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Il 15 agosto 2018 ci ha lasciati Danilo Zolo, fondatore del Centro e della Rivista Jura Gentium, di cui è stato per molti anni direttore. Lascia un grande vuoto in quanti hanno avuto la fortuna di conoscerlo e in tutti coloro che erano abituati a confrontarsi con le sue acute analisi del presente. La redazione lo ricorda con affetto, commozione e gratitudine.

Indice

SAGGI

Do Social Rights Deserve a Special Constitutional Protection?

On Luigi Ferrajoli's and Frank Michelman's Democratic Theory

Valerio Fabbrizi

Abstract: Within contemporary democratic constitutionalism, social rights are assumed as one of the most debated issues. This article offers an insight into the question about a possible constitutionalization of social rights, by proposing an analysis of such an issue within the liberal-democratic constitutional theory. The key question of this paper asks whether social rights should deserve a special constitutional protection or not. Thus, the purpose of this article is to give an answer to such a question, by comparing the Italian legal scholar Luigi Ferrajoli with Frank Michelman, two of the most distinguished contemporary constitutional theorists.

[**Keywords**: Democratic Constitutionalism; Social Rights; Judicial Review; Structural Entrenchment].

Introduction

Social rights are widely considered to be an essential component of any democratic regime; their defence against any kind of subversion or erosion is one of the core tasks of democratic constitutionalism. This article deals with social rights in constitutional theory, by confronting two different, but complementary, contributions: on the one hand, Luigi Ferrajoli's theory of a *fundamental guarantees constitutionalism* [*costituzionalismo garantista*]; on the other hand, Frank Michelman's proposal for a constitutionalization of socio-economic rights.

The purpose of this contribution is dual: on the one hand, it presents a broad and detailed definition of the constitutional social rights theories provided by Luigi Ferrajoli and Frank Michelman, on the other hand, it suggests the thesis of a convergence between the two authors. Both in fact argue in favour of the constitutionalization of social rights, by attributing them a special protection. Ferrajoli's and Michelman's democratic theories will be presented and analysed in the next section of this article; then, in conclusion, the argument of a complementarity between their proposals will be eventually proposed.

This article opens with a critical analysis of contemporary constitutional theory, by outlining the key aspects of the debate between legal and political constitutionalists, especially concerning fundamental rights within constitutional democracy. After drawing a brief and general background of the two fundamental alternative approaches to democratic constitutionalism, the contribution provides a more detailed investigation on social rights by recalling Thomas Casadei's very interesting reconstruction of such an issue.

The second section of the paper deals with Ferrajoli's definition of constitutional democracy, which I will define as the fundamental guarantees model of constitutionalism. Such a theory assumes fundamental rights – among which social rights are included – as the general norms which regulate and limit the legislative power.

This "fundamental guarantees" model is different from the classical model of the formal democracy since it does not simply impose a judicial control over formally enacted legislative decisions, but also on what the lawmaker "cannot do" and "what it should do" to guarantee fundamental rights.

Ferrajoli's model also offers an alternative definition of the substantial dimension of democracy: in this view, we should reject as illegitimate any legislative act that does not respect the principles enshrined by the constitution, though it has been formally enacted by parliament. In this perspective, social rights are understood as a basic part of constitutional essentials, by representing principles which cannot be undermined or overturned by a legislative majority.[1]

The third section investigates social rights within the American context, by examining Michelman's theory of liberal-democratic constitutionalism. I will focus here in particular on his most recent contributions, in which the classical framework of legal constitutionalism is redefined, in order to propose an alternative definition of judicial review, in sense of its "weak-form" version.

After having investigated social rights theory in the light of Ferrajoli's and Michelman's understanding of it, in the final section of the article I will provide some

[1] A. Ferrara, "Ferrajoli's Argument for Structural Entrenchment", *Res Publica*, 17 (2011), 4, pp. 377-383.

arguments to uphold the thesis of a convergence between Ferrajoli's and Michelman's perspectives. In this sense, I will conclude my contribution by offering the thesis according to which these two authors, though coming from different backgrounds (cultural, academic and theoretical), converge on some pivotal issues: both are engaged in a normative understanding of politics which goes hand in hand with a liberal-democratic vision; their proposals are intended to defend the thesis of the constitutionalization of social rights, in the same vein as it happens with civil and political rights; finally, they are deeply interested in discussing the future of democracy, by admitting – at first – that democracy is currently in a moment of crisis. This paper is aimed at highlighting Ferrajoli's and Michelman's different, but complementary, solutions.

1. Fundamental Rights Within Contemporary Constitutional Theory

1.1 Legal vs. *Political Constitutionalism*

Within contemporary liberal-democratic constitutionalism, two different approaches can be distinguished. Down one path, some scholars tend to consider the constitution as a product of the daily political action and the result of a majoritarian legislative decision-making.[2]

Down another path, other scholars consider the constitution as a *corpus* of norms and principles, which set limits and boundaries over political power and majority rule. In this sense, the constitution should be put under the protection of an independent judicial institution – such as a constitutional court – vested with the power of *judicial review* to avoid the risk of erosion by temporary parliamentary majorities. In this perspective, the question whether fundamental rights should be put under a constitutional entrenchment is crucial.

This section aims at providing a general sketch of liberal-democratic constitutional theories, by emphasising how it can be divided into these two different

[2] See R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, Cambridge University Press, 2007; J. Waldron, *The Dignity of Legislation*, Cambridge, Cambridge University Press, 1999; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 2000.

approaches. Two collateral arguments have to be raised in this section: on the one hand, a preliminary distinction between legal and political constitutionalism is necessary in order to clarify the theoretical background in which both Ferrajoli and Michelman situate themselves. On the other hand, we pose here that legal and political constitutionalists hold a different and alternative understanding of rights (included social rights): legal ones consider fundamental rights as an issue to be taken outside the realm of politics and separated from the legislative power and the majority rule. In this sense, courts serve to protect rights from potentially hegemonic majoritarian power as the guardians of the constitutional order.

By contrast, political constitutionalists affirm that rights are to be put under the control of legislative majorities and of parliamentary as the only democratically legitimate institution. At the same time, they refuse judicial authority over legislative decision-making as an undemocratic constraint over representative democracy.

Accordingly, the main difference between legal and political constitutionalism concerns the way in which democracy has to be conceived. Legal constitutionalists defend a dualist model of democracy which distinguishes between two levels of politics: ordinary politics and constitutional politics. The first one concerns the daily political actions and affects the choices of an elected legislative majority. Conversely, constitutional politics rarely occurs and only in particularly significant moments of history and it concerns the opportunity for the People to amend, adapt or reinforce the constitution.[3]

In Ackerman's words "a dualist constitution seeks to distinguish between two different kinds of decision that may be made in a democracy. The first is a decision by the American People; the second, by their government".[4] As Ackerman elucidates, this model implies that, during normal politics, the dualist constitution is aimed at preventing government and temporary majorities from confusing these two stages – ordinary and constitutional one – by maintaining the distinction between decisions by the People and by government or parliament.

