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The Turn to Governance:
The Exercise of Power in the International Public Space

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

- January 20 Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice
- January 27 Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law
- February 3 Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego)
- February 10 No Colloquium - Postponed due to weather conditions
- February 17 No Colloquium
- February 24 Gianluigi Palombella, University of Parma, Law Faculty**
Topic: Rule of Law in Extra-National Governance
Background reading
- March 3 Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues (and Vices) in European Integration
- March 10 David Kretzmer, Hebrew University/Ulster
Topic: State Reports to the UN Human Rights Committee
- March 11 (SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies
- March 17 No Colloquium – Spring Break
- March 24 Marta Cartabia, University of Milan
Topic: Rights in Europe
- March 31 No Colloquium
- April 7 Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance?
- April 14 Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes
- Thurs April 15- (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)
Daryl Levinson, Harvard Law School
Topic: Public Law: Constitutional and International
- April 21 Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance

CHAPTER ONE

THE RULE OF LAW AS AN INSTITUTIONAL IDEAL

Gianluigi Palombella

The rule of law is an institutional ideal concerning the law. Owing to its normative nature, in fact it has been held to mean different things at different times and in different contexts. Its complexity and contestability is due to many causes, including the interweaving of conceptual, historical, philosophical meanings. There is also the fact that the concept belongs in multiple domains, from law to political morality.

Thus, a general reconsideration, sensitive to such complexity, can emerge from pursuing historical, comparative, philosophical analyses and their interrelations. The issue can be addressed through various avenues: one of them is semantic, where rule of law is traditionally contrasted with the “rule of men”¹ through its *differentia specifica*. Although it may seem rather abstract, by initially following a similar path taking choices at the crossroads we can set the scene. We can approach the significance and deeper implications of general questions associated with an expression such as “Rule of Law.”

However, an investigation on the rule of law aimed at making sense of its potentialities in the twenty-first century needs to move on to a historically oriented recognition, focusing on institutional and comparative analysis. Through the latter the rationale of different conceptions can be more intelligibly recognised. Thus, the normative meaning of the “rule of law” can be identified by tracing it back to its distinctive (English) institutional setting, one that can be better understood by contrasting it with other similar experiences (on the European continent, mainly, the pre-constitutional *Rechtsstaat*).

The normative meaning can be subsequently discussed and elaborated on through some of the theoretical issues that it raises in the

* I am grateful to Christine Chwacza and Ana Vrdoljak for their precious and generous comments. I owe special thanks to Martin Krygier and Neil Walker for invaluable and ongoing conversations on the rule of law.

¹ Starting with Aristotle 1984:III 16 1287 a-b.

context of political, moral, and legal theoretical analysis. The rule of law confronts questions in turn concerning justice, the problem of liberty and non-domination, the balance between the right and the good, and of course, the validity of law.

The purpose of such reconsideration here is to suggest, carefully going through the stages just described, the meaning that the rule of law bears as: a) consistent with its historical constants, instead of being forged on a purely abstract basis; b) critically extendable to contemporary institutional transformations, even beyond the State; and c) conceptually sustainable on a philosophical and legal theoretical plane.

The rule of law ideal requires institutional settings that actually depend on time and context, but they must have in common coherence with the normative objective the ideal evokes. As I will maintain, this ideal concerns the law, not directly power or social organization. More specifically, it concerns the adequacy of legal institutions to prevent the law from turning itself into a sheer tool of domination, a manageable servant to political monopoly and instrumentalism.

Thus, the rule of law rests on a normative underlying structure, one that is often overlooked by scholarly debates, however concerned they are with the validity or morality of law, or with lists of formal or substantive requirements. This structure can be made to resurface: here it shall be essentially evoked through headings which include the “duality of law”, institutional balance, and “non-domination” that I conceive as relevant features on a distinctive legal plane.

PRELIMINARY SEMANTICS: “RULE OF MEN” AND “RULE BY LAW”

As an ideal, rule of law is not just a set of statements reflecting what is needed for law merely to be law. But the ideal is often conceived as mere compliance with the rules that law prescribes, assuming that some value can be found and cherished precisely within the certainty and predictability that enacted rules are trusted to grant.

Among the possible interpretations, we might understand the point of the contrast between rule of law and of men just by treasuring the very fact that some law does exist. However, this minimalist conclusion does not necessarily promise that the ideal called rule of law is thereby achieved. Yet, making the fact that some law exists a sufficient condition for fulfilment of the ideal happens to run against some simple common sense.

One explanation for this uneasiness lies with the rather unfocused or elusive issue about “who” or what “rules.”² Should we just submit ourselves to a sovereign’s sanctioned commands (Austin 1954)? Is this enough to dissolve the sheer “rule of men” and supersede it with “rule of law”?

According to Hayek (1960:153): “It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.” In principle, if we expect the sheer form of law to generate the rule of law, thereby displacing the substantive issue of “who” rules, this hope is destined to be disappointed. Law as such does not promise that much.³

Although Aristotle thought of law in a rather evocative way, as reason without passion,⁴ law could be apt to frame and serve both democratic and autocratic regimes. It has often been held that law’s indeterminacy itself ultimately leads to opposite results depending on “political winds” (Gordon 1984:125). Even the liberal stance, that law is a limitation on power, is untenable. In fact, so the argument goes, law is ultimately just a product of the will of the most powerful class. The expectations with which law is burdened are bound to suffer such a weakness, if not to hide ideological purposes.

In abstract terms, then, it is hard to cast the revered flag of “rule of law, not men” in an innocent mode. “Rule of men,” in the range of its semantics, includes rule which takes place also through law. This opens a path as well to another traditionally alleged adversary of the rule of law: “rule by law.” The latter cannot rest implicitly on anything less than the “rule of men.” Its distinct meaning evokes the service of law, and narrows it, however, to the role of an instrument.

Of course, in plain words, it would be against the grain to declare that law is not an instrument. But the rule of law conceives of an institutional setting which is held to bear an *inherent* value thanks to a

² Stephen Holmes (2003:51) writes that “the degree of justice or injustice depends on who wields power and for what ends.”

³ Martin Krygier (2009) interestingly argues against the primacy of *a priori* formal requirements for establishing the rule of law, and invites to focus instead on the ends to be pursued, i.e. on teleology as the true key to Rule-of-law.

⁴ Aristotle 1984:III 16 1287a 30.

specific articulation of law. Nonetheless, bearing an inherent value is also compatible with being a constitutive essential of some other ultimate values (Raz 1984:187 ff., 191 ff.). However, the evocative force of the “rule by law” alternative is properly meant to bring into focus and reflect a narrower case, when law is intended to be *just* an instrument. As Arthur Goodhart (1958:947) wrote: “I am not speaking about rule by law which can be the most efficient instrument in the enforcement of tyrannical rule: I am speaking about rule under the law which is the essential foundation of liberty. The two are totally distinct.”

Against this picture, however, one can find remarkable views from the opposite side. For example, drawing on Rousseau, Stephen Holmes (2003:49–51) argues that, the law being just an instrument, it is a matter of distribution of power among social groups whether the law will result as just or unjust. Going further, he maintains implicitly that there is only a degree difference between “rule by law” and rule of law: the difference is due to the social distribution of power, that is, it depends on the development of a full-fledged “polyarchy.”

Although this might be acceptable, I doubt it does justice to the qualitative shift which comes about, also on the legal plane, when socio-political distribution of power changes from tyrannical monopoly to polyarchy. It is not to be understated how the passage to the rule of law, to the extent it occurs, would allow for a radical turn, which consists of the emergence of law not just as an instrument of social groups. From the perspective of each social group, law shall start showing an authority which does not coincide with its manageability as their own instrument.

