

diritto & questioni pubbliche

CLEAR

#special**publication**

FEBRUARY 2026

RULE OF LAW IN BOOKS, IN MINDS

Edited by Corrado Roversi, Marco Brigaglia, Andrej Kristan



&^dq **CLEAR**
Concept of the Rule of Law:
Empirical and Analytical Research

DIRITTO & QUESTIONI PUBBLICHE / CLEAR
2026/#SPECIAL**PUBLICATION**

COMITATO EDITORIALE

Direzione

Giorgio Maniaci (Università di Palermo), Giorgio Pino (Università Roma Tre), Aldo Schiavello (Università di Palermo)

Redazione

Marco Brigaglia, Matija Žgur (coordinamento), Jorge Baquerizo Minuche, Maria Giulia Bernardini, Noemi Calidori, Gaetano Carlizzi, Miguel Fernández Núñez, Giulia Falletti, Maria Ferrara, Dario Ippolito, Alba Lojo Caride, Elena Marchese, Fabrizio Mastromartino, Paola Parolari, Giuseppe Rocché, Giulia Sajeve, Fernanda Serraino, Michele Ubertone, Adriano Zambon

COMITATO SCIENTIFICO

Manuel Atienza (Universidad de Alicante) – Mauro Barberis (Università di Trieste) – Juan Carlos Bayon (Universidad Autónoma de Madrid) – Roberto Bin (Università di Ferrara) – Bruno Celano (Università di Palermo) † – Pierluigi Chiassoni (Università di Genova) – Paolo Comanducci (Università di Genova) – Pasquale De Sena (Università di Palermo) – Enrico Diciotti (Università di Siena) – Jordi Ferrer (Universitat de Girona) – Riccardo Guastini (Università di Genova) – Mario Jori (Università di Milano) – Claudio Luzzati (Università di Milano) – Pierpaolo Marrone (Università di Trieste) – Tecla Mazzaresse (Università di Brescia) – Claudio Michelon (University of Edinburgh) – José Juan Moreso (Universitat Pompeu Fabra, Barcelona) – Pablo Navarro (Universidad de Córdoba) – Luca Nivarra (Università di Palermo) – François Ost (Université Saint-Louis, Bruxelles) – Gianluigi Palombella (Scuola Superiore S. Anna, Pisa) – Roberto Pardolesi (Luiss, Roma) – Baldassare Pastore (Università di Ferrara) – José Luis Pérez Triviño (Universitat Pompeu Fabra, Barcelona) – Anna Pintore (Università di Cagliari) – Luis Prieto Sanchís (Universidad de Castilla-La Mancha, Toledo) – Cristina Redondo (Università di Genova) – Michel Rosenfeld (Cardozo School of Law, New York) – Giovanni Sartor (Università di Bologna e European University Institute, Firenze) – Marc Van Hoecke (Universiteit Gent) – Josep Maria Vilajosana (Universitat Pompeu Fabra, Barcelona) – Vittorio Villa (Università di Palermo) – Francesco Viola (Università di Palermo) – Giuseppe Zaccaria (Università di Padova) – Gianfrancesco Zanetti (Università di Modena-Reggio Emilia)

© 2026, Diritto e questioni pubbliche, Palermo

www.dirittoeququestionipubbliche.it

ISSN 1825-0173

Double-Blind Peer Review

Banche dati: Scopus, Heinonline, Elsevier

Progetto grafico e impaginazione: Fabio Ruwett – www.ruwett.it

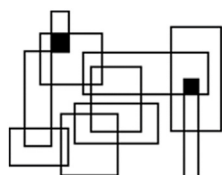
Questa Special Publication della rivista Diritto & Questioni Pubbliche è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.

Tutti i diritti riservati



RULE OF LAW: In Books, in Minds

a cura di / edited by
CORRADO ROVERSI, MARCO BRIGAGLIA,
ANDREJ KRISTAN



Diritto & Questioni Pubbliche | CLEAR
Special Publication, February 2026

RULE OF LAW:

In Books, in Minds

contents

<i>Introduction</i>	XI-XIV

PART I. The Rule of Law: Structure and Challenges

<i>Rule of Law: Hierarchy of Norms in Legal Reasoning</i>	3-14
MARIA CRISTINA REDONDO	
<i>Two Models of the Rule of Law</i>	17-26
ALDO SCHIAVELLO	
<i>On the Relations between the Rule of Law and Democracy</i>	29-35
RICCARDO GUASTINI	
<i>Soft Law, Justiciability, and the Rule of Law</i>	37-51
CHIARA VALENTINI	
<i>What is the Rule of Law? Toward a Perception-Based Definition of the Rule of Law</i>	53-64
PAOLO CAPRIATI	

PART II. The Rule of Law: Its Crisis and Its Enemies

<i>On the Origins of the Difficulties Faced by Constitutional Democracies (with an Appendix on Democracy, Constitutionalism, Rechtsstaat, Rule of law. Some Historical-conceptual Aspects)</i>	69-93
GIORGIO BONGIOVANNI	
<i>How Not to Be Populist. Anti-hegemonic Individualism and the Crisis of Democracy and of the Rule of Law</i>	95-105
MARCO MAZZONE	
<i>The Rule of Law and Its Enemies</i>	107-133
PIERLUIGI CHIASSONI	
<i>Between Dissensus and Dispute: Variations in the Rule of Law Discourse</i>	135-147
M. VICTORIA KRISTAN	
<i>From the Rule of Men to the Rule of Law and Back Again: Some Skeptical Insights about the Temptation of Judge-Made Social Justice</i>	149-170
ALBERTO PUPPO	
<i>The “Psychology” of Rechtsstaat: from a Sharp XIX-Century Distinction from Authoritarianism to the Collapse of One into the Other during Weimar Republic</i>	173-185
GIOVANNI BISOGNI	
<i>Are There Populist Constitutional Heuristics? Some Tentative Answers, and Their Implications for a Research Project</i>	187-197
LEONARDO PIERDOMINICI	

PART III. The Rule of Law in Minds

<i>The Cognitive Load of an Internal Point of View over the Rule of Law</i>	201-228
CORRADO ROVERSI, MARCO BRIGAGLIA, ANDREJ KRISTAN, LUISA LUGLI, NATALIA SCAVUZZO, ARIANNA ROSSI, FABIO RUWETT, GLENN DE MUYNCK	
<i>Legal Certainty, the Private Sector, and Empirical Studies: A Preliminary Approach</i>	231-248
JORDI FERRER BELTRÁN, CAROLINA FERNÁNDEZ BLANCO, VÍCTOR GARCÍA YZAGUIRRE, NATALIA SCAVUZZO	
<i>On the Psychological Basis of the Rule of Law: from Beccaria to Institutional Experimentalism...</i>	251-270
MARCO SEGATTI	
<i>Democracy and the Rule of Law: Rethinking Epistemic Accessibility</i>	273-284
FRANCESCO RIZZI BRIGNOLI	
<i>The Authority of Law and Indirect Theories of Decision-Making</i>	287-307
GIUSEPPE ROCCHÈ	

PART IV. Legal Design for the Rule of Law

<i>Social Perceptions of Judges and the Rule of Law: A Protocol for Designing Judicial Vignettes</i>	311-336
CLAUDIO AGÜERO SAN JUAN, PAULA MORGADO FERNÁNDEZ, JUAN PABLO ZAMBRANO TIZNADO	
<i>Governing by Nudging: A Critical Inquiry into Liberty and Equality</i>	339-360
PIER FRANCESCO BRESCIANI, SILVIA ZULLO	
<i>Contributors</i>	362

Introduction

The volume *Rule of Law: in Books, in Minds*, conceived as a special publication of the journal *Diritto and Questioni Pubbliche*, is intended to present the main scientific results of the PRIN 2022 Research Project “The Concept of the Rule of Law: Empirical and Analytical Perspectives” (CLEAR), funded by the European Union - NextGenerationEU under the National Recovery and Resilience Plan (PNRR) of the Italian Ministry of University and Research and coordinated by the University of Bologna in collaboration with the two local units of the Universities of Genova and Palermo.

The motivating hypothesis of CLEAR was that the concept of the Rule of Law is difficult to understand, particularly when compared with other, more autocratic and populist ways of organizing sovereignty, and that reducing this difficulty is an important and desirable aim in defending constitutional democracy against its enemies. Testing this hypothesis required us to answer an intricate web of research questions.

The first question is *theoretical* and twofold: what is the Rule of Law, can we identify at least a core conceptual structure for this elusive political and legal ideal? And can we identify one or a limited set of its enemies that reasonably count as alternatives to the Rule of Law and represent significant actors in the current political arena? These questions are philosophical: they require conceptual analysis in legal and political philosophy, knowledge of the history of legal and political thought, and normative perspectives on whether defending the Rule of Law is desirable and how.

The second question is *empirical*: can we reliably measure the understanding and support for the Rule of Law among ordinary people and legal experts, and can we do so in comparison with the alternative models? This is an inherently interdisciplinary question that connects philosophy of law with cognitive psychology: whether this is a question of experimental jurisprudence, of empirical philosophy of law, or simply of psychology of law was one of the methodological questions we had to address.

Finally, the third question is *practical*: is it possible to use the empirical results to reduce the difficulty of understanding the Rule of Law, for example by communicating its content more effectively? This is again an interdisciplinary question, connecting philosophy of law, cognitive psychology, and the field of design and communication studies currently known as legal design.

During CLEAR, which ran from September 2023 to February 2026, we undertook the challenging task of answering these questions: detailed descriptions of our theoretical, empirical, and practical conclusions can be found in the chapter of this volume titled “The Cognitive Load of an Internal Point of View over the Rule of Law,” as well as on the CLEAR website, which includes video presentations of the project’s hypothesis, methodology, and results, and on its YouTube Channel. The website can be found at <https://www.ruleoflawclear.eu/> and the YouTube Channel at <https://www.youtube.com/@rule-of-law-clear>. CLEAR also produced an educational video explaining the Rule of Law, available at <https://youtu.be/ahjTyouimwU>.

These results, however, would have been impossible without developing them against the background of broader collective research that involved all the members of the research group, as well as several other scholars who agreed to participate in the many workshops and congresses organized within this project. In this way, around CLEAR a community of scholars emerged who were interested in and willing to contribute to answering one or more of the project’s research questions. The outcome was a lively and challenging discussion brought forward from several different perspectives, all of which were intertwined around the main topics – a rich fresco, a witness to how scholars coming from different research interests found the project interesting. This volume purports to present the results of this wonderfully stimulating discussion.

The volume is organized into four parts.

In Part 1, titled *The Rule of Law: Structure and Challenges*, the reader will find contributions focused on the conceptual analysis of the Rule of Law and on some of the challenges it raises from the point of view of political and legal philosophy¹.

Part 2, titled *The Rule of Law: Its Crisis and Its Enemies*, examines the contemporary crisis of democracy and the Rule of Law and claims to identify some of its most crucial factors. In this part, contributors also address the question of what alternatives to the Rule of Law exist and whether finding such an alternative is possible².

In Part 3, *The Rule of Law in Minds*, after presenting the developments of the research brought forward in CLEAR, we have included contributions that, from different perspectives, address empirical research on the Rule of Law, or, more generally, the ways in which psychological questions can bear on the Rule of Law³.

Finally, Part 4, *Legal Design for the Rule of Law*, examines legal design as a tool for experimental jurisprudence, as well as the feasibility and constitutional admissibility of nudge-like design policies⁴.

We sincerely hope that, by reading these contributions, the reader can deepen her understanding of the Rule of Law and how theoretical, interdisciplinary, and empirical research can support it. CLEAR was, from the beginning, intended as research in defense of this ideal, which fosters pluralism and public, open deliberation. The richness, diversity, and depth of views that the scholars have contributed to this volume, we believe, constitute an important scientific contribution to this enterprise. We are very thankful to all of them and very proud of what CLEAR has been.

CORRADO ROVERSI

MARCO BRIGAGLIA

ANDREJ KRISTAN

¹ See REDONDO 2026, SCHIAVELLO 2026, GUASTINI 2026, VALENTINI 2026 and CAPRIATI 2026.

² BONGIOVANNI 2026, MAZZONE 2026, CHIASSONI 2026, KRISTAN 2026, PUPPO 2026, BISOGNI 2026, PIERDOMINICI 2026.

³ ROVERSI et al. 2026, FERRER et al. 2026, SEGATTI 2026, RIZZI BRIGNOLI 2026, ROCCHÈ 2026.

⁴ AGÜERO et al. 2026, BRESCIANI, ZULLO 2026.

References

- AGÜERO SAN JUAN C., MORGADO FERNÁNDEZ P., ZAMBRANO TIZNADO J.P. 2026. *Social Perceptions of Judges and the Rule of Law: A Protocol for Designing Judicial Vignettes*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 311-336.
- BISOGLI G. 2026. *The “psychology” of Rechtsstaat. From a sharp XIX-century distinction from authoritarianism to the collapse of one into the other during Weimar Republic*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 173-185.
- BRESCIANI F., ZULLO S. 2026. *Governing by Nudging: A Critical Inquiry into Liberty and Equality*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 339-360.
- BONGIOVANNI G. 2026. *On the Origins of the Difficulties Faced by Constitutional Democracies (with an Appendix on Democracy, Constitutionalism, Rechtsstaat, Rule of law. Some Historical-conceptual Aspects)*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 69-93.
- CAPRIATI P. 2026. *What is the Rule of Law? Toward a Perception-Based Definition of the Rule of Law*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 53-64.
- CHIASSONI P. 2026. *The Rule of Law and Its Enemies*, KRISTAN M. V. 2026. *Between Dissensus and Dispute: Variations in the Rule of Law Discourse*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 107-133.
- FERRER J., FERNÁNDEZ BLANCO C., GARCÍA YZAGUIRRE V., SCAVUZZO N. 2026. *Legal Certainty, the Private Sector, and Empirical Studies: A Preliminary Approach*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 231-248.
- GUASTINI R. 2026. *On the Relations between the Rule of Law and Democracy*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 29-35.
- KRISTAN M.V. 2026. *Between Dissensus and Dispute: Variations in the Rule of Law Discourse*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 135-147.
- MAZZONE M. 2026. *How not to be Populist. Anti-hegemonic Individualism and the Crisis of Democracy and of the Rule of Law*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 95-105.
- PIERDOMINICI L. 2026. *Are there populist constitutional heuristics? Some tentative answers, and their implications for a research project*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 187-197.
- PUPPO A. 2026. *From the Rule of Men to the Rule of Law and Back Again: Some Skeptical Insights about the Temptation of Judge-Made Social Justice*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 149-170.
- REDONDO M.C. 2026. *Rule of Law: Hierarchy of Norms in Legal Reasoning*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 3-14.
- RIZZI BRIGNOLI F. 2026. *Democracy and the Rule of Law: Rethinking Epistemic Accessibility*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 273-284.
- ROCCHÈ G. 2026. *The Authority of Law and Indirect Theories of Decision-Making*, , in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 287-307.

- ROVERSI C., BRIGAGLIA M., KRISTAN A., LUGLI L., SCAVUZZO N., ROSSI A., RUWETT F., DE MUYNCK G. 2026. *The Rule of Law and Its (Cognitive) Load: Experimental Jurisprudence on the Internal Point of View over the Rule of Law*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 201-228.
- SCHIAVELLO A. 2026. *Two Models of the Rule of Law*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 17-26.
- SEGATTI M. 2026. *On the Psychological Basis of the Rule of Law. From Beccaria to Institutional Experimentalism*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 251-270.
- VALENTINI C. 2026. *Soft Law, Justiciability, and the Rule of Law*, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 37-51.

PART I.

The Rule of Law: Structure and Challenges

Rule of Law: Hierarchy of Norms in Legal Reasoning

MARIA CRISTINA **REDONDO**

University of Genoa, Italy - CONICET,
Argentina.

E-mail: cristina.redondo@unige.it

ABSTRACT

This article offers a conceptual reconstruction of the rule of law as a political-institutional and normative ideal. Adopting an epistemic internal point of view, it clarifies the methodological assumptions underlying this reconstructive enterprise. On the basis of a minimalist conception largely aligned with Joseph Raz's account, the article argues that a rule-of-law state necessarily exhibits two structural features. First, it must be a constitutional state, incorporating a subsystem of rigid and hierarchically superior norms that serve as criteria of validity for ordinary legal norms. Second, it must recognize an internal hierarchy among constitutional norms, in virtue of which the principles constitutive of the rule of law enjoy hierarchical supremacy even vis-à-vis other rigid constitutional norms. This dual hierarchy has significant implications for legal reasoning: it excludes balancing in conflicts involving rule-of-law principles and requires their unconditional prevalence, without thereby entailing the invalidity of competing constitutional norms. The article concludes by outlining the implications of this account for the concepts of hierarchy, validity, and the identity of a rule-of-law state.

Questo articolo propone una ricostruzione concettuale dello stato di diritto come ideale politico-istituzionale e normativo. Adottando un punto di vista interno di tipo epistemico, esso chiarisce i presupposti metodologici che sottendono tale operazione ricostruttiva. Sulla base di una concezione minimalista in larga misura allineata all'impostazione di Joseph Raz, l'articolo sostiene che uno stato di diritto presenta necessariamente due caratteristiche strutturali. In primo luogo, deve essere uno stato costituzionale, che incorpori un sottosistema di norme rigide e gerarchicamente superiori, le quali fungono da criteri di validità per le norme giuridiche ordinarie. In secondo luogo, deve riconoscere una gerarchia interna tra le norme costituzionali, in virtù della quale i principi che costituiscono lo stato di diritto godono di una supremazia gerarchica anche rispetto ad altre norme costituzionali rigide. Questa duplice gerarchia ha implicazioni rilevanti per il ragionamento giuridico: essa esclude il ricorso al bilanciamento nei conflitti che coinvolgono i principi dello stato di diritto e richiede la loro prevalenza incondizionata, senza che ciò comporti l'invalidità delle norme costituzionali concorrenti. L'articolo si conclude delineando le implicazioni di questa ricostruzione per i concetti di gerarchia, validità e identità dello stato di diritto.

KEYWORDS

Rule of law, constitutional hierarchy, internal point of view, legal validity, constitutional identity

Stato di diritto, gerarchia costituzionale, punto di vista interno, validità giuridica, identità costituzionale

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



Rule of Law: Hierarchy of Norms in Legal Reasoning

MARIA CRISTINA REDONDO

1. *Introduction* – 2. *A Few Conceptual and Methodological Premises* – 3. *On the Content of The Concept: The Ideal of The Rule of Law* – 4. *On the Hierarchy of Norms* – 5. *On the Dual Hierarchical Superiority of the Norms that Define the Rule of Law.*

1. *Introduction*

This work is an exercise in conceptual reconstruction of the notion of the rule of law. First, I discuss some aspects concerning the methodological approach that such an exercise entails. I then adopt a minimal concept of the rule of law to advance some ideas that do not concern the concept in general, but rather the specific normative ideal that the individual instances (individual states, that is) falling within the scope of application of this concept ought to satisfy. My aim is to highlight two characteristics that, according to this ideal, the legal system of a state governed by the rule of law should satisfy. A state governed by the rule of law must necessarily: (i) be a constitutional state, that is, contain a subsystem of norms of higher hierarchical rank – rigid norms – which lay down the conditions of validity of ordinary norms; and (ii) recognize an internal hierarchy among the norms that belong to the subsystem of constitutional norms.

2. *A Few Conceptual and Methodological Premises*

In the first part of this work, I would like to clarify two general ideas concerning the concept of the rule of law and the methodological approach that I shall adopt in its analysis. These preliminary remarks, in my view, will prove relevant when presenting the theses that I intend to defend in the second part.

There are multiple theories concerning ordinary concepts in general, but I do not consider it necessary to dwell upon them in this context. Setting these theories aside, we may regard as philosophically well established the idea that the concept to which I intend to refer is an instance of a specific type of concept: namely, a political-institutional concept. And, as legal theorists commonly observe, political-institutional concepts are endowed with a normative or regulative content, which is typically contested.

The first idea I wish to emphasize is that, when we use a concept, the users or participants in the relevant practice, through their linguistic attitudes and behaviors, constitute the rules governing its use (which, in the case of an institutional concept, impose the application of regulative rules) and, in doing so, adopt towards those rules a practical and reflective attitude that is usually referred to as the internal point of view. This attitude is practical (prudential, moral, or political) insofar as it involves, on the part of those who accept the rules, the adoption of a policy of behavior that is favorable to them. This implies, among other things, that for the participants or acceptants of the practice the accepted concept is not radically indeterminate. On the contrary, as just noted, the participants are precisely those who accept that, although imprecise or not fully determined, the concept is nonetheless delimited and governed by certain rules. In other words, it is impossible – because contradictory – to be at once an acceptant and a sceptic with respect to the constitutive rules of a concept. By hypothesis, an acceptant assumes that the use of the concept is guided and delimited by the very rules that they themselves accept and constitute.

Accordingly, in undertaking the theoretical task of a reconstruction, albeit partial, of a concept in use – by showing, *inter alia*, cases of correct or incorrect application – we are in a certain sense also accepting or adopting an internal point of view with respect to its content. However, this

point of view differs from that of the participant or acceptant. It is an epistemic internal point of view which, on the one hand, does not imply agreement with what is accepted, nor the belief that it is justified or true¹. On the other hand, it may lead to the descriptive conclusion that the concept, contrary to what the participants assume, is wholly incoherent and/or radically indeterminate².

To adopt an internal point of view in an epistemic sense with respect to certain rules means to accept the semantic inferences that can be drawn from the identified concept, or the truth of conclusions concerning the application of that concept. In short, it is an acceptance, or internal point of view, that may be – but is not necessarily – accompanied by an attitude or internal point of view in an ethical-practical sense (prudential, moral, political, and so on)³.

