The Formalisation of Rights and the “Disorder” of Politics

Alfonso Catania

It is no easy matter to do justice to a work that is as comprehensive and differentiated as Luigi Ferrajoli’s *Principia Iuris*. For we are confronted with an extraordinarily rich mass of documentation and argumentation here. Yet there is certainly one thing that greatly facilitates this task – apart of course from the pleasure and interest which such a detailed and significant contribution can hardly fail to provoke – and that is the logical style in which the work is composed. The text begins by constructing a formal and axiomatic paradigm of right, clearly explicating its various levels and dimensions, before proceeding to apply this conceptual-categorial framework, with all its rigorous consequences, to the task of furnishing a theory of democracy that is responsive to the demands of a time like our own. This is a time in which we are witnessing a profound crisis of constitutional democracy and considerable ambiguity in the interpretation of the role which fundamental rights can play in such a democracy – a time of post-democracy and of an evident rhetorical evacuation of the celebrated language of the rights of man.

Before addressing Luigi Ferrajoli’s line of argument directly, I should like to emphasise this particular stylistic feature of his work. And here, of course, I am speaking of style in the logical and conceptual, rather than the literary, sense of the term. A programme that envisages a systematic and in some sense total and exhaustive conceptual reconstruction that embraces the entire evanescent reality in which we live cannot fail to have the most profound consequences for any rigorous scientific and theoretical investigation. The task is to construct a system, to create an articulated and coherent logical structure which furnishes the meta-theory of law and of the theory of law. And anything which cannot be reduced to this system, translated or transcribed in terms of this structure, can only be regarded as a theoretical lacuna, as a difficulty that requires a solution.

Although the demand for axiomatic coherence could easily suggest such a misunderstanding, Ferrajoli’s approach does not produce an essentially static or conservative conception of the paradigmatic relation between law, rights and democracy, but yields a precise project for the further expansion of law, and reveals Ferrajoli as a legal thinker

who is emphatically engaged with the real world. This totalising methodology, which for Ferrajoli implies a concrete and realistic project for expanding the sphere of constitutional control over the current state of global disorder, must constantly be borne in mind in all our reflections on this text.

Every plug must find its proper place, and every case in point its appropriate normative clarification; and if it fails to do so, this can only produce a troubling lacuna with respect to the realisation of the ethico-political juridical and constitutional principles, if it is considered from the meta-theoretical perspective of the whole coherent structure. As jurisprudential theorists, we all know that this juncture of theory and practice is the sensitive issue: the point where principles of justification and political legitimation are converted into principles of internal justification. The principia iuris et in iure are submitted to a further and decisive point of view. Ferrajoli’s argumentation will pursue this problem in detail.

With full awareness of the disparity between logical principles and actual law (including his principia iuris), Ferrajoli accords the normative burden to the sphere of logic in relation to the positive law of the constitutional state: the gap produced by the lack of correspondence between logic and the positive reality of law is filled by the authoritatively normative and prescriptive character of logical and meta-juridical discourses in relation to the positive ones. This is the proper site of the principia iuris tantum. What is in question here that level of normativity which renders explicit the prescriptive character of the constitutional norms themselves.

This claim of Ferrajoli’s proves decisive when the entire theoretical structure reveals its pragmatic dimension in constructing the paradigm of the democratic constitution. This paradigm is subjected to this meta-theoretical level, this totality of politically crucial principles, which includes the division of powers, peace, fundamental rights, and representation. The chief object of Ferrajoli’s immense systematic labour is precisely to formalise these basic deontological principles. Needless to say, the cultural presupposition of this approach is essentially rationalist and “enlightened” in character, and rests on the claim that analytical logic – no less than mathematics, grammatical rules, or other systems one could mention here – possess an intrinsically prescriptive status in relation to reality. And for Ferrajoli logic essentially signifies non-contradiction and systematic completeness. The first volume constructs the logical parameters of the theory in such a way that anything that exceeds it, or deviates from it, either assumes an antinomial character or becomes a lacuna in the system. And it is this construction which then furnishes the indispensable premise for the second volume which provides the juridical theory of democracy. The aim is to vindicate a juridical “ought” – derived from the principia iuris tantum – for the ordinances that are defined in democratic terms on the basis of the internal or constitutionalised principia iuris.

It is evident that the author’s intention is emphatically critical and pragmatic in character, and the concept of right serves as a logical device for exposing the mere approximations to democracy, and indeed the betrayals of democracy, on the part of those existing democracies which are so ready to proclaim their own democratic credentials. This must be pointed out straight away in order to dispel the impression, that may sometimes seem encouraged by the author himself, that one could concentrate entirely on the second volume, given that the first volume is formulated in rigidly analytical and logical terms and thus seems to suggest an utterly abstract conceptual world.
and a rigid juridical model as well. Yet I believe that this hypothesis could actually be reversed: the *principia iuris tantum* are crucial, in fact, to the transition to the normative theory of democracy, and possess an entirely formal, rather than axiological, character. For it is they which provide the principles of unity, coherence, and completeness, while the *principia iuris* involved in the concept of right are axiological and evaluative in character: peace, representation, fundamental rights, and so forth. But on their own they are insufficient to serve as a criterion for criticising the inadequacies of existing circumstances and bringing about the requisite changes. It is on account of the “ought,” of the deontological as such, that the juridical democratic ordinances possess a formal structure corresponding to the *principia iuris tantum*, and it is this structure which gives cogency to the substantial principles of justice.

I should like to offer some brief remarks regarding the truly impressive labour of logical and axiomatic organisation which is displayed in Ferrajoli’s text.

As we have already indicated, the key to the work is a “meta-theory” of law. For older readers, this terminology – a theory of the theory of law – will recall the period which Ferrajoli explicitly invokes, and to which he declares his allegiance, the golden age of conceptual jurisprudence. But we must immediately note that his analysis is far from abstractly theoretical or devoid of evaluative commitments. In its theoretical ambitions, his analysis of law – and specifically of positive modern conception of democratic and constitutional law – goes beyond the “separatist” approach of that earlier period. It is a theory of law which expressly presents itself as a construct which moves from deontological law to positive law, thus addressing the existing constitutional state and practical questions of efficacy, including – with reference to fundamental constitutionally guaranteed rights and the paradigm of the constitutional state – the question of democracy.

We may already see here how Ferrajoli’s approach overturns a commonplace conception to which we have become so easily accustomed, and returns us to the position of modernity in its classical phase, insofar as it attempts to juridify politics, rather than to politicise law. Democracy is critically scrutinised in the light of a deductive and axiomatised schema of law. This perspective demands serious consideration in its own right. Clearly it is not a question of describing reality in terms of the different vectors of social and institutional power, of political and governmental systems in the narrow sense, of economic, ideological, collective, local, sub-territorial or supra-territorial factors which prevail or conflict with one another at different levels of contestation or coexistence, all vectors of power amongst which national law and perhaps the international order as well must also be included. The reality of juridical relations is not simply conceived, as we tend to think today, as a multilevel plurality of sources. If it is true that the law, even in the reality evoked by Ferrajoli, represents the medium of social relations in the context of these vectors of power, it is also true that this disorder is evoked within the overall perspective of a resilient organised and deductive schema which appears capable of being subjected to unity and coherence by means of prescriptive principles. The evidence for this constant reiteration of an ordering (sovereign?) structure is also provided by the supreme and unchallenged hierarchical significance that attaches to the principle of a Declaration of Rights. By reference to this principle the author holds that a relevant structure of order could plausibly be extended to our globalised world, thus bestowing normative coherence upon the latter and remedying the lacunae which continue to characterise it.

