CONSTITUTIONALISM, GLOBALIZATION AND LAW

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I. INTRODUCTION

In the last years two phenomena, constitutionalism and globalization, have considerably contributed to changing the appearance of our legal systems. The two are of relatively opposing natures: constitutionalism represents the submission of political power to law, and its scope is that of state; globalization, in contrast, represents the submission of political power to economic power and, as its name suggests, has a scope which goes beyond state borders. The problem in question, therefore, is if it is possible to find some kind of adjustment between them or if, instead, one of them –presumably globalization- will in the end prevail over the other. The future of law –or, if you will allow me to go further, that of civilization- is largely at stake here.

II. WHAT ARE WE TALKING ABOUT WHEN WE SPEAK OF CONSTITUTIONALISM?

When one talks about "constitutionalism" the first thing one must clarify is that the term is ambiguous: a term with which one can refer to both a phenomenon and the way this phenomenon is conceptualized, also to a process of change which is taking place in law, or to its materialization in the scope of legal thought.

As a phenomenon, constitutionalism clearly does not only imply the existence of legal systems which have some kind of constitution. In its widest sense, "Constitution" makes reference to the structure of a political body, of a state: to the design and organization of the collective decision-making powers of a community; thus, if one understands the term in this way, any legal system (whose existence presupposes the fact that some kind of political organization exists) would have a constitution. In a stricter sense, a constitution has to meet two more requirements: a declaration of rights and an organization which finds its inspiration in a certain interpretation of the separation of powers principle. In this last sense, constitutions would only exist when the rule of law exists. For example, strictly speaking, during Franco´s regime a constitution didn´t exist, nor did it in Poland until recently.

However, when one speaks about “constitutionalism” or “constitutional state” more is being referred to. A constitutionalized legal system (that of “constitutional states” in some western countries) is characterized by having a constitution which establishes numerous rights and which is capable of conditioning legislations, precedents, the action of political players or social relations. Constitutionalization is not a question of all or nothing. It is, rather, a phenomenon essentially susceptible to graduation, since the features which define it can be found with different levels of intensity. These are, basically, the following: 1) Binding force of the constitution, that is, constitutional contents do not have a purely programmatic value, rather, they have a binding force on all public powers; in particular, they set a limit on both the legislator and the parliaments´ sovereign powers. 2) Jurisdictional guarantee of the constitution, which implies the existence of courts which are competent to annul laws and other provisions or decisions that violate what is established in the constitution. 3) Constitutional inflexibility, that is, the existence of mechanisms which make constitutional change difficult (for example, the demand of qualified majorities, which are different to the majorities necessary to amend laws). 4) Interpretation, in accordance with the constitution, of laws and the other norms established in the legal system. 5) Direct enforcement of the constitution. 6) Influence of the constitution on political relations [See. Guastini 2003].

Constitutionalism (which has, since World War II, become ever more established in the most advanced western states) represents, then, great changes in legal systems. For instance, law can no longer be seen as a set of rules, of specific norms of behaviour. What characterizes our constitutions (particularly, in that related to declaration of rights) are statements which refer to principles and values (equal protection of the law, dignity, political pluralism, etc.) which makes law appear much more malleable and indeterminate than it was during the times of a (legislative) state with a rule of law. This, moreover, means necessarily conferring on judges (those who are in charge of interpreting and applying the above mentioned statements) a far greater power than they enjoyed before; what, to some extent, justifies this greater power is that it is exercised to protect citizens´ rights. It also implies the substitution of the validity criterion (formal and procedural) of legislative state norms for another which adds a condition of a material nature to the former requirements: in a constitutional state, a norm, in order to be valid, must

not contradict the constitution, must not go against the principles and fundamental rights there established. The task of justifying decisions is considered to be more important: public bodies –in particular, judicial ones- cannot limit themselves to making decisions; they have to provide reasons for them of a certain quality. Many political domains, which were before exclusive to politics, are now beginning to be controlled also by law. Practically all "discretional" acts carried out by official authorities can, to a greater or lesser extent, be susceptible to jurisdictional control; with the result that hardly any purely political acts exist any longer. The limits existing between law, morality and politics are showing a tendency to disappear or, at least, the boundaries between those three classic fields of "practical reason" are becoming more flexible. Moral and political principles and values (incorporated into constitution) are part of law and, as a consequence, legal reasoning, based on these materials, cannot be seen as "insular" reasoning: moral and political elements also play a role, although this does not imply an ignorance of the peculiarities found in legal (judicial) reasoning.

