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THE RULE OF LAW AS AN INSTITUTIONAL IDEAL

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1. Introduction.

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

Thus, a general reconsideration, sensitive to such complexity, can emerge from pursuing historical, comparative, philosophical analyses and their interrelations.

The issue can be addressed through various avenues: one of them is semantic, where rule of law is traditionally contrasted with the “rule of men”¹ through its *differentia specifica*. Although it may seem rather abstract, initially following a similar path by taking choices at the crossroads, can set the scene and allow us to approach the significance and deeper implications of the general questions associated with an expression such as the “Rule of law”.

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

The normative meaning, as such, can be subsequently discussed and elaborated on through some of the theoretical issues that it raises in the context of political, moral, and legal theoretical analysis. The Rule of law confronts questions in turn concerning justice,

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

the problem of liberty and non-domination, the balance between the right and the good, and of course, the validity of law.

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

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

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

2. Preliminary semantics: the “rule of men” and the “rule by law”.

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

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

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

According to Hayek (1960: 153), “It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule”. In principle, if we expect the sheer form of law to generate the Rule of law, thereby displacing the substantive issue of “who” rules, this hope is destined to be disappointed. Law as such does not promise that much³.

Although Aristotle thought of law in a rather evocative way, as reason without passion⁴, law could be apt to frame and serve both democratic and autocratic regimes. It has often been held that law’s indeterminacy itself ultimately leads to opposite results depending “of political winds” (Gordon 1984: 125); that even the liberal stance, that law is a limitation on power, is untenable. In fact, so the argument goes, law is just to a product of the will of the most powerful class. The expectations with which law is burdened are bound to suffer such a weakness, if not to hide ideological purposes.

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

Of course, in plain words, it would be against the grain to declare that law is not an instrument. But the Rule of law conceives of an institutional setting which is held to bear an inherent value thanks to a specific articulation of law. Nonetheless, bearing an inherent value is also compatible with being a constitutive essential of some other ultimate values (Raz 1984: 187 ff., 191 ff.). However, the evocative force of the “rule by law” alternative is properly meant to bring into focus and reflect the narrower case, when the law is intended

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

³ Interestingly argues about teleology as the key to Rule-of-law, Martin Krygier (2009).

⁴ Aristotle 1984: III 16 1287a 30.

to be just an instrument. As Arthur Goodhart (1958: 947) wrote: “I am not speaking about rule by law which can be the most efficient instrument in the enforcement of tyrannical rule: I am speaking about rule under the law which is the essential foundation of liberty. The two are totally distinct”.

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

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

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

Although it is not possible now to deal at length with the “instrumentality” of law⁵, its differentia vis à vis the Rule of law suggests at least one more remark. After all, it

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

is to be noted that the scope of “instrumentality” must follow the nature of the instrument itself. As to the law (and its “nature”), some can assume a specially thin neutrality of the instrument, as good for everything; others might depict law in such a way that it can only lead to some uses and results: for example by narrowing the definition of law to a thick morally encumbered concept.

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

In his explanation of the Nazi “Doppelstaat,” for example, Ernst Fraenkel (1969: 56 ff.) showed that the Nazi dictatorship dismissed legal procedures and suspended its jurisdiction on arbitrary grounds, whenever it was convenient in order to pursue its ends. Nonetheless, Thomas Hobbes taught how, although not subject to laws, Leviathan does rule by the law, setting up rules, public competences, and organised procedures in stable and prospective ways (Hobbes 1946: chs. 26-8). This excess of ambivalence certainly belongs in the domain of the “rule by law”.

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

2.2. What is the point in rejecting the alleged contrast between Rule of law and rule of men?

From some angles the claim that rule is inconceivable other than as the “rule of men”, a claim that would endorse Hobbes’s stance rather than Aristotle’s⁶, appears

⁶ Joseph Raz (1979) endorses the continuity between Rule of law and rule of men and Hobbes (1946: ch. 46, part 11) considered the opposition an error of Aristotle’s “politics”.

understandable. After all, Rule of law cannot be automatically interpreted as the passage toward a de-humanised “objectivity” of legal imperatives, nor can it be deprived of its positive (law) aspect: whatever content the law is conceived to be bound to include (unless it is just like laws of gravity and natural causality), it has to be connected with some active role played by men’s rule in its plain meaning. This applies to Hobbes as much as to all the “modern ” contractualist (natural) law doctrines of the seventeenth and eighteenth centuries, to say the least.

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

Thus, on the one hand, as explained above, the “rule of law” suggests some ideal directly concerning the law, that does not dissolve into the ‘rule by law’. On the other hand, insisting on some “objective” meaning of the Rule of law as contrasted with (and independent of) “rule of men” may raise traditional concerns about its ideological function: Rule of law might be reduced to a patina for the legitimization of power; it might just hide the rule by law, far from being the “unqualified human good” (Thompson 1975: 266) in virtue of which the rulers end up being inhibited or constrained by the laws that they enacted (Ibid.: 264-5). Focussing instead on the Rule of law precisely through contrast with the “rule by law” helps us to become aware of such hidden ideological potentialities.

