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THE RULE OF LAW AT HOME AND ABROAD

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1 Introduction

Controversies surrounding the meaning, import and function of the 'rule of law' have generated abundant literature.[1] In what follows, I shall avoid starting with the essentially contested definitions (although I will return to this point later): instead of the answers, I shall begin with the questions and allow them to surface from a less abstract ground: describing some judicial cases (Sec. 2, I/II) in the international and the domestic legal order, which is helpful in identifying those problems that lead directly to the heart of the rule of law hurdles, and are still awaiting some convincing answers. Once the scene is set, however, a considered theoretical and reconstructive enquiry is necessary (Secs. 3 through 6) and should carefully guide to overcoming the weakness of some received ideas and focusing upon the profiles which are more genuinely distinctive of the original and present raison d'eˆtre of what we call the 'rule of law' (RoL). Through that path, the rule of law ideal is shown as requiring institutional settings that can actually vary according to time and context, but must be consistent with the normative objective which the ideal evokes. As I will submit, such an ideal concerns the law, not directly power or social organization. Before resulting in a limitation of power, it is a limitation of law through law. More specifically, it concerns the adequacy of legal institutions to prevent the law from turning itself into a sheer tool of domination. The RoL contrasts with the possibility that law can merely serve the ruling powers alone, lacking any other law which falls outside their reach, one that could be traced back to wider needs or diverse ends within the social whole. Thus, the RoL embodies a normative underlying structure that is never made fully clear by resorting to lists of formal or substantive requirements. As the central sections intend to show, this structure refers to an institutional balance, and a duality in law's organization as relevant features on a distinctive legal plane.[2]

As a preliminary note, among the premises of this article is the understanding that although it was coined in the ancient domain of domestic law, and mainly made to function within the boundaries of state-based legal orders, the RoL is nowadays being revived also due to the flourishing interconnections among concurring or conflicting legalities: what used to display its import within a self-accommodated realm of shared meanings and normative certainties is now emptied or relaunched depending on how it faces such an updated, challenging scenario.

[1] One of the best overviews which is still valid today was written by Craig (1997, pp. 467–487). Fundamental insights have been proposed in several works by Martin Krygier (2009, pp. 45–69 and 2011). I have myself elaborated at length on this issue. Among my own publications, see Palombella (2009 and 2010).

[2] While a part of the law legitimately remains at the disposal of the sovereign, an 'other' aspect of positive law is legally beyond his reach, and the sovereign is thus bound to be deferential. See below Sec. 6. More at length, Palombella (2010).

Accordingly, the issue of the RoL in the extra-state context comes to the forefront (Sec. 7) as a litmus test both for the general notion thereof and for its capacity to expand its meaning and significance into wider and often uncharted territory. Again, and even in such a different environment, the cases and the questions asked in the opening are conducive in selecting ideas of the RoL and in making deeper sense of them (Secs. 8–10).

2 Cases and Questions

(I) In 2012, the International Court of Justice[3] (ICJ) decided a difficult issue that, beyond the interest of the states in question, required a clarification of the rule of law in the jurisdiction of the international legal order. The case was brought by Germany claiming that Italy had breached international law when failing to respect the immunity of states by allowing civil claims before the Italian courts for compensation which was due to victims of WWII crimes. The ICJ declared that the violation of jus cogens norms by Germany does not displace its right to immunity.[4] Moreover, it ascertained that a customary rule, strictly endowed with procedural primacy, does exist granting state immunity for acta jure imperii, to which cases of grave war crimes are no exception. That must hold true, according to the ICJ, regardless of whether state immunity deprives the victims of any means of redress. The illegality of the German behaviour (acknowledged by Germany) and the breach of peremptory rules notwithstanding, the ICJ resolved to recommend the opening of further negotiations: the law could not afford any fair and sufficient satisfaction. Unsurprisingly, the issue concerning the rights of the victims and their access to justice ended up under the scrutiny of the Italian Constitutional Court as well.[5] That court could have disregarded the opinion of the ICJ and disobeyed it by simply asserting that, as far as the Italian legal order is concerned, deference to an international rule cannot override fundamental rights, thereby reaffirming the 'acoustic separation' between domestic and international law, and simply abiding by the most traditional dualist view of relations among states and extra-state orders. But, in my view, that is not what the Italian Court did; it did not embark on such a road.[6]

[3] ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012. www.icj-cij.org/docket/files/143/16883.pdf. Accessed 8 October 2015.

[4] Formally, this was supported by the argument that immunity avails itself of logical priority, being a procedural rule preventing any further discussion on the merits.

[5] Decision No. 238/2014. Official English translation available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.

[6] For the opposite opinion, Anne Peters, 'How to Make the Best out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order'. www.jurablogs.com/go/let-not-triepel-triumph- how-to-make-the-best-out-of-sentenza-no-238-of-the-italianconstitutional-court-for-a-global-legal-order. More about this question in Palombella (2016).

In truth, the Italian Court did not apply the opinion of the ICJ, but it did so after a thorough consideration of the weight and import of international law principles and rules. In brief, the unconditional primacy that the ICJ assigned to the pure rule of state immunity was found to be disproportionate and merely ignored the force of countervailing peremptory rules of international law itself concerning grave crimes against humanity or in wartime. Furthermore, according to the court, the automatic incorporation of the general principles of international law provided in the Italian Constitution (Article 10) could only take place subject to the condition that they are compatible with the constitutional provisions protecting human rights and access to justice.

If compared, the two judgments suggest two, non-identical, notions of the rule of law. For the ICJ, the rule of (international) law appears to be a matter of rules,[7] up to the point that the ICJ helplessly surrenders to its own interpretation of the customary rule of state immunity, to which it assigns unchallenged supremacy. Here the rule of law is therefore a one-sided legality, the dura lex sed lex that places that 'rule' above fundamental international norms.

For the Italian Constitutional Court, the rule of law appears to be a more complex notion, one that requires refraining from unilateral views, be they sourced by the ICJ or by the Italian order; one that asks for a contextual justification, recommends a balance in the given circumstances among interfering imperatives belonging to the two jurisdictions, and eventually paying attention to the principles and rules that concur in controlling the case in question, be they principles of international or domestic law.

Taken as examples of two different background ideas concerning the rule of law, the two decisions hint at a number of issues regarding the latitude of the notion of the rule of law, the relation between such a notion and the domain of each legal system, the potential of the rule of law to span different orders, and its role in cases that exceed the boundaries of one system and fall under the control of multiple jurisdictions.

(II) According to the ICJ the RoL conveys the very disputable idea that sticking to the rules is a neutral stance, one that can safeguard the achievements of the present international legal order, consistent with cherishing the basic premise that International law is based upon the consent of states.[8]

[7] In the same sense, I suggest, as Scalia (1989), pp. 1175–1188.

