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The "Constitutional law of enemy"

Provisional Text: please do not use in citations

«Il capitalismo si nutre dei suoi nemici»
Walter Benjamin

«Le democrazie hanno vissuto di assoluzioni di barbarie»
Alain Badiou

A. *Introduction*

The paper does not develop the relationship between the Constitutions and the "*criminal law of the enemy*".
This means that it does not discuss "*whether*" and "*how*" the Constitutions legitimize this form of criminal approach. In fact, the theme of the constitutional legitimation of legal discourse is very complex within the broader area of methodology of comparison, because it regards the intellectual and institutional phenomena of the so called "*legal flows*" or the "*imitation*", "*circulation*" and "*borrowing*" of "*out of place ideas*", born elsewhere but spread everywhere with an absolute normative and narrative de-contextualization (D. Kennedy, J.J. Gomes Canotilho, D. López Medina, M. Carducci).
Moreover, the "*criminal law of the enemy*", semantically rooted in the German constitutional history (the relationship between the criminal dogmatic proposed by G. Jakobs and the genesis of article 19 of the *Grundgesetz* on the "*core fundamental*" of rights is an example, especially if compared to the Weimarian experience of "*institutional guarantees*" of rights) arises as a category and normative practice (G. Jacobs).
Therefore, outside that context, its circulation has fueled imprecise and often misleading discourses and narratives, mainly ideological rather than analytical, as such insufficient to take all the variables into account, starting from the historical-constitutional one, that could favor or hinder the effectiveness of the mechanism in different contexts.
About this point, we can think of the conceptualization of the "*non-person*" in German constitutionalism (between "German", European, not European), compared to the notion in Latin constitutionalism (between Iberian, Creole, gringo, indio, mestizo, mulatto, negro, afro descendant).
This kind of explanation would be more appropriate with regard to Italy because of its particular constitutional history, its peculiar transition from fascism to the Republic, its peculiar survival of instruments and techniques of fascist law, its peculiar experience of legal definition of "person" (D. Richards).
However, this is not the place to deal with such an extensive topic.

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B. *Constitutionalism, "enemy", and natural resources*

The paper instead wants to deal with the relationship between Constitutions, historical processes of extractivism and the construction of juridical subjectivity with respect to the use of natural resources.
In particular, it intends to answer - in a concise and simple way - the following eight questions:

1 - *what is the historical connection between Constitutionalism and the configuration of the "enemy"?*
2 - *when, where and why does an "enemy" configuration arise connected to the use of natural resources?*
3 - *is this configuration a cause or an effect of historical extractive processes?*
4 - *which vectors have spread this configuration around the world?*
5 - *why now is this configuration increasingly widespread in Europe (including Italy and Salento)?*
6 - *what are the constitutional modalities that legitimize it?*
7 - *how to protect yourself against these processes?*
8 - *how to distinguish resistance to extractivism from the "capture" of "Sovranist" utopias?*

C. *Short theoretical references*

It is correct to premise that the theoretical basis used to discuss these questions is not the criticism of Carl Schmitt's thought, one of the most equivocal constitutional philosophers in the world on the circulation of "*out of place ideas*". In fact, paradoxically, regarding precisely the theme of natural resources, Schmitt has provided indispensable contributions to the desecration of the hypocrisies of Constitutionalism in the juridical construction of the subject.
Consequently, without ignoring Schmitt, the paper rethinks the lines of analysis that, from Karl Kautsky, through Karl Loewenstein and Hermann Heller, to Maurice Duverger and Alain Badiou, observe the "*fascist normality*" of the constitutional practices of liberal democracies (summarized in two recurrent metaphors: democracy as a "*Trojan horse*", democracy as a "*snake's egg*").

D. *Territory-Space-Order between "Ortung"/"Raum" and "Nemo"/"Peregrinus"/"Feind"*

Let's now analyze the first three questions:

- *the historical link between Constitutionalism and the configuration of the "enemy";*

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- *where and why a configuration of the "enemy" was linked to the use of natural resources;*
- *if this configuration has been a cause or effect of historical extractive processes*.

