, has in fact highlighted the delay of politics and law in protecting the state identity, while technology and economy support new clear examples of challenge. The article pays particular attention to the preparatory works, elaborated by the representatives of the United States and the European Union, of a commercial treaty, called Transatlantic Partnership on Trade and Investment Partnership (TTIP), that intends to create the largest free trade zone in the world and that represents new forms of communication between economic and legal operators, geographically distant but brought nearer by economic interests that seek to undermine the last shreds of state sovereignty.

Keywords: State Sovereignty. Globalization. Constitutional Dialogue. Legal Flows. Soft Law. TTIP.

Resumo: O artigo trata da crise do Estado e da sua soberania, como resultado do processo de globalização. Em efeito, na trilha do processo de globalização a lei nacional perde sua força normativa como símbolo do ordenamento jurídico positivo. A vontade do legislador tem sido substituída pela jurisdição e a desnacionalização dos estados seguiram a criação da dimensão jurídica global. Este contexto em parte direcionou a passagem do direito doméstico para o nível comunitário (UE) através do compartilhamento de valores e espaços e, conseqüentemente, promoveu a flexibilização do poder estatal; em parte direcionou a criação da 'soft law', uma lei que não é obrigatória nos seus vínculos jurídicos mas é suficientemente forte na

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sua estrutura programática para representar uma ruptura com a lei tradicional (o direito estatal), que se tornou excessivamente “rígida” para a lógica por trás dos governos da União Europeia. A globalização da *lex mercatoria*, sobrepondo-se à dimensão estatal, enfatizou, de fato, a insuficiência da política e do direito em proteger a identidade do Estado, enquanto tecnologias e economia dão suporte a evidentes novos exemplos de experimentações e desafios. O artigo presta particular atenção aos trabalhos preparatórios, elaborados pelos representantes dos Estados membros da União Europeia, para o Tratado Comercial, chamado Transatlantic Partnership on Trade and Investment Partnership – TTIP (Parceria Transatlântica de Mercado e Investimentos), que pretende criar uma maior zona de livre comércio no mundo e que representa novas formas de comunicação entre os operadores econômicos-financeiros e jurídicos, geograficamente distantes mas aproximados pelos interesses econômicos que tendem a desestabilizar os últimos fragmentos da soberania estatal.

Palavras-chave: Soberania. Globalização. Diálogo Constitucional. Fluxos Legais. Soft Law. TTIP.

1 INTRODUÇÃO

The current process of European integration is the first historical experiment of institutional response to the ‘Uneasiness’ which had characterized Europe in the late seventeenth century.¹ The attempt to overcome the modern restlessness is still the real task of the European Union that wants to recover its original *Stimmung*, deeply developed by the philologist Leo Spitzer in the analysis of European trouble: the multiple meanings (‘mood’ or ‘affective tonality’) that the term itself (*Stimmung*) assumes are handled by the scholar who decides to refer it to the harmony of ideas and feelings of the European Communities before the explosive eruption of modernity.² Art. 2 of the TEU promotes “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” as values “common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”, but European political choices seem characterized by the search for normative replies that want to impose solutions instead of discovering identifications, similarities, connections and self-understanding embedded in the awareness of shared history and dominated by a feeling of trust

and ‘fidelity’ towards and in the European Union. From the Copenhagen Conference of 1973, the theme of ‘identity’, as a necessary element to support a feeling of fidelity together with a European demos, has always been discussed,³ but actually the issue of recognition (*Anerkennung*), that consist of a set of practical attitudes to find standards of behavior, stabilizing content and uses that conform constitutionalism itself,⁴ seem to be in crisis.

In the first paragraph, the article tackles the crisis of the state and of state sovereignty such as the results of the process of globalization where the legal flows become the new communicative interactions that occur between legal operators from different parts of the world and produce ‘imitations’, judicial dialogues, migrations of constitutional ideas, constitutional borrowings between various legal orders. The legal flows modify the culture of the subjects: e.g. the concept of ‘common constitutional traditions’ has been definitely recognized as a new juridical category by art. 6 of the Lisbon Treaty. New forms of protection of the ‘common constitutional traditions’ will have to be elaborated by the states, especially if we consider that the European Union has various legal/economic flows with USA, China or Russia (leading powers which have imposed their financial superiority on the global scenario).

