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THE ABUSE OF RIGHTS AND THE RULE OF LAW

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1. The dark side of rights and the concept of abuse; 2. General characteristics of the abuse of a right or a power. 3. Rules, principles and abuse; 4. Rules and the abuse of the Rule of Law; 5. From the Rule of law to the abuse of the power; 6. A Legal Experiment. The Abuse of the Rule of Law at Guantanamo Bay.

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1. The Dark Side of Rights and the Concept of Abuse.

References to rights, especially in an attempt to promote guarantees for human rights or fundamental rights at a global level, have become so persistent as to induce fears of a universal inflation of such rights or of empty rhetoric. However, the multiplication of right-defining rules has not reduced, but in fact augmented the risk of violations[1]. On the one hand, this pressure on rights has almost exclusively assumed pretensive forms. The logic of rights proliferation [2] has often shown *individualistic* roots, rather than an intrinsic tendency towards justice among individuals. Moreover, it is becoming increasingly difficult to set individual rights in a coherent framework, within the limits of some sort of objective legal 'order'. Rights affirmation shows its artificial and political face, and not an intimate universal rationality. Evidently, it is impossible to distinguish

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[1] L. Pannarale, "*Quod alii nocet, et sibi non prosit, non licet"*, in *Sociologia del diritto*, 2, 2001, p. 167.

[2] C. Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?*, Boulder Oxford 1999.

[3] I addressed this issue in my *L'autorità dei diritti. I diritti fondamentali tra istituzioni e norme*, Roma-Bari, Laterza, 2002; and also in "From Human Rights to Fundamental Rights. On the Consequences of a Conceptual Distinction", in European University Institute Working Papers, forthcom. 2006 (see also on line in ssrn.com).: Cf. M. Loughlin, *The Idea of Public Law*, Oxford 2003, pp. 114-30.

between pro-rights intervention, careful consideration of the 'consequences', and knowledge of the ethical and institutional meanings that these rights possess in concrete terms[3]

On the other hand, the 'dark side' of rights emerges in many areas: at an international level, in humanitarian interventionism; in democratic multicultural societies; in democracies in transition: the denial of rights in the name of rights is spreading under many forms, even through the paternalism that, for example, bans women from wearing the hijab in official buildings in countries like France or Turkey. Similar problems are caused by a*ffirmative actions*, which impose quotas for women in the lists of candidates for general elections; this is an example of how safeguarding some individuals' substantial political rights leads to denial of others' political rights and equality[4].
Moreover, another and different as well as ever re-emerging phenomenon, i.e. the denial of rights in the name of *the rule of law* has been, in one of its specific forms, a dominant trait of the legal experience of the *Stato di diritto* (*Etat de droit, Rechsstaat*)[5] in continental Europe, where it has assumed the form of a legalistic positivism, according to which the defence of the imperative 'dura lex sed lex', together with a pre-constitutional idea of separation of powers, has come to ban the judiciary from defending principled rights which were not directly provided by legislation.

In general, *vis-à-vis* phenomena that appear as violations of other individuals' interests in the name of rights, or in the name of the limitations imposed by the *Stato di diritto (or the Rchtsstaat)*, we can profit from appealing to the idea of the abuse, which might prove to be a useful conceptual tool. The 'abuse' perspective highlights the unlawfulness of infringing an interest, on the part of the holder of a right or a power who acts *in apparent compliance with a legal rule*. The idea of abuse makes reference to the 'abuse of rights' in its subjective genitive [6], and not objective genitive meaning; moreover, it shows the negative effects of the dark side of rights, which emerges when rights are conceived as prerogatives with tendentially absolute priority and often risk being interpreted in a moralistic, individualistic, anti-institutional, etc. sense.

[4] See decision no . 442/95 issued by the Italian Constitutional Court, in "Giurisprudenza costituzionale", 1995, pp. 3255 ff..; a different perspective is shown by C. Cost., no. 49/2003 (according to which it is constitutional a law (statute) which requires both men and women be candidates to political elections); moreover, see article 23/2 in the Charter of Fundamental Rights of EU "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex". On the same question, see also G. Palombella, "From Huma Rights to Fundamental Rights" supra note 3..

[5] The expression dates back to F. J. Stahl, *Philosophie des Rechts* (1833-7), vol. II, *Rechts- und Staatslehre auf der Grundlage christlicher Verfassungsgeschichte*, Mohr, Tuebingen 1878. Among the Italian authors who have analysed the subject we can mention: A. Baratta, "Stato di diritto", in A. Negri (ed.), *Scienze politiche*, I, *Stato e politica*, Milano 1980 (II ed.), pp. 509-23; C. Margiotta, "Stato di diritto", in *Teoria politica*, XVII, 2, 2001, pp. 17-41. P. Costa and D. Zolo wrote and also supervised the publication of the collective volume *Stato di diritto*, Milano (Feltrinelli) 2002.

[6] The abuse is committed by the holders of the rights or powers. It is not an abuse suffered by the subject who has his/her rights violated, but an abuse *committed*.

To tell the truth, this concept of abuse is rarely invoked to defend rights. Rather, a privileged approach is followed - defined in particular by Ronald Dworkin - which stresses the inviolability and overriding nature of rights, whereas those who refer to the concept of abuse emphasise the *limits* to the actual exercise of rights or authorised powers. This strategy, which we may call *à la Dworkin*, coincides with a doctrine of moral rights capable of overcoming the resistance of positive law; it expresses a 'monistic' conception of the legal principles and sees them as a justification for individual rights, trump cards for clashing claims; it conceives of rights as imperatives, rather than taking into consideration the values or the aims that such rights safeguard, thereby trying to avoid the risk of subordinating these same rights to *social goals* or collective interests[7]. However, this is not necessarily a winning strategy, to be adopted in every case. When the doctrine of rights seen as *trump cards* is ideologically bent, it risks asserting itself equally ideologically and becoming blind to all the abuses that can be committed in the name of rights, both by their direct holders and by judges or lawmakers.

Moreover, as Mary Ann Glendon wrote "[I]t is difficult to imagine any serious contemporary European legal philosopher saying, as Ronald Dworkin did in *Taking Rights Seriously*, that 'if someone has a right to something, then it is wrong for governments to deny it to him even though it would be in the general interest to do so' " [8]. In a sense, we should acknowledge that sometimes we might have reasons for defending, as a general approach, a balanced attitude, beyond the idea of a 'lone rights- bearer', toward the 'language of responsibility' on the part of private individuals and public authorities[9].

In this case as well, we cannot exclude that in given contexts the 'political' insistence on guaranteeing social rights may be perceived, as happened in the US, as an excessive limitation on liberty or property rights.

However that may be, a unilateral deontological focus on the rights 'owed' to each individual may actually generate, if misunderstood, indifference towards the issue of the abuse of rights (first of all on the part of rights holders).