The historical link between Constitutionalism and the configurations of the "*enemy*" can be summarized through the historical semantics of some words used in the Western Euro-Atlantic constitutional law:

- territory;
- space;
- order.

In fact, in the Euro-Atlantic history, two elements characterizing the law can be found:

- the progressive separation of two different ontologies of space (C. Schmitt);
- a new function of the juridical rules of space due to changes in the systems of natural production of the earth (from the "*biochemical*" to the "*fossil*" ones: B. Marquardt).

The two ontologies of space are identifiable through the different terms used by Carl Schmitt, "*Ortung*" and "*Raum*", with a different combination of "*Ortung/Ordnung*" *vs* "*Raum /Ordnung*".

The juridical rules produced an order ("*Ordnung*") of space, structured on two different relations:

- "*place of things in relation to the human being*" ("*Ortung*": the physical and biochemical place);
- "*place of relations exclusively between humans*" ("*Raum*": the political-social place).

The philosophical matrix of this separation is in Aristotle, with the distinction between "*Bios*" and "*Zoon*" (M. Carducci).

This difference has therefore created a separation between the "*order of natural things*" and the "*order of social relations*" (a separation also deriving from the political theology of a Christian matrix: the separation of man from the earthly "Paradise"). It is, however, a separation unknown to other legal traditions (from Islamic to "indigenous") (H.P. Glenn) and generating further legal distinctions: just think of the distinction between private law (as an order of relations between human beings and things) and public law (as an order of relations between human beings, in the dialectic of freedom and power). It is also at the basis of the Hobbesian conception of "*public goods*" ("*public goods*" are powers of human beings towards other human beings and towards things: security, justice, peace, war, etc ...).

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These distinctions, today, are considered "*normal*" and this means that we perceive the "*normality*" of law in these terms of separation between the two spaces (H. Heller). For example, the legitimacy of the actions of multinationals, and with it the separation between public international law, private international law and investment law, is based on this logic of the two spaces: the registered office (of a multinational company) in a "*Raum*", and an investment action of a "*Ortung*" (that is to say the TAP case in Salento).
Not even the Marxist legal doctrine, despite its criticism of the historical matrix of that process of separation (the genesis of the capitalist system of production), denies this "*normality*" (Hosea Jaffe).
Even the Soviet State and "*real Socialism*" have kept it.
However, here it is important to underline how this separation, considered "*normal*", has helped to build the figure of the "*enemy*" and make it "*normal*".
It is possible to synthetically trace three historical evolution lines.
The first is marked by the definition of the "*enemy*" as a subject that "*does not know*" the distinction between the two spaces. It is the theme of the "*terra nullius*", at the base of the Hispano-Portuguese "*Conquista*" of the "*Western Indies*". If it is "*normal*" that the legal order ("*Ordnung*") knows two different spaces (as a relationship between things: "*Ortung*"; as social relations between humans: "*Raum*"), the one who ignores this distinction is "*against law*"; it is the "*natural enemy*".
Thus, the concept of "*enemy*" is connected to the conception of space: space split between "*nature*" and "*human*" (*Bios/Zoon*).
Moreover, "*enemy*" comes from the Latin "*Nemo*": one who "*is nobody*" because "*he does not have a defined place*".
It is important to remember that this identification of the "*enemy*" with respect to space characterizes the relations between Western law and the "*new continent*" (L. Zea; "*West and the Rest*": W. Mignolo).
In Europe, on the other hand, the legal distinction between "*Nemo*" and "*Sive Peregrinus*" (then "*forestiero*", in Italian) is very important, as it is linked to the concept of "f*orest*", understood not as "*terra nullius*" but as a common place of natural resources (water, animals, wood: the so-called "*commons*"). The "*forestiero*" is not the "*enemy*", but who shares vital needs common to all human beings. The "*forest*" (think of the English "*Charter of the Forest*" of 1217) is a "*common place*" of access to common life needs; whoever comes from the "*forest*" is not a "*Nemo*", he is not an "*enemy*"; he is a "*peregrinus*", a "forestiero".
In fact, Carl Schmitt's "*friend/enemy*" theory refers to space as "*Raum*", not as "*Ortung*", that is, to social and political space only, not to that of relations with

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natural resources. And the "*enemy*" of the "*Raum*" is called "*Feind*" (whose etymology is "to hate" and from which the Italian "feud" derives, therefore belonging to a lineage) not "*Nemo*", as it is the political owner of other spaces, with people and things "*similar*" to their own, but in opposition, hostile (L. Ornaghi).