The second part of the article aims to provide some hints of reflection on the European socio-legal scenario that, through transnational economic policies, pushed away the attempt to strengthen that European Stimmung proclaimed by Leo Spitzer: the globalization of the *lex mercatoria*, overcoming the state dimension, has in fact made concrete the delay of politics and law in protecting the state identity, while technology and economy support new clear examples of challenge. The particular reference is to the preparatory works, elaborated by the representatives of the United States and the European Union, on a commercial treaty, called ‘Transatlantic Partnership on Trade and Investment Partnership’ (TTIP), that intends to create the largest free trade zone in the world. With this agreement, the North-American producers of foodstuffs are trying to make the EU regulation less strict for market access in the old continent, while European companies are hoping to increase their sales in the USA: such as TISA (‘Trade in Services Agreement’), the TTIP represents new forms of communication between economic and legal operators, geographically distant but brought nearer by economic interests that seek to undermine the last shreds of state sovereignty, and to bend that harmony of ideas and feelings of

the European community, desired by Leo Spitzer, to the 'flat' world, so cynically but realistically foreseen by Thomas L. Friedman.

The crisis of the state sovereignty in the European transformative path and the failure of the attempt being the 'United States of Europe'

The modern state is characterized by its being fully rooted in a process of globalization which, under the influence of a multitude of forces and trends, has undermined its own forms and limits that, until some time ago, were evolutive 'acquisitions' of a constitutional democracy and, as such, part of a common heritage. The lacks of democratic constitutionalism denounced by scholars are particularly evident in the process of disintegration of the welfare state, where social rights are so evanescent such as to weaken the historically well-established foundations of democracy. 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 (as the main characteristic of the rule of law) the appropriate balancing between the founding values of a constitutional state operates. 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. The described framework is not the consequence of indefinite and extended globalized 'flows' and relationships, but has a specific and well defined cause in the Council Regulation (EC) 1466/97 which erased the economic policies of the member state together with any possible state actions, originally recognized and regulated by art. 102 A, 103 and 104 c of the TEU (but subsequently substituted by the mentioned Regulation). In fact, it has replaced the socio-economic development of states with the pursuit of a specific, predetermined result, that it is the balanced budget in the medium term, the implementation of which would be submitted to a supervisory power of individual obligations and duties that have nothing to do with the political and economic power of the member states granted by the TEU. The Council Regulation 1466/97 canceled the space of political decision together with any possibility to realize forms of participatory democracy because of the disappearance of political parties, democratic institutions,

strikes and lockouts, no longer useful tools for citizens that want to affect government decisions with their vote. The Treaties of Amsterdam and Lisbon themselves, reflecting the TEU, gave states the power to achieve the EU's growth along with its economic policies that would be coordinated by the EU (according with art. 102 and 103 TEU) but in fact they remained unimplemented and bypassed by Regulations 1055/05, 1175/11, the so called Fiscal Compact, framed all of them in the design traced by Regulation 1466/97.⁵ Last but not least, the judicial function 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 between socio-cultural conflicts of the new constitutionalism, as a new legislator, parallel and complementary to the parliamentary one.⁶ “These transformations have reduced the Constitution to a document where it is possible to find solutions to problems that arise during a constitutional path, as if it was a historical-ideal archive able to provide information and indications of origin and direction.”⁷

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.⁸ In the recent governmental changes (liberalization, marketization, globalization) “an increasing range of public life is being subjected 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.”⁹

What has occurred in recent years testifies the failure of the historical process of evolution that was supposed to involve the relationships between individuals, national and supranational institutions: the adherence to a ‘common ideal’ (that is what the EU was at the beginning of its historical path¹⁰) has instead sacrificed freedoms, making rational management

necessary over time, entrusting it to the economic power. Actually, Europe is only a conservative idea of a continuous historical process marked by constituent imperatives, duties of promotion, restrictions and (formal and material) limits that are always new. In its evolutive path, the European Union looked, at least in its federalist aspirations, at the North-American experience where, the idea of constitutional fidelity involved subjects and, through subjects has established itself as society's culture. The Declaration of Independence itself expressed the pivots of discontinuity with the past, as a real break of fidelity,¹¹ when it asserted the right of the people to constitute itself through a separation from its historical origin.¹² For the generation that gave birth to the Constitution, the concept of Higher Law of the Land, to protect natural rights, was widely shared and deeply felt. The essential element of American constitutionalism was precisely the reduction in a written form - and therefore in a positive law - of some of the principles of natural law, without closing the overall content of that superiority in 'simple' writing: for this reason, the US Constitution is linked to the idea of unwritten principles equally binding as derived from the sphere of the supposed Higher Law. Being faithful to the Constitution in the USA is not a kind of obligation,¹³ a characteristic of behavior, but it is a manifestation of conscience, a search for reality and truth that lead the process of constitutional interpretation.¹⁴

