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Economy and Market Hegemony and the Transformation of the Institutional Framework and of the Juridical Systems

1. Methodological Foreword: towards a century of unilateralism and hegemony?

This paper is focused on the hegemonic character in a certain Gramscian sense of the economy, the culture and the political relationships.

To understand the way of the apparently irresistibile egemony of economy over politics and law, it is absolutely necessary to analyse its cultural dimension.

In this context, as well focalized by French philosophers and essaysts (mainly Foucault, Deluze and Guattari and furthermore Hardt and Negri and many others italian authors) rise the concepts of biopolitics and biopower; thanks to this biopolitical process the interiorisation of a new way of life operates not only though institutions, the media, cinema, TV etc. etc. *those* *because* concepts become a political or almost political *instrumentarium*.

So when political and economical power became entirely biopolitical, it means that the power itself became dyrectly a part of life. Music, literature, food, clothes, and each element of the social life becomes part of the cultural – economic process of globalisation!

But an even more important example of the revolutionary consequences of the globalisation is the introduction of the computer system in the economical, social and political life!

On the economical side, the phenomenon was accurately deepened both in the specific sector of the “New Economy and correspondingly of the Nasdaq” and in the complessive impact of the Hi-Tech revolution on the finanziaization of economy and on the new way of producing goods. Not less important is the impact of the Computer-system in the private life, especially in the occidental world, due to the diffusion of the Personal Computer.

Big relevance has the impact of the administrative and political systems (e- administation and e-government) with the consequence of a further centralization of powers and, for the moment, a precariously politic partecipation of the citizen caused by statal decisions. (poca partecipazione dal basso a causa di decisioni imposte dall’alto).

My belief is that the network of international and transnational (as well as supranational) institutions and rules, as defined by the form of global and European governance, produces a segmentation and a concealment of power relationships that survive within and over the network of multilevel institutions and norms.

The main feature of this complex process is the crisis of both international law and universal international organizations. (Starting from UN, IMF and WB)

A further fundamental process is the crisis (irreversible, according with some authors) of the national constitution, in which the fundamental principles (democracy, participation, welfare state, central role of human person and right to work), the institutional framework and the constitutional bodies of guarantee (mainly the Constitutional Court), furtherly as far as the so called economic constitution, are concerned. But this crisis produces a more general crisis of the juridical categories.

This conception of hegemony seems in the position to explain the reasons of the current rule, not in a whichever ideology and economic praxis but in a neoclassic and neo-liberal economy conception, based on the presumed and assumed automatisms of the market and of the competitors that impose the elimination of fiscal customs obstacles and of social guarantees starting from the trade unions to the maximum opening of the markets. Without excluding few limited exception, this conception, today definitely hegemonic, excludes both the apparatus of mixed economy (public enterprises non rigidly subject to the market rules) and the one based on the classical type of participation of the State in economy that, in the second phase of globalization 1945-80, were thought compatible with the rules of the market both in a continental and universal levels (respectively CEE and GATT, IMF).

Actually, similar to the term and the concept of globalization, the word governance, which, as it sometimes happens with terminological innovations that seem to be able to describe and to re-include new and important phenomena, also aims at containing and representing, in a plastic manner, a proposal of a political-bureaucratic solution to the current processes of reduction and control of the complexities which spring from the crisis of the territorial state and from the multiplication of supranational relations and organizations.

This hegemony, defined also as the market revenge, after thirty years from the concept that Carl Schmitt defined as «Total State», is the capsizing of the politicization of the economic and the social in the forty years following the Second World War. It marks the passage from the struggle for the democracy to the revenge of the «expertocracy» (espertocrazia), passing through the principle of the political responsibility to the one of the administrative decision defined as non-political and a-partitital! An administrative techno-bouocratic decisional process that deprives the politics (i.e. the political representation operating within the parties-parliament- govern circuit) not only the big choices but also the ones relative to the psychophysical reproduction of the single person, the previously mentioned bio-politics (choices conditioned, especially in Italy, by independent administrative authorities that refer to the protection of the personal data, etc.