It could be said that this new type of law has both advantages and disadvantages. On the one hand, in simple terms, we are dealing with a legal system which takes fundamental rights and democratic values seriously. However, on the other hand, the changes which have been introduced for this purpose lead, at the same time, to a more undetermined and uncertain law which –as Laporta [2007] recently pointed out- can put at risk a moral value as fundamental as that of personal autonomy: if one doesn´t know precisely what to observe, doesn´t know the legal consequences of one´s conduct, then one cannot make plans or rationally organize one´s life either. What is more, an excess of power in the hands of judges (and not only in the hands of constitutional judges) represents a threat to democracy: law "lords" are no longer legislators, the representatives of the people´s will, they are instead legal bodies which lack democratic legitimacy, since judges are usually appointed through co-optation procedures. The recent actions carried out by judge Garzón (the same judge as in the Pinochet case), with reference to the victims of Franco´s regime, are a good example of the extraordinary power which judges have taken on in our legal systems and also of the complexity that the relationship between legislators and judges has acquired. On the one hand, it is understandable that sympathy is felt for a judge daring to go further than legislators (and the administration) appeared to be prepared to, when

he applied for lists to be made of the reprisals during and after the Spanish Civil War. What makes this possible –one could say- is that his decision-making process is simpler (than that of the legislators): a judge is not bound by the need to make a pact or bargain his decisions, he does not have to stand for election, etc. On the other hand, however, it is not easy to accept that the person deciding what is just (and not in a specific case, but in general) should not be the assembly which represents the people´s will but, instead, an individual who could easily allow himself to be led by purely subjective reasons (for example, the desire for public recognition), which could lead to arbitrariness. In classic terms: wouldn´t this be substituting the rule of law for the rule of men?

So far, I have been referring to constitutionalism as a phenomenon (complex) which is characteristic of our legal systems (of some of them). How, though, do these changes, which have taken place – or are taking place- in law influence legal thought? What reaction can be observed among legal theorists? Well, if I again greatly simplify things, one could speak of two broad types of responses, each one of which, logically, is susceptible to diverse graduation: one can, to a greater or lesser degree, be either sceptical or enthusiastic about legal constitutionalism.

Sceptics are usually also in favour of legal positivism in one of its versions. This means than law tends to be seen as a set of rules, of specific norms, established by political power; thus, it is an authoritative phenomenon, different to morality (with which, nevertheless, it still has some connections). In a democratic system, these norms are established, as a last resort, by the parliament, that is, by the legislature, which represents the people´s will. Legal norms (as opposed to moral ones) are backed up by state coercion but, at the same time, they regulate and limit the use of force: they represent a safeguard for the freedom of individuals. Moreover, norms (basically legislated norms) must be applied by judges through logical procedures (so called "subsumption") since only in this way can certainty of law be guaranteed and arbitrariness avoided. In conclusion, positivism, understood in this way, is linked to values such as freedom, foreseeability and equality (which is implicit in the generality and abstraction of laws: legal norms are addressed to classes of individuals and they regulate abstract actions which, no doubt, represents a necessary premise if one is to speak about equality before the law). They are all, if you like, formal values (although we have already seen that these values represent a premise for autonomy), and yet they are of extraordinary importance. And what

these authors –the sceptics with respect to constitutionalism- fear is that a legal system which pivots on principles and values (those of constitutionalism) eliminates these qualities, which are present in legalism.