In order for this to be feasible, the law itself will have undertaken transformations, which cannot prevent political power from brushing away some guarantees of, say, polyarchy, but which can prevent it from doing so legally. All in all, if Holmes’s argument is that law’s instrumentality (rule *by* law) is constant, and the change toward rule of law is a mere matter of power, then it largely avoids what I believe is the point in the rule of law ideal. Although one can admit that the explanation of social and legal change depends on some non-legal factors, one shouldn’t fail to see what transformations are to be recorded in the legal realm. Rule of law would no longer rest on an identical instrumentality, but rather would bear an inherent value: it would be upheld by meaning something different from “rule by law,” and exceed the spectrum the latter encompasses.

Although it is not possible now to deal at length with the “instrumentality” of law,⁵ its differentia vis-à-vis the rule of law calls for at least one more remark. After all, it is to be noted that the scope of “instrumentality” must follow the nature of the instrument itself. As to the law (and its “nature”), some can assume an especially thin neutrality of the instrument, as good for everything. Others, however, might depict law in such a way that it can lead only to some uses and results, for example, by narrowing the definition of law to a thick, morally encumbered concept.

Against the full neutrality thesis, it might be said that however “neutral” the law can be, one can hardly get rid of the canon prescribing the adequacy of means to ends. Since not all instruments can be used to attain whatever ends, it may turn out to be senseless to resort to a knife, however sharp it may be, in order to generate, say, linkages instead of slashes. This is testament both to the resistance of the instrument to uses that would be irrational in respect to it as well as to its amenability to be adopted as an instrument in some more “appropriate” ways.

In his explanation of the Nazi “Doppelstaat,” for example, Ernst Fraenkel (1969:56 ff.) showed that the Nazi dictatorship dismissed legal procedures and suspended its jurisdiction on arbitrary grounds, whenever it was convenient in order to pursue its ends. Nonetheless, Thomas Hobbes taught how, although not subject to laws, Leviathan does rule by the law: it sets up rules, public competences, and organised procedures in stable and prospective ways (Hobbes 1946: chaps. 26–28). This excess of ambivalence certainly belongs in the domain of the “rule by law.”

However, it begs our attention because its distinctive meaning rests on exploiting law, downplaying inner qualities per se or ideal visions (like the rule of law itself) that might turn out to check arbitrary use or limit flexibility in the pursuit of whatever goals. For sure, by sticking to instrumentality, one denies that the rule of law is that kind of ideal form where law is endowed with primacy and non-instrumental value - that the law can acquire some qualities which would narrow its

⁵ Explaining the passage to an instrumentalist view, Horwitz (1977:253) asserts that American judges before 1900 didn’t analyse law “functionally or purposively,” or as “a creative instrument” directed to “social change.” See also, Tamanaha 2006.

indiscriminate capacity. From this view, then, it holds true that “rule by law” emerges at odds with “rule of law.”

What is the point instead in rejecting the alleged contrast between rule of law and rule of men? From some angles the claim that rule is inconceivable other than as “rule of men,” a claim that would endorse Hobbes’s stance rather than Aristotle’s,⁶ appears understandable. After all, rule of law cannot be automatically interpreted as a passage toward a de-humanised “objectivity” of legal imperatives, nor can it be deprived of its positive (law) aspect. That is, whatever content the law is conceived to be bound to include (unless it is just like laws of gravity and natural causality), it has to be connected with some active role played by men’s rule in its plain meaning. This applies to Hobbes as much as to all “modern” contractualist (natural) law doctrines of the seventeenth and eighteenth centuries, to say the least.

Moreover, law is always a rule which men are responsible for, and it is men that govern through law. It is not the law that governs of its own accord. Eventually, the connection between power (a premise for “men” to exercise their rule) and the rule that law is must be recognised as necessary.

Thus, on the one hand, as explained above, “rule of law” suggests some ideal directly concerning the law, which does not dissolve into “rule by law.” On the other hand, insisting on some “objective” meaning of rule of law as contrasted with (and independent of) “rule of men” may raise traditional concerns about its ideological function: Rule of law might be reduced to a patina for the legitimization of power; it might just hide the rule by law, far from being an “unqualified human good” in virtue of which rulers end up being inhibited or constrained by the laws they enacted (Thompson 1974:264–66). Focusing instead on rule of law precisely through contrast with “rule by law” helps us to become aware of such hidden ideological potentialities.

Returning to the venerable idea of “the rule of laws, not men,” the antithesis can emerge meaningfully if we try to understand whether any law really does exist that gains some autonomous normativity, even *vis-a-vis* the will of those who ultimately are responsible for its protection and application. In what follows, I suggest that this contrast

⁶ Joseph Raz (1979) endorses the continuity between rule of law and rule of men whereas Hobbes (1946:chap. 46, part 4) considered the opposition an error of Aristotle’s “politics.”

can make sense only if we presuppose (a) a valid *positive* law (b) which is not under the *purview of the ruling power*, and (c) appears *from the vantage point of the latter* to be irreducible to a sheer instrument. Accordingly, not all the law shall be an available instrument of the will of the rulers or of the sovereign (“rule by law”).

Maybe the general question can be evoked through the lines of Dicey himself, when he maintains that the sovereignty of Parliament “favours the supremacy of the law” and it is “erroneous” to think that English solutions are just merely “formal,” or “at best only a substitution of the despotism of Parliament for the prerogative of the Crown” (Dicey 1915:268, 273). Although law is always a man-made artefact, the rule of law is held to designate some other law (however problematic it appears to be) which does not reduce itself to the actual ultimate will of Parliament.⁷

To make sense of Dicey’s reference we must rule out the alternative of some natural law, whose just content would be self-evident and self-imposing. Within these coordinates, it turns out that following the rule of law is not for Parliament to surrender itself to natural law. In theoretical terms, the puzzle is engendered instead precisely from the quest for legal imperatives (not merely moral ones) to prevail over the will of the sovereign. It would be a weak hypothesis to think that the rule of law ideal, on a legal plane, would be respected *absent any legal reason*. Inasmuch as it would depend on Parliament’s will, the rule of law would be imprisoned within a circle.

The assumption that this conception can be entitled to represent the “idea of the rule of laws, not men” would be clearly undermined. It is tantamount to saying that it hardly any law can exist which ultimately enjoys any self-standing status. Even if Parliament will not interfere against some old or traditional norms, contingent non-interference against the latter would not disprove that the law actually is under Parliament’s dominating ordinary will.⁸ Thus far, the rule of law would

⁷ Dicey (1915:273) writes: “Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.”

⁸ The concept of “non-domination” is central to the wider political theory of Philip Pettit (1997). I return to this later. See also Skinner (1998).

still fail to distinguish itself within the competing areas designated by “rule of men” and “rule by law.”

Within this picture, the remaining pretensions of the rule of law would retain only a paradoxical sense, that is, they would boil down simply to asserting that morality must rule (The Rule of Morality). But it would be counter-intuitive to allege that rule of law asks morality to rule directly, and thereby supersede legal control.

The scene of our rule of law ideal must be set differently, and the same is equally true of the interplay between men and laws. Although there may also be a moral ideal which is often recognised within rule of law, as connected to its root of liberty, certainty, non-arbitrariness, or even human dignity, it does not directly prescribe moral objectives. It prescribes only legal features. It does not ask for the law to bear some specific content, the good law, nor does it claim to dictate the internal form of the realm of power (for example, that power be organised democratically). As I will maintain in this chapter, although “rule of men” plainly cannot be replaced, rule of law means respect for a legally desirable situation. According to the latter, dominating law appears to be contestable, as a matter of law, on the basis of *some* independent legal force and institutional structures in the interest of everyone.

Historical reconstruction, providing for institutional traces, can support such a view. The general leitmotiv is that law can satisfy the rule of law ideal when “rule of men” turns out to be legally channelled, up to the point where the ruling power would face some other man-made rule and legal institutions sufficiently stable to prevent a monopoly on legal production and contents. Indeed, rule of law does not raise untenable pretensions, that is, that men are not ruling but that the law itself is ruling by its own fiat. Thus, conflict is not engendered against the rule of men *tout court* (*lato sensu* version) but rather against the (*stricto sensu* version) rule of men as domination. The latter emerges where no positive laws or legal devices are institutionally available, that are suited to cope with this dominating feature.