The North-American feeling of fidelity to the Constitution is the 'representation' of the constitutional contract in contemporary American society,¹⁵ a reflection of a constitutionalism different from the European one, genetically worry to oppose the rationality of a higher law to the will of the rulers and to the 'passions' of the human government;¹⁶ but also, and at the same time, it is a reflection of a unique rational trust based on the Social Compact¹⁷ of that community. In other words, in the North-American constitutional philosophy, being constitutionally faithful meant being mutually faithful without any sacrifice of freedom, trusting in a rational management over time, that should not only belong to the power, just as occurred in Europe.

In the path of transformation, the 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;¹⁸ the relationships between public institutions and between these and the private ones – 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, 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.¹⁹ 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 scenario, sovereignty has 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. In this perspective, the role of the citizen has also changed with the changing of the concept of state and sovereignty, where the regulative frame, external to the states, binds the decisional and financial availability of national decision-making, proposed by national parliaments and governments in the management of public expenditure: fundamental rights, subjected to a strict conditionality, are deprived of the basic levels of benefits related to civil and social entitlements, constitutionally protected and guaranteed on the national territory. For this reason, 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) are not guaranteed and redistributive policies cannot be implemented:²⁰ fundamental questions arise from this scenario and involve the ‘eternity clause’ of the European constitutionalism of the post-world war second 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.²¹

The European crisis has seen the loss of trust in the Euro as a tool to reach a greater geo-economic and geo-political role of Europe in the globalized scenario (monetary integration), but also in the integration process as a primary form of foreign policy which seeks to ensure the stabilization of the Continent (spatial integration), and again in the construction of an internal market as a permanent engine to build a ‘sense of community’ (economic and legal integration) and, last but not least, in the European social model as a distinctive sign of the ‘European way of life’ (social integration). Basically, 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 strongly desired by the founding fathers of the Community and the Union, who have always proposed an economic and legal framework, common to the whole Europe, as demonstrated by art. 102 A, 103 and 104 c of the TEU.

The Transatlantic trade and investment partnership. A new challenge for Europe.

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 reinforced and justified, but manipulated and twisted 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 but also through informal practices. This way, very different countries are united by using the same constitutional semantics which, moving from one place to another, lose their historic and cultural strength, in order to represent ‘softly’ the characteristic mechanism of an institution, rather than the institution in all its complexity.²² These flows become a legal ‘container’ in which, completely opposite cultures, carry and cross; they also become the tool to ‘transfer’ new concepts; they allow legal operators to circumscribe international spaces, determining outcomes sometimes obvious, other times unpredictable. Today, globalization appears with endless forms of communication between spaces, where the historical and material complexities disappear within the legal flows as the new socio-legal and linguistic phenomena.²³ In this perspective, the judiciary is no longer the guarantor of consistency of other constitutional functions (legislative function in the first place) but the replacement of political discretion.²⁴

Globalization has broken down barriers, creating various forms of communication between spaces, where ‘the logical atom’ of the state reconsiders itself within the legal flows. Communications between areas are benefiting from the use of the same language, through generic formulas of constitutional borrowing, migration of constitutional ideas, constitutional dialogue, ..., in which the legal operators are of various types and from various sources with reference to the related context (space) but united in the way they communicate through translation, borrowing, dialogue and flow. The use of precedent itself, which has made possible a change in the role of the judiciary, making it the ultimate interpreter of the Constitution and promoting the process of hybridization of the civil law systems with elements of common law, is emblematic, marked as it is by a multilevel network not only of signs and interpretations, but also of languages and translations from different backgrounds.²⁵ So, spaces are much wider, barriers collapse and scholars discuss in terms of Europe, European Union, ECHR.