Of course there are countries where, due to a series of historical circumstances, the main concern is, in fact , the protection and affirmation of rights, countries that are still lagging behind

[7] For example, R. . Dworkin, *Taking Rights Seriously*, London 1978[2] , pp. 90-2. J. Habermas follows the same line: cf. Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (1992), translated by W. Rehg, Cambridge 1996, p. 260 *passim.*

[8] A. M. Glendon, *Rights' Talk. The Impoverishment of Political Discourse*, New York 1991 (The Free Press), p. 40

[9] On the opposite, the U.S. is defined as a "land of rights" (Ibid., pp. 1 ff).

and suffering from the permanence of what has been defined as a 'pre-modern' tradition[10]. In these cases, perhaps, what is lacking most is a revolution of rights, since individuals simply continue waiting to be freed from social, state and institutional burdens. In these contexts, the adoption of new constitutions, new democratic attitudes, new guarantees for the rule of law and new priorities of rights may take place immediately and simultaneously, without the long development time that shaped these same elements, one by one, and allowed them to take roots in other Western countries. Under these circumstances, it is reasonable to deny that each of these factors should possess an absolute status, and it is better to identify, from time to time, the reasons that justify balanced mutual relations.

All things considered, a suitable answer to the paradox of the 'denial of rights in the name of rights', or 'in the name of the rule of law' cannot be provided by unilateral, monistic logic, which mainly draws on the deontology of moral rights; it is certainly better to start by defining the basic theme of the concept of the abuse of rights and of the abuse of the rule of law.

The idea of abuse is related to the definition of limits, on which the abuse itself depends, limits that encompass and restrain the concrete exercise of a right or a power that could injure the interests of other individuals, within spaces that seem (a) *prima facie* authorised, (b) not forbidden by other rules. Please note that the term abuse is used here in a general theoretical meaning, both with reference to those who exercise individual rights and to those who exercise legitimate public powers.

In this essay I shall first of all identify certain typical traits of the abuse of individual rights; then I shall define the relation between the *prima facie* conformity to a rule, which is a necessary (but not sufficient) pre-condition for an abuse, and the different phenomenon of the strict or formalistic observance of the rules of the *Stato di diritto* and of the rule of law; finally, I shall dwell on the abuse committed by public authorities, which is founded, too, on the extrinsic respect for the legal rules that attribute a power, and I shall identify at least some of the characteristics that reveal a particular type of abuse generally called misuse of power. Abuse of rights, abuse of power and abuse of the rule of law appear as differentiated figures, which however have in common certain elements that highlight an unlawful and instrumental use of the law. Finally, I shall comment a few passages of two recent judgements pronounced by the US Supreme Court that may confirm the usefulness of the concept of abuse of legality and its capacity to successfully replace or integrate, in some cases, the logic of rights assertion.

[10] A draft paper on line, by András Sajó, *Becoming "Europeans": The impact of EU 'constitutionalism' on post-communist pre-modernity***.**

2. General characteristics of the abuse of a right or a power.

The prevalent type of 'abuse' studied in Europe is the abuse of individual rights[11]. The subject of the abuse of rights, if seen against the background of absolute and overriding subjective rights, highlights the breaking of an ancient paradigm, according to which *qui iure suo utitur neminem ledit*, and draws upon, among other things, Accursius' medieval gloss (cf. fragment D. 39.3.1.12): "item quod alii nocet et sibi non prosit non licet"[12]. The abuse of rights is a figure that often raises legitimate suspicions, since it tends to limit the exercise of rights through notions that even might go as far as to void rights of their meaning; it sets the aims to be fulfilled by exercising a right vs. the social interest by which the right is determined, the function it should perform, the purpose and the "typical" goals that would justify, alone, its enjoyment, and so forth.

The abuse of rights, though, can at least indicate a general legal principle, according to which "a legal system defines norms in order for them to be enforced, not instrumentalised"[13]. Otherwise the law would only appear as "a screen or a cover for an arbitrary conduct"[14]

We may start from the identification of a typical characteristic of the abuse, i.e. that it is not a *prima facie* violation of the legal limits set for the exercise of the right itself (in that case we would be talking of an excess, and not an abuse), but it is rather "the apparent compliance of the

[11] This is expressly contemplated by some legal systems. However, the formula used in Germany, in § 226 of the BGB of 1900 and the Italian prohibition of *aemulatio* (article 833 of the Italian Civil Code) are not particularly useful for this purpose; the reference to *Treu und Glauben* or to the principle of good faith (in Italy), instead, have led to the identification of cases of abuse of rights. We can mention, as an example, the Charter of Fundamental Rights of the EU, which prohibits the abuse of individual rights (article 54). The Portuguese Civil Code of 1996 expressly provides in article 334 for the abuse of rights for lack of good faith or public morals, or departure from the social or economic aims. The abuse has been expressly codified in Spain, following the reform of *Titulo Preliminar* of the Civil Code: article 7 provides for the general respect for the principle of good faith and states that the law "cannot protect the abuse or the anti-social exercise of rights". In France, or Germany, or Italy, there is no explicit legal provision concerning the abuse since this concept has been constructed by judges in case law. In the Anglo-Saxon doctrine, there is no adequate construction of the concept of abuse or good faith. See, in general. M. Rotondi (ed.), *L'abuso del diritto*, in *Inchieste di diritto comparato*, vol. VII, Padova 1979. Useful historical references are available in several Italian books on the abuse of individual rights, such as V. Giorgianni, *L'abuso del diritto nella teoria della norma giuridica*, Milano 1963, pp. 41 ff.; P. Rescigno, *L'abuso del diritto*, Bologna 1998 (but the essays date back to 1965-6); G. Levi, *L'abuso del diritto*, Milano 1993, pp. 25 ff.; M. Messina, *L'abuso del diritto*, Napoli 2003, chapters 2 and 3.; M. Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario*, Milano 2003, esp. ch. 1.

[12] See *supra* fn 1)..

[13] M. Messina, *L'abuso del diritto*, cit., p. 181

[14] U. Breccia, *L'abuso del diritto*, in *Studi in onore di Pietro Rescigno*,V, "Responsabilità civile e tutela dei diritti", Milano 1998, p. 12.

holder's behaviour with the content of his or her right; accordingly, to abuse of a right, should mean concealing, under the guise of the law, an act that one would have the duty not to perform"[15]. Indeed, the main difference between an abuse and a simple excess lies in the apparent legitimacy/legality of a behaviour, which would ensure its legal safeguard[16]. In other words, it must be an authorised conduct, not a behaviour directly or indirectly forbidden by other rules. This view is confirmed by a judgement of the Spanish High Court dated 14 February 1944, which affirms that there are other limits "in addition to the legal ones", and then adds that these limits have "a moral, teleological, and social nature"; therefore "an individual is liable if, by acting under the justification of an external legality and of the apparent exercise of a right, trespasses, in fact, the limits imposed upon him or her by equity and good faith, thereby damaging third parties and society" [17].

