

THE CRISIS OF DEMOCRACY IN THE ERA OF GLOBALIZATION

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1. PREMISE

Once the division of the world into blocks had finished, after the fall of the Soviet regime fifteen years ago, it seemed that nothing could oppose the restoration of peace in the world and the diffusion and consolidation of democracy throughout the planet. And from that precise moment, a non-situational crisis that affects both levels of current constitutionalism has been brewing in the main Western countries and within international relations: on the one hand, the form of democracy designed by the rigid constitutions of the last post-war era, and on the other hand, the peace project and human rights guarantee formulated in this embryo of a worldwide constitution which the UN Charter and the different declarations and conventions about human rights represent.

In the first part of this paper I will briefly mention the various elements and factors relating to this double crisis, which is responsible for the risk of our losing the two greatest conquests achieved by constitutionalism in the 20th Century: constitutional democracy at the level of internal orders and the peace principle and universal guarantee of human rights. Subsequently, in the second section, I will try to indicate some of the analyses that have emerged about the constitutional paradigm and which, as I understand them, are necessary, although evidently insufficient, in order to face the current crisis.

2. THE CONSTITUTIONAL DEMOCRATIC CRISIS IN INTERNAL ORDERS

Firstly, therefore, I will analyze the democratic crisis by the way in which this manifests itself at an internal order level within many Western countries; I will present a detailed and thorough analysis of the Italian situation, and an analysis of other orders, which, although being of lesser magnitude, is no less insidious. To this effect I will identify three different aspects and factors of this crisis, which although being interconnected, affect —following the hypothesis proposed here— the three dimensions in which constitutional democracy is articulated: the policy of *representative democracy*, the institutional *separation of powers* and that which really corresponds to the guaranteeist dimension, being the *Constitutional law-governed State*.

The most important crisis factor is the personalization and verticalization of political representation. Throughout these recent years, in almost all advanced,

developed, democratic countries we have seen a reinforcement of executive power with the consequent loss of parliamentary authority. From the United States to England, from Spain to Italy, to France, Russia and the Latin American countries, political representation, due to the diffusion of the presidential model or electoral systems which clearly favour majorities, there is an increasing tendency to identify oneself with the personality of the Head of State or the Government. Following this model's underlying concept, political democracy should consist, not only of the representation of diverse social interests and their parliamentary discussion, but also and indeed, preferentially, in the election via electoral choice of a majority government, which therefore, would embody the maximum expression of popular will. The consequences have been, on the one hand, the weakening of parties in terms of areas and instruments of social adhesion, collective formation of political programmes and opinions, representation of interests and differing proposals even when conflicting; and on the other hand, an anti-representative regression of political democracy since, as Hans Kelsen has shown, a monocratic organism cannot represent the will of the entire population, not even the majority. In fact, "a collective will which is constituted in this manner", warns Kelsen "does not exist", and its ideological acceptance only serves to "mask the contrast of effective and radical interests, which are shown in the reality of political parties and in the reality, which is even more important, of the class conflict which lies behind these interests".¹

The second and most serious factor of this crisis consists in the process of progressive confusion and concentration of the powers that are being imposed in our democracies. I am referring, in the greatest extent, to the erosion of the classic principle of separation of public powers that Italy, for example, is trying to achieve, the gradual loss of an even more important separation which forms part of the constitutionalism of modern states even before that of democracy: the separation between the public and private spheres, that is to say, between political and economical powers. The process of this confusion of powers and interests begins by postulating the supremacy of the marketplace over the public sphere, which is consequently followed by the subordination of governmental powers to immense private powers and interests and the establishment of a close alliance between the powers of politics and the media. Italy is undoubtedly an extreme case, where this

1. H. Kelsen, *Wer soll der Hüter der Verfassung sein?*, (1931), Italian translation: *Chi deve essere il custode della costituzione?*, in Idem., *La giustizia costituzionale*, Milán, Giuffrè 1981, pp. 275-276. For this reason, affirms Kelsen, "the idea of democracy implies the absence of bosses". And he adds: "Fully keeping within the spirit of Plato's words in his *Republic* (III, 9), he places emphasis on Socrates' words, in reply to the question regarding how the State should treat an ideal man endowed with superior qualities, in brief, a genius: 'We would honour him as someone who is worthy of admiration, marvellous and kind; but after realizing that no man with these characteristics exists in our State, and *neither should* he, once he has been anointed and crowned, we would accompany him to the border" (H. Kelsen, *Vom Wesen und Wert der Demokratie* (1929), It. trans., *Essenza e valore della democrazia*, chap. VIII, in Idem., *La democrazia*, Il Mulino, Bologna 1981, p. 120).