The Transatlantic Trade and Investment Partnership is well suited for this framework. Since 2012, the representatives of the Member States and the European Union have been working on this trade treaty, called Transatlantic Trade and Investment Partnership (TTIP) with the aim of creating the largest free trade zone in the world: US producers of foodstuffs would like to ‘soften’ the EU rules for market access to the old continent; while European companies are hoping to increase their sales in the USA. The treaty, which will be signed by 2016, would involve, in addition to agriculture, also financial institutions, industrial packaging products ... that is to say, many of the economic sectors, with the following main goals (as the website of the European Commission explains clearly): “1. market access: removing customs duties on goods and restrictions on services, Gaining better access to public markets, and making cutting easier to invest it; 2. improved regulatory coherence and cooperation by dismantling unnecessary regulatory barriers: such as bureaucratic duplication of effort; 3. improved cooperation when it comes to setting international standards.”²⁶ One of the reasons for which the main directives of the Treaty have yet to be defined, even if the sixth round of negotiations has already started, is given by the risk that a regulatory US agri-food sector could lead, at an international level, to replace the European one, particularly rigorous in terms of the health of its consumers. In fact, the European law currently prevents the entry of American beef treated with artificial hormones,

which are suspected of causing cancer in humans and damage to the genetic heritage: in the United States, their use is allowed, while in Europe it has been forbidden since 1988, and as many as 160 countries, including Russia and China, have banned the use of ractopamine in the food industry, such as drug growth promoter. The risk European citizens run with the TTIP is that the industrial Americans groups could work directly (or indirectly, through legal-economic flows) in the drafting of European legislation, enabling global trade to break down the last barriers of customs duties and import quotas (which prevented or restricted the free movement of foreign products) and to realize what Thomas L. Friedman called a 'flat world'.²⁷ At least for now, the European Union has protected the health of its citizens through laws that prohibit the movement of certain products and technologies or require companies to accept some conditions, in view of the fact that, beyond the common interests, on either side of the Atlantic we often have different regulatory structures and traditions. In the name of the precautionary principle, the hormone-treated meat could be produced only where it is established that it is not harmful to the health of citizens; on the contrary, in the United States, certain production processes are allowed until proved irrefutably that are harmful to human health.

The content of the European legislation could damage the business of large industrial groups in the United States if Europe will not sign the TTIP but, trying to balance risks and advantages, it is actually recommending that “the EU is only discussing standards and regulations with the US on one strict condition: that we neither give up nor dilute the levels of protection we have in Europe. That goes for health and the environment as well as for consumer protection. Hormone-treated beef is not allowed in the EU, for example, and the planned trade agreement will not change that. Regulatory alignment and mutual recognition will only be possible if real convergence on the required safety and environmental standards is guaranteed.”²⁸

But why should Europe consent to conclude the agreement? The combination of international technical rules would be a useful result to increase the economies of many European firms: in fact, the United States are an important market for European banks with international relevance, because, in some cases (such as the Deutsche Bank), they receive large benefits from various aid programs supported by the Federal Reserve, (the central American bank). For these reasons, the slogan of European politicians in favor of the TTIP is to be able to

guarantee a greater well-being without any additional costs. But in fact, the question is once again ‘what balance’ do we have to manage between profitability and economic growth on the one hand, and state sovereignty in deciding individually how certain agricultural-food processing and certain financial transactions are harmful for the community on the other hand; the protection of investors is a further problem, as the TTIP give European companies the possibility to sue the United States if they believe to have been treated unfairly by the government of Washington; US investors can also sue EU countries. On this question, the TTIP allows, for the settlement of trade disputes, the bypassing of national courts to turn to the court of arbitration, with judges appointed by the parties themselves, who must decide according to law and the decision of the arbitrators is binding to the parties.

One of the most debated points, for which Germany has imposed an online public consultation, concerns the investor-state dispute settlement (ISDS), an international arbitration for disputes between states and companies that in some cases has brought them to sue entire countries and governments. The ISDS clause - Investor-State Dispute Settlement - is the most commonly used tool to settle disputes between investor and host State that are parts of an international agreement of investment (IIA), whether bilateral or multilateral. Initially introduced to protect investments, its use is becoming more widespread, as well as the criticism addressed to it. The concerns are related to the business of arbitration (which often lacks transparency, independence and impartiality), the uncertainty of the provisions (vaguely worded, and therefore susceptible to multiple interpretations), the absence of a mechanism of appeal and the high costs. The ISDS clause allows one to sue an arbitral tribunal specially constituted for the settlement of disputes derived from the alleged violation of the interests of the investor on the part of the country that hosts the activities. Furthermore, it supports the investor with four types of protection: protection from discrimination with respect to investors of the host country, providing for the application of the most favored national treatment; protection rather than expropriation without adequate compensation; the right to fair and equitable treatment; protection of the right to transfer the capital - that cannot be restricted by the host state. The parties will agree in advance on the legislation under which to constitute the tribunal that will be called to resolve the dispute. Furthermore, states could use the UNCITRAL (the United Nations