The pre-condition for an abuse is that by exercising an individual right granted by a legal rule, an injury is caused to a third party's interest, evidently "not safeguarded by a specific legal prerogative" (otherwise there would be a simple violation of conflicting rules, not an abuse). According to the above-mentioned Spanish judgement, the damage in question must have an immoral or anti-social nature, or be intentional, or be objectively dependent on an excessive or abnormal use of the right. Of course this would only remain an empty formula without the criteria needed to identify at least the 'symptoms' of an abuse. The first step is to summarise the "parameters" defined in European case law in order to identify a conduct representing an abuse: the "lack of an interest together with the sole intention to cause annoyance" (*aemulatio*), the anomalous or unfair exercise (e.g. contrary to objective good faith); the "inadmissible disproportion" between "interests to be pursued and interests to be sacrificed"; "misuse of power vis-à-vis its institutional objective" (*detournement du puvoir*) or a combination of the previous criteria[18]. The nature of both the interest that the rights protect and of the aim for which a public authority or function have been established, as well as the purpose or normality of the exercise, must be identified through considered reflection on the positive law system. Of course, these elements cannot be simply regarded as expressions of a particular ethical prejudice aimed at transforming the holders of rights

[15] U. Natoli, "Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano", in *Rivista trimestrale di diritto e procedura civile*, 1958, p. 37. Naturally, the main issue here is identifying which duty we are referring to and its legal foundations.

[16] Ghestin, Goubeaux, *Traité de droit civil*, vol. I, *Introduction général*, III ed., Paris 1990, pp. 681 ff.

[17] See Dìez Picazo, Gullon, *Sistema de derecho civil*, vol. I, Madrid 1985 (V edition), pp. 445 ff.

[18] This summary is found in Breccia, *L'abuso del diritto*, cit., p. 24

[19] Breccia, ibid., p. 70

into something they are not, "custodians of other people's interests or even of the public interest". Even when favouring an abuse-based approach to rights, we may not ignore the fact that rights are essentially a way to protect individual advantages: "those who wish to fight it, should fight for a different distribution of rights"[19]

From a theoretical point of view, the common element in conceptions of abuse does not draw on concepts like interest, or purpose, or function, but rather on trespassing against the substantial limits of a right, limits that may be regarded, in a way, as internal[20].

The identification of this 'internal' limit which relates to the concrete exercise of a right depends, again, on positive juridical sources. It has been written that while the excess of a right "implies that more or less general limits, defined in abstract terms and *a priori*, have been exceeded", the abuse of a right depends on a kind of norms that "allow an *a posteriori* judicial appraisal ". In any case "it remains a juridical judgement, whose application in concrete terms must draw on constitutional or ordinary legal sources": hence the identification of an abuse depends on the availability of different types, or rather levels, of legal sources or norms[21].

Accordingly, in terms of legal theory , we are to define the key to identify that particular type of illegitimate exercise of a right (or of a power) that constitutes an abuse: the key is- reasonably - the systematic or overall sense that links one rule to one or more legal principles of which that rule is a materialisation. The abuse of a right is what renders unlawful a conduct, otherwise permitted, in cases where the rule appears, so to speak as "over-inclusive"[22]. But the reasons for such unlawfulness and the criteria to identify cases when the exercise of a right exceeds the *prima facie* limits permitted by the rule, can be found in the principles inferred from the legal system: relevant, pertinent principles which highlight the justification(s) underlying the power or faculty in question and identify the limits to its exercise, whether protecting the private or the collective spheres.

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[20] Cf.. Breccia, ibid., pp. 71 ff..

[21] F. Busnelli, E. Navarretta, *Abuso del diritto e responsabilità civile*, in *Studi in onore di Pietro Rescigno*, cit., p. 86

[22] M. Atienza, J. _R. Manero, *Illeciti atipici*, Italian translation by V. Carnevale, Bologna 2004, p. 61, referring to F. Schauer, *Playing by the Rules*, Oxford 1991.

[23] M. Atienza, J. Ruiz Manero, *Ilìcitos atìpicos. Sobre el abuso del derecho, el fraude de ley y la desviacìon de poder*, Trotta, Madrid 2000. However I followed the Italian translation, *Illeciti atipici*, cit.

3. Rules, principles and abuse.

Although principles are unquestionably integral elements of the legal orders of our constitutional democracies, we find different definitions of the principles as compared to rules. For example, principles are defined for the use of their theory of "Ilìcitos atìpicos"[23], by Atienza and Manero, as a guide for the behaviour of those who, through careful weighing (of principles), have the power-duty to issue a norm (of judicial, legislative, or administrative nature). Principles are thought of as defining ultimate values to be realised and to be used as parameters for the assessment of the factual consequences determined by the issue of norms; whereas other principles, of a lesser degree of abstraction, are directives, that do not indicate ultimate values: they aim at the realisation of commodities or states of fact, nonetheless possessing a justifying function of decisions. Whatever definition and function we adopt with reference to principles, they offer the criteria necessary to assess the abuse of rights[24].

Basically, it is the principle that leads to the identification, among possible cases of exercise permitted by a norm (defining, for example, an individual right, or entrusting a power or a function), of those that are unlawful because they exceed the "justified area" of the rule. This also holds true in cases related to fundamental rights, such as the use of procedural guarantees or the right of strike.

The interpreter's task is to identify the principles that the legal system adopts to justify a power or a right or to define, directly or comparatively, in a relational manner, areas of exercise that prove to be admissible or inadmissible *a posteriori*. This means that the interpreter makes a principle-based assessment of whether "the exercise of a right can be considered legitimate, or not".

However, this presupposes a discipline of subjective rights that depends, as Robert Alexy wrote, on the joint role of rules and principles[25], so much so that even *definitive rights* bearing the "case in point" ("Tatbestand"), needs to be better defined, in their concrete scope, in specific cases, by making reference to the underlying principles[26]; finally, balancing and weighing may also be

[24] Atienza and Manero believe that an action is not an abuse if it simply does not sufficiently pursue the social utility of property, i.e. for 'finalistic' reasons, but for reasons of principle, which justify the property right in positive legal orders, like the Italian, French or Spanish ones. The principle of autonomy cannot justify, for instance, an abnormal use that violates other individuals' interests; it cannot remain insensitive to "damage caused to other subjects' or collective interests" because that, in turn, would violate the principle of equality in the safeguard of individual autonomy (Atienza, Manero, *Illeciti atipici*, cit., p. 58).

[25] For a distinction between rules and principles, being the latter "precepts of optimization" see, R. Alexy, *Begriff und Geltung des Rechts*, Freiburg, K. Alber 1992

[26] G. Zagrebelsky, who to some extent also follows Alexy's theory, writes: "Principles, however, unlike rules, are norms without the case in point (or determination of the fact or 'Tatbestand'). Principles are not in themselves capable of being expressed in the form of the hypothetical imperative of Kelsen" (G. Zagrebelsky, "Ronald Dworkin's Principle based Constitutionalism: an Italian Point of View", in *I.Con*, vol. I, n. 4, 2003, p.630).

required with reference to these principles[27]. Indeed, while principles can be satisfied "to varying degrees", by a *qualitative* contrast, "rules are norms which are always either fulfilled or not"[28]

This distinction resembles Ronald Dworkin's,[29] when he writes that "rules" apply in an "all or nothing" fashion, whereas principles do not require *one* particular decision since they allow different concretisations. According to Alexy, this distinction can be furtherly improved: also rules can suffer particular *exceptions* and are not applied in specific cases, this indeed on the basis of a principle; moreover, such exemptions cannot be quantified *a priori* with certainty .

I believe that it is therefore evident, according to the above, that the fact that rules can suffer *a posteriori* limitations, and on the basis of principles, is a decisive element with reference to the concept of abuse.