There exists an extensive discussion concerning the very idea of the internal point of view, which I shall not revisit in this text. In any case, I believe it is indispensable to distinguish the two senses just identified, to avoid an ambiguity common to a large part of the literature. The present work seeks to understand the content of an important regulative ideal to which most contemporary Western democracies profess adherence, and it aims to identify some of the ideas that the use and application of the concept designating this regulative ideal implicitly presuppose. Consequently, it adopts – and could not but adopt – an internal point of view in the epistemic sense⁴.

I said that the concept of the rule of law is of an institutional nature. The analysis of this type of concept requires a distinction between two types of norms or rules that are closely connected to one another: semantic or constitutive rules, and regulative or prescriptive ones. There is also an extensive literature on this distinction, which I shall not address here. I would merely like to point out that, on the basis of these two types of norms, it is generally acknowledged, on the one hand, that there exists a form of normativity of a semantic-epistemic kind, which justifies the validity or invalidity of acts that conform or fail to conform to constitutive rules, and, on the other hand, a form of normativity of an ethical-practical kind (often reduced to a “moral” normativity), which justifies political, legal, moral, etc., approval or blame, depending on the type of prescriptive rule with which a given behavior conforms or conflicts.

I draw attention to this classic distinction between constitutive and regulative rules to emphasize that adopting an internal point of view in a semantic or epistemic sense with respect to the rules governing the use of a concept does not amount to the exclusive acceptance of constitutive rules. In other words, we should not think that the internal point of view in a semantic or epistemic sense consists in the acceptance of semantic rules, whereas the internal point of view in an ethical-practical sense would amount to the acceptance of regulative-prescriptive rules. Reflection on my initial remarks suffices to reveal that this assimilation is misguided. There are moral and political-institutional concepts whose definitional or constitutive rules include the fulfilment, or the aspiration to fulfil, certain regulative rules. When one reconstructs a concept of this kind, one accepts – at least in an epistemic sense – the content of the concept that involves such regulative rules. Accordingly, from this perspective, legal theorists adopt – and could not but adopt – an inter-

¹ See COHEN 1988. According to Cohen, the notion of acceptance does not imply that of belief. Against this interpretation, see CLARKE 1994.

² I thank an anonymous reviewer for drawing attention to this possibility.

³ The distinction I present was initially introduced by REDONDO 2018. Some corrections can be found in REDONDO 2023, especially in 458-464, and in REDONDO 2022.

⁴ In much of the literature, it is assumed that the adoption of an internal point of view ultimately implies a practical and justificatory stance with respect to certain patterns of behavior and to the concrete actions or institutions to which they refer. In this sense, it involves a positive or favorable attitude toward them. At times, however, the expression is used in a very broad, almost trivial sense, to refer generically to the attitude of anyone who takes a stance – whether favorable or unfavorable – toward something and accepts certain political or moral values. In this broader sense, it becomes almost impossible to engage in a theoretical enterprise without adopting an internal point of view in an ethical-practical sense. In any case, when I emphasize that adopting an internal point of view in the semantic or epistemic sense does not amount to adopting it in the ethical-practical sense, the latter must be understood in a non-trivial way, namely as a positive and justificatory attitude with respect to specific values, institutions, or patterns of behavior.

nal point of view, at least in the epistemic sense, with respect to the regulative rules embodied in the institutional concepts they analyze and employ, as well as in the normative systems they study.

The second general idea I would like to emphasize is that the concept of the rule of law, among other characteristics, displays two well-known properties. First, as I have already mentioned, it is a normative and contested concept. For example, in order to qualify as a rule-of-law state, must a state protect certain fundamental substantive rights, such as the right to health? Or is it sufficient that it comply with certain forms of law-making, interpretation, and application?

On the other hand, whatever definitional properties one is prepared to accept, the concept of the rule of law is a clear example of a vague concept. This means that at least some of its properties admit of gradual application and give rise to the well-known problem highlighted by the *Sorites* paradox: What threshold of secret laws, or of judicial corruption, must be crossed before a state can no longer be regarded as a rule-of-law state (that is, before the concept can no longer be applied)?

In this regard, the idea I wish to emphasize is that, when a concept of the rule of law is used, participants, in adopting an internal point of view in the practical sense, cannot be skeptical⁵. In other words, although they may be mistaken, they necessarily assume that such a concept (i) although contested, is not, and cannot be, self-contradictory or radically indeterminate, and (ii) although gradual and vague, presupposes a limit, a threshold that demarcates a domain of applicability and inapplicability.

The first point (i) implies that, although there may be deep disagreements, at least some of them are conceived as merely epistemic disagreements – that is, disagreements for which there is a correct answer. When a concept is used from an internal-practical point of view, it is excluded that it may have just any content. On the contrary, it is assumed that the concept has – albeit a contested one – a coherent identity; that is, the possibility that its content be contradictory is ruled out.

The second point (ii) implies that, although logic allows that a gradual property may be paradoxically applied to an individual case that displays that property to a degree zero, the pragmatics of language use, again from an internal-practical point of view, does not allow this and requires that, to be applicable, such a property not only be present, but be present to a sufficient or satisfactory degree. Thus, for example, although the property of being faithful to the law is a gradual property, and although logic allows the possibility of correctly concluding that an interpretation intentionally contrary to the law is an interpretation faithful to the law (albeit to a degree zero), the pragmatics governing the use of the concept does not permit this. Certainly, given its vagueness, the concept does not determine a precise limit; however, the presupposition is that such a limit is necessary and that we must acknowledge it at the moment of using or applying the concept.

Consequently, considering what I have said about institutional concepts in general, it should be noted that those who use or apply a concept of the rule of law – unlike those who merely describe its uses and applications – adopt an internal point of view in the practical sense. From this point of view, such a concept cannot (in a normative sense) be regarded as a content that tolerates any interpretation and/or application whatsoever. The semantic normativity inherent in the use and application of a concept precludes the possibility of considering that the same concept is simultaneously applicable and inapplicable, or that it applies to a situation and to its opposite. In this sense, the belief in the coherence of the concept constitutes a minimal presupposition of the use of a concept by those who adopt an internal point of view in the practical sense.

At the same time, whatever the specific content of the concept of the rule of law may be, those who use or apply the concept – and not necessarily those who merely describe its use and

⁵ The adoption of a skeptical position with respect to the meaning of linguistic expressions – and, in the specific case, with respect to the meaning of the expression *rule of law* – makes sense only as a metalinguistic position, that is, as a descriptive theory aimed at illustrating the different ways in which that expression is used in first-order language. In other words, it cannot be presented as a normative position that presupposes the acceptance of a given concept, nor, *a fortiori*, as a proposal for a rational reconstruction of the concept itself.

application – understand it as having determinate limits, that is, as having an identity such that its contestation or denial would result in the abandonment of the concept in question or in its replacement with another concept. Accordingly, although disagreements do in fact exist as to what its content is or what exactly the properties that define it require, a participant-acceptant presupposes that the concept is internally coherent and that it has certain “essential” or “necessary” contents that make it the concept it is, rather than a different one. In other words, the members of a social group share a concept only if, explicitly or implicitly, they agree that certain properties or certain paradigmatic cases function as criteria of application. Without an agreement of this kind, however minimal, one cannot say that they share – or that a social group has – a concept of the rule of law.

For example, let us suppose that, within a given political community C, there is agreement on the idea that the rule of law requires a legal system that regulates the behavior of its members through non-contradictory, public norms that are interpreted and applied with fidelity. In other words, let us suppose that in C there exists a minimal agreement to the effect that the regulative ideal to which the concept refers includes at least three of the eight principles proposed by Lon Fuller⁶. Such an agreement allows us to say that the social group C has or shares a concept of the rule of law. The existence of this concept, however, admits, in the first place, the existence of deep disagreements concerning other possible characteristics of the concept: does the rule of law require that norms be “clear” and non-retroactive? In the second place, it also admits deep disagreements concerning the precise content and the applicability of the three requirements previously mentioned: what does it mean, exactly, that norms must be public or faithfully applied? When are two norms contradictory?

Accordingly, as I already noted, from the point of view of users or those who accept the practice, disagreements in this case cannot extend to the extreme of admitting (a) the incoherence of the content of the concept or (b) the applicability of the concept to cases in which the requirements that define it are not satisfied to a sufficient or satisfactory degree. Following the example proposed, although the concept of “faithful interpretation” is vague, its application is excluded in a case in which we know that the interpretation has been intentionally distorted to achieve illegitimate ends, that is, a case in which the interpretation would be faithful only to a degree zero. Strictly speaking, the application of the concept would be logically possible, but it would be paradoxical and ultimately excluded when the concept is used from an internal point of view in the practical sense. From this perspective, every gradual concept becomes scalar and requires a decision concerning the threshold beyond which its application is no longer considered correct or admissible.

3. *On the Content of The Concept: The Ideal of The Rule of Law*

The concept of the rule of law comprises a set of values, principles, and prescriptive rules – that is, a regulative ideal. Depending on how robust the ideal is taken to be, a distinction is drawn between a merely formal and a substantive conception of the rule of law. My concern here is to make explicit two general characteristics that form part of the ideal of the rule of law in any of its versions, whether formal or substantive.

To maintain that a state qualifies as a state governed by the rule of law implies that it has a legal system incorporating the values, principles, and rules that define this kind of state. But this is not all. It also implies, on the one hand, that the state is characterized by a specific model of legal order: a model in which those values, principles, and rules function as criteria of validity or invalidity for the remaining norms or legal acts. In other words, it is necessary not only that the

⁶ See FULLER 1969, 39.

legal system incorporate the rule-of-law ideal, but also that it be structured in such a way that the values, principles, and rules defining the rule of law occupy a hierarchically superior position within the system.

At the same time, to claim that a legal system can be regarded as the legal system of a state governed by the rule of law means that the values, principles, or rules that define this type of state constitute a subsystem of hierarchically superior norms, the elimination or systematic violation of which allows one to infer that the legal system in question has lost its identity – namely, that it is no longer the legal system of a state governed by the rule of law. Certainly, this amounts to attributing to the legal system an identity that is neither merely formal nor merely textual⁷. However, this does not necessarily mean that the legal system contains a specific document – namely, a formal constitution – in which its hierarchically superior principles are explicitly listed. In this essay, I am primarily thinking of the legal systems in the *Civil Law* tradition, which do contain a constitutional document. But a state may be a state governed by the rule of law and recognize the hierarchically superior status of certain principles by conferring rigidity upon them, that is, by establishing aggravated procedures for their amendment, without being endowed with a specific constitutional document.

It is also worth noting that a legal system may incorporate the ideal of the rule of law by conferring upon it the status of a condition of validity for the remaining norms, without expressly declaring in any text (constitutional or legislative) that those norms determine its material identity. The legal system of a state governed by the rule of law necessarily confers upon such norms a superior and rigid character, that is, it protects them through special mechanisms of amendment, but it does not necessarily confer upon them an intangible character. Certainly, a state may explicitly self-declare, in a text called a “constitution” or elsewhere, the unamendable character of the principles of the rule of law, just as, for example, the Italian state explicitly declares in Article 139 of its Constitution that the republican form of the state may not be subject to constitutional revision. However, in the same way in which a state may be republican by rigidly protecting the norms concerning that form of state without the need to establish that such norms are “unamendable”, “inviolable”, or “intangible”, a state may be a state governed by the rule of law by rigidly protecting the norms concerning that form of state even if it does not explicitly declare or establish the intangible or unamendable character of the principles that express the ideal of the rule of law.

In this respect, the difficulty initially noted in connection with the application of any vague concept arises once again. How many of the norms that define the rule of law (or the republican state) would have to be abandoned or permanently violated so that a state is no longer a state governed by the rule of law (or a republican state)? Certainly, since this is a vague concept, such a limit is not determined. Nevertheless, in general terms, we can say that beyond a certain limit a legal system loses its identity as a state governed by the rule of law and no longer falls within the scope of application of this concept.

The characteristics previously mentioned have some further implications. As is well known, the concept of a constitution is itself contested. Nevertheless, there is a widely shared sense according to which the term “constitutional” is applied to supreme norms, that is, to norms occupying the highest hierarchical position within a legal system. This implies that the legal system of a state governed by the rule of law must conform to the model of the constitutional state, in

⁷ According to Riccardo Guastini, the identity of a state governed by the rule of law is a political, legal, and axiological identity (cf. GUASTINI 2019). A rule-of-law state is therefore endowed with an “ethically dense” material constitution, in which certain values, principles, and rules are recognized as supreme. On the identity of the constitution, see also BAQUERIZO MINUCHE 2024. From a formal point of view, however, a state that, in accordance with the procedural rules of its legal system, abandons the principles and rules that define the rule of law does not lose its identity: formally, it remains the same legal system. It does, nonetheless, lose at least part of its material identity, insofar as that identity is, by hypothesis, determined by the principles of the rule of law.

which, by hypothesis, norms exist at two hierarchical levels: constitutional norms, which are rigidly protected and lay down rules and principles functioning as criteria of validity, and ordinary norms, which must comply with the criteria established by constitutional norms in order to be valid within the system. In this sense of “constitution”, a constitutional state is not necessarily a state endowed with a document called a “constitution”, nor is it necessarily a state governed by the rule of law. The latter point follows from the fact that nothing prevents a state from having a constitution – i.e. a subset of rigidly protected (superior) norms that function as criteria of validity for the remaining norms – without incorporating among norms of this kind those that define and protect the rule of law⁸. However, every rule-of-law state is necessarily a state endowed with norms of constitutional rank: one that protects, or “entrenches”, a subset of norms by conferring upon them the highest hierarchical status, and that includes among these norms those that characterize the rule of law⁹.

An inescapable corollary of the commitment to the ideal of the rule of law is that the norms that define or protect it are not only rigid constitutional norms that establish criteria of validity for subordinate norms; in addition, they prevail in the event of a conflict with other rigid constitutional norms that establish criteria of validity independent of the rule of law. In other words, the constitutional rules and principles that define the rule of law are norms of higher hierarchical rank even with respect to those that, although also constitutional, neither define nor protect the rule of law. Certainly, this idea forms part of the ideal – that is, of what ought to occur within a state in order for it to constitute a state governed by the rule of law. Indeed, a state that does not acknowledge that all the norms and principles of its legal system must be subordinated to the ideal of the rule of law – namely, that they must be created, interpreted, and applied in conformity with it – can hardly be regarded as a rule-of-law state.

Consequently, for a state to qualify as a rule-of-law state, it is necessary that it recognizes two types of hierarchy among legal norms. The first type is connected to the well-known criterion of *lex superior*, according to which, in the event of a conflict between norms of different rank, those situated at the highest level within the system prevail. The preference established by *lex superior* is an unconditional one, independent both of the content of the norms that come into conflict and of the circumstances in which the conflict arises. Under the presupposition that a legal system is the legal system of a rule-of-law state, one may therefore infer that the norms that define or protect it form part of the highest level of the system: they constitute the criteria of validity for all other norms of lower rank and prevail in the event of a conflict with them. In other words, they are rigid constitutional norms of the system and determine the invalidity of norms or decisions that fail to comply with them¹⁰.

The second type of hierarchy is a hierarchy among norms of the same type, that is, among rigid constitutional norms which, by hypothesis, constitute criteria of validity for ordinary norms. This type of hierarchy presupposes that any conflict among constitutional principles in which norms that define the rule of law are involved (that is, norms that determine the material identity of the state *qua* state governed by the rule of law) must be resolved by means of a model of reasoning that, both in its procedure and in its outcome, exhibits the state’s commitment to the principles of the rule of law, in a manner respectful of its own material identity. Such a model must respect the special preference that this type of state assumes in favor of a core or subset of values, principles,

⁸ What has been said implies a positivist conception of law: whether a state is a state governed by the rule of law or not is a contingent fact and depends on the norms of its own legal system. By contrast, for an anti-positivist position, the ideal of the rule of law is part of a necessary morality, without which a normative order could not be regarded as law. Cf. FULLER 1969.

⁹ As an anonymous reviewer observed, it would be erroneous – and historically false – to maintain that a state governed by the rule of law is necessarily endowed with a constitutional document. However, it would be equally erroneous to maintain that a state governed by the rule of law is not endowed with constitutional norms, in the precise and widely shared sense that I have adopted here.

¹⁰ On the notion of hierarchy, see RODRÍGUEZ 2017.

and rules within the set of norms that it regards as rigidly constitutional. A state governed by the rule of law, by virtue of being such, commits itself to act and decide, first and in all cases, in accordance with the principles that characterize it. It is this abstract preference that determines its identity as a state governed by the rule of law.

The recognition of the hierarchically supreme position of the principles that constitute the rule of law vis-à-vis other rigid constitutional norms does not imply the invalidity of the norms that come into conflict with those principles¹¹. Conflicts between constitutional norms in which this hierarchy comes into play are normally instances of partial-partial contradictions, in which two conceptually independent norms, by virtue of the factual circumstances, cannot be complied with simultaneously¹². The superior hierarchy of the norms that define the rule of law means that, in the specific case in which the conflict arises, the solution that is consistent with the ideal of the rule of law must always prevail, whereas the solution required by the conflicting norms must always give way or adapt to what is required by the principles of the rule of law.

Clearly, this hierarchy is not independent of the content of the norms that come into conflict; nevertheless, it is an absolute preference, not conditioned by any factual circumstance. The existence of the conflict may depend, and usually does depend, on factual circumstances, but the preference does not. The unconditional preference in favor of the principles that define the rule of law is a conceptually necessary property of every rule-of-law state.

Accordingly, it must be acknowledged that, within a rule-of-law state, not all conflicts among constitutional principles are to be resolved – as is usually assumed – by means of balancing. Strictly speaking, a conflict between a constitutional principle that defines the rule of law and one that does not cannot be resolved through balancing. This is because balancing provides a procedure for addressing conflicts among principles that occupy the same hierarchical position and, by hypothesis, allows for the possibility that any principle may prevail over, or yield to, another, depending on the circumstances.

As we have seen, a state governed by the rule of law commits itself to act and decide, first and in all cases, in accordance with the principles that materially characterize it. In this sense, within this type of state, the technique of balancing is not suitable for dealing with conflicts in which principles that constitute the rule of law, and to which hierarchical priority is accorded, are involved. Consequently, balancing applies only (i) in cases of conflicts that involve exclusively principles constitutive of the rule of law, which occupy the same hierarchical position, or (ii) in cases of conflicts that do not involve principles connected with the ideal of the rule of law.

It may be questioned whether there exist conflicts among constitutional principles the resolution of which does not involve – if not principles – at least some of the values that define the rule

¹¹ The notion of a “principle” is notoriously ambiguous. In the sense articulated by Dworkin, principles are standards that do not apply in an all-or-nothing fashion, but instead have a gradual dimension of weight or importance. Accordingly, when principles come into conflict, the fact that one prevails does not entail the invalidity of the other, which remains part of the legal system as a reason that may carry weight in other cases. In this sense, the norms that define the rule of law, when they conflict with other norms of the same type – that is, with other constitutional principles – operate as principles in Dworkin’s sense. By contrast, when these same norms conflict with ordinary norms, they operate as rules: they apply in an all-or-nothing manner, are applied by *modus ponens*, and render incompatible norms invalid.

¹² It should be noted that the notion of partial-partial contradiction was originally conceived for cases involving contradictions between rules whose deontic content consists in determinate actions (for example: “one must pay”, “it is forbidden to park”, “it is permitted to vote”). In such cases, a partial-partial contradiction implies that the solutions imposed by both rules cannot be satisfied simultaneously. The deontic content of principles, by contrast, does not consist in determinate actions (for example: “norms must be public”, “fidelity to the law is required”, “the law must be comprehensible”). Accordingly, when a partial-partial contradiction arises between two principles, this means that, in the specific circumstances of application, some – at least one – of the behaviors required by one principle are incompatible with some – at least one – of the behaviors required by the other. However, even in such circumstances, there may exist other behaviors, also required by the principles involved, that allow them to be honored simultaneously.

of law. If this were so, that is, if one holds that the resolution of every conflict necessarily invokes the values and principles of the rule of law, this implies that, although balancing is possible and required among principles that are conceptually independent of the ideal of the rule of law, both the process and the outcome of the balancing must always respect the values of the rule of law, which enjoy a hierarchically superior position.

4. *On the Hierarchy of Norms*

For the sake of greater clarity in presenting the characteristics just mentioned, I shall assume that we share a concept according to which the ideal of the rule of law roughly coincides with the set of principles analyzed by Joseph Raz in his work *The Rule of Law and Its Virtue*¹³. Certainly, the content of this ideal may vary from one state to another. Some states may accept a more robust conception that includes, for example, the prohibition of war or the protection of certain social rights. However, I take Raz's proposal as my point of departure because I assume that it is a coherent concept and that it captures some of the essential or necessary characteristics of what is regarded as a state governed by the rule of law in contemporary Western societies.

The thesis I defend is minimalist in scope and conceptual and ontological in nature. As I have already argued, a state governed by the rule of law, by definition, recognizes the values that characterize it and explicitly incorporates a set of principles and rules designed to protect them. This does not mean that such a state necessarily assigns the highest hierarchical rank to all norms that may be associated with the rule of law. Rather, it does so only with respect to a specific conception that captures those essential or necessary properties without which a state could not properly be described as a "rule-of-law state"¹⁴. According to this thesis, an essential feature of the rule of law consists not merely in the incorporation of principles requiring, for example, that legal provisions be public, intelligible, stable, and capable of compliance. It also involves recognition of the dual hierarchical superiority of such principles. In other words, a state governed by the rule of law acknowledges that these principles, insofar as they constitute the very ideal of the rule of law: (i) function as fundamental norms of the system, serving as criteria of validity for every legal norm; and (ii) invariably prevail over any other fundamental principle or criterion of validity whose content is independent of the ideal of the rule of law.