Thus, the configuration of the "enemy", linked to the use of natural resources, was born with the "*Conquista*" of the American continent. "*Nemo*" is the one who lives of natural needs in nature, without taking possession of nature, as it was an "*object*". As a consequence, the "*Nemo*" is bio-centric (one with nature), while the "*homo europaeus*" - including the "*peregrinus*" - is "*anthropo-technical*" (one with politics: P. Sloterdijk).

Paradoxically, it is precisely the configuration of the *"enemy*" that legitimizes the first experiences of extractivism and causes the first, huge genocide of the modern era: that of the "*Indios*" and their ecological legal tradition. The "*Indios*" were "*enemies*" because they ignored private law and the right of ownership over nature).

Not accidentally, the first "*epistemic and ontological*" extractivism of imposition of knowledge and existence was practiced on them (R. Grosfoguel): the "*color of reason*" has been imposed on them (C. León Pesántez) The observation, among other things, is important because it shows how the phenomenon of exploitation of natural resources has historically been linked to processes of "*epistemic and ontological*" extractivism, that is, of colonization of the intellect in the knowledge and understanding of reality.

Moreover, the normative emblem of "epistemic and ontological" extractivism is in art. 22 of the Covenant of the "*League of Nations*" of June 28, 1919, which should be mentioned in some passages:« *To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it [...]*»

The "*epistemic and ontological*" extractivism thus lurks in the ontologies of "*progress*" and "*development*", in the twentieth century, and of "*strategicity*", in the new millennium: words that do not describe a reality, therefore are

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impredicative, but serve to impose a way of conceiving being to "*extract*" from the subject a single, uniform reason for his life.

E. "Discovery" of coal and "fossil" constitutional law

At this point, it is necessary to highlight that the main vector that has spread the configuration of the "*enemy*" connected to natural resources throughout the world has been precisely the Western constitutional law with its distinctions between private law and public law (the "*coloniality of legal knowledge*"): a "*paradoxical*" law that, in Europe, accepts the figure of the "*sive peregrinus*"(with his rights and his natural survival needs), but that in the rest of the world recognizes only "*enemies*" (without rights and without needs).
Just Carl Schmitt, in the book "*der Nomos der Erde*" (1951) notes that the "*Ortung*" (space) will become the same all over the world, with the expansion of the "*ius publicum europaeum*".
This is the "*constitutional normality*" of the World. This "*normality*" will be called by Schmitt "*Konstitutionelle Verfassung*" (the "*true*" Constitution of the World).
The space, "*Raum*", will instead be the place of national Constitutions and national policies.
But when do a figure of the "*enemy*" connected to natural resources also emerge in Europe?
In summary, this configuration emerges in the long process of affirmation of industrial capitalism, from the "*Enclosures*" of the sixteenth century to the "*discovery*" of coal.
The "*discovery*" of coal has a huge impact on constitutional law: it transforms it from "*biochemical*" law into "*fossil*" law (B. Marquardt).
What does "*fossil*" constitutional law mean? It means a law that multiplies the subjectivities of the human being, with respect to the past, but not for political or social reasons, but for reasons connected to unprecedented forms of exploitation of nature (those just "*fossils*").
In "*biochemical*" constitutional law, the human being could be a "*Nemo*" (outside Europe in the "*Ortung*"/"*terra nullius*" to be conquered and colonized), a "*Feind*" (the political subjects opposed to each other in Europe and towards the World for their own space/"*Raum*"), a "*sive peregrinus*" (the subjects with vital needs in Europe during access to the common natural resources of water, animals and wood), a "*subject of rights*" (the European human being in the World, who exports and imposes Western law).
With the "*fossil*" constitutional law, on the other hand, two new legal assignments are born: that of "*user*" of the services produced by fossil resources