The rule of law is in contrast to the possibility that under the purview of ruling powers law can be reduced to a sheer instrument of their preferences alone, lacking any other law which falls outside their reach and can be traced back to wider needs or ends within the social whole. Since reference to rule of law appears to have been made constantly in legal history and in contemporary legal documents as well, its status as an ideal cannot be envisaged only from a desk. It must also

be reconstructed through its historical recurrence. Thus I will deal with the rule of law by drawing its lines along historical, institutional, and conceptual paths.

THE EUROPEAN LEGISLATIVE STATE

An overview of the wider European scene, recalling the main characteristics of the *Rechtsstaat* and its continental equivalents, can illuminate some elements of the rule of law as a distinctive historical-institutional concept.⁹ “Rule of law” is not really the same thing as *Rechtsstaat* or *l’Etat de Droit*, or *l’Estado de derecho*, *lo Stato di diritto*, and so forth. But the general idea of a “law-bound” State emerges most clearly through the institutional model of a *Rechtsstaat*, which developed its identity as a new form of State coming to replace the *Polizeistaat*, or *l’Etat de police*. The latter was entitled to apply any discretionary decision to the life of citizens in order to define their well-being. By contrast, *l’Etat de droit* related to its subjects only by submitting itself to the law, and to rules (Carré de Malberg 1920:I, 488–9).

As F. J. Stahl (1870:137 ff.) and the German public law doctrine¹⁰ worked out the concept of *Rechtsstaat*, this new State was to act under precise and fixed mechanisms, and pre-defined rules, thereby self-limiting its own power through the law. At the same time, it accomplished the public or welfare tasks of the State while maintaining its abstention from interfering with personal spheres (as regards guaranteeing happiness or religious salvation) (Boeckenfoerde 1991:145 ff.). Beyond enlightened absolutism (and State paternalism) it appeared to move from the law of power to the power of the law.

As an institutional and ideological concept the State still is attributed a metaphysical personality: it is a willing entity, preserving its primacy over society. The *Rechtsstaat* means that law is the structure of the State, not an external limitation to it. Its voice is rationality and strict legality of administrative action, the supremacy of which over ordinary citizens was granted despite the recognition of rights and the autonomy of individuals. Liberty is a consequence not truly a premise

⁹ The arguments in this and the next two sections are drawing on my earlier work, esp. Palombella 2009a.

¹⁰ The expression itself was definitely famous after L. von Mohl (1832); cf. Boeckenfoerde (1991:144).

of the law. The authority vested in this conservative aristocratic state protected civil liberties as a service offered through the State.¹¹

The idea of *Rechtsstaat* in its overall European meaning includes in its institutional organisation both the separation of powers and the so-called principle of legality, which requires that no authority can exist which is not created and conferred by legislation. In Otto Mayer's definition (1895:64 ff.), it is a State in which the administrative power is created by legislation and submitted to it as a product of (of course, largely elitist) Parliaments.

The priority of legislation can both formally grant individual rights, and subordinate them. The independent role of the judiciary was trusted rigidly to respect the legislative will. Law turns out to be the authentic voice of the State, through which it expresses its own will: it is not the constraint but rather the "form" of the State's will.

The importance and dominance of legislation was also a product of the process of codification of law which took place in continental Europe from the seventeenth through twentieth centuries. Moving beyond feudal privileges, codification overcame the particularities, uncertainty and arbitrariness engendered by the frustrating, multi-layered law of still fragmented European territories, wherein common law, Roman law, natural law and customary law were all valid and competing sources. After the successful process of codification, beyond legislation there was no instance or superior institution. Thus, there was no superior check on the law. Rather, through its clarity and unity, the basis for certainty was built. The price was not only the ultimate sovereignty of the State, but also its self-reference, that is, its being founded solely upon itself.

The poverty of the legislative state is generated by the hierarchical model of law, and mainly by the lack of a plurality of equally relevant protagonists and actors on the (institutional) scene. This was clear enough, if one focuses on the relationship between rights and legislation.

According to Georg Jellinek (1919) citizens hold "public subjective rights" on the ground that the latter result from a self-obligation of the sovereign, of the State. After the Revolution and the Declaration of the Rights of Man and of the Citizen, France's great lawyers and reformers endeavoured to protect positive legislated law from instability, change

¹¹ See Krieger 1957:14. See also his reference to von Mohl's theory of the *Rechtsstaat* at 1957:259 ff.

and the claims of natural law.¹² The same line has to be drawn throughout the rest of Europe, from Spain to Italy, as well eventually to Germany (in the *Buergerliches Gesetzbuch* of 1900).

The main French concern became that of having an unadulterated “democratic” inspiration of the institutions (rooted in Sièyès and Rousseau), rather than re-opening interpretative liberty on natural rights or granting them a force equal to the sovereign will (i.e. legislation).¹³ “*La loi*” is meant to express the final and supreme regulation which has no peers. In the German context, *die Herrschaft des Gesetzes* is the ultimate source of the law, beyond the contrasting dualism of King and Representatives.

The law-based state that came into being in Europe was based neither on “rule of law” nor on the practice of modern constitutionalism, as it developed in 1787 in the American Constitution. Instead of the flag of rights, sovereignty rooted in the French Nation or in the *Volksgeist* was generally prevailing. There is almost nothing which can be real, whether laws or rights, unless it is contained in legislation. The liberal state, of course, protected the “bourgeois” freedoms of the late eighteenth century. Indeed, the Code Napoleon was so lofty and solemn an instrument of private law that it could be called the “Constitution of the Bourgeois.” But the tussle between rights and public power could only be “decided” by legislation.

Accordingly, a view of the self-limitation of the State also developed, outside of which nothing autonomous could be recognised, not even “rights” (Jellinek 1919). The latter cannot be intended as showing any external limits against the omnipotence of legislation.

As von Gerber wrote in the middle of the nineteenth century, the concept (and reality) of the rule of law already had spread itself even as far as the United States and its constitutional setting: rights depend on the State leaving “free, outside its circle and influence, that part of the human being that cannot be subjected to the coercive action of the general will in accordance with the ideas of popular German life” (Gerber 1913:64–5). Thus it is true that rights did not consist of any “substance” but only of a form, the legal form of the legislative reserva-

¹² As then was taught by the hegemonic School of Exegesis, the caenaculum of the high priests of the Napoleonic Code, whose objective was to proclaim the priority and untouchable status of the Code itself.

¹³ Carré de Malberg (1920:140) was aware that Parliamentary monopoly over State sovereignty was a potential danger to French liberties.

tion (Zagrebelsky 1992:59). This is ultimately the conception according to which “the ‘law’ is what the state determines it to be” and “individual rights are, and must be, defined by the state and, as a consequence, are necessarily dependent on the state. In this vision of reality the state itself, along with its various arms and agencies, is subject to no rules beyond its internal limits” and there is “no meaningful constitution in this construction.”¹⁴

In the history of the European continent the collective ground of community and mainly the implicit idea of commonweal were the prevailing good that takes priority over ideas of justice. The declaration of independence of rights from State legislation was written only when contemporary Constitutions were written, that is during the twentieth century. It was the constitution – not legislation – which created this autonomy, which long had been awaited on the continent. Constitutional rules and principles granted fundamental rights as high a rank as parliamentary legislation and the democratic principle: through an effective Constitution individual rights came to be placed on the same plane as the public weal of the institutions (*salus publica suprema lex*). Prior to this, it would have been impossible in Europe to follow the logic embedded in the rule of law.

THE RULE OF LAW

Contrary to a *Rechtsstaat* (or a *Stato di diritto*), understood as a peculiar form of the State, the rule of law as an ideal presupposed that, in part, positive law be beyond the disposal or “will” of the King, or the sovereign power. Its ideal can be shown as one based upon a relationship, providing a link between two essential western law domains developed within the medieval tradition and evoked through the couple *jurisdictio – gubernaculum*: justice and sovereignty.