[8] That is a dogma in International Law. Nonetheless, it is the subject of debate: Fitzmaurice (1958) or Koskenniemi (1990), pp. 4–32, Franck (1998, for example, especially p. 29 on the self-founding insufficiency of consent). Pen˜alver (2000), p. 271.

Mutatis mutandis, that idea applies, of course, with reference to state legal orders as well. Here it is mainly connected with the premise that positive applicable law is to be kept in tune with the sovereign's will, or with democracy in our age. The legacy and limits of that notion of the rule of law become clear in concrete realities. Let us take, as I have done elsewhere, the famous decision of the US Supreme Court, praised for declaring the unconstitutionality of the Military Commissions ordered by President Bush to try detainees in Guantanamo Bay [Hamdan v. Rumsfeld (2006)]: According to the Supreme Court, the pronouncements of those Commissions and their executed decisions were reached without 'affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.[9] Humanitarian law had been infringed and this law is part of the uniform code of military justice (UCMJ) that 'conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations [...] including, inter alia, the four Geneva Conventions signed in 1949. [...]'.[10]
Beyond that, in so doing, the president had used a power which is not his own, is not 'implied' in times of war, and had not been conferred upon him, but must be deliberated and delegated by congress. This second reason for the illegitimacy of those decisions soon appears to be the one that conveys the entire significance of the Court's reasoning: violating the separation of powers—a 'structural' aspect in the US legal order—is what falls outside the rule of law, according to the Court: 'in undertaking to try Hamdan and subject him to criminal punishment, the executive is bound to comply with the rule of Law that prevails in this jurisdiction'.[11] For the same motives, the decision in the Hamdan case was dubbed 'democracy forcing'[12] (instead of, say, 'human rights protecting').

[9] The phrase is taken from The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Article 3 § 1(d).

[10] Hamdan v. Rumsfeld, 548 U.S. (2006), Opinion of the Court, p. 49. According to the Court, the Geneva Conventions—and the requirements of Common Article 3—are 'judicially enforceable' because they are part of the law of war (Article 21 of UMCJ).

[11] 548 U. S. (2006), Opinion of the Court, p. 72. The true objective in 'this jurisdiction' was to allow democratic deliberation in contrast to Presidential autocracy.

[12] As Jack Balkin (Hamdan as a Democracy-Forcing Decision, June 29, 2006) wrote: 'What the Court has done is not so much countermajoritarian as democracy forcing. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has, and if Congress gives it to him, then the Court will not stand in his way'. http://balkin.blogspot.com/2006/06/hamdan-as-democracy- forcing-decision.html. Accessed 15 October 2015.

This is why congress soon thought that its fiat could turn the Military Commission into a constitutionally legitimate institution: and so it did a few months later with the power-conferring Military Commissions Act (October 2006), despite its provisions being 'incompatible with the international obligations of the United States under human rights law and humanitarian law'.[13]
The 'rule of law that prevails in this jurisdiction' brings us to the question of whether respect for fundamental human rights and humanitarian law can be left to the choice of the democratic sovereign, that is, whether the rule of law entirely falls within the domain conceptually controlled by 'democracy'.
These are normative dilemmas and at the same time genuine 'rule of law' questions. Thus, they are not just hinting at a vindication of the legal strength to be acknowledged to individual rights. The rule of law is part of our legal civilisation trilogy, along with human rights and democracy: and with respect to them it purports to highlight an additional and separate ideal, concerning the quality of legality itself as a whole. As I shall submit, it is focussed upon legality per se. In other words, it revolves around law's autonomy and highlights its non-instrumental side, its irreducibility to the (albeit legitimate) exercise of sovereign legislative power. This holds true regardless of the sovereign capacity to show 'democratic' credentials.
In order to address these aspects, I am going to recall some features belonging to the 'principle of legality' and enhance the ingredients that make it represent some current conceptions of the RoL itself (Secs. 4 through 5). Then I shall elaborate beyond the conflation between rule by law and rule of law. That is to be done in two steps: firstly, accounting for the continental European notion of the 'legislative state' (as Carl Schmitt defined it) and explaining why the fact that it is being closely tied to the rule by law makes for its weakness along with the monolithic structure of the organisation of legality; secondly, recounting the distinctive historical traits of the original English RoL notion, which relies upon legal institutions (and a normative ideal) that are the key of its promise and were dismissed in the continental pre- constitutional state (Rechtsstaat, E´tat de droit,) (Sec. 6).
While the conflation between the RoL and the principle of legality is so evidently inspiring attitudes like that of the International Court of Justice in its important 2012 decision, the ideal of the RoL in its English roots rests on a balance between different sides of positive law that—if taken seriously—would oppose any such attitudes and their peculiar one-sidedness.
Eventually the rationale of the RoL 'at home' shall be tested beyond the borders of one single system, also considering that the questions arising in the cases opening this article are typically engendered at the connections between different legal orders.

[13] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, United Nations Press Release, 27 October 2006. www.unog.ch/unog/website/news_ media.nsf.

3 The Rule of Law "in this jurisdiction"

The 'cases' exposed above have aptly set the scene, in so far as they give rise to somewhat new questions and consequently shape our perspective. They rest on an understanding of the RoL that should be subject to further theoretical enquiry, which is the purpose of the coming sections. While the International Court of Justice in 2012 led to the ideology of compliance with 'strict rules', the Hamdan case exemplifies how in the domestic contexts 'respect for the law' is made to coincide with the rule of law itself because of a possibly misguided legitimating backdrop, that is, faithfulness to a democratic constituency.

In so far as the 'rule of law in this jurisdiction' is concerned, and the RoL notion is forged as being 'jurisdiction-related', it has, actually, appreciable intellectual roots. At one level of meaning the RoL, asking for generalised compliance with existing rules, emphasizes something more substantial than rules themselves: the linkage between constituency and the law, a situated ethos and its legal order. One can say that this conception, as venerable as it is, conservatively reflects the state-based law matrix. One of its versions in the 'Burkean' mode speaks of the courts as reflecting the whole experience of a nation.[14] The accent falls upon the safeguarding of internal normative achievements protecting the material constitution of a country.

It can also be traced back to the classic narrative of 'L'esprit des Lois' by Montesquieu.[15] The 'Montesquieu' pattern exposes an idea of law reflecting the complexity of a variety of concurring cultural, geographic, economic and political factors, whose unique relations give rise to a peculiar legality, related to given contexts, and weaving the stable fabric of meaning, embedded in the 'nature of things'[16]; the general 'esprit des lois' takes shape as a 'whole' recomposing, a rationale that would be missed should outward factors be overlooked.[17] Laws are hardly detachable from what they are supposed to regulate: accordingly, 'a thing is not just because it is the law, but it should be the law because it is just', while, on the contrary, monarchic despots think of laws as their own will.[18]

Somewhat misleadingly, this truthful narrative is turned to support an idea of law that it does not have to endorse, i.e., legality as the exclusive voice of a situated authority's will. This conception has consequences and repercussions, also externally, that is, as to the 'non-permeability' of a legal

[14] Oliver Wendell Holmes, in Missouri v. Holland, 252 U. S. 416, 433 (1920).