According to the acute analysis of A. Medici, those machines:

1. Give shape to the norms and rules that facilitate the expansion of the global hegemonic ordering.
2. Are the product of a global hegemonic ordering, also if their functions can change with the transformation of the power relations of the global ordering.
3. Ideologically legitimate the norms of the world-wide ordering.

4. Co-opt the elites of the peripheral states
5. Absorb, underline and functionalize contra-hegemonic ideas
6. Can be, sometimes, a chance to struggle.

Such apparatuses legitimating, in the name of the global governance, a process of political depauperation in a macro-systemic level, create a net-system of regulation that doesn't eliminate, but hides or, at least, tries to hide the charge to the political and economical lobbies and more often to a hegemonic block of states that are engaged to orient the choices of those institutions that represent the new way to express themselves in the sovereignty: "the sovereignty of the interdependence"; a particularly central phenomenon in the process of European integration.

In it, supranationality, intergovernmental relationships, mentality and statual reserves of decisional powers represent a complex net that, also if it doesn't exclude certain relations of power, demand to empty of contents the fundamental democratic institutes of the Constitution, that are: the popular sovereignty, the citizenship, the political participation and the social rights.

Finally, the hegemony that rules the current course of the globalization and the European integration is a techno-bureaucratic hegemony rather than a democratic one. The World Bank, the IFM and the WTO are instruments that influence, both in a general and a particular level, the regulation of the financial, monetary, commercial supervision until to the complete world wide economy.

Considered that this it is both a cultural and ideological hegemony, the economic hegemony, thanks to prestigious university institutions and research centers, has the pretension to be the only true science, legitimated to impose a program of political behavior at global level. This neoliberal ideology, supported and spread by the international organizations previously mentioned, has a great audience through the media of the western countries; this hegemonic strategy kept up in the last years by USA and UK, has produced negative effects in matters of employment and social assistance, also in the European countries, because of the adaptation of the UE to the International agencies decisions. The more evident consequence, for the juridical system, has been the whole transformation, not only of the system but of the juridical categories, too (Amirante, 2004).

The combination of Common Law and Civil Law has determined the following effects:

1. A tendency to a juridical pragmatism.
2. The rise of the so-called 'soft law'.
3. The prevalence of the jurisprudential decisionism on the Parliamentary Law making.
4. An evident crisis of the interpositio legislatoris, together with the fading of fundamental guarantees, such as the centrality of the generality of statutes, the reserve to statutory and constitutional provision, the proceeding boundaries.
5. Consequentially, the passage from the «regulamentation» (Parliamentary regulation) to the «regulation» (regulation by the government or by the agencies).
6. The crisis of the normative hierarchy and consequentially the crisis of the

- Constitution and especially of the human and social rights.
7. the crisis of the hierarchy of rules, the abstractiveness, the generality required to statutory norms, which goes together with historic systematic dimension that go into crisis. Furthermore, the couple post – modern/globalisation would imply the passage from the universality of laws to pragmatism and relativism, from the basically monocentric system of state law sources to an uncoordinated plurality of sources and rules, from the inner coherence of the system to complexity and outer integration.
 8. The split between monetary and commercial regulation and human and social rights guarantees. The consequence of this phenomenon is a marginalization of the human and social rights defence.
 9. The darwinization of International Law as a product of the substitution of the Classical International Law with a new system of International relations, leaded by the USA unilateralism.

The sector in which the critical opinions, in the USA, too, do a free and for which I recall the valuable articles of “Kenji Urata” and Marjorie Chon in the above mentioned book of the 21st IVR World Congress of Lund.

If we don't want to be extremely pessimists we will agree with the synthetic and open idea of G. Arrighi: in this actual phase of global politic we found ourselves hanged between the Chaos and the World Government!

That the only alternative to this chaotic economical and political situation has to be the American unilateralism in the world wide relationships, with the use of the Army as the only instruments of guarantee of the USA supremacy, is something that should and must worry us.

2. The sunset of a double dream (Keynes and Kelsen frameworks of a world democracy) along the way to globalization?

The first decade of the new century seems to be characterized as the era of hegemony of economy, finance and market as instruments dominating social and institutional processes throughout both the ideological-cultural and material levels, as the largest liberation of the capitalist economy from the restrictions and limits that politics, trade and the institutional forces have imposed on it, especially in the Welfare State increasing phase.

