

**THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS
AND THE QUESTION OF EPISTEMIC UNCERTAINTY**

XXVIII World Congress of the International Association for the
Philosophy of Law and Social Philosophy (IVR), Lisbon, July 17-21, 2017.
16. SW: Hard and Tragic Cases, Principles and the Limits of Law. Chairs:
Manuel Atienza, José Manuel Aroso Linhares

Cristina M. M. Queiroz

Faculty of Law
University of Porto
2017

“We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men’. People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regard-less of station, race, or creed”.

Franklin D. Roosevelt, *State of the Union Message to Congress*, January 11, 1944.

1. A comprehensive theory of global constitutional rights must give an answer to a set of related issues. Which theory or conception of rights best explains the global model of constitutional rights? This will include questions of which values are protected and what their limits are? How does the judicial enforcement of a particular theory or conception of rights relate to the values of democracy? How does it interact with the institutional competence of courts, on the one hand, and with the elected political bodies, on the other? This is particularly important with regard to the value of the separation of powers. Here we can observe a “polyvalence of discourses” and a certain degree of “ambiguity” and “epistemic uncertainty”.

Furthermore, the conception of rights which results in the imposition of negative obligations on the state, the traditional conception of rights constructed as defensive barriers or walls against the state, is seen today as having been “re-defined” by the growing recognition of economic and social

rights. These are rights that tend to be exercised not against the state, and other public authorities, but, above all, *through* the state; in brief, rights that guarantee the preconditions required for autonomy, both personal and collective.

The global model of constitutional rights follows a selective and fragmented procedure, which tends to dissociate the traditional functions of the market (circulation and redistribution). This separates economic liberties — classically, property rights, and freedom of contract and commerce — from the gradual implementation of social rights, whose evolution is necessarily slower and discontinuous.

Therefore, the question is how to ensure and promote at the transnational level the values of autonomy, equality and democracy. This takes place in the context of a constitutional theory which necessarily involves the three branches of government, although it is actuated at a transnational and global level, separating the sources of legitimacy, which remain linked to nation states, from the normative processes of validation situated at transnational or global levels.

In addition, the global model of constitutional rights is largely a creation of the Judiciary. This is an assertion that requires, specifically in the context of social rights, better coordination of international economic policies that must be integrated by the different actors and subjects involved, and an effective coordination between different states and actors, public and private, within the institutional framework of global governance.

2. The expansion of constitutional rights in the post-1945 era, and, in particular, the establishment of the European social model, is founded on the concept of the “social state” (*Sozialstaat*). It is this concept that constructs the rules and gives expression to the concept of *social citizenship*. This is a concept by which public institutions assume positive duties for ensuring

social welfare, including the rights of citizenship, that must necessarily respect the normative principles of equal consideration and respect, as well as security and legal certainty, actuated by an impartial due and fair process of law.

The concept of welfare state has two dimensions: *political* and *normative*. The normative dimension is reflected in the circumstance that the rules and policies that do not respect constitutional rights, including social rights, may potentially be reviewed by national and international courts. This is in the context of Europe, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR).

Nevertheless, the prevalence of “economic constitution” over “political constitution” creates a disparity between “Economic Constitutional Law” and “Social Constitutional Law”. This is a disparity that is unknown at the national constitutional level and which bestows to the considerations of economic and social policy an equal constitutional status in the field of political discourse and deliberations.

Furthermore, austerity programs address towards the peripheral countries in the Euro zone, negotiated with the “Troika”, together with the strict conditionality of assistance aid, provided as a preventive arm of the European Stability and Growth Pact, are now interpreted in the light of a neoliberal economic model. This is a model that imposes quasi-objective, that is, quantitative, references, entrusted to intergovernmental bodies “outside” the institutional framework of the European Union¹.

¹ In this respect, should be consulted the ruling of the Court of Justice of the European Union, November 27, 2012, Thomas Pringle case: www.curia.eu/juris/document. For further reading, see also KAARLO TUORI and KLAUS TUORI, *The Euro Zone Crisis. The Constitutional Analysis*, Cambridge: Cambridge University Press, 2014, Part II, entitled “The constitutional mutation”.

Yet in a time of economic and social crisis the relationship between constitutional rights and the structure of political power is reversed. The government will have more powers and the people fewer rights². This applies not only in the context of the territorial state unit, the traditional powers of the state, but also, markedly, in the framework of global economic and financial powers, which escape democratic control of legitimacy, transparency and accountability.

For this reason, the state loses legitimacy and its power of command is weakened. Many prominent authors advocate that it is increasingly difficult for the state to protect and enforce constitutional rights in the context of previously defined territorial units. In a global and transnational economy this new context tends to reduce the authority of the state. And this loss of authority leads, in turn, to a loss of democratic accountability which translates, ultimately, into a loss of popular support and confidence.