[15] de Secondat, Baron de Montesquieu (1873).

[16] de Secondat, Baron de Montesquieu (1873), Preface Vol. 1, where Montesquieu wrote: 'I have not drawn my principles from my prejudices, but from the nature of things' (p. XXXII).

[17] This was suggested by Ehrlich (1916), p. 582 et seq., at p. 589.

[18] Charles Louis de Secondat, Baron de Montesquieu, My Thoughts (Mes Pensées), translated, edited, and with an Introduction by Henry C. Clark, Indianapolis: Liberty Fund, 2012, Pense´e nn. 460 and 670. http://oll.libertyfund.org/titles/2534.

order, ensured through deciding the legal force to be assigned in domestic law to conventional or customary international law, to treaties and to general international principles.

4 The Rule of law as the Principle of Legality?

A connected second level of meaning is apparently less loaded with socio-ethical premises: it is still a jurisdiction-related conception, mainly turning upon obedience and conformity with the law, of which it underlines the alleged 'determinacy': one that should be shielded against the interpretive zeal of the judiciary calling upon its self-restraint. In the words of one authoritative theorist, the Supreme Court's Justice Antonin Scalia, it is the 'rule of law as a law of rules'.[19] After all, the protection of positive law vis-a`-vis discretionary and ungranted innovations safeguards legal certainty and predictability, as well as curbing public powers by virtue of pre- established rules: all of this is a premise of a liberal state and forms its main pillar, the separation of powers.

I have gathered the attitudes which often descend from these conceptions under the heading of the 'rule of law in this jurisdiction' because their reference to the RoL is tailored in the idiosyncratic, discrete domains of each different order, as it appears to be a system-relative notion. But in a more accurate understanding they expose, albeit with slight differences, the faith in the principle of legality. Such a principle is condensed in the requirement that public power only exists in so far as it is created and attributed by law and its exercise is disciplined through rules.

Admittedly, the legality principle converges into the guarantee of power's non- arbitrariness. Here lies an essential part of its virtue. On the one side, it is importantly connected with fidelity to the law, whose legitimacy depends on the link with the nation. On the other side, non-arbitrariness, a core aspect in the Anglo-American image of the RoL, is not simply a question of tempering power through rules, since it encapsulates fairness, some degree of responsiveness vis-a`-vis individuals addressed by the public power, and the principled coherence of public behaviour with the normative beliefs of a polity. Under the principle of legality, this has to occur through conformity with posited norms. That is the formal side, which is credited as a bulwark against arbitrariness, and the cherished certainty of legal systems can be traced back to it. From this angle, non-arbitrariness indeed refers to rule compliance, and to the procedural (ised) nature of the exercise of power, especially on behalf of the administration and of the executive.

However, and incidentally, we should also not overlook the fact that the English roots of 'government by laws', the 'rule of law not men', was originally sustained by a different inspiration. Common law jurists did not refer to the rule of law as that conflation between a system of formal rules and non-arbitrariness. John Reid has recalled that at least until the 18th century the ancient notion of the rule of law was close to an obscure, customary law, which could be traced back to times immemorial: devoid of the 'requirements of clarity or precision', according to Reid, the rule of

[19] Cited above, note 7.

law ‘was shrouded in immeasurability’ and ‘what mattered was not its intrinsic qualities but that it was customary practice, not deliberative decision’.[20]

It is instead through the European continental doctrines, and in subsequent epochs, that the quality of law structured through formal rules and procedures became the essence of that principle of legality on which the concept and reality of the ‘legislative state’ was essentially based. In the research pursued by Max Weber, the legitimacy of the modern state relies upon the predictable character of the behaviour of public powers, granted through the formal rationality of procedural law.[21]

Let us now consider a quite current and mainstream definition of the RoL, such as the one advanced by Brian Tamanaha:

“The rule of law, at its core, requires that government officials and citizens be bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied”.[22]

Their intent to display the core of the RoL notwithstanding, those propositions only capture the core of the rule by law. The mentioned requisites are certainly essential in order for the law to exist: this is also most aptly shown by Lon Fuller who believes that a list of eight features must possibly be satisfied with a view to increasingly establishing legality, that is, in order for the law to be actually law.[23]

The importance of establishing legality is highly valuable and certainly not in question: its distance from crude force and mere arbitrariness is immeasurable. Law as such and of itself is a necessary premise, the basic precondition, although it is not sufficient, for the dignity of subjected people to be respected.[24]

[20] Reid (2004), pp. 16 and 13. These references were originally brought to my attention and are also part of the chapter written by Krygier (2009), p. 53.

[21] For M. Weber, the legal norm becomes autonomous from the reasons why it was first enacted. He defined ‘formal rationality’ as that which maintains an absolute indifference ‘towards all substantive postulates’ (Weber 1978, p. 108). He identified the ‘formal’ character of law in the modern State and understood the material rationality of law to be that rationality that takes into consideration rules derived from ethical aims or connected to utilitarian objectives, rather than legal principles (cf. ivi, Vol. II, pp. 656 et seq.). As a critique of the principle of legality, and the question of the conflation between legality and legitimacy, see Schmitt (1993 or 2002, in the English translation).

[22] Tamanaha (2009), p. 3.

[23] Martin Krygier called such definitions ‘anatomical’, Krygier (2009), p. 47 et seq. Fuller did explain at length the requirements for the law in Chapter II of his book The Morality of Law (Fuller 1969).

[24] It is telling that Nazi Germany suspended its own legal order, although it was organised so as to serve the governmental will, freeing itself from legal ties of a procedural and formal nature when it deemed it to be useful to achieve its desiderata. On this point see Fraenkel (1969), pp. 56 et seq.

Despite all of that, to meet the requirements for the law to be established, that is, for the existence of a legal order, of itself does not automatically equate with the realisation of the RoL. Beyond its strict connection with non-arbitrariness, the RoL risks being misunderstood as being made to simply coincide with it, as well as being reduced to the sheer 'principle of legality'. After all, the latter could not help us to address any of the important questions from which I begun, precisely because it would instead be at the core of that recurrent downgrading of the rule of law sans phrase to a RoL which is 'jurisdiction dependent'. As we shall see, the idea that the law (RoL) merely has a 'relative' and instrumental nature, that its appearance depends only on the quality and the organisation of the political process, signals connotations which are properly true to the rule by law. This is particularly evident in the Hamdan case at the US Supreme Court, and its conclusion in Congress: the concern for democratic legitimacy happens to coincide with the protection of the separation of powers, and the two things together conceal anything, any further law, that should deserve deference, being beyond the reach of the ruling powers. At the same time, that is consistent with the limits inherent in the principle of legality: the legal form through which the political power, or the power of the state, can pursue its self-legitimated ends.[25]

5 The Continental side

Behind the alternative by/of lies an institutional 'difference', one that can be understood through an analysis of the institutional features that the RoL specifically embodies.[26] A reconstruction of the original sense of the expression is in order here, due to its heuristic value and, I believe, its normative appeal. Before that, however, it is necessary to explain what, by contrast, was the notion of 'legality' which prevailed on the European continent. Such a test is definitely significant.