The fall of Berlin wall and the implosion of communist systems allowed liberal ideology (enhanced with a great emphasis from the very first 70's). This trend has bear to the extreme consequences up to the current slogan of the Global Governance that assert that the concept of governability, introduced by the Trilateral in the 1970's, that has gradually come to substitute the concept of democratic government (the reasons of the efficiency of politics prevail over every other type of social orientation), so is emerged that the governance, in the words of Duncan Kennedy, is considered as a “motto that characterizes the international public order, consciously distinct from government, and consciously identified with that group of phenomena that are thought to define the international situation at the end of the twentieth

century: globalization, interdependency, the sovereignty crisis, the obvious and progressive pointlessness of the United Nations institution, the arising of an international civil society” to run for the leadership of the global governance, as well as the very different continental governance and, last but not least, national governance; so favoring a phase of globalization-mondialization in economy and society as larger than the previous two phases: the first one in the years 1870-1914 and the second one in 1944-1980!

Today we are leaving the sunset of a parallel dream of two great thinkers of the past century: Kelsen. and Keynes.

The crisis of regulation system in monetary, financial and economic worldwide regulation (WTO, IMF, WB) have had dramatical consequences for the underdeveloped countries and have given problems to that great system of regulation of the world-wide economy that has preceded and has accompanied the agreements of Bretton Woods, system, this one, thought to throw again the economic boom, the opening of the global markets and a greater economical and social equilibrium between continents and nations. In the situation of pacification and cooperation of the post-war period, Keynes proposed a monetary unification, embodied by a stateless currency, the bankor, as a system that in a world wide economical system represented by WB, IFM and GATT, rules all the financial and economical changes in order to reduce any monetary speculation. Shelving Keynes’ proposal we have drop the whole world in the dollar’s supremacy, that has been the non-neutral catalyst of the latest 60 years world economics.

Getting back to the UN system political crisis, we can surely say that today it is characterized by North America unilateralism and Angle-Saxon monopoly of peacekeeping actions and interventions.

Norms, institutions and principles of the UN the general international law have been replaced by international political relationships, leaded by USA and based on the alliance among a small group of states (absolutely not representing the hundreds of UN member states). This has determined the end of the kelsenian dream (inspired by Kant) raised in the Forties: the leading idea of the supremacy of the international order legitimated by democracy, over the ego state-sovereignty.

The crisis of the general UN competence in both sectors of economy and politics - whose task is often reduced to a post-festum legitimation of an international order power managed by USA army with the serving cooperation of volunteers – is an evident outcoming because of the arising of the new -more or less informal- comitology. (i.e. G8, G20)

Finally, giving a stroke to the concept of international democratic order based on the free and equal cooperation among states and peoples, obviously without forgetting the Security Council overpower, we are now facing a “de-constitutionalization” of the international system through the international praxis, as we can see in an interview that Richard Perle – the Pentagon “guru”- has given to the Guardian, dated 21 March 2003, in which he said, talking about Iraq War, «Thank God for the death of UN» . The a-posteriori legitimation of the UN system is in conflict-opposition to the lading principles of the UN Charter, human rights system, peace and democracy.

The leading idea - that the removal of monetary, financial and customs, and mostly institutional obstacles to free the circulation of capitals, goods, services and workers could automatically favor the growth of the underdeveloped worldwide economies - represents the foreword to a global (or, if you like, transnational) spreading of the technobureoucracies, starting from the world level, passing through continental or infra-continental level, reaching national and local level.

The latest analyses about the globalization process – or, better, we can speak in terms of Bourdieu's policies of globalization – underline the dominance of neoliberal economic organizations, as legitimate by academic and political authoritativeness of neo-classical economy; this is the technopolitical instrumentarium for the technobureaucratic international organizations (legitimate 'guardians' of the economic growth).

The dominion of the optimization approach, thought the best one, even the only legitimate one, postulate an imaginary human being, the homo oeconomicus "who is capable of calculating with ease the best course of action in any decision-making situation".

3. Law and economics in an evolutionary perspective

Economists have applied the peculiar method of their analysis to all the aspects of human life. The practitioners of the "dismal science" are not reluctant to use the economic way of thinking "to explain social phenomena as far removed from each other, as having children in a family or launching missiles in a nuclear war".