Supporters of constitutionalism do not hold the same conception of law. Some (like Ferrajoli) are still positivists, that is to say, they continue to see law as an authoritative phenomenon, but they emphatically underline the fact that law can no longer be identified with laws, but rather with both laws and the constitution. This implies fundamental changes in relation to the way law is understood, due mainly to the possible existence of formally valid but materially invalid norms. This means that legal science cannot be understood in purely descriptive terms, since its essential function (critical) is to show and seek to correct the gaps and contradictions generated by the violation of rights (established in the constitution, but not developed by laws).This also means that jurisdiction, in the sense that it should be seen as enforcement and interpretation of laws in accordance with the constitution, also incorporates an aspect which is both pragmatic and of civic responsibility. Other authors (such as Dworkin, Alexy or Nino) consider, from a theoretical point of view, that the phenomenon of constitutionalism implies a move away from legal positivism. The main idea is that two elements, one authoritative and the other axiological, should be integrated into the concept of law. Law cannot be seen exclusively as a given reality, as the result of an authority (of a will), but instead (in addition and fundamentally) as a social practice which incorporates a claim of justification or correctness. This last implies a certain axiological objectivism; for example, the assumption that human rights are not simply conventions, but that they are founded in morality (in a universal morality). It also means attributing especial importance to the interpretation guided by the aims and values which endow practice with meaning. Dworkin [1986] expresses this last idea by pointing out that the interpretation model in law can be neither conversational nor intentional (interpreting, in this case, cannot consist simply in seeking to discover the intention of the issuer of a message), but rather of a constructive character. Interpreting means trying to present an object or a certain practice as the best possible example of the gender to which it belongs. To do this, it is necessary to resort to a theory: a theory (one of those which succeed in explaining legal materials –the rules-) which makes possible a greater realization of the principles which endow practice with meaning.

This last (and I think best) way of understanding constitutionalism implies giving priority to the axiological element of law over the authoritative, but this does not imply ignoring the values of legalism and, therefore, the relevance of the positivists´ defence of these values. What the defenders of this kind of constitutionalism hold is that our laws are essentially unstable, affected as they are by an objective tension; and what they reproach positivist jurists for, is their tendency not to see one of these elements, or to undervalue it. What should guide the work of a jurist who seeks to act meaningfully within the frame of constitutional states "is not, needless to say, the contempt of the authorities, of the rules or of subsumption but, rather, the purpose (perhaps not always achievable and, of course, not achievable definitively) of achieving some type of adjustment which integrates within a coherent whole the authoritative dimension of law with the value order expressed in the principles" [Aguiló-Atienza-Ruiz Manero 2007, p.18].

III. GLOBALIZATION AND LEGAL CHANGE

Similarly, with regard to globalization, a distinction between the phenomenon and its legal conceptualization needs to be drawn, that is to say, between the legal changes which arise with globalization and the way these changes are translated into theoretical terms.

The notion of globalization is relatively imprecise. As a starting point, one could use a very broad notion, such as Steger´s: "a multidimensional series of social processes which creates, multiplies, gives rise to and intensifies social interchange and interdependence on a global level, while, at the same time it gives rise to an ever growing sense of connection between the local and the distant" [Steger 2003, p.13]. This is, approximately, the notion which many social scientists take as a starting point when they hold that globalization can be described as "the tendency towards a growing interconnection and interdependence between all countries and societies in the world". It is a process whose engine is international trade and capital flows and which also incorporates aspects "of a social, cultural and, of course, technological nature". If one takes this approach, law can be seen as a recipient of those great changes; not in the scope of causes, but in that of the effects of globalization and, thus, it is claimed, "this dynamic is so strong that it

may be provoking a certain degree of obsolescence in legal and political institutions”.[1]

The idea probably underlying the above approach is that the globalization process moves at different speeds in different spheres of society (and, as a result, the awareness of the phenomenon differs depending on the sphere in which it operates within the social reality). In this way, for example, Laporta [2005] states that with respect to ownership law and to criminal law “no or hardly any legal globalization exists (...). Financial capital can fly over borders, but legal entitlement to the property of this capital remains under the wing of domestic law (...) crucial aspects of social life and the economic activities of the inmense majority of individuals and corporations which inhabit the globalization planet happen to be still regulated by domestic legal norms. Communicative, economic or social globalization are not sufficiently ruled or subjected to norms”. Moreover, in his opinion, “the disconnection between the undeniably global nature of many actions and economic activities, and the prevailing private and state nature of the legal norms which support them, produces many perverse consequences which are at the basis of much of the discontent globalization has created” (pp. 235 and 236). Is this true? It depends on how you look at it.