Unquestionably, a *prima facie* principle can be trumped by another, more important principle in a specific case, whereas a rule is not automatically trumped by a principle: the relevant principle must be balanced with other principles "which also need trumping, such as the one that rules passed by an authority acting within its jurisdiction are to be followed, and the principle that one should not depart from established practice without good reason. Such principles can be called '*formal* principles' " [30].

Finally, another important aspect relating to the concept of abuse is that both the experience in legal systems in continental Europe, and theory do not induce to link principles solely to the safeguard of individual rights, as Ronald Dworkin claims, but also to the protection of collective interests and, therefore, of public interests as well[31].

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[27] See R. Alexy, *A Theory of Constitutional Rights*, transl. by J. Rivers, Oxford 2002, p. 50 ff. and *passim*

[28] Alexy, *A Theory of Constitutional Rights*, cit. , pp. 47-8. According to Alexy, therefore, a rule can be "valid or not", and in case of conflict between rules, unless an exception is read into one of them, at least one must be declared invalid. By contrast, between principles in conflict one of them must be outweighed, but this "means neither that the outweighed principle is invalid nor that it has to have an exception built into it" (Alexy, *Theory*, cit., p. 50). Accordingly, "conflict of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimensions of weight instead" (*ibidem*).

[29] R. Dworkin, *Taking Rights Seriously*, London 1978[2], pp. 22 ff. ; Alexy, *A Theory* cit., p. 48, ft. 27.

[30] Alexy, *A Theory* cit., p. 58.

[31] Too many European left-wing theorists in general - and in Italy in particular - who are gifted with an acute "social" awareness- agree with Dworkin's deontological vision of rights because they gloss over the real objectives against which it is aimed. Rights are a way of supporting the arguments in favour of individual autonomy *against* collective choices and, therefore, against public autonomy; they are a way of contrasting the egalitarian, redistributive levelling implicit in the logic of political and legislative deliberations, and of restraining the paternalism that results from collective decisions *as such* (I have addressed this problem in my *L'autorità dei diritti*, Roma-Bari 2002, p. 53): collective preferences are unacceptably "external": in other words, they are concerned with what *others* should do or have (Cf. R. Dworkin, *Taking Rights Seriously*, London 1978[2] , p. 276, *passim)* . Explicit criticism of the equation principles-individual rights is also in Alexy, *A Theory of Fundamental Rights*, cit., pp. 65-6; and G. Zagrebelsky, "Ronald Dworkin's Principle based Constitutionalism: an Italian Point of View", cit., pp. 642-3.

Formal principles, as defined by Alexy, often tend to defend the rule against its limitation therefore, they play an antagonistic role and are the background *against* which the issue of the abuse can be set. Non-democratic regimes have often let the criterion, or legal concept, of the abuse fall into desuetude and have prevented its application to the exercise of public powers, while exalting legal formalism, in an attempt to prevent the internal control over the concrete exercise of public prerogatives[32].

In a way, the idea of submitting the behaviour of both individuals and, above all, public authorities to 'norms' (to 'rules' only) is one of the fundamental requisites of the *Stato di diritto*[33]: let's mention, for example, the principle of legality in the *Stato di diritto (or Rechtstaat, or Etat de droit)* of the nineteenth-twentieth century in continental Europe, and Weber's definition of the *Rechtsstaat* as legal-rational power [34]. The respect for 'rules' allows for the *rule of law* – in a non historical, theoretical meaning- to designate the functions and the features it now has. The fact that we are talking, in this case, of 'formal' principles in the meaning which concerns processes and functions of the *rule of law*, can also be seen in their enumeration, as provided, for instance, by Lon Fuller: generality, enactment, irrectroactivity, publicity, non contradiction, possibility to abide by the law, constancy over time, and so forth[35]

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[32] According to some scholars, the recourse to formalism in Francoist Spain was a way to avoid checks over the discretionality of administrative powers, which, with the re-emerging of the concept of power misuse, ceased with the Spanish constitution of 1978 (Atienza and Manero, *Illeciti atipici*, cit., p. 100)

[33] Of course, the definition of the Rule of Law offered in Great Britain by Albert Venn Dicey is different and more complex and is referable to a specific historical vision: according to Dicey the rule of law includes the guarantee of individual freedoms, the non-arbitrariness of power and the equal subordination of public powers and private citizens to common law (see Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), ed. by E. C. S. Wade, London 1956, pp. 183 ff; p. 188; p. 193).

[34] The subordination of the State to law and other dogmas of the European public law are found in the formalism of Paul Laband, *Das Staatsrecht des Deutschen Reiches*, 1867-82; in C.F. von Gerber, *Über öffentliche Rechte* (1852), Tübingen 1913; and in other contemporary jurists. With reference to "administrative jurisdiction-based state"s see M. Nigro, *Giustizia amministrativa*, Bologna 1987, p. 33 . M.Weber, *Economy and Society*, edited by G. Roth and C. Wittich, vol. II, Berkeley 1978, identified the "formal" character of law in the modern State and, on the opposite, understood the material rationality of law to be that rationality that takes rules derived from ethical aims or connected to utilitarian objectives into consideration, rather than legal norms (pp. 656). ff. The most scathing criticism of the legality principle of the *Stato di diritto* was levelled by C. Schmitt, *Legalität und legitimität*, Berlin 1993 (or C. Schmitt, *Legality and Legitimacy*, translated by J. Seitzer, Westport 2002).

[35] L. Fuller, *The Morality of Law*, New Haven 1969 (rev. ed.). There are other versions, written for instance by Joseph Raz, *The Rule of LAw and Its Virtue* (1977), in Id., *The Authority of Law*, Oxford 1979, pp. 210-29; or, most recently, by Andrei Marmor, "The Rule of LAw and Its Limits", in *Law and Philosophy*, 23, 2004, pp. 1-43.: but they all refer to the features of law as such.

Of course Fuller saw evidence of an inner morality in the overall service provided by such principles. But beyond that, they are essential elements of modern law, regardless of the substantial features the law acquires in the different legal systems. The debate over the importance of the so-called formal constraints of the *rule of law* and of its *requirements*, focuses periodically on controversial hypotheses about the meaning, also moral, of law in Western civilisation[36]. The importance of limiting the interpreter's discretionality, of ensuring predictability, consistency, certainty, knowledge to citizens, of excluding the conditions for power arbitrariness, is universally recognised and draws on those fundamental requisites: this holds true not only if, as a consequence, an inner morality is identified in the *rule of law*, as Fuller does[37] but also if such inner morality is denied and considered external to the law [38].

Evidently, in the case of the abuse, the exception must only be regarded as a *reduction of the area authorised by the rule*: we are not talking in this case of that type of exception determined by a recourse to equity and case-by case justice (justice of the individual case). An abuse is not a derogation based on the unique features of an individual case[39], but it depends, .rather, on a general rule, drawing on equally general principles and created after discovering, *a posteriori*, the unlawfulness of a conduct, which had been authorised *a priori* in the abstract . We can say that the resistance of *rules* to the penetration of principles (i.e. to the admissibility of an additional rule, which represents the concretisation of a competing principle) is ensured only by the weight of other formal principles (which are related to the principles of regularity, publicity, generality[40]): such principles certainly represent the heritage of civilisation we normally attribute to the *rule of law*, seen as a general theoretical concept that also defines the specific capacity of law to resist external imperatives, its boundaries and, in a way, its 'authority'.