Thus although he is fully aware of the incon-
gruity between actual reality and the idea of law, Ferrajoli assumes that this incongruity could in principle be resolved in a unified manner, and his general perspective therefore remains faithful to the persisting normative model of classical modernity.

This basic claim is clearly connected, in a double sense, with the axiomatic method, i.e. with a rigid and rigorous reconstruction, in a logically coherent concatenation, of all the relevant conceptual terms, but also, and above all, with the founding rational claim of the totality of arguments which legitimate the prescriptive character of the theory: a character which reveals a quintessentially modern Enlightenment perspective in the face of reality itself. Once the axioms and the principles of coherence which “must” apply to the different dimensions of the normative juridical system are properly established, one can only convict the untamed realm of reality, the turbid, confused, contradictory, and inconclusive forms of actual praxis, for lacking genuine validity and legitimacy.

In this axiomatic method, as we can see, it is not the theory of the theory of law which reflects the anarchical character of actual concrete forms of praxis. On the contrary, it is the unitary, coherent, and thus also rigid, deontological model which identifies the principles of law as actually ineffective, and the various forms of praxis as illegitimate, to the degree in which there still remains, and cannot but remain, a certain disparity or incongruity here.

I should like to draw particular attention, within the meta-theoretical construction, within the theory of law – characteristically defined as an “organic” complex of claims (and reducible to coherent unity precisely because of this organic character) – to the section of the work dedicated to pragmatics, which specifically elaborates, with considerable theoretical power, the difficult explication of the teleological character of juridical concepts and assertions. This teleological character is obviously just as bound up with the human sensus communis as it is with the ideologies that find expression in the various projects and contexts associated with the general conception of law and rights.

I think we should emphasise the pragmatics here since, as I have already suggested, the immense theoretical labour of Ferrajoli certainly harbours a strong, indeed passionate, pragmatic project at its core. The noteworthy vigour and intensity with which Ferrajoli broaches the critical issue of the relationship of theory and praxis in terms of antinomies also explicitly reveals the significance of the work, centrally concerned as it is with the way in which juridical form relates to the reality that it would like to change.

The axiomatised meta-theoretical premise of the work creates a certain linguistic level, at once artificial and conventional, which readily lends itself to formalisation, is contrasted with the level – also admittedly formal, but in a highly frayed and incoherent way – of the dogmatic structure of the particular juridical disciplines. This double focus is explicitly chosen for the sake of the reasons which sustain the work as a whole: simplification, clarity, univocity, deductive logical organisation, coherence, systematicity, the rejection of all forms of aporia and ambivalence.

For Ferrajoli, the extraordinary rigour, though perhaps we could also say, the rigidity, of the model can – paradoxically enough – prove to be the best way to mount a critique of the inadequate realisation of law, or to project the relevant legal guarantees which current reality largely disregards. With both passion and consistency, he maintains that the model’s apparent detachment from the chaotic and disorderly character of juridical discourse and concrete politics paves the way for a more rigorous formalisa-
tion of the axiological and substantial implications of democratic constitutional law, a formalisation which could furnish a means of more fully realising principles of law, or, more precisely, of adequately vindicating such rights, with respect to the unemployed and the weakest members of society, for example. And it must also be admitted that complex formal construction which Ferrajoli offers us in this connection is explained and clarified with commendable precision. But this is not the central problem.

If I have insisted particularly strongly on this point, it is because I consider it to be essential if we are to understand the spirit of this work and the complex project it embodies, a project which, I point out once again, is actually anything but purely abstract and theoretical, in spite of the sometimes forbiddingly abstract level of its formulations. But to return to the pragmatic dimension of the work: Ferrajoli makes his own position quite clear with regard a central issue of the contemporary debate by emphatically endorsing a normative, rather than the value-free, conception of the juridical scene, whether we are speaking, obviously, of the level of positive law, which includes constitutional norms, or of the dogmatic level (and here perhaps we perceive the influence of Betti, and the evaluative pragmatic dimension which is developed in the analysis and interpretation of the language of positive laws), or, finally, of the level of the *principia iuris tantum*, since his purpose is precisely to show the prescriptive character of the democratic order as a whole.

Now Kelsen also emphasised the discretionary and evaluative character of legal and interpretative language, but he drew the line at that point, and endorsed the myth of a purely descriptive legal science, or one that at least aspired to the standpoint of neutral description. Ferrajoli, on the other hand, argues that the prescriptivity, the normativity of the meta-theoretical language, is itself constitutive, that it is not axiological or value-free from the scientific point of view, but is prescriptive in relation to the forms to which it is applied. The significant structural lacunae which, for the reasons already indicated, testify to the inevitable detachment of the juridical order from the chaotic and dynamic character of reality cannot be remedied, according to Ferrajoli, by some authoritative interpreter, but rather demand to be resolved, and I emphasise again, resolved, by the theorist or meta-theorist as the logical or conceptual problems which they are.

To re-transcribe an event such as an aggressive rather than a defensive war, for example, in terms of the problem of the lack of corresponding sanctions obviously implies a logical and theoretical solution, and not, as a less complex and rigorous approach would claim, an act of diagnosis or political therapy. The relationship between law and politics seems to be developed here in a static and horizontal sense: it exists, it is manifest in the substantial norms of the constitution (which will also have been chosen by someone at a certain time or other), but these nonetheless acquire a formalisation, a deontological character which is binding in a logical and atemporal sense. And thus actual jurists cannot help but appeal to the fixed historico-temporal character of this relationship, and if, for example, there is no adequate guarantee for the relevant political values, they will denounce the lacuna in question, or better, will denounce the ordinary legislature for violating the obligation to enact laws that embody those values. In short, the theoretical jurist – Ferrajoli himself or anyone else capable of applying the systematic formalisation – is already strangely prescriptive, already exercises an expressly normative activity, without adopting any direct political role, which is something that could only be exercised separately. Speaking, as it were, in his official capacity as a representative of
(enlightened) rationality, the jurist denounces the disparities, the anomalies, the lacunae that are revealed in the organs responsible for administering the law in the everyday context, and thus decide, historically speaking, on how law, the principle of legality, the division of powers, etc., are to be understood.

Considered in a broader and emphatically more realistic cognitive context, would it not be the task of the theoretical jurist and philosopher of law to register the actual anomalies, the incoherencies, the disparities etc., and, above all, to indicate the forces which also find expression in juridical practice, and show how the ambivalent character of this practice may adapt and respond to new politically emerging demands? Why should they have to apply the *principia iuris tantum* (in all their unity, coherence, and completeness) in order to account for the “entire normative structure”?

And I should like to point out a certain curiosity here: if coherence and completeness are values to be pursued, and not just facts to be registered, one can, up to a certain point, endorse this approach. But these values are often internal to right, to a certain system of law which is historically given, for example, to the Italian system established in 1942, one which, independently of its other political and ideological features, in the preliminary provisions of the Civil Code involves these liberal principles. The relationship between law and politics is neither static nor susceptible to total rationalisation. In the actual context of everyday life, the organs of the social order and the citizens themselves frequently, and often unconsciously, give political form to their own acts and decisions, and thus from time to time determine, that is, provisionally determine, their political position through a practice of interpretation.

The section of the work specifically dedicated to democracy, as we have pointed out, is by no means external to Ferrajoli’s project. For it proceeds from the axiomatised theory of right to furnish a normative formulation of the constitutional paradigm. The foundation of the normative thesis lies in the axiomatic network of claims and assertions which render this normativity compelling, that is, logically compelling.