It is true if we regard law essentially as state law and international law in the classic sense: a law whose main players are fundamentally states. However, perhaps it is not true (or at least not as true) if instead of focussing on “official law” we focus on the legality coming from informal or more or less informal entities. The fact is that many authors believe that the outstanding feature of legal globalization consists in the privatization of law, in the same way that, in more general terms, globalization has resulted in a trend toward the privatization of what is public. The centre of gravity has passed from the law, as a product of the state´s will, to contracts between individuals (even if those “individuals” –or some of those “individuals”- are the big multinational companies). This goes hand in hand with a growing (and relative) loss of state sovereignty, as a consequence of the advance of both supranational and transnational law. An example of the first, which is commonly put forward, is the existence of a European law which implies that a great number of the legal norms in force in the European Union are not state

[1] The quotations are taken from the presentation to a recent multidisciplinary meeting on globalization.

norms, or are norms which are significantly conditioned by supra-state norms. And what is often put forward as an example of transnational law, is the existence of a new "lex mercatoria" which regulates international trade and which is not made either by national states or by public institutions of an international nature, but instead by the major law firms. The main figures in globalization law are no longer legislators, but rather judges and experts in law not occupying public office: thus, it is the Luxemburg Court which has played a central role in the current configuration of European law and those who settle the important international trade cases are lawyers or university professors.

It is said, moreover, that a new type of law has appeared with globalization – *soft law*- in which resorting to coercion is less important than in the case of state law. This can be seen in the tendency to favour conflict solving mechanisms (such as mediation or arbitration) which (in contrast to adjudication) are not of an obligatory nature, since they presuppose the acceptance of the parties (who are the ones that appoint the mediators or the arbitrators). It can also be seen in the importance of legal bodies such as the World Trade Organization, regulated by norms and procedures which are different to those existing in classic state law. In the same way, it is held [Ferrarese 2000] that law (globalization law) no longer consists exclusively in norms (in orders), but instead it is held that many of the behaviour rules contained in this "soft law" seek to guide conduct in a flexible way or without trying to impose themselves through coercion: let us, for example, consider the European directives or the growing importance of ethical codes as auto-regulation mechanisms. All of this leads, in the end, to the traditional limits of law "losing definition": not only in relation to morality and politics, but also in relation to the traditional distinctions between private law and public law or between internal and external law. Thus, nowadays, elements of private law, such as negotiation or the concept of private interest, play a role in the context of public law: consider, for example, "plea bargaining" in criminal law or "lobbies" as institutions which articulate private interests in the legislative process. What is more, as we have already mentioned, european law limits the internal law of European states and, at the same time, it is usual to speak about a "dialogue" between European and state jurisdictional and legislative bodies; in such a way that law no longer appears as a result of an imposition laid down by a superior, but rather as an agreement reached "from below". Consequently, the function of law is

no longer only (or so much) one of prescribing, directing conduct, but rather that of providing ways of acting; its nature is instrumental more than political.

Well, all the above can serve as an argument to show that globalization has indeed had a significant effect on law, transforming many of its institutions, giving rise to new forms of juridicity, modifying the classic functions of law, etc. It is, however, also very important not to lose sight of the fact that law has not only suffered the effects of globalization but has also played a causal role in the process; in other words, all this interchange and interdependence which takes place on a global level –which define globalization- would be impossible if the necessary legal instruments had not been present. Without law (or without a certain type of law) we would not have globalization, and neither would capitalism or market economy have existed without the legal institutions which are characteristic of the modern state.

So, in relation to globalization, the legal theorists have reacted in different ways, in principle, in accordance with their political tendencies. Thus, those who could be considered to belong to the right wing political spectrum are also those who evaluate the phenomenon (the changes which have taken place in law) in a more positive way. After all, what globalization has meant until now is the victory of neoliberal ideology. One of the most illustrious supporters, Hayek, held that the order which could be found in complex phenomena was of two kinds: created and spontaneous. Spontaneous order is the unsought result of an evolutionary process whose main indicator is the market. The superiority of the market over any other organization of a deliberate type is due to the fact that human beings, in pursuit of their particular desires (whether egoistical or altruistic), make it easier for other people who, generally speaking, they will never even meet, to reach their goals. Law´s *raison d´être* is, consequently, an essentially instrumental one: its mission is to contribute to the maintaining of this spontaneous order [Velarde 1994, p. 261]. Globalization, then, as we said before, essentially means this, the subordination of politics to the market, of the law (or of the treaty) to the contract, which takes material form in the ideal of deregulation: a more globalized economy with fewer ties and, thus, less regulated by legal state norms or by international law norms. It should, however, be clarified that "deregulation" does not exactly mean that rules do not exist or even that fewer rules exist than before. It means, rather, that a type

of rules (let us say, those of a public nature) have been substituted by others of a private nature.