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[36] See the dispute between M.H. Kramer, "On the Moral Status of the Rule of Law", in *The Cambridge Law Journal*, 63, March 2004, pp. 65-97;and N. E. Simmonds, "Straightforwardly False: The Collapse of Kramer's Positivism", *ibidem*, pp. 98-131.

[37] Besides Lon Fuller, noteworthy is the criticism levelled by J. Habermas against the moral indifference attributed by Max Weber to the Rechtsstaat. See J. Habermas, (Recht und Moral), *Tanner Lectures on Human Values*, Salt Lake City 1988, vol. VIII, pp. 217-79 [38] As H. L. A. Hart wrote, "The Morality of Law- by L. Fuller", in *Harvard Law Review*, n. 78, 1965.

[39] In the sense of recourse to equity or to the non-enforcement of the rule, as quoted by W. Blackstone, *Commentaries*, 1, * 59-62

[40] I quote here a version of these principles provided by Lawrence Solum, who summarises them in order to highlight their contrast with equity: *Equity and the Rule of Law*, in *The Rule of Law*, Nomos XXXVI, ed. by J. Shapiro, New York Univ. Press, New York and London 1994, p. 129

[41] A. Scalia, "The Rule of Law as a Law of Rules", in *University of Chicago Law Review*, 56, fall 1989, p. 1176.

4. Rules and the Abuse of the Rule of Law

As will be explained more in detail, using the resistance of formal principles as a shield to hide objectives *incompatible* with the legal order could certainly appear, to put it concisely, an abuse of the *rule of law*. I think that not even in this case, the abuse has something to do with moral considerations. Therefore, understanding the notion of abuse does not require discussing the moral character of the virtues of the *rule of law*. The fundamental aspect in our discussion is, rather, that a derogation from the application of a rule does not depend on a direct comparison between that rule and the substantial principle to which it should succumb (freedom of expression, protection of health, equality, etc.). A limitation of the relevant scope of the rule is permitted only after weighing, on the same plane, the relevant substantial principle and the formal principles that require rigorous respect for the definitive character assumed by the rules. In a well known manifesto of the ideas he follows as Justice of the US Supreme Court , Antonin Scalia has highlighted the dichotomy between compliance with the 'general rule of law' (as a 'law of rules') and the effects of abandoning that parameter, i.e. the 'personal discretion to do justice'[41] that would be consequently granted to courts. In deciding single cases, courts should try and define general rules, in particular in order to respect the principles of *equal treatment* and *predictability ("there are times when even a bad rule is better than no rule at all")*[42]. Justice Scalia is talking here of the approach that the Court should adopt:whether to decide on the basis of the "totality of factual circumstances" that identify the individual case, or to define a rule that can be followed in the generality of cases. According to the R*ule of Law*, in Justice Scalia's opinion, a judge should adopt general rules, rather than pronouncing decisions whose 'rationes' only apply to the single case.

Of course, this construction is not, *per se*, unacceptable. However, according to this conception, the respect for the principles of the *rule of law* can also render us completely indifferent towards cases of abuse of the law. The definition of the unlawfulness of an act compliant with a rule, but clashing with relating reasons of principle, can lead, indeed, to the definition of a rule that applies to the generality of similar cases. However, it is equally true that the sort of loyalty to the idea of the *rule of law* that regards it as an ultimate value, is not acceptable on the constitutional level. Constitutional states do not regard any of *their own* principles as absolute[43], not even 'formal'

[42] Ibid., *p.* 1179

[43] G. Zagrebelsky, *Il diritto mite*, Torino 1992, ch. VI.

[44] R. *A Theory* cit., pp. 66-9; pp. 397-414.

ones, and the criteria of proportionality, applied to all of their principles, is a pivotal element when balancing is to be performed[44]. An 'absolutistic' idea of the rule of law as a *law of rules* would violate this set of principles found in the constitutional state, an essential and overriding element that preserves the identity of a given legal system, where political and ethical commitments are expressed through *standards* that cannot be reduced to *formal* ones. In other words, the perspective of the abuse of powers or rights teaches us that we cannot just simply obey the formalism of the *rule of law:* and this not because it prevents justice in the single case, but rather because such formalism may not be able to control the 'legalistic' abuse of power that could lie concealed in it. There is a risk of deactivating the normativity of substantial principles that form the ethical and political identity of a given constitutional legal system .

This is why it is important to recall here a paper concerning the sense of the *rule of law*, presented a few years ago by Joseph Raz, who favours a neutral conception of the *rule of law*. In it, he discusses the "literal sense of the 'rule of law' " [45]. Now, Raz writes, the rule of law is compatible even with "gross violations of human rights"[46] .

Therefore, while respecting the rule of law does not guarantee that violations of human dignity "do not occur", it is "clear that the deliberate disregard for the rule of law violates human dignity", through leading "to uncertainty" and frustrating "expectations"[47].

According to Raz, it does not follow that legal systems do not contain at least some moral value. The rule of law is a "negative value": since the law limits people autonomy, it also creates the danger of arbitrary power, and therefore the rule of law is designed to prevent this danger[48]. The rule of law is just law in its specific "excellence" not a moral virtue but the "necessary condition for the law to be serving directly any good purpose at all" [49]. The law guides human conduct, and it is

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[45] J. Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law*, Oxford, Clarendon Press, 1979, p. 213. Raz enumerates some eight requisites which are included by definition within the concept, and do descend from the two basic aspects according to which people (a)should be ruled by the law and obey to it, and (b) that law must be capable of being obeyed. The principles are enumerated at pp. 214-219. Among those, especially the requirement of being the laws and decisions "guided by open, stable, clear, and general rules" (p. 215) seems to be the one most enhanced by Antonin Scalia's *The rule of law as a law of rules*, cit.. But another requisite, the fifth, ("the principles of natural justice must be observed" (p. 217) deserves attention: Raz speaks about "[O]pen and fair hearing, absence of bias, and the like" which "are obviously essential for the correct application of the law and thus, through the very same considerations mentioned above, to its ability to guide action". The same criterion of capability to guide action is the reason for the independence of judiciary (which makes it possible to "apply the law correctly") (ibid., p. 216 e p. 217).

[46] .And it does not guarantee individuals from "governmental interference" (the law may "institute slavery without violating the rule of law" . Nonetheless, the Rule of Law contributes to insuring respect for human dignity, that is for "humans as persons capable of planning and plotting their future", their "autonomy" ("their right to control their future") (ibid., p. 221).

[47] Ibid., p. 221 and p. 222

[48] "The rule of law is a way to avoid the danger caused by the law itself" (ibid., p. 224).

[49] Ibid., p. 225.