Commission on International Trade Law), the Court Permanent Arbitration in The Hague, the International Chamber of Commerce in Paris and arbitration centers that exist at national level. Each party will appoint its arbitrator, and the third will be decided jointly by both; in case of disagreement, the International Center for the Settlement of Investment Disputes can be called upon to replace the parts in the description, choosing the third member of the Court. In order to decide, the three arbitrators will be based on the law established between the parties, that is the text of the agreement under which the dispute began; alternatively, the members of the Court will resort to the law of the host state or international law. With no mechanisms for appeal, the decision of the arbitrators shall be deemed final. The CETA is the Comprehensive Economic and Trade Agreement recently concluded between the European Union and Canada, but that will come into force only after the approval of the European Parliament and of the governments of the 28 Member States. The text of the agreement contains a revision of the ISDS clause: the most important additions are those relative to arbitration, its transparency (encouraged by the obligation to publish the documents and to hold public hearings, but also the possibility that third parties such as NGOs can submit their comments) and the choice and conduct of judges (selected from a list of professionals already jointly identified by the Parties and subject to compliance with a binding code of conduct). If the CETA comes into force, it will be interesting to see if the structure of the ISDS from this planned will have reflections on TTIP. The TTIP provides an example of the new processes of communication, not based on the exchange of models but interested in regulating and organizing the relationships of a specific activity, pursuing a specific 'result', while 'models', 'systems', 'families of law' would be a consequent creation, not a pre-existing reality.

Transnational agreements demonstrate that the power to control economy today is characterized by the deterritorialization of economic activities that in fact escape the control of each single state. The market escapes state law to be governed by rules from different public and private sources, or from rules endorsed by the business community; the contract is the tool that allows to easy operating between different legal orders, beyond the territorial boundaries of a single state, surpassing the territorial discontinuity and barriers of different sovereignties. Therefore, unlike its meaning, the use of language becomes a decisive and fundamental element,

while national identities become evanescent, in search for a new identity that is necessarily the ‘economy of linguistic exchanges’.

The TTIP is not a simple commercial treaty but it is the biggest trade agreement in the world. The goal is to reach a total liberalization of transatlantic trade,²⁹ to give life to a common market between the USA and Europe which should provide significant advantages to the automotive industry on both sides of the Atlantic and to the chemical and pharmaceutical industries in the EU, but that almost certainly will penalize some agribusiness sectors, for example, those in the Mediterranean countries.

The interested sponsors of the TTIP do not talk about social costs. If we consider that the Agreement covers all sectors – the chemical-pharmaceutical, health, cars, education, agriculture, common goods, financial instruments – the removal of non-tariff barriers would compromise European established guarantees to protect workers and consumers, health and environment. Controls, labels and certifications could be considered ‘indirect barriers’ to free trade.³⁰ Once again, do social costs have any form of protection? And furthermore, it seems it is becoming increasingly clear that the United States are planning to build a trans-oceanic free trade agreement as part of a wider project of neo-hegemonic nature: holding a vicelike grip on the Atlantic and the Pacific, the Russian-Chinese Euro-Asia.

We can take one more example. The Free Trade Agreement signed in 2006 by Colombia with the United States was approved in 2011 by the Congress of the United States after multiple oppositions; the FTA between Colombia and the EU signed in June 2012 and approved by the European Parliament in December 2012 has not yet been approved by the Colombian Congress.³¹

The study Horn et al. underlined that the TLC signed by the EU and the USA since 2008 contains binding clauses (hard law) and others that may be understood as belonging to the so called ‘soft law’. Specifically, the term ‘soft law’ in international law has been used to indicate those regulations that do not have legally binding force but which may have legal indirect and practical effects; it is also used in some circumstances to avoid judicial controls, since the rules do not have coercive power but may come to influence behaviors. In this sense, for example, rules of a commercial nature are useful to remit the case to the competent body of the WTO in order

to reinforce their application through measures of reprisals, and for this reason they have a clear character of hard law; on the contrary, rules protecting human rights continue to not be coercible because of the lack of the same mechanisms of protection in case of default. This means, from the point of view of international consequences, that states prefer to observe and implement trade agreements.