And this is precisely what causes the phenomenon of globalization to be seen with considerable scepticism from the stand point of a left wing ideology. The liberalization of the economy – deregulation- has gone hand in hand with a lack of measures guaranteeing human rights, particularly, social rights. Perhaps one should remember that, according to Hayek, social justice is one of the greatest threats to western culture, a prejudice of tribal nature, lacking any rational or moral support [Velarde 2000, p. 196-7]. Economic globalization has increased world wealth, but only at the price of deepening inequalities between countries and individuals and leading to a deterioration of the environment, which could have irreversible consequences for future generations. Altogether, the law of globalisation is clearly an undemocratic law; the loss of state sovereignty has meant a step backwards for democracy, precisely because the scope it operates within is that of the state.

And if this is the situation, then, it is logical that one is rather pessimistic when suggesting a possible solution. It is quite symptomatic that, in order to account for the current situation in the globalised world, one often makes reference to Thomas Hobbes and to his description of the state of nature as one in which the law of the strongest prevails, a state in which, however, not even this last can feel completely safe, since the weakest could find enough strength to kill him. Let us see what answers –theoretical answers- were recently given to the problem by jurists taking part in a world congress on the subject of "Law and justice in global society", held in 2005.

After declaring his scepticism regarding global law´s chances of achieving the rule of law, Francisco Laporta, comes to the conclusion that "only processes like the European Union´s seem to meet the precise requirements needed to incorporate the ideal of the rule of law" [Laporta 2005, p. 25]. Therefore, the solution cannot be found in "transnational private networks in a supposedly anomic world", but rather in "the construction of political units and supranational legal units". However, in his opinion, the legal model to be followed is not exactly that which we previously understood as constitutionalism but, instead, that of a more or less classic state in which the rule of law operates; a law based on rules which derive from a state or a supra-state authority, but which possess coercive backing and allow the advantages of the rule of law to be guaranteed in a broader scope than that of state.

Luigi Ferrajoli, for his part, defines globalization as "a gap in public law" and supports the need for a "world constitutionalism" (in terms which differ little from those of Habermas). The "extension of the constitutional state paradigm to international relations" implies, in his opinion, "the greatest challenge posed by the crisis of law and state to legal reason and political reason" and, moreover, represents "the only rational alternative to a future of wars, violence and fundamentalism". According to him, there are no "reasons for optimism", but not because it is a question of a utopic or unattainable programme: "it is simply not wanted because it conflicts with the prevailing interests" [Ferrajoli 2005, pp. 50 and 51].

Juan Ramón Capella makes an even more pessimistic diagnosis of the situation. As he sees it, what really governs the globalized world is "business, military and political technocracy which takes the role of Plato´s Philosopher King and of his Nocturnal Counsel". "Democratic institutions submit and subordinate themselves to this new imperial power [that of the military-industrial conglomeration; that of the big multinationals; that of the experts on financial capital management, on the administration of the big industries, on the creation of public opinion, on the economic, political and military adjustment]. On a daily basis, democratic procedures turn into forms lacking any content, social rights vanish, political rights become increasingly inefficient, except in the submission to global power. In addition, new institutions appear and remain beyond the reach of the exercise of political freedom. Alternatively, systematic practices of power, which existed before the modern age reappear: this can be seen in the treatment of soldiers on the losing side, in the torture of prisoners, in wars which have not even been declared, in the total abandonment of the ill and hungry in poor countries" [Capella 2005, p. 23]. No alternative to this regressive process is in sight: "Perhaps it is a temporary phenomenon. The thirties and forties of the last century were also dark decades, as are these for numerous peoples on the planet. However, the regression of democracy seems to go hand in hand with everything which is politically-socially new in the globalized world. There are no new examples to the contrary opposing this trend." [Ibid].