At least until the decades of the totalitarian age of the 20th century, continental Europe was organised through the form of the E´tat de Droit, Stato di diritto, Rechtsstaat. Despite the fact that these expressions are currently used to translate the English notion of the 'rule of law', they were not its equivalent. Firstly, they do not refer to law, but to the State, and define a configuration of power belonging to a specific time: that is, to the European State before its constitutional transformations which occurred in the aftermath of WWII and later on. On the contrary, RoL embraces diverse settings in different times, from medieval times to the contem- porary age: as such, it can hardly be frozen as a contingent organisation of the State. Despite the fact that the continental State did not at all amount to 'arbitrary power', some of its operational features were fully compatible with those recently dubbed with the oxymoron 'the authoritarian rule of law', a denomination aptly used to identify contemporary regimes whose typology is instantiated in

[25] The instrumental nature of law—as a consequence of the organisation of power—is in my view at the basis of Stephen Holmes' theory in 'Lineages of the Rule of Law' (Holmes 2003, pp. 19–61).

[26] Sections 5 and 6 draw upon my previous writings, i.e. chapter I of *E' possibile una legalita` globale? Il Rule of law e la governance del mondo* (Palombella 2012) and 'The rule of law as an institutional ideal' (Palombella 2010).

Singapore.[27]

If we return to the German doctrine of public law and to the teaching of F.J. Stahl,[28] the notion of Rechtsstaat was held to entail what I have recalled in the foregoing sections, the subordination of the State to procedures and organisational partitions pre- determined through legislative rules: with such a State, legal norms are the way through which power defines its self-limitation in the form of law. Although that Stato di diritto brought about a shift from power tout court to the power of (by) law, the latter actually represents the very structure of the State, it is the vehicle of power action, not a limitation thereof. Of course, the organisation of the State relies upon the separation of powers, and freedom is meant to be a consequence of law, not a premised asset thereto. At the centre of the legal order we find the primacy of legislation, which can guarantee individual rights as much as it can subordinate them to itself. The achievement of the independence of the Judiciary is conceived vis-a` -vis the Executive, and is functional to a rigid conformity with legislation and legislative will. Legislation is not only the apex of the law, but it is assumed to be the authentic voice of the State; it materialises its 'will'. As such, the law is not so much a bridle or a binding, but the very 'form' of the State's will.[29] Both 'la loi' in France and die Herrschaft des Gesetzes in Germany were the highest source of law. Such a 'legislative State' is generated through the hierarchical supremacy of legislation, the lack of equally ranked sources, of equivalent protagonists on the institutional scene. This, of course, has relevant consequences for rights. According to Georg Jellinek,[30] in his times citizens were holders of 'public subjective rights' in so far as they are produced by a self-obligation of the Sovereign. Nothing, ultimately, can be real, unless it is provided by legislation. And only the latter can be entrusted to 'arbitrate' the tussle between rights and the public power (actually, iudex in causa propria). In conclusion, and albeit being a modern and sophisticated actualisation of the rule by law, this Stato di diritto could barely be thought of as an incarnation neither of the RoL ideals nor of the practice of constitutionalism (as set in the American Constitution of 1787).

As we shall see, the fact that some rights are actually granted and protected is not the proper test for the RoL. The issue depends, instead, on the formal existence in positive law of equally independent sources. And such a declaration of the independence of rights (and of individuals' prerogatives) vis-a`-vis State legislation was only proclaimed by contemporary European constitutions. These constitutions entrenched fundamental rights and other normative principles,

[27] Rajah (2012).

[28] Stahl (1870), p. 137 et seq. The expression Rechtsstaat itself seems to have been coined by von Mohl (1832).

[29] The primacy of legislation consolidates with the codification process between the 18th and 20th centuries.

[30] Jellinek (1892) (full text available at https://archive.org/details/systemdersubjek00jellgoog).

affording to them equivalent ranking vis-a`-vis the democratic principle, and preventing the latter from holding the juridical legitimate power to decide the fate of the first. Before then, there had hardly been any favourable terrain for the RoL to flourish.

6 On ''duality'' and the English root

The RoL conveys the prospect of limiting jurisgenerative, normative power, an idea that is also visible, in its English roots, also through the insight and picture drawn by Dicey.[31] Its sense and scope along the line that links Henry de Bracton (and the coupling of gubernaculum/jurisdictio), Edward Coke (cf. Bonham's case), the Federalist Papers and eventually the American 'judicial review' expose—beyond various differences—a more general unitary logic.[32] There is a plurality of sources that concur to determine the inherent diversity of the 'law of the land'. While sovereignty is complex and is shared between the Crown, the Lords and the Commons, the law also develops through the common law and the courts,[33] being the second, in truth, the final interpreters of the coherence of the resulting legal 'system'. Of such an order, Dicey explained the traits and properties that he deemed typically 'English': that no man can be punished for what is not forbidden by the law, that legal rights are determined by the ordinary courts, and that 'each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded'.[34]

Being that, the RoL is hardly understandable as a specific historical form of the 'state',[35] it is centred upon the law and requires that the 'state'—as the rule- generative apparatus nurtured by the directive will of the political sovereign (gubernaculum)—does not monopolise the production of law. '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'.[36]

[31] Dicey (1915).

[32] An important point is made by Matteucci (1993), pp. 157–158.

[33] A.V. Dicey also wrote: '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'. (See also Dicey 1915, p. 273.).

[34] Dicey (1915). Dicey also wrote: 'with 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' (p. 121).

[35] This was the tenet of the political science scholar Giovanni Sartori: Sartori (1964), p. 310.

[36] McIlwain (1940), p. 85. McIlwain wrote, very explicitly, that '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' (p. 90).