[3] For a deep analysis see B. Ackerman, *We the People, Volume 1: Foundations*, Cambridge (Mass.), Harvard University Press, 1991; J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993.

[4] B. Ackerman, "Constitutional Politics/Constitutional Law", *The Yale Law Journal*, 99 (1989), 3, pp. 453-547, p. 461.

Political constitutionalists propose a monistic definition of democracy which does not distinguish between a "constitutional" (or "supreme") and a "legislative" (or "ordinary") level. In this sense, monist democracy rejects the thesis of the separation between *normal politics* and *higher lawmaking*, by stating their correspondence on a single stage, the majoritarian legislative power, which holds constitutional power.

Moreover, monist democrats refuse any legal or judicial control over legislatures by constitutional or supreme courts vested with the power of judicial review. At the same time, political constitutionalism rejects many pivotal issues of the legal model, such as the relationship between citizens and government, which – according to political constitutionalists – is not based on contractarian terms, but on a direct trust-relationship between people and government.

In Bellamy's opinion, one of the most relevant weaknesses in legal constitutionalism concerns the fact that it would tend to "depoliticize" fundamental principles in two main ways: the first involves establishing constraints and boundaries over the political sphere, by leaving some principles outside politics. The second one would try to realize an "apolitical" form of politics to override reasonable disagreement.

One of the most controversial issues which oppose legal and political constitutionalists concerns the role of constitutional or supreme courts and of justices within contemporary constitutional democracies. Down one path, legal constitutionalists, by assuming a dualist concept of democracy, postulate the existence of a constitutional or Supreme Court vested with the power of judicial review and independent from legislative power and majority rule. Down another path, political constitutionalists refuse this argument, by affirming the idea of the courts as an essentially undemocratic institution. At the same time, the power of judicial review is considered by them as an illegitimate constraint over the popular will. This issue is commonly known as the *counter-majoritarian difficulty*.

In *The Least Dangerous Branch*,[5] Bickel discusses this matter, by defending the role of the US Supreme Court and its power to enforce the Constitution and to protect it

[5] A. M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Indianapolis, The Bobbs-Merrill Company, 1976.

against the will of a temporary legislative majority. In defending the democratic legitimacy of judicial review, legal constitutionalists propose four issues:

1. Constitutional courts, by being independent of political and electoral pressures, are better equipped to decide hard cases or to defend fundamental rights;

2. The existence of a bill of rights or a written constitution forces justices to decide hard cases only by interpreting constitutional principles and leaving aside their political, ethical and moral views.

3. Decisions about constitutional principles and fundamental rights cannot be left in the hands of political legislative majorities, which could impose their own vision of such principles;

4. Judicial review is essential to legitimate democratic institutions, to limit parliamentarianism and to protect the constitution against the risk of a so-called "tyranny of the majority".

By contrast, political constitutionalists affirm that, by being responsive to popular will, parliamentary representatives hold the necessary legitimacy to decide about constitutional essentials, whilst unelected justices lack this popular legitimation. Regarding this point, Bellamy argues that judicial review undermines democracy, by putting an apolitical, unelected and unrepresentative institution such as a constitutional court above democratic legislative bodies. In Bellamy words,

> The democratic arrangements found in world's established working democracies are sufficient to satisfy the requirements of republic non-domination, whereas all efforts to improve on such arrangements through judicial intervention create conditions of domination. Judicial review undermines the equality of concern and respect between citizens that lies at the heart of the constitutional project and that democratic processes serve to secure.[6]

Following Waldron, we would have to distinguish between an *ideal* commitment to fundamental rights – in the form of a constitution, for instance – and the existence of an institution which would assume such a commitment (peculiarly in the form of *judicial review* by courts). Nevertheless, consent about rights may also be influenced by the consequences of the general moral disagreement regarding political issues:

[6] R. Bellamy, *Political Constitutionalism*, cit., p. 260.

according to Waldron, reasonable disagreement might concern what kind of rights should be considered as "fundamental" and how they should be applied.

> Disagreements about rights are often about central applications, not just marginal applications. Because of assuming a general commitment to rights, it is tempting to infer that the general commitment covers the core of each right and that the right only becomes controversial at the outer reaches of its application. That is a mistake. A commitment to rights can be wholehearted and sincere even while watershed cases remain controversial.[7]

1.2 An Introduction to Social Rights

Following Thomas Casadei's analysis, we shall emphasize that the first definition of fundamental rights traces back to Thomas Paine, according to whom rights have a primarily "natural" substance. In this vein, from a "natural law" perspective, individuals – before having *civil* rights – hold *natural* rights that underpin all the civil and political ones. According to the classical contractarian theory, civil and political rights arise when individuals accept to create a common sovereign power for having protected their own rights.[8]

Furthermore, social rights arise when, during the post-French Revolution era, the principles of solidarity, social security, equal rights, free and open education system emerged. In referring to Paine's understanding of social rights, Casadei argues that "*civil* rights originate from *natural* rights; natural rights are *human* rights, but […] natural human rights imply a form of *solidarity* between individuals and, thus, the existence of institutions to guarantee the creation and the enjoyment of such rights for all citizens".[9]

In Paine's view, social rights go hand in hand with civil and political ones, by serving both as "normative reason" and "general protection". Therefore, social rights should be conceived within the set of the fundamental rights and they should be ensured by the State as natural human rights. Here, the issue of the constitutionalization of social

[7] J. Waldron, "The Core Case Against Judicial Review", *The Yale Law Journal*, 115 (2006), 6, pp. 1346-1406, p. 1367.

[8] Th. Casadei, *I diritti sociali, Un percorso filosofico-giuridico*, Firenze, Firenze University Press, 2012, pp. 4-5.

[9] Ivi, p. 10.

rights assumes a central role: as Casadei notes, according to Paine, the State has no longer the duty to merely "ensure" individual liberties, but is now vested with the power to defend and promote social and economic welfare, in a perfect equilibrium between liberty and equality.[10]

Regarding the development of social rights in democratic regimes, three historical steps can be identified: the first, occurring during the XVIII century, was characterized by an initial elaboration of social rights, on the wave of the principles of the French Revolution; the second which took place during the XIX century, was marked by a stronger demand for social rights by popular and working class; the third and final step arose during the XX century, when social rights became an essential piece of fundamental principles within modern liberal-democracies.