The rule of law appears to consist of a history of institutional conventions, customs and social practices where law is interconnected with a particular system of power. Even if the supremacy of the English Parliament is beyond doubt, its inclusion in a wider picture is inherent in the things themselves. The principles inherited (Matteucci

¹⁴ The definition is in James Buchanan (1977:290), appropriate to German legal writing especially between the nineteenth and twentieth centuries even as Buchanan intends it to span “legal positivism” pure and simple.

1993:157–8) in the line which unites Henry de Bracton (cf. the pair *gubernaculum* and *jurisdictio*) with Edward Coke (cf. Bonham's case), the U.S. *Federalist Papers* and ultimately U.S. judicial review are — despite their differences — evidence of a general unitary logic.

There is a plurality of sources which go together to make up the intrinsic diversity of the law of the land. It allows for rights to be retained and emerge with an autonomous aspect.

To be sure, the law also includes Parliamentary sovereignty, that is, the unlimited authority of legislation, the assumption that as a matter of abstract law legislation can even infringe rights (Dicey 1915:4–5). This was the motivation for the “grotesque expression” (as De Lolme put it, cited by Dicey) that the English Parliament “can do everything but make a woman a man, and a man a woman” (1915:5). However, sovereignty is complex, shared between Crown, Lords and Commons, and the law has a wider purpose. As a matter of fact, law includes a main second pillar, the common law and the courts, which are in fact the ultimate interpreters of the legal system as a whole.

The complexity of legal achievements in the diverse denominations of common law, precedents, customary law, conventions and rights, is entirely relevant to the “rule of law.” The latter is a “founding” element of itself, to the extent that Dicey recognised in it certain quintessentially English features, namely that: no man can be punished for what is not forbidden by law; legal rights are determined by the ordinary courts; and “each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded” (1915: Introduction, LV). As Dicey wrote (1915:21): “[W]ith us... the rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts.”

The roots in the common law of the land put some qualified rights at the foundation of the constitution, not on the level of the consequences of the constitution. But this endows the constitution and the rule of law with the historical content of liberties, which is part of positive law, not abstract claims from natural law (or, say, organic) doctrines. This historical content cannot be made equal either with some appeal to nature or to the fundamental and obscure soul of the “Volk.” And linking contemporary to the ancient tradition, it can be said that even the reasonable character of law is not due to a sort of simple “natural” reason. The claim made by King James I was precisely that being law based on reason, the King might be entitled to decide.

But according to Lord Coke this point was mistaken, since cases were to be treated according to (an importantly different concept) “the artificial Reason” of law, which the King obviously lacked.¹⁵

The experience of a law which incorporates the “foundational” individual rights of the English is also testament to the conventional and historical character of law that also has matured through prudential judicial assessment. This feature stands at odds with the self-reference of the formalist idea of legality, the final turn of the *Rechtsstaat*. The latter’s emptiness was easily laid bare when Mussolini or Hitler purported to take power “legally” and under the authority of the law.

The institutional premises are substantively different. The rule of law embedded substantive liberties and provided procedural guarantees (such as habeas corpus and due process),¹⁶ and its organisation of powers does not simply correspond to the “law.” Rather, it corresponds to the law in a specific setting, that is, to structures, practices, ideas in their institutional concreteness. As a consequence, if we can reduce the law to an instrument, perhaps we cannot depict the rule of law, with its specific institutional historical content, as being reducible to empty means.

Moreover, if we narrow the rule of law to a form re-presenting the State, we would be making a big mistake. As Giovanni Sartori (1964:310) noted, “the Rule of Law does not postulate the State, but an autonomous law, external to the State: the common law, the case law, in sum the judge made and jurists’ law. Therefore, there is a ‘rule of law’ without the State; and more exactly it does not require the State to monopolise the production of law.” However, while the reality of a *Stato di diritto* is the self-subordination of the State by its own law, in the case of the “rule of law” the State is subordinated to a law which is not its own (1964:311).

A further note, however, should be dedicated to the glorious victory of the seventeenth century Parliament against absolutism, the restoration of the rights and privileges of the English people against the King’s claims. Here the parallel becomes even more instructive: while the *Rechtsstaat* or *l’Etat de droit* defeated the ultimate absolute power of

¹⁵ See Charles Fried (1981:57) and his quotation of E. Coke, *Reports* 63, 65 (pt. 12, 4th ed. 1738), reprinted in 77 Eng. Rep. 1342, 1343 (1907).

¹⁶ Article 39 of the Magna Carta (1215)

the King, because it was the King's, the rule of law defeated it because it was absolute.¹⁷

The root of this difference is normally traced back to the thirteenth century medieval "rule of law," as described by George Haskins (1955:535–6): "[T]here appeared a noticeable reluctance to permit alterations in common law, and we soon hear of cases in which writs brought by the King were quashed by his own judges. . . . To this extent at least, the rule of law was extended to limit prerogative action and to prevent the king from making further changes in the substantive rights and procedures of his subjects." Haskins continues: "But this was not all. The remarkable feature of the development was that the rights and remedies of the common law came to be identified with the rule of law itself."

Also interestingly on this point, Charles McIlwain elaborated on the pairing of *jurisdictio* and *gubernaculum* (1940:85): "For in *jurisdictio*, as contrasted with *gubernaculum*, there are bounds to the king's discretion established by a law that is positive and coercive, and a royal act beyond these bounds is *ultra vires*. It is in *jurisdictio*, therefore, and not in "government" that we find the most striking proof that in medieval England the Roman maxim of absolutism was never in force theoretically or actually."

As far as these notes are correct, the rule of law appears to be built on a diversity of sources of law, and can reflect a "tension" within the justice-government coupling. The first term refers to the law of the courts and the common law, that is, it does not present itself as an appeal to some ideal of rational or natural justice through its normative force *per se*.

JURISDICTIO AND GUBERNACULUM, THE RIGHT AND THE GOOD

As long as the "rule of law" is a concept with institutional, historical, and normative meaning, it says more than it might appear to say. It does designate a cultural reference to law, but also a normative sense which might be extended elsewhere. Here, it seems that the meaning of the rule of law depends on an enduring continuity with its own past: it would be very hard to accept its alleged coincidence with the

¹⁷ See Kluxen (1983:50 ff.) and Zagrebelsky (1992:26 and his reconstruction, at 24–29).

exclusive substance of one contemporary ideology.¹⁸ When we refer to the Rule of Law, after all, we take account of many more consistent ancient and modern records, an institutional-historical rationale which promises a potential openness, in particular due to its reference to the rule of law as a peculiar balanced relation.

“The aspect of *jurisdictio* which is most important”, according to McIlwain’s description, was “the fact that in *jurisdictio*, unlike *gubernaculum*, the law is something more than a mere directive force” (1940:85). This aspect of the law is therefore different from the expression of power or will. Nonetheless, it is not the evocation of morality. According to McIlwain the thirty-ninth chapter of the Magna Carta was not conceived “as the Austinians would say, as a mere maxim of positive morality.” A principle was insisted upon and enforced as coercive law, namely the principle that “king must not take the definition of rights into his own hands, but must proceed against none by force for any alleged violation of them until a case has been made out against such a one by ‘due process of law’” (1940:86).

The rule of law depends on a distinction. On the one hand, there is that part of the law belonging in the land, protecting its positive idea of justice and giving liberties their due: it is the part formed through judicial decisions, the common law and conventions. On the other hand, there is the *gubernaculum*, the will of the sovereign, which embraces instrumental aims and government policies.

As a matter of fact, on one side we find, so to speak, the concrete achievements of minimal requirements of coexistence, respecting the individuality of human beings; on the other side lies the sphere of “the good” (including the common good), evolving through time. The ultimate power of a polity could avail itself of the law only in part: that which is under its sovereign prerogative. The fundamental law of the land appears, after all, to be a complex and collective construct. What is deemed justice is itself artificial, law made by many hands, through the wisdom of decades or centuries.