phenomenon has arrived at an unprecedented point as all this powers is concentrated in the hands of one person: the political powers of the government, the powers of the media —guaranteed by the quasi-monopoly of televised information, and an enormous system of economic interests and powers which openly clash with public interests. However, these conflicts of interests and political clientelism which in times past was known as the “fourth power” are phenomena which are currently endemic in all orders,² having further and further extended the relationships between money, information and politics: money to produce information, information to produce money and politics, following a vicious and perverse circle which resolved with an increasing anti or extra representative conditioning action by the government. This is not merely a simple subordination of public interests to private interests, but rather a pathological phenomenon which corrupts the very forms of political representation such as representation free from coercion, thereby annihilating an elemental supposition of democracy which is freedom of information and pluralism of informative sources and, in the face of the absence of limits and balance between powers, leads to two convergent kinds of absolutism: the absolutism of the majority and the marketplace; the omnipotence of the political power in majority, and the absence of rules and controls upon the economic powers.

The consequence of all the above is the third factor in the democratic constitutional crisis: the legality crisis, both ordinary and constitutional, and with this, the paradigm of the Law-governed State as a system of limits and restriction imposed by the political powers in majority and by marketplace economy. The absolutist verticalization, concentration, confusion and vocation of public and private powers are, in fact, equal to a new and more current version of ‘government by men’ instead of ‘government by law’, as a result of having resorted to war (disobeying the UN Charter), the use of torture, emergency laws (such as the American *Patriot Act*) harmful to the most basic guarantees of *habeas corpus* and, on the other hand, of the progressive erosion of the public sphere as a set of functions and institutions subjected to rules and controls, to the effect of guaranteeing everyone’s rights. Consequently, not only are the institutional guarantees of fundamental rights debilitated, and specifically social rights, but this factor also directly aims at progressive privatization of the public sphere and its corresponding functions: in the fields of teaching, social services, health care and also in the fields traditionally reserved for the province of the State even in the liberal model, such as civil jurisdiction, the execution of prison sentences, the functions of public order and even military defence, which may be given over to private mercenary forces. Consequently the entire structure of the constitutional state as

2. Please see: With regard to, G. Rossi, *Il conflitto endemico*, Adelphi, Milan 2003, pp. 21-23 y 27-29, which denounces in a figurative sense, the transfer of conflict “from the endemic state to the epidemic state, so that the deviation which now characterizes not only “the activities of any one marketplace protagonist” but also the behaviour of “all the actors in our marketplaces” (Ibid., p. 23).

an instrument to guarantee fundamental rights is blown to pieces, and these are degraded to patrimonial, merchantizable and negotiable rights, being a clear contrast to their universal character and constitutional rank, which on the contrary, should be supported and maintained outside of the marketplace and the logic of obtaining benefits in favour of living identical guarantees which benefit everyone by the performance of the public sphere.

2. DEMOCRACY AND THE LAW-GOVERNED STATE IN THE NATIONAL STATE CRISIS. THE ABSENCE OF AN INTERNATIONAL PUBLIC SPHERE

Likewise, another change in the political systems which affect the constitutional paradigm at the level of internal orders such as that of the international order, has been produced. I am referring to the deformation of the traditional lines of democratic politics of the law-governed state which began with the crisis of the sovereign national state and its location outside of national frontiers, originating from globalization processes from increasing plots of power, both public and private. In the age of globalization, the future of each country depends increasingly less on internal politics and depends increasingly more on external decisions, taken in out-of-state political forums or by global economic powers. This may be applied to all countries, with the possible exception of the United States, and above all, to the impoverished countries, which have been subjected to a model which was already in a national State crisis, exported by the West during the last century, together with the illusion that this would be sufficient to guarantee self-determination and independence, and whose future, on the contrary, would increasingly depend on decisions taken in the centre of the world: that is to say by the politics democratically decided by the rich and comfortable majorities of a number of reduced Western powers which control the international institutions —the World Bank, the Monetary Fund, the World Trade Organization, G-8, the selfsame United Nations Security Council—, just as the large multinational enterprises.