Ferrajoli is fully aware of the extraordinary lack of unity in the legal order, of the inadequate capacity of existing law to regulate areas of behaviour and entire sectors of life which would be crucial for the genuine exercise of fundamental rights. He is equally aware of the profound, one might even say genetic, change he must confront regarding the anarchic plurality of legal sources, the superimposition and contradiction of infra-systematic juridical principles and extra-juridical decrees which are immediately acted upon, the frequent situation of the suspension of legal guarantees, something which instead of being defined in the context of a “state of emergency” is redefined in the context of undisclosed “preventive measures.” In short, the author is perfectly aware that the world is not one which is organised in terms of his constructed juridical order, and hardly resembles the rigorous, coherent, and unified paradigm that finds its absolute foundation in his axiomatised theory. But he deliberately and radically defends the normative character, the fundamental normative claim, of his meta-theory in relation to the law.

And this is crucial, since his perspective, as is well known, cannot be assimilated to a purely formal and procedural conception of democracy. What Ferrajoli passionately defends as a point of honour is the idea of substantive democracy, of the indissoluble nexus between the sovereignty of the people and the buttress of fundamental rights, and thus seeks to contain or prevent possible abuses on the part of the majority by setting firm constitutional limits to any such action, by reinterpreting the still contra-
dictory concept of sovereignty logically through the principle of democratic limitation, and by reformulating the central role of guarantees regarding strictly universal rights, including social rights. And he does so with a view to extending the constitutional democratic paradigm, as he has presented it, at once formal and substantive, and expressly juridical, to the international order.

Others more competent in this field than myself may be able to speak more authoritatively on this way of analysing and presenting the democratic paradigm. In expressing my own thanks to Ferrajoli for his enormously significant contribution to questions of fundamental concern to all of us, I can only reiterate in conclusion that his approach demands 1) a rationally ordered perspective, and thus one that can be presented in an entirely coherent and definitive form, and 2) presupposes, above all, an emphatic commitment to the rational, universal, and necessary foundation in logic. For only such an approach, the author believes, could possibly serve, as it has never served before, to furnish a cogent normative criterion for addressing the disorder of current reality and the heterogeneous motivations of those involved in applying juridical practice itself.

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Towards a Reading of Luigi Ferrajoli’s “Principia iuris”

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I must begin by declaring a certain embarrassment: I find it very difficult to discuss the latest book by Luigi Ferrajoli not only on account of my own subjective limitations, but also on account of the nature of the subject matter in question. What then are the particular difficulties which any reader of this text must confront? The most obvious difficulty would seem to be connected with the unusual dimensions of the work itself: in a book market that is increasingly dominated by the model of the instant book, we are suddenly presented here with a work in two hardback volumes, with an extra volume in CD Rom format. The third volume alone amounts to 1,002 pages, and is thus only a single page shorter than the same author’s earlier work, _Dritto e ragione_, which itself, as has often been observed, possesses a number of pages (1,003) which equals the number of Spanish beauties mentioned in the famous “list” produced by Leporello. But if we add the first two volumes to the third, then with respect to its number of pages as a whole _Principia iuris_ far exceeds the total number of conquests which Don Giovanni managed to make in the whole of his illustrious career. The conquests of Don Giovanni stand at 2,065, while _Principia iuris_ comprises 2,746 pages: Don Giovanni is thus defeated, but the potential readers of the book may worry that they will be defeated too.
Yet in fact such worry would be unjustified. Not because there aren’t actually as many pages as I have suggested, but because the concrete value and utility of the book are by no means disadvantaged by its massive bulk. The third volume is intended, the author tells us, more as a source to be consulted as the need arises than as a book to be read systematically from start to finish: it provides a support and a rigorous foundation for the claims presented in the first two volumes. And while these volumes are demanding, they certainly do not repel the efforts of the serious reader, who will be able to work through the text without experiencing feelings of boredom or exhaustion, despite the great length of the journey involved. But how is it possible for the reader to undertake this arduous journey without tiring of the task? It is possible if we are properly nourished and sustained along the way. And the work displays a number of characteristic features which do help to sustain the prospective reader: firstly, its breadth of thematic range (the most important issues of the current legal and political debate are all thoroughly addressed and dealt with in depth); secondly, the transparency of the overall structure of the work, which can readily be grasped even by a quick glance at the index; and thirdly, the punctilious presentation of the definitions and the clarity of the argumentation. And this argumentation captivates the reader not by means of any flattering rhetoric, but simply by the art of definition, discrimination and distinction. It is true that there are certain formulae that are rather forbidding to the historicist attitudes of many readers, but the author hastens to reassure us by pointing out that “all the relevant formulae have been translated into and analysed in terms of ordinary language.” And this promise, expressed in the Preface, is indeed effectively maintained throughout the ensuing work.

It is thus easy to read Principia iuris, as long as we understand the act of “reading” not as a quick tour of the terrain or a casual sampling the text (what we would describe today as a “random” approach), but a linear and sequential process which advances from the first argument to the following ones in the precise order determined by the author. It is easy to read Principia iuris – but the apparent paradox here lies in the fact that the very reasons that make it easy to read also make it very difficult to discuss. The sheer multiplicity of the issues that are addressed certainly helps to sustain the attention of the reader, but prevents the commentator from providing an adequate discussion of all of them. The rigorous consistency of the argumentation (a veritable mos geometricus for the twenty-first century) captivates and involves the reader, but discourages the critic from dwelling on any single link in the general chain of argument.

Nonetheless, I shall have to do some violence to the seamless garment of the argument in Principia iuris by drawing particular attention to just a few of the themes that constitute the work. One aspect that I should like to underline in particular is its fundamental connection – expressly acknowledged by the author – with an idea that we can trace back to Austin: the idea of a philosophy or theory of right which lays claim to universality not because it has been isolated or detached from every historical contingency, but because it is constructed, through a process of generalisation and abstraction, by starting from some given positive order, or rather (as Austin recommended) from several positive orders. Principia iuris too revolves around a group of legal orders that are internally compatible: the constitutional systems created in Italy and Western Europe in the period after the Second World War, and the international order that has been developed on the basis of the Universal Declaration of Human Rights.
legal systems furnish the data from which Ferrajoli extracts his scintillating normative model. The American constitutional tradition, on the other hand, remains somewhat in the background, as it seems to me.

The way in which Ferrajoli constructs his model has nothing simply self-referential about it, but produces effects in several directions. Thus it performs a salutary function of linguistic and conceptual elucidation, providing the reader with a clear and univocal theoretical vocabulary; and if the model is derived by abstraction from positive legal systems, it also serves as a valuable instrument for deciphering and testing the internal logic of them; and, finally, it also allows us to pursue a diachronic comparison with other orders and juridical cultures of the past.

But perhaps the most fascinating appeal of the model lies elsewhere: in the way in which it both takes up and transforms the intellectual legacy of juridical positivism. Ferrajoli’s characteristic style of thought is firmly anchored in this tradition, and some of the basic choices and commitments of the author must, directly or indirectly, be traced back to this tradition as well: his opposition to the traditional perspective of natural law (the rejection of the possibility of deriving norms from the notion of some underlying “human nature”), his anti-cognitivist orientation (the denial that ethics represents a system of values that are objectively “true”), and, finally, his choice of a fundamentally normative approach, rather than a realist or sociological one. Thus the normative model developed by Ferrajoli wants to have nothing to do with value judgements or ideological-political choices: the model in question is solely concerned with a legal order – a network of norms, rights, duties, powers etc. – that is constructed by individuals for individuals.

On the one hand we have the principles of law, on the other hand the principles of politics: juridical positivism must remain faithful to this distinction, but it must also come to terms with the new and decisive element represented by the constitutional systems that were introduced in the post war period. For these constitutions transform political principles (precisely those principles, such as liberty and equality, in terms of which and in the name of which the great struggles of modernity were so ardently prosecuted) into juridical principles which become the very foundations of the new systems of order.