On August 1, 2013 the provisional application of the free trade agreement between EU and Colombia started being effective and the Colombian population has expressed its resistance in defense of the territory against the buying up of national and transnational capital and the cornering of the earth and nature to satisfy the demands of energy and minerals from all the world. After various popular actions against the TLC, because there was the conviction that the Treaty violated human rights of indigenous people, the Colombian constitutional jurisprudence has identified a need for an a priori analysis of the TLC, underlining at the same time, that this kind of de facto control cannot be considered as the final decision, but a way to use constitutional power to protect fundamental rights affected by the implementation and execution of the TLC.³² What was clear, in this case, was the fact that free trade agreements were, and currently are, a fundamental key step of ‘accumulation by dispossession’, where the economic and social policy assumes the character of an international agreement. Their application and implementation is determined by agreements with third countries or blocks of countries such as the United States, the European Union and Canada, through which the markets for goods, services and capital markets themselves are liberalized, the domestic market is deregulated and the state assumes the commitment of national policy to meet the needs of international markets and transnational capital.³³

In the last two decades, corporations have taken advantage of the natural heritage policies through Colombian mining and energy – between January and December 2014, for example, the EU's imports of primary products increased by 67%, while exports increased by only 29.3% - while the state has abdicated its responsibility to regulate the agreements that, in most cases, have not respected the rights of workers, caused the forced displacement of entire communities, depleted mining areas, destroyed lands, polluted water sources and generated socio-environmental conflicts in their areas of influence. The mining code together with the declaration

of public utility and general interest have never been applied to the mining industry and this explains the social opposition to these companies and the consequent socio-environmental conflicts. It is therefore a series of policies to ensure the necessary conditions for the action of transnational capital at the local level and to increase their profits. Faced with this corporatization of public policy, indigenous people, farmers and communities have organized themselves to defend their land and life, as testified in the historic ethnic and inter-sectoral agreement Cumbre Nacional Agraria, Campesina y Popular ethnicity:³⁴ just to cite a few examples El Cerrejón (BHP Billington, Xtrata Glencore, Anglo Gold), Unión Fenosa, *Nestle*, Aguas de Barcelona and Prodeco have been reported to the Tribunal Permanente de los Pueblos for human rights violations.³⁵

2 CONCLUSIONS

When the complexities of the process of globalization are taken into account, a well-defined context, such as the state and European territory, can no longer guarantee the ‘positivization’ of values; an intertwined, entropic ‘constitutionalization’ exists, circulates and affects individuals as well as places. Geopolitical relationships of power and especially of economic interest are hidden behind the ‘dialogues’, covered by words that ‘do not cost’ (as the theme of the fundamental rights of individuals) and in the dialogue between courts, the rights are de-socialized, eradicated from the related social context. Dialogue is necessary, but not sufficient; it can counteract or legitimize the constitutional regression ... and this is typical in Europe.

If we consider the European transnational constitutionalism not based on imitations of state constitutional models, but on ‘soft’ dialogues with a preventive function in order to avoid the constitutional ‘tightening’ of the member States as regards the constitutional processes of integration, in this perspective, the dialogue, is understood as a ‘cross fertilization’, and not as an imitation, and for this reason would serve the purpose. But, what about the ‘constitutional identity’ mentioned in the art. 4.2. TUE? And again, where is the socio-democratic nature of constitutionalism of the European states? (hot topic today with the European crisis ...). Do we really think constitutionalism can be substituted by dialogue? Is it a real tool of ‘prevention’ of the risks of nationalist entrenchment of states and their Constitutions? Or it is a soft way to swallow bitter pills of integration.