To understand this essential feature of the rule of law, it is necessary to reflect more carefully on what the recognition of this dual hierarchy entails. On the one hand, the fact that certain principles occupy the highest hierarchical position within the legal system implies, as has been said, that they have a constitutional character. And the constitutional character of a norm presupposes its rigidity. A norm can be regarded as fundamental and function as a criterion of validity for ordinary norms only if it cannot be modified through a procedure identical to that by which an ordinary norm is created. Its enactment and amendment can take place only through a special procedure that is more demanding than the ordinary one¹⁵. This conception of constitutional norms contradicts the idea according to which a constitutional norm does not prevail by virtue of its superior hierarchy, but is of superior hierarchical rank because, and insofar as, it prevails in a conflict with other norms. In other words, the notion of hierarchy that I am employing requires

¹³ See RAZ 1979, 210-229, esp. 214-218.

¹⁴ This position rests on the assumption stated at the outset. The aim of this essay is to offer, from an epistemic internal point of view, a partial reconstructive analysis of a concept that participants accept and toward which they adopt an internal point of view in the practical sense. As already noted, it would be incoherent to suppose that those who adopt this stance, at the moment of using the concept, regard it as radically indeterminate. For them, the concept possesses essential properties that normatively guide its use and that, if disregarded, either undermine its applicability or lead to its erroneous use. This is precisely what it means to adopt an internal point of view in the practical sense.

¹⁵ See BAYÓN 2004, 67-118.

the rigidity of the norms to which the property of being hierarchically superior is attributed (that is, constitutional norms). More generally, it contradicts the concept of a flexible constitutional norm, according to which norms of this hypothetical superior rank are not violated, but rather modified, by norms that fail to comply with them. In accordance with the concept of hierarchy that I am adopting, hierarchically organized legal systems have a stable structure or stratification. In this sense, “hierarchies”, if they are such, cannot be mobile or unstable¹⁶.

There is no doubt that the expression “hierarchy” can be understood in different and even contradictory ways. However, as I noted at the outset with regard to concepts in general, with respect to the concept of hierarchy a skeptical position that admits its radical indeterminacy is not available when the term is employed from an internal point of view in the practical sense, which is the point of view that, at least in part, this essay seeks to reconstruct. This is because, if such radical indeterminacy were admitted, both the use of the concept and its very reconstruction would turn out to be contradictory. For example, one would have to admit the possibility that the same norm N_1 is and is not hierarchically superior to another norm N_2 and, consequently, that a norm N_3 is simultaneously valid and invalid, or that a decision D_4 is at once correct and incorrect, depending on how – contingently – a conflict between norms is resolved.

For this reason, and consistently with its premises, the “realist” or “skeptical” position that admits the existence of a variable hierarchy among constitutional norms – and its individual case-relative character – cannot present itself as a normative-reconstructive position with respect to the concept of hierarchy. Rather, it can only be understood as a metalinguistic and descriptive account: either of how the term “hierarchy” is actually used, or of what, as a matter of fact, may occur in the application of norms by the users or operators of the legal system.

It is undeniable that, in cases of conflict, the effective preference accorded to constitutional norms is contingent, and that their hierarchical position – supreme by definition – may in practice be disregarded or even violated by the operators of the legal system. However, if we accept the premise that the constitutive rules of a concept – in this case, the concept of normative hierarchy – have a normative character (in the semantic or epistemic sense), then this undeniable possibility cannot be described, at the metatheoretical level, by claiming that the norms of the legal system have a mobile or variable hierarchy. Such a claim would rest on a mistaken use of the notion of hierarchy and would contradict one of its defining properties: namely, that a hierarchy does not depend on how conflicts are resolved, but instead provides a criterion that guides their resolution *ex ante*.

If a hierarchy exists between two norms, this means that, in the event of a conflict, one of them – the one identified by the hierarchical criterion – must always be preferred over the other, regardless of the circumstances. From this perspective, if the criterion of preference is made dependent on variable circumstances, this implies that, strictly speaking, no hierarchy exists between the conflicting norms.

Legal systems are normally understood as systems endowed with a hierarchical structure that guides, *ex ante*, the resolution of possible conflicts: (i) a vertical hierarchy, according to which there exist norms of higher rank and norms of lower rank, and, in the event of a conflict, the preference criterion established by *lex superior* requires that priority be given to the superior norms; and (ii) a temporal and horizontal hierarchy among norms of the same rank, according to which, in the event of a conflict, the preference criterion established by *lex posterior* requires that priority be given to norms enacted at a later time. Without entering into further distinctions – which would be necessary for a more thorough analysis of these types of hierarchies – it is worth noting that it is problematic to maintain that the principle of *lex specialis* allows for the establishment of a hierarchy of norms in the strict sense¹⁷.

¹⁶ On the possibility of a “flexible” hierarchy, see GUASTINI 2001, 147.

¹⁷ A more thorough analysis would require distinguishing between a static and a dynamic approach to law. As for the problematic character of the principle of *lex specialis* as a principle capable of generating a hierarchy among norms, see RODRÍGUEZ 2017, 184–186.

In conclusion, it is appropriate to reiterate that the existence of legal operators who use language in a contradictory manner, or who violate the hierarchy of norms, is an ineliminable possibility. However, from a methodological point of view, a theoretical position that points to or describes such situations should not accommodate an incoherent use of the concept of hierarchy. If one does not wish to employ or reconstruct a concept that is intrinsically incoherent, it is necessary to clarify that a hierarchy – insofar as it constitutes a criterion that establishes *ex ante* which norm must be preferred in the event of a conflict – cannot be mobile or unstable; that is, it cannot, by hypothesis, depend on the way in which operators actually resolve the conflict.

5. *On the Dual Hierarchical Superiority of the Norms that Define the Rule of Law*

A state's commitment to the values of the rule of law is reflected in the recognition of the hierarchical superiority of a subset of principles that constitute a specific conception of the rule of law (hereafter, PROL). This hierarchical superiority manifests itself in two distinct ways. On the one hand, as we have just seen, it requires that the PROL be configured as a specific type of norms within the legal system: they are necessarily fundamental norms, endowed with a rigid character, which establish conditions of validity for the remaining norms. An obvious consequence of this feature is the invalidity of norms, acts, or decisions whose content contradicts or fails to comply with the PROL¹⁸. On the other hand, their hierarchical superiority requires that the PROL necessarily prevail in the event of a practical conflict with other norms of the same type but not related to the rule of law (that is, other rigid norms that establish additional conditions of validity).

There are different types of practical conflicts¹⁹. In any case, the incompatibility present in a conflict among constitutional norms is not normally of a logical nature. The contents of the norms that enter a practical conflict are not necessarily in contradiction with one another. In this sense, the difficulty is not of logical origin, but empirical. This means that, by virtue of the specific characteristics of the individual case that render them applicable, not all the behaviors or states of affairs required or justified by constitutional norms can be realized simultaneously. In other words, the norms require or justify behaviors or states of affairs that, in the circumstances in which they are to be realized, become incompatible with one another, that is, they cannot occur jointly.

This type of conflict is therefore relative to specific circumstances of application. However, it should be emphasized that what depends on the circumstances is the existence or non-existence of the conflict, not the priority of the PROL. The priority of these principles is stable and inflexible and rests exclusively on the fact that, by hypothesis, we are dealing with a legal system that commits itself to respecting the rule of law.

The hierarchical superiority of the PROL therefore requires that, in circumstances of conflict, the behaviors required or justified by those principles always take priority over those required or justified by the other fundamental norms. As I noted already, this priority does not mean that the fundamental norms that conflict with the PROL must be declared invalid or inapplicable. On the contrary, the conflict presupposes that the conflicting norms are valid and applicable to the case.

It follows that, in cases of practical conflicts in which the PROL are involved, the decision-making authorities of a state governed by the rule of law possess *ex ante* a criterion for resolving the conflict: the solutions justified by the PROL always prevail. And the solutions required by other

¹⁸ Certainly, different senses of “invalidity” can be distinguished, as well as different types of consequences associated with it, which I cannot address in this context. The difficulty typically arises because, in a certain sense – namely, validity understood as membership in, or mere existence within, the system – norms that contradict the PROL may still be described as “valid”. However, the hierarchical superiority of the PROL requires that such norms be declared invalid, that is, that they be expelled from the system.

¹⁹ See CANALE 2017, 37-44.

fundamental principles, in the cases and to the extent that they prove incompatible with the PROL, give way or are overridden. In such circumstances, however, the defeated principles retain their validity and practical relevance; this means that they continue to require an interpretive effort aimed at honoring them in some alternative manner.

Principles are general norms that admit of different forms of concretization and of satisfaction or fulfilment. If a principle comes into conflict with another principle in a given case, even though it need not prevail, it nonetheless requires the search for other modes of fulfilment compatible with what is demanded by the prevailing principles; or, in cases in which it is not possible to find any compatible avenue of satisfaction, it requires or justifies compensatory or remedial measures that offset such impossibility. It is not appropriate to pursue this feature further here, but it should be recalled that, in general, a principle that is defeated or yields – unlike an invalid norm – does not lose its rational force merely because it is insufficient to prevail in the situation of conflict²⁰.

For this reason as well, in conflicts in which the PROL are involved, the technique of balancing does not appear to be applicable. The balancing procedure typically concludes with the identification of a single rule applicable to the individual case, or of a single conclusive reason. However, if we admit that all the principles involved in the conflict retain their practical relevance, the resolution of the conflict cannot consist in a single response grounded exclusively on the prevailing reasons. Necessarily, in addition to the solution required or justified by the principles that prevail (in this case, the PROL), there must also be a solution required or justified by the principles that, although they do not prevail, remain relevant reasons²¹.

In conclusion, in these pages I have proposed an exercise in the analysis of the concept of the rule-of-law state. If what has been said is correct, then a state governed by the rule of law necessarily has a legal system that incorporates and configures, as fundamental and rigid norms, a set of rules and principles that concretize and constitute a specific conception of the ideal of the rule of law. These norms determine its identity as a rule-of-law state. A state may qualify as a state governed by the rule of law without expressly declaring its adherence to this ideal. In turn, if a state is a state governed by the rule of law, it recognizes that the norms that concretize this ideal not only constitute conditions of validity for the remaining norms, but also always prevail over other fundamental and rigid norms, in the cases and to the extent that they prove incompatible.

²⁰ See GARDNER 2007, 100-103; see also GARDNER and MACKLEM 2002, ch. 11.

²¹ On the “residual” force of reasons, see HURLEY 1989, 125-135.

References

- BAQUERIZO MINUCHE J. 2024. *I limiti della revisione costituzionale. Uno studio di teoria generale*, Edizioni ETS.
- BAYÓN J.C. 2004. *Democracia y derechos: problemas de fundamentación del constitucionalismo*, in BETEGÓN J., LAPORTA F., PÁRAMO J.R., PRIETO SANCHÍS L. (eds.), *Constitución y derechos fundamentales*, Centro de Estudios Políticos y Constitucionales, 67-118.
- CANALE D. 2017. *Conflitti pratici. Quando il diritto diventa immorale*, Editori Laterza.
- CLARKE D.S. 1994. *Does Acceptance Entail Belief?*, in «American Philosophical Quarterly», 31, 2, 1994, 145-155.
- COHEN L.J. 1989. *Belief and Acceptance*, in «Mind», 98, 391, 1989, 367-389.
- FULLER L.L. 1969. *The Morality of Law*, Yale University Press (1964).
- GARDNER J. 2007. *Justifications and Reasons*, in Id., *Offences and Defences. Selected Essays in the Philosophy of the Criminal Law*, Oxford University Press, 100-103.
- GARDNER J., MACKLEM T. 2002. *Reasons*, in COLEMAN J., SHAPIRO S. (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press.
- GUASTINI R. 2001. *Lezioni di teoria costituzionale*, Giappichelli.
- GUASTINI R. 2019. *La molteplice identità delle costituzioni*, in «Analisi e diritto», 2, 2019, 161-172.
- HURLEY S.L. 1989. *Natural Reasons. Personality and Polity*, Oxford University Press.
- RAZ J. 1979 [1977]. *The Rule of Law and Its Virtue*, in Id., *The Authority of Law. Essays on Law and Morality*, Clarendon Press, 210-229.
- REDONDO M.C. 2018. *Positivismo jurídico “interno”*, Klub Revus.
- REDONDO M.C. 2022. *Internal Legal Positivism Refined. A Reply to Critics*, in «Revus», 48, 2022, 173-199.
- REDONDO M.C. 2023. *Sobre el positivismo jurídico interno. Algunas respuestas*, in «Doxa», 47, 2023, 429-468.
- RODRÍGUEZ J.L. 2017. *La justificación de las decisiones judiciales en las democracias constitucionales*, Ministerio de Justicia y Derechos Humanos de la Nación.

Two Models of the Rule of Law

ALDO SCHIAVELLO

University of Palermo, Italy.

E-mail: aldo.schiavello@unipa.it

ABSTRACT

All conceptions of the Rule of Law (RoL) can be traced back to two models. The first model emphasises formal features that limit the arbitrary power of rulers. According to this model, the RoL is both a means of organising power and safeguarding those subject to it. The second model considers positive law to result from balancing two elements, dating back to the medieval tradition: *gubernaculum* and *jurisdictio*. The *gubernaculum*, the expression of sovereign power, finds an insurmountable limit in legal practice. Its principles express a true “legal reason”. The judges and jurists are the foremost priests of this legal reason. This essay identifies the pros and cons of both models and attempts to demonstrate that they are incompatible alternatives.

Tutte le concezioni dello Stato di diritto (RoL) possono essere ricondotte a due modelli. Il primo modello enfatizza caratteristiche formali che limitano il potere arbitrario dei governanti. Secondo questo modello, il RoL è insieme uno strumento di organizzazione del potere e di tutela di coloro che vi sono sottoposti. Il secondo modello considera il diritto positivo come il risultato del bilanciamento di due elementi, risalenti alla tradizione medievale: *gubernaculum* e *jurisdictio*. Il *gubernaculum*, espressione del potere sovrano, trova un limite insormontabile nella pratica giuridica, i cui principi esprimono una vera “ragione giuridica”. I giudici e i giuristi sono i massimi sacerdoti di questa ragione giuridica. Questo saggio individua i pro e i contro di entrambi i modelli e tenta di dimostrare che si tratta di alternative incompatibili.

KEYWORDS

law and morality, inner morality of law, legal certainty, enlightenment rule of law, contemporary constitutionalism's rule of law

diritto e moralità, moralità interna del diritto, certezza del diritto, stato di diritto dell'illuminismo, stato di diritto del costituzionalismo contemporaneo

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



Two Models of the Rule of Law

ALDO SCHIAVELLO

1. *Two Models of the Rule of Law: Introductory Remarks* – 2. *The Enlightenment Model of the RoL* – 3. *The RoL Model of Contemporary Constitutionalism* – 4. *The Political Community, According to Ronald Dworkin* – 5. *Two Models of a Political Community* – 6. *The RoL of Contemporary Constitutionalism and the Community's Shared Values* – 7. *Two Models of the Jurist* – 8. *Conclusion*.

All animals are equal
but some animals are more
equal than others
(George Orwell, *Animal Farm*)

1. *Two Models of the Rule of Law: Introductory Remarks*

The Rule of Law (henceforth referred to as RoL) has four characteristics that should be made explicit. It is a notion that is: 1) indeterminate, 2) controversial, 3) endowed with a positive aura, and 4) expansive in force.

Any discourse on RoL requires an analysis in which an explanatory definition of the notion is proposed, as indeterminacy demands. Without this attempt at conceptual clarification, there is a risk of a dialogue of deaf people. The term “RoL” can denote different things.

The fact that RoL is a controversial notion means that we are dealing with one of those concepts that Ronald Dworkin refers to as “interpretive” (see WALDRON 2002). Each proposed definition results from evaluative and ideological choices and aspires to prevail over all others. Therefore, proposing a definition of RoL implies taking a position among a shortlist of alternatives. Consequently, any statement on RoL is ambivalent. It simultaneously answers the questions “What is RoL?” and “How should RoL be understood?” These two questions cannot be separated from each other.

Jeremy Waldron (WALDRON 2008, 3) asserts, «The Rule of Law is one of the most important political ideals of our time». The positive aura surrounding the RoL makes discourses on this notion susceptible to emotional rhetoric. This aspect is also captured by Gerald Postema (POSTEMA 2022, p. 17): «While [the RoL] enjoys a halo of legitimacy, it imposes irritating constraints on those who exercise power and necessitates compromises with other political goals. Consequently, it is vulnerable to capture and rhetorical abuse by those who would retain its halo and minimize its costs. Political ideals with this kind of scope, power, and visibility cannot escape controversy, not just at the periphery but also at its core». In concrete terms, this means that people tend to unite under the banner of the RoL without realising that they are defending different – if not opposing – conceptions of this notion. This is the same phenomenon that characterises discourses on human rights. While we all support human rights, we are furiously divided over the meaning of equality and how to strike the right balance in the event of a conflict between rights (see § 6).

Finally, the RoL is endowed with an expansive force. Like a phagocytic cell, it tends to incorporate – or at least merge with and/or overlap with – other concepts, such as law, human rights, democracy, and freedom. This increases its scope and, consequently, the potential for misunderstanding (WALDRON 2004, p. 319). The fundamental error, sharply identified by Joseph Raz, is that the RoL is often made to coincide with the *Rule of good law* (RAZ 1979, 210): «Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated».

All conceptions of the RoL can be traced back to two models that differ in their approach to the

alternative between the Rule of Men and the RoL (see also TAMANAHA 2004, 91-113): the “Enlightenment model”¹ and the “model of contemporary constitutionalism”.

2. *The Enlightenment Model of the RoL*

The first model identifies certain characteristics of the law, mainly formal, that enable it to limit the arbitrary power of the governors. In this first version, the RoL would be both a way of organising power and a guarantee for those subject to this power. A famous compendium of this model is proposed by Friedrich von Hayek when he defends the ideal of the sovereignty of law: «Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge» (HAYEK 2006, 75-76).

The best-known version of this model is probably the one proposed by Lon Fuller. According to this author, for the law to pursue its purpose, which is to govern the conduct of individuals while protecting their freedom and also their dignity, certain errors must be avoided: «The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on ad hoc basis. The other routes are: 2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; 3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; 4) a failure to make rules understandable; 5) the enactment of contradictory rules or 6) rules that require conduct beyond the powers of the affected party; 7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, 8) a failure of congruence between the rules as announced and their actual administration» (FULLER 1969, 39; WALDRON 2010).

Fuller believes that if these errors and, in particular, contradictions and incongruities are avoided, law has “greater affinity” with what is morally good than with what is evil. Herbert Hart is less optimistic than Fuller; he is convinced that this conception of the RoL «...is unfortunately compatible with very great iniquity» (HART 1994, 207).

A conception of the RoL similar to Fuller’s, but in line with Hart’s latter observation, is proposed by RAZ (1979). In short, for Raz, the RoL is an ideal that has more or less the characteristics identified by Fuller, but, unlike Fuller, Raz denies the coincidence between the law and the RoL; for Fuller if a legal system does not respect its inner morality in any way, it is not only a bad legal system but not a legal system at all. On the contrary, for Raz, a legal system can radically disregard the formal characteristics identified by Fuller and still remain a legal system. Moreover, the presence of these characteristics does not guarantee that the law does not radically violate certain moral values or adequately protect the dignity of individuals.

The primary function of law is to regulate human conduct. The RoL ensures that this task is performed efficiently, that the arbitrariness of power is curbed, and that, as Hayek notes, individual freedom is protected. To use Raz’s famous analogy (RAZ 1979, 225), just as a knife serves to cut, law guides behaviour; a sharp knife cuts better than an unsharp one, and a law that respects the RoL ideal guides behaviour more efficiently than a law that does not. A sharp knife, however, can be used to cut bread or a human being’s throat, and similarly, a law that respects the RoL ideal can protect human rights and human dignity as well as trample on both. Even if one were to concede that the Enlightenment RoL always protects individual liberty, since a specific and clear law allows individuals to know in advance what the consequences of their behaviour will be, it remains true that a law that conforms to the Enlightenment RoL can be thoroughly immoral.

¹ I take the expression “Enlightenment RoL” from CELANO 2013.

In any case, this model of the RoL treats those subject to the rules as adults, in the sense that it aims to affect human behaviour in an open and non-underhanded manner, leaving individuals themselves the choice of whether or not to follow the rules, knowing *ex ante* the consequence of their decision. The communicative stance through which norms influence behaviour implies that the governors recognise the dignity of individuals as responsible agents, capable of autonomous choices. In this way, the governors pay respect to the governed (CELANO 2013, 198). To better understand this observation, it is sufficient to notice the differences between an order and other forms of constraints on behaviour, such as preference manipulation and symbolic influence. Preference manipulation imposes a constraint on someone's behaviour by influencing their desires and preferences through different means – drugs, hypnotic practices, and so on. The preference manipulation cancels the faculty of choice of the individuals involved. In addition, it is an insidious means of affecting the behaviour of others because it acts “behind the back” of the person subjected to it. Those who are manipulated believe they are free, although they are not. Similarly, one who is subject to symbolic influence makes no choice, but merely performs a mechanical behaviour produced by the power of suggestion of the symbol. After all, a behaviour or attitude induced by a symbolic influence is very similar to the movement of the knee under the pressure of the doctor's reflex hammer. Even in the case of a symbolic influence, the constraint on behaviour escapes the perception of the victim.

3. *The RoL Model of Contemporary Constitutionalism*

This model of RoL originated in common law legal culture and was theorised by authors such as Edward Coke and later Albert Dicey. Unlike the previous model, this latter does not focus on formal and procedural constraints on sovereign power; rather, according to this model, positive law is not exhausted in the law produced by the sovereign power but is the outcome of the balance between the two elements of the pair, dating back to the medieval tradition, *gubernaculum/jurisdictio*. The *gubernaculum*, which is an expression of sovereign power, finds an insurmountable limit in the related legal practice, which is governed by its principles, which, in turn, express a genuine “legal reason” whose priests are first and foremost the judges and, secondly, the jurists. The characteristics of this RoL model are well summarised by Mauro Barberis (BARBERIS 2016, 17): «The law *par excellence*, for common lawyers, has always been the common law, produced not by Parliament with the intention of producing it, but by judges, as an unintended effect of the resolution of concrete cases submitted to them. At least since the 19th century, moreover, it is not so much a matter of the individual judicial decisions – in themselves no less intentional than the laws of Parliament – as of the complex of principles or *rationes decidendi* that can be derived from these decisions: a complex that, as such, does not correspond to the intentions of the individual judges nor of any other legislator in the flesh».

