ABSTRACT. This essay aims at laying the foundations for a general theory of fundamental rights. It starts out from a formal and structural definition of the concept of ‘fundamental right’, which is defined as a non-disposable, universal right. The author believes that this definition can be used as a starting point for the construction of a theory of constitutional democracy based on four main theses. 1) As fundamental rights are non-disposable and universal, they are structurally different from patrimonial rights, which are disposable and individual; 2) fundamental rights constitute the content of substantial democracy, i.e. the positive and negative limits set on the power exercisable by the majority that comprises formal democracy; 3) citizenship, which is still the precondition for holding many fundamental rights, is a regressive category because it is a source of inequality; 4) a distinction must be drawn between fundamental rights and the guarantees (duties and sanctions) put in place to protect them. Should a legal order make provision for fundamental rights but fail to accompany them with the necessary auarantees, the result is a gap that the legislator and the legal interpreter have a duty to bridge. The theory of constitutional democracy thus elaborated constitutes a profound change in classical (Kelsenian) legal positivism, which is no longer suitable for presenting the law of contemporary states governed by the rule of law, and calls for a more active, critical attitude towards law both by the judge and by legal science.

1. A FORMAL DEFINITION OF THE CONCEPT OF FUNDAMENTAL RIGHTS

I propose a theoretical, purely formal or structural, definition of ‘fundamental rights’: ‘fundamental rights’ are all those subjective rights to which ‘all’ human beings are universally entitled by virtue of having the status of persons, or of citizens, or of persons capable of acting; what is understood by ‘subjective right’ is any positive expectation (of services) or negative expectation (of non-infringement) ascribed to an actor by a legal norm, while ‘status’ is taken to mean the condition of an actor for which provision is also made by a positive legal norm as a precondition of his suitability to hold entitlement to legal situations and/or be the author of the acts that are their exercise.¹

¹ The arguments illustrated here are elaborated much more analytically in Chapter XI of my forthcoming book Principia Iuris. Teoria giuridica della democrazia On this topic see also my Diritto e ragione. Teoria del garantismo penale, Rome-Bari: Laterza
This definition is theoretical because, although it is stipulated in reference to the fundamental rights positively sanctioned by statutes and constitutions in contemporary democracies, it does not require that these rights be actually formulated in constitutions or in fundamental laws and even the fact that they be actually contained in norms of positive law. In other words, this is not a dogmatic definition, i.e. one formulated with reference to the norms of a concrete legal system, such as the Italian or the Spanish constitution, for example. On the basis of this definition, we shall proceed to say that those rights that are ascribed by a legal system to all physical persons by virtue of their being so, or by virtue of their being citizens or by virtue of their being capable of acting, are ‘fundamental’. But we shall also say, without in any way thereby questioning our definition’s validity, that a given legal system, for example a totalitarian one, is without fundamental rights. In short, the provision of such rights by the positive law of a given system is the condition of their existence or being in force in that system, but does not affect the meaning of the concept of fundamental rights. This meaning is affected even less by their inclusion in the text of a constitution, which is only a guarantee that they will be respected by the ordinary legislator: for example, the rights to a defence ascribed to the accused by the code of penal procedure – which is ordinary non-constitutional law – are fundamental.

Secondly, our definition is formal or structural, in the sense that it is irrespective of the nature of the interests and of the needs that are protected by their recognition as fundamental rights and is based solely on the universal character of their attribution; whereby ‘universal’ is understood in the purely logical and non-evaluative sense of the universal quantification of the class of actors who are entitled to it. As a matter of fact, personal freedom, the freedom of thought, political rights, social rights and so on are protected as universal and, thus, fundamental. But wherever those rights are alienable and, thus, virtually non-universal, such as would be the case

in a society that practises slavery or is based upon an entirely mercantile ethic, they would be neither universal, nor fundamental. On the contrary, if an absolutely futile right were set up as universal, such as the right to be greeted in public by everyone you know, or the right to smoke, it would be a fundamental right.

There are obvious advantages to such a definition. As it holds true irrespective of the factual circumstances, it will be valid for any legal system, regardless of the fundamental rights provided for or not provided for in it, including totalitarian and pre-modern legal systems. It therefore has the value of a definition belonging to the general theory of law. Moreover, as it is valid regardless of the goods or the values or the substantial needs that are protected by fundamental rights, it is ideologically neutral. It is therefore valid whatever legal or political philosophy is shared: legal positivism or the natural law theory, liberal or socialist and, even, illiberal and anti-democratic.

And yet this ‘formal’ character of our definition does nothing to reduce the fact that it is sufficient to identify the basis of juridical equality in fundamental rights. It is by virtue of this character that the universalism expressed by the universal quantification of the (types of) actors who are entitled to the rights in question takes the form of a structural connotation which, as we shall see, involves the inalienable and non-disposable character of their constituent substantial interests. The historical experience of constitutionalism teaches us that these interests coincide with the freedoms and the other needs on whose guarantee, conquered at the price of struggle and revolution, life itself, survival and the equality and dignity of human beings depend. But this guarantee is achieved by means of that self-same universal form that derives to them from their stipulation as fundamental rights in constitutional norms set above any decision-making power: if they belong normatively to ‘everyone’ (the members of a given class of actors), these rights are neither alienable nor negotiable, but correspond, as it were, to non-contingent, inalterable prerogatives of their holders and to as many absolute limits and restrictions on all forms of power, both public and private.

On the other hand, it is clear that this universalism is not absolute, but relative to the arguments with reference to which it is proclaimed. The ‘everyone’ whose equality these rights enable to be proclaimed is actually logically relative to the classes of actors who are normatively recognised to be entitled to them. If the intension of equality depends on the quantity and the quality of the interests protected as fundamental rights, it is therefore on the extension of these classes, i.e. on the suppression or reduction of the
differences of status that determines them, that the extension of equality and thus the degree of democracy in a given system depends.

These classes of actors have been identified, in our definition, by their status as determined by their identity as a ‘legal person’ and/or a ‘citizen’ and/or being ‘capable of acting’ (i.e. legally fully empowered to make legal decisions by and for themselves), categories which as we know have historically been the subject of the broadest possible variations and discriminations. As conditions of equal entitlement of all the (different types of) fundamental rights, ‘personality’, ‘citizenship’ and the ‘ability to act’ are thus the parameters of equality as of inequality en droits fondamentaux. This is demonstrated by the fact that their premises can be – and historically have been – more or less extensive: extremely restricted in the past, when the majority of human beings was excluded on the basis of gender, birth, property specifications, level of education or nationality, they have become gradually more extensive, although still without achieving universal extension to all human beings today, at least as far as citizenship and the ability to act are concerned.

Citizenship and the ability to act now remain the only differences of status that still restrict the equality of human beings. For this reason, they can be adopted as two parameters – the first of which can be overcome, the latter not – on which we can base two great divisions between fundamental rights: the one between personality rights and citizenship rights, to which respectively all people or only citizens are entitled, and the one between primary rights (or substantial rights) and secondary rights (instrumental rights or rights of autonomy), to which respectively all people or only those who are capable of acting are entitled. If we combine these two distinctions, we obtain four classes of rights: human rights, which are the primary rights of persons, to which all human beings are entitled without distinction, such as (according to the Italian Constitution) the right to life and the integrity of the human being, personal freedom, the freedom of conscience and of expression of thought, the right to health and to an education; public rights, which are those primary rights to which only citizens are entitled, such as (again according to the Italian Constitution) the right of residence and free circulation in the metropolitan territory, the right to hold meetings and form associations, the right to work and the right of those unable to work to receive assistance and insurance; civil rights, which are secondary rights ascribed to all human beings capable of acting, such as the power to negotiate, the freedom to enter into a contract, the freedom to choose and change job, the freedom of enterprise, the right to initiate legal proceedings and, in general, all those subjective rights in which private autonomy is manifest and on which the market is based; and
finally political rights, which are those secondary rights that are reserved only to those citizens who are capable of acting, such as the right to vote, the right to be a candidate for election, the right to hold public office and, in general, all those subjective rights in which political autonomy is manifest and on which representation and political democracy are based.3

Both our definition and the typology of fundamental rights operated on its basis have a theoretical value that is, however, totally independent of concrete legal systems and even of modern constitutional experience. Whichever legal system is taken into consideration, ‘fundamental rights’ – human, public, civil and political, according to the case – are all in fact on a par with those attributed to classes of actors determined by the identity of ‘person’, or of ‘citizen’, or of the ‘ability to act’ within that system. In this sense, at least in the West, fundamental rights have always existed, ever since Roman Law, although mostly restricted to rather limited classes of actors.4 But it has always been these three identities – person, citizen and ability to act – that, albeit amid the extraordinary variety of discriminations on the basis of gender, race, religion, property, class, education and nationality, have supplied the parameters of human beings’ inclusion or exclusion from entitlement to rights and, thus, their equality or inequality.