Returning to the venerable idea of “the rule of laws, not men”, the antithesis can emerge meaningfully, if we try to understand whether any law does really exist that gains some autonomous normativity, even *vis a vis* the will of those who are ultimately responsible for its protection and application. In what follows, I will suggest that this contrast can make sense only if we presuppose (a) a valid *positive* law (b) which is not under the *purview of the ruling power*, and (c) appears *from the vantage point of the latter to be* irreducible to a sheer instrument. Accordingly, not all the law shall be an available instrument of the will of the rulers or of the sovereign (“rule by law”).

Maybe, the general question can be evoked through the lines of Dicey himself, when he maintains that the sovereignty of Parliament “favours the supremacy of the law” (Dicey 1915: 268) and it is “erroneous” to think that English solutions are just merely “formal”, or “at best only a substitution of the despotism of Parliament for the prerogative of the Crown” (Ibid.: 273). Although law is always a man- made artefact, Rule of law is

held to designate some other law (however problematic it appears to be) which does not reduce itself to the actual ultimate will of the Parliament⁷.

To make sense of Dicey's reference we must rule out the alternative of some natural law, whose just content would be self-evident and self-imposing. Within these coordinates, it turns out that following the Rule of law, is not for the Parliament to surrender itself to natural law. In theoretical terms, the puzzle is engendered instead precisely from the quest for legal imperatives (not merely moral ones) to prevail over the will of the sovereign. It would be a weak hypothesis to think that the Rule of Law ideal, on a legal plane, would be respected without any legal reason. Inasmuch as it would depend on Parliament's will, the Rule of law would be imprisoned within a circle.

The assumption that this conception can be entitled to represent the "idea of the rule of laws, not men" would be clearly undermined: which is tantamount to saying that it hardly can exist any law ultimately enjoying any self-standing status. Even if the Parliament will not interfere, with some old or traditional norms, contingent non interference against them would not disprove that the law actually is under its dominating ordinary will⁸. Thus far, the Rule of law would still fail to distinguish itself within the competing areas designed by the "rule of men" and "rule by law".

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

The scene of our Rule of law ideal must be set differently, and so equally the interplay between men and laws. Although there may also be a moral ideal which is often recognised within the Rule of law, as connected to its root of liberty, certainty, non-arbitrariness, or even human dignity, it does not directly prescribe moral objectives, but legal features. It does not ask for the law to bear some specific content, the good law, nor does it claim to dictate the internal form of the realm of power (e.g. that power be organised democratically). As I will maintain in this chapter, although "rule of men" plainly

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

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

cannot be replaced, Rule of law means respect for a legally desirable situation, according to which dominating law appears to be contestable as a matter of law, on the basis of some independent legal force and institutional structures in the interest of everyone.

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

Rule of law is in contrast to the possibility that under the purview of ruling powers law can be reduced to a sheer instrument of their preferences alone, lacking any other law which falls outside their reach and can be traced back to wider needs or ends within the social whole. Since reference to the Rule of law appears to have been made constantly in legal history and in contemporary legal documents as well, its status as an ideal can be not only envisaged from the desk, but also reconstructed through its historical recurrence. Thus I will deal with the Rule of law drawing its lines along historical, institutional, and conceptual paths.

3. The European Legislative State

An overview of the wider European scene, recalling the main characteristics of the Rechtsstaat and its continental equivalents, can illuminate some elements of the rule of law as a distinctive historical-institutional concept.

The “the rule of law” is not really the same thing as the Rechtsstaat or l’Etat de Droit, or l’Estado de derecho, lo Stato di diritto, and so forth. The general idea of a “law-bound” State emerges most clearly through the institutional model of the Rechtsstaat which developed its identity as a new form of State coming to replace the Polizeistaat, or l’Etat de police. The latter was entitled to apply any discretionary decision to the life of citizens in order to define their well-being. On the contrary, l’Etat de droit related to its subjects only by submitting itself to the law, and to rules (Carré de Malberg 1920: I,488-9).

As F.J Stahl (1870: 137 ff.) and the German public law doctrine⁹ worked out the concept, the new State was to act under precise and fixed mechanisms, and pre-defined rules, thereby self limiting its own power through the law.

At the same time, it accomplished the public or welfare tasks of the State, but maintaining its abstention from interference with personal spheres (as regards the guarantee of happiness or religious salvation) (Boeckenfoerde 1991: 145 ff.). Beyond enlightened absolutism (and State paternalism) it appeared to move from the law of power to the power of the law.