IV THE ROLE OF LAW AND JURISTS IN GLOBAL SOCIETY

On the basis of the above, I will now put forward a series of points, a series of thesis, which simply seek to serve as a basis for a discussion on the subject of the possible role of law and jurists in global society.

1) Anyone adopting a minimally realistic perspective on the evolution of the world has no choice but to recognize that globalization is a phenomenon which is here to stay. Law, as a result, will no never again be what it was. To consider it as an essentially state phenomenon, as a set of norms, established by state authorities, is becoming more and more unsatisfactory, even if this vision is basically correct with respect to some areas of law, such as criminal law. It is true that a penal judge, when performing his duties follows state rules. Yet, even here one cannot forget the existence of institutions, such as the International Criminal Court (despite the quiet period it is going through). Neither can one forget the universal jurisdiction principle, which has been acknowledged by some state legal systems (like the Spanish) in relation to crimes against humanity, the principle that this type of crimes does not prescribe, which has led some constitutional courts to deny the validity of "amnesty laws" passed by states to guarantee impunity to those who have been involved in this kind of act or the acknowledgment bestowed by state judicial authorities on supra-state courts like the European Court of Human Rights or the Inter-American Court of Human Rights.

In other areas of law, the incidence of supra-state or transnational regulations derives, simply, from what is demanded by the nature of things. International trade, the internet, migratory flows, ecology or terrorism are phenomena which cannot be regulated (or, at least, not efficiently) in the national scope and which are also not covered by international law understood in its classic sense. It is not, therefore, a question of whether law has ceased to be a state phenomenon but rather one of accepting the fact that juridicity does not only exist in this scope; there is also a supra-state (and infra-estate) juridicity, whose importance is becoming greater every day.

2) Yet, also, insofar as the contract constitutes the typical form taken by juridicity in the scope of globalization, law, logically, tends to be seen less as a product of a political will and, instead, what takes on more importance is a vision of law as a means for obtaining certain ends, as a mechanism of social construction. In this sense, Ferrarese has spoken about a change in direction, taken by law, which he characterizes as a move away from a parametric rationality towards one of a strategic nature:

"Rationality of a parametric nature takes place when the subjects find themselves facing situations which depend on others, situations whose redefinition or change they cannot contribute to: they can only shape different consequences which derive from the restricted or rigid choice they have before them (...). In contrast, a strategic rationality takes place when, on accepting the decision, the subjects find themselves in a situation of interdependence with other subjects and, while interacting with them, they must seek to hypothesize their choices of behaviour. [Ferrarese 2006, p. 23].

3) The direction in which globalization is causing laws to develop seems to go against a positivist conception of law. It seems to me that law tends to shape itself and to be seen by those who practise it, not so much, or not only, as a system, as a set of pre-existing norms, but rather as a practice, as a procedure or a method used in order to reconcile interests, to solve conflicts, etc. This means that the limits of what is juridical disappears to a certain extent, and also implies a new way of understanding the function of science, of theory and of law: it is a question not so much of describing an already completely determined object (in a more or less abstract way), but rather of taking that (certain previously existing materials) as a starting point and showing how they can be used to carry out this practice to achieve certain goals.

4) The globalization phenomenon clearly shows the growing juridification of our societies and how wrong it is to take an interpretation scheme of social reality in which law is made to play a subordinated role as a starting point. As we know, this is what happened with the classic Marxist scheme, in which law belonged to the superstructure and not to the social base (which is considered to have a determining role), and this is, very probably, a prejudice which remains active in the minds of many social scientists. The result is an undervaluing of the role of law, which implies risks of both a theoretical and a practical nature. Theoretical, because it is impossible to understand our societies, including the globalization phenomenon, if one lacks a certain type of legal education. Practical, because law is, at the very least, a premise for the achievement of the most essential values in social life; to not take legal aspects sufficiently into consideration implies seriously putting at risk the achievement of these values. It is, naturally, not a question of not knowing the social conditioning (which is particularly economic) of law. It is a matter of understanding that economic, legal, cultural, etc. elements constitute a complex unit in which a constant interaction takes

place. Thus, law –or certain legal instruments- has contributed to what we call the globalization of our societies but, at the same time, globalization is causing legal systems and the conception of law to change.