Thus we find that inequalities came to expression in classical times primarily in the form of the denial of many human beings’ status as persons (in the case of slaves, who in some legal systems were considered to be chattels) and only secondarily (with the various restrictions imposed on women, heretics, apostates and Jews) in the form of the denial of the ability to act or of citizenship. Subsequently, with the affirmation of the value of the human person, inequalities were only exceptionally defended by the device of denying the status of person and legal capacity – such as in the case of the slavery that still survived in the United States in the nineteenth century – but were maintained primarily by restricting the ability to act on the basis of gender, education and income: thus, even long after 1789,

---

3 There is another distinction quite unlike this one, which is based on the different types of actors to whom fundamental rights are attributed by positive law: this is the distinction between civil rights, political rights, rights of freedom and social rights, and is based on their structure: in addition to being negative expectations (of non-infringement), civil and political rights are powers to undertake acts of autonomy in the private sphere and in the political sphere respectively; rights of freedom and social rights, on the other hand, are only expectations, respectively negative (of non-infringement) and positive (of services). On these two distinctions, see my Dai diritti del cittadino ai diritti della persona, 272–276.

it was male, white, adult, property-owning citizens who were *optimo iure* actors. Now that the ability to act has been extended to everyone, with the sole exceptions of minors and of the mentally infirm, inequality is expressed essentially in the statalist form of citizenship, whose definition on the basis of belonging to a nation and a territory comprises the last great normative restriction of the principle of juridical equality. Apart from the guarantees listed in codes and constitutions, what has changed with the progress of law, then, is not the criteria – personality, ability to act and citizenship – on the basis of which entitlement to fundamental rights arises, but solely their meaning, at first restrictive and strongly discriminatory, then increasingly extensive and tendentially universal.

2. **FOUR THESIS ABOUT FUNDAMENTAL RIGHTS**

The definition of ‘fundamental rights’ proposed here is capable of founding four theses, all in my opinion essential to a theory of constitutional democracy.

The first of these theses concerns the radical structural difference between fundamental rights and property rights, as the former are pertinent to entire classes of actors, while the latter are pertinent each to its title holder, to the exclusion of everyone else. This difference has been concealed, in our legal tradition, by the use of a sole term – ‘subjective right’ – to designate subjective situations that are heterogeneous and in certain ways opposite; inclusive rights and exclusive rights, universal rights and singular rights, non-disposable rights and disposable rights. And this is explained by the different theoretical derivations of the two categories of rights: the natural law and contractualist philosophy of the eighteenth and nineteenth centuries for fundamental rights and the civil and Roman law tradition with regard to property rights.

The second thesis states that as fundamental rights correspond to the interests and expectations of everyone, they form the foundation and the parameter of legal equality and thus of what I shall call the ‘substantial’ dimension of democracy, prejudicial with respect to its political or ‘formal’ dimension, which, on the other hand, is based on the powers of the majority. This dimension is none other than the set of guarantees ensured by the paradigm of the rule of law, which, having being modelled at the

---

5 In Italy, the full ability to act – and as a consequence the full enjoyment of secondary rights, both civil and political – was only conceded to women in the twentieth century: in 1919, when the suppression of the authority of the husband gave women full entitlement to civil rights; and in 1946, when they were accorded the right to vote, together with other political rights.
beginning of the modern state on the protection of the rights of freedom and property only, has plenty of scope for extension – after constitutional recognition that such vital expectations as health, education and assistance are ‘rights’ – to include the ‘welfare state’, which developed de facto during the twentieth century without the forms and the guarantees of the rule of law, but only with those forms and guarantees that derive from political mediation, one of the reasons why it is now in a critical condition.

The third thesis concerns the current supranational character of many fundamental rights. We have seen how our definition supplies the criteria of a typology of such rights within which the ‘rights of citizenship’ are no more than a sub-class. Many of these rights are actually conferred by states’ constitutions, regardless of citizenship. Above all, now that they have been formulated in international conventions that have been transposed into state constitutions or in any case signed by states, they have become supra-state rights: this means that they are now external and no longer just internal restrictions to the public powers and normative bases of an international democracy that is still far from being achieved in practice, but for which normative provision is made by them.

Finally, the fourth and maybe most important thesis concerns the relationships between rights and their safeguards or guarantees. Not unlike other rights, fundamental rights consist of negative or positive expectations to which duties (of services) or prohibitions (of infringement) correspond. I agree with calling these and these prohibitions primary guarantees, while secondary guarantees are obligations to repair or sanction juridically the infringement of rights, i.e. violations of the primary guarantees. But both the duties and prohibitions of the first type and the duties of the second type, while logically implied by the normative status of rights, are often actually not only violated, but also sometimes not even established by legal norms. In opposition to the thesis of the confusion between rights and their guarantees, which means denying the existence of the former in the absence of the latter, I shall maintain the thesis of their distinction, which holds that the absence of relative guarantees is tantamount to a failure on the part of positively stipulated rights to perform and thus consists of a legal gap, which it is the legislator’s duty to remedy.

Each in its own way, these four theses contradict the current conception of fundamental rights, as its many heterogeneous contributions and derivations demonstrate. It may be useful, for this reason, to cite four classical sources where the theses to be countered here are argued.

The first piece is Chapter II of John Locke’s Second Treatise of Government, 1690, where Locke identifies the three fundamental rights whose protection and guarantee justify the social contract as life, freedom
and property: the association between freedom and property was to be repeated by article 2 of the 1789 Declaration of the Rights of Man and of the Citizen: “The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression”.

The second piece is by the nineteenth-century German public law theorist Karl von Gerber who, in an 1852 monograph about ‘public rights’, stated that they are none other than a series of effects of public law, rooted not so much in the legal sphere of the individual, as in the abstract existence of the law: precisely, they are organic constituent elements of a concrete state and thus, from the point of view of individuals, reflected effects of the power of the state. This thesis was to be repeated by late nineteenth-century public law theory as a whole – from Laband to Jellinek, from Santi Romano to Vittorio Emanuele Orlando – contradicting not only the natural law theory paradigm of fundamental rights as a logical, axiological *prima a se*, underlying rather than underlain, with respect to the artifice of the

---


7 K.F. Gerber, *Über öffentliche Rechte*, (1852), Italian translation by P.L. Lucchini, *Sui diritti pubblici*, in *Diritto pubblico*, Milan: Giuffrè 1971, 67, 82. Gerber, who does not accept the concept of ‘citizen’, because it is exclusively political and not at all legal, clarifies that the position of a subject is that of one who is dominated by the state and is characterised perfectly by this concept (ivi, 65–66), such that the general meaning of those so-called rights of the citizen (political freedoms) can only be found in something negative, i.e. in the fact that the state, in its domination and subjection of the individual, remain within its natural limits, leaving that part of the human person that cannot be subjected to the coercive action of the general will according to the ideas of Germanic public life free and outside its sphere of influence (ivi, 67). He then goes on to say that all public rights have their foundations, their contents and their aims in the organism of the state, where the national will must be achieved in its tendency to bring about the life of the community (ivi, 43).


9 Georg Jellinek talks about the state’s ‘self-obligation’ (Das System der subjektiven öffentlichen Rechte, (1892), Italian translation by G. Vitagliano, *Sistema dei diritti pubblici soggettivi*, Milan: Società Editrice Libraria 1912, 215ff). Similarly, Santi Romano talks about the state’s ‘self-limitation’, *La teoria dei diritti pubblici soggettivi*, in *Primo trattato di diritto amministrativo italiano*, edited by V.E. Orlando, Milan: Società Editrice Libraria 1900, vol. I, 159–163. Jellinek expresses the subjection of the citizen’s public rights to the general interest saying that individual interests are distinguished between interests consisting primarily of individual aims and interests consisting primarily of general aims. That individual interest that is primarily recognised as the general interest constitutes the content of public law (58); and that any public law exists in the general interest, which is identified with the interest of the state (ivi, 78).
state, but also the constitutional paradigm which, while positivising rights, drew them up in the form of restrictions and limitations to the set of public powers, underlying their legitimacy and not themselves legitimated by them.