The first identification of social rights within political and legal framework appeared within the 1919 Weimar Republic Constitution. In such a context, the attempt was to define social rights as a cornerstone of any legitimate democratic regime and, at the same time, to combine liberal-democracy and social-democracy.[11]

Before Weimar Constitution, social rights were considered by the classical legal theory as mere legal norms subject to the legislative will, rather than fundamental principles to be guaranteed by constitution. Thus, such a paradigm denied constitutional relevance for social rights, insofar as it emphasised that social rights could only be enacted through a legislative decision; accordingly, the classical conservative theory of rights stated that no legal institution or constitutional norm could force the legislator to enhance social rights by law. Moreover, Casadei argues that social rights were put "on a *lower* level with regard to liberty rights, both in terms of protection and guarantees and in terms of their *status* (legislative and *not* constitutional)".[12]

Among contemporary democracies, the Italian Constitution is one of the most deeply engaged in upholding and defending social rights as a pillar of the whole constitutional order. The peculiarity of the Italian Constitution consists of connecting

[10] See ivi, p. 18.
[11] Ivi, p. 33.
[12] Ivi, p. 34.

social rights with the so-called "social formations", as stated by Article 3.[13] In this sense, the Italian Constitution does not conceive social rights as a grant by a centralized and paternalist State, but rather like a product of social claims which take place through organizations within which everyone expresses themselves (family, schools, work, public and private associations and so forth).[14]

As Casadei shows, the Italian Constitution provides one of the wider and deeper definitions of social rights and it is one of the few constitutions to define social rights as purely inviolable constitutional principles, by distinguishing social rights in the light of their thematic focus: the right to work; the right to an equal remuneration as the base for a decent life; the right to housing; the right to move within the State and abroad; the right to organize trade unions; the right to promote strikes and protests; the right to social care and insurance; the right to education and teaching; the right to public health care. Nonetheless, two principles are at the basis of social constitutional rights: down one path, the principle of *human dignity*; down another path, the principle of *substantive equality*.[15]

By contrast, in discussing the idea of social rights as a part of constitutional essentials, several theses can be traced:

1. *Instrumentality*: implies that social rights should not be considered as a part of constitutional essentials, but as mere theoretical principles. In this sense, social rights would be considered only as *conditions* to participate in democratic citizenship, rather than normative *preconditions* for participation.

2. *Formability*: this notion tends to highlight that, whilst civil and political rights are "formal" and "universal", social rights are seen to be depending on the financial

[13] As Article 3 of the Italian Constitution states: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

[14] See ivi, p. 37.

[15] Casadei shows that substantive equality, which underpins Article 3 of the Italian Constitution, goes hand in hand with the principle of human dignity. As he writes, "only the combination of normative worth of dignity, on the one hand, and the egalitarian demand, on the other hand, can open the way for an ideal of liberty which we have defined as *equal liberty*". Equality principle thus represents the philosophical ground for Article 3 and from this principle social rights can be derived. See ivi, p. 39.

situation of the State. This means that, as Casadei underlines, social rights are understood as "benefits" rather than as "rights".

3. *Minimality*: in such a perspective, social rights are taken in their "minimal" level, as relating to a basic distribution of resources. This paradigm also states that social rights are considered to be subordinate to liberty rights. In addition, this thesis assumes the Schmittian view for which only liberty rights are fundamental rights since social rights would derive from ordinary lawmaking, and not from the set of constitutional essentials.

4. The *Dworkinian argument*: according to it social rights represent "normative principles", rather than "collective ends". For Dworkin, rights should be considered as one of the checks and balances against majoritarian rule. Dworkin's perspective proposes the principle of equal concern and respect, rather than the principle of substantive equality.[16]

5. *Not judicialization* of social rights: in this sense, the Dworkinian paradigm takes social rights outside the larger set of the constitutional essentials, by excluding the possibility for a legal protection of such rights by courts, through the process of judicial review.

Eventually, Casadei addresses three further issues: 1. the relation between *liberty rights* and *social rights*; 2. the supposed "cost of rights", which particularly affects social rights; 3. The question of a possible "judicialization" of social rights, which recalls Michelman's proposal.

The first concerns the constitutionalization of social rights as an essential part of fundamental rights; the second relates to the economic sphere and the relation between public economy and political institutions; the third finally involves the question of the legal enforcement of social rights. These issues will return at the centre of our discussion about social rights in the next two sections.

[16] As Casadei elucidates, this thesis, by differing from the Italian and European constitutionalism, follows the US constitutional approach according to which rights are essentially grounded on an individualist conception, which – in particular – considers social rights as collective, but not fundamental, principles. Eventually, the US constitutional theory rejects the thesis of a possible constitutionalization of social rights. As we know, the U.S. Constitution does not confer to social rights a "fundamental" or "constitutional" *status*, but considers them as private benefits to be purchased individually. See ivi, pp. 44-45.

2. Luigi Ferrajoli's Democratic Constitutionalism

The most stimulating and articulated restatement of constitutional democracy was recently proposed by one of the most eminent and distinguished Italian legal scholars, Luigi Ferrajoli. His theory assumes the classical Kelsenian distinction between the "formal" and the "substantive" dimensions of democracy for which "democracy – understood as a model of civil coexistence – represents a "form" of government which holds an essentially "substantive" soul and content. This distinction between "form" and "substance" of democracy is essentially relative, by depending on the point of view from which it is observed".[17]

In the first volume of his trilogy *Principia Iuris*, Ferrajoli specifies that many terms can define fundamental rights: "public" and "constitutional" rights within the constitutional law; "personal" rights within the civil law; "human" and "universal" rights within the international law. As we shall see, Ferrajoli adds a further multiple differentiation among rights: "political"; "civil"; "social" and "liberty" rights.

In such a context, Ferrajoli introduces the distinction between "patrimonial" and "fundamental" rights. "Patrimonial" rights testify the subjective prerogative over goods and needs; they are singular and alienable. Conversely, fundamental rights are universal, inalienable and irreversible. As Alessandro Ferrara highlights, "we cannot legitimately sell our right to vote or even our contractual autonomy".[18] These rights are also "mandatory and inescapable: they cannot be appropriated by the State or by any majority, no matter how overwhelming".[19]

Constitutional democracy, as designed by Ferrajoli, is based on four different classes of rights: *political*; *civil*; *liberty* and *social* rights. *Political* and *civil* rights relate to the "formal" dimension of democracy, by ensuring political and private autonomy; the respect for these rights delineates the formal legitimacy of political and legislative decisions. *Liberty* and *social* rights affect, instead, the "substantial" dimension of democracy, by being considered as primary rights that the lawmaker can never overturn.

These four classes of rights reflect the four dimensions of democracy on which the "fundamental guarantees" model is based: *political* and *civil* rights constitute the

[17] L. Ferrajoli, *Principia Iuris*, vol. II, *Teoria della democrazia*, Roma-Bari, Laterza, 2007, p. 28.
[18] A. Ferrara, "Ferrajoli's Argument for Structural Entrenchment", cit., p. 382.
[19] *Ibidem*.

political and *civil* dimension of democracy; *liberty* and *social* rights represent, in turn, its *liberal* and *social* dimension.[20] Fundamental rights arise from a democratic process, such as a constituent assembly and are aimed at limiting the power and the will of contingent majorities. Therefore, Ferrajoli notes that fundamental rights are the product of a consensus among representatives that reflect the popular will; to use a Rawlsian metaphor, this condition is possible only under a "veil of ignorance", which prevents parties from imposing their contingent interests over the common good.[21]

A further distinction concerns the *political*, *civil*, *liberal* and *social* concepts of democracy. *Political* democracy entails the idea of "political rights" and the principle of the division of power. It is presented as a system in which the legitimacy of any political decision is given by the majority of citizens through their elected representatives in regular electoral consultations.