The categorial distinction between law and politics (and between juridical theory and political philosophy) remains intact, but the change in the object is also reflected, to some extent, in the model: insofar as the latter is a theory of democratic-constitutonal orders, it cannot fail to include the great political principles of modernity as intrinsic components of itself, without thereby forfeiting its own juridico-normative vocation. From this point of view, I would say that the theory of constitutional democracy, which is specifically addressed in the second volume, is both the essential point of departure and immanent goal of Principia Iuris. But the attainment of this goal itself requires the formidable analysis and development of the structured theoretical argument to which the first volume is dedicated. The theory of democracy thus presupposes the theory of law (law can exist without democracy, Ferrajoli claims, but democracy cannot exist without law). We must speak of democracy and law; and, in particular, of democracy and rights. One of the central themes of Principia Iuris is precisely the nexus of complementarity between the first and the second.

This thesis, as we know, is not uncontroversial. And to understand the sense of a potential tension between democracy and constitutionalism, we must remember the
context in which the democracies of the second half of the last century effectively emerged: they were inspired by the anti-totalitarian pathos of the immediate post-war years, they breathed the air of the natural law tradition (in the broad sense), and they were dominated by the need to emphasize the role of constitutionally guaranteed rights and secure them from interference on the part of state power. The post-war sympathy for natural law theories was soon dissipated, but neo-constitutionalism still emphatically assumes that rights must be protected irrespective of the decisions of any parliamentary majority. This assumption already gives rise to the suspicion that rights and democracy represent two poles of an unresolved tension: on the one hand, the all-powerful will of the demos, the condition of the legitimacy of an order that considers itself to be democratic, and on the other, the inviolability of fundamental rights. We may also think of this as another manifestation of the ancient opposition between ratio and voluntas.

Are we then inevitably confronted by the opposition of rights and democracy? By no means, according to Ferrajoli, for rights, far from standing in intrinsic tension with democracy, are the condition of the possibility for the latter. In fact, the democracy of which Ferrajoli speaks is neither the democracy of the ancients nor that of the moderns. The ghost of Rousseau, which also haunted the ideas of radical democracy that circulated in the nineteenth century, halts at the threshold of constitutional democracy, a democracy which substitutes the pluralism of subjects and groups for the monism of the demos. In the pluralistic democracy of late twentieth century neo-constitutionalism, and thus also in the democracy thematised in *Principia iuris*, there is no such thing as the demos, the unity of the people, the people as social body, that would be the bearer, as a “total entity,” of an absolute and omnipotent sovereignty. Ferrajoli thus has an easy task in tracing the idea of popular sovereignty back to the sum of individuals rather than to some unitary demos, and in presenting these individuals as the bearers of fundamental rights. Once again, we see how democracy and rights come together to form a perfect circle.

One should also remember that the democracy of which Ferrajoli speaks has nothing to do with the rhetoric of representation as participation. In this respect, the legal positivist Ferrajoli, like his great predecessor Kelsen, is indebted to the “realist” analyses of the elitist tradition. The key figures of this tradition, from Mosca to Michels and Schumpeter, have demonstrated that power does not belong to the people, or to “all” of the citizens, but rather to the few, and specifically to the elites, while the machinery of representation is simply an effective means of creating a governing class (through the “selection of the able,” as Vittorio Emanuele Orlando had already argued), and one which also serves to replace its members in a relatively smooth and painless way. Thus democracy does not refer us to the sovereign decision of the people: it refers us instead to a sum of subjects who are bearers of rights imputed to them by democratic-constitutional order. Far from being in tension with democracy, rights furnish the constitutive rules and structures which sustain it.

Ferrajoli expends a good deal of analytic labour on developing the conceptual axis of rights and democracy, a labour which succeeds in almost every passage in yielding important results and conclusions, and in furnishing extremely valuable conceptual clarifications. And here we might point, for example, to Ferrajoli’s lucid formal definition of fundamental rights, and the two distinctions he subsequently introduces:
that between personal and proprietary rights, and that between the rights of the person and the rights of the citizen.

The first distinction allows him to expose and to criticise the confusion of different levels which was perpetrated by the liberal tradition. For this tradition substantially identified the active and appropriative dimension of the subject and the concrete effects and results of individual activity, and invested both with the same aura of inviolability. And the second distinction (between the rights of the person and the rights of the citizen) places him in a position to challenge Marshall’s highly successful category of “citizenship.” For it is Ferrajoli’s principal objection that this category illegitimately identifies classes of rights which are conceptually distinct: the most diverse kinds of rights – rights of liberty and political rights, social rights and proprietary rights – are all indiscriminately traced back to a single source – the concept of citizenship – and their distinctive characteristics are conflated in the process.

Once again, the work of conceptual clarification that is accomplished in Principia iuris is beyond reproach. But we should say a few words on behalf of the unfortunate Marshall who emerges rather battered from the harsh analytical treatment to which Ferrajoli has subjected him. Marshall is indeed mistaken if we look at him from the perspective of the jurisprudential theorist for whom the proper definition and distinction of the categories he employs is crucial. But we should bear in mind that Marshall is not a philosopher of law, an analyst of normative discourse, but a sociologist who is not concerned with constructing a normative model, but is simply attempting to understand the effective socio-juridical or politico-juridical conditions in which specific subjects come to find themselves in a given context. Thus the use of a single term, such as “citizenship,” to refer to all sorts of rights is not offered as an adequate response to the demand for precise definition or classification with respect to the rights themselves, but is merely intended to emphasise the effect that the policies of a specific socio-political form of organisation exercise on the conditions (in the broadest sense) of the subjects that belong to it, whatever the particular grounds which may be invoked from time to time in order to assign specific rights to these subjects.

These distinctions, which are not absolutely required in the context of a historical or sociological type of analysis, are nonetheless central to the inner structure of the juridical-analytic theory that is developed in Principia iuris. I would suggest that it is precisely this erudite play of distinctions and categorial connections that makes Ferrajoli’s model into something more than a monolithic structure which is capable of resisting every possible attack, but also makes it a flexible and effective instrument for intervening in some of the most burning and controversial issues of the contemporary debate.

In this respect, I would just like to indicate two examples where Ferrajoli’s conceptual regime of distinctions and connections reveals its considerable power. In the first place, I refer to the distinction between decidable and non-decidable rights. This vocabulary may seem provocative in relation to juridical or political theorists in the Schmittian tradition. I would even suggest that Ferrajoli’s particular choice of language here has something malicious about it (though whether intentionally or unintentionally malicious I cannot say) in relation to the kind of politico-juridical conception that emphatically maintains that norms essentially depend on “power,” on a “will” that “decides,” and does so “decisively.” In fact, for Ferrajoli, the non-decidable character
of fundamental rights is not a metaphysical postulate or one that covertly draws on the
natural law tradition: on the contrary, this idea is the direct juridical consequence of
a model that he would describe as “contractualist.” Ferrajoli tells us that constitutions
are “nothing but social contracts in written or positive form: pacts of civil association
which have been historically generated […].”1 We could clarify this by recourse to the
following hypothetical formulation: if we contractually create an order characterised
by respect for fundamental rights, if we opt for a democratic-constitutional order, then
such an order can only be constructed in terms of a network of rights that are (assumed
to be) non-modifiable, non-decidable, and binding for all and for each.

It is this complex of non-decidable rights which defines the distinctive character
of constitutional democracy. And it is the distinctions introduced to identify different
classes of rights that allow us to specify the different dimensions of democracy: on the
one side, liberty rights and social rights, and on the other side, political rights and civil
rights; on the one side, the substantial dimension of democracy, on the other side, the
formal dimension of democracy. If we combine these indications in different ways, we
can then distinguish between different types of democracy, while insisting that we can
only properly speak of constitutional democracy (the democracy for which Ferrajoli’s
Principia iuris provides the rigorous conceptualisation) when all four dimensions of
democracy (namely political, civil, liberal, and social democracy) are present.