(think of the "*invention*" of rail transport) and that of "*consumer*" of the products generated by those services (think of electricity).
But to whom do these new entitlements belong and who is the "*enemy*" of these titles?
Here emerges the second "*colonial paradox*" of Western constitutional law.
"*All*" can be "*users*" and "*consumers*", but not because everyone is "*equal*", with the same rights and needs; so not because the distinctions between "*Nemo*"-"*Feind*"-"*Peregrinus*" fail, but because the "*fossil*" system can only work with the opening to "*all*" (the greater is the number of "*consumers*" and "*users*", the greater will be the "*fossil*" energy production).
This is the matrix of both the so-called "*Ricardian equivalence*" (human actions are all equivalent in economic terms because they all contribute to consumption and utilities: D. Ricardo) and the elaboration of the idea of "*Welfare*".
The "*fossil*" constitutional law must not have "*enemies*", otherwise it will not work.
But this does not mean that it is an "*altruistic*" and a "*right*" law. It is a "*generalist*" and "*opportunistic*" law. The most effective historical example of this "*colonial paradox*" of Western constitutional opportunism is India and its railway: all have the "*right to use it*", but independently of being "*enemies*" of Western law.
Therefore, the "*fossil*" constitutional law is a genetically contradictory and hypocritical law.
It is not a constitutional law that "*eliminates the enemy*".
It is not a constitutional law that "*accepts the enemy*".
Banally it is a constitutional law that "*uses the enemy*" to keep up its "*fossil*" operating system (based on consumption rights and utilities).
It becomes a "*banal law of the enemy*" (K. Loewenstein).
This "*banality of evil*" seems atrocious outside the West, especially after the decolonization that has deluded about democracy and freedom (F. Fanon); in Europe, only in recent years, precisely through the migratory phenomena which make "*visible*" the presence of a subjectivity "*amputated*" in their own rights (the immigrant who takes the train as a "*user*", but can be insulted and repressed as "*enemy*"), it is clearly merging.

F. The constitutional subjectivity "without spaces" of consumption

Why now is this configuration increasingly widespread in Europe (including Italy and Salento)?
The answer is very simple: with the globalization of "*consumption*" and "*users*" (further encouraged by the financialization of the exchange value of natural

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resources, (think of the TRIPS agreements on the "*patentability*" of nature), the hypocrisy of the "*fossil*" constitutional law has also become "*global*" and therefore also includes Europe.

Until the late seventies of the twentieth century, Europe lived in a fourfold identity, summarized in four formulas, proposed respectively by Maurice Duverger and Robert Gilpin.

The first identity was twofold and translated into the formula of "*social democracy in external fascism*" (M. Duverger): Europe democratized itself within States, reducing the figure of the "*enemy*" through political pluralism and inclusive statutes of social citizenship, but kept the distinction elsewhere, in the former colonized States that were, not by chance, authoritarian, non-democratic, non-social, in order to continue to exploit their natural resources without the pluralistic involvement of indigenous peoples. In this sense, Alain Badiou argues that European democracy has experienced "*absolutions of barbarism*" (think of the hypocritical French constitutional universalism).

Moreover, within the European democracies, subjects were "*citizens*" not only politically but also socially because they could access to "*consumption*" and "*users*" (think of the concepts of "*social utility*" of private economic initiative and that of "*social function*" of property, in the Italian Constitution: artt. 41 and 42 Cost. it.).

Also the second identity was twofold, summarized in the formula "*Adam Smith abroad, Keynes in homeland*" (R. Gilpin). Until the late seventies of the twentieth century, the European States have been able to act, with the US influence of the Marshall Plan, as "*Trading States*", i.e. as subjects open to international trade relations (the "*trade balance*"), but in the contextual possibility of sovereignly managing the internal policies of production, consumption and use of natural resources, without external interference (for the "*economic sovereignty*" think, for all, the nationalization of natural monopolies).

Under these conditions, the European States did not know their "*enemy*" over the use of natural resources (the "*Nemo*"). They could only know the political "*enemy*" (the "*Feind*").