In short, there has been a leap in the nexus between the democracy and the people, between the powers who take decisions and the law-governed state, that was traditionally found in representation and the supremacy of law over politics, of which law itself is a product. In a world of sovereign inequalities and increasing interdependence, it is no longer true that the relevant decisions correspond to direct or indirect democratic powers; that democratic procedures guarantee the coincidence between governors and representatives; that in addition, the election of a president or parliament of a great power by its people should turn out to be indifferent for the future of other peoples. In such a case, we should ask ourselves: in the face of this paradigmatic change in the public and political sphere, —in what sense and under what conditions, is it still possible to talk about democracy?— The correlation state/democracy is a necessary nexus, but up to what point of deterioration of the representation relationship between governors and governed of

which the national State is an intermediary, carries the deterioration of democracy along with it, or, on the other hand, is it possible to begin a process of re-foundation of the democratic forms with the aim of elevating them to the heights which Jürgen Habermas has called “global internal politics”?³ To summarize, are we in a condition, if we don’t want to file away the very concept of “demo-crazy”, to draft a democracy that will go beyond the State boundaries?

An identical problem is posed in relation to the law-governed state. Once the state monopoly on legal production is finalized, due to a great extent to the fact that the presiding norms in the different national orders have out-of-state origins (European or international), can we continue to talk, as in the past, about a generic link between “the state” and “positive law”, or at least between “the state” and “law-governed state”, to an extreme at which the deterioration of the national States would be equal to an inevitable deterioration of the law-governed state and of the principle of legality? Or on the contrary, is it possible to foreshadow an amplification towards politics and international law from the paradigm of the constitutional state of law, by which this would be subjected to law, overcoming the old state scheme, to new subjects —the World Trade Organization, the Monetary Fund, the World Bank and the dense trans-national network of economic powers— which today operate in the international scene without democratic legitimization or constitutional ties. Finally, what kind of future does politic democracy and the state of law augur since its premises are in crisis, that is to say, the State as a sovereign order and state law as an expression of popular will to which all powers are subjected?

The dilemma confronted by the theory of democracy and the law-governed state is, in many accounts, radical. In the sphere of international relations, the main effect of the ancient national states’ crisis has been, in fact, a *void in public law*, that is to say, a lack of rules, of limitations and of bonds to guarantee peace and human rights in relation to the new trans-national powers, public or private, which have deposed the ancient state powers or extracted their power to govern and control. Consequently this has resulted in a neo-absolutist regression both by the great powers such as the great economic global powers, which has been manifested in general anomy beneath the protection of the strongest law: on one hand, the deterioration of the UN as a guarantee of peace, accompanied by the renewed recourse to war, a war that has not been defined by chance as “infinite”, whilst being an instrument to govern the world and resolve international problems and controversies; on the contrary, in the absence of rules, openly claimed by

3. “Putting an end to the balance of terror”, writes Habermas, “it seems that on the political international plane, the doorway to securing humans rights is half-open—in spite of all the setbacks—a perspective defined by C. F. von Weizsäcker as ‘internal world politics’ [*Weltinnenpolitik*]”. (*Die Einbeziehung des Anderen* (1996), It. trans., *L’inclusione dell’altro. Studi di teoria politica*, Feltrinelli, Milan 1998, p. 139. The expression “political world politics” is taken up again by J. Habermas in *Die postnationale Konstellation* (1998), It. trans., *La costellazione post-nazionale. Mercato globale, nazioni e democrazia*, Feltrinelli, Milan 1999, pp. 26 and 90-101.

current globalized capitalism to be a kind of *grundnorm* of the new international economic order. The same globalization of the economy may be identified, from the legal point of view, by this absence of international public law being suitable to dominate the great trans-national economic powers; this is not about: —be careful— an absence of law, which is impossible in any event, but rather a void of public law, inevitably totally taken up by private law, that is to say, by a right of contractual production⁴ instead of legislative production, which converts it in an inexorable expression of the law of the strongest.