As an institutional and ideological concept the State still is attributed a metaphysical personality, it is a willing entity, preserving its primacy over society. The Rechtsstaat means that law is the structure of the State, not an external limitation to it; its voice is rationality and strict legality of administrative action: the supremacy of which over ordinary citizens was granted despite the recognition of rights and the autonomy of individuals. Liberty is a consequence not truly a premise of the law. The authority vested in this conservative aristocratic state, protected civil liberties as a service offered through the State.¹⁰

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

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

The importance and dominance of legislation was also a product of the process of codification of law which took place in continental Europe from the 17th to 20th Centuries. Moving beyond feudal privileges, codification overcame particularities, uncertainty and arbitrariness engendered by the frustrating multi-layered law of the still fragmented European territories, where common law, Roman law, natural law, customary law where all

⁹ The expression itself was definitely famous after L. von Mohl(1832). Cf. Ernst-Wolfgang Boeckenfoerde (1991: 144).

¹⁰ See Krieger 1957: 14. See also his reference to von Mohl's theory of the Rechtsstaat, *ibid*: 259 ff.

valid and competing sources. After the successful process of codification, beyond legislation there was no instance or superior institution, nor any superior check on the law, and through its clarity and unity, the basis for certainty was built. The price was not only the ultimate sovereignty of the State, but also its self-reference, i.e. its being just founded on itself.

The poverty of the legislative state is generated by the hierarchical model of law, and mainly by the lack of a plurality of equally relevant protagonists and actors on the (institutional) scene.

This was clear enough, if one focuses on the relationship between rights and legislation. According to Georg Jellinek (1919) citizens hold “public subjective rights” on the ground that they result from a self-obligation of the sovereign, i.e. of the State. After the Revolution and the Declaration of the Rights of Man and of the Citizen, France’s great lawyers and reformers endeavoured to protect positive legislated law from instability, change and the claims of natural law¹¹. The same line has to be drawn throughout the rest of Europe, from Spain to Italy, as well eventually as Germany (in the *Buergerliches Gesetzbuch* of 1900).

The main French concern became that of having an unadulterated “democratic” inspiration of the institutions (rooted in Sièyès and Rousseau), rather than re-opening interpretative liberty on natural rights, or granting them a force equal to the sovereign will (i.e. legislation¹²). “La loi” is meant to express the final and supreme regulation which has no peers. In the German context, die *Herrschaft des Gesetzes* is the ultimate source of the law, beyond the contrasting dualism of the King and Representatives.

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

¹¹ As then was taught by the hegemonic School of Exegesis, the caenaculum of the high priests of the Napoleonic Code, whose objective was to proclaim the priority and the untouchable status of the Code itself.

¹² Carré de Malberg (1920: 140) was conscious that the Parliamentary monopoly over State sovereignty was a potential danger to French liberties.

the view of the self- limitation of the State developed, outside of which nothing autonomous could be recognised, not even “rights” (Jellinek 1919²). The latter cannot be intended as showing any external limits against the omnipotence of legislation.

As von Gerber wrote in the middle of the 19th Century, while the concept (and reality) of the Rule of Law had already spread itself even as far as the United States and its constitutional setting: rights depend on the State leaving "free, outside its circle and influence, that part of the human being that cannot be subjected to the coercive action of the general will in accordance with the ideas of popular German life"(Gerber 1913: 64-5). Thus it is true that rights did not consist of any "substance", but only of a form (the legal form of the legislative reservation) (Zagrebelsky 1992: 59). This is ultimately the conception according to which "the 'law' is what the state determines it to be" and “individual rights are, and must be, defined by the state and, as a consequence, are necessarily dependent on the state. In this vision of reality the state itself, along with its various arms and agencies, is subject to no rules beyond its internal limits" and there is “no meaningful constitution in this construction”¹³.

In the history of the European continent the collective ground of community and mainly the implicit idea of common weal were the prevailing good that takes priority over ideas of justice. The declaration of independence of rights from State legislation was written only when contemporary Constitutions were written, i.e. in the 20th century. It was the constitution - and not legislation – which created this autonomy, that had been long awaited in continental Europe. Constitutional rules and principles granted fundamental rights as high a rank as parliamentary legislation and the democratic principle: through an effective Constitution individual rights came to be placed on the same plane as the public weal of the institutions (*salus publica suprema lex*). Prior to this, it would have been impossible in Europe to follow the logic embedded in the Rule of Law.

4. The Rule of Law.

Contrary to the *Rechtsstaat* (or the *Stato di diritto*), understood as a peculiar form of the State, the rule of law as an ideal presupposed that, in part, positive law be out of the disposal or “will”, of the King, or of the sovereign power. Its ideal can be shown as one based upon a relationship, providing a link between two essential western law domains,

¹³ The definition is in James Buchanan (1977: 290) (appropriate to German legal writing esp. between XIX and XX centuries, it is instead meant for "legal positivism" pure and simple).

developed within the medieval tradition and evoked through the couple *jurisdictio-gubernaculum*, i.e. justice and sovereignty.

The rule of law appears to consist of a history of institutional conventions, custom and social practice where law is interconnected with a particular system of power. Even if the supremacy of the English Parliament is beyond doubt, its inclusion in a wider picture is inherent in the things themselves. The principles inherited (Matteucci 1993: 157-8) in the line which unites Henry de Bracton (cf. the pair *gubernaculum* and *jurisdictio*) with Edward Coke (cf. Bonham's case), the U.S. Federalist Papers and ultimately U. S. judicial review are — despite their differences - evidence of a general unitary logic.