This model of RoL presupposes (a) the existence of values and principles expressed by legal practice and unchangeable (or, at least, not modifiable in the manner of legislation) and (b) cooperation between institutions, in particular between parliament and the courts.

With the transition from the modern state to the contemporary constitutional state, this second model has also been reconsidered by jurists and legal philosophers belonging to the civil law legal culture. This is largely due to the socio-institutional differences between these two forms of state.

If sovereignty is the hallmark of the modern state, the “crisis of sovereignty” is probably the case of the contemporary state (FERRAJOLI 1997). After the end of the Second World War, the sovereignty of nation-states was doubly limited. Internally, the sovereignty of parliament is limited through the introduction of rigid constitutions, i.e., that can only be amended through an aggravated procedure compared to that of ordinary laws, and long constitutions, i.e., containing a declaration of rights. Externally, the end of the absolute sovereignty of states, which consisted in the *ius ad bellum*, is estab-

lished by the birth of the UN and the promulgation of the Universal Declaration of Human Rights.

In short, if the nineteenth-century liberal state – the modern state – recognises as the only limits to state sovereignty the “procedures” that the legislature must comply with to create valid law, the constitutional state adds to the procedural limits also “substantial” limits, limits of “content”, that prevent the legislative power from doing or deciding whatever it wants. In the constitutional state, the dialectic between *gubernaculum* and *jurisdictio* appears inescapable.

In this case, the purpose is not, as with the Enlightenment RoL, to protect individual liberty through a determinate law but to guarantee the moral correctness of the legal system through a flexible law produced not only by the legislative power but also by the judicial power. It is easy to see that these aims are not compatible.

A clarification is needed at this point. The two RoL models, precisely because they are models, exert a normative force: they outline an ideal, they do not “describe” what it is. The preference for one or the other is therefore associated with reasons that can be traced back to the ideological-political sphere. On the other hand, it cannot be denied that, especially in practical rationality, changes in reality play a not insignificant role in orienting choices in favour of certain world views and not others. This means, in short, that the prevalence of certain models over others depends at least in part on the ability of these models to successfully interpret reality. This second model, therefore, deserves special attention precisely because it expresses the ideological substratum of contemporary law, even though, in recent years, demagoguery, populism, and the crisis of democracy have put both models of RoL in a checkmate.

In the following sections – taking advantage of the Dworkinian distinction between the “rule-book” model of the community and the community of principle (DWORKIN 1985, 9-32) – I try to highlight some limits of the latter model of RoL (represented by the community of principle) and some merits of the former model (represented by the rule-book model).

4. *The Political Community, According to Ronald Dworkin*

DWORKIN (1986, 190-224) maintains that a political community has essential points of contact with what he calls genuine communities, such as family, friendship, work relationships, and so on.

Genuine communities are characterised by “reciprocity”; a member of such a community is only responsible for and obligated to other members insofar as they are also responsible for and obligated to her. While everyone in the community doesn’t need to agree on the specific responsibilities and obligations of each member, it is required that there be a general and widespread understanding of the responsibilities and duties that come with membership. For example, Dworkin observes that a friendship does not require each person to feel obligated to break a promise to help a friend in need. It is sufficient for all to share a willingness to make significant sacrifices to help a friend. From this basic agreement, the concrete determination of the sacrifices appropriate to a friendship becomes a matter of interpretation.

The reciprocity that characterises genuine communities must fulfil four conditions.

Firstly, community obligations are “special” obligations; they only apply within the group and differ from obligations to non-members. For example, the loyalty one owes to a friend differs from the loyalty required in all social relations that do not fall under friendship.

Secondly, community obligations are “personal” in that they are not (at least not exclusively or primarily) obligations towards the group as a collective entity, but rather towards individuals within the community or institution. For example, Dworkin argues that each family member is obligated not only to preserve the family’s good name or enhance its prestige, but also to support relatives in need.

Thirdly, these obligations stem from a broader concern for community members.

Finally, this general concern must be addressed equally to all community members. This does not mean there cannot be hierarchies or role differences between community members. The role

of parents within the family is different from that of children; such differences, however, are legitimate if they are in the interest of all and, more precisely, in the equal interest of all. Consequently, communities organised through a caste system, for example, in which some individuals are less valued than others, are not genuine communities. Therefore, they do not give rise to community obligations or responsibilities.

From this analogy between genuine community and political community, Dworkin defends a specific model of political community, which he calls the community of principle. In the following paragraphs, I question the analogy between genuine and political communities and put forward some objections to the community of principle.

5. *Two Models of a Political Community*

Dworkin presents three models of political community: the *de facto* community, the “rule book” community, and the community of principle. Only the latter two are relevant here, as they correspond to the Enlightenment RoL and the RoL of contemporary constitutionalism.

The “rule book” model requires a general commitment to obey the rules. Rules are obeyed not only as a matter of strategic expediency, but also because one believes they are obligated to follow them. However, the obligations to obey are strictly bound by what the rules provide. These rules are a compromise between the conflicting individual values and interests, rather than the outcome of an interpretive practice of more general principles that hold the community together.

This model, which at first sight seems adequate at least about pluralist communities, does not pass Dworkin’s rigorous scrutiny of associative obligations. In particular, it disregards the third and fourth conditions that specify the reciprocity that characterises genuine communities. People may be motivated by purely personal and selfish interests. Once a rule has been established, they will commit to respecting and enforcing it, regardless of its content. However, this commitment is too weak to be considered an expression of concern for others, which is characteristic of genuine communities. Finally, according to Dworkin, the relationship between the members of a “rule book” community is based on some version of the fair-play argument. When participating in a cooperative enterprise – and a well-ordered, rule-based society can be considered such an enterprise – those who restrict their freedom for the greater good are entitled to demand the same from those who benefit from their behaviour. It is unfair to benefit from the sacrifices of others and then refuse to do one’s part. For Dworkin, this argument provides an insufficient foundation for building a political community. According to the fair-play argument, a political authority is justified if it improves the welfare of those subject to it. If this means that a political authority is only justified if it can maximise general welfare more effectively than any other system, then the fair-play argument is too demanding. Conversely, if “otherwise” means that any authority is better than no authority, the argument is too broad.

According to the community of principle model, the rules that govern members’ behaviour do not result from a compromise between individual interests. Instead, they are the outcome of a common understanding that aims to realise the community’s shared values and principles in the best and broadest way possible. These values and principles are not metaphysical or absolute; instead, they have a historical character and arise from discussion within the community. Rather than viewing it as a necessary compromise to be part of the community, each person accepts the interpretation of the principles that deviates from their interpretation because they are aware that their reasons have been taken into account, as well as those of everyone else. Moreover, precisely this awareness justifies obligations arising from norms that are not entirely shared.

The community of principle model combines two fundamental theses from Dworkin’s conception of law: the integrity thesis and the idea that law is an interpretative social practice. The integrity thesis presents law as a social practice centred on congruent principles and values. In contrast, the thesis of law as interpretation asserts that the identification of law stems from an

interpretative process characterised by the value of law's integrity: «Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbor when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship» (DWORKIN 1986, 189-190; MACCORMICK 2009).

The concept of a political community contrasts with the complexity of contemporary Western societies. In short, political communities are different from genuine communities. However, this aspect can be set aside here. What I am interested in questioning is the idea, which also underpins the RoL of contemporary constitutionalism, that a political community is a collection of individuals sharing a common pattern of justice. In general, this model of RoL is based on the idea of fidelity to law (POSTEMA 2022, 65 ff.) and the idea that law is an interpretative social practice in which everyone is equally entitled to put forward their interpretation of the principles of the community. This model views law as a set of horizontal relationships between equals, rather than vertical relationships involving the exercise of force. However, force is an indispensable element of law (SCHAUER 2015), and concealing it can be dangerous, as a force acting behind our backs is far more frightening than one that is openly exhibited.

6. *The RoL of Contemporary Constitutionalism and the Community's Shared Values*

A community of principle is built around shared values. In such a community, political decisions do not arise from compromises and negotiations between conflicting interests and values, but from the correct application of shared principles and values to a given situation. This is the essence of the ideology of contemporary constitutionalism.

Examining the limitations of this ideology in light of the actual characteristics of contemporary constitutional Rule of Law enables us to highlight the conceptual and pragmatic limitations of the community of principle model (SCHIABELLO 2016).

A crucial aspect of the "age of rights" (BOBBIO 1996a) was the idea that the most crucial step had been taken once human rights were recognized. The problem was finding a universal agreement on which rights should be recognised. Once this was achieved, the only remaining task was to protect them.

The importance of this universal agreement on human rights is also evident in the fact that contemporary legal-philosophical and philosophical-political literature consciously avoids seeking a justification that could ground a universal consensus on human rights. There is a fear that searching for a philosophical foundation for human rights could lead to radical divisions and thus weaken the agreement on rights.

Attempting to address the issue of the philosophical basis of rights is destined to fail for several reasons. The main reasons are listed below.

Firstly, the language of rights is indeterminate, so interpretative activity aimed at identifying their meaning or content presupposes the exercise of broad discretion. Attributing one meaning to a provision expressing a right rather than another requires engaging in argumentative-justificatory activity that cannot avoid the philosophical question of foundation.

Secondly, there are many rights. Over the years, the increasing number of declarations of rights has led to an ever-growing list. This creates the potential for conflicts (if not in theory, then certainly in practice) between the rights of different individuals. The plurality of rights creates problems: which right should prevail (after weighing up the options)? What is the correct trade-off between conflicting rights, where possible? Once again, the problem of grounding arises.

Third, protecting rights costs (HOLMES, SUNSTEIN 1999). The exercise of any right by citizens presupposes that the state has planned spending policies guaranteeing their protection. The fact that rights cost makes it necessary to make justified choices. The justification of policy choices inherent to the protection of rights (or, rather, the protection of one right at the expense of another) presupposes an interpretative activity aimed at determining the content of rights, some

form of balancing or trade-off, and so on. For the reasons seen above, this calls into question the foundation of rights.

Fourthly, we must consider the intricate relationship between rights and democracy. The proliferation of rights, coupled with the role of judges as guardians of those rights, reduces the discretionary choices available to political power. Judges' erosion of political power is one of the defining features of the RoL of contemporary constitutionalism (see § 3). Moreover, disagreement over rights is a structural feature (as is disagreement over justice, politics, and law more generally) (WALDRON 1999). Consequently, the belief that rights delineate an area removed from decision-making is a dangerous fiction, since decisions taken by a majority or a "judiciary aristocracy" are "disguised" as mere recognition of pre-existing rights.

Finally, a particularly demanding challenge to the reassuring idea that there is a universal consensus on human rights comes from pluralism. Pluralism evokes the notion of incommensurability. A genuinely pluralist society is one in which there are instances of genuine divergences, i.e., divergences that cannot be rationally composed. This conclusion is all the more pertinent in multicultural societies, which are characterised by multiple cultural entities – i.e., multiple symbolic universes that give meaning to individuals' life plans – that aspire to preserve their ever-changing identity of origin and participate in everyday political life. The original nature of cultures renders the problem of incommensurability even more significant than it is in the context of pluralism.

These difficulties do not deter supporters of the RoL of contemporary constitutionalism. As we have seen, they resort to ideas such as fidelity to the law and the interpretive community. The values shared within a political community are indeed controversial. However, all community members are encouraged to express their views on these values. In the interpretative contest that follows, the better argument will prevail. At this point, everyone is expected to show loyalty to the law because they have had the opportunity to express their interpretation of the community's values and are treated with equal consideration and respect.

However, this is a simplified version of RoL's second model. According to this model, law is an interpretive social practice in which the only permissible form of coercion is that of the best argument (see § 5). In an interpretive-argumentative contest, the only permissible coercion is the persuasion without coercion of good arguments. However, as Aristotle taught, reason is founded on the *endoxa* – our intuition and judgment. The problem is that «in a pluralist society – one characterised by different individuals and groups embracing different yet reasonable ideologies, world-views, and conceptions of what is good and just – there is no shared fund of *endoxa* about many bitterly debated issues. [...] Thus, [...] in a pluralist society, about many controversial issues, no argument is possible: there are no common reasons. Moreover, if we understand "genuine reasons" to be considerations that would persuade a universal audience and assume that reasonable pluralism is not contingent but structural to a free society, then on many crucial issues, "genuine" argumentation will not be possible in a pluralist society» (CELANO 2009, 249-250). If this is the case, the best argument is often the one defended by those with the most power to be heard.

7. Two Models of the Jurist

Two different models of jurist and judge correspond to the two alternative models of RoL (BOBBIO 2007).

The first model portrays the jurist as a "guardian" and custodian of an existing body of norms. According to this model, the jurist's main activity is interpretation. It should be noted that, in this model, interpretative activity involves little or no discretionary decision-making by the interpreter. The concept of the jurist-custodian emerges from ideological and political choices relating to the understanding of the principle of legality, the relationship between powers, and the authority of the state. This conception of legal knowledge considers the latter subordinate to political power. In this respect, the words of 19th century French jurist Charles Demolombe are meaningful: «My credo, my profession of faith, is also: texts first! I am publishing a *Code Napoléon* Course: my aim

is therefore to interpret and explain the *Code Napoléon* itself, considered as living law, as applicable and mandatory law. My preference for the dogmatic method will not prevent me from always taking the very articles of the law as a basis» (BOBBIO 1996b, 83).

The second model portrays the jurist as a “creator” of law, playing a full role in legal practice and contributing to the legal system’s modification, integration, and transformation. According to this model, Bobbio argues that the jurist’s main activity is the creation of law. Even when the jurist self-presents himself as the creator of law, the activity that characterises him is always interpretative. What changes from the first model is the jurist’s attitude towards interpretation. In the former case, the jurist adopts an attitude of self-restraint. In contrast, in the latter, he expands his discretion to the maximum through recourse to principles, programmatic norms, and constitutionally oriented interpretation.

Several factors influence the prevalence of one model over another. The first factor relates to the legal system in which the jurist operates (“institutional factor”). A legal system can be either closed or open. A legal system is closed if it is a systematic body of rules tending towards completeness and expressed in a specific language. It is open if the rules are “fluid”, i.e., indeterminate and continuously changing, and if «the jurist is involved in creating new law alongside the legislator and judge». (BOBBIO 2007, 36). The Enlightenment RoL can be depicted as a closed system, whereas the RoL of contemporary constitutionalism is open.

The second factor depends on the general social situation (“social factor”). The stability or change of a society depends on the influence of change factors on existing cultural patterns.

The last factor stems from the prevailing conception of law among jurists and how the relationship between law and society is “calibrated” (“cultural factor”). Law can be viewed as an autonomous, largely self-referential system, a subsystem within a broader system, or a superstructure built upon the social and economic structure. If the law is considered a sub-system of the social system, it becomes interesting to explore its role within society. In other words, it is important to understand whether the law is at the centre or periphery of the social system.

It is difficult to deny that contemporary law is an open system continuously transforming due to globalisation, and is characterised by pluralism and multiculturalism (see § 6). Furthermore, the law is increasingly understood as a reflection of society, which implies that today’s model of the jurist is what Bobbio calls “creative”: «in this perspective the main activity of the jurist is no longer the interpretation of a law already made but the search for a law to be made, *in fieri*, not so much the *validation* based on an analysis of the formal sources of the law that is, as the *legitimation*, based on the material principles of justice, of the law that is to be» (BOBBIO 2007, 37-38).

8. Conclusion

The theses that I have defended in this essay are threefold.

Firstly, there are two RoL models, each of which has many versions. These two models are alternatives because they pursue different values and goals. The Enlightenment RoL cherishes individual freedom and, for this reason, identifies certainty as the fundamental value of law. The RoL of contemporary constitutionalism considers law an interpretative social practice centred on specific shared values. To realise these values, the law must be flexible and judges must be given broad discretion. However, this fatally reduces the certainty of the law, and with it, the freedom of individuals. In short, the first RoL model treats individuals as adults because it does not act behind their backs. It gives each individual the freedom to decide whether or not to follow the law, with full knowledge of the consequences of their actions.

On the other hand, it risks fostering an acquiescent and accommodating attitude towards the law, which, by eroding individual autonomy, produces a regression to childhood. If the law is considered a practical authority, we must do what it asks us to, not because we choose to, but because it asks us to. Contemporary law and today’s prevailing legal ideology openly challenge the original

myth of legal certainty. The constitutionalisation of legal systems increases the law's flexibility to the detriment of certainty and requires everyone – legislators, judges, and individuals subject to the law – to assume their responsibilities and the risks involved.

The second thesis is that although the RoL of contemporary constitutionalism presents law as a social practice built around horizontal and not vertical relationships and minimises the role of force, the image does not coincide with the reality of things. The difference from the Enlightenment RoL is that, in that case, force acts openly in front of individuals. In contrast, in the case of the RoL of contemporary constitutionalism, it acts behind their backs.

Finally, the two models are not elaborated in vacuo but express the zeitgeist of different legal experiences. The Enlightenment RoL expresses the ideals of the modern state, while the RoL of contemporary constitutionalism is that of contemporary constitutional states. There is a tendency to present these two models in continuity, but they are alternative models.

References

- BARBERIS M. 2016. *Possono governare, le leggi? Il dilemma del rule of law*, in PINO G., VILLA V., *Rule of Law. L'ideale della legalità*, Il Mulino, 13-35.
- BOBBIO N. 1996a. *The Age of Rights* (1992), Polity.
- BOBBIO N. 1996b. *Il positivismo giuridico* (1a ed. 1961), Giappichelli.
- BOBBIO N. 2007. *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (1a ed. 1977), Laterza.
- CELANO B. 2009. *La forza dell'argomento migliore*, in «Diritto e questioni pubbliche», 9, 2009, 229-255.
- CELANO B. 2013. *Normative Legal Positivism, Neutrality, and the Rule of Law*, in FERRER BELTRÁN J., MORESO J.J., PAPAYANNIS D. (eds.), *Neutrality and Theory of Law*, Springer, 175-201.
- DWORKIN R. 1985. *A Matter of Principle*, Harvard University Press.
- DWORKIN R. 1986. *Law's Empire*, The Belknap Press of Harvard University Press.
- FERRAJOLI L. 1997. *La sovranità nel mondo moderno*, Laterza.
- FULLER L.L. 1969. *The Morality of Law. Revised edition* (1964), Yale University Press.
- HART H.L.A. 1994. *The Concept of Law. Second Edition* (1961), Calrendon Press.
- HAYEK F.A. VON. 2006. *The Road to Serfdom* (1944), Routledge.
- HOLMES S., SUNSTEIN C.R. 1999. *The Cost of Rights. Why Liberty Depends on Taxes*, W. W. Norton & Co.
- MACCORMICK N. 2009. *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press.
- POSTEMA G.J. 2022. *Law's Rule. The Nature, Value, and Viability of the Rule of Law*, Oxford University Press.
- RAZ J. 1979. *The Rule of Law and Its Virtue* (1977), in ID., *The Authority of Law. Essays on Law and Morality*, Oxford Clarendon Press, 210-229.
- SCHAUER F. 2015. *The Force of Law*, Harvard University Press.
- SCHIAVELLO A. 2016. *Ripensare l'età dei diritti*, Mucchi.
- TAMANAH B.Z. 2004. *On the Rule of Law, History, Politics, Theory*, Cambridge University Press.
- WALDRON J. 1999. *The Dignity of Legislation*, Cambridge University Press.
- WALDRON J. 2002. *Is the Rule of Law an essentially Contested Concept (in Florida)?*, in «Law and Philosophy», 21, 137-164.
- WALDRON J. 2004. *The Rule of Law as a Theater of Debate*, in BURLEY J. (ed.), *Dworkin and his Critics: with Replies by Dworkin*, Blackwell Publishing, 319-336.
- WALDRON J. 2008. *The Concept and the Rule of Law*, in «Georgia Law Review», 43, 1, 2008, 1-61.
- WALDRON J. 2010. *The Rule of Law and the Importance of Procedure*, in «NYU School of Law-Public Law & Legal Theory Research Paper Series. Working Paper no. 10-73».

On the Relations between the Rule of Law and Democracy

RICCARDO GUASTINI

University of Genoa, Italy.

E-mail: guastini@unige.it

ABSTRACT

The essay clarifies the relationships between the rule of law, the separation of powers, and democracy – concepts that are often conflated in public discourse. After distinguishing the different meanings of “separation of powers”, the paper reconstructs the rule of law as an institutional arrangement grounded on the specialization and independence of the judiciary and in the subjection of the executive to the law, which, within the liberal state, is complemented by the principles of liberty, equality, and legality. Democracy, by contrast, is understood as a form of government based on meta-rules regulating legislative production: the election of the legislative assembly by universal suffrage, proportional representation, and majority decision-making. The essay argues that there is no necessary conceptual connection between democracy and the rule of law: the nineteenth-century rule-of-law state was not intrinsically democratic, whereas the twentieth-century constitutional state, characterized by constitutional rigidity and judicial review, introduces counter-majoritarian institutions that limit the democratic principle. The result is an analytical reconstruction that sharply separates the three concepts and redefines their relationships in structural terms.