[50] Ibid., p. 227.

neutral, as every instrument is, towards the ends. So, the rule of law, although a virtue of law, is not a moral value. Finally, he writes, this makes it possible to reject F. Hayek's idea of the rule of law as the supreme guarantor of freedom: "This is the slippery slope leading to the identification of the rule of law with the rule of the good law"[50]. The conclusion is: since the rule of law is an instrument it cannot be an ultimate goal; when the goals are incompatible with the rule of law they cannot be pursued by legal means; finally, we need to be cautious in "disqualifying the legal pursuit of major social goals in the name of the rule of law", because, after all, the rule of law should enable us to better promote our social goals: "Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty"[51]

Now, I am not necessarily following Raz's legal theory, as to his "exclusive positivism", and rather I subscribe to the general possibility of an "inclusive positivism" which thinks it tenable that the rule of recognition of a legal order may include substantive criteria, or principles, within itself. Raz's theory on the rule of law provides very good ground for rejecting two opposed 'fundamentalisms' : that of the *rule of law* as ultimate ideal, and that of *the rule of law* as a set of substantial principles, linked in particular to the ultimate value of individual rights. If we admit that the *rule of law* is a tool to pursue even *diverse goals*, then we cannot but respect its requisites, although we cannot transform such requisites *from means to goals.*

The impossibility to switch the rule of law from *means to goals*, or to consider it an absolute aim, makes it impracticable to follow Scalia's theory, in terms that lead to merely textualist and formalistic closure of the law.

Rather, this induces us to different, and differently balanced, conclusions: firstly, the structure of the law is based on the 'formal' requisites of the *rule of law* and therefore cannot be jeopardised; secondly, the virtues of the *rule of law* cannot be transformed into requisites immune from any assessment of proportionality, or such as to prevent compliance with competing criteria, like ensuring the 'essential core' of rights (something expressly provided for in the German legal system or in the European constitution)[52].

The balance between these needs cannot be maintained without taking into account the fact that the legal order has a complex structure, composed of rules and principles.

Now, this last claim resembles first of all Dworkin's: but he orients it in a unidirectional way, since the Dworkinian interpreter of principles only makes reference to the moral rights of

[51] Ibid., p. 229.

[52] German Constitution, art. 19/2; Constitution of European Union, art. II- 112/1

[53] For example V. Giorgianni, *L'abuso del diritto*, cit., p. 149.

individuals. On the contrary, among the principles that can authoritatively compete there are indeed also the *structural principles of the rule of law* or of the *Stato di diritto*.

This is relevant with reference to the issue of the abuse. We are not talking here of a conflict between *rules* and *principles*, which in Dworkin's view would fatally lead to a prevalence of the latter (principles-rights) over the former (rules). It is, instead, a comparison between principles, i.e. the functional principles of the rule of law, which are related to the form of rules , and all the other competing substantial principles, which safeguard collective interests or individual rights.

5. From the rule of law to the abuse of the power.

At a general theory level, there are elements of continuity between concepts such as the abuse of rights and a specific manifestation of the excess of power, i.e. the misuse of public powers. This idea has been criticised and questioned[53], but it has also been supported, especially within the French legal institutionalism, [54] which correlates abuse and *detournement de pouvoir*. The European "administrative-law" doctrine refers to those cases in which public power is used for a different goal than that for which it was attributed. Also in the case of misuse, as already said, reference should be made to principles. As Atienza and Manero rightly wrote, in order to know if typical legal aims have been "vulnerated" (…) it is necessary to resort to principles that justify both the rule that grants the power and the regulative norms that define the use allowed"[55]. The distinctive feature of the abuse-misuse of public powers is the need to assess the *consequences*, in factual terms, and in particular if these consequences cause unjustified damage or unjust benefit, excluded by the principles that in the legal system justify the granting of the power exercised. A public authority, unlike private individuals who are let free in pursuing their goals, is compelled to fulfil objectives defined in accordance with the public interest. Although apparently the public authority may be pursuing them, at least formally[56], there are cases when this generates unacceptable situations [57] since it leads to the infringement of legal principles (for example, it

[54] See for example, M. Hauriou, *Précis élémentaire de droit administratif*, Paris 1898, p. 190.

[55] Atienza, Manero, *Illeciti atipici*, cit., p. 99.

[56] Otherwise, these would be ends excluded by power-attributing rules and therefore an infringement of norms, a "typical" unlawful action and not an atypical one or that special kind of "abuse" defined as misuse of power.

[57] Misuse is one of the defects of public action that the administrative doctrine considers as infringements of the inner limits of the administrative discretionary power "which are not contained in explicit legal provisions"; in particular, Italian lawyers believe that misuse occurs when the interest in question is not defined as public interest or

legitimately regulates *prima facie* the restricted entry for university access thus actually making, in certain circumstances, the access impossible for a specific category of subjects, who follow a certain religion; or it regulates the traffic thus leading to a situation that unjustly benefits a certain haulage (transport) contractor to the detriment of others)[58]. Theoretically, this logic can apply even to the lawmaker if, in the exercise of the legislative function, he ends up infringing constitutional principles , or to a judge, if he resorts to the power of preventive detention (custody) only with the aim of influencing the defendant so that he/she "follows a specific trial conduct"[59]. Significantly, the idea of power misuse was elaborated by the French Council of State in order to regulate the administrative discretionary power as a reaction against the legal formalism behind which it actually hid.

I would like to set this vision of things in the wider context of the legitimacy of the recourse to, the implementation of, or the use of a rule, by public authorities. If the *rule of law* is meant as the submission of power to rules, the abuse of the *rule of law* does certainly not depend on the infringement of rules, but does not depend *either on the fact of having caused damage or prejudiced pre-existing rights*. In fact, the problem is that the exercise of public powers can legitimately bring both benefits and damage (as could be the case of the classification of a piece of land as building area or farmland, for its owner): but it cannot do so, for instance, by acting arbitrarily, i.e. by violating the principles of non-arbitrariness, reasonableness, effectiveness, or other significant principles, as, among others, Italian case law and doctrine teaches us.

This implies that contrasting the exercise of public power on the basis of infringed rights is not always a winning strategy. The abuse of power, instead, meant as power misuse, could be useful in cases when appealing to rights may be vain or inadmissible.

Recalling a judgement of the Supreme Court, Owen Fiss underlined that in the case of a legislative measure excluding the children of illegal immigrants from secondary schools it would have been meaningless to object that this measure infringed the prohibition of discrimination and all the rights ensuing from the principle of equality and from the *Equal Protection Clause* (Plyler vs. Doe of 1982 concerning an act of Texas appealed before the Supreme Court). Generally speaking, a legislative act or a public authority may always distinguish or discriminate: provided that this is made for a recognised and rational public end, to which the discriminatory principle is functionally and consistently linked. Against the exclusive power exercised by the state of Texas, the Supreme Court showed that, besides the rights ensuing from the non-discrimination principle, another

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when "the purpose of the measure is not typical of the power in whose exercise such a measure was adopted" (P. Virga, *La tutela giurisdizionale nei confronti della pubblica amministrazione,* II ed., Milano 1976, pp. 264-5).

[58] Atienza, Manero, *Illeciti atipici*, cit. pp. 106 ff.

[59] *Ibid.*, p. 114.

argument could and had to be used, against the irrational effects of the measure; effects that infringe another principle, the anti-caste principle, ensuing from the Equal Protection Clause as well. This principle prohibits to promote a society of unequals, of castes and pariahs, where some individuals are socially and economically inferior and subordinated.