The third piece is neither by a lawyer, nor a philosopher, but a sociologist, Thomas Marshall, whose classical 1950 essay *Citizenship and Social Class*, rediscovered in recent years by the science of politology as the most accredited doctrine of fundamental rights, draws a distinction within the set of fundamental rights between three classes: civil rights, political rights and social rights, all conceived as rights not of the person or the personality, but of the citizen or citizenship. Citizenship is a status that is conferred upon those who are fully entitled members of a community, says Marshall, adding that what is conferred by that status are the rights and duties on which the equality of all those who possess it are based.\(^\text{10}\)

The fourth piece is by Hans Kelsen, who describes a subjective right as a simple reflection of a legal duty.\(^\text{11}\) and states that having a right means having the legal capability to take part in creating an individual norm, that individual norm by virtue of which a sanction is ordered against an individual who – according to the decision of the court – has committed an illicit act, has violated his duty.\(^\text{12}\) This is a thesis, which enjoys widespread popularity today, that takes the form of identifying fundamental rights with their guarantees and, in particular, with the ones that I have dubbed their ‘secondary guarantees’, i.e. with the possibility they offer of bringing a court action: “a right that is formally recognised but not justiciable – i.e. not enforced or enforceable by the judiciary using defined procedures – is tout court a non-existent right,” states Danilo Zolo, for example.\(^\text{13}\)

I shall therefore develop my four theses by starting out from a critical analysis of these four pieces. On this basis, it will be possible to demonstrate how the constitutionalisation of fundamental rights practised


\(^{11}\) H. Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967), 127–128: “The concept of a right which is only the reflection of a legal obligation – the concept of a “reflex right” – may facilitate, as an auxiliary concept, the description of the legal situation; but from the point of view of a scientifically precise description of the legal situation, it is superfluous”; *ibidem*: “If one designates as “right” the relationship of one individual toward whom another individual is obligated to a certain behavior, then this right is merely a reflection of this obligation” *Id., General Theory of Law and State*, New York, Russel & Russel, 1945, 81: “The legal right is, in short, the law”. This thesis evidently echoes Gerber’s on the nature of fundamental rights as “reflected rights”.


\(^{13}\) D. Zolo, *La strategia della cittadinanza*, in *La cittadinanza*, 33, where this thesis is supported by citing “the perspective of legal realism, from Roscoe Pound to Karl Olivecrona, to Alf Ross”.

in rigid constitutions acted in the twentieth century to produce a profound change in paradigm of positive law with respect to the classical model of paleo-legal positivism.

3. FUNDAMENTAL RIGHTS AND PROPERTY RIGHTS

Let us start with the first of the four questions posed here. What are fundamental rights? Life, liberty and property, answers Locke in the piece quoted above; liberty, property, security and resistance to oppression, states Article 2 of the 1789 Declaration, which repeats the ‘sacred and inviolable’ nature of property in Article 17. Similarly, although he expanded the catalogue of fundamental rights, Marshall included both freedom and property in the same class, that of civil rights.14

This admixture in one and same category of such mutually heterogeneous figures as the rights of freedom on the one hand and the right of property on the other, the result of the juxtaposition of the doctrines of the natural law theory and of the Roman Civil Law tradition, is thus an original operation carried out by early liberalism, which has conditioned the entire theory of rights and, with it, of the rule of law to this very day. It is based on a misunderstanding, deriving from the multiple meanings of the term ‘right of property’, which is used – in Locke as in Marshall – to indicate the right to become an owner and to dispose of one’s own property rights, which is one aspect of the legal capacity and of the ability to act that can certainly be traced back to the class of civil rights, and at the same time the concrete right of property of this or that good. Clearly, in addition to being the source of a serious theoretical misunderstanding, this confusion has been responsible for two contrasting incomprehensions and of two consequent political operations: the valorisation in liberal thought of property as a right of the same type as liberty and, on the contrary, the devalorisation in Marxist thought of liberties, because they were thought to be discredited as ‘bourgeois’ rights, on a par with property.

If we now subject these two figures – ‘liberty’ and ‘property’, or more generally ‘fundamental rights’ and ‘property rights’ – to analysis, we find that they are separated by no less than four structural differences, of the kind that generate a great divide within the dominion of rights, if we want to continue using one and the same word to designate such different situations: the great divide between fundamental rights and property rights. The contents of the two classes of rights do not affect these four differences, which only concern their form or structure. The first difference

consists of the fact that fundamental rights – rights of freedom, such as the right to life, civil rights, including the right to acquire and dispose of goods of property and also political and social rights – are ‘universal’ rights (omnia), in the logical sense of the universal quantification of the class of actors that are entitled to them; whereas property rights – from the right to own property to other real rights and rights of credit – are singular rights (singuli), in the equally logical sense that for each of them there is a given title-holder (or several who hold title together, as in shared property), to the exclusion of everyone else. The former are thus attributed to all those who are entitled to the same measure and degree, while the latter belong each in a different manner, in terms of both quantity and quality. The former are inclusive and form the basis of juridical equality which, as Article 1 of the 1789 Declaration states, is a matter of men being ‘equal in rights’. The others are exclusive, i.e. excludendi alios, and thus form the basis of juridical inequality, which is also a matter of men being ‘unequal in rights’. We are all equally free to express our thought, equally immune from arbitrary arrest, equally free to dispose of our property and equally entitled to health and an education. But each of us is the owner or the creditor of different things and to a differing extent: I own the clothing I am wearing or the house where I live, which are different objects from those worn or occupied and thus owned by others and not by me.

This solves several cases of apparent aporia. When the ‘right of property’ is spoken of as a ‘right of citizenship’ or a ‘civil right’, on a par with the rights of freedom, there is an indirect allusion to the right to become an owner connected (on a par with the right to become a debtor, or a creditor, or an entrepreneur, or an employee) with legal ability, i.e. with the right to dispose of goods of property, which constitutes (on a par with the right to dispose of a credit or to undertake the obligation to provide a service) the ability to act of a fully empowered normal adult: i.e. civil rights that are certainly fundamental, because everyone is entitled to them, in the first case as human beings and in the second because of the ability to act, i.e. fully manage one’s legal affairs. But these rights are completely different from real rights (iura in rem) over certain goods that have been acquired or alienated by virtue of them, just as the right of credit of a reimbursement of damage concretely suffered is different from the fundamental right of immunity against infringements practised by others. On the other hand, if we assume that all universal rights, i.e. the ones to which everyone is entitled as persons or citizens, are fundamental, then these also include social rights, whose universalism is not ruled out, as for example Jack Barbalet and Danilo Zolo argue, by the fact that the concrete services that each individual is entitled to claim, according to his economic conditions,
by virtue of them are inevitably different and have a given content; also the thoughts that each individual expresses by virtue of the freedom to express thought will inevitably be different.

The second difference between fundamental rights and property rights is related to the first and is possibly even more significant. Fundamental rights are non-disposable, inalienable, inviolable, non-compromisable and highly personal rights. Property rights, on the other hand, are disposable by their very nature – from private property to rights of credit – negotiable and alienable. The one can be accumulated, the other remains unchanged. It is impossible to become juridically freer, while it is possible to become juridically richer. As their object consists of a property good, property rights are bought, exchanged and sold. Freedoms, on the other hand, are neither exchanged nor accumulated. The one is altered and maybe extinguished by its use, the other remains unchanged, whatever use is made of it. A property good is consumed, sold, bartered or rented out. But the right to life, or the rights to personal integrity or civil or political rights, cannot be consumed or sold.

The non-disposability of fundamental rights is therefore tantamount to their removal from the sphere of political decisions and from the market. By virtue of their active non-disposability, they cannot be alienated by the actor who holds them: I cannot sell my personal freedom, or my right to vote, nor even less my contractual autonomy. By virtue of their passive non-disposability, they cannot be expropriated or limited by other actors, starting with the state: no majority, no matter how overwhelming, may deprive me of my life, of my freedom or of my autonomy. This is evidently a difference related to the former, i.e. to the singular nature of property rights and the universal nature of fundamental rights. Property rights are singular because they may be the object of exchange in the sphere of the market as well as – for example in the Italian legal system by virtue of Article 42, section 3 of the Constitution – of expropriation in the public interest. Fundamental rights, however, are universal because they are excluded from this sphere as nobody can divest himself of them,

---

16 Of these two forms of non-disposability of fundamental rights – the one that is expressed by their inviolability by the public powers and the one that is expressed by their inalienability between private individuals – while Locke maintains the former and refutes the latter in part (*Second Treatise*, §§149 and 85), Rousseau maintains the latter and refutes the former (*Du contrat social*, (1762), Paris: Flammarion 1996, liv. 1, 4, ch. VI and IX, 46, 50–52 and 56 and liv. II, §§4–5, 67–73).
be deprived of them or suffer their reduction without them thereby ceasing to be equal or universal and, thus, fundamental.