Il saggio chiarisce i rapporti tra Stato di diritto, separazione dei poteri e democrazia, nozioni spesso confuse nel discorso pubblico. Dopo aver distinto i diversi significati di “separazione dei poteri”, il paper ricostruisce lo Stato di diritto come assetto istituzionale fondato sulla specializzazione e indipendenza del potere giudiziario e sulla soggezione dell'esecutivo alla legge, che, nello Stato liberale, è integrato dai principi di libertà, uguaglianza e legalità. La democrazia, invece, è intesa come forma di governo fondata su meta-regole che disciplinano la produzione del diritto: l'elezione dell'assemblea legislativa a suffragio universale, il sistema proporzionale e la decisione a maggioranza. Il saggio mostra che non vi è una connessione concettuale necessaria tra democrazia e Stato di diritto: lo Stato di diritto ottocentesco non era intrinsecamente democratico, mentre lo Stato costituzionale novecentesco, con rigidità costituzionale e controllo di costituzionalità, introduce istituzioni contro-maggioritarie che limitano il principio democratico. Ne risulta una ricostruzione analitica che separa nettamente i tre concetti e ne ridefinisce i rapporti in termini strutturali.

KEYWORDS

Liberal rule-of-law state, separation of powers, constitutional democracy, legality, liberty, equality, self-determination, judicial independence, judicial review

Stato (liberale) di diritto, separazione dei poteri, democrazia (costituzionale), legalità, libertà, uguaglianza, auto-determinazione, indipendenza giudiziaria, controllo di costituzionalità

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



On the Relations between the Rule of Law and Democracy

RICCARDO GUASTINI

1. *Separation of Powers* – 1.1 *The Legislative and the Executive* – 1.2 *The Judiciary* – 2. *The Rule of Law* – 3. *Democracy* – 3.1 *Self-determination* – 3.2 *Democracy, Separation of Powers, Rule of Law*.

The expressions *rule of law* and *Stato di diritto* occur in several international treaties. They occur, but they are not defined.

In the North Atlantic Treaty one reads, among other things: «The Parties to this Treaty [...] are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and *the rule of law*»¹. In the Italian version, the same passage reads: «Gli Stati che aderiscono al presente Trattato [...] si dicono determinati a salvaguardare la libertà dei loro popoli, il loro comune retaggio e la loro civiltà, fondati sui principi della democrazia, sulle libertà individuali e sulla *preminenza del diritto*»². It is worth noting that “rule of law” is translated not as “*Stato di diritto*”, but as “*preminenza del diritto*” (supremacy of law), an expression that is, to say the least, unusual.

In the Treaty on European Union we read that “[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, *the rule of law*, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”. And again: «The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, *the rule of law*, human rights and the principles of international law»³.

In the Italian version we find: «L’azione dell’Unione sulla scena internazionale si fonda sui principi che ne hanno informato la creazione, lo sviluppo e l’allargamento e che essa si prefigge di promuovere nel resto del mondo: democrazia, *Stato di diritto*, universalità e indivisibilità dei diritti dell’uomo e delle libertà fondamentali, rispetto della dignità umana, principi di uguaglianza e di solidarietà e rispetto dei principi della Carta delle Nazioni Unite e del diritto internazionale»⁴. Here, in short, the rule of law is rendered as “*Stato di diritto*”.

Thus – leaving aside the peculiar expression “*preminenza del diritto*” (supremacy of law) – “rule of law” and “*Stato di diritto*” appear to denote the same thing: the classical idea of “*nomos basileus*”, or what is commonly called the “government of laws”, as opposed to despotism or arbitrary government. One should note, however, that the English word “law” translates “*diritto*”, not “*legge*”, since it refers not only to statutes (acts of Parliament) but also, and above all, to the common law.

If one looks at the history of legal thought, however, it is at least doubtful that the two expressions correspond to a single concept. “Rule of law” and “*Stato di diritto*” (or “*État de droit*”, “*Rechtsstaat*”) belong to two distinct doctrinal traditions: the common law tradition (Dicey, Bingham, and others), and the civil law tradition (Jhering, Laband, Jellinek, Duguit, Hauriou, Carré de Malberg, and others)⁵. The literature on the subject is vast and I will not attempt to summarize it here.

¹ The North Atlantic Treaty. (1949). <https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/1949/04/04/the-north-atlantic-treaty>.

² Trattato Nord Atlantico. (1949). <https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/1949/04/04/the-north-atlantic-treaty?selectedLocale=it>.

³ The Treaty on European Union. (2016). https://eur-lex.europa.eu/eli/treaty/teu_2016/2025-03-15.

⁴ Trattato sull’Unione europea. (2016). https://eur-lex.europa.eu/eli/treaty/teu_2016/2025-03-15.

⁵ See, e.g., HEUSCHLING 2002; COSTA, ZOLO 2002; LOUGHLIN 2010.

In Italian public discourse – *toute chose confondue* –, the rule of law, the separation of powers, and democracy are treated as if they were interchangeable notions. In particular, it looks as if there can be no democracy without separation of powers, and no rule of law without democracy.

Some conceptual clarification therefore seems necessary – in the form of a series of redefinitions.

1. Separation of Powers

It is convenient to begin with the separation of powers. This notion is closely connected with the rule of law (but not with democracy, as will become clear shortly).

“Separation of powers” is a complex and far from univocal notion. The reason is that, in such a phrase, the word “power” is used to denote, indiscriminately and somewhat confusingly, two quite different things:

- i. a function of the state;
- ii. the body, or set of bodies (state organs), to which that function is attributed.

Accordingly, separation takes different forms depending on whether it is referred to functions or to organs.

1.1 The Legislative and the Executive

Let us first consider the relations between the legislative and the executive.

(i) *Separation of functions*. If separation is referred to functions, it amounts to “specialization”: A function can be said to be specialized when it is reserved to a certain organ, which exercises it entirely and exclusively.

(ii) *Separation of organs*. If separation is referred to organs, it does not amount to mutual independence, despite what the word “separation” might suggest. It amounts instead to a system of reciprocal checks and balances: *le pouvoir arrête le pouvoir*. Powers and counter-powers are, in fact, the opposite of reciprocal independence.

1.2 The Judiciary

The judiciary requires a separate discussion. This is the aspect of separation that is relevant for the concept of the rule of law.

With regard to the judiciary, separation of powers requires both specialization of the judicial function and independence of judicial bodies. Specialization excludes the possibility that the legislative and/or the executive exercise judicial functions. Independence, above all, excludes the existence of checks and balances constraining adjudication.

(i) *Specialization*. Neither the legislature nor the executive should exercise the judicial function.

Not the legislature: If the determination of violations of the law in concrete cases were entrusted to the same body that is competent to produce the law, both the principle of equality and legal certainty – understood as the predictability of decisions – would be exposed to serious risks. When deciding a concrete dispute, the legislature could enact *ad hoc* norms that are at once individual (thus violating equality), and retroactive (thus undermining predictability of decisions).

Not the executive, for at least two reasons: First, the use of force – the application of sanctions – must be grounded on a prior and impartial determination of a violation of legal norms (otherwise it would lack justification). Second, the acts of the executive themselves are subject to judicial review.

Here, separation of powers is connected not with democracy (as will be shown later), but with the rule of law.

(ii) *Independence*. If judges were appointed, renewed, or removed by one of the other two powers, their impartiality and political neutrality would not be guaranteed.

2. *The Rule of Law*

By “rule of law” – the “government of laws” – one usually means a legal order in which public powers are subject to the law. But which public powers are at issue? Certainly the executive and the judiciary. Certainly not the legislature – with the exception of the Constitutional state – since the legislature is the source of the law.

From an institutional point of view, the rule of law therefore reduces to, and practically coincides with, the following two elements: (a) on the one hand, the specialization and independence of the judiciary; (b) on the other hand, the subjection of the executive to the law and the judicial review of its acts.

In a liberal state, however, the rule of law is characterized not only by a certain arrangement of powers, but also by a certain content of the legal order: on the one hand, the principle of legal equality; on the other hand, the principles of liberty and legality.

As to the principle of equality, this is not the place to go into detail. It will suffice to say that it is a meta-rule requiring the equal distribution of rights.

Now, any (modern Western) legal order consists of two levels, or layers, of rules:

- i. rules of conduct, addressed to private individuals, which deontically characterize behavior (as obligatory, prohibited, permitted, optional);
- ii. power-conferring meta-rules or meta-rules of competence, which establish and delimit the public powers of producing and applying the law, using non-deontic modalities: power (or competence), liability, disability, immunity.

However, in a liberal state, the rule of law requires that each of these two sets of rules have its own closing principle.

The set of rules of conduct is closed by the principle of liberty, also known as the general “exclusive” or “negative” norm: “Everything that is not expressly prohibited (to private individuals) is tacitly permitted”. A celebrated formulation can be found in Article 5 of the 1789 French Declaration of the Rights of Man and of the Citizen: «Tout ce qui n’est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu’elle n’ordonne pas»⁶.

The set of competence rules, by contrast, is closed by the principle of legality: roughly speaking, “Everything that is not expressly permitted (to public authorities) is tacitly prohibited”.

Both principles require clarification.

(a) The principle of liberty, thus formulated, is a tautology, since deontic modalities are inter-definable and “permitted” is logically equivalent to “not prohibited”. What matters, however, is to understand that one thing is a behavior that is permitted (in a negative or weak sense, so to speak) merely because it is not prohibited – and is therefore susceptible of being prohibited in the future; another thing is a permission (strong or positive) laid down by a norm that expressly confers a liberty right.

The distinction between negative permission and positive permission becomes particularly important when the positive permission in question is a liberty right guaranteed by a rigid constitution. A constitutional liberty is something quite different from a “natural”, pre-legal, liberty that exists (only) where positive law does not reach.

⁶ National Assembly of France. (1789). *Declaration of the Rights of Man and of the Citizen* (August 26, 1789). <https://www.legifrance.gouv.fr>.

This way of thinking (which dates back to seventeenth-century legal theory) presupposes that there is no obligation without a rule establishing it. Accordingly, “natural” liberty is coextensive with legal gaps, understood in an elementary sense as forms of behavior that are not deontically regulated and are therefore indifferent. This is the idea of the “empty space of law”, elaborated by Karl Bergbohm and Santi Romano: the set of forms of conduct, or legally relevant states of affairs, with respect to which the law is silent⁷.

(b) As to the principle of legality, its deontic formulation, offered above and symmetrical to that of the principle of liberty, is appealing but conceptually inaccurate, since what is at issue here are not deontic notions, but Hohfeldian ones (that is, concepts elaborated at the beginning of the last century by the American jurist W. N. Hohfeld, intended to disambiguate the notion of subjective right)⁸. Not obligations and permissions, but powers and liabilities. Strictly speaking, one should say: “Everything that is not authorized is unauthorized”. Again, a tautology – apparently. But not quite.

In public law, unauthorized means formally invalid – that is, invalid independently of the content of the act concerned. This is because, while there are pre-legal liberties “in nature” (that is, legally indifferent forms of behavior), there are no pre-legal powers or competences. Legal power – unlike mere factual power – is an artificial creation of positive law. There is no legal power without a rule that confers it. In short, the principle of legality is therefore nothing more than a rule concerning the validity of the acts of public authorities. In a rule-of-law state, such validity is subject to judicial review.

No need to say that a state qualifies as a rule-of-law state if, and only if, this set of principles is effectively applied.

3. *Democracy*

Democracy – the last concept that needs clarification in this context – is nothing other than a form of government (or of state, or of regime, as some might prefer to say). That is, in the final analysis, a set of meta-rules governing the production of law. Which should not be confused with the content of the law.

In a democratic form of government, the meta-rules at stake confer the legislative function – the power to enact general norms binding on the entire community – on an assembly elected by universal suffrage under a proportional system, and deciding by majority. This is the core of democracy. Everything else is secondary.

Two marginal remarks are in order.

(a) First, the direct election of the executive (or of its Head: be that the president of the republic or the prime minister, for example) has nothing to do with democracy. It is, rather, a characteristic feature of regimes that are at least tendentially autocratic – “elective autocracies”, as Michelangelo Bovero aptly calls them⁹ – in which the executive tends to be insulated from parliamentary control and significant political powers are transferred from the legislature to the executive.

(b) Second, any majoritarian electoral system contradicts the democratic principle (with the possible exception of a two-round system with very small constituencies, as many as there are seats to be filled). The democratic principle requires equality of the vote. Yet in a majoritarian system votes clearly do not have equal weight: The votes of the majority weigh more.

This is even more evident in systems that provide for a so-called “majority bonus”, where the holders of the “bonus” seats represent no one, since they have not been elected by anyone.

⁷ BERGBOHM 1892; ROMANO 1925.

⁸ HOHFELD 1913; HOHFELD 1917.

⁹ BOVERO 2015.

The so-called majority bonus prefigures the “tyranny of the majority”. Moreover, the majority thus produced is fictitious, since it is artificially created by a non-proportional electoral law.

With the aggravating circumstance that such a fictitious majority endangers the qualified majorities typically required by constitutions to protect constitutional rigidity, minorities, and the independence of those organs (such as constitutional courts) that are meant to guarantee the constitution and/or political minorities and/or citizens’ rights and liberties.

3.1 *Self-determination*

The axiological foundation of the democratic form of government lies in the political principle of self-determination, albeit (inevitably) tempered by the majority rule. According to this principle, citizens should obey only themselves – that is, the laws that they themselves have willed, directly or at least through their elected representatives.

The principle of self-determination presupposes that certain fundamental civil and political liberties are guaranteed (at least personal liberty, free speech, freedom of the press, freedom of assembly, freedom of association) as well as equality among citizens – that is, their political equality and not so-called substantive (social) equality, which depends on social facts and, if anything, on the content of the law rather than on the mode of its production.

Another clarification is needed here. If equality and fundamental liberties are guaranteed by statutory law or by a flexible constitution – that is, a constitution freely amendable by the legislature – then they are merely necessary presuppositions of self-determination. If, by contrast, they are guaranteed by a rigid constitution, not amendable by “ordinary” acts of parliament, then they constitute limits on the legislature (that is, on the political majority) and therefore limits on democracy itself.

Constitutional democracy is thus a limited form of democracy. Constitutional rigidity and, even more so, judicial review of legislation are counter-majoritarian institutions. Constitutional judges – or supreme court justices, where the review is decentralized – are counter-powers to legislative power.

3.2 *Democracy, Separation of Powers, Rule of Law*

Given the confusion that characterizes public discourse, some further clarification is required concerning the relations between democracy, separation of powers, and the rule of law.

(i) As regards the separation between the legislative and the executive, democracy would require specialization of the legislative function: only the legislative assembly should have the power to enact general rules binding on the whole community.

Yet in no constitutional system is the legislative function strictly specialized, since the so-called “executive” function never consists in the mere enforcement of the law. To begin with, governments are always endowed with legislative initiative and, above all, with more or less extensive normative powers: at least secondary powers (consisting in enacting rules with a lower rank than the statutory ones), but almost always primary normative powers as well, that is, powers competing with the legislative function (decrees having the force of law). The legislative function, in short, is not fully reserved to the body called “legislative”. Moreover, governments invariably enjoy powers that escape any legislative predetermination, for example in the field of international relations.

All this contradicts the democratic principle, which sits uneasily with an executive that legislates or co-legislates.

In a democratic form of government – and only in such a form – the executive is separated, but not “independent”, from the legislature, in the sense that its acts are subject to legislative rules.

In parliamentary systems, the executive is politically responsible to the legislature, which may deny it confidence and thereby force it to resign. It should be noted that this holds in parliamentary systems, not in a presidential one, in which the executive does not depend on the confidence

of the legislative assembly. Legislative primacy over the executive would appear consistent with the democratic principle. Yet this same principle is contradicted by the veto power over legislation and by the power to dissolve the legislative assembly – powers that the executive typically holds, at least in parliamentary regimes.

It should also be said that, in some systems (roughly speaking, parliamentary regimes), and in any case according to certain juristic doctrines, the head of state is regarded – rightly or wrongly – not as the head of the executive, but as a “fourth power”, a so-called “neutral power”, functioning as guarantor of the proper functioning of the constitutional process. This calls into question not so much the separation of powers as the identification of the powers themselves (not three, but four – leaving aside constitutional judges, whom I will address shortly).

(ii) As regards the judiciary, it should first be observed that the democratic principle, properly understood, requires not that judges be chosen “democratically” – that is, elected by the people, on the basis, it is assumed, of one or another political orientation – but, on the contrary, that they be subject only to the law (the outcome of democratic deliberation), independently of their political preferences. And therefore that they be selected on the basis of technical competence, not political inclination.

On the other hand, in a constitutional democracy – characterized by a rigid constitution and judicial review of legislation (exercised, depending on the system, by a constitutional court or by the courts in general) – the legislative function is divided between two distinct bodies: the legislature and the constitutional judge. The latter, despite its judicial nature (in terms of decision-making procedure), concurs in the legislative function, at least “negatively”, by removing unconstitutional laws from the legal order (and sometimes positively, through so-called “additive” or “substitutive” decisions).

Constitutional rigidity and judicial review are counter-majoritarian and therefore non-democratic institutions.

Constitutional rigidity defeats the democratic principle because it limits legislative function, in particular the majority rule, since constitutional amendment typically requires qualified majorities.

Judicial review of legislation defeats the democratic principle because it involves a judge interfering with the legislative function. It also conflicts with a central aspect of the separation of powers. On closer inspection, the constitutional judge is something other than part of the judicial power: It is an institution that again calls into question not so much the separation of powers as the very identification of the powers in question.

(This is not the place to examine the normative function – and thus, in a broad or “material” sense, “legislative” function – exercised by ordinary judges by virtue of their interpretive powers).

(iii) Finally, as regards the relations between democracy and the rule of law, two points must be made: (a) the nineteenth-century “legislative” or “liberal” rule-of-law state had little or nothing to do with democracy; (b) the twentieth-century “constitutional” rule-of-law state – characterized by constitutional rigidity and judicial review of legislation – openly contradicts the democratic principle, in the manner just described.

The “government of laws”, however, says nothing about the nature or structure of the legislature, which is not necessarily a democratic body. In short, there is no conceptual connection between the rule of law and democracy.

References

- BERGBOHM K. 1892. *Jurisprudenz und Rechtsphilosophie*, vol. I, Dunker & Humblot.
- BOVERO M. 2015. *Autocrazie elettive*, in «Costituzionalismo.it», available at: https://www.costituzionalismo.it/download/Costituzionalismo_201502_529.pdf.
- COSTA P., ZOLO D. (eds.) 2002. *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli.
- HEUSCHLING L. 2002. *État de droit, Rechtsstaat, Rule of Law*, Dalloz.
- HOHFELD W.N. 1913. *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in «The Yale Law Journal», 23(1), 1913, 16-59.
- HOHFELD W.N. 1917. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in «The Yale Law Journal», 26(8), 1917, 710-770.
- LOUGHLIN M. 2010. *Rechtsstaat, Rule of Law, l'État de droit*, in ID., *Foundations of Public Law*, Oxford University Press.
- ROMANO S. 1925. *Osservazioni sulla completezza dell'ordinamento statale*, Università di Modena.

Soft Law, Justiciability, and the Rule of Law

CHIARA VALENTINI

University of Bologna, Italy.

E-mail: c.valentini@unibo.it

ABSTRACT

The justiciability of soft law is a demand of the rule of law, understood as “articulated governance” (WALDRON 2013): the normative impact of power must be channelled, exposed, and controlled by structuring its exercise through a sequence that encompasses, and differentiates, the phases in which that impact takes shape – norm-production, application, and scrutiny. Within this sequence, courts occupy a central position, serving as a crucial node of control over power’s normative impact in relation to particular cases. Soft law too, insofar as it has normative influence, must be “articulated” in these terms and, thus, subject to judicial scrutiny. The aim is not to convert soft law into hard law, but to render visible, and subject to public scrutiny, the normative force it exerts.

La giustiziabilità del soft law risponde ad una esigenza fondamentale dello stato di diritto, in termini di “articulated governance” (WALDRON 2013): occorre incanalare, esporre e controllare l’impatto normativo del potere articolando il suo esercizio in una sequenza che contempra, e differenzia, le fasi in cui esso prende forma – produzione normativa, applicazione, e scrutinio. In questa sequenza, la giurisdizione occupa una posizione centrale, costituendo il cruciale snodo di controllo sull’impatto normativo del potere in relazione a casi concreti. Anche il *soft law*, data la sua portata normativa, deve essere “articolato” in questi termini e, quindi, sottoposto a scrutinio giudiziale. Non si tratta di convertirlo in *hard law*, ma di rendere visibile, e soggetta a pubblico scrutinio, la forza normativa che esso dispiega.

KEYWORDS

Soft law, justiciability, rule of law, governance, judicial review, democracy

Soft law, giustiziabilità, stato di diritto, governance, controllo giurisdizionale, democrazia

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall’Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all’impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



Soft Law, Justiciability, and the Rule of Law

CHIARA VALENTINI

1. *Introduction* – 2. *What Is Soft Law?* – 2.1 *Conceptual Challenges* – 3. *Normative Challenges* – 4. *Soft Law and the Rule of Law* – 4.1 *From the Articulation of Governance to Justiciability* – 5. *The Debate on Soft Law Justiciability* – 5.1 *Assessing the Rule of Law Legitimacy of Soft Law* – 6. *The Approach of the ECJ* – 7. *Justiciability and Democratic Legitimacy* – 8. *Conclusion*.

1. *Introduction*

Contemporary systems of governance increasingly rely on soft law, a heterogeneous set of normative instruments sharing a common feature: they are not hard law in the sense that they stand outside the system of legal sources and lack legal bindingness (SNYDER 1994; SENDEN 2004; WESTERMAN et al. 2018; PINO 2021)¹.

Yet soft-law instruments exert normative force and play a significant role in shaping the conduct of both institutional and non-institutional actors, also interacting with legal norms through relations of complementarity, supplementarity, or integration. These relations can also assume a conflictual character, when soft law produces effects that contradict binding legal norms (SHAFFER, POLLACK 2012; STEFAN 2024) or when it effectively imposes obligations that the legislature did not enact, displacing the normative choices embedded within hard law².