Jurisdictio refers to law, but in this domain men have the duty to say it (*jus dicere*), not to choose or decide. There is, then, some part of the law which remains at the disposal of the sovereign. But the other aspect

¹⁸ Such as liberal ideology, in a line proposed by Hayek (1960, 1944).

of law is not at his disposal, and the sovereign is thus bound to be deferential.¹⁹

As McIlwain wrote (1940:90), “in the Middle Ages...government proper, as distinguished from *jurisdictio*, was ‘limited’ by no coercive control, but only by the existence beyond it of rights definable by law and not by will.” The absence of sanctioning through legally coercive devices does not however necessarily coincide with and does not essentially mean being outside law, not counting as law.

Much of this un-decidable (or not disposable) justice has been clarified as having been present in the medieval tradition. It is from this that the Enlightenment experience broke away, especially through the codification of law.

The relationship mentioned above between sovereignty and – as we also might call it – the realm of rights (as a matter of law), has a definitive development in liberal philosophy, and properly so. As John Rawls noted (1971:234), the rule of law “is obviously closely related to liberty.” This relationship on a philosophical ground comes to suggest its affinity with the opposites of justice and ethics. The rule of law, in a sense, entails relying on the conceptual capacities of both the “right” and the “good,” which appear suited to explain some common lines of its historical developments.

In fact, when the law destroys this relationship and its vitality, it falls into the trap of the full “ethicization” of the legal system, which is a characteristic feature of totalitarian regimes. Writing in the middle of the twentieth century, McIlwain saw in his times “a constant threat to all the rights of personality we hold dearest — such rights as freedom of thought and expression and immunity for accused persons, from arbitrary detention and from cruel and abusive treatment” (1940:139). He defined these circumstances, saying that “never has *jurisdictio* been in greater jeopardy from *gubernaculum*.” His institutional history brings him to conclude: “If *jurisdictio* is essential to liberty, and *jurisdictio* is a thing of the law, it is the law that must be maintained against arbitrary will” (1940:140).

Again, *jurisdictio* is associated with the preservation of the law, not with the preservation of a sort of external morality. But nonetheless, what essentially qualifies it, beyond any other contents, is that it

¹⁹ This aspect was enhanced also by Habermas (1988:217–79), speaking of *Unverfügbarkeit* (“non-disposability”).

incorporates the side of positive law whose merit concerns “the right,” not “the good” as a sovereign political choice. Where the rule of law is absent, justice, or the “right,” has no shield. It provides no filter against the contingency or absoluteness of ethics, that is, to the “tyranny of values” (to cite the title of Schmitt’s famous essay, 1996), which can be, and indeed has been, totalitarian.

As is well known, as a question of moral and political philosophy, this opposition was an important part in the work of Immanuel Kant and, in our times, mainly in that of John Rawls (1971, 1993). As Rawls wrote (1971:31), the “principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one’s good.” Principles of justice “specify the boundaries that men’s systems of ends must respect.... Interests requiring the violation of justice have no value.”²⁰ This also holds true of political action, pursuing ethical values of majoritarian groups or interests. In Rawls’ construction, justice takes precedence and helps to shape the admissible prospects of action towards the good.

This general view is in fact linked, as Rawls knows, to the *Critique of Practical Reason* where Kant clearly argues that our concept of the “good” should not determine what is just and “make possible the moral law.” Rather, “it is on the contrary the moral law that first determines and makes possible the concept of the good” (Kant 1996a:191). Moral legislation requires the universal recognition of human beings as coexisting, under innate equal liberty. It concerns justice, not the good nor happiness: “No one can coerce me to be happy in his way (as he thinks of the welfare of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e. does not infringe upon this right of another)” (Kant 1996b:291).

These very conditions of coexistence can be coerced through the law. The guarantee of the “negative” external freedom of the private sphere precedes and does not even imply any confusion with ethics.

²⁰ This statement falls within the “particular meaning” of the priority of justice, as distinguished later on by Rawls from the “general meaning.” The latter refers for Rawls to the priority of the right as a political conception “so that we need not rely on comprehensive conceptions of the good but only on ideas tailored to fit within the political conception” (1993:209).

So a precept's moral and rational validity does not depend upon its conformity with any particular ethics or any view of goodness and happiness. With Kant therefore, rational legislation "is not mingled with anything ethical" (1996b:291).

Law and justice are resorted to conceptually in order to avoid the ("state of nature") condition in which the abuse of personal liberty is unobjectionable. At the same time, it is true that justice in law here is separated from ethics: whatever value of life or social construction dominates, it has to accommodate itself within the coordinates of this minimal justice to human beings. This conceptual distinction depends on a transcendental ideal of law, which sees law as the condition of coexistence through liberty, before any ethical objective can be actually pursued through the means of existing law.

There is a necessary distinction, and a necessary connection, between justice and ethical and political choices. One of the main risks that law can run (from the rule of law vantage point) is the loss of the institutional settings, social guarantees, and practices which realize this relationship in different legal orders and societies. It can fairly be said that the tension between these two poles can be protected through institutional devices and also by the law when it pursues the ideal of the rule of law, demanding the non-disposability of justice (*jurisdictio*) by the rule of the sovereign.

BALANCE, LIBERTY AND NON-DOMINATION

In the event that the "autonomy" of the "*jurisdictio*" side were to be denied, it would alter the equilibrium between conditions of inter-subjective justice, liberties and sovereign prerogatives. As a general notion, then, when some rights, or some relations of justice which are conceptually unrelated to the choice of any sovereign (whether the King in Parliament, or the people, or the Nation, etc.) fall "legally" under the purview of the sovereign, a whole part of the law has virtually faded and has been pushed outside. The effect of this is that its normative claim is left out, as belonging at best to sheer morality. In this case – and we should take the following as a *caveat* – there is no more division between *gubernaculum* and *jurisdictio*, and thus no reliable foundation for the rule of law.

I am not suggesting that there is somewhere a substantive conception of justice, which can be defended on the basis of rational natural

law arguments, as is done for example in the outstanding work of John Finnis (1980). Instead, the meaning of the rule of law, as its core emerges especially after being compared with the experience of the *Rechtsstaat*, does not simply incorporate some prerequisites – whether procedural or substantive – into the definition of law. It instead incorporates fidelity to an idea of relation, to a relational notion. It implies respect for and protection of the opposition – to use freely these solemn terms – between *gubernaculum* and *jurisdictio*, two sides of the law, with all of their historical evolutions and equivalents. This very relation in fact eventually disappeared on the Continent, and consistently so, with the institutional subordination of rights and justice under the will of the sovereign, with any competing law being eliminated or sidelined (see above, sections on “The European Legislative State” and “The Rule of law”).

For example, this structure of the *Stato di diritto* was typically a legal reason to debase the claims of some to a possible institutional protection and “locus standi.” If the law exhausts itself within the (monopoly of) legislative sources, and if the latter does not mention a right, then neither harm nor offence can “legally” occur. And if no harm or offence can be alleged, the lack of “locus standi” prevents any challenges to the law from being heard.

The autonomy of the “*jurisdictio*” side of the law and its connection to “rights” and wider common values has today been broadly positivised in national constitutions as well as international charters and conventions. This side of the law and its corresponding institutional and social practice are a prerequisite for the rule of law to exist as the relationship of the kind here argued.

Focusing on this relationship means that we can characterise the rule of law as it is, as well as remain open to its normative extension beyond its territorial manifestation in any particular instantiation. However, this view of the rule of law, that has been explained already with reference to the heuristic couple of the right and the good, can be better characterised by also enhancing the connection of this requisite balance-relation with the non-domination feature mentioned in the opening of this chapter.