Civil democracy is based on the so-called "civil rights". It regulates and protects the private life of individuals beyond their own political "dimension". Taken together, these two dimensions compose the *formal* concept of democracy, by identifying rules and norms on which any democratic regime is grounded. *Liberal* democracy assumes at its basis the ensuring of individual liberty rights. Finally, *social* democracy focuses its attention on the protection of social rights.[22]

Ferrajoli's model of constitutional democracy represents a "third way" between the legal and the political approach, by stating that constitutionalism should represent a normative framework within which constitutional legitimacy is given by the acceptance and the respect of the fundamental constitutional guarantees. As Ferrajoli claims, within democratic constitutionalism, alongside the classical distinction between legal positivism and natural law, it is possible to identify a further dichotomy: the so-called *basic-principles constitutionalism* and the *fundamental-guarantees constitutionalism*.[23]

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[20] L. Ferrajoli, *La democrazia attraverso i diritti*, Roma-Bari, Laterza, 2013, p. 49.

[21] As regards the discussion about the "veil of ignorance" and the "original position" see J. Rawls, *A Theory of Justice*, Cambridge (Mass.), Harvard University Press, 1971, pp. 118-123.

[22] On this issue, see. L. Ferrajoli, *Principia Iuris*, vol. I, *Teoria del diritto*, Roma-Bari, Laterza, 2007, pp. 932-937.

[23] In its original Italian version, these two models are defined by Ferrajoli as "costituzionalismo *principialista*" and "costituzionalismo *garantista*". Due to the difficulty in providing a literal and coherent translation, and in order to give the best result as possible, I chose to maintain the difference between a principles-based constitutionalism and a fundamental guarantees-based constitutionalism, by

The first one defines fundamental rights as moral principles, which are subject to a reasonable disagreement, but they are not intended as general rules. The second one imposes a stronger constitutional constraint, by interpreting such principles as regulative rules. Thus, "fundamental guarantees of constitutionalism" model focuses on the thesis that constitutional principles – interpreted as rules – can never be overturned or undermined, by being considered as the pillars of any democratic regime.

Ferrajoli's defence of a guarantees-based constitutionalism – in the same vein as the legal constitutionalism – is based on the idea of a judicial control over legislative power by courts, both on the constitutional legitimacy of legislative acts, and on "what political power can (or cannot) do".[24]

"Fundamental guarantees constitutionalism" maintains that we should consider as illegitimate all political and legislative acts that – though being *formally* legitimate and validated in accordance with the legislative procedures – contrast with fundamental principles enshrined by the constitution.

Ferrajoli's constitutional view extends this legal paradigm in three ways: first, it poses that the power of judicial review by courts should be extended to every "political" act, by including also non-legislative ones. Second, judicial control should include the possibility to decide about what the lawmaker did not do and what it should do, not only about what the lawmaker actually did. Three, his approach focuses on the deficiencies of legislative decision-making, namely on the so-called "violations by omission".[25]

However, the expansion of democratic constitutionalism risks contrasting with the classical principle of the separation of powers, which allows justices to invalidate a legislative act as illegitimate, but not to declare what the lawmaker should do or to act on its behalf. As we are going to see in the next section of this article, Michelman draws the same considerations as Ferrajoli, by pointing out that his weak-form judicial review

elaborating an interpretation of the meaning of these ideas. We should underline, however, that these two versions may be contested: as regards the first case, for instance, another possible solution can be given by the term "foundationalist", to emphasize that the most vexed issue in Ferrajoli's paradigm does not concern "principles" as such, but making them the "foundational" elements in constitutional democracy. Elaborating constitutionalism "without principles" is, obviously, a very controversial issue.

[24] L. Ferrajoli, *La democrazia attraverso i diritti*, cit., p. 37.

[25] Ivi, p. 240.

presupposes that the Supreme Court could actually indicate any possible lacks to the legislative, but not replace it in the lawmaking process.

The overexpansion of judicial power and its possible overlapping with the political and the legislative spheres risks leading to a distorted concept of the separation of powers; Ferrajoli's response lies in reinforcing the conditions of legitimacy of each power. As the Italian scholar suggests "the guarantee role of such a power allows us to exclude, in principle, any possible risk of the so-called 'government by judges'".[26] In this vein, Ferrajoli reiterates that "judicial power intervenes only on the illegitimate exercise of the other powers, and not on their legitimate use. It is a censorship and not transformative power; a preservation and not innovation power".[27]

The development of the constitutional paradigm requires four conditions to be enhanced:

1. The role and power of justices should comply with a "fundamental guarantees" conception of constitutionalism which considers fundamental rights not as general principles under judicial control, but as binding rules to which any power must comply;

2. Ferrajoli suggests conceiving judicial power as a "supervisory power" on the legitimate exercise of the other powers by courts. In this respect, judicial power – though reaffirming its independence – should be limited by strict constraints as a basic condition of its own legitimacy;

3. The development of constitutional democracy implies the reinforcement of legal guarantees, by starting with the principle of "strict legality" as a strict observance of the constitutional text, and the legal norms as a prerequisite of the dependence of the justices to the law and the constitution;

4. The expansion of the constitutional paradigm entails the definition of a demanding legal deontology. In this sense, Ferrajoli argues that, in order to define the judicial system as legitimate, we need to design such a system in accordance with some essential ethical rules: the understanding of judicial systems as an imperfect organism;

[26] Ivi, p. 241.
[27] *Ibidem*.

the independence of justices from political power and "comprehensive doctrines"; the rejection of any possible judicial activism and so forth.

Ferrajoli's constitutional theory devotes much of its attention to social rights, by maintaining that, whilst social rights are formally protected by our Constitution – our democratic system does not provide an adequate legislation about them. The right to work, for example, is formally enshrined by Article 1 of the Italian Constitution, but the lawmaker cannot impose the right to work "by law". Hence, this results in the impossibility to transform the formal ideal right to work in a real substantial right *to have a work.*

Furthermore, Ferrajoli emphasizes that political systems base their democratic legitimation on the protection of constitutional fundamental principles (equality, dignity, liberty, etc.). Obviously, there is a close connection between the guarantee of social rights and the economic growth: the right to health and the right to education, for instance, imply a relevant cost for the State, and such a cost falls on the whole community. However, Ferrajoli defines the ensuring of social rights as the primary task of the State, which should devote primary economic investments on social welfare.