It is not difficult to see that Ferrajoli’s model elegantly avoids the characteristic
oppositions which have plagued so much juridical debate during the twentieth cen-
tury. Here I will merely mention the most famous of these oppositions: that between
liberty rights and social rights. The brilliant de-construction (or de-constitutional-
isation, as I would call it) which Carl Schmitt advanced in his interpretation of the
Weimar constitution (the first one that specifically acknowledged and included social
rights) has long exercised a significant influence: although social rights – to summarise
Schmitt’s argument – may be enshrined in a constitution, they do not enjoy the same
significance as liberty rights. These rights, and only these rights, are absolutely and
unconditionally valid, while social rights, which can only be satisfied sub conditione,
in relation to the available resources etc., have a weaker and merely “programmatic”
significance. Even Calamandrei (during the Constituent Assembly debates) is still dis-
posed to relegate social rights to the limbo of “good intentions,” to the ghetto of a
“preamble” to the true, proper, and binding constitutional ordinances. The model
presented in Principia iuris leaves these controversies behind and acknowledges both
classes of rights (liberty rights and social rights) as essential for the existence of a con-
stitutional democracy: citizens have the right to habeas corpus, no less than they have
the right to education and to means of subsistence.

We are speaking therefore of liberal and social democracy, of political and civil
democracy. And the second volume of Principia iuris develops its argument precisely
in terms of this “four-dimensional” model, as Ferrajoli describes it. It is impossible
not only to discuss the relevant individual aspects of this project, but even to enumer-
ate them all here. I shall simply indicate a few of the many issues and problems that
are addressed here.

I should particularly like to mention the issue of the “constitutionalisation of private law”: a rather neglected issue which springs from a recognition that threats to fundamental rights derive not only from the state, but also from the realm of society, not only from the sovereign power that was so feared by Locke and Constant, but also from “private” subjects that are often more invasive and uncontrolled than political institutions. What is more, even historically speaking, the private sphere has not always presented itself as a realm of freedom, not only in the ancien régime, but even in the nineteenth century. In this respect we only have to think of the domain of the family and the field of employment: of the family which was still capable of maintaining, throughout the nineteenth and into the early twentieth century, the hierarchical structures of authority defined (once and for all, we might say) by Aristotle in the *Politics*, and of relations of employment which are based upon contract (and presented as the triumphant vindication of the liberty of private individuals), but still produce rigidly hierarchical and potentially despotic conditions. Ferrajoli’s *Principia iuris* provides exemplary clarification of all these issues.

I should also like to point out the careful attention which Ferrajoli accords, in the chapter dedicated to the different kinds of freedom, to the least guaranteed of such freedoms, namely the freedom of movement, one which today finds itself on a collision course with the self-defensive demands of our western societies, and therefore tends to be sacrificed or compromised in the name of the security of their members. And in Ferrajoli’s view, penal law also belongs to the chapter on liberty and its guarantees, and is presented as a fundamental and crucial means for the protection of subjects (of all citizens before an offence is committed, of the accused during the legal process, of the convicted party in the administration of punishment). Finally, I should also like to mention the way in which the model of constitutional democracy is extended from the domain of a given State to the international legal order in the light of the antithesis which is in some sense foundational for the very idea of a legal ordinance itself, namely that between the state of war and the state of right.

I realise that I have hardly mentioned, let alone analysed, a number of fundamental issues (and have also passed over other arguments of great significance). And moreover, up to this point, I have largely spoken of *Principia iuris* as a project essentially dedicated to the construction of a juridico-normative model: a general theory (in Austin’s sense) of contemporary constitutional democracies. But in fact, this line of argument, which certainly sustains the general structure of the discourse developed by Ferrajoli, by no means exhausts the latter. For in fact Ferrajoli does not restrict himself merely to constructing this normative model. He also investigates the relationship between theory and praxis, contrasts that which *is* with that which *ought* to be, and relates the one to the other, and asks, in short, about the genuine effectiveness which can be attributed to the four-dimensional model of constitutional democracy which he proposes and to the rights which define this model.

The readers of *Principia iuris* thus find themselves confronted with two distinct discursive strata which are in evidence throughout the work, but are particularly conspicuous in the second volume. This produces an undeniably singular effect on the rhetorical level (on the level of the concrete organisation of the discourse and of the effects it produces on those to whom it is addressed): the reader is simultaneously aware of two voices that are different in sound and character. There is an emphatic,
crystalline, and imperturbable voice, essentially concerned with the construction (more geometrico) of the normative model; but this voice is crossed and interrupted by another voice, with a different melody, which manifests the dramatic (and often increasingly insistent) drift of the praxis, remote as it is from the normative previsions of theory. No sooner have we been shown, for example, the necessity for minimal penal law, one consistent with the essential features of the normative model, when the song is suddenly interrupted by a very different and dramatic melody which tells of the ever-increasing reach and power of new “security” measures. The text speaks of the obligatory (normative) demand for a global constitutional order, and once again the song is interrupted by a bitter denunciation of the unchecked power of the multi-national corporations and the impotence of the United Nations. The learned texture adopted by Ferrajoli adopts a technique that the ancient polyphonists called *oquetus* (or *truncatio*): the frequent and alternating interruption of voices in a musical passage when it is constantly broken by two different melodic lines.

Two quite distinct discourses are interlaced in the text of *Principia iuris* without impairing the overall coherence of the work. The exemplary distinction between the “is” and the “ought” prevents any confusion between the two voices and renders the presence of both epistemologically unassailable. And it is precisely the presence of both that frees the text from any semblance of cold abstraction, so that every single page of the book shows how the definition and elucidation of rights is a fundamentally serious matter connected to the needs and vital aspirations of every human being.  

*Principia iuris* thus presents us with not one but two discursive levels. But I cannot help asking – and I offer this as a non-rhetorical question by way of conclusion – whether we cannot perhaps detect a third discursive level at work in the text: a level where the author does not simply limit himself to constructing a normative-juridical model, but is ready to add, like God contemplating the world that he has just created, that this model is “good.” It seems to me, in short, that between the lines of *Principia iuris* we can also glimpse the emergence of an anticipatory, evaluative, and political moment, of at least fragments of a political philosophy (and perhaps of a philosophical anthropology) that can hardly be accommodated within the value-free limits of a general theory of right. In that case, constitutional democracy would not simply represent a normative model constructed on the basis of several positive legal systems. For then it would also appear as an indispensable means of realising an “other” and better world, like that which Kant connected with the continual progress of the human race towards the “highest good.” And it is perhaps the image and anticipation of this “other” world which sustains the civil passion which courses through the entire work of Luigi Ferrajoli and enhances both its inner tensions and its persuasiveness.

(Translated from Italian by Nicholas Walker)

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I should like to begin with two observations which may also serve to express my grateful acknowledgement of Ferrajoli’s achievement in two regards. In the first place, I can say that I wholly applaud the basic intention which Luigi Ferrajoli has tenaciously pursued in his book *Principia iuris*, a work that makes a fundamental contribution to its subject and is the product of a labour that is “extraordinary” in the real sense of the word, that is, one that is entirely beyond the parameters of the ordinary and indeed, in many respects, beyond the parameters of the present cultural and intellectual climate itself. For Ferrajoli has responded to the crisis of (modern) juridical reason not by eliminating the latter, but by undertaking to defend and reconstruct it.