5) A consequence of this way of seeing things consists in recognizing the ambiguous role played by law in our societies: law is equally essential in processes of exploitation and in those of emancipation. The alternative to the so called "deregulation" is not simply the legal regulation of a certain kind of relationships (which are, in fact, regulated legally: by means of private law –contractual- schemes), but rather its legal regulation according to a certain kind of moral and political standards. In other words, we are, one could say, "condemned" to live in legal societies, but the law of our societies (and, as a result, society itself) can take many different forms.

6) And it is here where the concept of human rights, understood as a set of criteria which inspire legal practices, plays a fundamental role. Human rights are founded on morality, yet not on just any morality, but on one of universalistic nature. To deny that certain universal moral principles of an objective validity exist is, in my opinion, a serious error which has been made by a certain left wing school of thought, influenced perhaps by two circumstances. Firstly, because in Marxist tradition (a tradition set in motion by Marx himself) morality (and law) was considered to be a part of ideology, in such a way that moral truths could not be said to exist and neither could any "rational" discourse on morality consisting in anything other than the "unmasking" of its deceptive nature. Secondly, because the language of moral truths and of absolute moral values is the language of religion, of the churches: secular, enlightened and rationalist thought –it is believed- leads inevitably to relativism in moral scope.

7) The case of an author like Luigi Ferrajoli can be given as an example of this conception, which simply presents human rights as legal conventions, free of objectivity in moral scope. Ferrajoli should, moreover, be considered as one of today´s greatest jurists and one of the main supporters of "constitutionalization" of law in the world context. I here select some paragraphs from one of his most recent works:

> "The values they [fundamental rights] express can, in no way, be described as objective, and even less as natural. The axiological thesis according to which they should be shared is not admissible either (...) These principles are, in fact,

legal norms which, as such, must be observed, but do not require moral adherence or any kind of political or cultural con-division" [Ferrajoli 2008, p. 4]

"Fundamental rights, established as they have been by the historical experience of constitutionalism, are all –from the right to life to the right to fundamental freedoms, from civil rights to social rights- shaped as *laws of the weakest,* as an alternative to the law of the strongest which would rule in its absence (...)

By protecting the weak, even when it goes against the cultures which are dominant in their context, fundamental rights serve to protect all differences (...) In particular, they serve to protect women from fathers or husbands, minors from parents, they serve, in short, to protect the oppressed from their own oppressive cultures" (p. 6).

"In brief, they [fundamental rights] are heteronymous legal norms, which are universal because they are general and abstract like all norms; which, whether we like it or not, serve beyond the consensus which supports them; and they are established precisely because such a consensus can not be taken for granted, not even within our culture" (p. 7)

"The main adversaries of fundamental rights and, at the same time, of multiculturalism are, then, those who share an ethical-cognitive conception (of universality) of such rights: whether this conception is used to defend them or, on the contrary, to criticize them (...) It is clear that the moment that these rights are shaped as "truths" (according to a typical conception held by the Catholic Church) any form of protection, including war, is justified (...)

The basis or, rather, the reason and the premises for the existence of the legal provision of fundamental rights and, in general, of the constitutional paradigm are not here the idea of the moral unity of human kind, but the opposite (...) The legal convention on what is not lawful and on what one must do, is required, precisely, because of the fact that humanity is not united by the con-division of the same values but is, on the contrary, divided by the pluralism of its values and respective cultures" (p. 7).

Well then, I find a position like the one above surprisingly incoherent, once a couple of misunderstandings have been clarified. The first is that moral objectivism is not the same as moral absolutism. What the absolutist (like the Catholic Church) seeks is the existence of moral truths which go beyond rational discussion: absolute truths.