In supporting such a position, Ferrajoli notes that the Italian "economic miracle" during the Sixties coincided with a strong affirmation of relevant social rights, such as the arising of the basic workers' rights; the introduction of a wide and equal national health service; the opening of school and university system to a greater part of the society. In contrast, the economic crisis has originated with a gradual erosion of the social system, epitomized by a cutting of education funding; the weakening of workers' rights and the gradual worsening of public health conditions.

Government action should thus be aimed at ensuring the basic social minimum – to use a Rawlsian formula – though facing many economic and financial difficulties. Ferrajoli admits that democratic constitution might only enshrine an ideal right to work, to an adequate health system, the refusal of any form of corruption, an efficient and well-ordered education system; however, the real economic conditions – work

insecurity; tax evasion; many forms of corruption – make this task very difficult to be achieved.[28]

Within social welfare, the right to work holds a particular *status*. As Ferrajoli points out, its defence is affirmed by Article 4 of the Italian Constitution, in which it is stated that the lawmaker should grant the highest level of employment as possible, for the highest number of citizens as possible. In order to achieve this task, the Constitution indicates an ideal list of fundamental workers' rights the lawmaker should respect: the rights to job stability; a fair working time; the prohibition to an unfair dismissal and so on.

Ferrajoli's solution focuses on the defence of a universal *social rights welfare state*, on which the so-called "third generation constitutionalism" is based. Such a "third generation" has recently been developed in some Latin American countries, such as Brazil. It gives a great relevance to the respect for socio-economic rights, by stating the mandatory task for the government to dedicate a part of public finance to the protection and ensuring of the welfare state for disadvantaged groups.[29]

By defending such economic choices, Ferrajoli remarks that it is possible to abandon a so-called *weak guarantee* political model, in order to apply a *strong guarantee* one, which would allow transforming a generic and ideal *right to work* in a real and concrete political action. This strong guarantee might only be possible by respecting the principle of the progressivity of taxation, through which most advantaged groups might contribute to the common welfare state, according to their economic resources.

Accordingly, any possible restoring of democratic constitutionalism would depend on a real application of the principle of progressive taxation, in order to financially support social rights and to reduce the huge economic differences which affect contemporary society. Nevertheless, Ferrajoli emphasises the necessity for a liberal-democratic regime to promote the protection and to ensure the so-called *fundamental goods*, as well as the classic category of fundamental rights.

[28] Ivi, pp. 214-222.
[29] Ivi, p. 220.

These goods are *fundamental* since, differently from *patrimonial* goods, and in the same vein as fundamental rights, they must be considered as inviolable. Democratic constitutionalism should then take into account fundamental *rights* and *goods* deserve the same protection against any possible subversion, violation or infringement by temporary legislative majorities.[30] Ferrajoli's proposal follows three directions:

1. Enlarging the liberal paradigm from the classical defence of liberty rights towards a social understanding of constitutional democracy. In this sense, the Italian scholar theorizes the introduction of a *social constitutionalism*, to incorporate such different demands;

2. Putting economic and financial powers under constitutional control, in the same vein as political and institutional powers. This point might be engaged through the definition of a *private law constitutionalism*, in addition to the classical *constitutional private law*;

3. Expanding the paradigm of constitutional theory from a "domestic" to a global dimension. Ferrajoli proposes here to restate the legal theory by individuating a so-called *international constitutionalism*, besides to its classical *national* model.

Furthermore, Ferrajoli shows that the whole *welfare state* system might be reinvigorated by implementing a real redistribution policy which might be based on a progressive and rigorous taxation, by starting with the highest incomes. Thus, the defence of social right in its broader definition should follow two main directions: on the one hand, they should be assigned to independent institutions, in order to be protected from the majoritarian rule. On the other hand, social rights should be included within the larger set of the constitutional essentials, as the experience of the so-called "third generation constitutionalism" shows.

This new understanding of constitutionalism imposes specific social responsibilities to the legislators, namely the requirement to devote a minimum portion of the public budget to the defence and implementation of fundamental social rights, such as the right to public health care, to public education and so forth.

[30] Ivi, p. 231.

3. Frank Michelman's weak-form judicial review

In his most recent contributions, Frank Michelman proposed a redefinition of legal constitutionalism, by discussing a so-called "weak-form" version of judicial review. Three issues are addressed here:

1. Within a liberal conception of constitutional democracy, the constitution is to be considered as the foundation of legitimate government;

2. The constitution should embrace socio-economic rights, besides political and institutional ones;

3. The weak-form judicial review would allow us to respect these two previous points. Moreover, in Michelman's view, a discussion about social rights implies four distinctive issues: 1. Justice; 2. Legitimacy; 3. Constitutionalization; 4. Judicialization.

Concerning *justice*, Michelman points out that, in defining a political regime as properly legitimate, we might expect a strong commitment to social rights within the constitution. Nonetheless, we should also consider that some people might reject this view, by affirming that it is impossible to consider health care as a constitutional right, because, if so, that would mean to establish a national health system under constitutional protection. In recalling Rawls' idea of the "social minimum", Michelman notes that:

> Fairness in the basic terms of cooperation […] necessitates a principle of assured provision for certain "basic needs" of all citizens. […] This minimum [as] a package of material goods and social services up to the levels required for a person's capability to "take part in society as a citizen." You can see how such a principle corresponds closely to what we would mean by a social right.[31]

The second issue concerns *legitimacy*. Here, the constitution is considered as a legal-normative framework which serves as the fundamental standpoint for a democratic regime to be legitimate. Michelman's argument tries to go beyond such a legal-normative foundation, by identifying a so-called "expressive function" of the constitution. This function allows citizens to identify themselves as a unified people. As Michelman stresses, "a constitution can also serve an additional important purpose,

[31] F. Michelman, "Legitimacy, the Social Turn and Constitutional Review: What Political Liberalism Suggests", *Critical Quarterly for Legislation and Law*, 3 (2015), pp. 3-4.

which is to provide a public platform for the legitimation of the country's regime of law".[32]

In this context, two different definitions of *legitimacy* can be proposed. The first one asserts that the legitimacy of a political regime is fully and properly satisfied if political leaders and people representatives are chosen by free and democratic elections, in which all citizens have the same right to vote. Moreover, the principle of legitimacy would require that people are protected against arbitrary punishment and that their fundamental liberties are fully and properly guaranteed and ensured. Other liberal theorists – the so-called *social-liberals* – follow the Rawlsian principle of the "social minimum", by defending the idea that a standard of legitimacy should always include a strong commitment to social rights.

The third issue relates to the idea of a *constitutionalization* of socio-economic rights. By affirming that the social minimum is an essential condition for the legitimacy of a political regime, we may ask how the social minimum should be assumed as a constitutional essential. Furthermore, we may also ask why we need a special constitutional protection for social rights and why ordinary laws are not enough consistent with such a commitment; eventually, the last question asks if there is some reason why every requirement for legitimacy should be constitutionalized.