The use of bilateral free trade agreements confirm the close connection between social rights and international trade, allowing the certain integration of the regulations on fair labor practices in the Treaty, to use the OIL social standards, to recognize the Labor International Law as the domestic benchmark to consider the effectiveness of internal labor legislation, and to equate the violation of social rules to the violation of fair trade practices. This means that the national and international systems interact and are mutually linked to each other, while the international law becomes the universal language to regulate conditions and conflicts about labor. Indeed, the reference to art. 21 TEU is emblematic, because it determines the principles and objectives of the Union on the international scene: the natural linkage between international trade and social rights could be achieved through the construction of a normative ‘connective’ web created by the ultra-states courts, even in the absence of a general global system to judge social rights. “The rapid advance of the process of constitutionalization at the national level coincides with a growing recognition that, to an increasing extent, governmental decision making is occurring beyond the structures of the nation states. Public power is now being exercised by supranational bodies of regional or global reach. In fields such as financial regulation, competition policy, energy and trade policy, environmental protection, crime and security, and such like, governmental policy making is regularly formulated through transnational arrangements. These developments undermine the claims of the modern Constitutions to be comprehensive in their reach, not least because governmental decisions in these fields appear to be made through networks that are unknown to national Constitutions and with respect to which existing accountability mechanisms seem ill-suited.”³⁶

NOTAS

¹ P. Hazard, *La crisi della coscienza europea. 1685-1715*, Einaudi, Torino, 1946, p. 440.

² L. Spitzer, *Classical and Christian Ideas of World Harmony: Prolegomena to an Interpretation of the Word «Stimmung»*, The John Hopkins University Press, Baltimore, 1963, p. 75.

³ Compare with P. Wagner, ‘Does Europe Have a Cultural Identity?’ in H. Joas, K. Wiegandt (eds.), *The Cultural Values of Europe* (Liverpool University Press, Liverpool, 2008) 187. On the idea of a European

- constitutional patriotism, see J. Werner Müller, 'A European Constitutional Patriotism? The Case Restated' (2008) 5 *European Law Journal* 542, 546.
- ⁴ About different 'constitutionalisms' between Europe and USA, see G. Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press, Cambridge, 2005).
- ⁵ G. Guarino, 'Un saggio di "verità sull'Europa e sull'Euro. 1.1.1999 Il colpo di Stato. 1.1.2014 Rinascita!?' <www.giuseppeguarino.it> accessed 20 April 2015.
- ⁶ A. Stone Sweet, *Governing With Judges. Constitutional Politics in Europe*, Oxford University Press, Oxford, 2000; W. Voermans, 'The Coming of Age of the European Legislator' in A. Kinneking (ed.), *Rethinking Europe's Constitution* (Wolf Legal Publishers, Nijmegen, 2007); P.P. Portinaro, 'Dal custode della costituzione alla costituzione dei custodi' in G. Gozzi (ed.), *Democrazia, diritti, costituzione. I fondamenti costituzionali delle democrazie contemporanee* (il Mulino, Bologna, 1997).
- ⁷ G. Zagrebelsky discusses about the Constitution as a 'responsive text' in G. Zagrebelsky, P.P. Portinaro, J. Luther (eds.), *Il futuro della Costituzione* (Einaudi, Torino, 1996) 74.
- ⁸ M. Loughlin, 'What is Constitutionalisation?' in P. Dobner, M. Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford, 2010, 48.
- ⁹ M. Loughlin, *Id.*, 61.
- ¹⁰ L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Papers, 04/09, <www.JeanMonnetProgram.org> accessed 9 March 2015.
- ¹¹ As observed by H. Arendt, *Sulla rivoluzione* (1963), ed. Comunità, Milano, 1983, 136, during the XVIII century there was the need of a Constitution understood as both the 'edge' of a new political world and 'definition' of a new identity, different from the English one. In this sense, see M.A. Jones, *Storia degli Stati Uniti d'America*, Bompiani, Milano, 2000, 47.
- ¹² G. Tarello, *Storia della cultura giuridica moderna*, il Mulino, Bologna, 1976, 598.
- ¹³ S. Civitarese Matteucci, 'Misera del positivismo giuridico? Giuspositivismo e scienza del diritto pubblico' (2006) 3 *Diritto pubblico* 685, 703, and A. Baldassarre, *Misera del positivismo giuridico*, in *Studi on. G. Ferrara*, vol. I, Giappichelli, Torino, 2005, 202.
- ¹⁴ Compare with A. Donati, *Giusnaturalismo e diritto europeo. Human Rights e Grundrechte*, Giuffrè, Milano, 2002, 51 and on the 'federal theology' that supports the *Covenant* as *foedus* and *vocatio* together, see 75. On the relationship between *Covenant* and *Rule of Law*, compare with P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, Clarendon Press, Oxford, 1990.
- ¹⁵ 'Figurations' are a conceptual tool to understand the relational aspects of constitutional law, accepting the already existed links; they are a semantic, communicative and regulative tool for all constitutional subjects. On the opposite approaches proposed by G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago University Press, Chicago, 1991, on the fundamental role of the Supreme Court and by R.E. Zietlow, *Enforcing Equality: Congress, the Constitution and the Protection of Individual Rights*, New York University Press, New York, 2006).
- ¹⁶ E.S. Corwin, *L'idea di «legge superiore» e il diritto costituzionale americano*, Neri Pozza, Vicenza, n.d.