However, what the objectivist holds is that there are moral principles which seek to be of objective worth because they are the result of rational discourse and are, obviously, open to rational discussion. The other misunderstanding lies in the fact that it is one thing to hold that moral truths exist in the sense of absolute truths or even in the sense of "scientific truths", but it is another to claim that a rational discourse on the subject of morality is possible. Ferrajoli appears to have incorrectly identified both positions and this, I insist, explains his unsustainable position. Thus, when he maintains that fundamental rights are simply "legal norms which must be observed", wouldn´t it, perhaps, make sense to ask him why they must be observed? Could one accept –understand- an answer to this question which did not contain objective moral reasons? Again, when he states that fundamental rights have been shaped "by historical experience" like the law of the weakest, couldn´t one easily answer him by asking why we have to accept the criterion of historical experience? Isn´t it true to say that here he is again presupposing a moral objectivism, as he does when he resorts to other moral concepts like "the oppressed", "the oppressors", etc.? Finally, if fundamental rights are simply legal conventions then, why would they have a value beyond the consensus? Why would consensus (what else, after all, is a convention?) established by certain legal norms be valued above other types of consensus?

In short, law in the globalized world should be structured on the basis of certain (legal) principles of a universal nature. In their turn, these principles are based on a morality which is also universal. To separate, as Ferrajoli suggests, legal discourse from moral discourse in such a radical way is, it seems to me, a serious mistake, an error which moreover essentially damages left wing thinking, which is determined to transform the world in a more egalitarian way.

8) The situation of the globalized world is probably not sustainable in the medium or long term. It is by no means clear that our way of life (that of the inhabitants of rich countries or of many of them) is compatible with the preservation of life on earth. Neither is there any reason to believe that the present situation will last for ever, a situation in which a minority of individuals lives in affluence, while the majority (which includes nearly 80% of humanity) lacks its basic needs. However, in any case, and independently of whether or not it is possible to go on like this, what seems clear is that the situation is unjust. And it is unjust according to the criteria of justice accepted, if not by all, at least by a great deal of the inhabitants of the rich countries. How could

one consider just a world in which the opportunities offered to an individual depend, fundamentally, on such random circumstances as being born in one place or another, in one social, family group or another, etc.? Doesn´t this contradict the "universal" nature of human rights, no matter how one understands the term "universal"?

9) It is not exactly an easy task to take juridical-political institutions of constitutionalism (those institutions which came into being to implement the protection of human rights and to ensure a democratic exercise of power) into a world context. It is a moral necessity whose success (as is true of all moral tasks) is, by no means, assured. However, in any case, a precondition for success is to have clear ideas about the goals one aspires to, and about the means which are available. It may be true to say that the world is complex, but the solution to some of its problems (the theoretical solution) is relatively simple. If the greatest evil humanity suffers from is the profound economic inequality existing among its inhabitants then, the first thing to be done is to try to ensure a minimum income for everyone, that is, a basic universal income, which would be received independently of any geographic circumstances or any other kind of circumstance (including the level of wealth). The most obvious objection to this kind of approach ("basic income" has been a constant source of discussion for a couple of decades) is its lack of realism: where would one get the resources to do this? And the answer might be a universal tax which could, for example, share the characteristics of the so called "Tobin tax".

10) From the point of view of social structure (on a state, supra-state or infra-state level) four basic kinds of individuals, who could be denominated in the following way, can be found: the "sharp-unscrupulous" (to abbreviate: the "sharp"), the "idiots", the "pariahs" and the "civic". The first are those who manage to place themselves in an advantageous position, because they know how to take advantage of their opportunities and because they act without moral inhibitions. The second type, the "idiot", can belong to both the privileged and the underprivileged, but they are not aware of their position or prefer not to be. Apparently, in its original sense –in classic Greece- the "idiot" was the individual who took no interest in public things, in city matters, in the "polis". The "pariahs" are those who find themselves in a profoundly underprivileged position, not through any fault of their own, but rather, as a result of the combined acts of the "sharp" and the "idiots". Finally, the "civic", seek to achieve a society in which,

as far as possible, there are neither privileged nor underprivileged and, in order to do this, they set limits on the “sharp”, rouse the “idiots” and redeem the “pariahs”. So far, globalization has contributed to stirring up a great deal of passion among the “sharp”, and to considerably increasing the number of “idiots” (in rich countries) and the number of “pariahs” (in poor countries). What, however, is obvious, is that the world needs “civic” citizens. And law (not any law, but law imbued with constitutionalist values) is, probably, one of the most powerful instruments they possess to carry out the enormous task of *civilizing* the world.

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