According to Dicey (1915:198) the rule of law precludes “the existence of arbitrariness, of prerogative, or even of wider discretionary authority on the part of government.” As we have seen in our comparative reconstruction, non-arbitrariness results from the rule of law. Although respect for laws and procedures, regularity and certainty served the attainment of both non-arbitrariness and the rule of law, it

would be short-sighted to assume that the rule of law simply coincides (or exhausts itself) with non-arbitrariness – and even more so should non-arbitrariness be understood like such a rule-regularity as that constructed by the so-called legislative European State. The latter has proved largely amenable to conveying the whim of the Executive or of legislative majorities.

What makes it possible for non-arbitrariness – as the absence of an unbridled discretionary authority – to be appreciated certainly includes this kind of formal requirement. But it hardly depends just upon it. Rather, it also depends on the aforementioned “foundational” balance between sovereign and “*jurisdictio*” law. When the rule of law is embedded in the equilibrium of such relations, non-arbitrariness “on the part of the government” obtains as it develops through such a legal-institutional environment, while it might prove flawed outside of it.

The question of law as restraining power, which became entrenched in eighteenth-century modern liberalism, enjoys a wider completion in the rule of law ideal which was “lived” by lawyers and courts since medieval times. Thus, the idea of liberty as “the negative” of power, and that of law as constraint on it, are subsequent transformations of the rule of law’s more ancient roots. John Phillip Reid recalls how Bracton’s contribution rests on an idea of law, different from the law as command, which enjoyed a millenary tradition from Roman Law to English and German customary law. “What is of significance of this story of liberty is that this theory of autonomous law was the theory lawyers and officials employed when resolving issues” (Reid 2004:12).

Law as the conviction of the community benefited from an autonomous status, which not even the ruling power could afford to disregard, because no will ought to prevail against it. According to Reid: “In a theoretically attenuated sense, the ideal of medieval law was the rule of law” (2004:13).

When seen in the light of the *jurisdictio-gubernaculum* pair, and with its load of Magna Carta guarantees and rights-creating trends, the illegality of arbitrary interference (by the ruling power) is caused by an “autonomous” law capable of resistance and evolution, which bears procedural and substantive pillars. Thus, a legal reason is available for arbitrariness not to take place, whether through the “forms” of law or by the fiat of the King. It is not just liberty as absence of interference; rather, absence of interference is structurally, not contingently granted, by the positive existence of “another” law.

When this situation applies, it could not be improper to describe the ideal of the rule of law as a non-domination principle, provided that we do not measure its extent and depth through criteria of content, social structure, power organization, individual-centred and autonomy concepts we are so used to in liberal democracies. Moreover, it should be observed, as a matter of rule of law, non-domination can only be used in a weak sense, and only in order to mean a pure legal configuration, pertaining to legal institutions, not directly to political or social ones.

We might draw here on the heuristic strength of the couple non-interference/non-domination by adapting Philip Pettit's analysis of it. He emphasises that law does not necessarily offend (or limit) liberty; this would be true only if liberty should reduce itself to non-interference, but not when liberty is conceived as non-domination (Pettit 1997; and 2008). Domination is the case where reason-independent control of others is always possible, and although interference may be absent control remains present. The abstract possibility of arbitrary (reason-independent) interference is admitted, and while this holds true, someone else remains your "master" even if you may feel you are acting according to your preferences.

Thus, freedom as non-domination does not require non-interference but rather absence of control over one's fundamental choices. According to Pettit this ideal, which he sees as a "property" of the person, has consequences for the structure of power. It implies at its best that control be equally shared as it can be through the model of democracy within a neo-republican tradition (Pettit 1997). Accordingly, Pettit assumes that given the structure of democracy, legislation can and ought to be "non-dominating," and that it will fail to be a constraint on freedom (as non-domination).

Although this assumption, in my view, contains the normative vein of the rule of law ideal, it is not addressed as a peculiar ideal of law, but only as the content of a political ideal, *directly* concerning the distribution of *power*, which is equal among the citizens exercising self government. Thus, it concerns the configuration of the "sovereign" and commends a unique political arrangement (neo-republican democracy).

Rule of law, instead, encompasses a wider spectrum of political regimes, and concerns the configuration of *law*. If we narrow the field within the specifically legal domain of the rule of law, it requires that

interference into the life of citizens be possible while reason-independent and arbitrary interference be legally impossible. As we now know, this becomes true when another law is available which makes such a control not viable. On the legal plane this rule of law basis applies whatever political regime is meant to be the best for disparate reasons.

Although I have drawn on Pettit for elaboration of terms like interference, or domination, what may get lost through his political focus on neo-republican democracy is that non-domination can be an ideal of the rule of law. Although, in my view, there is no necessary objection that the rule of law theory needs to raise against the political theory as such, nonetheless it is remarkable that the reason for legislation to be non-dominating is not traced back by Pettit to the existence of some law or legal device which accomplishes its own separate task. On the contrary it is directly derived from the transformation of law into a faithful instrument of societal ruling. Once the ruling power is democratic in the recommended sense, then this turns out to be fortunate and produces good law.

Of course, rule of law is not a logical necessity. Insofar as this ideal is mentioned in our most solemn legal documents, though, we might keep trying to make sense of it. After all, what should be counterproductive about cherishing an ideal directly concerning the rule of law? Yet, if we have such an ideal, certainly it will displace the “rule by law” and the purely instrumental conception of the law itself: precisely because they would open conceptually a path to domination and would proscribe the internal balance that, instead, rule of law needs. The point with the rule of law is that it contains the normative conditions for the (legal) conceivability, and appearance of the non-domination ideal as a matter of law.

In its own right, as we shall remark later as well, this depends on the concurrence of the two flanks of law (justice-sovereign law; customary, judge made and legislative; and equivalents) matured through English customary and judge-made autonomous law. But its normative spectrum finds equivalent incarnations of the same non-domination, balance logic. It was also raised to a more complex institutional form by the Constitutional guarantee in the United States, and found rule of law realization in European twentieth century Constitutions, as I already noted. Tellingly, here as well, where the nature of power is democratic, a positive law is protected even against democratic powers.

This law's side proves to be resistant to the sovereign. Thus, should, say, reason-independent and arbitrary interference into that law be made, this would substantively and formally cross the legal order's boundary, thereby dissolving it. This kind of exercise of power would not be legally supported but indeed legally inhibited. Of course the "domination" attempt, so to speak, can be successful, but it will win against law, as a manifestation of naked power (regardless of whether it is democratic or otherwise). This would be the lesson of the rule of law, and perhaps a reason why solemn contemporary legal documents enumerate it, not democracy alone. Not even the democratic sovereign should be allowed to be the ultimate, and thus discretionary, "master" of laws.

THE LAW, VALID LAW, AND RULE OF LAW

Theoretical discourse concerning the "rule of law" has often focussed on the "concept" and on the "validity" of law. I will therefore dedicate some comments to its relations with these two notions.

Generally, the rule of law has been largely entangled in the definition of law.²¹ Such a conceptual overlap with what law essentially is (or should be) ends up underestimating the very fact that the appeal to the rule of law as an ideal cannot be satisfied by the mere existence of law. The normative import of the rule of law indeed demands that legality be structured in such a way as to satisfy some further objectives through some institutional configuration, one that law may- or may not-possess.

What is needed for the law to exist as "law" has been viewed from various angles, but in legal philosophy the contributions of Lon Fuller and Joseph Raz are major reference points of theoretical discussion. According to Fuller the law can function on the condition of being based on general, public, non retroactive, non-contradictory and comprehensible rules –, that are possible to perform and relatively stable. Moreover, rules in force must be followed consistently by officials and

²¹ It is from this viewpoint that I agree with Waldron's observation according to which the Rule of law has been construed starting from the concept of law. Waldron refers to the possibility that the converse route be taken (Waldron 2008).

administrators (Fuller 1969:ch. 2). It is reasonable to think of these features as describing some “anatomy” of law (Krygier 2009:47 ff.).