As regard this point, Michelman argues that, in any democratic regime, "citizens […] know they are fated to disagree over the ultimate rightness and goodness of the state's policies as adopted and pursued from time to time",[33] at the same time, however, they also recognize that they need a common and shared standard of political legitimacy, which everybody accepts and endorses. This conception of political legitimacy leads us back to the Rawlsian liberal principle of legitimacy:[34]

> The constitution is to figure as something like our public charter on legitimacy, our public contract on legitimacy. But, of course, no constitution is actually a legal contract, to which all who are bound by it have given their assent. I will

[32] Ivi, p. 4.
[33] Ivi, p. 5.
[34] The Rawlsian liberal principle of legitimacy states that: "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason" (J. Rawls, *Political Liberalism*, cit., p. 137).

> therefore speak of the constitution as providing a public "platform" for legitimacy.[35]

As Michelman elucidates, if we accept that a commitment to the social minimum requires a constitutional protection, thus we should consider the constitution as the highest and binding law – or, in Michelman's terms, a platform for political legitimation – that must include such a commitment for social justice and equality.

The fourth issue concerns the so-called *judicialization* of social rights. Michelman maintains that a commitment to a social minimum is not only an ideal principle of justice, but it implies a requirement of legitimacy; in this sense, this social commitment represents an essential pillar of any constitutional democracy.

Two different understandings of the idea of social right can be identified: down one path, Michelman indicates a so-called "way of individual subjective entitlement and immediate effect", in which we state that a person has the right to housing, but, if such a social right is not adequately guaranteed or if this person lacks the financial means to obtain a house, the legislator is supposed to intervene in providing a solution.[36]

Down another path, social rights might be understood in a "programmatic way". It means that the constitution should entail a strong consideration for social rights – such as the right of housing, for instance – but, at the same time, it should also leave an adequate room for legislators and representatives "to make the best political choices, to order priorities under limited resources, to device programs that try to find the right mix between attending to the most urgent need […] while also making progress toward society-wide fulfilment of the social right".[37]

As Michelman remarks, we should be careful about a possible constitutional commitment to social rights, because it might lead to merely individual claims, by providing individualistic rather than collective responses to social issues. For this reason, Michelman underlines that:

> We tend to favor constitutional clauses that would obligate the government to exert itself to all reasonable limits to find ways of getting everyone decently housed as soon as possible, taking due account of limits on resources and other,

[35] F. Michelman, "Legitimacy, the Social Turn and Constitutional Review", cit., p. 5.
[36] Ivi, p. 6.
[37] Ivi, p.7.

> competing claims on those resources, and also of other principles – liberty, dignity, responsibility, security, general economic prosperity – that might have traction in our societies' orderings of political values.[38]

In his analysis, Michelman postulates different socio-economical strategies to ensure social rights. Thus, we might imagine different strategies aimed at reinforcing economic incentives in order to promote and encourage the economic development in accordance with the rules of the free market, but – at the same time – by implementing measures to redistribute resources to disadvantaged and most vulnerable groups.

About this point, Michelman wonders whether – in making economic choices – a constitutional norm, which upholds social justice, is still binding for lawmakers, or the State can consider itself free from such social obligations. A second question arises from the first one: who can decide about constitutional commitment to social justice? Obviously, we might suppose that this role would be perfectly played by constitutional courts; nevertheless, Michelman points out that classical liberals would give a negative response.

Some liberal constitutionalists consider such issues as too complex and vexed. According to this view, constitutional courts would be too weak and not enough democratically legitimate to respond to these questions and to give an adequate response. Michelman responds by referring to the so-called "American common objection" against a constitutional commitment to social rights. This thesis states that, by constitutionalizing social rights, we would force the judiciary and particularly the Supreme Court to choose between "usurpation" and "abdication", and it would lead to a loss of authority and legitimacy for the Court itself:[39]

> Down one path, the judicial choice to issue concrete, positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against the prevailing political will. Down the other path […] the judicial choice to debase dangerously the entire currency of rights and the rule of law – the spectacle of courts openly ceding to executive and legislative bodies a non-reviewable privilege of indefinite postponement of a declared constitutional

[38] *Ibidem*.
[39] Ivi, p. 8.

> right. In sum, a formal act of writing or reading social rights into constitutional law would pose grave risks of serious damage to public confidence in country's practices of constitutionalism, of law and legality, and of democracy, upon which political legitimacy depends.[40]

Michelman's objection deals with the idea that many liberal theorists reject the so-called "judicial supervision" of economic politics by courts. By rejecting the judicial control over the economy, we are furthermore rejecting the possibility to constitutionalize our socio-economic rights; alongside this fact, we should consider that, if we cannot embed social rights within the constitution, we cannot even consider social rights protection as a platform for legitimacy.

The idea of "legitimacy", to be fully accepted, should never overlap or interfere with individual conceptions of justice. For Michelman, the idea of legitimacy should be, to some extent, weaker than our individual conception of justice. The question arises when we reflect upon our conception of justice and how reducing or weakening the requirements for legitimacy in order to reduce disagreement and, at the same time, promote it.

> No liberally satisfactory standard can possibly be framed which will have sufficiently wide appeal to work as a clause in a public contract on legitimacy, and at the same time will have sufficient specificity to prevent intense interpretative controversy at the point of application. Yes, of course, everyone agrees on "freedom expression" and "procedural justice" in the abstract, but at the point of actual application of these standards, our disagreements come roaring back.[41]

By interpreting the constitution as a platform for legitimacy, we operate within a public agreement through which defining a social minimum that our democratic society should guarantee to all citizens. Michelman defends judicial review by highlighting that – when issues concerning the legitimacy of legislative acts and their accordance with the constitution are at stake – we should leave the courts the power to decide about constitutional matters. Thus, constitutional courts are to be considered as better

[40] F. Michelman, "Socioeconomic Rights: Explaining America Away", *International Journal of Constitutional Law*, 6 (2008), pp. 663-683, quoted in F. Michelman, "Legitimacy, the Social Turn and Constitutional Review", cit., p. 8.

[41] Ivi, p. 9.

equipped in deciding about hard cases or when social and constitutional issues are at stake.

In this perspective, we might suppose that the commitment to a "social minimum" represents a platform for legitimacy. However, as Michelman remarks, "no credible constitutional clause on that topic can be written which supplies a so-called "justiciable" or "judicially manageable" standard for adjudication, according to the prevailing ideas about what such a standard must be like".[42] Michelman defines this issue as a bind, which can be resolved only through a weak-form judicial review, which implies that courts would maintain their power to raise issues of constitutional legitimacy and provide their opinion about such issues, but – at the same time – not indicate specific measures to be implemented by the legislature. To use a metaphor, we might affirm that courts can indicate the disease, but not prescribe the cure.