This argument validates our formal notion of fundamental rights: life, personal freedom and the right to vote are fundamental not so much because they correspond to vital values or interests, but because they are universal and non-disposable. So much so that, were it possible to dispose of them – for example by permitting slavery, or in any case the possibility of alienating freedom, or maybe even life itself, or the vote – they would also be (degraded to the status of) patrimonial rights. For this reason, in an apparent paradox, fundamental rights act as a restriction not only on public powers, but also on the autonomy of their holders: nobody can alienate his own life or his own freedom, not even voluntarily. This restriction, however paternalistic,17 is logically insuperable: the paradox would actually arise if it were to disappear and fundamental rights were alienable. Because, in that case, even the freedom to alienate one’s own freedom to alienate would be alienable, with a double result: that all fundamental rights would no longer be universal, i.e. attributed to everyone in equal form and degree; and that the freedom to alienate all one’s own rights – from the right to life to civil and political rights – would bring the survival of the fittest, the end of all freedoms and of the market itself and, ultimately, the denial of the law and regression to the state of nature.

The third difference is in turn a consequence of the second and concerns the legal structure of rights. As we have just seen, property rights can be disposed of. Contrary to fundamental rights, they are therefore subject to vicissitudes, i.e. destined to be constituted, modified or extinguished by legal acts. This means that they spring from acts of negotiation or in any case from singular provisions: contracts, donations, wills, judicial decisions and administrative provisions, which produce, modify or extinguish them. Fundamental rights, on the contrary, spring immediately from the law, in the sense that they are all ex lege, i.e. conferred directly by general rules whose rank is usually constitutional.

To put it more simply, while fundamental rights are norms, property rights are predisposed by norms. The former identify with the general norms or rules that attribute them: the freedom of speech, for example, is guaranteed in Italy by Article 21 of the Constitution and is no more and

---

17 Cf. M. Jori, La cicala e la formica, in Le ragioni del garantismo. Discutendo con Luigi Ferrajoli, edited by L. Gianformaggio, Turin: Giappichelli 1993, 111–112, who describes as ‘exceptional, and thus to be justified case by case’ the paternalistic restrictions expressed by non-disposability, which is actually a general principle that is logically valid for all fundamental rights.
no less than the norm expressed by it. The latter, however, are always singular situations, called into being by acts that are in their turn singular and predisposed by norms that provide for them as their effects: the property of this clothing of mine, for example, is not called into being, but predisposed by the norms of civil legislation as the effect that is called into being by the act of buying and selling, as disciplined by the rules of private law. We can use the expression *thetic norms* to describe the norms of the first type, which immediately call into being the situations expressed by them: they include not only the norms that ascribe fundamental rights, but also those that impose obligations or prohibitions, such as the norms in penal legislation or the ones governing road signs. I shall use *hypothetical* norms, on the other hand, to describe norms of the second type, which neither ascribe nor impose anything immediately, but simply predispose legal situations as effects of the acts for which they make provision: these include not only the norms of the civil code that predispose property rights, but also the ones that predispose civil obligations as the effects of acts of negotiation or contracting. The former express the nomostatic dimension of the legal system; the latter belong to its nomodynamic dimension. As a matter of fact, while property rights always consist of situations of power whose exercise comprises acts of disposition that in turn produce rights and duties in one’s own or third party juridical spheres (contracts, wills, donations and suchlike), the exercise of rights of freedom always consists of mere behaviour, as they are bereft of legal effects in the sphere of other actors.

Finally, there is the fourth difference, which is also formal and no less important for understanding the structure of the constitutional state based on the rule of law. While property rights are as it were *horizontal*, fundamental rights are as it were *vertical*. In two senses. Firstly, in the sense that the juridical relationships entered into by holders of property rights are intersubjective relationships of a civil nature – contracts, succession or suchlike – while the relationships entered into by holders of fundamental rights are relationships of a public law nature, i.e. of the individual (alone or among others) *vis-à-vis* the state. Secondly – and above all – in the sense that while property rights correspond either to the generic prohibition of infringement in the case of real rights, or debt obligations in the case of personal rights, fundamental rights, where they are expressed by constitutional norms, correspond to prohibitions and duties incumbent on the state, whose violation will render laws and other public provisions invalid.

---

18 An express distinction between ‘fundamental rights’ and ‘norms about fundamental rights’ is drawn, however, *inter alia* by R. Alexy, *Theoria de los derechos fundamentales*, 47ff.
while compliance, on the contrary, is a condition of the legitimacy of the public powers. “The declaration of rights contains the legislators’ duties,” states Article I of the ‘duties’ section of the French Constitution adopted in Year III. And it is precisely in this set of obligations, of restrictions and limitations set up to protect fundamental rights, that we find the public sphere of the constitutional state based on the rule of law – as opposed to the private sphere of property relationships – the one that I started out by calling the ‘substantial’ dimension of democracy.

4. FUNDAMENTAL RIGHTS AND SUBSTANTIAL DEMOCRACY

This brings me to the second thesis I intend to develop here. How do fundamental rights express the dimension of democracy that I have called ‘substantial’, in opposition to the ‘political’ or ‘formal’ one? And how do they incorporate values that are prejudicial to and more important than those of political democracy? To what extent, then, are Gerber’s thesis, which qualifies them as ‘reflective effects’, and those of Jellinek and Santi Romano, who consider them to be the product of a self-obligation or a self-limitation on the part of the state, i.e. subjective concessions that can always be revoked or limited, the fruit of a misunderstanding of them, which is in practice tantamount to their denial as constitutional restrictions on the public powers?

Although the answer to these question concerns the contents of fundamental rights, i.e. the nature of the needs protected by them, it is to a considerable extent consequent upon the preceding analysis of their structural characters: universality, equality, non-disposability, their conferment ex lege and their usually constitutional rank, which thus sets them on a higher plane than the public powers as parameters of the validity of their activities.

It is by virtue of these very characteristics that fundamental rights take the shape – unlike other rights – of as many normatively imposed substantial restrictions, safeguarding the interests and needs of everyone stipulated as vital, or ‘fundamental’ (life, freedom, survival), both on the decisions of the majority and on the free market. In other words, the universal, inalienable, non-disposable and constitutional form of these rights turns out to be the technique – or the guarantee – applied to protect what is considered to be ‘fundamental’ by the constitutional pact: i.e. those substantial needs whose satisfaction depends on civil cohabitation and is at one and the same time the cause or the social reason for that artifice that is the state. If the question “what are fundamental rights?” can be answered a priori on the plane of their form, listing the structural characteristics I illustrated
above, on the plane of their contents – i.e. of which goods are or should be protected as fundamental – it can only be answered *a posteriori*: so whenever we want to guarantee a need or an interest as fundamental, we remove it both from the market and from the decision-making power of the majority. We have stated that no contract may dispose of a life. No political majority may dispose of freedoms and of the other fundamental rights, nor can it decide that a person be condemned without proof, or deprived of personal freedom, or of civil or political rights or, again, left to die without care or in poverty and need.

Hence the ‘substantial’ connotation given by fundamental rights to the rule of law and constitutional democracy. Those norms that ascribe – beyond and maybe against the contingent will of the majorities – fundamental rights, whether those of freedoms that impose prohibitions or social rights that impose obligations on the legislator, are actually ‘substantial’, i.e. relative not to the ‘form’ (to the who and to the how), but to the ‘substance’ or the ‘content’ (to the what) of decisions (i.e. to what it is illicit to decide or not decide). This refutes the contemporary conception of democracy as a political system based on a series of rules that ensure the omnipotence of the majority. If the rules that govern representation and the principle of majority are formal norms with regard to what the majority *can decide*, then fundamental rights circumscribe what we can call the *sphere of the undecidable*: of the positive undecidable, i.e. of the prohibitions that correspond to the rights of freedom, and of the negative undecidable, i.e. of the public obligations corresponding to social rights.

This identification of the paradigm of the ‘rule of law’ with the ‘substantial’ dimension of democracy may certainly appear to be unusual, at least because of the multiple ideological uses that have devalued the expression ‘substantial democracy’ in the past. And yet it is by virtue of the substance of the decisions involved with the obligations and the prohibitions imposed on legislation by the fundamental rights stipulated in the norms governing their production that we can therefore call them ‘substantial’ (for example, the ones contained in the first part of the Italian Constitution): unlike the ones that I have dubbed ‘formal’ (those contained in the second part), which dictate the conditions of their being in force, these norms establish the conditions of their own validity. While, in the democratic state governed by the rule of law, *formal norms* about being in force identify with the rules of *formal or political democracy*, because these discipline the *forms* of the decisions that ensure the expression of

---

19 A criticism of my use of ‘substantial democracy’ and of the equivalence I have instituted between the substantial dimension of democracy and guarantism has been expressed by M. Bovero, *La filosofia politica di Ferrajoli*, in *Le ragioni del garantismo*, 403–406.
the majority’s will, *substantial norms* governing validity correspond to the
rules with which we can characterise substantial democracy by restricting
the *substance* (the meaning) of the same decisions to the respect for funda-
mental rights and the other axiological principles established in them, on
pain of invalidity.