The consequences are therefore unlawful, but not on the basis of a principle for the protection of rights but rather of a different principle of *public interest:* the non-subordination principle, protecting the American society as a "community of equals"[60].

On the other hand, that the exercise of power may be stopped by virtue of the logic of inner limits, the logic of abuse of power, in general, rather than on the basis of the infringement of rights alone, appears understandable in the European legal universe too.

In a sense, if reference is made to legal systems such as the Italian one, presenting many similarities with the French and German legal systems under several aspects, it is as if a level difference is entailed a priori, making a collision *impossible,* from a juridical point of view, between individual rights and the exercise of a legal and legitimate power *prima facie* (i.e. complying with the rule, complying with the rule of law as law of rules). The impossibility of collision is conceptually assumed in the very construction of the administrative state and of the "administrative jurisdiction"-based states of contemporary Europe. Here, it is therefore impossible to contrast the legal public power by means of individual rights. This is due to the fact that the relationship between a public power availing itself of a legal norm and private rights is similar to the relationship between man and death, as described by Epicurus: there is no need to fear death, considering that when we are here, death is not, and when death is here, we are not. If the exercise of a power mirrors a legal rule and has a legitimacy *prima facie*, the individual right, such as in the case of an owner whose land is being expropriated, is already "weakened" and is transformed into an "interest" (the legitimate interest). Significantly, the citizen coming into contact with a public authority in the exercise of its institutional powers and deeming himself damaged on account of a measure legally adopted by administrative bodies, cannot assert his right in court (e.g. the right of property) against his opponent (the public administration), who is endowed with "supremacy"[61], but can only resort to a court (administrative, not ordinary) on the basis of a qualified, i.e. justified

[60] O. Fiss, *A Community of Equals. The Constitutional Protection of New Americans*, ed. By J. Cohen, J. Rogers, Boton, Beacon Press, 1999, p. 12.

[61] The notion of "supremacy", always opposed by British juridical culture, can be found in particular in German legal literature: Otto Mayer , *Deutsches Verwaltungsrecht*, I, Berlin 1895, distinguishes the personality of the State from the person according to civil law (ibid., p. 49), and defines the supremacy, the inequality between State and subjects, deriving from the fact that the State controls public power (ibid., p. 67). The British legal culture moves from the opposite notion. Although the incompatibility with the setting up of special administrative courts has been overcome, the conceptual definition of relations between state administration and citizens remains different (see A. Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), cit., esp. pp. 193 ff. About Dicey, see S. Cassese, "Albert Venn Dicey e il diritto amministrativo", in *Quaderni fiorentini*, 19, 1990, pp. 19 ff.).

interest to verify whether the public authority adopted a given measure in compliance with the legislation, without excess of power or lack of competence. The problem would not be the same, in the case of a public authority acting in total absence of competence, i.e. without a rule conferring the kind of power that it exercises: in this case it would have no supremacy and no special protection against a private citizen.

This situation, typical of European state tradition, renders the theorisation of the abuse of power even more interesting : in the sense, already analysed, of a misuse verifiable through justification principles, beyond compliance with "the rule" that attributes and authorises it.

From the point of view of the abuse, even the "atypical" figure of misuse can be referred to the idea of the abuse of the rule of law, meant as abuse of the principle of the legality of action. The principle requires the fulfilment of at least these conditions: (a) that the body which exercises the power is actually the holder of that power and acts in compliance with the law, but (b) that the consequences of such actions are incapable of standing up to the test of principles governing the exercise of that power. This is not, and I wish to reiterate it, a conflict between rights and the *rule of law*. The abuse of the *rule of law* can be distinguished from the simple *abuse of rights*, this time in the sense of rights injury.

6. A Legal Experiment. The Abuse of the Rule of Law at Guantanamo Bay.

Finally, it is possible to analyse also different questions according to this logic, with reference to the judicial control over the exercise of public powers. In Padilla vs. Rumsfeld, the US Supreme Court denied the receivability of the "habeas corpus petition" filed by plaintiff Padilla, since it was filed to a federal court of New York, and not to the court of South Carolina, i.e. the state to which, two days afterwards, Padilla was transferred as "enemy combatant": the Court held that the habeas statute requires, generally, that habeas petitions challenging physical confinement be filed in the district of confinement. And that otherwise a "forum shopping" would be authorised in favour of the prisoner, whereas the court's competence cannot be questioned. The words of the dissenting opinion drawn by Justice Stevens perfectly describe a series of abuses: the first was committed by military authorities that consider the power of transferring the prisoner as "a right to try the persons so seized in any place which the general might select"; the second abuse is evident as well, as remarked by Stevens: "Whether the respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible

answer to the question as to whether he is entitled to a hearing on the justification for his detention". What is at stake here is the relation between the executive power and the rule of law. The inner limits of the powers of the executive can be found in the relation between the executive and the judiciary, in the *due process, in the rule of law. Those limits* cannot be frustrated by the dull observance of a literal formula, i.e. of a procedural rule, when it must be assessed whether the actions of the military administration are the result of an use that we would define "misuse", on the basis of the principles underlying the rule.

The abuse of the *rule of law* can be expressed in this case by the words of this *dissenting opinion*: <<Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure[62]. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny. I respectfully dissent.>>

Evidently, this assertion is not based on the priority of human rights that the alleged observance of competent court's obligations would infringe; it is based, on the contrary, on the unacceptability of the power's real aims if compared to the principles regulating it.

This assertion is therefore different, because it refers to the idea of abuse of power or abuse of law, rather than to the probably more controvertible thesis of the infringement or denial of human rights (the opposite sense of the sentence "the abuse of human rights").

This is a different subject if compared to the meaning of Ronald Dworkin's words. The Bush administration, he writes, claims that legal provisions

allow it to detain some prisoners, whom it calls "unlawful combatants," indefinitely without charge or prosecution, even though they are not treated as favourably as prisoners of war and may be subjected to coercive interrogation". (…) In an earlier article in these pages I argued that, whether or not this option is permitted by a strict understanding of international law, a decent respect for human rights requires that the administration set it aside and choose between prosecuting its prisoners as criminals, with the normal safeguards of the criminal process, and treating them as

[62] All the more so, given what Justice Stevens refers: "Respondent's custodian has been remarkably candid about the Government's motive in detaining respondent: " '[O]ur interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts.' " 233 F. Supp. 2d 564, 573–574 (SDNY 2002) (quoting News Briefing, Dept. of Defense (June 12, 2002), 2002 WL 22026773).".

prisoners of war, which would mean an end to round-the-clock interrogation, sensory deprivation, humiliation and other forms of coercion. I said that the administration's present policy shows an impermissible contempt for the rights and dignity of its victims.[63]

Although these considerations can be shared, they follow a path that apparently is not directly based on the idea of the *abuse* of the *rule of law,* but rather on the idea of the priority of the safeguard of human rights, which can in some cases be an even more difficult path to follow, from a practical point of view.