In the second place, I can only welcome Ferrajoli’s readiness to develop the theory of law on a conceptual foundation that is more complex, perhaps less comfortable, but certainly much richer than usual: “The perspective adopted by the theoretical jurist is not that of a mere spectator. We are part of the world that we describe and help to produce with our own theories. It is evident that this pragmatic dimension of juridical science contradicts any aseptic or purely descriptive conception of its task. But since it is inscribed within the very structure of the constitutional paradigm, this dimension cannot be ignored without jeopardizing, along with the civil and political role of juridical science, its full significance and explanatory power” (vol. I, p. 38). In particular, in spite of the well-known and traditional claims concerning the distinction between the philosophy of justice and the positivistic juridical theory of normativity, Ferrajoli is well aware in fact that such a theory, in the context of our contemporary democracies, cannot avoid involving a certain philosophico-political perspective (an awareness which represents a genuine achievement in such an “analytical” framework). This partial “impurity” on the part of “pure” theory, or this connection which intrinsically exceeds the normative “form,” arises spontaneously from the question of methodological rigour itself: for Ferrajoli is convinced that the more the theory of juridical normativity, with its “logical” sophistication, is capable of eliminating paralogisms, incoherencies, elliptical adjustments and qualifications, etc., then the more its prescriptive role will emerge as such and reveal its full “civil” potential. This post-traditional connection between form and substance, *logos* and *polis*, produces an apparent paradox in the meta-theory of law: “it is not in spite of the fact, but by virtue of the fact, that the theory is logically coherent and its presentation is value-free, that it plays a normative […] rather than merely descriptive role with regard to its object. Again, it is not in spite of the fact, but by virtue of the fact, that the theory is normative in this
sense, that it is capable of describing and explicating the normative structure of contemporary constitutional democracies, something that would be out of the question for any theory that claimed to be purely descriptive in character. Finally, it is not in spite of, but because of, the fact that the theory has been formalised, that it is capable of acknowledging, firstly, the substantive, and not merely formal, dimension imposed on the concept of law by the paradigm of constitutional democracy, and, secondly, the inevitable discrepancy, internal to positive law itself, between its normative model and its actual concrete existence” (Ibid.). Ferrajoli’s approach presupposes acceptance of the thesis according to which every theory of law – including Kelsen’s pure theory of law (as it quite evident from the conclusion of his Problem of Sovereignty⁵) – insofar as it is conventional and artificial, or based on particular assumptions and decisions, is also pragmatic and evaluative in character, and ends up playing a performative role whether it intends to or not (pp. 32 ff.).

In the brief critical observations that follow, I should like to pursue a few problematic questions, although inevitably they do not do full justice to the complexity of Ferrajoli’s systematic reconstruction of juridical normativity. Nonetheless, these questions are quite central, in my view, as well as indicative of certain “key issues” which reveal a number of eloquent aporias which are sometimes productive, and sometimes symptomatic. The leitmotif of these observations is what Bobbio rightly recognised as the authentic crux of every theory of law: the bi-univocal relationship between law and power.

According to Ferrajoli, the legal state, in the “strict” or “strong” sense, is the constitutional state under the rule of law (to be distinguished from the “legislative” state which arose from the original modern juridical revolution that affirmed the primacy of the law). The constitutional state of law characteristically affirms a law over the law: it implies the progressive positive realisation of limits and juridical restraints on the exercise of power, whether public or civil, national or international, executive or legislative. We are thus presented with a potentially unlimited expansion of the realm of law. This is possible to the degree that (modern) law projects itself as such, and asserts its own “ought.” Thus the founding principle of the constitutional state under law is no longer simply the positivist maxim, derived from Hobbes, that “Auctoritas, non Veritas facit legem,” but also a theoretical “coherence,” or a logico-deontic Veritas, that is constructed to secure the compatibility of its axiological principles. The distinction between substance and form, and that between authority and truth, would thus be “overcome” here (p. 487). Clearly, this does not imply any return to a pre-modern substantialist conception of law since the repudiation of ethical cognitivism is strongly maintained from the methodological point of view, as is the position of juridical conventionalism. While this formal dimension of validity is maintained, there is also a sense in which it is “superseded” (the way in which Ferrajoli deploys the notion of “overcoming” is objectively significant) since it is powerfully “integrated” through a validity reinforced by “principles” (ones which are “posited” rather than inferred from nature or guaranteed by God, that is, established by some ethical or religious auctoritas). This “super-validity” appears to relativise the opposition between positive law and natural law on which the modern juridical paradigm is based (in the sense that even modern natural law, with its

individualist and rationalist character, serves, with a paradoxical necessity, to prescribe and theoretically to justify the “artificial” character of law since it readily extends to furnishing an “ethical” justification of the existing order, thus transcending its minimal purpose of preserving the peace and ensuring the safety of its citizens).

The point is that the constitutional state under law is defined precisely by the fact that it is not satisfied with such a deflationary strategy: it exceeds the mere state (of law) and ends up importing significant content, albeit in a “formal” way, and this poses an objective problem. Obviously, this does not mean that it would be desirable, or even possible, to “return” to an earlier approach. But this dynamic surely conceals a core element of contradiction. Once the law becomes its own norm, with this second revolution, does it not also run the risk of constitutionally transmuting itself, or the characteristically “modern” form which it inherited from the first revolution (the distinction between law and morality, the neutralisation of the fundamentalist potential – a source of hard conflicts – of the axiological approach)? Does Ferrajoli’s “overcoming” not run the risk of failing to be an overcoming at all, of harbouring risks that we believed had already been overcome, of helping to nourish theoretical-juridical ambiguities and “indirect powers,” and even – clearly against the author’s explicit intention, indeed in a paradoxical inversion of that intention – of encouraging the repetition of “substantialist” fantasies which aim to re-legitimise the claim to ground law definitively in an unavoidable and immediate given (on the ethical “nature” of humanity, for example) or to deploy the language of human rights polemically in support of a politics of identity? Such a development, unfolding quite independently of the aims and the “secular-rationalist” cultural premises of the theory – does it not increasingly elude, with all its symbolic ambiguities and ethico-normative difficulties, the “logical” plot of the theory itself? With the intention of enriching the constructed character of law – for the entirely commendable aim of responding to newly emergent needs at the heart of modern society – but also, and above all, with the hyper-enlightened idea of providing a full and definitive legitimation of contemporary constitutional arrangements – for which the theory of law would represent the logical transcription and provide the seal of “closure” – do we not risk of feeding the illusion, or the ideological hopes, of exempting ourselves from the unavoidable implications of the conventional character of law, from its inevitably provisional and relatively unanticipatable character, from its pluralistic and conflictual openness? – in short, from the insufficiency of law, which represents not only a given fact but probably a conditio sine qua non, a qualifying element that is intrinsic to any post-substantialist (and constitutional) juridical form, and also, if recognised as a factor by critical self-conscious reflection, a certain resource as well.