The paradigm of constitutional democracy is none other than the
subjection of law to the law generated by this dissociation between being
in force and validity of the law, between mere legality and strict legality,
between form and substance, between formal legitimation and substantial
legitimation or, if you prefer, between ‘formal rationality’ and ‘material
rationality’. The acknowledgement of this disassociation undermines what
Letizia Gianformaggio has called the ‘presumption of regularity of the acts
executed by the power’ in positive legal systems, all the more so if they
are politically democratic, as the formal principle of political democracy
in relation to who decides what and how it is decided – in other words
the principle of popular sovereignty and the rule of the majority – is
subordinate to the substantial principles expressed by fundamental rights
and relative to what it is illicit to decide and what it is illicit not to decide.

The fundamental rights enshrined in constitutions – from the rights
of freedom to social rights – thus operate as sources of invalidation and
delegitimation, as well as of legitimation. This is why their configuration
as ‘organic elements of the state’ and ‘reflected effects’ of the power of
the state in the piece by Gerber quoted here, and more generally in the
doctrine of public rights elaborated by German and Italian public law
theories in the nineteenth century, overturns their meaning and expresses
a profound incomprehension of constitutionalism and of the model of the
constitutional state based on the rule of law. Because it is true that these
rights exist as situations of positive law by virtue of being enshrined in the
constitutions. But this is the very reason why they are not a self-imposed
restriction that the sovereign power can revoke at its whim, but on the
contrary a system of limits and restrictions of a system higher even than
the sovereign power; not, therefore, ‘rights of the state’, or ‘for the state’
or ‘in the interests of the state’, as Gerber and Jellinek wrote, but rights
towards and, if necessary, against the state, i.e. against the public powers,
even if they be democratic or an expression of the majority. In addition,
the fact that fundamental rights, as we have seen in the previous para-
graph, are not predisposed by norms as effects of singular preceptive acts,
but are themselves norms, reflects back on the nature of the relationship
between actors and the constitution. It follows that all the actors to whom

---

20 L. Gianformaggio, *Diritto e ragione tra essere e dover essere*, in *Le ragioni del
garantismo*, 28.
fundamental rights are ascribed by these norms, i.e. the substantial part of the constitution, are as it were ‘entitled’, as well as subject, to them. Hence the impossibility for the majority to amend them. In principle, those norms are equipped with absolute rigidity because they are none other than the fundamental rights that have been established as inviolable, so that all and every one of us are entitled to them.

Seen from this standpoint, we can say that the paradigm of constitutional democracy is the offspring of contractualist philosophy. In two senses. In the sense that constitutions are none other than social contracts in a positive written form: pacts that underlie the civil cohabitation, generated historically by the revolutionary movements that have from time to time been the vehicle for imposing them on the otherwise absolute public powers, as sources of their legitimacy. And in the sense that the idea of the social contract is a metaphor of democracy: of political democracy, since it alludes to the consent of the contracting parties and is therefore a means of establishing, for the first time in history, a legitimation of the political power that moves from the bottom upwards, rather than from the top downwards; but also a metaphor of substantial democracy, as this contract is no empty agreement, but has as its clauses and at the same time as cause and reason precisely the protection of fundamental rights, whose violation by the sovereign legitimates the breakdown of the pact and the exercise of the right of resistance.21

This reveals the theoretical genealogy of fundamental rights to be quite different from the Civil or Roman Law derivation of property rights. While it is true that fundamental rights are none other than the contents of the constituent pact, Thomas Hobbes, the theorist of absolutism, must be recognised as the inventor of their paradigm. This paradigm is the one expressed by the right to life as an inviolable right of everyone, on whose protection depends the justification of the retirement of the bellum omnium of the state of nature and the construction of “that great Leviathan called a Commonwealth, or State, in Latin, Civitas, which is but an artificial man; though of greater stature and strength than the natural, for whose protection and defence it was intended.”22 With Hobbes, then, we have the construction of the state as a public sphere established to guarantee peace and, at the same time, fundamental rights.

---

This public sphere and this rôle of guarantor vested in the state, which Hobbes restricted to protecting only the right to life, then proceeded to broaden as history advanced, expanding to encompass other rights as they gained acceptance from time to time as fundamental: to civil rights and the rights of freedom, as a consequence of the thought of the Enlightenment and of the liberal revolutions that gave birth to the first declarations of rights and constitutions in the eighteenth century; then to the political rights that gained acceptance as suffrage and political ability gradually expanded; then again to the right to strike and the social rights enshrined in the constitutions of the twentieth century and on to the new rights to peace, to a clean environment and to information that are now claimed and have not yet all found their way into constitutions. All the while, fundamental rights take the form of laws of the weakest as an alternative to the laws of the strongest that used to and would hold sway in their absence.

The history of constitutionalism is the history of this progressive expansion of the public sphere of rights.\textsuperscript{23} It is not theoretical, but social and political history, considering that none of these rights has ever fallen from the sky but they have all been won by means of breaks with the institutions: the great American and French revolutions, the nineteenth-century risings that clamoured for constitutions and more lately the working class, feminist, pacifist and environmentalist struggles of the twentieth century. We can say that all the different generations of rights correspond to generations of revolutionary movements: from the liberal revolutions against royal absolutism in past centuries, to the constitutions of the twentieth century, including Italy’s 1948 Constitution, born from the Resistance and from the repudiation of Fascism as the underlying pact of constitutional democracy. This history also includes the extension – albeit as an embryo – of the constitutionalistic paradigm to international law. With the institution of the United Nations Organisation and the international human rights conventions, the history of international relations has also produced a sea change: away from that international \textit{ancien régime} that was born three centuries ago with the Peace of Westphalia, which was based on the principle of the absolute sovereignty of the state and was finally driven into bankruptcy by the tragedy of the two World Wars.

This internationalisation of fundamental rights is the third thesis mentioned at the outset on which I intend to dwell now. Since the creation of the UNO and by virtue of the approval of international charters and conventions on human rights, these rights have progressed from being ‘fundamental’ only within those states whose constitutions make express mention of them to the status of supra-state rights to which the states are bound and subordinated, also in terms of international law: no longer rights of citizenship, but rights of people, regardless of their various citizenships.

And yet this very change risks being misunderstood by a significant portion of today’s political philosophy. Two years after the Universal Declaration of Human Rights, Thomas Marshall, in the essay already mentioned here, *Citizenship and Social Class*, reduced the whole varied array of fundamental rights, which he distinguished into the three classes of civil rights, political rights and social rights, into a question of citizenship, dubbing them all citizenship rights, without distinction. A similar thesis, which contradicts all the modern constitutions – not only the 1948 Universal Declaration, but also the majority of national constitutions that confer almost all these rights on ‘persons’ and not only on ‘citizens’ – has been relaunched in recent years, just as our wealthy countries and our rich citizens have started feeling threatened by the phenomenon of mass immigration. As soon as the question of taking fundamental rights seriously arose, their universalism was promptly denied, subjecting the entire catalogue to the status of citizenship, regardless of the fact that almost all of them, except political rights and some social rights, are attributed by positive law – whether on the level of the state or internationally – not to citizens alone, but to all persons.

Underlying this operation is a deformation of the concept of ‘citizenship’, which Marshall understands to be not a specific subjective status in addition to that of ‘personality’, but the premise for all fundamental rights, including those of the person, starting from the ‘civil rights’ to which, in all evolved legal systems, actors are not entitled because they are citizens – despite the name – but only because they are persons. Citizenship thus takes over from equality as the basic category of the theory of justice and

---

24 If we look through the long *Saggio bibliografico* (bibliography) by Francesco Paolo Vertova, in *La Cittadinanza*, 325–333, we find that very few books on citizenship were published before the end of the eighties.

25 Article 7 of Napoleon’s *Code Civil*, reproduced by many other European civil codes, establishes: “L’exercice des droits civils est indépendant de la qualité de citoyen.” For a more analytical critique of Marshall’s theses, see Dai diritti del cittadino ai diritti della persona.
democracy. For Marshall, this replacement and the anchorage of the entire set of fundamental rights to citizenship were possibly dictated by the idea of supplying welfare policies with a more solid foundation. His aim – and this is unquestionably the progressive aspect – was to use this category to offer a theoretical basis to social rights, with a view to overcoming the old liberal-democratic models with the social democratic approach that was beginning to gain ground in the advanced capitalist countries at that time. On the one hand, then, the category of equality was abandoned at the very moment when the quality of the person and the universal entitlement to rights of all the human beings on the planet had been solemnly acknowledged, not only by the new state constitutions drawn up after the war, but also in the 1948 Universal Declaration. But, on the other hand, assuming social rights as rights that are equally binding and as inviolable and irrenunciable as the classical rights of freedom has the effect of furnishing the quality of democracy with a greater depth. But then, in Marshall’s day, the processes of globalisation and world integration and the phenomena of migration had not yet reached the point where a strident contradiction arises between the rights of man and the rights of the citizen.