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

For sure, the law also includes Parliamentary sovereignty, i.e. the unlimited authority of legislation, the assumption that as a matter of abstract law legislation can even infringe rights (Dicey 1915: 4-5): this was the motivation for the “grotesque expression” (as cited by Dicey from De Lolme) that the English Parliament “can do everything but make a woman a man, and a man a woman” (Ibid.: 5). However, sovereignty is complex, shared between the Crown, the Lords and the Commons, and the law has a wider purpose: as a matter of fact, it includes a main second pillar, the common law and the courts, which are in fact the ultimate interpreters of the legal system as a whole. The complexity of legal achievements in the diverse denominations of common law, precedents, customary law, conventions and rights, is entirely relevant to the “rule of law”: the latter is a “founding” element of itself, to the extent that Dicey recognised in it certain quintessentially English features: 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”(Ibid.: Introduction, LV). As Dicey 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” (Ibid.: 121). The roots in the common law of the land put some qualified rights at the foundation of the constitution, and not on the level of the consequences of the constitution. But this endows the constitution and the rule of law with the historical content of liberties: part of positive law, not abstract claims from natural law (or, say, organic) doctrines. It cannot be made equal either with some appeal to nature or to the fundamental and obscure soul of

the “Volk”. And linking contemporary to the ancient tradition, it can be said that even the reasonable character of law is not due to a sort of simple “natural” reason. The claim made by King James I was precisely that being law based on reason, the King might be entitled to decide. But according to Lord Coke this point was mistaken, since cases were to be treated according to (an importantly different concept) “the artificial Reason” of law, that the King obviously lacked¹⁴.

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

The institutional premises are substantively different. The Rule of law embedded substantive liberties and provided procedural guarantees (such as habeas corpus and due process¹⁵), and its organisation of powers does not simply correspond to the “law”, but to the law in a specific setting, that is to structures, practices, ideas, in their institutional concretisations. As a consequence, if we can reduce the law to an instrument, perhaps, we cannot depict the Rule of Law, with its specific institutional historical content as being reducible to empty means.

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

A further note, however, should be dedicated to the glorious victory of the 17th Century Parliament against absolutism, the restoration of the rights and privileges of the English people against the King’s claims. Here the parallel becomes even more instructive: while the Rechtsstaat or l’Etat de droit defeated the ultimate absolute power of the King,

¹⁴ See Charles Fried (1981: 57) and his quote of E. Coke, *Reports* 63, 65 (pt. 12, 4th ed. 1738), reprinted in 77 Eng. Rep. 1342, 1343 (1907).

¹⁵ Article 39 of the Magna Carta (1215)

because it was the King's, the Rule of Law defeated it because it was absolute¹⁶. The root is normally traced back to the 13th Century medieval "rule of law": "(...) there appeared a noticeable reluctance to permit alterations in common law, and we soon hear of cases in which writs brought by the King were quashed by his own judges. (...). To this extent at least, the rule of law was extended to limit prerogative action and to prevent the king from making further changes in the substantive rights and procedures of his subjects". And more: "But this was not all. The remarkable feature of the development was that the rights and remedies of the common law came to be identified with the rule of law itself" (Haskins 1955: 535-6).

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

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

5. *Jurisdictio* and *gubernaculum*, the right and the good.

5.1. As long as the "rule of law" is a concept with institutional, historical, and normative meaning, it says more than it might appear to say. It does designate a cultural reference to law, but also a normative sense which might be extended elsewhere. Here, it seems that the meaning of the Rule of Law depends on an enduring continuity with its own past: it would be very hard to accept its alleged coincidence with the exclusive substance of one contemporary ideology¹⁷. When we refer to the Rule of Law, after all, we take account of many more consistent ancient and modern records, a institutional-historical rationale which promises a potential openness, especially due to its reference to the rule of law as a peculiar balanced relation.

¹⁶ See Kluxen (1983: 50 ff.) and Zagrebelsky (1992: 26 and his reconstruction, at 24-29).

¹⁷ Like the liberal ideology, in a line proposed by Hayek (1960 and 1944).

“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” (MacIlwain 1940: 85). This aspect of the law is therefore different from the expression of power or will. Nonetheless, it is not the evocation of morality. According to McIlwain the thirteenth chapter of Magna Carta was not conceived “as the Austinians would say, as a mere maxim of positive morality“. A principle was insisted upon and enforced as coercive law, namely the principle that “king must not take the definition of rights into his own hands, but must proceed against none by force for any alleged violation of them until a case has been made out against such a one by ‘due process of law’. "(Ibid.: 86)

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

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

Jurisdictio refers to law: but, in this domain, men have the duty to say it (*jus dicere*), and not to choose or decide. There is, then, some part of the law which remains at the disposal of the sovereign; but the other aspect of law is not at its disposal, and the sovereign is thus bound to be deferential¹⁸.