With his theory of validity – which distinguishes between the validity and the actual force of law and places the issue of invalid or illegitimate (though existing) law at the centre of attention – Ferrajoli’s approach has the considerable merit of demystifying the presumption of legitimacy that juridical formalism ascribes to a legal order monolithically interpreted as “positive” and thus already endowed with authority. That is to say, Ferrajoli disconnects the domains of law and power, thereby attempting in every possible way to protect juridical science from a risk that it has always courted historically and to which it has frequently capitulated: that of transforming itself into a powerful ideological tool – and all the more powerful the more “abstractive” it is – at the service of the power that is actually victorious historically.
Yet are we really so sure that law, even modern law, as a self-normative form of knowledge, is entirely rational and consistent from the perspective of its “ought,” and that it is only the system of power (which it also requires) that renders it “spurious”? Perhaps it is the intrinsically “political” genesis of modern law that is spurious, as the Hobbesian paradigm indicates, something that cannot easily be eliminated, especially if we wish to maintain the conventional aspect of law, its secular character, the distinction between law and morality, etc. In short, the schema according to which modern law springs forth “armed” with its own autonomy, like Athena from the brow of Zeus, seems problematic to us. As does the idea that the impurity of law derives “from outside,” from its connection (although this is recognised as inevitable) with the “politics of law” (in which the theory of law also ends up participating, though only insofar as it “serves,” or explicates, the logical coherence of juridical normativity, thereby encouraging juridical systems to correspond more closely to their own logos). It is more plausible to acknowledge that there is an original and reciprocal nexus, one that preconditions the legal order as a whole, between sovereignty (or, if one prefers, “instituting force”) and modern public law: the original auctoritas is an immanent presupposition endowed with efficacy, though it functions neither on the basis of formal authorising norms, nor on the basis of some already presupposed veritas. But in order to achieve this, it must artificially presuppose – and on this basis also implement – the indispensable because strategic-rational primacy of what it is supposed to realise: the securing of the peace and the political exchange of protection and obedience as the sole source of minimal and elementary legitimation (one that is removed from the kind of disputes that arise in connection with religion and natural law) and of an ultimately functional form of power in an order “without substance”. In short, there is also a certain “ought” that attaches to the (modern) structure of power, which is that of the order of survival. Can the logical normativity of modern law, once it is fully articulated and “constitutionalised”, ignore that minimal and admittedly difficult “ought”? And is it not the case that such a normative core – inherent in the question of order, and united with its function as a necessary presupposition (even though it is itself “foundationless”), brings the “political” dimension inside the juridical domain and the normative theory (not only in the sense that the

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latter can contribute to certain political-cultural effects, but because it must already take account of questions of effectiveness, questions which cannot be logically neutralised and, above all, are not at the disposal of theory itself, and whose resolution precedes both the production of a system of rules and its logical acknowledgement? This marks a fundamental point of disagreement with Ferrajoli, who believes that the discourse regarding the “state of emergency” (as a question that explains the relation between law and politics in conditions that are “out of the ordinary”) is exhausted simply by recognising that this is “prohibited” (which is true, but only from the point of view internal to the existing order, not from a “constituent” genealogical perspective, or of a theory of law which does not separate itself off from the “political” dimension, except by covertly or unconsciously presupposing this dimension; that is, of a theory which also thematises the crises internal to the juridical domain and thus its “non-autarchic” character). In my view, however, the “state of emergency” is not only a concrete challenge to effective law that is always possible in any order, but is also, more generally, the litmus test of the inevitable impurity of the theory of law, including a legal theory that coherently – and from my point of view auspiciously – treats the task of rationalising the structures of power with utter seriousness, as Ferrajoli to his merit attempts to do. To eliminate precisely that which creates problems for a normativistic approach, and restricting oneself to the task of confirming the grounds of regularity, runs the risk of damaging the theory itself and forfeiting its full potential, and of becoming aporetic from a theoretical point of view since the regularity in question does not simply stand on its own, and is not completely immune to every threat. In short, it is not enough to say the “state of emergency” is “illicit” in order to eliminate the threat it poses for law.

Having said this, and despite these particular reservations, it must be recognised that Ferrajoli has made a quite fundamental contribution to the logical clarification of the nature of the constituent act: this is an informal but preceptive act, and thus possesses an ambivalent character somewhere between fact and law (pp. 856 ff.). This qualification is determined by its placement at the apex of the system: the constituent act is normative if viewed “from below,” from within the order that it constitutes; it is extra-juridical – or downright anti-juridical – if it is considered from an external perspective (that is, from the point of view of an alternative or substituted order). This implies that the legitimation of the constituent act and power fundamentally consists, as it seems we may say in the wake of Ferrajoli, in a form of “self-recognition” (both as a self-perception of legitimacy and a position of political plus value valid erga omnes, which lays claim to generalised obedience, and as collective response to such a claim); it also possesses a retrospective character (that is to say, it intervenes through an effect which is qualified and interpreted as the “verification” of the constituent situation). The point is that, once this genealogy of order has been exhausted and acquired, the term “sovereignty” need not appear in Ferrajoli’s theory of the constitutional state under the rule of law, even though in fact the theory postulates the actual exercise of sovereignty. But are we thus so sure that this possibility and “problem” has properly been dealt with (this “challenge” which sovereignty and constituent power – another post-revolutionary name for sovereignty – express, channel, and “resolve”)? There are aspects connected to the construction of obedience and to processes of symbolic identification in the context of power, to the emergence of conflictual cases that need to be integrated, to the reproduction of the social-normative conditions of a shared
“constitutional culture,” which condition the juridical order not only in its “foundation” but subsequently too, and which the theory of law cannot allow itself to ignore except at the cost of becoming entirely self-referential.

With respect to the relationship between *Principia iuris* and the juridical-political tradition in which the work broadly belongs, one cannot avoid emphasising the extent to which it copiously goes “beyond Kelsen”: not only in relation to the question of war, the conception of the role of legal sanction, subjective rights, the distinction between the validity and the existence of norms (this existence being identified with the actual “force” of law) in the name of a “reinforced validity.” In fact there are also three other decisive points of disagreement which also place the principal points of Kelsen’s general theory into question: firstly, the thesis that positive law can only be dynamic, and that which claims that a hierarchical normative order can only be dynamic. Precisely by criticising these assumptions Ferrajoli succeeds in freeing himself from one of the most problematic features of the pure doctrine of law (whose aporetic character is nonetheless a product of the obstinate “legal-positivistic” coherence of Kelsen’s approach): in *Principia iuris*, a fundamental norm, in the sense of a “non-originated” norm, simply does not exist; it is resolved into the constitution, and its indispensable legal nucleus (p. 854). This highly original “revision” of Kelsen’s theory leads to a recovery of a nomostatic conception, even if it is no longer understood in a traditional natural law sense. Ferrajoli recognises that non-dynamic positive law would be a contradiction in terms, but in the light of the transformation of the political state into a constitutional state of law (which in a way represents the “logical” fulfilment of a theoretical demand), it is impossible to conceive of a legal order that would not also be static in a certain sense (p. 571). Here too, a number of questions inevitably arise – in large part, it must be said, a consequence of Ferrajoli’s courage in refusing to minimise the “key issues” which Kelsen himself recognised as a threat to the formalistic character of normativistic theory. And one is naturally led to ask whether this logico-deontic theory – which corresponds to real historical-institutional processes which the theory helps to construct and which it simultaneously presupposes – is not itself something of a “philosophy of history”? In addition, it is also necessary to recognise that it is by no means irrelevant even from a theoretical point of view (and not merely from a politico-historical or factual-practical point of view) that this very content has assumed specifically positive form in the highly fixed constitutions characteristic of the period after the Second World War. Now the supporting ground of Ferrajoli’s entire theoretical construction (and indeed in general of every formalised account of the constitutional state of law), that is, the ground which renders this construction possible, is the internal connection between formal theory and the rationalised character of the modern politics of law, which thus shows itself to be essential here. In fact, the theory holds specifically for modern positive law, and for the structures of constitutional democracy in particular. We would seem to have arrived, therefore, through a complex historico-cultural process that has here been raised to a coherent and clearly articulated and coherent theoretical level, at a recognition of a possible (indeed necessary) coexistence and conjunction of both formal and substantial rationality: Ferrajoli’s reflections, in many respects, thus also point “beyond Weber.” Must we then conclude, paradoxically enough, that what Ferrajoli interprets as the complete fulfilment of the modern conventionalist conception of law, as the realisation of the
secular heritage of the Enlightenment juridical tradition, should lead us to relativise the concept of *Wertneutralität*, to accept a kind of harmonious marriage between an ethics of responsibility and an ethics of conviction? And should not this already set off certain alarm bells, and indicate the risk of a sort of counter-productive reintroduction of an ethical perspective into this otherwise entirely rationalised theory of law, insofar as it would now appear to be both formal and substantial at the same time?