This is not to mention that rights presuppose an increasing degree of universality, legal uniformity and abstraction. And these factors can, likewise, be defined in the global legal order.

3. The European Union Treaty (1993) established, for the first time, “de iure” full citizenship within the Union. This attribution and recognition of legal and political rights, “beyond” the state, indicates a rupture of the direct link between the state and its citizens. It also explains why there may not exist a logical link between the “community of citizens”, on the one hand,

² CLINTON L. ROSSITER, *Constitutional Dictatorship. Crisis Government in Modern Democracies*, Princeton: Princeton University Press, 1948, p. 5.

and the “community of sentiment” on the other, within a delimited territorial unit, the traditional or classical Westphalian state³.

A number of factors explain this growth of supranational citizenship rights in a context of a “post-national constellation”⁴. This process is not unique to Western Europe, since the expansion of the “post-national” model is activated as transnational norms and human rights discourse permeate the limits of the nation state.

In this process the national identities are altered so that they can contain more and more supranational elements. National identity undergoes a transformative process in relation to both the “community of sentiment” and the “community of citizens”. This is an element that is neither in opposition to nor in conflict with national identity, even if it provokes a transformation of the concept of “citizenship”, which evolves from a more “pluralistic” nation-based model to a more “universalist” one based on the individual as a person⁵.

In this transformative process it is not the nation itself which is under pressure to establish a claim to substitute national communities of origin. Rather it is the content of the nation that is transformed to incorporate new

³ GEORG SØRENSEN, *The Transformation of the State: Beyond the Myth of Retreat* (translated to Spanish “La transformación del Estado. Más allá del mito del repliegue”), Valencia, 2010, pp. 106 ff. On the concept of “constitutive community”, which included the “communities of memory”, see also DANIEL BELL, *Communitarianism and Its Critics*, Oxford: Clarendon Press, 1993.

⁴ JÜRGEN HABERMAS, *Die postnationale Konstellation. Politische Essays*, Frankfurt am Main: Suhrkamp, 1998.

⁵ CRISTINA QUEIROZ, *Direito Constitucional Internacional*, 2nd ed., Lisboa: Petrony, 2016, pp. 106 ff.

elements, understood as a clear commitment to a closer and more perfect cooperation at supranational, European, and international levels⁶.

4. The Constitution is not only a juridical instrument but a social and political covenant, a portentous instrument of social integration. For this reason the “new” methodology proposed by the “*Ius Publicum Europaeum*”, and in particular by Armin v. Bogdandy⁷, Director of the Max-Planck Institute for Comparative Public Law and International Law, de-parts from the unidimensional and introspective model of the old *Staats-recht*. This new school of legal thought, which is inserted as a “third way” between the “classical” methodology of the State Theory (*Staatsrecht*) and the Constitutional Theory (*Verfassungsrecht*), does not vindicate nor use the homogeneous concepts of “domination” (*Herrschaft*), and, neither does it vindicate nor use the homogeneous concepts of, among others, sovereignty, order and command. Instead it is essentially posited as interdisciplinary, multi-jurisdictional, comparative and post-national.

As a consequence, even if we can discern an analogous concept of constitutional rights in the context of a multi-dimensional, multi-spatial and multi-temporal adjudication of constitutional rights, and although these concepts may appear similar, the objectives regarding the enforcement of these rights may be different and even opposite. And last but not least, we can observe the perils of an epistemic ambiguity and uncertainty, including the perception of opposite results.

⁶ Ibid.

⁷ ARMIN v. BOGDANDY, *et al* (eds.), *Ius Publicum Europaeum*, Heidelberg: C. F. Müller, 2007-2016, 6 vols.

5. As stated above, the conception of rights that translates into the imposition of negative obligations on the state, that is to say the traditional conception of rights constructed as barriers or walls against the state, is seen today as “re-defined” by the growing recognition of economic and social rights.

Hence the contradictory effects of the integration process at global, European and national levels, that can vary according to the nature of a manifold range of organizations, institutions and actors involved. Furthermore, International Law, and in particular International Human Rights Law, risks destabilizing national legal systems without being in a position to offer them a transnational and effective legal order enforced by the courts.

The question is how to guarantee and promote, at transnational and global levels, the values of autonomy, equality and democracy in the frame of a Constitutional Theory that involves the three branches of Government — legislative, executive and judicial powers.

This is particularly true in the context of social rights which require effective coordination of international economic policies, i.e., a set of actions that integrate different actors; a better coordination and collaboration among the different states and other actors, public and private, within the structures of global governance institutions.

Against this background, the expansion of constitutional rights observed in the post-1945 period, and in particular the establishment of the European social model, cannot be based exclusively upon the concept of “social state” (*Sozialstaat*). This is a concept of social state in which public authorities assume responsibility for ensuring social welfare, including citizenship, and fully respect the normative principles of “equal consideration” and “respect”, “security” and “legal certainty”, enacted through a due and fair process of law.