It is therefore, the lack of an international public sphere capable of confronting the new extra-state powers —understood to be “the public sphere”, the set of institutions and functions dedicated to the protection of general interests, such as peace, security and fundamental rights— the authentic, colossal problem derived from the states’ sovereign crisis which has been dramatically revealed in the tragedies which have taken place over the last few years: in wars, in many crimes against humanity, in the increase of inequality, and in environmental catastrophes. The crisis of the states and therefore the role that they must play within national public spheres, has not been compensated by the construction of a public sphere equal to the processes of globalization that are being produced. The 1945 UN Charter, the 1948 Universal Declaration and the 1966 international Pacts, which together form a species of embryonic world Constitution, promising peace, security, guarantee of fundamental liberties and social rights for all the inhabitants of the planet. But what we could call laws of performance, that is to say, the guarantees for proclaimed rights: stipulation of their corresponding prohibitions and obligations, justiciability of their infractions and the creation of international institutions to guarantee them, are conspicuous by their absence. It is as though a state order was only composed by its Constitution and a few basic institutions lacking power. International order is no more than an order endowed only by a constitution and little more: lacking, in other words, in institutions of guarantee. To summarize, it is a set of promises that cannot be maintained.

The most notorious consequence of globalization, in the face of the absence of a worldwide public sphere, has been the exponential increase of inequality, a sign of a new racism that takes for granted misery, hunger, the illnesses and deaths of millions of worthless human beings. This inequality —as shown in the statistics with reference to the increasing differences between rich and poor countries and to the tens of millions of deaths each year due to lack of water, food and essential medicines— is unprecedented in history. Humanity is today, as a whole, incomparably richer than in the past. But it is also, if we look at the increasing quantity of people who have been exterminated, incomparably poorer. People are undoubtedly, from the legal point of view, incomparably more equal than in any other era, thanks to the innumerable charters, constitutions and declarations of rights. But

4. M. R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Il Mulino, Bologna 2000.

they are also, in practice, incomparably more unequal. The “era of rights”, to use the Norberto Bobbio’s expression⁵ is also the era in which its violation is most widespread, the era of the most profound inequality.

It is clear that this void in public law—in a global society that is increasingly more fragile and interdependent—will not be able to be maintained for much longer without giving rise to a future of war and violence capable of bringing down our very own democracies. That is why, putting an end to the growing breach that exists among our constitutional charters and the generalization of their daily infraction is not only a legal obligation, but also a condition for our own security and for the survival of our democracies. In the introduction to the selfsame Declaration of ’48, this link between peace and rights, between violation of human rights and violence is realistically established. It is urgent that the great powers understand, once and for all that the world is not just a global marketplace but also possesses the global and indivisible characteristics of security, peace, democracy and rights, and that we cannot realistically and decently, continue to talk about peace and a secure future if we do not eliminate or at least reduce the oppression, hunger and poverty suffered by millions of human beings. This represents a categorical denial of the promises contained in the numerous constitutional and international charters.

3. RECONSIDERATION OF THE PUBLIC SPHERE. GOVERNMENTAL INSTITUTIONS AND SAFEGUARD INSTITUTIONS

There is a common element to all these aspects and factors of the democratic constitutionalism crisis, at both state and international level. The increase of complexity of these problems, interdependencies, asymmetries and power relations originated by globalization correspond, paradoxically, to a simplification and verticalization of the political systems instead of a more complex institutional articulation of these systems; a confusion and concentration of powers instead of greater limitation and separation of them; and therefore a reduction of the public sphere with regard to internal and international orders, instead of their amplification and reinforcement to guarantee the promises contained in the constitutional models. However, in the face of this paradoxical division between our political systems’ obligation to follow norms and the need to be effective, it is this same paradigm of democratic constitutionalism that suggests, if it is taken seriously, some appropriate indications to confront the crisis in relation to our internal orders, and above all to the international order.

The first indication consists of the need to reconsider the structure of the public sphere. The stipulation of the peace principle and of fundamental rights in the constitutional and international charters compels that in practice it is supported

5. This is the title of the book by N. Bobbio, *L’età dei diritti*, Einaudi, Turin 1990.

by adequate guarantees and the corresponding safeguard functions and institutions. Far more important than the Montesquian differentiation and separation between the three classical powers —legislative, executive and judicial— by reason of the above, what is essential today, is another distinction between *governmental institutions and safeguard institutions*, whose separation is demanded by the different sources of legitimization; the *political representativity* of government institutions, be they legislative or executive and, that their *subjection to law*, and specifically to the universality of fundamental rights which are established in them, on behalf of the safeguard institutions. It is evident that the real problem is found at the international level. The truly, enormous hiatus is the safeguard institutions' absence of functions, even more than governmental functions, as they do not make sense and are not even concerned with the defence functions for human rights a planetary democratic hypothesis based on the principle of one man, one vote. At this level, what is really necessary, over and above the reinforcement of *governmental functions and institutions* —which are related to the sphere of political discretionality and hence are more legitimate the more they are put into practice by the representative organisms of the national states—, is the creation of *functions and safeguard institutions*: not only the traditional *secondary guarantees* or jurisdictional guarantees, responsible for intervening in the event of violation of rights, but this intervention is needed even beforehand, in relation to primary safeguards and the corresponding institutions which are directly responsible for their protection and compliance.