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The ‘otherness’ of the jurisdictio does not replace any of the qualities of the gubernaculum. Actually, looking at the coupling of gubernaculum-jurisdictio, expressing the dual nature of legality from Bracton to McIlwain, it is not on each side but in their coexistence, in their mutual tension, that one can find the essential RoL scheme. In that very sense, then, law is something more than just a ‘directive force’. But what countervails the instrumental side of legality is not just morality. The famous Article 39 of the Magna Carta, as McIlwain again recalls, was insisted upon and enforced as coercive law, namely as the principle that the ‘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’.[37]

In conceptual terms, then, the RoL originally depended upon a certain distinction: on the one hand, that fabric of law which belongs to the land, the country and the People, and embeds the positivised idea of what is just, giving rights and liberties their due; it was the side of law that also includes judicial achievements, judge-made law, established customs and conventions, the common law in general. On the other hand, there is the gubernaculum side, bringing about the ethics and the policies legitimately decided by the will of the sovereign, who has the right to honour his duty to govern. As one may realise, in the eyes of the ultimate power upon a societal group not all the available law appears to be either its creation or a tool at its disposal. On the contrary, there is a side of law upon which it cannot extend its will, and whose juridical force is not for the sovereign and his law to challenge. Although part of the law is actually the law of the sovereign, an instrument to (and from) his hands, there is then another side of law which is not at his disposal, toward which he is bound to be deferential (it being illegal should the sovereign do otherwise).[38] It can fairly be said that the tension between these two poles can be protected through institutional devices configuring legality in such a way as to pursue and approximate the ideal of the RoL, demanding the non- disposability of justice (jurisdictio) by the rule of the sovereign. At the same time, the RoL would prevent the opposite from occurring: it is completely misleading to think that some law of itself can rule by displacing the legitimate directive will of the sovereign (say, through an aristocracy of judges, the infringement of the essential core and scope of political sovereignty by

[37] McIlwain (1940), p. 86.

[38] The notion of non-disposability was generally also enhanced by Habermas (1988), pp. 217–279.

the diktat of, say, some epistemic community). Such an image is not, per se, anything which is proper to the RoL.

To deny the mutual autonomy of either sides of law would simply alter the conditions of inter-individual justice, liberties and the sovereign prerogative. And whenever rights once felt to be beyond the disposal of the majority (being due to human beings, to citizens, or to other community members) fall prey to the exclusive (discretionary) power of the sovereign, they are automatically deprived of their juridical force, are pushed outside the legal order, and end up being translated into sheer morality claims.

The normative ideal of the RoL, because of its very nature, does not simply promise that some single, eight or more, requisites of procedure, or substance, shall permanently be part of law, but that law be upgraded through the features of a 'duality' that excludes the monopoly of one source, and exposes an internal organisational, institutional relation: in the balance inherent in such a relation the RoL explicates its nature. And many of the qualities that are often believed to capture the core of the RoL, like, in the first place non-arbitrariness, could only do so if placed within the legal-institutional premises of such a RoL environment: outside of which they would merely prove to be miserable comforters (like it was in the pre-constitutional Rechtsstaat).

In the original scene, whose sense is invited by the RoL, we find that the English subject's cottage becomes his castle, one that the King cannot conquer. This hindrance is due to another law that the sovereign cannot override. In still many cases decided by national or international Courts, we miss the evidence of such a positive law efficiently countervailing the albeit legitimate sphere of sovereign rulings. Is the international legal order always capable of making its fundamental rules concerning the interests of the entire community of peoples and individuals (whether on health, hunger, human rights, the environment, etc.) fairly balanced against the will of the Masters of Treaties? Is the democratic will of the people in Western orders always met with the counterpoise of substantive constitutional limits? The conclusion of the Hamdan story is, from this point of view, a neglect of the RoL ideal: not so much differently—to mention recent examples—from the use of legality by, say, the majoritarian executive (and parliament) in Hungary or in Poland now: undermining 'another' law, the constitutional freedom of the press or the independence of the judiciary. And in its decision of 2012 the ICJ chose the legality of a customary rule of immunity, so unilaterally getting rid of what I call (in the coming section) 'another' international law, one that preserves, through jus cogens and erga omnes norms, those aims and values placed beyond the equal and sovereign ineffability of States' will.

The general form and the scheme of the RoL normative ideal extend throughout time, regardless of the variety of political regimes. When one of its incarnations can take place it has to correspond with a specific structure of freedom, at the level of law's organisation, referring to what can be called legal non-domination[39]: what the RoL specifically adds to whichever political arrangement, and that bears relatively independent features, brings about the autonomy of a law, that lies beyond the sovereign's whim, and against which he cannot legally interfere. Arbitrary interference on behalf of the sovereign is prevented not contingently by his goodwill or way of being, but by law's structural ties, defining its illegality. For that very same reason, not even democratic sovereignty, regardless of how poliarchic and republican its 'organisation' can be, is allowed to become the ultimate, unconditionally free, master of law-making. Not even the best possible men and the best possible sovereign (the rule of men) can replace the claim or the proprium of the rule of law ideal.

7 The Rule of Law outside the State

So far, it is clear that the normative significance of the RoL is irreducible to the sheer imperative of law's compliance, including the law that prevails in one jurisdiction. This connects with—and hopefully answers—the genuine RoL question that I emphasised above, by instantiating the case of war crimes at the International Court of Justice or the priority of democracy in the Hamdan case. The opposite is true: it is the law in 'this' jurisdiction that should be measured through the parameter of the RoL as a shareable, cross-order, transitive notion concerning the internal configuration of legality, and exposing a structural scheme serving the purpose of freedom as the non-domination of (and through) law. From this perspective the RoL appears to be a normative ideal, as much as human rights and democracy are. The language and reasoning of the International Court of Justice in Germany v. Italy is an example of a self-incurred impotence of a Court that seems to surrender one single, (right or wrong) unconditional, procedural rule by subscribing to the supreme rule-making power of the sovereign (States).[40] The Hamdan v. Bush case proves that even in the land of the venerable 1787 Constitution, the inward- looking concerns for democratic legitimacy may lead to displace the RoL ideal and its potential consequences.However, once freed from the misunderstanding of a jurisdiction-dependent notion, as well as from an unjustified equivalence with some generic State under the law (E´tat de droit), the RoL can naturally hold onto the extra-State scene as well: here its beneficial potential should apply to the tensions among diverse legal orders.

[39] About liberty as non-domination, I have borrowed and adapted the concept from Pettit (1997, 2009). However, Pettit focuses on the political matrix, being the character of legality as a secondary effect of the organization of the polity.

[40] For a more detailed analysis of the decision of the ICJ, both with reference to the underlying principle of sovereign equality and to the arguments of the Italian Constitutional Court n.238/2014 decision, see Palombella (2016).

Accordingly, as much as the sovereign's monopoly upon domestic law is foreclosed, the same holds true concerning an unconditional primacy of democratic deliberation on the 'external' side: this means that the dogmatic assumption of an international law based on the sheer 'will' of the States is to decline if the RoL has to develop.