As McIlwain wrote, “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” (MacIlwain 1940: 90). The absence of sanctioning through legally coercive devices does not however necessarily coincide with and does not essentially mean not counting as law, or being outside of it.

¹⁸ This aspect was enhanced also by Habermas (1988: 217-79) speaking of (Unverfügbarkeit) “non-disposability”.

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

5.2. The relationship mentioned above between sovereignty and - as we also might call it - the realm of rights (as a matter of law), has a definitive development in liberal philosophy, and properly so, since as John Rawls noted, the Rule of law "is obviously closely related to liberty" (Rawls 1971: 235). That relationship on a philosophical ground comes to suggest its affinity with the opposites of justice and ethics. The rule of law, in a sense, entails relying on the conceptual capacities of both the "right" and the "good", which appear suited to explain some common lines of its historical developments.

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

Again, *jurisdictio* is associated with the preservation of the law, and not to the preservation of a sort of external morality. But nonetheless, what essentially qualifies it, beyond any other contents, is that it incorporates the side of positive law whose merit concerns "the right", not "the good" as a sovereign political choice. Where the Rule of law is absent, justice, or the "right", has no shield, and provides no filter against the contingency or absoluteness of ethics, i.e. to the (famously Schmitt's essay title) "tyranny of values" (Schmitt 1996)(which can be, and have also been, totalitarian).

5.3. As it is known, as a question of moral and political philosophy, this opposition was an important part in the work of Immanuel Kant and in our times, mainly of John Rawls (1971 and 1993). As the latter wrote, the "principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good". Principles of justice "specify the boundaries that men's

systems of ends must respect (...) Interests requiring the violation of justice have no value” (Rawls 1971: 31)¹⁹. This also holds true of political action, pursuing ethical values of majoritarian groups or interests. In Rawls’ construction, justice takes precedence and helps to shape the admissible prospects of action towards the good.

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

These very conditions of coexistence can be coerced through the law. The guarantee of the “negative” external freedom of the private sphere, precedes and does not even imply any confusion with ethics. So a precept's moral and rational validity does not depend upon its conformity with any particular ethics or any view of goodness and happiness. With Kant therefore, rational legislation "is not mingled with anything ethical"(Ibid.).

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

There is a necessary distinction, and a necessary connection, between justice and ethical and political choices. One of the main risks that law can run (from the Rule of law vantage point) is the loss of the institutional settings, social guarantees, and practices which realise this relationship in different legal orders and societies.

¹⁹ This statement falls within the “particular meaning” of the priority of justice, as distinguished later on by Rawls (1993: 209) from the “general meaning”. The latter refers for Rawls to the priority of the right as a political conception “so that we need not rely on comprehensive conceptions of the good but only on ideas tailored to fit within the political conception”. (ibid.)

It can fairly be said that the tension between these two poles can be protected through institutional devices and also by the law when it pursues the ideal of the Rule of law, demanding the non disposability of justice (*jurisdictio*) by the rule of the sovereign.

6. Balance, liberty and non domination.

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

I am not suggesting that there is somewhere a substantive conception of justice, which can be defended on the basis of rational natural law arguments, as is done for example in the outstanding work of John Finnis (1980). Instead, the meaning of the Rule of law, as its core emerges especially after being compared with the experience of the Rechtsstaat, does not simply incorporate some prerequisites – whether procedural or substantive -- into the definition of law, but rather fidelity to an idea of relation, to a relational notion: it implies respect for and protection of the opposition – to use freely these solemn terms - between two sides of the law, with all their historical evolutions and equivalents. That very relation in fact eventually disappeared on the Continent, and consistently so, with the institutional subordination of rights and justice under the will of the sovereign, with any competing law being eliminated or sidelined (*supra*, § 4).

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

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

Focusing on that relationship means that we can characterise the Rule of law as it is, as well as remain open to its normative extension beyond its territorial manifestation in any particular instantiation. However, this view of the Rule of law, that has been already explained with reference to the heuristic couple of the right and the good, can be better characterised by also enhancing the connection of this requisite balance-relation with the non-domination feature mentioned in the opening (§ 1.3).

6.2. According to Dicey (1915: 198) the rule of law precludes “the existence of arbitrariness, of prerogative, or even of wider discretionary authority on the part of government”.

As we have seen in our comparative reconstruction, non-arbitrariness results from the Rule of Law. Although respect for laws and procedures, regularity and certainty served the attainment of both non-arbitrariness and the Rule of Law, it would be short sighted to assume that the Rule of law just coincides (or exhausts itself) with non-arbitrariness, and even more so should non-arbitrariness be understood like such a rule- regularity as that constructed by the so called legislative European State. The latter has proved largely amenable to conveying the whim of the Executive or of legislative majorities. What makes it possible for non-arbitrariness - as the absence of an unbridled discretionary authority- to be appreciated, certainly includes that kind of formal requirement, but hardly depends just upon it. Rather, it also depends on the aforementioned “foundational” balance between sovereign and “jurisdictio” law.