When in theory we can usually divide the law into private law and public law, the sector of the large expansion of economical analyses of law is certainly the private law.

In practically, economists seem to conduct the economic research useful for the resolution of case study imprivate law by analysing the intentional actions of presumible rational choises of individual.

Human beings and, in particular, the unintended social results of such behavior.

At very important dimension of the human rationality, in economic theory, is the inclination of social actors to discover opportunities to produce a spontaneous tendency toward social efficiency the so called "optimum"!

The Economic analysis of law, above all for the North American influence, are the most useful expansions of research in modern economics and in post modern law. This paper aims to outline the relevance of economic theory to jurisprudence (especially the constitutional jurisprudence) by presenting an approach not particularly fashionable in the current legal and economic doctrines.

The critical on the direct application of the fully predetermined process of economical decision making for solving juridical problem is the focal point of the following paragraphs.

4. Law and economics as a core paradigm for an out coming postmodern law?

In the international debate a comparative approach (within the disciplines as well as at an interdisciplinary level) has become fundamental as an element that marks better than others the political-institutional transitions of the new century, coming with the nation-state crisis claimed as irreversible.

We are not dealing here with the mere over-determination by economic categories in general toward the related categories of modern law. What is worthy here to notice is that, on the contrary, is the dominance of the neo-liberal and neoclassical categories applies in the analysis of the globalization process.

The optimization approach: it is not by chance that the o.a. has occupied a dominant position in academic research, and that it is the mainstream in the economics of law, too. It is not even by chance that one of the best known among American lawyers, the judge Richard Posner, and the Nobel prize winner Ronald Coase, are considered in a common way, as people having neo-liberist Chicagoan theories as a common scientific and cultural reference.

As disciplinary scholars outlined "the adherents to the optimization approach postulate an imaginary human being, the economic man, who is capable of calculating to ease the best course of action in any decision-making situation.", "a rational clown or a rational fool" according to the scratching critic of A. Sen, theoretical [?] victim of automatisms stranger to the effective behavior of the single one.

5. Lex mercatoria

A typical example of the political rule of the leading principle for the economic globalization is the LEX MERCATORIA. As a fundamental support of this process, lex mercatoria is today the core principle of transnational affairs, as the best expression of a global juridical culture, characterized by a prevailing of the civil law. In fact its centrality is based on a general and erroneous idea: that is its a-political (or, if you like, un-political) character.

On the other hand, this idea finds its own origins:

- a) in a purely formalistic juridical standpoint: the hypothetical equality between the contracting subjects
- b) secondly, in the claimed irrelevance of state powers in matter of intervention, particularly in transnational agreements of great importance.

This leading idea is supported above the others by Boaventura De Sousa Santos, in the sense that the lex mercatoria: "fait trop abstraction des hierarchies et des échanges inégaux qui caractérisent le système mondial".

In fact, the economic exchanges in the global theatre, are powered by the main actors, especially the global multinational enterprises. We have to introduce a very important extra-contractual factor in the transnational contracts and agreements: the political facilities offered by the states; this way transnational and extra-territorial factors and the states supporting makes a mix where the pure contractual dimension of the lex mercatoria loses its central role. Nevertheless in the international transactions the corruption of diplomatic and institutional

actors plays a very important role (S. Manacorda).

Not less relevant are the processes of corruption, that are determining, within the transnational circulation of commodities and services, an un-moral approach (that seems to occur in the philosophical and technical-juridical debate) and can underestimate as well as consider as a standard feature of trade relationships. As well exemplified by the unrulid spreading of North American movie production worldwide (It is concerned both in cinemas and television, as far as in the European case), with the consequence that both the local level of related production and the high cultural level of national productions (French, German, Italian, Swedish, Spanish, etc.) are in a current phase of crisis, also because of the exportation of European productions towards the North American broadcasting is practically interdicted.

It's not by chance that the economic normative – in the general context of deregulation and delegitimation – is not due by institutional powers but is based on a private normative-production above all the multinationals one.