From this perspective, undoubtedly, the most important event has been the coming into operation of the International Penal Court for crimes against humanity, although it has not shown many signs of life and this may mean that it is in danger of failure, in addition to its lack of acceptance by some of the great powers such as the United States, Russia, China and Israel. However, there are many more safeguard institutions which need to be established. There is a need to set up such institutions, as a matter of priority, in the face of the gigantic social problems of hunger and misery which originate in a globalization without rules, institutions dedicated to comply with social rights such as those envisaged in the 1966 Pacts. Some of these institutions, for example, the FAO, the World Health Organization, have been in existence for some considerable time, and they need to be endowed with the necessary resources and powers in order to offer the alimentary and sanitary services that correspond to their functions. Others, such as institutions that guarantee peace, even when provided with current international law, have to be established once and for all: I am referring to the International Police Force as set out in chapter VII of the UN Charter and, on the other hand, to the enforcement of the International Penal Court's competences as detailed in paragraph *d*) of art. 2 of its Statutes, with relation to the crime known as "war of aggression". Other institutions, moreover —in material related to environment defence, guarantees for education, housing and other vital rights— must finally not only be created, but even beforehand, should be planned by means of new international conventions.

It is of course true that the construction of an international public sphere also requires the establishment of a worldwide taxation system, with the aim of obtaining the necessary resources to finance safeguard institutions. But before achieving this, such resources could be obtained, according to the elemental principles of private law, through the imposition of appropriate compensation for wrongful enrichment to be paid by the richest countries' enterprises for the use of exploitation, if not deterioration, of the elements commonly known as humanity's communal goods: such as satellite orbits, electromagnetic bands and mineralogical resources in the ocean depths, currently used as though they were *res nullius*, instead of being recognised by the international Conventions relating to the sea and extra-atmospheric space, "humanity's communal heritage"⁶.

5. THE COST OF RIGHTS AND OF FAILING TO SAFEGUARD SUCH RIGHTS

The second indication that suggests the constitutional paradigm concerns the synergy of fundamental rights. Opposed to the widely emphasized cliché affirmed by recent philosophical and judicial politics of the conflicts between fundamental rights, the inevitable outcome is, including that of the "zero sum," that any law that always prejudices another will be satisfied⁷, we must recognise that, based on the experience of our Western countries, all fundamental rights should be reciprocally reinforced, and that each one of them is weakened when guarantees of another are diminished. In fact, it is impossible to conceive an effective autonomy in the practice of political rights without guaranteeing the right to freedom, or effectively practising fundamental liberties without meeting social rights, from those related to survival and health to those concerning teaching and information. Otherwise,

6. This is the expression used in art. 136 of the *United Nations Convention on maritime law* dated 10/12/1982: "The Area (of the high seas) and its resources are a communal heritage of humanity". All rights over the resources of this Area, as added in art. 137, 2nd paragraph, conferred on humanity as a whole, in whose name the Authority [The International Authority for the sea floor] takes action. These resources are inalienable"; "The activities in the Area", likewise established in art. 140, "are carried out for the benefit of all humankind, and the interests and necessities of the State will especially be taken into account in the process of development", this being so "the equal share of the benefits obtained upon a non-discriminatory basis, is assured". As "an income for all humanity" it is likewise classified as extra-atmospheric since in art. 1 of the corresponding *Treaty* dated 27/1/1967, which imposes its "use for the benefit and interest of all countries, whatever their level of economic or scientific development".

7. Cfr. A. Pintore, *Diritti insaziabili*, in L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico*, in the charge of E. Vitale, Laterza, Roma-Bari 2001, pp. 189-190. According to this author, my approach to fundamental rights, which I call "primary guarantees", carry along with them certain obligations and prohibitions which could lead to an "unlimited moral space, which would therefore be indefinitely expansible" from the "extension" of rights, each one of which would have a "'surface'... which is closely delimited". To see my response to this, please see, *I fondamenti dei diritti fondamentali*, 6, pp. 318-332.

the defence of social rights, let alone the previous conquest of adequate guarantees to safeguard them, would not be possible.