In Michelman's view, the weak-form judicial review would allow us to include a wide discussion about social rights within liberal constitutional theory; in this sense, Michelman proposes a redefinition of the functions and power of constitutional courts, by maintaining that:

> The introduction of a weak-form review into the global discourse of constitutional law can be seen as a response to crosscutting pressures. On the one side […] the pressures from social-democratic political-moral impulses to include social rights in constitutional law. On the other side […] the deeply entrenched political habit of reliance on constitutional courts, using recognizably legal-rational modes and styles of argumentation, to serve as guarantors of state compliance with the constitutional "contract" on legitimation. The weak-review models seem designed to find a path between these opposing pressures. The more the weak-review models gain in credibility and influence, the more space they may seem to open for inclusion of social rights as an essential component of the contract while holding at bay the standard worry of liberal constitutionalism.[43]

Michelman's proposal follows two different directions: the first one considers socio-economic rights as an essential issue in constitutional legitimation process (the *social turn* of liberal constitutionalism). The second one is related to a redefinition of

[42] Ivi, p. 10.
[43] Ivi, p. 11.

the rule and functions of constitutional courts, especially regarding judicial review. Furthermore, Michelman underlines that his proposal is not aimed at embracing political constitutionalism, due to the constant and – in some cases – radical opposition proposed by political constitutionalists against any kind of judicial control over legislative and constitutional acts.

Thus, two different concepts are at stake: the idea of the so-called *socio-economic rights* (henceforth SER) and the thesis of the *legitimation by constitution* (henceforth LBC). Nevertheless, Michelman admits that this approach might raise at least four questions and doubts:

1) A question of ideal political morality. Political liberalism works, in part, by developing an ideal conception of basic attributes required of any political regime aspiring to justice in modern pluralist conditions. Is that ideal conception receptive or not to the idea of SER? If not, there would be little cause to pursue further the matter of socioeconomic commitments in constitutional law.

2) The question whether a socioeconomic commitment is not only a requirement for the ideal justice of the regime but is also a condition for its minimal-moral legitimacy.

3) Whether that necessarily would provide a reason to write that recognition into the country's constitutional law.

4) The final question wonders how "our writing the commitment into constitutional law will involve the country's courts of law in deciding, from time to time, the adequacy of the state's performance in the field of social provisioning".[44]

By appealing to the "American common objection", Michelman reaffirms his argument for a constitutional commitment to social rights. In "Socio-economic Rights: Explaining America Away" (2008),[45] Michelman has emphasized that, by constitutionalizing socio-economic rights, we would put pressure on US legal system and subject the Supreme Court to a twofold risk: on the one hand, the risk is to be accused of an "usurpation of power"; on the other hand, the Court would risk renouncing its role of constitutional interpretation and control.

[44] Ivi, p. 6.
[45] F. Michelman, "Socioeconomic Rights: Explaining America Away", cit., pp. 663-686.

In facing these difficulties, we should raise four issues: the first one concerns justice and states that socio-economic rights represent a claim for equality within the basic structure of society. From a liberal-democratic point of view, the creation of a political society as based on a principle of cooperation between free and equal citizens should remain the fundamental standpoint of a liberal democratic constitutionalism. In this case, an important role is played by the so-called "basic terms" of social cooperation.

> The basic terms are those made manifest in society's major political, social, and economic institutions – its "basic structure" – which combine to produce the differing positions, conditions, and prospects of life that various persons will occupy from time to time. Consider, then, a population of would-be social cooperators, reciprocally bound in recognition of each other common humanity and motivation by the moral powers and corresponding higher-order interests. It seems there would arise within this population a common concern for *fairness* in the basic terms of social cooperation amongst them. Social justice, then, would be equatable with the satisfaction of the presumed desire of free and equal persons, within a company of likewise free and equal persons so recognized, for fair basic terms of social cooperation.[46]

This approach clearly follows the Rawlsian theory of a social minimum, but it poses at the same time that this is not the only way in which coping with socio-economic rights in a liberal-democratic regime. According to Michelman, there is no discordance between a constitutional welfare state and a purely liberal perspective; for this reason, a liberal-democratic thinker would not consider a commitment to social rights as a merely contingent political choice, but as a moral commitment to a principle of justice.

The second issue concerns the question of "legitimacy". It states that political liberalism conceives the basic structure of society as a strong judicial system; from a liberal-democratic point of view, any issue concerning the "rule of law" involves a theoretical discussion about the moral justification of democracy. Here again, the reference to John Rawls is quite evident: within the Rawlsian "reasonable pluralism", everyone proposes a different point of view about their own moral conception of justice.

[46] F. Michelman, "Legitimacy, the Social Turn and Constitutional Review", cit., p. 8.

The third issue relates to the so-called "constitutionalization of social rights"; it is aimed at investigating how socio-economic rights can be fully included within the constitutional essentials as the basis of a liberal-democratic society. The Rawlsian idea of a constitutional social minimum tries to respond to such a question, by considering the commitment to social rights as a platform for legitimation.

The idea of the "legitimation by constitution" adopts a Kelsenian approach to democracy according to which, if the constitution is *formally* democratic, then it might be considered as fully legitimate. Michelman clarifies that "a legitimation-worthy constitution confers upon all other laws and decrees that duly issue from it an entitlement to that outer layer of institutional respect we denominate as legitimacy. In other words: legitimation-by-constitution ("LBC") ".[47]

Finally, the fourth issue concerns the "judicialization" of socio-economic rights. If we consider the judicialization of economy as substantially unacceptable, then the economy itself – within which the Rawlsian social minimum is included – might not be considered as a constitutional essential. Consequently, by accepting the principle of a "legitimation by constitution", we should observe that if we do not consider socio-economic rights as a part of the constitutional essentials, we cannot even consider them as a condition for a basic moral legitimacy of a political order.

4. Conclusion

The purpose of this article was to investigate Michelman's and Ferrajoli's approach to social rights as a part of the constitutional essentials of any democratic regime. Although they are exponents of two different legal-philosophical horizons and refer to two different social and political contexts – such as Europe, where social rights form an integral part of the constitutional principles, and the USA, where, by contrast, the constitutionalization of socio-economic rights still represents a really vexed issue – both Ferrajoli and Michelman endorse the thesis of the necessity to constitutionalize social rights by putting them under protection. To corroborate the thesis of a convergence between Ferrajoli' and Michelman's democratic theories, three arguments can be presented:

[47] Ivi, pp. 13-14.