Are the first to carry out a curricular reform of juridical studies in the area of the 'global playing field', a method in which the jurist can move about in order to facilitate the process of globalization, removing therefore the normative obstacles in commerce and bringing institutional structures into harmony, "reacting in the same way as a person who makes an investment which is headed abroad" (sic!), dressed as the globalization mandarin. It's natural that also in this field, as A. Blackett emphasizes, different points of view are possible, because there are different solutions: from the perspective of creating the 'well-trained post-modern lawyer' to one where there is a critical analysis of a new political-institutional background, which puts itself in the outlook of who prefers understanding rather than conforming to contextual hermeneutic tendencies of a new law and of the new role of the jurist in the global community.

6. The European context

Remaining on European context, we can easily assume that the prevailing of communitarian law on national law is often translated in terms of the prevailing of market-concurrence principles, along with the four freedoms in economy (free circulation of people, commodities, services and capitals).

The formal prevalence of the European Law on the Member State Law, fixed by the New Constitutional Treaty of Rome, is more an occasion of troubles, uncertainty and doubts that a legitimating element of the new communitarian ordering. In fact, the so-called European Constitution doesn't realize a significantly change of the political organization for Europe. For B. Cassen and many constitutionalists the answer to the question "Is this really a Constitution?" is obviously negative. Especially about the normative contents this is not a real constitution: "Not only is the document far longer than any national constitution, it is also worded differently. Many of its key terms are foreign to traditional constitutional language. In fact, most of its favorite words do not appear even once in the French constitution. Our reader might

run the document through a computer. In 202 pages of the main text, there are 176 instances of the word bank and its derivatives. The word market appears 88 times, trade 38, competition 29, capital 23 and commodity 11.”

Actually, it is quite evident that this text make us think to the statutes of the International Monetary Fund and World Trade Organization rather than a Constitution.

The move, in tendency, of political institutions responsible for their choices, and of governments devolved to apply those choices, in favor of independent authorities (UE Commission, national authorities, etc.) implies a parallel change of both the regulation models and the main contents. As for the regulation models, these become technobureaucratical and case-based, whereas, as for the contents, the choices focus themselves on regulation of economy and market.

The enlarging crisis of an economy assumed as Nationaleconomie makes the institutions (state, government, public administration) lose their function inleading the economic growth and the welfare of countries and peoples, by radically transforming the legal categories of the constitutionalism.

In this context the hegemony of the economic on the juridical, transform the Law from instrument of direction and conditioning, not only of the citizen but also of the finance and the productive system, to mere element of regularization of the market and the concurrency, principles and aims to which are functionalized the whole juridical organization, starting from the human and social rights.

What we have just said before, in which the economical and bureaucratic lobbies take the place of the political institution, responsible for the citizen, implying the crisis of the principle of political representatives, in which the instruments of regulation undertake the form of the Soft-Law. It imposes a hegemonic reclaim of the political-juridical principles, directed in a social and ethical way, based on the principles of solidarity, equality, and security, that means as the protection of the human being from the risks of the new forms of productions and technological regulation between interpersonal relationships (i.e. the so-called Network Society) and the political and institutional relationships (i.e. the so-called e-government).

If we objectively consider the European integration process in the context of the globalization is evident that the sectors in which, although the attempts of the treaties that have followed one another until the present Constitutional treaty, to create slender counterbalances with social character, it is evident that the trade and the concurrency have generated, heartlessly, cynically, their function, are the labor sector and the final system.

In both sectors, the employment and the tax ones, substantially reserved to the regulation of the member state, because the communitarian regulation rest subordinated to the humanity principles, so is born a decreasing match, which has produced this consequences:

1. The small importance of European Community initiatives of coordination and harmonization.
2. The flexibility of the productive organization with the consequence of a new and most

important extra-Community de-localization, in the name of global competition.

3. The flexibility of the productive organization and the rules concerning the market and the concurrency, and a very strong presence of extra communitarian under salaried labour forces, which implicate a drastic diminution of the labour stability and rights!

4. A very strong tax competition between the member-states

Not less important, as consequence of the final concurrency to the decrease, that is unleashed in the UE member states, is the progressive and drastical reduction of the welfare state and of the public financing of three fundamental sectors, not only in giving contents, to the citizenship's rights, and so to the life quality too, but also to promote an effective concurrency (European and Extra-European): Public services (above all the local ones), the professional formation, also the scientific research (both the basic and the applied ones).