Another “key issue” which Ferrajoli’s approach specifically raises is that concerning the relationship, which may also be one of mutual tension, between the normative character of the constitutional state of law and the practice of democracy: if the “decision on the matter” has already been decided (i.e. it is either prohibited or obligatory to decide it), is it not the case that the “who” and the “what” lose much significance here? And does not political democracy thereby lose significance too, insofar as such democracy is not just a formal fact (the automatic and institutionally correct execution of an already given “ought”), but a manifestation and articulation of consensus, a form of participation, an ideal mobilisation, a choice of interests and principles with emphatic symbolic importance, an expression of conflicts and of possibilities of integration? Ferrajoli is well aware that this dimension exists, and that it is hugely important. It is the domain of that socio-cultural normativity which finds expression in the notion of “civic duty” and is most emphatically projected within the public democratic sphere: “the effectivity of law and the legal grounds of action depend upon the fact that law is a socially shared symbolic world: it reflects, and at the same time produces, a *sensus communis* and communal values. And this is the principle dimension of both normativity and effectivity, and is relevant above all to the most fundamental principles of all. The fundamental rights, and the legally guaranteed character of these rights, the principle of equality, the importance of peace, and the rules of democracy, are seriously normative, as well as effective, insofar as they are socially shared, or are governed by what we call ‘civic duty’” (pp. 704-705) But is not this “pre-juridical” sphere excessively invoked merely as a support of “juridical reason,” and especially of constitutional democracy as the completed model of complete juridification? And is it not paradoxical that juridical science, in turn, is invoked in its “critical” and “projective” (pp. 704 ff.), and in fact in its performative, role to reinforce and sustain this civic sense of duty (which ought to nourish the resources of legitimation with regard to constitutional democracy)? Is it not imperative for juridical science to recognise its limits as well? Ferrajoli claims that law both reflects and produces a *sensus communis*, etc.; I agree entirely with this, but on condition that we do not deceive ourselves that we are producing, in some exclusive or pre-eminent way, that which in reality we are limiting to reflecting, or *believe* that we are reflecting. To prevent the spread of this optical illusion, and to ensure that law effectively performs its work as a “break” – something it must certainly do if we are not to fall below even the minimal “ordained” and “constitutional” standards – it may be necessary to consider a deflationary and also self-critical conception of juridical science.

As Ferrajoli show, the constitutional state of law represents a model for minimising the exercise of power (and grounding political legitimacy) (p. 594). This is not in doubt, but it seems to me that we should constantly remember the “ideal” character of the model – and especially its value as a kind of “antibody,” as a resource to which we can appeal (there may be a judge in Berlin ...), as a bond which is not complete or
definitive and in a sense never could be – rather than regarding it as a formula capable of entirely absorbing and monopolising the “political” dimension. If we think, for example, of the “substantial” bonds that are envisaged by the constitutional state of law, would they not be more effective if understood in a reductionist sense, namely as a minimal level below which we cannot fall, rather than as projected indications “as a rule” which are to be evaluated (more or less) politically? Let us assume (and unfortunately this is no merely academic example) a democratic-constitutional order that recognises social rights as fundamental, in which the majority legislated measures designed to abrogate general health care or universal education, placing the possibility of such things entirely at the disposal of the market and private commercial initiatives: in this case, I believe it would be more than reasonable, if not entirely obvious, to raise the problem of going beyond a certain limit, of a choice that could not be contemplated. But if, on the other hand, the same majority chose to pass legislation that invested significantly fewer resources in areas of social policy, thus reducing but not abolishing public health and educational provisions entirely, how would the constitutional state of law “iuxta propria principia” respond? Would such measures have to become an object of prohibition, or would they contravene any obligation to implement them, as the model proposed by Ferrajoli appears to suggest? Would it not be possible to understand them rather as a “legitimate” object of dispute and democratic choice (and thus to be contested on the basis of a “politics of law” and general socio-cultural intervention)? And is it conceivable that we can reduce our evaluations and qualitative distinctions – which inevitably extend the space of juridical and, above all, constitutional interpretation – to a kind of rigid and inexorable logico-deontic structure, or ascribe the normative-projective character of law, with all its realistic limits and conditions, entirely to the domain of rational necessity? Do we not thereby run the risk of emphatically restricting the space of the “quid novi” (so central to a conventionalist, positivist, and, I would say, “secular” conception of law), and producing a semi-deterministic system of juridical reason?

The drama of contemporary economic “globalism” lies in the way in which it naturalises the ideology of non-politics, attempts to bind the political agenda (whether domestic or international) to automatic and pre-constituted choices, and absolutises purely economic mechanisms. For this reason, I would maintain that the constitutionalist approach to rights should not allow itself to restrict the sphere of (democratic) politics more narrowly than it needs to, especially since the latter is far too depleted as it is. On the contrary, this approach must strive to augment its dynamic and agonistic contribution to public discourse, even if this incurs certain risks of its own. Either because the juridical bond on its own can hardly resist the dominion of advanced western capitalism, or because the sphere of “juridical mediation,” in order to re-legitimise itself and re-acquire some force in relation to the “savage powers,” must return for support to real political processes and cultural movements that express currents of legitimation “from below,” that is, must accept that it will be traversed and marked by relations of power and asymmetries of one kind or another, by new forms of subjectivity and novel hegemonies. The science of public law today is called upon to discover a difficult equilibrium between its (indispensable) role in guaranteeing rights, and its ability to “renew” juridical systems, its “undecidability,” and its capacity for political innovation.
Ferrajoli thinks there is a sense in which law “saves.” For my part, I would be quite content if, in addition to avoiding unnecessary damage, it could curb the threats and challenges of “the political” in relation to which it is constantly called upon to offer protection, thereby internalising and involving itself in that domain as well. And likewise if the task of advancing the struggle for law (and rights) were pursued, not only by means of juridical culture, but also by a democratic politics that has not already been definitively neutralised. Let me make myself quite clear: I am entirely in agreement with Ferrajoli concerning the risks that are constitutively inherent in the ever latent and potential disorder in the sphere of power. Indeed, I would argue that juridical science should never allow itself to forget the lesson of Canetti: power in itself, in its innermost character, is always “homicidal” power, related, in the ultimate instance, to the watershed between life and death over which it presides. But I believe that power must also be recognised, tragically, as a kind of “fate” with respect to law, one which the latter cannot avoid confronting as a theoretical datum, without thereby deceiving itself that it is the *Other* of power, entirely free of any dross or residue of the latter, and capable of decontaminating that domain. Perhaps it is no accident that, while employing a very different method, Ferrajoli’s work pursues the same end as Habermas in *Facticity and Validity*: the juridical overcoming of the opaque decisionistic nucleus of politics, and the “violent naturalism” that still characterises it. We are dealing here, in fact, with the two contemporary theories which attempt, in the most coherent and systematic possible way, to unite law and democracy in a structural fashion. And in doing so, they both undoubtedly furnish an arsenal of normative criteria, a sort of ideal-critical model in the face of various diffuse processes that threaten to undermine the constitutional legal paradigm. But apart from confronting an ever more recalcitrant reality, does not this neo-enlightened approach, which I personally think can broadly be endorsed in ethico-political terms, simply risk becoming the expression of a self-proclaimed narrative of Modernity which generates an excessive faith in the possibility – and reasonableness – of a “complete juridification of politics”?

*(Translated from Italian by Nicholas Walker)*

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