But above all, what must be rejected and abandoned is the cliché about the conflict between guaranteeing social rights and economic development. What is undoubtedly costly are social rights in terms of health, teaching, and survival,⁸ as much as, on the other hand, the right to liberty and consequently, constitutional democracy is also costly. But the cost of not satisfying such rights is even higher. As Amartya Sen has demonstrated, when fundamental liberties and political rights are lacking, mere popular participation and control over the correct performance of public powers is not only impossible, but neither is economic initiative, market security and investment, intellectual, cultural and technological development.⁹

However, as I understand it, the above-mentioned by Sen is worthy of being amplified. It clearly serves, not only for fundamental liberties, but also for social rights —the right to health, teaching and survival—, which are perhaps more essential, if possible, for the development of security and the economy. Sen herself has demonstrated the extraordinary results obtained with industrial development and the increase in prosperity, firstly in Japan and then in China; the increase of levels of instruction and, consequently, of qualified work, research and technological development.¹⁰ But the same can be said, and with even more reason, with regard to the right to basic nourishment and health which take greater priority over all other rights. The guarantee of these rights —access to water and to what are known as “essential medicines”, no less than basic education— is the budget upon which the survival of the individual depends, and also the economic development of society as a whole. Hunger and malnutrition do not only impede any possibility of development: of the person, whose cognitive and productive capacities remain depleted, affecting both their manual and intellectual aptitudes; but also economic development, since this becomes stagnant due to insufficient individual productivity leading to the impossibility of creating general prosperity. Hunger, in short, gives rise to a terrible vicious circle: diseases which, due to the cost of medicines, deplete the already sparse family incomes; reduces the productive capacity of the population; provokes riots, social conflict and civil disorder; it is ultimately the main factor of criminality for survival. Today, more than a thousand million people suffer from hunger and thirst and tens of millions die each year from diseases or lack of water or basic nourishment. This is not only a morally intolerable catastrophe. It is also the main reason for the lack of economic growth over a large area of the planet.

8. S. Holmes y C. R. Sunstein, *Il costo dei diritti. Perché la libertà dipende dalle tasse*, Il Mulino, Bologna 2000.

9. A. Sen, *Resources, Values and Development* (1984), It. trans., *Risorse, valori, sviluppo*, Bollati Boringhieri, Turin 1982, cap. V, pp. 122-141; Idem., *On Ethics and Economics*, (1987), It. trans., *Etica ed economia*, Laterza, Roma-Bari 2001; Idem., *Lo sviluppo è libertà. Perché non c'è crescita senza democrazia*, Mondadori, Milan 1999.

10. A. Sen, *Globalizzazione e libertà*, Mondadori, Milan 2002, pp. 142-143.

Fundamental rights are, in short, a factor and a motor for not only civil, but also economic development. We shall consider women's rights, and to be specific, the right to decide autonomously about maternity, and the level of effectiveness that this latter right assumes which is, at the same time, one of the main factors of women's independence with regard to man; her level of education, her possibilities of accessing the workplace, in short, of guaranteeing all her rights pertaining to freedom as well as civil and social rights. This is Amartya Sen's premise to explain the emancipation of women with regard to their domestic ties and for their participation in civil, political and productive life. It is also a form of self-control and reduction of the birth rate, and therefore the deactivation of what is known as the "demographic bomb", which is less damaging to people's dignity.¹¹

The guarantee of all fundamental rights catalogued as essential —is not only the right to freedom, but also and above all is the claim to social rights— it is not merely an end in itself, but also a means to economic development. The historical demonstration of this bond between the satisfaction of social rights and development is found to be within sight of all, and we can extract it from the experience undergone by the rich Western countries. These countries certainly have the greatest economic development, the greatest well-being of their populations, and the most wealth, with regard to the rest of the world, and thus, with reference to their own past, they are responsible, moreover, for the exploitation of the rest of the planet, the improvement in general life conditions: better education, better state of health, greater energy dedicated to work and research by each and every person. Such is the situation that we can clearly affirm, dismantling the fallacy of the contra-position between guarantees of rights and economic development, that the best economic politics, the most effective in order to encourage development, just as the best politics in the field of security and crime prevention, is social politics directed towards guaranteeing everyone's essential rights; and the necessary public expenditure to ensure it should not be considered as a passive burden on public budgeting, but rather as certainly the most productive form of public investment.