Fifty years after Marshall’s essay, the reasoning behind this operation is more difficult to understand. On the one hand, as we have seen, many of today’s theorists of citizenship have gone so far as to deny or at least question whether social rights are actually ‘rights’ – and thus to abandon the idea of a welfare state governed by the rule of law and based on rights rather than the discretionary powers of the government apparatus – as soon the welfare state reached a crisis of efficiency and of legality that was judged to be irreversible. On the other hand, as we are now faced with the parallel crisis of the nation state and of state sovereignty, to which citizenship is connected, it would appear to be less legitimate to accord fundamental rights in statalist terms. The sovereignty of even the strongest countries has been dislocated, together with the restrictions imposed on them by the stipulation of rights at supra-national level. At the same time, the increase in interdependence and contemporaneously of inequalities between rich countries and poor countries, together with the phenomena of migration and globalisation, warn us that we are approaching a degree of world integration in which the choice of whether it will develop in oppression and violence or in democracy and equality will depend on law, among other things.

In such conditions, the category of citizenship runs the risk of being borrowed for the purpose of founding not so much a theory of democracy based on the expansion of rights, as a regressive and in the long term illusory idea of democracy in a single country, or at least in our
wealthy western countries, at the cost of non-democracy in the rest of the world.\textsuperscript{26} With the result of definitively disqualifying fundamental rights and our very model of democracy, whose credibility is totally bound to their proclaimed universalism. As we know very well, these rights have always only been universal on paper: although \textit{de jure} they have always been rights of the person, ever since the French Declaration in 1789, \textit{de facto} they have always been rights of the citizen. And the reason for is that, in actual terms, at the time of the French Revolution and then throughout the nineteenth and the first half of the twentieth centuries, right up to the 1948 Universal Declaration and to the years when Marshall was writing, the dissociation between ‘person’ and ‘citizen’ caused no problem, as our countries were not threatened by the pressures of migration. But it would be a very sad failure of our models of democracy and, with them, of what we know as Western values, if our \textit{de jure} universalism were to be denied today, at the very moment when it is put to the test.

In the long term – during which these interdependencies, processes of integration and migratory pressures are all destined to increase – this antinomy between equality and citizenship, between the universalism of rights and their state-bound borders, by its very nature of becoming increasingly untenable and explosive, can obviously only be solved by overcoming citizenship, de-nationalising fundamental rights once and for all and at the same time de-statalising nationalities. But, equally obviously, if we want to progress towards these results gradually and peacefully and at the same time provide immediate responses to what is already today both mankind’s most serious problem and the greatest challenge to democracy, then politics and, even before politics, political philosophy, should favour these processes, by realising that the old categories of citizenship and sovereignty are in an irreversible crisis and that the weak remedy to their discriminatory values that has been provided to date by the right of asylum is totally inadequate.

The right of asylum suffers from an original sin: it represents the other side of the coin of citizenship and sovereignty, in other words the statalist limit set by them to fundamental rights. Moreover, it has traditionally always been the exclusive reserve of refugees from political, racial or religious persecution and has never been extended to encompass refugees from the infringement of the right of everyday subsistence. These strict premises reflect a paleo-liberal phase of constitutionalism when, on the one hand, the only fundamental rights to be recognised were political rights and

\textsuperscript{26} Quite correctly, R. Bellamy, \textit{Tre modelli di cittadinanza}, in \textit{La cittadinanza}, 237ff, has pointed out the communitarian connotation of the doctrines of citizenship, which express a conception of democracy based on ‘belonging to a given community’.
rights of negative freedom, whose violations were only suffered by small élites who were perceived by the liberal élites of the countries of reception to be their fellows and, on the other hand, economically motivated emigration took place mostly within the Western world, from European countries to the American continent, to the benefit of both.

Nowadays, these premises of the old right of asylum have changed. Today’s European constitutions and the international rights charters have added to the classical rights of negative freedom a long series of positive human rights – not just to life and freedom, but also to survival and subsistence – disengaging them from citizenship and also making their enjoyment the foundation stone of modern equality en droit and of the dignity of the individual. There is therefore no reason why these premises should not also be extended to the more serious violations of these other rights: to economic as well as political refugees. And yet the restrictive thesis has prevailed, further emptied by recent, even more restrictive, immigration legislation. The result is a closed door attitude in the West that risks causing not only the failure of the UN’s universalistic design, but also an involution in our own democracies and the formation of an identity for them that is regressive and solidified in its aversion to diversity and by what Habermas has called the ‘chauvinism of wealth’.27 There is of course a profound nexus between democracy and equality and, on the other hand, between inequality of rights and racism. Just as parity in rights generates a sense of equality based on respect for the other as our equal, thus inequality in rights generates an image of the other as unequal, anthropologically inferior, precisely because (s)he is juridically inferior.28

6. FUNDAMENTAL RIGHTS AND GUARANTEES

The arguments of legal theory that are usually employed to respond to the thesis of the supra-national character of human rights, whether freedoms or social rights, are realist in nature. The argument goes that the rights enshrined in the international charters are not rights because they are not accompanied by guarantees. For the same reason, many philosophers and politologists hold that social rights are not true rights, because they, too, are


28 On the interaction generated in the past between discrimination against women in fundamental rights and their perception as inferior beings, see M. Graziosi, Infinititas Sexus. La donna nell’immaginario penalistico, in ‘Democrazia e diritto’ (1993) 2, 99–143.
not backed by adequate jurisdictional guarantees or safeguards. This is the fourth thesis, classically formulated by Hans Kelsen, that I undertook at the beginning to counter: over and above its proclamation, even in a document with the rank of a constitution, a right without any guarantee is said to be no right at all.

This brings us to the fourth question posed at the beginning, which is prejudicial to any argument about rights, whether in domestic or international law: the question of the relationship between rights and their guarantees. Obviously, if we confuse rights and guarantees, the ultimate effect, on a legal level, is to disqualify the two most significant conquests of twentieth-century constitutionalism: the internationalisation of fundamental rights and the constitutionalisation of social rights, as their lack of adequate guarantees would reduce both to the status of mere rhetorical declamations or at the best vague, legally irrelevant, political programmes. This ought to be enough on its own to warn against identifying the one with the other and to justify the distinction, on a theoretical level, between rights and their guarantees: theoretical definitions are stipulatory definitions, whose acceptance depends on their suitability for satisfying the explanatory and operative aims they are used to pursue.

But this is not the main reason – one which might be necessary as well as sufficient – for drawing a conceptual distinction between subjective rights, which are the positive expectations (or expectations of services) or negative expectations (of protection against infringement) attributed to an actor by a legal norm, and the corresponding duties that constitute the guarantees equally dictated by legal norms: these are the duties or prohibitions relative to the rights, which form what I called primary guarantees in §2, or the second level duties to apply the sanction or to declare the nullity of the violations of the first that form what I called secondary guarantees. What makes this distinction necessary is a rather more fundamental reason, intrinsically related to the positive and nomodynamic nature of modern law.

In a nomostatic system, such as morals or such as would be a natural law system based exclusively on principles of reason, the relationships between the various deontic figures are purely logical relationships: given that there is a right, i.e. a positive or negative legal expectation, there must be another actor with a corresponding duty or prohibition; given that there is a positive permission, the behaviour permitted is not prohibited and there is therefore no relative prohibition; given that there is an obligation, omission of the obligatory behaviour is not permitted and there is therefore no relative negative permission, while there is the relative positive permission.

---

29 See the these argued by Zolo and Barbelet mentioned in Notes 13 and 15.
In such systems, the existence or the non-existence of such deontic figures is entailed in and deduced from the existence of the assumptions ‘given’. They therefore contain no antinomies and no shortcomings: if two norms contradict each other, one of the two must be ruled out as non-existent, even before declaring its invalidity. This is the meaning of the natural law principle of *veritas non auctoritas facit legem*: when there are no formal criteria for identifying an existing right, the only criteria available are logical and rational criteria of an immediately substantial type, i.e. related to what the norms say.

None of this holds true for the nomodynamic systems of positive law. In these systems, the existence or the non-existence of a juridical situation, i.e. of an obligation or a prohibition or a permission or a juridical expectation, depends on the existence of a positive norm that provides for it, which in its turn is not deduced from the existence of other norms, but is induced, as an *empirical fact*, by the act of its production. It is therefore quite possible that, given that there is a subjective right, there is no corresponding duty or prohibition – even if there ought to be one – because of the (undue) non-existence of the norm that provides for them. Just as it is possible that, given that there is a permission, there is also a prohibition of the same behaviour – even though there ought to be nothing of the kind – because of the (undue) existence of the norm that provides for it. In short, both *gaps* and *antinomies* are possible and to some extent inevitable in such systems. It follows that, under such conditions, expressed by the juspositivist principle that *auctoritas non veritas facit legem*, the theses of the theory of law, such as the definition of a subjective right as a juridical expectation to which a duty or a prohibition corresponds, are – not unlike the definitions of a prohibition as the lack of permission to commit and of an obligation as the permission to omit, and even not unlike the logical principle of non-contradiction – theses of a deontic or normative type, not about being, but about having to be with regard to the right in question.