- ¹⁷ About the notion of *Social Compact* and that of inter-generational contract, see J. Fenton, *The Theory of the Social Compact and its Influence upon the American Revolution*, Kessinger Publishing, Whitefish, 1891. Compare with C.J. Friedrich, *Il fondamento europeo della Costituzione Americana*, Italian translation, in L. Bolis (ed.), *La nascita degli Stati Uniti d'America* (Ed. Comunità, Milano, 1957) and R. Kirk, *Le radici dell'ordine americano. La tradizione europea nei valori del nuovo mondo*, Mondadori, Milano, 1996.
- ¹⁸ A. Stone Sweet, *The European Court of Justice and the judicialization of EU Governance?*, (2010) <http://europeangovernance.livingreviews.org/Articles/lreg-2010-2> accessed 21 April 2015; F. Terpan, *Soft Law in the European Union – The Changing Nature of EU Law*, in *European Law Journal*, Wiley-Blackwell, 2014, 1.
- ¹⁹ P. Craig and G. De Burca (eds), *The Evolution of EU Law*, Oxford University Press, Oxford, 1999; M. Dawson, *New Governance and the Transformation of EU Law, Coordinating EU Social Law and Policy*, Cambridge University Press, Cambridge, 2011.
- ²⁰ M. Luciani, 'Sovranità' (2011) 7 *ItalianiEuropei* available at <http://italianieuropei.it/it/italianieuropei-7-2011/item/2256-sovranita.html> accessed 21 April 2015.
- ²¹ As recently demonstrated by the Lisbon decision in the D'altra parte, come recentemente dimostrato dalla sentenza Lisbona, nell'ordinamento federale tedesco, il legame tra diritti fondamentali, sovranità parlamentare e sovranità statale è tanto saldo da porsi come non superabile da parte dei trattati internazionali. V. S. Gambino, W. Nocito (note 33), 29.
- ²² M. Carducci, A.S. 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, 118.
- ²³ M. Carducci, A.S. Bruno (note 37), 119.
- ²⁴ C. Piperno, *La Corte costituzionale e il limite di Political Question*, Giuffrè, Milano, 1991.
- ²⁵ M. Carducci, *Euristica dei 'flussi giuridici' e comparazione costituzionale*, in *Annuario di diritto comparato e di studi legislativi*, 2013, 337.
- ²⁶ http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf
- ²⁷ *The World Is Flat: A Brief History of the Twenty-First Century*, Farrar-Straus and Giroux, New Yor, 2005.
- ²⁸ See, *supra*, note 26.
- ²⁹ http://ec.europa.eu/trade/policy/infocus/ttip/index_it.htm.
- ³⁰ It is typically the case of genetically modified organisms, whose massive introduction in European agriculture has so far been slowed by a series of rules based at the European 'precautionary principle.' Large multinational agro-industry are fighting for a long time against these rules that consider an indirect trade barrier against products 'substantially equivalent.' in the event that the TTIP became operational, many of these rules would become illegitimate and large groups of chemistry and agricultural genetic (often even dominant companies in the health sector) is not would have more obstacles in the mass marketing of their products in one of the three largest agriculture worldwide.

- ³¹ In Colombia, the ordinary law that approves the International treaties must operate an automatic control of constitutionality before the ratification. In case of unconstitutionality, the treaty cannot be ratified; and if it is a multilateral treaty, it can be ratified partially in its constitutionally conformed parts. Once it is effective, they are the same hierarchical level of the ordinary laws.
- ³² <<http://www.tni.org/es/article/tratados-de-libre-comercio-y-conflicto-en-colombia>> accessed 1 January 2015.
- ³³ Compare with NAFTA, the North American Free Trade Agreement, B. Ackerman, D. Golove, 'Is NAFTA Constitutional?' (1995) 108 *Harvard Law Review* 799.
- ³⁴ See, *supra*, note 32.
- ³⁵ See, *supra*, note 32.
- ³⁶ M. Loughlin (note 6), 63.

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