6. FOR A CHARTER OF FUNDAMENTAL GOODS AND ILLICIT GOODS

We finally find a third indication, imposed by technological development which has led to the destruction, squandering and merchantisation of an increasing quantity of essential goods for the individual and for humanity as a whole: these are the *communal goods*, such as the air, the whole environment and the future of the planet, and their degradation raises dramatic blisters for *ecology*; the goods which I will call "*intensely personal*", such as the organs and the entire human body, and whose manipulation leads to no greater problems than those of *bioeth-*

11. Ibid., pp. 110-113.

ics; and finally, the goods that I will call *social*, such as water, basic nourishment and essential medicines, on which people's lives depend. We could correctly name all those goods *fundamental goods*, contrary to patrimonial goods, those which are, in practice, the object of fundamental rights, whether they be negative rights or those which protect against damage, whether they be positive rights for assistance, whose guarantees consist of prohibitions or obligations, the first being at everyone's expense and the second being at the expense of the public sphere.

The stipulation of these limits and bonds corresponds to a new dimension of democracy and constitutionalism, although already inderogable. The determination of the fundamental bonds to guarantee the services of social goods is relatively new with regard to the ancient liberal paradigm, whilst linked to the social dimension of democracy, and raises fundamental problems of redistribution and political economy. But what is even newer, since it is linked to recent and increasing industrial development and technology, is the identification of fundamental boundaries to guarantee communal goods and intensely personal goods, which are resolved by each one having its own limitations for development, both in defence of the generations that inhabit the planet and future generations. And therefore, these fundamental boundaries carry with them, perhaps for the first time in history, a conflict between rights and technology, or even worse, between rights and science, which contradicts the so firmly established idea in Western culture about the progressive character seen just as frequently in technological development as in the freedom to research or undertake scientific experimentation. For this reason, in the current constitutional systems, the definition of these limitations and their corresponding guarantees are found to be as absent as the inability to approach them. And precisely because the problems referred to require difficult, costly and in certain cases "tragic"¹² decisions to be taken, it is therefore necessary to find urgent normative solutions being as well thought out and rational as possible and which, following the logic of the law-governed state, minimizes powers and guarantees rights and fundamental goods for both people alive today and future generations.

From all that has been said beforehand, I consider it appropriate to annex the constitutional charters of fundamental rights a *Constitutional charter for fundamental goods*: in which one part stipulates the ties for the production and distribution of social goods; and the other establishes, upon the basis of a new "natural contract" destined to protect intensely personal and communal goods,¹³

12. With reference to this problem it is useful to recall the classical essay by G. Calabresi and P. Bobbit, *Tragic Choices*, (1978), trad. it., *Scelte tragiche*, Giuffrè, Milan 1986. On the relation between law and technology, see S. Rodotà, *Tecnologie e diritti*, Il Mulino, Bologna 1995; Ídem., *Tecnopolitica. La democrazia e le nuove tecnologie della comunicazione*, Laterza, Roma-Bari 2004, chap. VIII.

13. This is the title of the essay by M. Serres, *Le contrat naturel*, (1990), It. trans., *Il contratto naturale*, Feltrinelli, Milan 1991.

rigorous limits both on the marketplace and politics. In particular, with reference to communal goods, we must be conscious of a rational policy which is responsible for their defence, making them inviolable, inalienable and perpetual, and which also, at this present moment, finds itself in a battle against time. In effect, this gives rise to a terrible novelty with regard to the past crisis. Our generation has inflicted irreversible damage on our environment, a deterioration which increases every year. We are destroying our planet in a crazy race towards unsustainable development. We have exterminated entire species of animals, consumed a great proportion of our energy resources, poisoned the seas, polluted air and water, we are responsible for deforestation, desertization and have buried millions of hectares of land under concrete. With reference to other catastrophes, including the worst of all —such as the Second World War or the horrors of the Holocaust— political reason has always been capable of extracting lessons and formulating new social pacts for coexistence, with the aim of preventing the repetition of such events, a new expression of “never again”. To differentiate from all the above catastrophes of human history, the ecological catastrophe is, to a great extent, irremediable, and perhaps we will not be in time to learn the right lessons. For the first time in history there is the danger that the awareness required to change direction and stipulate a new pact will arrive too late.