Let’s now re-examine Kelsen’s notion of ‘subjective right’. Kelsen makes not one but two identifications or reductions of the subjective right to imperatives corresponding to it. The first of these is that of the subjective right to a duty incumbent upon the other party in a legal relationship, i.e. what I have called *primary guarantee*: “There is no right for someone,” he states, “without a legal duty for someone else.”30 The second is that of

---

30 Kelsen, *General Theory*, 76: a right “is nothing but the correlative of a duty” (ivi, 77); Id., *Pure Theory of Law*, 127: “This “right” or “claim” of an individual, however, is merely the obligation of the other individual or individuals. If the right or claim of an individual is spoken of as if it were different from the obligation of the other, the impression of two legally relevant facts is created where only one is present”.
the subjective right to a duty that, when it is violated, obliges the judge to apply the sanction, i.e. what I have called a secondary guarantee: “The right” consists “not in the presumed interest, but in the legal protection.”

Now, these identifications are theoretical theses, certainly no more true than the logical and deontic equivalences between permission to commit and non-prohibition, between permission to omit and non-obligation, between prohibition and non-permission to commit and between obligation and non-permission to omit. But, on a par with these, they can be invalidated, or rather violated, by the effective reality of the law.

This is because, in a system of positive law, it is possible that as a matter of fact there exist antinomies, in other words contradictions between norms, over and above the existence – which is in turn also a fact – of criteria for solving them. It is also possible that, alongside freedom and, thus, the permission to manifest one’s own thought freely, there exist, as in the case of Italian law, a penal prohibition against expressing contempt of certain institutions or other crimes of opinion. In such cases, it cannot be denied that there are norms in conflict: in our case, the existence of a permission and at the same time of the prohibition of the same behaviour: it can only be said that the norms governing crimes of opinion are invalid norms, albeit extant (or in force) until abolished by the Constitutional Court. In the case of positive law, then, the principle of non-contradiction, or the prohibition of antinomies, is a normative principle.

Similarly, it is quite possible that, as a matter of fact, there exist no duty or prohibition correlated to a subjective right and, moreover, that there exist no duty to apply the sanction if the one or the other be violated: in other words, that what exists is primary gaps, because the duties and the prohibitions that constitute the primary guarantees of the subjective right have not been stipulated, and secondary gaps, because the organs obliged to sanction or invalidate its violations or to apply the secondary guarantees, have not been established. But the existence of the subjective right stipulated by a legal norm cannot be denied in these cases either: we can

---

31 Kelsen, General Theory, 81. See also the passage referred to in Note 12. Also: a subjective right is ‘the legal possibility’ offered to its holder “of bringing about the application of the pertinent legal norm providing the sanction . . . only if the application of the legal norm, the execution of the sanction, depends on the expression of the will of an individual’s . . . only if the law is at the disposal of an individual, can it be considered to be ‘his’ law, a subjective law, and that means a ‘right’ ” (ivi, 82–83); “the essence of the right, that is more than a mere reflex of a legal obligation consists in the fact that a legal norm confers upon an individual the legal power to bring about by a law. Suit the execution of a sanction as a reaction against the nonfulfillment of the obligation” (Pure Theory, 136).
only lament the gap that makes it a ‘paper right’ and call on the legislator
to fulfill his duty to make up for it. Also the principle of completeness, i.e.
the prohibition of gaps, is a principle of normative theory, on a par with
the principle of non-contradiction.

All this is probably concealed, in Kelsen’s theory, by the fact that it
assumes property rights as paradigmatic examples of the subjective right.
In such cases, the theoretical definition of subjective right as an expectation
to which a duty corresponds raises no problems, particularly with regard
to primary guarantees, as it does not appear to be a normative thesis at
all, but corresponds exactly to what actually happens. Kelsen says that “A
contracting party has a right against the other contracting party only if the
latter has a legal duty to behave in a certain way towards the former; and
the latter has a legal duty to behave in a certain way towards the former
only if the legal order provides a sanction in case of contrary behavior.”

But this depends on the fact that these rights, as we have seen, are not
established, but pre-established by hypothetical norms as the effects of
contracts, which are always at the same time the sources of the correlated
obligations that form their primary guarantees. On the other hand, it also
depends on the venerable tradition of the jurisprudence of civil law, which
has always maintained a close connection between property rights and the
right to bring a legal action as a specific technique for activating the related
secondary guarantees.

The case of fundamental rights – of all fundamental rights, not just of
social rights and rights at an international level – is different, since, as I
have demonstrated, they are immediately (established by) thetic norms. In
this case, the existence of the relative guarantees – of primary guarantees
but even more so of secondary guarantees – is by no means something
that can be taken for granted, as it depends on their express stipulation by
norms of positive law quite distinct from the ones that ascribe the rights.
Where if not criminal law did not exist, for example, then by virtue of the
principle of legality in criminal law if of nothing else, there would be no
primary guarantee for any of the rights that it protects, not even the right
to life. If there were no norm of habeas corpus, there would be no primary
guarantee of personal freedom. Even more clearly, if there were no norms
about jurisdiction, there would be no secondary guarantees for any rights

32 As Riccardo Guastini calls non-guaranteed rights (Diritti, in Analisi e diritto (1994),
33 General Theory, 82. Kelsen formulates a similar argument for real rights: “the reflex-
right of ownership actually is not an absolute right; it is the reflex of a multitude of
obligations of an indeterminate number of individuals toward one individual with respect
to one thing, in contradistinction to a claim, which is the reflex of the only one obligation of
a specific individual toward another specific individual” (Pure Theory of Law, 131–132).
whatsoever. But it would obviously be absurd to deny the existence of
the rights for these reasons alone, if there were norms disposing them; we
should rather, more correctly, deny the existence of their guarantees if there
were no norms predisposing them.

It is thus the nomodynamic structure of modern law that, by virtue of
the principle of legality as the standard of recognition of positively existing
norms, forces us to distinguish between rights and their guarantees, to
recognise that rights exist only if they are established by norm, just as the
guarantees constituted by the corresponding duties and prohibitions exist
if and only if they, too, are established by norm. And this principle holds
true for rights of freedom (negative rights) and for social rights (positive
rights), for those established by the law of the state and for those estab-
lished by international law. If we do not want to fall into the trap of a form
of paradoxical realistic jusnaturalism and do not want to make our theories
carry out legislative tasks, we must admit that rights and the norms that
express them exist to the precise extent that they are produced positively
by the legislator, be he ordinary, constitutional or international.

The consequence of this distinction between rights and their guaran-
tees is enormously significant, not only in theory but also in meta-theory.
At the level of theory, it means that the nexus between expectations and
 guarantees is not an empirical nexus, but a normative one, which may be
contradicted by the existence of the former and the non-existence of the
latter; it thus means that the absence of guarantees must be considered to
be an undue gap which the public powers, both domestic and international,
are obliged to make up, just as violations of rights perpetrated by the public
powers against their citizens must be conceived as undue antinomies that
it is obligatory to punish as illicit acts or annul as invalid acts. At the level
of meta-theory, it involves a rôle for legal science vis-à-vis its object that is
not purely descriptive, but equally critical and normative: critical because
its task is to detect the gaps and antinomies and normative with regard to
the legislation and the jurisdiction that are obliged to complete them or
make them good.

Whether the guarantees can actually be put into practice in concrete
terms is another question: certainly, the constitutional enunciation of
social rights entailing positive public services was not accompanied by
the elaboration of adequate social or positive guarantees, i.e. by tech-
niques of defence and of justiciability comparable to the ones provided
by the liberal or negative guarantees for protecting the rights of freedom.
The development of the welfare state in the twentieth century took the
form primarily of simply enlarging the spaces of discretionary jurisdiction
allotted to the bureaucratic apparatus, rather than of instituting appropriate
techniques for guaranteeing the new rights. Even less activity has taken place at international level, where no guarantees have been put in place to protect the human rights stipulated by the international charters, which have thus remained almost totally ineffective. But this only means that there is an abyss between norm and reality, which must be bridged or at least reduced because it is the source of a not only political but also juridical delegitimation of our legal systems.