In this respect, the nature of soft law instruments is atypical and raises important questions at two levels. First, at the conceptual level, questions arise about the distinctive features of soft law, its relationship to the legal system and the sources of law, its function, and the mechanisms that characterize its production and application. Second, at the normative level, questions arise about the legitimacy of soft-law instruments, in light of the rule of law and the democratic principle. On both levels, these questions remain highly contested, as we are dealing with a new and continuously evolving phenomenon that still requires substantial clarification.

Against this background, a central and particularly controversial issue concerns the justiciability of soft law, that is, whether, and on what grounds, judicial bodies may rely on soft law in adjudication and how such judicial reliance fits the rule of law in a democratic system. I will attempt to illustrate this problematic dimension of soft law, suggesting that its justiciability is not only compatible with, but justified by, the rule of law. The argument is, in a nutshell, that soft law emerges from the exercise of powers that shape the normative environment within which citizens

* This article partially expands on the contents of VALENTINI 2025a, chapter 4. I wish to thank all participants in the CLEAR workshop “Rule of Law: in Books, in Minds” (Bologna, 7-8 July 2025) for their comments and observations on an earlier version of this work, which were extremely insightful and helpful.

¹ SNYDER 1994, 32 defines soft law as a set of «rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects». For a comprehensive overview and analysis of the heterogeneous and varied spectrum of sources of soft law, see ELIANTONIO et al. 2023, and DELGADO, NUNEZ VAQUERO 2025.

² This conflict potential is bound up with the sources of soft law's authority. Soft law gains its normative power from the quality of its reasoning and the expertise it reflects, as well as from the institutional position of its source. A guideline issued by a regulatory agency, a recommendation from a higher administrative body, or an indicator developed by an international organization carries weight both for what it says and for who issues it. For actors within institutional hierarchies or those dependent on ongoing relationships with these bodies, ignoring soft law involves risks, such as reputational costs, relational consequences, or the expectation of stricter enforcement, which make it practically binding regardless of its formal status. The result is a *de facto* obligation that functions outside the usual legal and democratic authority governing the creation of legal duties. When conflict arises, the hierarchy of legal sources requires that hard law prevails. However, without mechanisms to identify and resolve these conflicts, soft law can still operate, potentially displacing hard law, and the tension often remains unnoticed for legal review. This gap is what justiciability is meant to address.

and institutions operate. As such, it falls within the scope of the rule of law, understood as an ideal of “articulated governance” (WALDRON 2013): the exercise of power with normative impact must be channelled through a sequence of distinguishable stages – production, execution, scrutiny – that make it visible and subject to control, opposing its arbitrary use (WALDRON 2013; KING 2025). Courts play a central role within this sequence by examining how power normatively impacts on particular cases, thereby providing an indispensable stage of control: in these terms, the rule of law justifies the judicial scrutiny of soft law.

From this perspective, the article clarifies the conditions under which, and the standards by which, the judicial engagement with soft law is grounded in, and enhances, the rule of law. The analysis proceeds as follows. After outlining the concept of soft law and emphasizing its atypical nature and effects, it points out the normative challenges that soft law raises, particularly its contested relationship with the rule of law. The article then examines this relationship and highlights its relevance for the rule-of-law requirement that normative powers be subject to public scrutiny, especially by judicial means. From this perspective, the analysis proceeds by outlining the debate on the justiciability of soft law and responds to key objections, arguing that justiciability follows from the rule of law. Then, it draws on recent developments in the ECJ’s case law and in contemporary soft-law theory to propose a framework for assessing the legitimacy of soft law, pointing out that justiciability is crucial not only for reasons of legality but also for reasons of democratic accountability.

2. What Is Soft Law?

The concept of soft law captures a varied set of normative instruments, such as recommendations, guidelines, communications, codes of conduct, technical standards, that do not belong to the legal system and lack legally binding force (SNYDER 1993, 1994; THIBIERGE 2003; TERPAN 2023)³. Nonetheless, these instruments exert significant normative influence by shaping the expectations, and orienting the actions, of citizens and institutional and non-institutional bodies. In this sense, soft law provides a distinctive normative route – alternative or complementary to hard law, in preparatory or executive forms – offering an informal regulatory option free from the burdens of time, form, and procedural rigidity that hard law imposes. As such, soft law has become increasingly central to contemporary systems of governance and, today, it constitutes one of the most relevant elements of institutional practices across the EU, spanning both public and private law settings. The production of soft law has increased exponentially, involving a plurality of actors, from institutions to independent agencies, transnational networks, and standardisation bodies (ELIANTONIO et al. 2023; DI ROBILANT 2006; SNYDER 1993, 1994).

Despite its widespread use and practical relevance, however, soft law remains without clear conceptual boundaries. Explicit references to it in positive law are rare; rather, the concept has taken shape primarily within doctrinal discourse, first in international law (MCNAIR 1930), then with a progressively broader scope (TERPAN 2023). Originally the term referred to treaty instruments intended to generate extra-legal obligations between States. Over time, doctrine extended the concept to describe various regulatory techniques adopted at the supranational level especially to govern relations between the European Union and its Member States. Within domestic settings

³ The most minimalist definition describes soft law in residual terms: the set of regulatory instruments that do not fall within the category of hard law, such as recommendations, guidelines, codes of conduct, resolutions and opinions. These instruments have common characteristics – often in contrast to hard law – such as lack of precision, absence of binding force and lack of enforcement mechanisms. THIBIERGE 2003, depending on the combination of these characteristics, further distinguishes between “flou”, “doux” and “mou” law, respectively referring to law that is vague or imprecise in content (*flou*), that lacks binding force (*doux*), and that is devoid of enforcement mechanisms (*mou*).

as well, soft law encompasses norms that have no direct legal effect and yet guide the behaviour of their addressees. Domestic soft law often results from regulatory powers exercised by public authorities in sectors such as taxation, health, and public security, but in some cases is produced without a specific legislative mandate, also by private or hybrid actors⁴.

Understanding the nature and function of soft law, therefore, requires engaging with a multi-form, hybrid, and multi-level regulatory paradigm in which normativity goes beyond legality to encompass forms of “soft” practical guidance that are external to hard law. Although indirectly, this guidance remains legally relevant: the coordinates provided by soft law instruments interact with legal norms and, by virtue of this interaction, acquire significance for the operation of hard law, particularly through courts and administrative bodies (SCOTT 2011; ELIANTONIO 2018). Indeed, through various mechanisms, soft law enters legal circuits to guide administrative practice, inform judicial reasoning, contribute to the formation of “living law” (TERPAN 2015)⁵. As such, soft law stands as a normative belt connecting legally binding norms, and the legal system, to normative reasons that emerge from external rule-making and standard-setting spheres, which can be institutional, technical, civil (VALENTINI 2025a)⁶. This connecting function is particularly important in multi-level governance systems that require a flexible decision-making structure and the integration of diverse spheres of rule-making. Soft law is thus not merely “weak” law, but a set of autonomous, hybrid, and adaptive regulatory instruments that exert a distinctive normative force. This force derives primarily from its capacity to provide practical orientation through reasoning, persuasion, expertise, rather than through legal obligation.

2.1 Conceptual Challenges

Nonetheless, soft law is typically defined in negative terms, by contrast to hard law, rather than by its own distinctive properties. This negative definitional strategy highlights what soft law lacks, that is, legal bindingness and inclusion among the sources of law, but does not clarify its positive, distinctive, features. This is partly because soft law occupies an intermediate position between hard law and policy-making, inviting comparisons with both while resisting full assimilation to either. In this respect, positions in the literature vary considerably. Some accounts present soft law as a quasi-legal instrument, capable of being partially assimilated to hard law (REGENT 2003; SCOTT, TRUBEK 2002); others treat it as a complement to hard law (DE BÚRCA, SCOTT 2006); others reduce it to a mere rhetorical device, functional to the legitimisation of existing power relations under the guise of normative neutrality (KLABBERS 1998).

As a result, attempts to classify the many forms of soft law remain uncertain: instead of a clearly defined set of distinctive properties that might ground a coherent taxonomy, analyses of soft law tend to rely on loosely specified missing features. What soft law *is*, in positive terms, remains

⁴ An instructive example is offered by administrative circulars (*circolari amministrative*) in Italian law (see, *inter alia*, GIANNINI 1960, CATELANI 1984, BASSI 1989). Traditionally conceived as “internal” acts, binding only within the administration, these normative instruments have increasingly been used to produce also external effects, particularly in sectors such as taxation and public health. This ambiguous status and the controversial question of their justiciability illustrate the broader difficulties surrounding soft law.

⁵ According to TERPAN 2015, soft law can take various forms: on the one hand, non-binding but legally relevant rules; on the other hand, formally binding rules with weak content or no enforcement mechanisms. By combining these two levels, we have a classification based on two axes: the nature of the obligations (more or less binding) and the type of enforcement (more or less stringent). On the basis of these coordinates, we can distinguish between soft law acts that do not establish formal obligations but provide practical guidance from formally binding acts that are ineffective. In this perspective, Terpan proposes a systematic reflection on the regulatory functioning of the European Union, emphasising that it cannot be assimilated to either international or national law. Rather, the EU legal system is part of a regulatory continuum in which binding and non-binding instruments, “hard” and “soft” rules, with strict enforcement and with more flexible enforcement mechanisms, co-exist.

⁶ For a deeper analysis mechanisms of deliberative transmission and their importance, see VALENTINI 2025a.

only partially articulated, both with respect to its sources, forms and modes of production and with respect to its distinct type of normativity.

Further difficulties arise because the descriptive use of the category of soft law is often conflated with its normative use, which aims to justify the legal relevance of non-binding acts (KLABBERS 1998). When the distinction between these two perspectives collapses, soft law risks being analysed *as if* it were law, despite lacking the attributes of legal validity (KLABBERS 1998). Two specific dangers follow. One is the creation of a “regulatory illusion” (KLABBERS 1998), in which soft law is granted an unexamined normative status on the basis of excessive optimism about its impact, allowing political or technical agreements to be accepted as law even when they do not satisfy the criteria of legal validity. The other is conceptual instability: either soft law is assimilated to hard law, thereby losing the specific features that distinguish it, or it is excluded from legal discourse altogether (KLABBERS 1996). Some more articulated positions propose to overcome this dichotomy by considering law not only as a source of formal obligations, but also as a set of instruments that guide behaviour, structure expectations and contribute to the construction of shared meanings. In this perspective, soft law is part of a *continuum* in which normativity takes on gradual and hybrid forms (PASTORE 2003; GOLDMANN 2008; WESTERMANN et al. 2018).

These difficulties extend to the modes of production and application of soft law. Indeed, soft law instruments can be produced and used in different types of institutional settings, within administrations or legislative bodies, as well as in non-institutional – private or hybrid – settings, by entities exercising delegated or non-delegated regulatory powers. Across these various domains, different entities resort to soft law for various regulatory purposes as well as to interpret hard law or to anticipate or implement legal norms. Here too, analysis is often flattened onto the model of hard law, merely noting that soft-law instruments are produced and applied through procedures lacking the formal qualities of the procedures used for hard law, without further characterising this informality or differentiating among its many practical manifestations.

A neglected but crucial point, in this respect, concerns the different degrees of informality that can be observed. Some types of soft law, especially in institutional contexts, arise from procedures whose steps and timelines are defined with considerable precision⁷. This matters because it affects the degree of transparency and certainty we can associate with soft law, and therefore its compatibility with the rule of law.

It is also essential to distinguish between forms of soft-law production and application that rely on a delegated institutional competence and those that do not. This differentiation likewise bears on the legitimacy of soft law and the kind of authority, whether epistemic or practical, that can be associated with it, depending on the institutional credentials of the actors who produce or use it.

This is not the occasion to address all these aspects in detail, but it is important to emphasise that the lack of precise analysis affects the discussion on the justiciability of soft law. The different types of soft-law acts, and the processes governing their production and application, are highly relevant for assessing whether and how courts may rely on them, and with what implications. In this respect, as the case law of the ECJ highlights, the existence of an institutional link between soft law and hard law is particularly significant.

3. Normative Challenges

The conceptual uncertainties surrounding soft law are mirrored by uncertainties concerning its legitimacy. Much of the existing analysis evaluates soft law through criteria developed for hard law, both in terms of legality and democratic authorization. Unsurprisingly, soft law often fails

⁷ This applies to EU Commission regulatory acts, which are produced in accordance with rules of procedure providing for public consultation.

to satisfy these criteria, though its non-conformity varies significantly depending on the type of instrument under consideration. As noted above, one limitation of existing debates is that they rarely differentiate between soft law produced by public actors, private actors, or hybrid entities. These forms of soft law originate from normative activities of different kinds and involve actors whose authority and accountability differ significantly. Without distinguishing among them, we risk flattening important differences.

Against this background, questions of legitimacy arise in two dimensions. One concerns the compatibility of soft law with the rule of law and the requirements associated with legality, such as publicity, clarity, certainty, congruence, and access to justice. The other concerns the democratic legitimacy of soft law, given that it is produced through normative activities that are not directly subject to democratic authorization and control and unfold outside the channels of administrative or judicial processes (ELIANTONIO, ȘTEFAN 2021; SENDEN 2004; KORKEA-AHO 2015; VALENTINI 2025a).

Let me point out that these two dimensions, in democratic constitutional systems, are interdependent: democracy and legality form an integrated normative framework – a system – in which each supports, and enriches, the other (MORESO 2020; VALENTINI 2022, 2023, 2025a, 2025b). Assessing the democratic legitimacy of soft law, therefore, requires consideration of its legality, just as an evaluation of legality involves attention to the democratic dimensions of soft law. The analysis that follows concentrates on the relationship between soft law and the rule of law but will conclude by pointing out that the justiciability of soft law serves not only the demands of legality but also the deliberative quality of democratic systems of governance.

4. *Soft Law and the Rule of Law*

The relationship between soft law and the rule of law is highly contested, particularly in the present context of widespread concerns about regression in legality (SCHEPPELE 2013; PECH, SCHEPPELE 2017; SAJÓ 2024). As soft law becomes an increasingly ordinary tool of governance, it is crucial to assess whether its use reinforces or undermines the expectations associated with the rule of law. Indeed, the informality of soft law is in tension with the core requirements of legality – generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence (FULLER 1969, 33-94). When soft law is produced through procedures that lack the guarantees attached to the adoption of hard law, these requirements may be strained; and when soft law is applied through variable or opaque practices, the same requirements are strained even more.

It should be emphasized, however, that this tension is also due to a theoretical insistence on deriving the rule of law from the “essence” of legality, at the expense of its significance as a political ideal opposing arbitrary power (KING 2025). Recognizing this significance allows us to move beyond the traditional debate between thin and thick conceptions – centred on the moral depth of the rule of law – and to reconsider its scope, also in relation to soft law (KING 2025; RAZ 2009; WALDRON 2008). Indeed, what soft law challenges us to appreciate is not (only) the formal or substantive dimensions of the rule of law, but also its function: structuring power to prevent its arbitrary use. From this perspective, the essential requirements of legality serve to anchor power within a framework of public justification (DICEY 1885; FULLER 1969; DYZENHAUS 2014). Although traditionally applied to hard law and governmental authority, these requirements aim more broadly to channel the normative impact of power on citizens, making its junctures exposed, differentiated, and subject to public scrutiny⁸. The scope of the rule of law, understood in

⁸ WALDRON 2013, 458 points out that «each of those elements embodies concerns about liberty, dignity, and respect that the rule of law represents. They offer multiple points of access, participation, and internalization. Each and all of them represent the step-wise incorporation of new norms into the lives, agency, and freedom of those who are to be subject to the norms».

these terms, extends beyond the exercise of governmental powers to also include other forms of normative power that operate in private or hybrid contexts and depart from ordinary law-making and institutional rule-making more in general. Therefore, not only hard law, but all measures that shape expectations, guide conduct, or influence the practical environment in which individuals act, should be produced through a sequence of recognisable stages, each with its own justificatory role (WALDRON 2013, 458).

This understanding draws on the idea of “articulated governance”: the requirement that power be exercised through a sequence of distinct institutional phases – legislation, adjudication, administration – rather than in an undifferentiated or compressed manner (WALDRON 2013, 459). The point is not simply to limit power but to channel it and “open up the decision making for access [...] at various points” (WALDRON 2013, 457)⁹. Each phase offers opportunities for scrutiny and contestation; and a serious failure of the rule of law occurs when these steps are “omitted” or “blurred” (WALDRON 2013, 458-459).

It is here that the rule of law intersects with the principle of separation of powers (WALDRON 2013, 458; VILE 1998). Both ideals converge on the requirement that the exercise of normative authority unfolds through distinct and identifiable phases, each subject to its own justificatory demands (LOCKE 1690; MONTESQUIEU 1748). Crucially, articulation and separation do not imply that the different stages of governance should remain isolated from one another. On the contrary, they must be connected through mechanisms of control that allow the outputs of one stage to be examined, challenged, and evaluated at subsequent stages (WALDRON 2013, 466). It is this connection, not mere division, that ensures the coherence of the overall structure set up by the rule of law and prevents normative influence from escaping accountability. Soft law-making powers must be brought within this framework: precisely because it shapes conduct and expectations without formal bindingness, soft law must be situated within the framework of “articulated governance”, which exposes its normative contribution and renders it susceptible to scrutiny, even though in different ways and to a different extent than hard law. In this sense, the justiciability of soft law, and the modes of adjudication, become crucially relevant.

4.1 *From the Articulation of Governance to Justiciability*

Courts occupy a distinctive position within an articulated structure of governance. They serve both as the sites where power’s normative impact on particular cases is examined, and as forums through which affected persons can challenge the reasons offered at different stages of its exercise (DICEY 1885; WALDRON 2013, 457-459). Moreover, when soft law influences the meaning or application of binding legal norms, judicial engagement becomes essential to preserving this structured character of governance. Without it, the stages through which normative power takes effect remain opaque, and the opportunities for contestation that the rule of law demands are foreclosed. Justiciability thus serves not to transform soft law into hard law but to ensure that its place within the sequence of governance is exposed, differentiated, and subject to the public reasoning that courts are uniquely positioned to provide.

From this perspective, the interaction between soft law and hard law at the normative level reinforces the need for interaction at the applicative level. When soft law interprets, anticipates, supplements, or otherwise shapes the meaning and effects of binding law, the application of the latter requires courts to take soft law into account. Scrutiny of hard law cannot be considered adequate from the perspective of the rule of law unless the ancillary instruments that influence its application are also susceptible to judicial examination. Only by recognising the justiciability of soft law can courts disaggregate and scrutinise the various stages through which normative

⁹ «The legislature, the judiciary, and the executive – each must have its separate say before power impacts on the individual».

powers interact to influence citizens¹⁰, ensuring that reasons offered at each stage are publicly expressed and evaluated.

From this perspective, the rule of law requires that soft law be brought within the sphere of judicial scrutiny. The aim is not to confer upon soft law a binding force it does not possess, but to ensure that its normative influence is exercised consistently with the demands of transparency and reviewability.

Nonetheless, at present, the role of courts with respect to soft law remains uncertain. It is not clear under what conditions soft law is justiciable, nor which techniques courts should employ when taking soft law into account. It is also unclear to what extent soft law may guide the interpretation of hard law or be invoked in adjudicating cases. The European Court of Justice requires national courts to take soft law into account when relevant, but the precise manner in which they should do so remains contested and underdeveloped.

5. *The Debate on Soft Law Justiciability*

Among the various aspects of the relationship between soft law and the rule of law, justiciability is particularly relevant (HUBKOVÁ 2023, EICK 2025) not only because public scrutiny by judicial means is central to the disarticulation of, and control over, the exercise of normative powers, but also because the penetration of soft law into contemporary systems of governance has become so extensive that the absence of clear criteria for judicial scrutiny is increasingly problematic. A structured and principled approach to justiciability has become essential given the diffusion and practical relevance of soft law.

Despite this need, much of the debate approaches soft law with hesitation or resistance. Concerns arise not only about the desirability of judicial scrutiny but also its institutional feasibility. Opponents of justiciability argue that non-binding instruments lack the formal credentials required for judicial enforcement, and courts should not compensate for this weakness by granting informal instruments a status they do not possess. The fear underlying this position is that judicial engagement might blur the boundary between legally binding and non-binding norms, undermining legal certainty and distorting the separation of powers. If courts were to give legal weight to instruments that the legislature deliberately left non-binding, they might appear to be transforming political guidance into legal obligation, thereby reshaping the regulatory landscape without democratic authorization.

These objections are reinforced by the conceptual vagueness that surrounds the definition of soft law. Because the category lacks clear boundaries, very different types of instruments are often grouped together, obscuring the specific difficulties that particular forms of soft law pose for adjudication. At the same time, the debate frequently proceeds by analogy with hard law: it applies to soft law the criteria and expectations appropriate to binding norms, concluding that it fails to meet them. The result is that soft law is non-justiciable because it lacks the characteristics of hard law. At the same time, its normative influence is acknowledged without adequate mechanisms for scrutiny.

Some recurrent concerns shape this perspective. Some argue that judicial scrutiny would erode the distinction between binding and non-binding norms, placing legal certainty at risk. Others maintain that soft law lacks the procedural legitimacy that could make judicial oversight appropriate. A related view holds that judicial involvement would threaten the separation of powers by inviting courts to validate instruments that the legislature or administration did not intend to produce legal effects (ELIANTONIO, KORKEA-AHO 2018; KLABBERS 1996). Still others warn that

¹⁰ For a comprehensive analysis and defense of the distinction between the stages of production and application of norms, see SANDRO 2022.

judicial scrutiny may rigidify soft law, depriving it of the flexibility that constitutes one of its primary regulatory advantages. Taken together, these concerns rest on the belief that justiciability presupposes assimilation to hard law, and that such assimilation is undesirable because it either misrepresents the nature of soft law or distorts the constitutional allocation of powers.