1. Both Ferrajoli and Michelman take a "social-liberal" position about constitutional democracy, by defending the principle of the constitutionalization of social rights. Ferrajoli and Michelman share a common point of view about constitutional democracy, by stating that political power is not an unlimited power and, overall, that we can identify a specific list of rights which are left outside the availability of temporary legislative majorities.[48]

Ferrajoli and Michelman argue that, by constitutionally imposing limits and boundaries over majoritarian legislative power, we can enforce and protect our constitutional democracy and reiterate the thesis for which our fundamental rights – *liberty* rights and *social* rights, overall – give form and substance to the equality principle. In Ferrajoli's words, "fundamental rights and the constitutional essentials […] are, at the same time, both individual and common, and they cannot be suppressed or reduced by majoritarian rule. The majority cannot decide about something that does not belong to it".[49]

2. Ferrajoli and Michelman operate within a legal constitutional framework – Ferrajoli's constitutional proposal can indeed be considered as an alternative definition of the legal constitutionalism – which assumes the principle of the constitutional rigidity as its cornerstone. Fundamental rights can never be overturned, suppressed or restricted by majority rule. Ferrajoli and Michelman share the idea that any decision enacted by a legislative majority should always be examined by an independent institution – such as a constitutional or Supreme Court, for instance – empowered to establish the constitutional legitimacy of such acts.

As Ferrajoli points out, a constitution should represent a common and "generational" heritage, which can be amended only for specific reasons and to a limited extent. Any other radical or unjustified modification of the constitutional system should be considered as an illegitimate violation of the constitution itself. Moreover, fundamental rights cannot be subject to a decision by a contingent majority. The only way in which legislative majorities can intervene on rights is to extend and reinforce

[48] On this point see F. Michelman, "Unenumerated Rights Under Popular Constitutionalism", *University of Pennsylvania Journal of Constitutional Law*, 9 (2006), pp. 121-153.

[49] L. Ferrajoli, *La democrazia costituzionale*, Bologna, Il Mulino, 2016, p. 41.

them; any change aimed at restricting or suppressing such rights has to be rejected as illegitimate.[50]

The same thesis was proposed by Rawls, who – in defending the Supreme Court's power of judicial review – argued that "an amendment is not merely a change. One idea of an amendment is to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values".[51]

To corroborate his argument, Ferrajoli has recently elucidated that majorities can undermine or subvert fundamental rights only through a *coup d'état* or an illegitimate breakup of the constitutional order. When constitutionally guaranteed, fundamental rights are left outside the availability of contingent and temporary majorities, which can only take measures aimed at expanding or reinforcing rights.[52]

Michelman's most recent restatement of legal constitutionalism is aimed at enlarging and reinforcing the liberal-democratic framework; his contribution proposes to expand fundamental rights in order to incorporate socio-economic rights within the constitutional text. This proposal fully responds to the Rawlsian thesis of an always amendable constitution: the constitution change; new fundamental rights arise, and they are to be added to those already included in the constitution.

Let us consider that, before the '50s and '60s civil rights movements, minority rights in the United States were completely missed by the Constitution. Only after intense protests, social-political movements and several Supreme Court's opinions during Johnson's and Nixon's Presidencies, the USA Congress was able to enact legislative and constitutional measures in order to extend the sphere of rights.[53]

[50] L. Ferrajoli, *La democrazia attraverso i diritti*, cit., p. 78.
[51] J. Rawls, *Political Liberalism*, cit., p. 238.
[52] L. Ferrajoli, *La democrazia costituzionale*, cit., p. 41.
[53] The first Supreme Court's decision on civil rights was *Brown v. Board of Education* in 1954, which overturned the classic "separate but equal" doctrine. In 1967, *Loving v. Virginia* legalized interracial marriages. In 1961 and 1964, the USA Congress emanated two constitutional amendments (the XXIII and XXIV) in order to extend the right to vote to include District of Columbia citizens (XXIII) and to abolish the poll tax (XXIV). Other important steps in the civil rights era were the three Civil Rights Acts (1957; 1960; 1964); the 1965 Voting Rights Act and, finally, the 1968 Housing Rights Act. On this matter see the third volume of Bruce Ackerman's monumental *We, The People* trilogy – *The Civil Rights Revolution* – published in 2014.

3. The third point in common between Ferrajoli and Michelman concerns their worry about the future of democracy. Ferrajoli has recently reiterated that democracy is currently subject to a progressive weakening of its representative function which leads to an increasingly popular disaffection for politics. According to the Italian scholar, this critical condition for democracy relates to the radical overturning of the traditional relation between politics and economy, government and governance, government and financial markets and, finally, between the public and the private sphere.[54]

Michelman and Ferrajoli also share alarms about the future of representative democracy, by highlighting many problems and weaknesses of the democratic system. In his classic essay, *How Can the People Ever Make the Laws*[55], Michelman identified four "inhospitable conditions" for democracy today:

1. The growing extension of the electorate, which leads to a perception of the irrelevance of our own vote during elections;

2. The complexity of our contemporary societies, which makes it difficult to "grasp the relation between one's vote and its real political consequences",[56] but also the difficult understanding of the political issues which are leading to a progressive political disaffection;

3. The increasing extent of pluralism, characterized by a continuing migratory flux, which contributes to accelerate and amplify such a process;

4. The anonymity of political will-formation, in which public opinion and popular interaction with government are in a constant redefinition. On this issue, we might add the collapse of the mass parties in Europe – and especially in Italy – during

[54] About this point, Ferrajoli underlines that it is no longer the government that controls the economy, but it is the economy that controls the government. At the same time, the State – in its national and global definition – is now subject to the financial markets power. The global economy now controls and governs national politics. Democracy would now assume a new dimension: the social and economic policy is no longer administrated by democratic elected and representative national government and parliaments, but economic choices are now imposed by international and unelected institutions, without any popular representativeness. Many other economic issues would lead to a democratic crisis: the irreversible globalization process; the transformation of social-liberalism into a capitalist neo-liberalism; corruption and conflicts of interest; finally, the subordination of national constitutions to supranational laws, etc. Cfr. L. Ferrajoli, *La democrazia attraverso i diritti*, cit., pp. 143-157.

[55] F. I. Michelman, "How Can The People Ever Make The Law?", *Modern Schoolman*, 74 (1997), 4, pp. 311-330.

[56] A. Ferrara, *The Democratic Horizon*, Cambridge, Cambridge University Press, 2014, pp. 6-7.

the late '80s, which led to a relevant and dramatic loss of political interest and participation.[57]

In this difficult conditions, social rights are considered to be endangered by the globalization and financialization of democracy and both Ferrajoli and Michelman seem to share such a view, and they tend to remark the need to constitutionalize socio-economic rights, in order to protect them against the attack of capitalist neo-liberalism.

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[57] Alessandro Ferrara recently reworked the classical Michelmanian classification, by including five new difficult conditions for democracy: 1. the prevailing of finance within capitalist economy; 2. the acceleration of societal time; 3. the globalization and supranational tendency; 4. the transformation of public sphere, the crisis of traditional media and the consequent arising of new social media; 5. the more and more frequent use of opinion polls which influence the perception of legislative action. See A. Ferrara, *The Democratic Horizon*, cit., pp. 7-8.