When the Rule of law is embedded in the equilibrium of such relations, non-arbitrariness “on the part of the government” obtains as it develops through such a legal-institutional environment, while it might prove flawed outside of it.

The question of law as restraining power, which became entrenched in eighteenth century modern liberalism, enjoys a wider completion in the rule of law ideal which was “lived” by lawyers and courts since medieval times: the idea of liberty as “the negative” of power, and that of law as constraint on it, are subsequent transformations of the rule of

law's more ancient roots. John Phillip Reid recalls how Bracton's contribution rests on an idea of law, different from the law as command, which enjoyed a millenary tradition from Roman Law to English and German customary law. "What is of significance of this story of liberty is that this theory of autonomous law was the theory lawyers and officials employed when resolving issues" (Reid 2004: 12).

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

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

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

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

and implies at its best that control be equally shared as it can be through the model of democracy within a neo-republican tradition (Ibid.). Accordingly, Pettit assumes that given the structure of democracy, legislation can and ought to be “non dominating”, and that it will fail to be a constraint on freedom (as non domination).

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

Rule of law, instead, encompasses a wider spectrum of political regimes, and concerns the configuration *of law*. If we narrow the field within the specifically legal domain of the Rule of Law, it requires that interference into the life of citizens be possible while reason-independent and arbitrary interference be legally impossible: which, as we now know, becomes true when another law is available which makes such a control not viable. On the legal plane this Rule of law basis applies whatever political regime is meant to be the best for disparate reasons.

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

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

In its own right, as we shall remark later as well, the concurrence of the two flanks of law (justice-sovereign law; customary, judge made and legislative; and equivalents), matured through English customary and judge-made autonomous law. But its normative spectrum finds equivalent incarnations of the same non-domination, balance logic. It was also raised to a more complex institutional form by the Constitutional guarantee in the United States, and found Rule of law realization in the European 20th century Constitutions, as I already noted. Tellingly, here as well, where the nature of power is democratic, a positive law is protected even against democratic powers.

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

7. The law, the valid law, and the rule of law.

7.1. When dealing with the "rule of law", legal theory concentrates typically on the features which law generally needs in order to rule. Thus, the requirements for the law to exist are also typically considered as sufficient conditions for the rule of law to be satisfied. For what I have argued so far, this conclusion would be misleading.

The issue as to which characteristics are necessary for the law to rule, is not a stranger to controversy. General attention has been devoted to the eight requirements listed by Fuller²⁰, and to the influential contribution of Joseph Raz. With Raz, non-retroactivity (prospectivity), publicity and clarity, stability, generality of rules are required together with institutional settings which guarantee judicial independence, compliance with the principles of natural justice (open and fair hearing, absence of bias); review powers of the courts and their accessibility; and limitations on the discretion of prosecution

²⁰ Generality, clarity, promulgation, stability, consistency between rules and behaviours, non-retroactivity, non-contradictory rules, nor requiring the impossible (Fuller 1969: ch. 2).

authorities (Raz 1979: 214-8). All these main prerequisites derive from the essential objective of the law, which is that of guiding behaviour (Ibid.: 214).

This common rationale lies at the core of both the separation of powers and their subordination to law. Since they are regarded as efficient means of achieving this objective, these requisites are morally neutral, as in the positivist scheme. Accordingly, in the latter, legal validity does not depend on morality but only on social sources: the “sources thesis” rules out the possibility of a norm's moral character being a reason for its legality (Raz 1979: 47 ff.; 1996: 210 ff. , esp. 230 ff.). Accordingly, neutrality accepts that it is possible for rights and human dignity to be infringed, even when those requirements are satisfied. This means, first, that law can infringe human dignity, which is historically proved. But more importantly, as a further consequence, that this can be done despite (indeed, even in accordance with) the “rule of law” in Razian sense ²¹. But, it is to be stressed, within this picture “the rule of law” is meant to be however just an efficient, established law.

I will not put at the center for the moment, the controversy about such neutrality of law. The important point here is less the requirements of the “concept of law” than the normative meaning of the “rule of law” (as a specific ideal about the law, grown and developed within our legal civilisation). Raz is right, however, in properly stressing the difference between a conceptual definition of the “rule of law”, and any definitions which pick up on political preferences over the contents of the law and translate them into conceptual requirements of the “rule of law”. Indeed, the rule of law is to be distinguished from the rule of the “good” law (Raz 1979: 227).