It is often debated whether these features convey an “internal morality” of law, instead of just the “virtues” required for it to efficiently guide behaviour (Raz 1979:214). What I would consider debatable, though, is the (whether latent or explicit) pre-understanding, according to which such anatomic requirements, stating what law needs in order to be law, are at the same time a sufficient definition of what the “rule of law ideal” requires.

One should conceive of the “inner moral” value of such requirements, as a notion to be distinguished from “positive” (or socially current) ethics, which is “external” to the law itself and based on a range of varying choices and values. This inner morality of the law is related to the way in which the law presents itself, is constructed and administered. It is fair enough to admit that Fuller is stressing the service to regularity and non-arbitrariness, to the protection of coexistence, and accordingly the moral importance that these features actually have, even taken in themselves, for those who are subject to the law. In a sense, it recognises the value of being under the law, not at the mercy of something else. We can acknowledge these features of law, regardless of the merit of its further contingent goals or substantive contents. I will return once more to this point later.

It is true as well that, beyond *law’s anatomy*, when we turn to the ideal of the rule of law we are engaging in some more demanding, or at least better exposed, *teleology* to which the rule of law is committed. As Krygier observed, we can hardly determine *a priori* a universal list of institutional prescriptions for the rule of law (Krygier 2009:47), applicable to every case.

As I interpret this *caveat*, it leads us to the normative *ends* that the rule of law ideal prescribes, on the legal plane, without fixing permanently the ultimate set of requirements, whether procedural or substantial, to be expected as automatically granting the achievement of those ends. Features and ends are, after all, distinguishable.

When we turn to “ends” and teleology, in the rule of law ideal, we should not mistake them for the pursuit of extraneous goals that typically inspire different spheres as politics, ethics, economy. This is what Joseph Raz might have had in mind when he distinguished the rule of law from the “rule of the good law”, as he aptly dubbed the stance taken by Hayek, in conflating his liberal market economy ideal with

the very definition of the rule of law (Raz 1979:227; Hayek 1960 and 1944; Scheuermann 1994).

As we know, for Raz the rule of law only corresponds to the requirements needed for law, whatever its content, to accomplish its inherent task (i.e. the efficient guide of behaviours). And thus, it is independent of further good or bad goals to be pursued through the law.

Based on my arguments in the above sections, I doubt that a definition of *law* in itself tells the whole story about the ideal historically developed in our modern civilization, that we call *rule of law*. Moreover, the limits of the “anatomical” conception are to be found in their essential reference to the law in itself. The normative core of the rule of law exceeds the mere definition of what counts as law, as much as for example democracy exceeds the definition of a polity, of political society in general. In order for democracy to be achieved the polity must be structured according to further objectives, bearing a coherent scheme of power allocation, the framing of public discourse, the adjudication of at least political rights. The rule of law similarly requires that on the plane of legal institutions a peculiar scheme of legality be available, that can be implemented, in diverse modes, through different contexts. Thus, the functional requirements for the law, be they attributed or not a further moral value, are both necessary for us to be under the law and in themselves insufficient for us to be under the rule of law.

Accordingly, I can share, although for different reasons, the point related to the unacceptable conflation of the rule of law with the rule of the *good* law. The rule of law ideal has to do with a configuration protecting social normativity from being monopolised by one dominating legal source.²² It purports to safeguard the tension between *gubernaculum* and *jurisdictio*, depending on the (existence of an) equilibrium between two sides of positive law, that we have learned to develop as related to justice and sovereign deliberation. The continuity of this meaning in the last centuries can be maintained if the law is produced and organised by preserving this duality. The latter would be cancelled should, for example, the law be dictated by an unconstrained choice made by the will of the rulers, and should it be called upon to

²² We started from the fact that the formula gains its meaning from incorporating an institutional logic, wrongly equated with the experience of the pre-constitutional *Rechtsstaat*.

reflect exclusively one conception of the “good” in the absence of a legally separate and independent defence of the “right”. In other words, the full ethicization of law (that I have already recalled as typically occurring in totalitarian or fundamentalist regimes) is at odds with the concerns that have since long inspired the rule of law ideal. And the road we take when confusing the normative ideal of the rule of law with the rule of the *good* law (or better said, of *one* good law), is slippery enough and conceptually comparable. On the contrary, the rule of law asks for protection of the balanced duality of law which, as shown above, bears also an accent of non-domination.

Now, a further question has to be addressed: if the rule of law is an ideal with which existent law is asked to comply, it has been and can be at odds with “valid” rules.

For the rule of law, admittedly, a general conception of law is needed, one which would not turn out to be incompatible with its normative pretensions. I am not maintaining thereby that the rule of law posits a definitive claim as to the essential nature of the law, apart from one regarding the potential capability of law to be framed in a way consistent with the rule of law.

As recalled in the opening of this section, the requirements of law certainly have a functional virtue, to which Fuller (1969:42–79) assigned also a moral value. Others, apart from natural law theorists, have also endorsed some moral connection of law, even in its procedural necessities (MacCormick 2005:16; 2008).

In the foregoing pages, I do not deny that as an ideal, as a matter of fact, rule of law embeds moral values. I have not posited, though, the question whether the *validity* of law may be made dependent on moral arguments. The question of the rule of law can be distinguished from the problem of the (criteria of) validity of law: for the law to be valid maybe we need less demanding criteria than those which are required for the rule of law ideal to be achieved.

However, legal positivism does not deny either that law can embody moral content or that it is capable of endorsing pretensions such as those supported within the rule of law ideal. For what concerns the “nature” of law, the validity problem, and the separation thesis (between morality and law), a strict legal positivist like Andrei Marmor reminds us that the Separation Thesis just “asserts that the conditions of legal validity do not depend on the moral content of the norms in question.” And this is held to be consistent both with taking law as “essentially good” and “with Fuller’s basic insight that the rule of law, properly

understood, promotes certain goods which we have reasons to value regardless of their purely functional merit" (Marmor 2004:43).²³

One can also test the point from a softer legal positivist stance and allow that even moral criteria can actually become part of those comprised within the fundamental rule, or the rule of recognition of a legal order. Indeed, from my point of view, it is necessary that law be held compatible by its nature with the normative meaning of the rule of law. And to this extent, it may also prove to be theoretically adequate to endorse the "inclusive positivist" view according to which moral standards can become part of the fundamental meta-rules governing legal validity.²⁴

It is actually valuable that validity in a legal system can be made to depend ("inclusively") upon structural (procedural) and substantive criteria which are suited to protecting the "rule of law," as it occurs in our constitutional states. Yet there have indeed been opposite cases, an eventuality which may also occur in the future, as it can equally happen that a society might still lack reliable structures in order for the rule of law to be realised. For legal positivism in its general attitude this is conceptually admissible.

LEGACY AND PROSPECTS OF THE RULE OF LAW

When we cherish the "rule of law" as the ideal according to which sovereignty is prevented from being "unlimited" and "unbridled", we are not just relying on the concepts of non arbitrariness and certainty.

²³ For Marmor (2004:39), Hart and Raz are "wrong about [this] criticism of Fuller" because "most virtues of the rule of law, though essentially functional, are also moral-political virtues." In fact they also "enhance certain goods which we have reasons to value in addition to their functional merit. If the law fails on these conditions, it would not only fail in guiding its putative subjects' conduct, but it would also fail morally." But in his turn, Raz (2007) remarked that legal positivism can stand some connection between law and morality.

²⁴ Coleman (2000:175) writes: "whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely, the rule of recognition.... If the rule of recognition incorporates no moral principles, however, then no such principles figure in the criteria of legality." W. J. Waluchow (1985:194) argues that, if moral principles can be incorporated explicitly in a legal system's rule of recognition, then the validity of a norm X cannot be solely a function of its source, but also of its content, seeing that it must be considered in relation to its potential violation by a principle of justice. Although both the norm X and the "moral" principle depend on having a "pedigree", it "remains, however, that more than X's pedigree is relevant in determining its legal validity."