Finally, there is one final type of goods, which would be considered the contrary to everything that has been previously stated, and it would be appropriate to control this in a hypothetical Charter of fundamental goods, prohibiting its production and possession. I am referring to those goods that can be considered as *illicit goods*, because just as they are illicit (or should be), their use and commercialization is prohibited. Currently, the main form of these goods consists of narcotics. However, it is clear that, for a guaranteeist theory of law, the illicit goods which are most damaging to people’s integrity must be, above all, weapons, made to kill, and whose prohibition would be an essential guarantee of the two fundamental rights whose protection depends on the external justification of any one system: the right to live within state orders and the right to peace in the international order. One indication of this kind, although it may seem utopian, would be if this was at least supported in its theoretic aspect, which would serve to campaign for progressive disarmament, both by people and States, in order to credibly attain a monopoly of a strength which does not now correspond to the state, but to the international community, as logically stated in the content of the UN Charter. This would be the most effective method of preventing terrorism and criminality, as well as many of the wars that afflict the planet.

7. FOR A WORLDWIDE CONSTITUTION

I believe that the perspective proposed here to widen the paradigm of a constitutional state of law to international relations —and soon, the construction of a worldwide public sphere— today assumes the greatest challenge that, due to the

crisis of law and the State, must confront legal and political sense. I would add that a focus on these characteristics would be, if we take law seriously, not only implicit and therefore correctly imposed by the set of regulations designed by the UN Charter and conventions about human rights, as this represents the only rational alternative to a future of war, violence and fundamentalism. In as much as the current international anarchy is equal, in practice, to the supremacy of the strongest law, in the long run this does not benefit anyone, not even the strongest, because it leads to generalized insecurity and precariousness: because “the weakest” as stated by Thomas Hobbes, “always has sufficient strength to kill the strongest, be it by means of secret intrigue or by allying himself with others”.¹⁴

Sadly, there is no reason to be optimistic. But it is essential to avoid the fallacy which a large part of “realist” political and juridical philosophy fall into. In the processes which are being developed there is nothing natural or necessary, and therefore not inevitable. These processes are the fruit of political elections, or if you prefer, a political void, and if we want to face up to them, politics—and previously juridical and political culture—must prepare new and specific guarantees which will have to be endowed with a state of international law in order to stand up to them. It has always been so in the history of institutions. Let us not confuse theoretical problems with politics. We cannot present such things as being utopian or impossible to carry out, concealing political responsibility, and not wishing to undertake them because they conflict with dominant interests, which are not inclined to change, and for this sole reason, are not likely to be put into effect. This form of “realism” is finally legitimized and assumed as being inevitable, although in the end, is merely the work of men, and a great part of the responsibility for this is down to the strongest economic and political powers.

With regard to all the above, I would like to conclude by appealing to the optimistic methodology that Norberto Bobbio expressed in one of the most beautifully written passages of his latest works. Surely, writes Bobbio, paraphrasing Kant,¹⁵ progress “is not necessary”, but rather “only possible”. However, this also depends on our willingness to trust in this “possibility” and our denial to accept the of inevitability of “the immobility and monotonous repetition of history”. “With reference to man’s grand aspirations”, shaped in many charters and declarations of rights, he warns “we are very far behind. We must endeavour that this delay is not increased by our mistrust, indolence and scepticism. There is no time to lose. History, as always, maintains its ambiguity opening out in opposite directions: towards peace or war, towards liberty or oppression. The way towards peace and

14. T. Hobbes, *Leviathan*, It. Trans., *Leviatano*, bilingual edition with 1651 English text, in the charge of R. Santi, Bompiani, Milan 2001, chap. XIII, 1, p. 203.

15. This quotation refers to I. Kant, “Se il genere umano sia in costante progresso verso il meglio” (1798), in *Scritti politici e di filosofia della storia e del diritto*, It. trans., by G. Solari, Utet, Turin 1965, 6 and 7, pp. 218-226; Idem, *Sopra il detto comune: ‘Questo può essere giusto in teoria ma non vale nella pratica’*, (1793), *ibid.*, III, pp. 273-281.

freedom will certainly pass through the recognition and protection of the rights of man... I am not blind to the fact that this road is difficult. But there are no alternatives".¹⁶

16. N. Bobbio, *Dalla priorità dei doveri alla priorità dei diritti* (1989), now in Idem, *Teoria generale della politica*, in the charge of Michelangelo Bovero, Einaudi, Turin 1999, pp. 439-440.