Actually, the mentioned 'duality' emerges in the international order as well. Beyond the States' prerogative to negotiate their own interests in the traditional domain of treaty-making, an 'other' international law has developed in the last 70 years or so, especially starting from the Universal Declaration of Human Rights (1948), and subsequent legal instruments like the International Covenant on Civil and Political Rights (1966), or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), to mention but a few. Of no less importance is the increasing corpus of environmental law and humanitarian law, beginning with the Hague Conventions (1899 and 1907) or the Geneva Conventions (1949, and 1977 Protocols) with their exemplary 'common' Article 3, defined in 1986 in the Nicaragua case by the International Court of Justice, as an expression of 'elementary considerations of humanity'.[41] Albeit slowly, a corpus of general norms of international law is gaining the legal force of jus cogens.[42] A 'super partes law', a law of the international community as a whole, started flourishing, also through erga omnes obligations, that do not necessarily depend upon the participants' consent. All of that, and more, indeed forms an 'other' law, beyond the purview of the sovereigns, of the most powerful, and a normative fabric that cannot be instrumental to their exclusive ends. In so far as it includes such a duality of sides, even international law is increasing its capacity to mirror the RoL scheme, a normative ideal that often surfaces as a measure of civilization vis-a`-vis States and a large number of regional or global legal regimes and other authoritative supranational bodies.

Compared to the unique alleged foundation of traditional international law on the functional principle of pacta sunt servanda, aimed at a content-independent operational order, those relatively 'new' international obligations weave a substantive fabric that aspires to achieve a legal strength of its own vis-a`-vis the sheer will of the Masters of Treaties. As much as domestic democracy should not be held to be the ultimate authority in the internal legal order, similarly and consistently, the

[41] Nicaragua v. United States of America, Merits, judgment of 27 June 1986, ICJ Rep. 1986, para. 218. The Court also recalled a preceding use of the same expression in the Corfu Channel case (United Kingdom v. Albania, 9 April 1949).

[42] Cf. Cassese (2005), pp. 294 and 310.

States themselves, in their external intercourse, cannot think of their unconditioned will as the ultimate legislator.

Although not intended to be a redefinition of the RoL, even the recent novel proposal by Ronald Dworkin of a 'new philosophy for international law' ends up supporting a general converging idea: that the deep significance of International law itself should consist of the 'mitigation of power', a regulative ideal that States themselves should approximate at their best in order to serve the fundamental reason of their sovereignty, id est, the dignity of the individuals under their governments'.[43]

In sum, the recognition of the RoL cannot hold a double standard, and it requires consistency, one that prohibits cherishing some internal RoL while disregarding it in the extra-state ordering.

In a legal perspective, the world avails itself of legal orders, of diverse thickness, width, structure. It is not yet the time for, and this is not necessarily desirable, a world under one single cosmopolitan order, be it subject to the power of reason or a global unified authority. Orders and regimes of law confront themselves in the extra-state domain: States, the international legal order, the regional order of the EU, a number of other regional powerful organisations, functionally specialised global regimes, that avail themselves of massive rule-making power, and whose self-referential status is often complete, given their jurisdictional capacity through internally entrusted bodies.

For that reason, one cannot escape the question of the RoL as concerning the legal frames where the relations, dialogues and confrontations are to be located. Here the RoL still has some unlimited potential to develop. This point has a traditional genealogy concerning the nature of the beyond-the-states space. Is it just a wild land where the law of power prevails? More than that, if any external legality is inevitably affecting the 'internal' normative contents and structure of our polities, what is the sense of a domestic RoL when there is a lack of a similar measure in relation to external regulators? This is why the RoL ideal has to fare as a parameter concerning mutual respect among orders of a diverse nature and kind (for instance, between global regimes like the WTO and a regional order like the European Union, between States and other specialised regulators, like the ISO, the UNCLOS, the ICANN, and the several jurisgenerative entities that rule, as a matter of fact, each polity, peoples and individuals, although through the formal diaphragm of States' legal orders). Thus, the point is how the relations among States and supranational regulators can be disciplined by the law, and whether the RoL can permeate the quality of the relevant legality. Whether States do adopt some more deferential or self-protective interfacial arrangements vis-a`-vis extra-State law, this does not change the fact that most of the 'external' norms once disciplining only the mutual independence of States are now deeply piercing their

[43] Dworkin (2013). For a further appreciation of this last work by Dworkin, I wish to refer to Palombella (2015), pp. 3–22.

internal autonomy, influencing and narrowing the scope of their sovereignty, be it in matters of human rights protection or the environment, health, the requirements for commercial products, the pursuit of free and undistorted trade competition, and so forth. These circumstances make clear that a watertight separation between the 'inside' and the 'outside' cannot stand, unless it is used as a deceptive shield.

The desirability of the RoL derives from the balance between ruling powers, guarantees, and the plurality of independent jus-generators that naturally feature in the national-supranational world. Also because of that, the RoL cannot be made to match the protection of human rights only. It does not simply produce effects which immediately benefit individuals and their rights. Its supranational dimension concerns, first of all, the relations among legal orders, to which it must grant a measure of fairness by preventing the domination of law that would delete the plurality and the autonomy of multiple diverse legalities populating the planet: they possess peculiarities and raisons d'eˆtre of different kinds, they are irreducible to one single format of formal normative structures, being varied in terms of their function, structure, social embeddedness, and political roots. Thinking of global regimes certainly much more powerful that any single State, like the mentioned UNCLOS, WTO, ISO, ICANN, let alone the UN Security Council, one takes as implicit that they do not avail themselves of any supporting polity, they are deracinated and disembedded legalities, devoid of sense and operational capacity, if not through their encounter with States, and socio-political legal entities at the regional or sub- state level. All of them and their diversity are not overlapping and among themselves they are unsuited to any hierarchy whatsoever.[44] No one among the functional specialised regimes can work without piercing the veil of States' orders, imposing compliance on them and the implementation of their regulative canons. The whole of these interconnections falls within the magmatic world governance, which follows functional (non-territorial) divides, escapes political control by its final addressees, and often frees itself from an actual legality check.[45] As some successful attempts to build up requirements of legality, transparency, revisability, justiciability, and new procedural guarantees show,[46] the aim of creating some more administrative rules curbing the material power of such regulators is to compensate for the unilateral character of jurisgenerative entities that are scarcely controlled through legal limitations, and to make up for rules-governed relations among orders. The increasing development of the RoL can be seen in some of these processes, also supported by Courts belonging to different levels of jurisdiction. The entire enterprise is intended to afford new legal instruments, especially to weaker

[44] My Italian book deals at length with these issues: Palombella (2012), in particular, Chapter III.

[45] Again I have developed this point elsewhere, Palombella (2013).

[46] Mainly through the project of a Global Administrative Law, starting with its Manifesto: Kingsbury et al. (2005), pp. 15–61. For the perspective as to European Integration cf. Harlow and Rawlings (2010), pp. 215–258.

parties, thus serving an objective of empowerment.