These criticisms, however, highlight the difficulty of framing the justiciability of soft law and putting it into practice, not its illegitimacy, and do not undermine the central point: from the perspective of the rule of law, some degree of judicial scrutiny is not only legitimate but required (SCOTT 2011; ELIANTONIO 2018; VALENTINI 2025a). Although the atypical features of soft law complicate the assessment of its justiciability, the normative influence it exerts confirms rather than negates the need for judicial review. Soft law derives from the exercise of normative powers affecting the conduct and expectations of its addressees. When such effects remain insulated from public scrutiny, the rule of law is weakened. In a constitutional democracy, the exercise of power, formal or informal, with normative impact on citizens, must be capable of justification and such justification must be open to challenge before impartial institutions.

In this sense, the opacity and normative uncertainty surrounding soft law provide the strongest reasons for judicial intervention. Without scrutiny, influential regulatory instruments escape control, undermining legal certainty and allowing regulatory authority to operate without accountability. In this sense, judicial engagement can contribute to anchoring the use of soft law to standards of public justification. Courts can test whether administrative or regulatory actors rely on soft law in ways that are coherent, reasonable, and compatible with rule of law requirements. They can also prevent authorities from treating recommendations and other soft law instruments as binding without providing adequate justification.

This understanding of judicial scrutiny allows a response to concerns about judicial overreach. Justiciability can take the form of an inquiry into the reasons governing the production and use of soft law. Courts may, for instance, review whether authorities have relied on a soft-law instrument without allowing meaningful contestation, or whether a recommendation has been treated as a *de facto* obligation without an adequate basis. Such review does not require converting soft law into hard law but serves to prevent arbitrary uses of informal norms.

Refusing justiciability on the ground that soft law lacks procedural legitimacy produces a paradox. Instruments with the weakest democratic and legal credentials thereby escape all forms of control, even when their normative impact is substantial.

5.1 *Assessing the Rule of Law Legitimacy of Soft Law*

If soft law is to operate within the constraints of the rule of law, there must be criteria capable of guiding its adoption and application. These criteria cannot be conceived as rigid thresholds imported from hard-law doctrines, for soft law does not share the same formal attributes or institutional pedigree. Instead, they must be understood as standards of justification that reflect the “channeling” purpose the rule of law and can be applied contextually. An instructive approach is offered by accounts that unpack the rule of law requirements applicable to soft law into a series of normative elements (DALY 2021; DALY 2020) that, rather than functioning as absolute requirements, serve as standards for testing the “degree” to which soft law is compatible with the demands of articulated governance (DALY 2021)¹¹.

¹¹ DALY (2021, 10), understands the requirements of the rule of law, in relation to soft law, as “benchmarks” forming a complex “normative framework” and argues that «it is important to recognise that these are ideals» and «compliance with them accordingly is not a binary matter, but rather a question of degree» and involves «trade-offs» among the different requirements, drawing on TASIIOULAS 2020, 121 (according to whom «it is important also to recognize that the Rule of Law necessitates trade-offs, both trade-offs among its eight desiderata when they conflict, such as between stability and possibility of compliance, and also trade-offs of those desiderata against other considerations, such as

The first of these elements is “correctness”: soft law should illuminate the consequences of its addressees’ conduct and allow them to orient their behaviour accordingly. Closely associated with this is the expectation that soft law be formulated with sufficient “clarity” to render its practical implications intelligible, even if some flexibility is inherent in its non-binding nature. “Accessibility” forms a further element: those subject to soft law should be able to know its content and understand the context in which institutional actors rely upon it. These demands are supplemented by the requirement of scrutiny, which concerns the possibility of subjecting soft law to public and institutional verification, and by the requirement of “reliability”, which entails that soft law be used in a manner that is coherent and predictable rather than arbitrary or shifting (DALY 2021, 2020).

Taken together, these elements delineate a scheme for assessing the legitimacy of soft law in a principled yet contextual manner, reflecting a conception of the rule of law as a justificatory ideal rather than a purely formal threshold. Gradual compliance with these elements contributes to a form of normative transparency that compensates for the absence of binding force and allows soft law to operate within channels of accountability consistent with constitutional democracy. When soft law does not fully conform to these standards, the resulting gap calls for justification. Judicial review here plays an indispensable role: courts are uniquely positioned to scrutinize the reasons that account for how these standards apply in a given context and to determine whether deviations from them are consistent with the demands of the rule of law. This judicial function allows an important distinction to emerge between legitimate and illegitimate uses of soft law. Soft law may strengthen the legal system when it is produced and invoked by actors who are institutionally recognised and accountable. Such actors need not be elected, but their authority must be grounded in public criteria and exercised through practices of reason-giving that enable their decisions to be traced, assessed, and, where appropriate, contested. Soft law is especially valuable when it forms part of a transparent and structured process subject to institutional oversight. Examples include instruments adopted by European institutions – such as the EU Commission recommendations or the reports issued by the Council of Europe – which are integrated into deliberative processes that allow for public scrutiny and public discussion. In these circumstances, soft law serves as an adaptive technique that enhances the capacity of the legal system to incorporate complex information and to respond to regulatory demands in a reasoned and accountable manner.

Soft law becomes more problematic, however, when it is produced without transparent procedures, without opportunities for public scrutiny, and without clear lines of authority or justification. When courts or administrations invoke such instruments without allowing their origins, rationale, or consistency with general principles to be examined, they become factors of opacity and normative distortion. In these cases, soft law weakens institutional accountability by permitting influential regulatory guidance to circulate without the safeguards associated with formal legality. In this sense, the shift from hard to soft law, entails a shift from mediated to unmediated accountability (SANDRO 2025): rather than being accountable to an external authority capable of enforcement, addressees are left to hold each other accountable through informal, interpersonal dynamics, a structure that exposes the weakest members of society to regulatory gaps. It is precisely to avoid such distortions that a framework of legitimacy is necessary, and that judicial scrutiny plays a central role. The evolving case law of the European Court of Justice illustrates the potential of such scrutiny, demonstrating that courts can engage with soft law in ways that preserve flexibility while ensuring accountability.

democracy or justice») making reference to FULLER 1969. This gradual account is also discussed by PINO 2019 and KRISTAN 2024 reading CELANO 2019. In broader terms, a gradual approach to constitutionalist standards of legitimacy is analysed, and defended, as part of a systemic view of constitutional democratic orders in VALENTINI 2020, 2022, 2025a, 2025b.

6. The Approach of the ECJ

The jurisprudence of the European Court of Justice offers an increasingly important point of reference for understanding how soft law can be subject to judicial scrutiny without becoming binding law. Within the European Union, where multi-level governance generates complex interactions among institutional actors and regulatory instruments, soft law plays a crucial role. The Court's case law reflects this complexity and demonstrates the gradual emergence of a more articulated approach to the justiciability of soft law.

Although soft law lacks legal bindingness, the Court has recognised its practical and interpretative relevance and has developed procedural mechanisms through which it may be subject to judicial monitoring. According to the Court's case law, acts that are not binding, such as recommendations, opinions or guidelines, cannot be the subject of direct appeal. The Court has repeatedly confirmed a restrictive interpretation, holding that only acts capable of producing binding legal effects can be directly challenged. Documents such as codes of conduct or interpretative notes, unless they impose new obligations not provided for by binding legal sources, therefore remain inadmissible.

The only potentially accessible instrument remains the preliminary ruling under Article 267 TFEU, through which a national court may raise doubts about the validity of a soft law act. However, this channel has structural limitations: it is subject to the initiative of the national court, is not open to European institutions or Member States, and presupposes the existence of a dispute in a judicial context in which soft law is actually relevant (*Belgium v. Commission*, C-16/16 P).

A foundational step in this direction has been taken by the Court in the *Grimaldi* (C-322/88) decision, where it held that recommendations, though not binding, must be taken into consideration by national courts to the extent they are relevant to the interpretation of EU or domestic law. This principle acknowledges that soft law may play a meaningful role in legal reasoning without attributing it binding effect. Subsequent case law has refined the *Grimaldi* rationale, emphasising that the obligation to consider soft law is conditional on its relevance to the specific case, with a broad margin of assessment (*KORKEA-AHO* 2018, 470-473). In doing so, the Court has linked the judicial relevance of soft law to its capacity to serve as a reasoned and accessible interpretative resource connected to, and grounded in, the legal order.

In recent years, the Court has extended this understanding of soft law through the preliminary reference mechanism. Even when a soft-law instrument cannot be directly challenged, it may be examined indirectly when questions arise concerning its compatibility with primary or secondary law. This mechanism allows the Court to review the legality of soft law in the course of adjudicating disputes involving binding norms. It thereby prevents soft law from escaping all judicial oversight simply because it is non-binding and ensures that the reasons embedded in non-binding instruments can enter the legal circuit and be subjected to public justification.

The decision in *FBF* (C-911/19) illustrates both the potential and the limits of this approach. The case concerned soft law issued by the European Banking Authority, whose guidelines exerted substantial influence on market actors and administrative authorities. The Court reaffirmed that such instruments lack binding force but examined their practical effects in detail¹². While ultimately finding no justiciable legal effects in this instance, the Court's willingness to analyse the instrument's indirect consequences revealed an awareness of the normative role of soft law. The judgment also exposed a tension in the Court's jurisprudence: although it recognises the significant practical impact of soft law, it maintains a restrictive stance on direct justiciability. This cre-

¹² The Court has emphasised that such acts exert a power of exhortation and persuasion over competent authorities, who must justify any decision not to comply. The Court has also noted that these acts may prompt the adoption of national legislation and has recalled that national courts are required to take EBA guidelines into consideration when resolving disputes before them.

ates a potential accountability gap whenever instruments with considerable normative influence fall outside the scope of direct judicial review.

At the same time, the Court has taken steps to mitigate this gap by integrating soft law into its broader legality framework. Through the preliminary reference mechanism, courts can assess whether soft law is consistent with higher norms, procedurally sound, and in conformity with general principles. This indirect review ensures that soft law remains subject to legal scrutiny and that standards of public justification frame its use. National courts, for their part, are expected to explain how and why they take soft law into account, thereby embedding the interpretative use of soft law within a practice of reasoned adjudication. This practice enhances transparency and safeguards access to justice within the Union.

The ECJ's evolving practice¹³ reveals an effort to balance the flexibility that makes soft law attractive with the accountability that the rule of law requires. By requiring national courts to consider soft law when relevant, while declining to treat it as binding, the Court promotes a model of judicial engagement that is sensitive to context and proportional to the instrument's practical effects. The insistence that courts take soft law into account when interpreting binding law reflects the Court's concern for coherence within the legal system, while the refusal to grant direct binding effect preserves the institutional balance established by the Treaties. This twofold approach allows the Court to maintain the distinction between binding and non-binding norms while ensuring that the normative influence of soft law does not remain unchecked.

Although the Court restricts the availability of direct actions against soft law, it recognises that the non-binding character cannot serve as a barrier to judicial protection in every case. When soft law affects the application of binding law or produces relevant practical consequences, it should be subjected to judicial examination. This principle reflects the Court's commitment to preserving access to justice even when regulatory techniques diverge from traditional legal forms. The result is an increasingly nuanced jurisprudence that situates soft law within a system of articulated governance without depriving it of its regulatory flexibility.

7. *Justiciability and Democratic Legitimacy*

The analysis has focused primarily on the justiciability of soft law as a requirement of the rule of law. Yet in a constitutional democracy, the significance of judicial scrutiny extends beyond legality. Justiciability also has a democratic dimension, for courts are not external to the democratic system but constitute an integral part of its deliberative structure (VALENTINI 2022, 2023, 2025a). They participate in a broader practice of public reasoning through which normative considerations circulate among different institutional spheres, from technical and administrative bodies to legislative and judicial arenas. In this broader sense, the judicial engagement with soft law is deeply connected to the deliberative quality of democratic governance (VALENTINI 2022, 2025a).

Soft law itself performs a deliberative function that is often overlooked. Many soft-law instruments emerge from processes of discussion and exchange among experts, civil society actors, and public authorities. In this respect, they embody the outcomes of deliberative practices that occur outside formal legislative mechanisms but nonetheless contribute to shaping public norms. At the same time, soft law enables deliberation by allowing the transmission of normative reasons across different spheres of governance. For example, a recommendation issued by an independent authority may articulate expert-based reasons that become relevant in administrative or judicial contexts, thereby linking the technical domain to broader institutional decision-making. Soft law thus can serve as a transmission belt within a deliberative system, enabling the circulation of arguments and concerns that might otherwise remain confined to specialised or informal settings (VALENTINI 2025a).

¹³ See also the recent decision on the *Jemerak* case (C-109/23) and the comment by LASHIN 2024.

This transmission function is particularly significant in complex governance systems such as the European Union, where decision-making and rule-making are distributed among multiple institutions, levels, and actors. Soft law helps maintain a connection between different spheres of such systems, by providing channels through which reasons and deliberative inputs can be integrated into more formal legal processes.

In this way, courts can play a pivotal role within a democratic deliberative practice (KORKEA-AHO 2015). Through judicial reasoning, they can select, interpret, and formalise the normative content of soft law, enabling it to enter the legal sphere in a manner consistent with principles of justification and accountability. When courts engage with soft law, whether by taking it into account for interpretative purposes, scrutinising its compatibility with legal norms, or addressing the underlying reasons, they do more than apply rules (HAGE 2018). They participate in a process of democratic reasoning that links different components of a broader, more complex deliberative system: their decisions help ensure that the normative reasons embedded in soft law are articulated publicly, tested for coherence, and made accountable within the legal framework.

From this perspective, however, the democratic legitimacy of soft law depends on certain conditions. Its production should be open to meaningful forms of participation; its adoption should be transparent; and its content should be susceptible to contestation and review. Although these conditions differ from the more stringent conditions that apply to legislation, they reflect the need for soft law to operate within a framework of public justification (PETROPOULOU IONESCU, ELIANTONIO 2021). Judicial review is essential to this framework. By subjecting soft law to scrutiny, courts ensure that its normative influence is exercised in accordance with democratic values. They make it possible to challenge unjustified reliance on soft law, to expose its underlying reasons, and to situate its use within a broader practice of democratic deliberation. For these reasons, justiciability is significant not only for legality but also for democracy.

8. Conclusion

This article has argued that the justiciability of soft law is not only compatible with, but required by, the rule of law. The argument rests on a re-conception of the rule of law as an ideal that does not merely constrain power but channels its exercise through a sequence of distinct institutional phases: “articulated governance”. Each phase must be identifiable and subject to scrutiny, and the phases must be connected through mechanisms of control that allow the outputs of one stage to be examined and evaluated at subsequent stages. Courts occupy a distinctive position within this structure: they are the institutional sites in which the articulated character of governance is preserved and through which affected persons can challenge the reasons offered at prior stages.

Soft law, precisely because it shapes conduct and expectations without formal bindingness, must be situated within this articulated structure. Its normative influence often operates at preparatory, interpretative, or supplementary stages of governance, shaping the meaning and application of the resulting binding norms. When soft law-stages remain opaque or escape scrutiny, the rule of law is weakened. Judicial review is therefore essential to ensure that the role of soft law in the sequence of governance is exposed, differentiated, and subject to public monitoring. The evolving jurisprudence of the European Court of Justice demonstrates how courts can engage with soft law in this manner, integrating it into the legal framework and preserving its flexibility and, also, accountability.

Justiciability also has democratic significance. Soft law contributes to the circulation of normative reasons across diverse institutional and non-institutional spheres, and courts function as a conduit through which those reasons are articulated and embedded in the deliberative structure of a constitutional democracy (VALENTINI 2022, 2023, 2025a, 2025b). In this light, the justiciability of soft law should not be viewed as an anomaly but as a requirement of a legal and democratic order committed to ensuring that all forms of normative influence are subject to public justification.

References

- BASSI F. 1989. *Circolari amministrative*, in «Digesto delle Discipline Pubblicistiche», III, Utet, 1989, 54 ff.
- CATELANI A. 1984. *Le circolari della pubblica amministrazione*, Giuffrè.
- CELANO B. 2019. *Rule of Law e Principi*, in M. Maldonado e P. Luque (eds.), *Discutendo con Bruno Celano*, Vol. II, Marcial Pons.
- DALY S. 2020. *Tax Authority Advice and the Public*, Bloomsbury.
- DALY S. 2021. *The Rule of (Soft) Law*, in «King's Law Journal», 32 (1), 3-13.
- DE BÚRCA G., SCOTT J. (eds.) 2006. *Law and New Governance in the EU and the US*, Bloomsbury.
- DELGADO J.I., VAQUERO Á.N. (eds.) 2025. *Soft Law: Aspectos teóricos y problemas prácticos*, Marcial Pons.
- DI ROBILANT A. 2006. *Genealogies of Soft Law*, in «American Journal of Comparative Law», 54, 218-268.
- DICEY A.V. 1885. *Introduction to the Study of the Law of the Constitution*, Liberty Classics (ed. 1982).
- DYZENHAUS D. 2014. *Proportionality and Deference in a Culture of Justification*, in HUSCROFT G., MILLER B.W., WEBBER G. (eds.), *Proportionality and the Rule of Law: Rights, Reasoning, Justification*, Cambridge University Press, 234-258.
- EICK A. 2025. *Soft Law and National Courts in the European Union*, Springer.
- ELIANTONIO M., KORKEA-AHO E., MÖRTH U. (eds.) 2023. *Research Handbook on Soft Law*, Edward Elgar Publishing.
- ELIANTONIO M. 2018. *Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of It?*, in «Yearbook of European Law», 37, 496-524.
- ELIANTONIO M., KORKEA-AHO E. 2018. *Soft Law and Courts: Saviours or Saboteurs of the Rule of (Soft) Law?*, in ELIANTONIO M., KORKEA-AHO E., MÖRTH U. (eds.), *Research Handbook on Soft Law*, Edward Elgar Publishing.
- ELIANTONIO M., STEFAN O. 2021. *The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU*, in «European Journal of Risk Regulation», 12 (1), 159-175.
- FULLER L.L. 1969. *The Morality of Law*, Yale University Press.
- GIANNINI M.S. 1960. *Circolare*, in «Enc. Dir.», VII.
- GOLDMANN M. 2008. *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, in «German Law Journal», 9 (11), 1865-1908.
- HUBKOVÁ P. 2023. *Judicial Review of EU Soft Law Acts as a Matter of the Rule of Law*, in «European Public Law», 29, 181-198.
- KING J. 2025. *The Rule of Law*, in BELLAMY R., KING J. (eds.) *The Cambridge Handbook of Constitutional Theory*. Cambridge University Press, 297-315.
- KLABBERS J. 1996. *The Redundancy of Soft Law*, in «Nordic Journal of International Law», 65 (2), 167-182.
- KLABBERS J. 1998. *The Undesirability of Soft Law*, in «Nordic Journal of International Law», 67, 381-392.
- KORKEA-AHO E. 2015. *Adjudicating New Governance: Deliberative Democracy in the EU*, Routledge.
- KORKEA-AHO E. 2018. *National Courts and European Soft Law: Is Grimaldi Still Good Law?*, in «Yearbook of European Law», 37, 470-495.
- KRISTAN V. 2024. *Celano e lo Stato di diritto: una questione di gradualità*, in «Milan Law Review», 5, 154-166.
- HAGE J. 2018. *What Is Legal Validity? Lessons from Soft Law*, in WESTERMAN P. et al., *Legal Validity and Soft Law*, Springer, 19-45.
- LASHYN S. 2024. *Soft Law's Increasing Clout*, in «VerfBlog», <https://verfassungsblog.de/soft-law-clout/>.
- LOCKE J. 1690. *Two Treatises of Government*, Cambridge University Press (ed. P. Laslett, 1988).
- MCNAIR A. 1930. *The Functions and Differing Legal Character of Treaties*, in «British Yearbook of International Law», 11, 100-118.
- MONTESQUIEU 1748. *The Spirit of the Laws*, Cambridge University Press (eds. A.M. Cohler et al., 1989).

- MORESO J.J. 2020. *Lo Normativo: variedades y variaciones*, Centro de Estudios Políticos y Constitucionales.
- PASTORE B. 2003. "Soft law", *gradi di normatività, teoria delle fonti*, in «Lavoro e diritto, Rivista trimestrale», 1, 2003, 5-16.
- PECH L., SCHEPPELE K.L. 2017. *Illiberalism Within: Rule of Law Backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», 19, 2017, 3-47.
- PETROPOULOU IONESCU D., ELIANTONIO M. 2021. *Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective*, in «Journal of Contemporary European Research», 17, 2021, 43-65.
- PINO G. 2021. *Sources of Law*, in GARDNER J., GREEN L., LEITER B. (eds.), *Oxford Studies in Philosophy of Law*, Volume 4, Oxford University Press, 58-92.
- PINO G. 2019. *Celano su Rule of Law: il tassello mancante*, in MALDONADO M., LUQUE P. (eds.), *Discutendo con Bruno Celano*, Marcial Pons, 385-398.
- RAZ J. 2009. *The Rule of Law and Its Virtue*, in *The Authority of Law: Essays on Law and Morality*, 2nd ed., Oxford University Press, 210-229.
- REGENT S. 2003. *The Open Method of Coordination: A New Supranational Form of Governance?*, in «European Law Journal», 9 (2), 2003, 190-214.
- SAJÓ A. 2024. *Militant Rule of Law and Not-so-Bad Law*, in «Hague Journal on the Rule of Law», 16, 2024, 525-549.
- SANDRO P. 2022. *The Making of Constitutional Democracy: From Creation to Application of Law*, Hart Publishing.
- SANDRO P. 2025. *Soft, but for Whom? Law and the Creation of Accountability*, in «UK Constitutional Law Blog», 12 February 2025.
- SCHEPPELE K.L. 2013. *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, in «Governance», 26, 2013, 559-562.
- SCOTT J. 2011. *In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law*, in «Common Market Law Review», 48 (2), 2011, 329-356.
- SCOTT J., TRUBEK D.M. 2002. *Mind the Gap: Law and New Approaches to Governance in the European Union*, in «European Law Journal», 8, 2002, 1-18.
- SENDEN L. 2004. *Soft Law in European Community Law*, Hart Publishing.
- SHAFFER G., POLLACK M.A. 2012. *Hard and Soft Law*, in DUNOFF J.L., POLLACK M.A. (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 197-222.
- SNYDER F. 1993. *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in «The Modern Law Review», 56, 1993, 19-54.
- SNYDER F. 1994. *Soft Law and Institutional Practice in the EC*, in MARTIN S. (ed.) *The Construction of Europe*, Kluwer Academic Publishers.
- STEFAN O. 2024. *Crisis Soft Law by the European Commission: Turning into Anti-Law?*, in «Romanian Journal of Comparative Law», 15, 2024, 144-164.
- TASIOULAS J. 2020. *Rule of Law*, in TASIOULAS J. (ed.), *The Cambridge Companion to the Philosophy of Law*, Cambridge University Press, 117-134.
- TERPAN F. 2015. *Soft Law in the European Union: The Changing Nature of EU Law*, in «European Law Journal», 1, 2015, 68-96.
- TERPAN F. 2023. *The Definition of Soft Law*, in ELIANTONIO M., KORKEA-AHO K., MÖRTH U. (eds.), *Research Handbook on Soft Law*, Edward Elgar Publishing.
- THIBIERGE C. 2003. *Le Droit souple: Réflexion sur les textures du droit*, in «RTD Civ», 4, 2003, 599-610.
- VALENTINI C. 2025a. *Per un costituzionalismo deliberativo*, Il Mulino.
- VALENTINI C. 2025b. *Lo Stato di diritto, in una democrazia costituzionale*, in «Etica & Politica», 27(2), 2025, 453-567.