Although these concepts are often part of the rule of law's achievements, in themselves they might just entail a strict "law of rules" (Scalia 1989:1175; and 1996), and end up serving law as a sheer instrument of power (the "rule by law"). After all, the European State, before its contemporary constitutional transformation, proved to be non arbitrary, rigidly submitted to the principle of legality, and yet unsuited to embody the rationale that we have found in the English "rule of law" root. For the latter to be pursued, "another" positive law should be available, which is located somehow outside the purview of the (legitimate) government, be it granted by the long standing tradition of common law or by the creation of a "constitutional" higher law protection, and so forth.

Rule of law is, therefore, a matter concerning the sources of law, their diversity and two-sided equilibrium, their consequential capacity of reflecting – on a true legal plane – social normativity in a non monolithic voice. As I have said so far, this general scheme can be matched at different times and in different contexts by a variety of institutional arrangements and of course it can call for the general requirements, enumerated by legal theorists, for the law to efficiently guide behavior or meet the condition for its very existence. But – as explained in the foregoing – it is this "duality of law" that has to emerge, for the ideal to be achieved.

Thus, our focus shifts from certainty to equilibrium. Certainty as well as pre-determined rules, stable, knowable to subjects and clearly defining spheres of action legally permitted or prohibited, these are actually an unobjectionable achievement of legal civilization (López de Oñate 1953).²⁵ Nonetheless, certainty can be easily converted into an end in itself.

Certainty was also be attributed a preeminent role as the essential premise for the modern State to be obeyed: it was celebrated as depending on the formal and rational qualities of legislated law in the Weberian "legal State" of the Nineteenth and Twentieth centuries Europe (Weber 1978:82 and 886; Habermas 1996:124 ff.). But certainty always is to be seen in context, thereby depending on time and space.

²⁵ This holds true despite the inherent indeterminacy of the law, which is a well known challenge to the rule of law – as certainty. A convincing defence of the rule of law on this side is in Neil MacCormick 2005.

In present constitutional states, it must be seen in the light of the supervening patterns of social development, and within the context of contemporary democratic communities. Here, the prevailing language conveys reference to values and consensus, and rules are embedded in wider and higher legal principles, whose openness bears concrete implications. The rule of law tends to preserve a balance between substantive and procedural law, as much as between, say, the strength of democratic decision making, its final authority, and the safeguard of justice among the plurality of forces from which democracy is constructed. It is present where legal concerns related to “the right” cannot be overruled by and are shielded against the ethical commitments of the prevailing majorities.

The unstoppable rise of the well known “proportionality principle” witnesses the development of some evaluative, “discursive”, rationality, aimed at balancing and weighing between divergent normativities, both substantively and legally legitimate, whose aims are not only to find a mutual constraint, but must sometimes be justifiably sacrificed. Although its outcomes are possibly exposed to contestation, proportionality is considered a “golden rule” of the rule of law (Beatty 2009); its formalised intellectual construction (Alexy 2002:47–50 *passim*) bears the feature of a shared legal tool, and it has become a “global” (Mathews and Stone-Sweet 2008) constant of the rule of law. If, on the contrary, sheer compliance with rules is unilaterally celebrated it risks being easily abused and instrumentalised (Sajo 2006; Palombella 2006).

The rule of law has been described as depending, as well, on more substantive requirements, including the protection of fundamental rights, and the necessary conditions for a community of welfare or a full-fledged democracy (Craig 1997; Allan 2001). While the “thin” and formal conception comes close to equating the rule of law with sheer conditions for existence of a functioning law,²⁶ the thick and substantive conceptions require the rule of law ideal to stretch too far, to match one of its historical incarnations, and to embody within its very definition, a political notion of democratic power, or a socio-economic pattern, whether asking for welfare solidarity or individual market-autonomy. On the contrary, the rule of law, as we have seen, can only

²⁶ Jeremy Waldron has aptly shown, however, how law would totally fade away, denying its own existence, should it turn into crude violence and brutality (Waldron 2005:1681).

have a meaning related to the institutional legal setting, where it requires non-monopolization of legal sources and the safeguard of the tension between the legitimate “gubernaculum” law and a law otherwise developed (through common law, constitutional law, customary law and so forth), one exceeding the ordinary extension of the other.

At least on the conceptual plane, we cannot conflate rule of law and democracy. Although our western constitutional and democratic states approximate quite well, in our times, the conditions for the ideal to be achieved, the rule of law was invoked and proclaimed at least since Medieval times, as our historical reconstruction shows. And the structures and quality of law are at issue, whether related or not to a democratic constitutional State. Obviously, in our *Weltanschauung*, both democracy and the rule of law deserve appreciation and recognition. However, the rule of law is conceptually independent of democracy, since its rationale is meant to confront power regardless of its shape, any forms of government, regardless of its autocratic or democratic nature. As “democratic” power can be unlimited and unbridled, it would be unreasonable to consider the rule of law as an unnecessary problem in a democratic regime, at least until one acknowledges the distinctive service and the distinctive nature of law and politics, despite their stable interweaving.

In a sense, although as a normative ideal the rule of law is not at all “neutral”, it is a politically “crosscutting” concept, precisely because it asks for the law to rule, a claim whose theoretical import and historical meaning have been here addressed at length.

Eventually, the rule of law has gained a relevant role in the debate concerning international and supranational law: in these realms its potential is still to be carefully developed. The extension of the normative ideal beyond the State cannot be analysed here in depth. Nonetheless, it can be readily admitted that the perspective of rule of law as an ideal resting on duality, balance and non domination can have a significant critical impact when applied at the international level, where it is suited to functioning as a (counterfactual) check against an environment in which the “non-domination” problem is the essential one.

It is relevant that the rule of law can maintain its core meaning without the State, in the absence of any democratic device whatsoever, and that it takes as central the point of irreducibility of law within the reach of the ruling powers. These items find their intuitive weight precisely in the problematic International Law concurrence of sources,

and in related issues, such as coordination between customary and treaty law, or the relatively recent development, beyond conventional law, of a community or *super partes* law which is the reason for the invalidity of contrary treaties. But while this turn, at least in the last sixty years, has caused the tension between law and power to resurface, the occurrence of further transformations has made the quest for the rule of law even more daunting.

The search for legal constants to be woven in the *global space* is impelled less from the obsolescence of the State than by the multiplication of law-producing entities operating as “global regimes” in functionally separated and often interrelating fields; by the increasing of institutionalised supranational authorities that end up affecting individuals and peoples, often without proportionate guarantees and countervailing legal checks. In a setting where neither democracy nor a State is available, the weaving of the rule of law proves its importance in the face of some newly originating legality whose generators are at best self-controlling. It is still unclear how far its service can reach, although admittedly it appears to be an essential precondition for a decent legal environment.

Its urgency, again, has to do neither with the purposes of a cosmopolitan democracy nor with the systemic aspirations of a world constitutionalism. Prior to these achievements, the rule of law, outside the templates we have so far associated with it, amounts to the claim for legal principles widely practiced, conditioning the viability of legal intercourses, and capable of developing as “positive” law. The rule of law claims to be more than the exercise of power *by law*. The jurisgenerative potential of the most active entities, be they States, supranational organisations, or “economic” actors, is already clear and visible. At stake is instead the mentioned duality of law, the conflict between power and justice (Palombella 2007), the feasibility of “another law” at odds with the superimposition of an unrivalled normativity (Palombella 2009b) conveying dominant conceptions of “the good”. It might generate slowly or emerge through institutional practices, where admittedly a primary role might be played by mutual reference, legal canons and reasoning laid down by the multiplicity of courts and tribunals now operating in the global sphere (Cassese 2009).

As a general comment, it should be stressed that in this realm the rule of law, as described above, remains an ideal, whose objectives are still to be achieved, and whose configuration, however, should make its use as an apologetic and ideological concept more difficult.

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