8 Who Benefits?

As I recalled earlier, the RoL does not exhaust itself with human rights, as much as it cannot be assimilated with the ideal of democracy. Although human rights, democracy and the RoL are to be seen as propitiating each other, the RoL itself has a separate rationale. Thus, its nature involves the legal universe as a whole: and this feature separates it from the albeit relevant questions of a right of an individual person, and of justice due to her. Therefore, it is only in part true, and might otherwise be potentially misleading to assume that only individuals, not States, as Jeremy Waldron claims, are 'entitled to the benefits of the rule of law'.[47]

Despite the fact that almost nothing can be ultimately justified if not in the name of human beings, this cannot detract from the importance of recognising the value of a RoL universe extending beyond—and hosting—the States as well as the diverse actors that exercise normative responsibilities: a scenario of law where equal concern and respect is to be afforded to those legal orders that can feature therein through ostensible legal reasons. What, on the whole, they are is not devoid of some inherent value: and that is premised on their entitlement to a degree of recognition and respect. Although we are today convinced that sovereignty itself is to become a 'conditional' notion, we cannot ignore the fact that a dramatic confrontation occurs constantly in a multilateral guise: not only human rights are in tension with democracy and/or States' arrogance, but also States and other organisations have to defend their own legal order, their commitments to social values, their identity, and also fundamental rights, vis-a` -vis regional or global orders.[48]

Often global governance authorities pursue efficiency targets and homologating benchmarks: their interlocutors can only be the politically embedded legal orders—expressing the life-worlds of concrete social beings—that do aspire to have a voice and to avail themselves of a legally regulated theatre immune from sheer hierarchy and one- sidedness: a theatre where it is possible to articulate arguments of dissent and participation. The RoL will benefit these actors and orders, if it has to ultimately benefit the dignity of individuals they represent.[49]

As I already hinted at, something possessing intrinsic value imposes consider- ation per se, although that does not preclude in any way serving further and even

47 Waldron (2011a), pp. 315–343.

48 One can think of the tussle between the (then) European Court of Justice and the Security Council in Joined Cases C-402/05 P, Yassin Abdullah Kad`ı and Al Barakaat International Foundation v. Council & Commission, 2005 ECR II-3649, judgment of 3 September 2008. Or in a different way, of the ECtHR judgment of 26 November 2013, Al-Dulimi, No. 5809/08 (condemning Switzerland for having complied with a Security Council resolution, and consequently infringing Article 6 of the European Convention).

49 As I noted above, I find that a similar vein lies at the core of R. Dworkin's last article, 'A New Philosophy for International Law' (Dworkin 2013).

It is to be added here that his non (-just) cosmopolitan view of the international order takes into account the roles of States and their intermediated relevance to individuals' dignity.
more fundamental values (like justice towards individuals). This is why the 'benefits' deriving from the RoL are better believed to be as wide and directed to multiple senses, as it turns out to be the case.

Jeremy Waldron advanced the thesis that the RoL is essentially oriented towards the freedom of single individuals, and not towards the freedom of governments, so that the procedural requirements and the requisites that the RoL should defend are eminently addressed to tame governments administering their own societies. He exemplifies his tenet by recounting the famous dissenting opinion in Rasul v. Bush (2004), written by the Supreme Court's Justice, Antonin Scalia. Actually, Scalia affirmed, with surprising words,[50] that the Court's decision had shattered legal certainty (affording Guantanamo's detainees the right to Habeas Corpus, despite the absence of any legislation providing for that in this specific case, that is, in a territory outside the jurisdiction of the United States) and proposed an argument based upon the RoL: he invoked the expectations generated by previous law, and complained about the fact that allowing detainees in Guantanamo to make use of the right to habeas corpus would render useless the choice by the Executive of an extraterritorial place of imprisonment, and would thus make Guantanamo 'a foolish place to have housed alien wartime detainees'.[51] Resorting to the RoL with the only aim to support the legality of an unlawful and incommunicado detention, according to Waldron, can only be prevented or excluded assuming that the RoL cannot be invoked by the public power for its own benefit, and also not by the State within the realm of international law: unless it does so in only the role of an agent for individuals' rights. Given its inherent moral objectives, the RoL cannot be placed at the service of the government's freedom, it does not protect the sovereign but rather individuals. Thereby the thesis that sovereigns are not entitled to the benefits of the RoL.

The above argument is apparently convincing, but of course it relies upon an ungranted cosmopolitical vision of the world, and on some implied global legal monism,[52] both of which are not addressed or explicitly contemplated by Waldron. However, in so far as the consequence of the argument is a 'reduction' of the senses of the RoL, some dissent is in order.

Can the notion of the RoL bring about the paradoxical consequences to which it is brought by Scalia's opinion? The Supreme Court's Justice, by entirely relying upon rule compliance, formal text and predictability, simply resorts to the form of law in its instrumental properties, in a line which

[50] I had myself commented earlier upon the dissenting opinion of Justice Antonin Scalia and analysed the Supreme Court's Rasul v. Bush (2004) decision in my book (in Italian) Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia (Palombella 2006, Chapter III).

[51] 542 US 466, 497–8 (2004).

[52] This is also hinted at by David Dyzenhaus commenting on Waldron in 'Positivism and the Pesky Sovereign' (Dyzenhaus 2011), pp. 363–372.

is consistent with his interpretation of the RoL 'as a law of rules'.[53] The set of such properties that Scalia stresses in the RoL constitute the core of the rule by law, i.e. of that conception that is erroneously associated with the RoL, and to which the first part of this article is dedicated, with the intention to clearly disambiguate the notion.

Despite the fact that an instrumental use of law is always possible, the RoL rationale predicates precisely the opposite, and denies that the whole available legality falls completely under the purview of either the sovereign or of minorities, oppositions, individuals themselves (with a view to defending their liberties up to abusing their own rights or attacking the core of the gubernaculum duties).[54]

In other words, the problem is not 'who' can resort to the RoL and to whose benefit, but which notion of the RoL is premised as being in place.[55] The RoL is based upon an underlying normative structure which determines the duality of law, and prevents 'domination' by the most powerful. As explained in the foregoing, its meaning does not end with procedural features, with rule compliance, with non- arbitrary public behaviour: all of them are however essential for the law. The RoL is not premised upon the idea of only limiting power, and it pursues the limitation of law through law; its medieval genealogy, also because it dates before the dominium of the modern State, leads to the exclusion of pure anti-State RoL dynamics. The relations among power and individuals had then been, and today are turning to become so again, much more complex and diversified than those between the State and individuals. Today the production of law by new protagonists, entities of an uncertain public nature, private or hybrid, spontaneously transnational, generates a normative layer which is often uncharted, beyond States' chain of control, and triggering novel concerns, all very different from those prompting the limitation of the State: weak parties and individual actors, or more often unaware individuals called upon to bear the consequences of unknown powerful regulators, would see their own nation States as themselves, at pains to cope with the same problem. This is all well known. At this conjunction, however, one can better appreciate the RoL's potential in its normative claim to prevent the coalescence of any monopolies of rule-making. From this point of view, even State legislation sometimes becomes a counter-power, worth supporting if endowed with contextually sound and ostensible legal reasons. It is a counterpoise to those deracinated global entities whose authority is difficult to contest. This is why States can be legitimately entitled to invoke with the RoL all that is needed to foster an enduring legal equilibrium.