We can here observe a process of asynchrony and asymmetry between the development of juridification and democratization, on the one hand, and mechanisms of individual self-determination and democracy, on the other. This asynchrony and asymmetry is well illustrated through the course of European integration.

6. Europe and European Union are witnessing a continuous process of “constitutionalization” of rights; a selective and differentiated process, of a simultaneously multi-dimensional, multi-spatial and multi-temporal nature; a process that ends up attributing prevalence to the “economic constitution” to the detriment of the “political constitution”.

The “triple crisis”, a crisis that is the cumulative outcome of a *financial market* crisis, a *sovereign debt* crisis of the *European Union* and its *Euro zone*, and of *economic growth*, made it clear that the European order, based on an idea of balance and concert among European states, was not built on sound foundations. The market principle, with an Ordo-liberal resonance, superseded the Kantian and cosmopolitan vision of democratic self-determination. Europe, quite simply, is stuck in an “elite’s project”, more managerial and functionalist than Kantian and cosmopolitan⁸.

The emancipatory potential of the Kantian and cosmopolitan vision, on the contrary, includes a principle of sociability, which is an integral part of the affirmation of the democratic principle. It also implies the prevalence and primacy of the political constitution over the economic constitution rather than a “neutralization” of the political constitution by the economic constitution, subjecting the former to a constitutional soft law.

⁸ CRISTINA QUEIROZ, *As múltiplas faces da Europa*, in: CRISTINA QUEIROZ, “Direito, Estado e Constituição no limiar do século XXI”, Coimbra: Coimbra Editora, 2015, p. 56.

And, in fact, Europe has multiple faces. But it cannot fall into the “illusion” of the primacy of the market, of “output legitimacy”⁹, to the detriment of the principles of the Rule of Law and Democracy. The “reserve” of power lies with the democratic constitution, never with the economic constitution based on market principles and free competition. And it is precisely in time of economic and social crisis that rights most need protection and guarantees, from and through the state and other public institutions.

Hence the importance of universal human rights and the principles of equality and justice. And the problem is precisely this: how to govern a country effectively and civilly in the context of a “state of permanent emergency” not foreseen or authorized in accordance with constitutional clauses and provisions, including at European and international level.

Surely a hard case. However, we must keep the hope that it won’t become tragic.

References:

BECK, Ulrich, *The Metamorphosis of the World*, Cambridge: Polity Press, 2016.

BELL, Daniel, *Communitarianism and Its Critics*, Oxford: Clarendon Press, 1993.

BOGDANDY, Armin v., *et alii* (eds.), *Ius Publicum Europaeum*, Heidelberg: C. F. Müller, 2007-2016, 6 vols.

⁹ FRITZ W. SCHARPF, *Legitimacy in the Multi-level European Polity*, in: PETRA DOBNER e MARTIN LOUGHLIN (eds.), “The Twilight of Constitutionalism?”, Oxford: Oxford University Press, 2010, pp. 89 ff.; *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999, pp. 7-22.

BRUNKHORST, Hauke, *Das doppelte Gesicht Europas*, Berlin: Suhrkamp, 2014.

KOSKENNIEMI, Martti, *The Politics of International Law*, London: Hart Publishing, 2011.

MAIER, Charles S., *Once Within Borders. Territories of Power, Wealth, and Belonging since 1500*, Cambridge, Mass.: Harvard University Press, 2016.

MÖLLER, Kai, *The Global Model of Constitutional Rights*, Oxford: Oxford University Press, 2012.

MÖLLERS, Christoph, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford: Oxford University Press, 2013.

OFFE, Claus, *Europe Entrapped*, Cambridge: Polity Press, 2016.

PERRY, Michael J., *A Global Political Morality. Human Rights, Democracy, and Constitutionalism*, Cambridge: Cambridge University Press, 2017.

POSNER, Eric A., *The Twilight of Human Rights Law*, New York: Oxford University Press, 2014.

QUEIROZ, Cristina, *Direito Constitucional Internacional*, 2nd ed., Lisboa: Petrony, 2016.

— *As múltiplas faces da Europa*, in: CRISTINA QUEIROZ, “Direito, Estado e Constituição no limiar do século XXI”, Coimbra: Coimbra Editora, 2015, pp. 55 ff.

SCHARPF, Fritz W., *Legitimacy in the Multi-level European Polity*, in: PETRA DOBNER e MARTIN LOUGHLIN (eds.), “The Twilight of Constitutionalism?”, Oxford: Oxford University Press, 2010, pp. 89 ff.

— *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999.

STREECK, Wolfgang, *Gekaufte Zeit. Die vertragte Krise des demokratischen Kapitalismus* (translated to Portuguese “Tempo Comprado. A crise adiada do capitalismo democrático”), Coimbra: Actual, 2013.

TUORI, Kaarlo, and TUORI, Klaus, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014.