I assume that this is true from a further perspective, though different from that argued by Raz. With Raz it is true because the Rule of law embraces technical requirements, and its virtue is efficiency (Ibid.: 226). as a “behavioural guide”, regardless of the good or bad goals to which it may serve as a means. It is therefore inconsistent to ask for the rule of law conceptually to match our idea of the “good law”, whether it is founded on, say, liberal or welfare state principles. It is highly questionable whether the rule of law, as understood by Hayek (1960 and 1944), i.e. as a formal rule-based system, should be necessarily connected not only with liberty, but also with capitalism, and by extension to suggest that it cannot be compatible with the welfare state (Raz 1979: 227-8 and

²¹ As far as the question whether the law can violate basic rights and be unjust is concerned, the main alternative mindset to the positivist and Razian scheme is the natural law doctrine, which elevates morality to the ultimate criterion of legal validity, thus regarding unjust law as non-law. See Robert Alexy (2004) elaborating on Radbruch's “extreme injustice”.

Scheuermann 1994). The ethical goodness of law relates to its external ends, that are ultimately decided and assessed by the ruling powers.

From the perspective I have pursued above, the rejection of a “good law” conception is justified differently because the “rule of law” cannot be just made to collapse into the prevailing ethical-political choices which belong within the domain of sovereign will. This conclusion depends upon the tension between justice and sovereign deliberation, *jurisdictio* and *gubernaculum*, as a fundamental and stable meaning of the Rule of law. The conflation with the rule of the “good law” would involve a concealment of that meaning, as observed in its continuity through the last centuries.

But this new argument has brought us beyond Raz’s justification for it. The Rule of law, I should add, is not simply a technical concept: instrumentally open to, and compatible with, all uses and aims²². As already noted, our continental European statist past has made us more sensitive to some features, and “rule of law” is not just a question of abiding by the rules, giving formalism and regularity their due. Despite the service to certainty and against arbitrariness, it would still not be clear what the ideal of the rule of law was there for. Its ordinary meaning, originally conceived against the background of absolutism, suggests at least a duality in the composition of the law, i.e. the idea that there are two sides to the law (on the one hand, say, the law of the land and on the other the sovereign will); institutional settings which do not run against this general dualism are acceptable, to the extent that they can prevent the legitimate existing sovereign from monopolising law through its absolute and overriding will. In conclusion, the rule of law accordingly asks for protection for the balanced duality of law which, as shown above, bears also an accent of non domination.

7.2. If the Rule of law is held to point to some concrete institutional meaning, it is not identical with the requirements for any law whatever to exist as an efficient authority, but it brings also a normative import whose political morality and historical configuration are combined²³. If the Rule of law is an ideal with which existent law is asked to comply, it has been and can be at odds with “valid” rules. However, for the Rule of law, a general

²² It is among the limits of the approach through “requirements”, what Krygier has called the “anatomic” approach, to understate the import of the Rule of Law or alternatively to expect too much from the requirements themselves, regardless of the social institutions that would be further required (Krygier 2009).

²³ We started from the fact that the formula gains its meaning from incorporating an institutional logic, unfaithfully equated with the experience of the pre-constitutional Rechtsstaat.

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

Nonetheless, to resume, commonly it is assumed that the requirements of the Rule of law coincide with those necessary for the law to exist in its very nature. Although those requirements certainly have a functional virtue, Fuller (1969: 42-79) added that they also constitute an 'inner morality'. And others apart from natural law theorists, have endorsed some moral connection of law, even in its procedural necessities (MacCormick 2005: 16; 2008).

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

However, legal positivism does not deny either that law can embody moral contents or that it is capable of endorsing pretensions like those supported within the Rule of law ideal. For what concerns the "nature" of law, the validity problem, and the separation thesis (between morality and law), a strict legal positivist like Andrei Marmor (2004) reminds us that the Separation Thesis just "asserts that the conditions of legal validity do not depend on the moral content of the norms in question". And this is held to be consistent both with taking law as "essentially good" and "with Fuller's basic insight that the rule of law, properly understood, promotes certain goods which we have reasons to value regardless of their purely functional merit"(Ibid.: 43)²⁴.

But one can also test the point from a softer legal positivist stance and allow that even moral criteria can actually become part of those comprised within the rule of recognition of a legal order. Indeed, from my point of view, it is necessary that law be held compatible by its nature with the normative meaning of the Rule of law. And to this

²⁴For Marmor (2004: 39), Hart and Raz are "wrong about [this] criticism of Fuller" because "most virtues of the rule of law, though essentially functional, are also moral-political virtues". In fact they also "enhance certain goods which we have reasons to value in addition to their functional merit. If the law fails on these conditions, it would not only fail in guiding its putative subjects' conduct, but it would also fail morally". But on his turn, Raz (2007) remarked that legal positivism can stand some connection between law and morality.

extent, it may also prove to be theoretically adequate to endorse the “inclusive positivist” view according to which moral standards can become part of the fundamental meta-rules governing legal validity²⁵.

It is actually valuable that validity in a legal system can be made to depend (“inclusively”) upon structural (procedural) and substantive criteria which are suited to protecting the “rule of law”, as it occurs in our constitutional states. Yet there have indeed been opposite cases, an eventuality which may also occur in the future, and is to legal positivism in its general attitude conceptually admissible.