[53] Cf. above, note 7.

[54] I suggest here Sajo` (2006).

[55] A similar point can be made, for example, with reference to the notion of democracy: if it simply means the rule of the majorities, then it hardly obliges one to protect minorities, dissent and the like.

9 On Procedures

As much as the idea of centring the RoL upon its beneficiaries might only be in part persuasive, so are those focusing on its procedural virtues. Again, it is contended[56] that procedures would of themselves exceed the formal requirements listed by Lon Fuller[57] and imply an orientation by the intelligence and equal participation of citizens and the safeguarding of their dignity. Unfortunately, the focus upon procedures in the just application of law can be seen as only partly satisfying the sense and scope of the RoL. Yet, it might be close to sheer non-arbitrariness, or to natural justice and the threshold already reached by Fuller's 'inner morality of law' in its practical results.[58] However, for sure, in emphasising procedures, one fundamental profile that I have highlighted so far tends to fade, that is, briefly, the 'duality', the gubernaculum-jurisdictio coupling, in its several possible variants concerning the way of structuring the organisation of legality. Compared to such an essential feature, how far would the benefits of a (non-formal) procedural conception of the RoL actually reach?

It is commonplace that even the best procedures, in the application of law, could ultimately coexist with substantive positive law barely conforming with how some or most of the citizens perceive their dignity.[59] The normative momentum of the RoL, not directly providing for the content of positive norms (otherwise it would turn into the known 'rule of the good law'[60]), can be tested by verifying the availability of an 'other' law, be it procedural and/or substantive, due to independent sources establishing autonomous normative presidia (also able to function as efficient counter-limits).

56 Waldron (2011b), pp. 3–31.

57 Fuller (1969).

58 For example, Fuller's requirements are seen not only as 'functional' but also as a source of a series of further substantive consequences by Marmor (2004), pp. 1-43.

59 What West writes, in commenting on Waldron, is largely agreeable (West 2011, p. 42): 'Procedural justice, in other words, can be demoralizing. After all, you had your day in court, what's to complain of? The procedural justice, then, strengthens the system by legitimating it, all the more so in an unjust regime. If that effect—the legitimizing effect, for short—is substantial, then the procedural justice of a trial in an unjust regime may perversely increase the overall injustice of the regime, making it all the more invulnerable to change, whether through politics, revolution, or subterfuge. A legal system that abides by the Rule of Law, where the latter is defined by reference to procedural criteria, is not necessarily thereby more just. When it isn't, it's not clear where the value of all that procedure lies, other than in the fodder it provides modernist writers.'.

60 Raz (1979), p. 267.

Through provisions of substantive or procedural law, it is crucial that areas of 'justice', equal concern for individuals and their rights, the principles founding the sovereign's power (today the principle of democracy) are independently safe- guarded through law (also for instance, vis-a`-vis arbitrary interference from external regulators or other sovereign powers). From this angle, the RoL is more a concept which is 'equilibrium dependent' than procedure dependent. After all, the ICJ—in the case recalled in Sec. 2 above—did use an argument from procedure and a rule- attaining procedure to prevent any balancing between fundamental norms of international law. An 'other' law, in the Hamdan case, examined here at the beginning, had certainly been part of the Supreme Court's reasoning: both with regard to the constitutional separation of powers, defending democracy (or the prerogatives of congress against the executive) and with regard to international humanitarian law or human rights. However, it is to such a normative side that the Supreme Court did not afford convenient protection prevailing upon subsequent legislative manipulation. From this perspective, Congress's deliberation of the Military Commission Act more than proving that the RoL should not be invoked by States, showed that in ending the Hamdan case Congress's use of the law was simply not compatible with the RoL. The point is that, in fact, the RoL is an inherently anti-instrumentalist structuring of legality (inherent in the view of preventing the law from becoming a sheer instrument only in the hands of those in power): not a tool so good for any uses that it would be better if it does not fall into the hands of the 'wrong' person (or of the 'wrong' holders).

10 Concluding Remarks

Stretching the argument to the extreme, the rule by law would never fare like the RoL, even if it were used in aiming at the more or less occasional benefit of individuals. After all, the RoL, as already remarked, does not coincide simply with human rights, being instead a systemic articulation of the law as a whole, also granting the sovereign's right to pursue his own vision of the public weal, what he can assert, in turn, vis-a`-vis internal or—and all the more so—external threats. Thus appealing to the RoL can also today evoke the pillars of our liberal democracies that our constitutions defend: safeguarding individuals as well as the freedom of the government, preventing its conversion into a normative monopoly. Nothing of this, of course, contradicts the moral argument that justifies whichever artificial institution, ultimately, and sovereignty especially, subject to the condition that it also complies with its duties, and primarily its responsibility to protect peoples and individuals.[61]

[61] Int. Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect'. www.iciss.ca/pdf/Commission-Report.pdf. And 'A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change', 2 Dec. 2004 (UN Doc. A759/565), sub-chapter 3: Chapter VII of the Charter of the United Nations, Internal Threats and the Responsibility to Protect, paras. 199–203. Finally, cf. the Resolution: General Assembly, UN Doc. A/RES/60/1 of October, 24 2005, para. 138: 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.'.

Having started from the cases and institutions in which the RoL appears to have been misleadingly evoked, for the most part this article turned to enlighten, with the help of some historical reconstruction and conceptual enquiry, what the RoL normative potential is all about. Not detracting from other theoretical narratives, focussing on some collateral virtues connected to the RoL, the questions exposed in the above can only be answered by centring upon the core aspects of the mentioned equilibrium, that makes the RoL a distinctive notion, exquisitely legal, whose promise extends within the State as well as onto relations among orders in the extra- State domains.

The RoL is an old concept upon which history, legal artefacts and instrumental wisdom have spread a blanket of accidental derivations and contingent deviations. Its normative nature is nonetheless still appealing especially if it is disentangled from a number of false friends, often reducing its power as a critical measure. As a measure, the RoL can guide us toward the practice in many fields and theatres, can help us in extricating from many deceptive appearances, with a view to understanding what precisely we should care about and wish to foster.

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