The German constitutional law was emblematic of this characteristic (not by chance, defined a constitutional law "*protected*" towards the "*enemy/Feind*" but "*tolerant*" towards the "*enemy/Nemo*": artt. 2 and 21 *GG*).

The global financialization of the economy, the end of the "*Gold Standard*", the birth of the "*consumer Europe*" first, with the "Single European Act" of 1986, and that of the "*currency"* then, with the introduction of the Euro as "*reason*" "of integration have put an end to this quadruple State dimension.

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Europe is that of "*consumers*" (in the "*family-business*" hendiadys) and of money.
The new "epistemic and ontological" extractivism is now based on this.
The States are definitely "captured" by the financial reasons (the so-called "*Maastricht parameters*") and, consequently, they can no longer afford "*Keynes in homeland*". Everything must be financed and globalized, including the use of natural resources and, with them, also the rights of "*consumption*" and "*user*".
It should be noted, however, that this phenomenon does not produce the extinction of the distinction between "*Ortung*" and "*Raum*": in fact, States continue to exist. It is the consumption and use of natural resources that are "*globalized*". Then the dimensions of the "*Ortung*" change: the "*Ortung*" is the whole world Planet Earth.
At this stage, the "*constitutional law of the enemy*" acquires a new paradoxical hypocrisy: it is an increasingly open law in the face of individual claims of autonomy within the States (the so-called "*new rights*" of "*individual autonomy*" in the "*Raum*" of any State), but increasingly contrary to the discourses about "*common use*" of natural resources, about "*respect*" for vital needs, because now "*Ortung*" is global; it escapes the State (S. Sassen).
Moreover, the global "*fossil*" constitutional law definitively eliminates the figure of the "*sive peregrinus*", to flatten subjects to global "*consumers*"/"*users*" of "*goods and services in global competition*" (think of the formula, semantically very expressive, of the "*global village*": the world is one, there are not many "*villages*" and, in passing from one to the other, there are many "*pilgrims*": it is the mythology of "*free movement of people*).
Everything is "*consumption*" and "*users*" everywhere.
The logic of human survival, completely perverse, counter-natural, defined by Jason W. More as the logic of the "*Capitalocene*", has become definitive: you can meet your primary needs of life, as you "*consume*" and "*use*" "*fossil*" resources; not vice versa.
First the consumption, then the natural survival of life.
Who refuses this logic becomes "*enemy*" in a double meaning: that of "*Nemo*" (a "*nobody*" who opposes the world globalization of "*consumption*" and "*use*") and that of "*Feind*" (a subject with many rights that disputes the system that recognizes those rights and allows them within the "*Raum*" of a State).
But this logic also explains the contradictoriness of those who oppose it (punctually criticized by those who criticize the "*no global*"): a system that produces new freedoms is being challenged, but those who challenge the system benefit from those freedoms as "*consumers*"/"*users*".

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This is the accusation addressed, for example here in Salento, to the "*no TAP*" activists: they oppose a gas pipeline, but ... use the gas to eat!
The "*fossil*" constitutional "*normality*" works this way: everyone, to live, must consume through the "*fossil*". Those who oppose this system are contradictory, because they still feed it, continuing to consume it to live. He can only be an "*enemy*".
In the global "*Ortung*", extractivism takes possession of the individual subjectivity of each of us, to denounce us in our contradictions of opposition (P. Dardot, Ch. Laval).