8. Concluding remarks.

If we thought of the Rule of law as only granting “certainty” of law, and cherishing a static idea of a “law of rules” (Scalia 1989: 1175; and 1996), this kind of closed definition would cause a draining of the concept. No doubt, the rigidity of a “law of rules” can today make them an unsuitable medium for reflecting the ideal of the Rule of law, and its formalism can be easily manipulated and abused: its final results might simply abolish the tension between “justice” law and sovereign law, or may even be used as a shield enabling right holders or public authorities to avail themselves of a power that has been “formally” assigned but is in fact “substantively” abusive and unjustified (Sajo 2006; Palombella 2006a).

This does not at all mean that certainty must not longer be aspired to. It means that the ideal of the Rule of law might also require different incarnations, better suited to realising its normative rationale. Sheer compliance with strict rules would ignore the logic of principles (Dworkin 1978: 48 *passim*; Alexy 2002: 47-50 *passim*) which developed as the possible answer in polycentric and conflicting societies. Here, law is called upon to make less rigid substantive choices, and to serve within principled (constitutional) frameworks, thus functioning as a factor of equilibrium (Palombella 2006b).

²⁵ Coleman (2000: 175) writes: “whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely, the rule of recognition. [...] If the rule of recognition incorporates no moral principles, however, then no such principles figure in the criteria of legality”. W. J. Waluchow (1985: 194) argues that, if moral principles can be incorporated explicitly in a legal system's rule of recognition, then the validity of a norm X cannot be solely a function of its source, but also of its content, seeing that it must be considered in relation to its potential violation by a principle of justice. Although both the norm X and the “moral” principle depend on having a “pedigree”, it “remains, however, that more than X’s pedigree is relevant in determining its legal validity”

In fact among the tools that are useful for preserving the logic of the Rule of law, it is the practice of “proportionality” one of the “ultimate” (Beatty 2004) means, far more than the “law of rules”. Nonetheless, the requirements proposed by Fuller or Raz, are to be taken seriously in general terms: this is also because they are held to be necessary for the very existence of law. It is equally essential to note that law itself would totally fade away, denying its own existence, should it turn into crude violence and brutality (Waldron 2005: 1681).

As far as the possible substantiation of the ideal is concerned, it holds true that within the constitutional State adequate protection has been afforded both for the law of rights and sovereign legislation. Within the constitutional state, the law and the relevant institutions also appear to meet the conditions which must be satisfied in order for the rule of law to be achieved.

This match cannot be meant to conceptually identify the rule of law with the constitutional democratic state, nor with one or the other among its political interpretations: e.g. through the inclusion of shorter or longer lists of rights and other substantive pretensions (Craig 1997; Allan 2001). The long history of the Rule of law has many incarnations, and this final absolute identification with the latest version would fail to grasp the general and non-contingent sense of this normative concept, developed even before the emergence of the constitutional organisation.

Finally it cannot be equated with the requirements of, “democracy” or the democratic state: the nature of the political structure of the sovereign is not the most important question here. It is essential that an equilibrium relation inside positive law and its sources be possible, thus allowing for a broader understanding of social normativity, and positing the condition for non domination on the legal plane. This has been understood in most western legal systems, up until this century, and in the statutes of contemporary supranational organisations. In our constitutional democracies, alongside the decisions of majorities, we refer to constitutional laws and, depending on the particular legal system, the law of equity, the law made by judges, the customary law.

Indeed, the Rule of law is also appealed to constantly enough within another and wider realm, that of International law, where the relevance of customary law is well-known. In fact, a question of not minor importance is the capacity of this model to be projected onto International law, and beyond States. As far as the latter is concerned, the fragmentation of legal domains and the trans-state development of law, legal pluralism and the growing obsolescence of sovereignty are at the same time countered by attempts to

enhance some unitary legal constants²⁶. The more legal orders and actors appear to multiply, the more a world “constitutionalism” appears to be developing. The extension of the normative ideal of the rule of law onto the international realm might call for some basic legal principles, protected against the sheer whim of men, whether economic powers or States or supranational organisations: an issue, however, to be left for another day. Nonetheless, it can be readily admitted that the perspective of Rule of Law as an ideal resting on duality, balance and non domination, can have a significant critical impact when appealed to within International law.

In this realm, the view on the Rule of law developed in the foregoing is suited to function as a proper (counterfactual) check against an environment where the “non domination” problem is the essential one. It is relevant that Rule of law can maintain its core meaning without the State, in the absence of any democratic device whatsoever, and that it takes as central the point of some other law which is beyond the reach of ruling powers: items which find their intuitive pendant precisely in the problematic International law concurrence of sources, and coordination between customary and Treaty law, mainly displaying as vividly as ever the question of some law which can be put beyond the reach of the sovereign ruling States. As a general comment, it should be stressed that in this realm, Rule of law as described above, remains an ideal, whose objectives are still missing, and whose configuration should make its use as an apologetic and ideological concept harder.

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²⁶ Although I cannot deal with this here, I have said more in Palombella 2007.

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