There are sectors, in which maybe, more in the name of the globalization than the in the one of European integration, rule an effective and ferocious concurrency, and where it is possible to say that there are in those sectors where the national systems promote this process, is realized a soft law or, if you like, a pure postmodern law.

An example of those contraddictions, between formal recognition and real contents, is the *Nice 's Charter* considered as the major result of the convention for a European Constitution; critical scholars as G. Ferrara and Cervati in Italy and B. Cassese and many others in France have defined the aim of the application of the Nizza's charter as limited or better self-limited.

In fact the article II 111- 2 says that this charter does not... "estabilisch any new power or task for the union, or modify powers and tasks defined in other parts of constitution".

To avoid any dubts or any misunderstanding, the preamble to the charter reminds us what those other parts or all about: i.e. the guarantees of free movement (of persons, services, goods and capitals) together with the freedom of estabilishment.

As Cassen has rightly said the european Charter is "the only social Charter in the world that explicitly subordinated social rights to the requirements of international capital flows and free trade".

7. Conclusive remarks

Instead of concluding I prefer recall the attention of my colleagues on some of my fundamental convictions and on some open questions which, also in view of a process of european integration, characterised by many stop and go, can be usefully forced by discussion – better than by the simple exposition of arguments pro and contra.

The Costitutional European Experiment, in the constellation of the international governance regimes, occupies a very singular place from the point of view of the original process of development as well as from the point of view of its contents and in particular in the relationship between currency, economy, law and politics.

The focal point of the actual discussion in both global and European governance directions, is the conflict “between legal concepts based on market values and the concepts concerned with the non-market values of individual and human rights is crucial to the database on a future world order” (Delmas - Marty).

The crisis of the hierarchy of rules, the abstractness, the generality required to statutory norms, that goes together with the historic systematic dimension go into crisis.

Furthermore, the couple post-modern/globalisation would imply the passage from the universality of laws to pragmatism and relativism, from the basically mono-centric system of State law sources to an uncoordinated plurality of sources and rules, from the inner coherence of the system to complexity and outer integration.

That the hegemonical relationships, based on market values, are today dominant, have a very large influence on the juridical and political discussions for the future of European integration.

In fact, while the only concepts that today seem universal are market-related, the Human and social right are leaving between the formal reverence of the new European Constitution, and a legal practise, strongly determined by the Nationals Courts and even more by the European Court of Justice.

Despite the institutional transformations, and the inserting of the European Charter of Rights (Nice’s Charter) in the so called Constitutional treaty of Rome, the survival of the separation of competences between “Luxemburg” and “Strasbourg”, is a clear symbolic manifestation of the prevalent economic vocation of the E.U.

As a provisory conclusion we can remark the watershed between the economical Europe and the social Europe was the Maastricht treaty.

When the Delor’s proposal to insert the promotion of middle-time employment and the youth employment in the famous Maastricht criteria was rejected by the prevalent trade-purist, was marked the destiny of the social Europe.

The attempts to moderate the concurrency and the free-trade principles is subordinated to whose Europe decide to operate in the globalization politics!

All depend from this: if the UE prefers to learn the lesson from the European citizens, really evident especially those last years, taking seriously the promises of Laeken and worrying about the “new structural unemployment” and of the crisis of the W ST or, in alternative, prefers to continue to follow the current way despite all the worrying signals of political delegitimation.

References

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This paper follows the topic of my previously released essay on the hegemony of multilevel governance (C. Amirante, *Principles, values, rights, duties, social needs and the interpretation*

of constitution. *The hegemony of multilevel governance and the crisis of constitutionalism in a globalised world*, in Nergelius – Policastro - Urata (eds.), *Challenges of multilevel constitutionalism*, Polpress Publisher, Cracow 2004), aiming to develop the issue of hegemony in the line neoclassical economy – politics – law and society. The temporary results of my analysis are focusing on the cultural-ideological dimension of a techno-bureaucratic mediation in the decision making process, by introducing itself as a process directed by non refutable scientific criteria..

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