The same can be shown with the cases of detention of persons in Guantanamo Bay, who similarly required to know the charges and the reason of their indefinite detention. The Bush administration chose a defence approach based on rules, rather than on the merits. No mention was made to the definition of which rights the military authorities must grant to different individuals, according to their status of regular soldiers of an enemy state, unlawful combatant and terrorists, suspected persons or citizens of a friendly nation, etc. The United States could have defended its actions in the merits, by asserting that the due process or the Conventions of Geneva had been observed, although not all the defence and cross-examination petitions could have been received for national security reasons, given the dramatic circumstances of the war against terrorism. This would have indicated, moreover, a wise consideration of the proportionality and balance between principles. The administration, however, simply chose to deny that prisoners could have any kind of constitutional protection, given that there are no instruments to extend the *habeas corpus* beyond the "natural" jurisdiction of federal courts: and prisoners are unfortunately not in the United States and under its "sovereignty" but in Cuba. This "formal" affirmation is a typical reference to the limits established by the rules of the "rule of law", but the apparent compliance with a rule is used to hide an excess beyond the inner principle limits defined for the kind of power exercised in this case.

It can be stated that, although the infringement of the detainees' human rights is evident to us, the question seems to be out of *focus*, and not taken into consideration at the level at which the legal discussion takes place.

The problem seems to be that- whatever we can think of detainees' human rights and habeas corpus rights- the Administration has got a place out of the reach of the deontological power

[63] *The New York Review of Books*, Volume 51, Number 13 · August 12, 2004. The mentioned article is : "Terror and the Attack on Civil Liberties," *The New York Review*, November 6, 2003

of human or civil rights, a place where it is procedurally impossible and not admissible, unavailable a competent jurisdiction, so that there is no law, just power.

That is why, while reasoning through the lens of human rights can be strategically useless, challenging the legality of the power itself, on the basis of its own principles, which is what I have called the possible abuse of the rule of law, seems more appropriate.

The Supreme Court, in Rasul vs. Bush rejected the Administration's statements, granted *habeas corpus* and resorted, in the end, to the principles regulating the aims and meaning of public power. According to the Court, the Congress gave the power to district federal courts "within their respective jurisdictions," <<to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §§2241(a), (c)(3)>>. The historical reason and justification in principle of this authority can be found in the limitation of preponderant and therefore worrisome powers of the executive[64]. It could be added that according to Western legal civilisation, the interpretation of a norm, in the event of a controversy, with reference to criminal issues, i.e. issues concerning fundamental freedoms, shall be, as for all dubious cases, in favour of defendants or detainees (*in dubio, pro reo!*). All the more so, given that, as the Court itself maintains, the *habeas corpus* belongs to the *common law* before than to the definitions given by the Congress.

The Court recalls a precedent from which it can be inferred that the jurisdiction area shall refer to the place to which "custodians" belong, not to the place where prisoners are held[65]. *Beyond the literal meaning of the precedent, the recourse to it, by the Court, depends on the choice of* the principle justifying the authority of courts, which is the limitation of the executive power; not the limitation of jurisdiction in order to guarantee to the executive an area free from jurisdictional control. According to this point of view, the provision ("within their jurisdictions") shall be interpreted in the interest and respect of the detainee's position. It is for this reason that *habeas corpus* shall be granted also in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

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[64] The Court mentions these justifications in previous cases: "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). See also *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial").

[65] << this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of §2241 as long as "the custodian can be reached by service of process." 410 U. S., at 494–495>> In Braden v. 30th Judicial Circuit Court of Ky., 410 U. S. 484, 495 (1973).

Equally significant is, as always, the dissenting opinion of Justice Scalia. He states the need to strictly observe the provision of § 2241. He deprives of any foundation the mainstream opinions[66]:

<<Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the over-sight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees. II In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth>>.

The fact is that Guantanamo had to remain that place of *suspension of legal civilisation*, functional to the interests of the United States. I believe that this would be an *abuse of the rule of law,* well before the detainees' human rights are actually infringed. Generally speaking, it is illegitimate to create a place where the executive power is freed, as if by magic, from the jurisdiction of any Court, civilian or military. This inner unlawfulness is the precondition for any kind of action, including the infringement of human rights.

According to Dworkin, the basic meaning of the Court's judgements is that "the Constitution does not permit the government to hold suspected enemy combatants or terrorists indefinitely without charging and convicting them of crimes, according them all the traditional protections of our criminal law process, unless they are treated in effect as prisoners of war. They would then have the benefits and protections allowed by international law, including the Geneva Conventions"[67]. His statement is noteworthy but makes direct reference to human rights. He follows therefore another line of thinking if compared to the one I have highlighted, i.e. the abuse of the *rule of law*[68]. Dworkin however considers the question from a point of view totally different from Scalia's.

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[66] <<The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong*>>. Cite as: 542 U. S. __ (2004) 11, SCALIA, J., dissenting.

[67] *The New York Review of Books*, Volume 51, Number 13 · August 12, 2004, p. 1.

[68] Justice Kennedy maintained (concurring in *Rasul)*, that although *habeas corpus* and *due process* cannot be guaranteed in the same way for everyone, a minimum safeguard level, compatible with the military interest, shall be offered to all detainees who are not citizens of a warring nation.

The consequentialist issue raised by dissenting Scalia is that there was a betrayal of the *trust of the* Bush *Administration*, we could say of the virtue of the *rule of law,* the certainty of law, and accordingly, of the belief that the Administration could have had in confining the prisoners in Guantanamo: i.e. that Guantanamo was not subject to the authority or jurisdiction of US federal courts.

One cannot help being struck by this startling criticism of the "consequences" of the Court's judgement. It is actually taken for granted and considered legitimate that military authorities thought they could avoid any kind of legal control.. In fact, they were quite sure they would avoid it. The naturalness with which this assumption was expressed cannot be adequately contrasted by recalling the declaration of rights, but rather by questioning the legitimacy of that assumption and its very legal foundation: does the certainty to be (or that the power is, thanks to the extra-territoriality of Guantanamo) *legibus solutus* deserve to be protected? Does it represent an interest worth of protection? Or is it an unworthy interest that turns the exercise of power into abuse, misuse and therefore unlawful exercise?

The interest of avoiding any kind of law control over detainees does not deserve any safeguard from the legal point of view and reveals the real extent to which the power exercised (and the interpretation of Scalia) is an actual "misuse". On the other hand, the typical features of this unlawfulness, of this abuse, clearly emerge: the consequences of the exercise of the power of detention in Guantanamo are in contrast with fundamental principles, such as the check and balances principle (in this case the check of the judiciary over the executive).

A different and opposed aspect is noteworthy as well: the principle of security, which is a substantial principle and is pursued without any balancing with other overriding principles of the *rule of law*. If a further characteristic may be identified in this significant event is that this misuse, although appealing to the forms of the rule of law, unlike others, seems to make substantial principles, as security certainly is, prevail even over the minimum formal principles of the *rule of law: this* is made without being aware of the risk, not only symbolical, of the dangers, that the denial of guarantees of the *rule of law* determines. The risk is that of turning the "exception state", even in Guantanamo no man's land, into a parallel moment coexisting with the legal state, where the burdens of the legal civilisation may finally be removed and the tyranny of values prevail, to quote Carl Schmitt.