To this end, a distinction must be drawn between what is technically feasible and what is politically feasible. In technical terms, there is no reason why social rights cannot be safeguarded on a par with other rights, because the acts necessary to satisfy them would be inevitably discretionary, impossible to formalise and not susceptible to the control and enforcement of the courts. First and foremost, this reasoning does not hold true for all forms of guarantee *ex lege* that, unlike the case of the bureaucratic and facultative practices typical of the welfare state based on patronage, may well take the form of services that are free of charge, obligatory and even automatic, such as free compulsory public education, an equally free public health service or a guaranteed minimum income. Secondly, the thesis of these rights’ non-justiciability is refuted by the latest juridical experience, which has witnessed the expansion of their forms of jurisdictional protection in a variety of ways (provisional remedies, suits for recovery of damages and so on), with particular reference to the rights to health, social security and fair pay. Thirdly, quite apart from their justiciability, these rights amount to principles that inform the legal system and are used extensively in the jurisprudence of Constitutional Courts. Finally, new guarantee techniques can be developed. Nothing would stop a minimum share of the budget from being reserved in a constitution for distribution under the various headings of social expenditure; this would enable the constitutional compliance of financial and budget legislation to be subjected to judicial review. And it would also be possible – at least on the technical and legal level – to introduce guarantees of international law: such as the institution of an international criminal code and a correlated jurisdiction over crimes against humanity; the introduction of a jurisdictional control of the constitutionality of all the acts perpetrated by the international organisms and possibly also of all those perpetrated by the states to control violations of human rights; or the imposition and regulation of economic aid and humanitarian projects, defined in the form of guarantee, in favour of the world’s poorest countries.

Although it is often confused with technical feasibility and sometimes attributed to it, the question of these guarantees’ political feasibility is actually totally different, both at domestic level and – in the more
distant and difficult case – at international level. Satisfying social rights is certain expensive: it means that resources have to be collected and redistributed, it is incompatible with the logic of the market or at the very least involves placing restrictions on it. Equally certainly, if the human rights proclaimed at international level are to be taken seriously, this requires us to question our standards of living, which enable the West to bask in wealth and democracy at the expense of the rest of the world. Certainly, again, today’s wind of unfettered market reform, which has raised the absolutism of the market and the tyranny of the majority to the status of a new ideological credo, leaves little hope that the wealthier classes, who are in a majority in our rich countries and in a minority with respect to the rest of the world, will be prepared to accept limitations and restrictions imposed by regulations and laws informed by the principle of equality. But then let it be said that the obstacles are political in nature and that the challenge to the forces of democracy is equally political and consists now more than ever before of the struggle for rights and their guarantees. What is not acceptable is the realistic fallacy of reducing rights to facts and the deterministic fallacy of identifying between what happens and what cannot help happening.

7. CONSTITUTIONALISM AS THE NEW PARADIGM OF LAW

The four theses developed thus far provide the means for conceiving constitutionalism – as it took shape in the twentieth century in the democratic state systems, with the spread of rigid constitutions and, in perspective, in international law, with the subjection of states to the human rights conventions – as a new paradigm, the result of a profound internal mutation in the paleo-juspositivist paradigm.

The postulate of classical legal positivism is the principle of formal legality, or if you prefer mere legality, as the meta-standard of recognition of norms in force. On this basis, whatever a legal norm’s contents, it exists and is valid solely by virtue of the forms of its production. As we know, its affirmation overturned the paradigm of pre-modern law, introducing the separation between law and morals, i.e. between validity and justice, by virtue of the entirely artificial and conventional character of existing law. In modern law, a norm’s justiciability no longer depends on its intrinsic justice or rationality, but only on its positive status, i.e. on the fact that it is ‘posited’ by an authority duly vested, using the forms required for its production.

Constitutionalism, which is the result of positivising fundamental rights as substantial limits and restrictions on legislation, corresponds to a second
revolution in the nature of law that produces an internal alteration of the classical juspositivist paradigm. While the core of the first revolution was the principle of the legislator’s omnipotence, i.e. of the principle of mere legality (or of formal legality) as the standard of recognition of the existence of legal norms, this second revolution took the form of what we can call the principle of strict legality (or substantial legality), i.e. of subjecting also legislation to the no longer only formal but now also substantial restrictions imposed by the principles and the fundamental rights expressed in constitutions. And while the principle of mere legality had generated the separation between validity and justice and the end of the presumption of justice of the law in force, the principle of strict legality generated a separation between validity and force and the end of the a priori presumption of the validity of existing law. In a legal system with a rigid constitution, for a norm to be not only in force, but also valid, it is not enough that it was enacted in the forms required for its production: its substantial contents must also respect the principles and fundamental rights established in the constitution. By stipulating what, in §4, I called the sphere of the undecidable (of the positive undecidable, expressed by the rights of freedom, and of the negative undecidable, expressed by social rights), the substantial conditions of validity of laws – which in the pre-modern paradigm identified with the principles of natural law and in the paleo-positivist paradigm had been removed by the purely formal principle of validity as positivity – penetrate once again into legal system in the form of positive principles of justice stipulated in norms of an order higher than ordinary legislation.

There is a precise moment in history to which this change in paradigm can be traced. It falls immediately after the catastrophe of the second World War and the defeat of Nazi-Fascism. In the cultural and political climate that gave birth to today’s constitutionalism – the United Nations Charter in 1945, the Universal Declaration of Human Rights in 1948, the Italian Constitution in 1948, the Basic Law of the Federal Republic of Germany in 1949 – it is understandable that the principle of mere legality, while sufficient to guarantee against abuses of power perpetrated by the jurisdiction and the administration, was insufficient to guarantee against abuses of power perpetrated by legislation and against illiberal, totalitarian involutions on the part of the supreme decision-making organs. This was solved by rediscovering the meaning of ‘constitution’ as a limit and restriction on the public powers stipulated two centuries ago in Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen: “Any society in which the guarantee of the rights is not secured or the separation of powers not determined has no constitution at all”. What was rediscovered – at the
level not only of the state, but also internationally – was thus the value of the constitution as a set of substantial norms tailored to guarantee the separation of the powers and the fundamental rights of all individuals: in other words, precisely the two principles that had been denied by Fascism and which of Fascism is the negation.

We can express the change in the paradigm of law produced by the rigid constitutionalisation of these principles by stating that, on this basis, law is marked by a dual artificiality: no longer qualified just by its ‘existence’ – which can no longer be derived from morals nor discovered in nature, but is, as the name implies, ‘posited’ by the legislator – but also by its ‘ought’, i.e. its condition of ‘validity’, equally positivised at constitutional level as a law about law, in the form of legal limits and restrictions to legal production. This is not a question of the failure or crisis of the separation between law and morals that took place with the first legal positivism, but, on the contrary, of a completion of the legal positivist paradigm and at the same time of the state governed by the rule of law. By virtue of the dual artificiality, not only the production of law, but also the choices employed in its design are positivised by legal norms and the legislator, too, is subjected to the law. As a consequence, positive legality in the constitutional state governed by the rule of law has changed its nature: it is no longer just conditioning (mere legality), but also conditioned (strict legality) by restrictions, some of them substantial, relating to its contents or meanings.

This has led to an internal alteration in the classical legal positivist model, which has affected both law and debate about law, i.e. jurisdiction and legal science. For the very reason that it is conditioned by restrictions of content imposed on it by fundamental rights, strict legality has thus introduced a substantial dimension into both the theory of validity and the theory of democracy, producing a dissociation a virtual parting of the ways between the validity and the force of laws, between the ought and the existence of law, between the substantial legitimacy and the formal legitimacy of political systems.

On the other hand, this parting of the ways – which constitutes a physiological trait of constitutional democracy, its greatest prize and its identifying mark, as well as its greatest defect, as it becomes pathological if it is taken beyond certain limits – has also changed the nature of juris-

diction and of legal science. Jurisdiction is no longer merely the subjection of the judge to the law, but it is also a critical analysis of its meaning, for the purpose of monitoring its constitutional legitimacy. And legal science is no longer – if it ever was – merely a description, but is also a critique and a design of its own subject matter: a critique of law that is invalid even if it is in force, because it conflicts with the constitution; a reinterpretation in the light of the principles of the entire normative system established in the constitution; an analysis of antinomies and shortcomings; and an elaboration and design of guarantees that are missing or inadequate, despite being imposed by the norms of the constitution.

The consequence is that legal and politological culture is invested with a responsibility that grows as this parting of the ways becomes more marked and, thus, with the task of answering for the ineffectiveness of the rights stipulated by the constitution. There is an epistemological paradox that marks our discipline: we are part of an artificial universe which we describe and to whose construction we contribute to a rather more crucial extent than we believe. It therefore also depends on juridical culture that, as Ronald Dworkin so aptly put it, rights be taken seriously: as they are otherwise no more nor less than normative meanings, whose first, indispensable condition for being effective is that their binding nature be perceived and agreed by society.

Facoltà di Giurisprudenza
Università di Camerino
Via Gentile III da Varano – Camerino (Mc)
Italy