G. *Three forms of reaction: false, passive, subversive*

In this "*subsumption*", the constitutional modality of "*pacification*" of the "*enemy*" within the "*fossil*" system of coexistence is also included: recognizing and encouraging it as much rights about individual autonomy as possible (from the so-called "*new rights*" to "*bio-ethical rights"*), in order to multiply the autonomy of "*consumption*" and "*use*" of the global "*Ortung*" of exploitation of nature.
The "*era of rights*" has become synonymous with "*consumer era*" in the global "*Ortung*".
Are there any forms of opposition and resistance to this counter-natural and self-destructive rationality? How are they classified?
From the point of view of comparative constitutional law, the forms of opposition/resistance can be classified into three categories.
The first category identifies a "*false opposition*" to self-destructive rationality: it is the neo-mercantile "*Sovranism*". This is a "*false opposition*" because Sovereignism does not pose the problem of the subject enslaved as a consumer with respect to natural resources. Sovereignism simply claims the supremacy of the State as "*Raum*", within which to decide the political fate of the subjects. In fact, it identifies the "*enemy*" in the migrant as a subject alien to the "*Raum*", instead of discussing the new phenomena of the "*enemy*" of natural resources. The "*Sovranist"* State, therefore, is not a "*sovereign*" State: it is like a Roman "*Libertus*", a slave who wants to be freed, but will never be actually free. And, like the "*Liberti*", he will in turn enslave (the migrants). An example is offered by the Italian Matteo Salvini, in fact je is a "*Sovranist"* but favorable to TAP, a multinational that "*captures*" the sovereignty of the State.
The second form of opposition is that of the so called "*neo-colonial resistance*": it is the resistance to the powers and their instruments of repression; it does not question either the "*coloniality of knowledge*" of the "*fossil*" constitutional law that legitimizes those powers or the narrative of individual freedoms of

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autonomy. It is a "*partial*" resistance (for some scholars, by taking back the Gramscian coordinates, it is a "*passive*" revolution) which mainly recognizes a "*political dimensions of dignity*" within the existing "fossil" system (Fathi Triki).
In this sense it is "*neo-colonial*" (in resisting, it maintains the colonial conditions, especially outside Europe, of "*epistemic and ontological*" extractivism). The most interesting criticism in Italy against this kind of "*opposition*" was that of Pierpaolo Pasolini, with his "*Lettere luterane*".
The third form of opposition is given by the "*de-colonial resistance*", personified by the Commander Marcos and by the need to proceed to the "*de-colonization of knowledge*" (not accidentally in the ex-colonized contexts, to reject the "*epistemic and ontological*" extractivism), even before the power to recover "*bio-chemicals*" and no more "*fossil*" conceptions of life and cohabitation. Precisely because the "*fossil*" constitutional law has flattened the subjectivity on "*consumption*"/"*users*" in the most unjust forms (precisely in the countries with the first experiences of extractivism), we must be emancipated from the "*coloniality*" of this knowledge, to fight against power. This form of resistance identifies the most inconvenient expression of contrast to the global logics of "*fossil*" constitutional law.
Within it, the distinction between "Raum" and "Ortung" is surpassed by a "*migrant humanitarianism*" (Patrick Chamoiseau), who does not want to "*have places*" projected into a present and future common condition. Rethinking the rights of future generations and no longer the actual individual autonomy, I do not consider it "*normal*" to question myself about what I want today (the constitutional instantaneous self-determination); I consider it "*normal*" to question myself about what will come after me (the constitutional self-determination of "*always for all and forever*"), inclusive of non-human life (discussing nature as a subject of interaction and not as an object of appropriation: the "*Pacha Mama*" Andean, the "*Ubuntu*" African etc ...), recovering Non-Western juridical holistic traditions (the "*indigenous*" juridical tradition of "*Buen Vivir*"), in the spatial dimension of the climate as a biosphere of the human family, the only "*border*" with which to deal with (the "*Mother Earth*").
This resistance is the only potentially "*subversive*" and "*constituent*" one.
Not surprisingly, it is the one that statistically counts more deaths among activists and participants (indigenous, women, children), because of the procedures and rules of "*fossil*" constitutional law (the most crudely contradictory example is Brazil, with its "*Green Constitution*" of 1988 - article 225 *CFB* - "indifferent" to the extermination of the Amazon).

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The great question of this Earth and its future, even here in the West, is that it can universally become a "*constituent*" resistance.

In any case, the "*constitutional law of the enemy*" is the "*fossil*" constitutional law that kills three times:

- it kills nature,
- it kills health of life,
- it kills the subjectivity of the present and of the future.

In its two centuries of life, the "*fossil*" constitutional law has achieved the goal of "expanding" the autonomy of "*social*" life of many people. Now, however, it is necessary to be aware of the price paid in terms of the autonomy of "*natural*" life for all of humanity.

The "*enem*y" of the "*fossil*" constitutional law is within himself.

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