- VALENTINI C. 2023. *Towards Deliberative Constitutionalism/Per un costituzionalismo deliberativo*, in «Notizie di Politeia», 39, 2023, 158-162.
- VALENTINI C. 2022. *Deliberative Constitutionalism and Judicial Review. A Systemic Approach*, in «Revus», 47, 103-125.
- VALENTINI C. 2020. *Post-sovereign Constitution-making and Stages of Representation. The Representative Continuum*, in «Revus», 41, 2020, 151-165.
- VILE M.J.C. 1998. *Constitutionalism and the Separation of Powers*, 2nd ed., Liberty Fund.
- WALDRON J. 2008. *The Concept and the Rule of Law*, in «Georgia Law Review», 43, 2008, 1-61.
- WALDRON J. 2013. *Separation of Powers in Thought and Practice*, in «Boston College Law Review», 54, 2013, 433-468.
- WESTERMAN P., HAGE J., KIRSTE S., MACKOR A.R. (eds.) 2018. *Legal Validity and Soft Law*, Springer.

What is the Rule of Law?

Toward a Perception-Based Definition of the Rule of Law

PAOLO **CAPRIATI**

University of Palermo, Italy.

E-mail: paolo.capriati@unipa.it

ABSTRACT

What is the Rule of Law? In order to define the Rule of Law, I suggest adopting a conceptual clarification based on the analysis of ordinary language. In this sense, I will assume that “what is meant by the Rule of Law” is equivalent to “what the Rule of Law is”. To test the uses of this expression, I will turn to the analysis of international Rule of Law indicators. This choice is motivated by the fact that their measurement of the Rule of Law is opinion-based. After presenting the classical definitions of the Rule of Law, I will describe the functioning of the different Rule of Law indicators that I will examine. The analysis of these indicators shows that the results of their measurements are largely identical. The convergence of these results suggests a hypothesis: the various Rule of Law indicators ultimately refer to the same underlying concept. The common core of these indices suggests that what Rule of Law indicators measure is the perception of government impartiality. In this sense, the analysis of Rule of Law indicators shows that the Rule of Law consists of two elements: (a) the expectation that there is a government; (b) that it acts impartially.

Che cos'è il Rule of Law? Per definire il Rule of Law suggerisco di adottare una chiarificazione concettuale basata sull'analisi del linguaggio ordinario. In questo senso, assumerò che “che cosa si intende per Rule of Law” sia equivalente a “che cosa è il Rule of Law”. Per mettere alla prova gli usi di questa espressione, mi rivolgerò all'analisi degli indicatori internazionali del Rule of Law. Questa scelta dipende dal fatto che la loro misurazione del Rule of Law è basata sulle opinioni. Dopo aver presentato le definizioni classiche del Rule of Law, mi occuperò di descrivere il funzionamento dei diversi indicatori del Rule of Law che prenderò in esame. Dall'analisi di tali indicatori emerge come i risultati delle loro misurazioni siano pressoché identici. La convergenza dei risultati suggerisce un'ipotesi: i diversi indicatori del Rule of Law rimandano, in ultima analisi, allo stesso concetto sottostante. Il nucleo comune dei vari indici suggerisce che ciò che gli indicatori del Rule of Law misurano è la percezione dell'imparzialità del governo. In questo senso, dall'analisi dei Rule of Law indicators emerge che il Rule of Law consiste di due elementi: (a) l'aspettativa che vi sia un governo; (b) che esso agisca in modo imparziale.

KEYWORDS

Rule of Law, government impartiality, Rule of Law indicators, quality of government, conceptual clarification

Rule of Law, imparzialità del governo, indicatori del Rule of Law, qualità del governo, chiarificazione concettuale

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



What is the Rule of Law?

Toward a Perception-Based Definition of the Rule of Law

PAOLO CAPRIATI

0. Introduction or About Method – 1. Defining the Rule of Law – 1.1 Formal and Substantive Definitions of the Rule of Law – 1.2 What Are International Rule of Law Indicators? – 1.2.1 The WJP Index – 2. The RoL Indicators to Clarify the Concept of the Rule of Law – 2.1 The Common Core of the RoL Indicators – 2.2 Government Impartiality and the Limits of the RoL Indicators – 3. Conclusions.

0. Introduction or About Method

What is the Rule of Law? Unfortunately, we lack a clear, sufficiently unambiguous, and widely shared definition of the Rule of Law. How can we circumvent this problem? One possibility is to adopt a specific point of view and examine how that perspective defines the Rule of Law. But which point of view should we adopt? It should be a widely shared perspective because defining a concept requires understanding how that concept is generally used. In this case, to understand the Rule of Law, we would need to analyze its usage in ordinary language. According to this definition of “definition”, there would be no distinction between “what *x* is” and “what is meant by *x*”, and the Rule of Law would coincide with what is understood by the Rule of Law.

This is the method I suggest using: a conceptual clarification based on the analysis of ordinary language. In this sense, I will assume that: “what is meant by the Rule of Law” is equivalent to “what the Rule of Law is”: the correctness of a concept’s definition depends on how the linguistic expression designating that concept is used. In this case, it is correct to define the Rule of Law as *x* if *x* is what is meant by the Rule of Law.

Now, we must ask who the subjects are entitled to define, through the use of a specific linguistic expression, a certain concept. We lack a criterion for determining which subject has the authority to establish this definition; however, this problem can be bypassed. To do so, we must examine how the concept is usually understood: if we find a sufficiently shared definition, it will mean we have a provisional definition of the Rule of Law – its foundation lies in the usage of this expression. But how can we know how the expression “the Rule of Law” is used? There are actors that, through interviews (with experts and non-experts), compile rankings measuring the level of the Rule of Law in a country. These are the international Rule of Law indicators. The indicators – typically opinion-based – provide a good basis for gauging how the concept of the Rule of Law is commonly understood.

In summary, the goal I have set is to determine a sufficiently solid definition of the Rule of Law. If by “definition” we mean a conceptual clarification based on the ordinary-language usage of a certain expression, we must examine how the expression “the Rule of Law” is used: this usage is reviewed by the international Rule of Law indicators. Before analyzing these indicators, a brief and summary overview of the most prominent definitions of the Rule of Law is necessary.

1. Defining the Rule of Law

1.1 Formal and Substantive Definitions of the Rule of Law

Many have attempted to define the “Rule of Law”. Definitions can be distinguished as formal (or thin) and substantive (thick).

Formal definitions see the Rule of Law as a set of formal requirements that the law must satisfy. The most famous elaboration is by Lon Fuller (FULLER 1964), who identifies eight formal

principles: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence. These are formal principles because they concern not the content of norms but the formal characteristics a norm must possess. Alongside formal principles, procedural principles have also been identified. According to these principles, we might argue that no individual should face penalties, stigma, or significant adverse consequences imposed by the state unless such outcomes result from procedural safeguards, including the following (TASHIMA 2008, 264):

- a hearing before an impartial and independent tribunal, bound to adjudicate based on existing legal norms, with judgments grounded in formally presented evidence and legal argumentation;
- the right to legal representation during such proceedings;
- the right to participate in person, including the ability to confront witnesses, challenge testimony, and present legal arguments regarding the evidence and applicable laws;
- the right to a reasoned decision, wherein the tribunal provides explanations addressing the evidence and arguments submitted.

These principles carry greater weight in the ordinary person's understanding of the Rule of Law than the formal criteria outlined earlier (WALDRON 2016). Procedural principles are, therefore, nothing more than a specification of formal principles and their application concerning individual freedom.

The other family of definitions is the substantive one. Substantive theories do not deny that the Rule of Law consists of formal elements but argue that, alongside these elements, there is also a substantive dimension. According to these authors, it cannot be said that a state has the Rule of Law if, for example, fundamental human rights are not respected. In this sense, the Rule of Law is inseparable from certain substantive requirements.

An example of a substantive definition of the Rule of Law is that proposed by Tom Bingham (BINGHAM 2010, 67):

«I would roundly reject it ("thin" definition) in favor of a "thick" definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed».

Against substantive theories, Raz (RAZ 1979, 211) argues that «the Rule of Law is just one of the virtues which a legal system may possess and by which it is to be judged», and that for analytical clarity, the Rule of Law must be distinguished from democracy, human rights, and social justice. By conflating it with other concepts, substantive theories would burden the concept of the Rule of Law with moral content, thereby transforming the Rule of Law into the Rule of Good Law¹.

Waldron (WALDRON 2016, sec. 5.3) also highlights the dangers of adopting a substantive theory of the Rule of Law:

«Once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law. Those who favor property rights and market economy will scramble to privilege their favorite values in this regard. But so will those who favor human rights, or those who favor democratic participation, or those who favor civil liberties or social justice. The result is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals».

¹ On this matter, see again Raz (RAZ 1979, 211), who states: «If the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy. But if so, the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph».

Which of these two conceptions of the Rule of Law should we adopt? I have already mentioned that, lacking a clear, sufficiently unambiguous, and widely shared definition of the Rule of Law, I will try to define the Rule of Law based on what is usually understood by it. For this reason, I suggested looking at the RoL international indicators. To determine which of these two conceptions these indicators favor, it is first necessary to clarify what the RoL indicators are.

1.2 What Are International Rule of Law Indicators?

There are several international RoL indicators. These indicators, based on certain parameters and following a specific methodology, compile rankings that measure the level of the Rule of Law in a state. They have proven very useful, for example, in identifying countries where investments are safer: the higher the level of the Rule of Law in a country, the safer investments are considered to be.

The RoL indicators have faced criticism on multiple fronts, both individually and collectively (DAVIS 2004; DAVIS 2014; MØLLER, SKAANING 2014). Versteeg and Ginsburg (VERSTEEG, GINSBURG 2017, 101) observe:

«Indicators inherently reduce complex social phenomena to simple measures and thus may mislead. Some indicators measure formal institutions, others measure behavior, while yet others measure beliefs. These differences are not always transparent».

Additionally, the indicators encounter various technical issues related to aggregation and endogeneity, which may not always be evident (GINSBURG 2011).

Since each indicator uses different parameters to identify the level of the Rule of Law, we can conclude that each RoL indicator has a particular conception of the Rule of Law. These conceptions, although all substantive, share different values.

Beyond differing in their conceptualizations of the Rule of Law, these indicators also utilize distinct coding methodologies. The Heritage Foundation and Freedom House both derive their indicators from evaluations conducted by country experts. On the other hand, the World Governance Indicators (WGI) project compiles a comprehensive RoL index by aggregating various pre-existing variables. The World Justice Project (WJP) is unique in its approach, as it integrates expert assessments with the perspectives of ordinary citizens, collected through nationally representative surveys.

In summary, each RoL indicator has its own definition of the Rule of Law (always substantive or thick) and uses its own methodology to measure it. Consider, for example, the WGI, which is regarded as the most well-known and widely used RoL index in social science research (KAUFMANN et al. 2010). The definition this index gives of the Rule of Law is as follows:

«Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence»².

The WGI's method is to: «compile and summarize information from over 30 existing data sources that report the views and experiences of citizens, entrepreneurs, and experts in the public, private and NGO sectors from around the world, on the quality of various aspects of governance»³.

For our purposes, the most interesting index in terms of methodology is that of the World Justice Project. It is founded exclusively on personal opinions (both from experts and non-experts)

² Available at: <https://www.worldbank.org/content/dam/sites/govindicators/doc/rl.pdf> (accessed on 10/08/2025).

³ Available at: <https://www.worldbank.org/en/publication/worldwide-governance-indicators/documentation#2> (accessed on 10/08/2025).

and, in this sense, is likely to fulfill the mission of conceptual clarification I have set, that is, to define a concept based on the uses of a certain expression.

1.2.1 *The WJP Index*

First, what is the WJP? The World Justice Project (WJP) is defined as an independent, multi-disciplinary organization working to create knowledge, build awareness, and stimulate action to advance the Rule of Law worldwide⁴.

But what is the Rule of Law for WJP? WJP defines the Rule of Law as a durable system of laws, institutions, norms, and community commitment that aims to ensure four universal principles:

- accountability: the government as well as private actors are accountable under the law;
- just law: the law is clear, publicized, and stable and is applied evenly. It ensures human rights as well as property, contract, and procedural rights;
- open government: the processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient;
- accessible and impartial justice: justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

Some benefits would also be attributable to the Rule of Law. According to the WJP team, research shows that the Rule of Law correlates to higher economic growth, greater peace, more education, and improved health outcomes.

The WJP has been compiling the Rule of Law ranking for several years. This measurement is done through questionnaires that are provided to both subject matter experts and non-experts in each country. There were 143 countries covered in the 2025 ranking. Each country is then given a score ranging from 0 to 1. In 2025, the country with the lowest score is Venezuela with 0,26; while the one with the highest score is Denmark with a score of 0,90. This score is calculated by averaging the scores assigned to each factor. What is relevant at this stage is the evaluation of the factors under consideration. There are 8 factors and 44 sub-factors, which are presented below.

⁴ Available at: <https://worldjusticeproject.org/about-us> (accessed on 10/08/2025).

<i>Factors</i>	<i>Sub-factors</i>
1 Constraints on government powers	1.1 Government powers are effectively limited by the legislature 1.2 Government powers are effectively limited by the judiciary 1.3 Government powers are effectively limited by independent auditing and review 1.4 Government officials are sanctioned for misconduct 1.5 Government powers are subject to non-governmental checks 1.6 Transition of power is subject to the law
2 Absence of corruption	2.1 Government officials in the executive branch do not use public office for private gain 2.2 Government officials in the judicial branch do not use public office for private gain 2.3 Government officials in the police and the military do not use public office for private gain 2.4 Government officials in the legislative branch do not use public office for private gain
3 Open government	3.1 Publicized laws and government data 3.2 Right to information 3.3 Civic participation 3.4 Complaint mechanisms
4 Fundamental rights	4.1 Equal treatment and absence of discrimination 4.2 The right to life and security of the person is effectively guaranteed 4.3 Due process of the law and rights of the accused 4.4 Freedom of opinion and expression is effectively guaranteed 4.5 Freedom of belief and religion is effectively guaranteed 4.6 Freedom from arbitrary interference with privacy is effectively guaranteed 4.7 Freedom of assembly and association is effectively guaranteed 4.8 Fundamental labor rights are effectively guaranteed
5 Order and security	5.1 Crime is effectively controlled 5.2 Civil conflict is effectively limited 5.3 People do not resort to violence to redress personal grievances

6 Regulatory enforcement	6.1 Government regulations are effectively enforced 6.2 Government regulations are applied and enforced without improper influence 6.3 Administrative proceedings are conducted without unreasonable delay 6.4 Due process is respected in administrative proceedings 6.5 The government does not expropriate without lawful process and adequate compensation
7 Civil justice	7.1 People can access and afford civil justice 7.2 Civil justice is free of discrimination 7.3 Civil justice is free of corruption 7.4 Civil justice is free of improper government influence 7.5 Civil justice is not subject to unreasonable delay 7.6 Civil justice is effectively enforced 7.7 Alternative dispute resolution mechanisms are accessible, impartial, and effective
8 Criminal justice	8.1 Criminal investigation system is effective 8.2 Criminal adjudication system is timely and effective 8.3 Correctional system is effective in reducing criminal behavior 8.4 Criminal system is impartial 8.5 Criminal system is free of corruption 8.6 Criminal system is free of improper government influence 8.7 Due process of the law and rights of the accused ⁵

2. The RoL Indicators to Clarify the Concept of the Rule of Law

I started with the RoL indicators to find a sufficiently solid definition of the Rule of Law. As we shall see, although the various RoL indicators measure the level of the Rule of Law according to different parameters, due to the convergence of results in those measurements, it has been suggested (VERSTEEG, GINSBURG 2017) that they end up measuring the same thing and, therefore, share a common understanding of what the Rule of Law is. Starting from the RoL indicators, however, presents at least two limitations:

- the personal opinions collected by the RoL indicators do not pertain to the definition of the Rule of Law, but solely to its measurement, as the definitions are established beforehand;
- each RoL indicator has its own particular substantive definition of the Rule of Law.

For this reason, it is appropriate to ask how useful the RoL indicators are for clarifying the uses of the expression “the Rule of Law”.

⁵ Available at: <https://worldjusticeproject.org/rule-of-law-index/factors/2024> (accessed on 10/08/2025).

2.1 *The Common Core of the RoL Indicators*

As we have seen, the RoL indices have different definitions and use different methods and parameters to measure the Rule of Law. However, these indices end up reaching similar conclusions about the level of the Rule of Law: there are convergences in the measurement results. In other words, even though the parameters used for measurements and the conceptions of the Rule of Law differ, the RoL indicators arrive at the same result.

How is this possible? Some have suggested that, despite differences in definitions and methodologies, the indices ultimately refer to the same underlying concept. It is therefore necessary to clarify what this concept is. The convergence of results clearly emerges from a 2017 analysis by Versteeg and Ginsburg (VERSTEEG, GINSBURG 2017, 102):

«The indicators created by the WGI, the Heritage Foundation, and the WJP are almost identical, with their pair-wise correlations all exceeding 0,95. Freedom House's RoL indicator is the only one that produces slightly different values – its correlation with the other measures ranges from 0,79 (with the Heritage Foundation) to 0,83 (with the WJP). Moreover, using factor analysis, we show that a single underlying latent dimension explains 92 percent of the variation in the four RoL indicators».

As can be seen, in assessing the level of the Rule of Law in different countries, they differ very little from each other. It is possible that all three indicators in fact capture the essence of the Rule of Law, and that the similarities between the indicators confirm their validity as RoL indicators. If all indicators indeed capture the Rule of Law, it suggests that the Rule of Law has a common core. This conclusion seems unlikely. What is the common core of the Rule of Law? More importantly, why should indicators that use different definitions and methods to calculate the Rule of Law capture the common essence of the Rule of Law?

A second convergence can help us understand why the RoL indicators yield the same results. It has been observed (VERSTEEG, GINSBURG 2017) that the results of the Transparency International's corruption perceptions index are identical to the RoL indicators. In other words, there is an identity between the measurers of the Rule of Law and the measurer of the absence of corruption.

It has been suggested that what the RoL indicators (and the Transparency International's corruption perceptions index) capture is a more abstract concept that goes beyond both the concept of corruption and that of the Rule of Law:

«Specifically, the fact that three of the four RoL indices are almost identical to Transparency International's Corruption Perceptions Index suggests that the RoL indicators do not exactly capture the RoL but may instead capture a more abstract concept that the corruption perceptions index and RoL indicators share in common. The suspicion that the RoL indicators do not actually capture the RoL is further reinforced by the fact that the more technical explanations for why RoL measures converge do not explain the similarity between the WJP RoL index's and the others. Again, the WJP data is drawn wholly from in-country surveys among people who are most likely unaware of the other RoL indicators or even of outside perceptions of their country.

But if the RoL indicators capture a more abstract concept of the quality of governance, what does this concept entail? To answer this question, it is worth pointing out an important conceptual link between the RoL and corruption. While the classic discussions of the rule of law focus on the risk of government arbitrariness and oppression, they do not specify the motives that might prompt such pathologies. Corruption, meaning the misuse of public power for private gain, is surely one such motive. Both concepts, it has been noted, fit into a broader umbrella concept of impartiality (ROTHSTEIN 2014). The rule of law is one mechanism for the impartial exercise of public power; but impartiality may extend to many domains that are untouched by law, and these may be correlated with deeper causes» (VERSTEEG, GINSBURG 2017, 101 and 102).

So, the candidate concept for this has been identified as impartial government (ROTHSTEIN 2011; ROTHSTEIN 2014). According to this perspective, the concept of impartiality would encompass both corruption and the Rule of Law. This would be evident for two reasons. First, corruption, as well as various forms of particularism, are incompatible with impartial government (ROTHSTEIN 2011). «Second, government impartiality implies the presence of the Rule of Law»⁶ (VERSTEEG, GINSBURG 2017, 118). For these reasons, it has been hypothesized that the concept unifying all RoL indicators – and corruption indicators – is government impartiality (VERSTEEG, GINSBURG 2017, 118).

This hypothesis also finds support in an empirical study. Attempts were made to measure impartiality through online surveys of experts, specifically scholars of public administration (TEORELL et al. 2011). The responses to questions about impartiality show a high correlation with both the RoL indicators and the corruption measurer. In this sense, it seems plausible that the fundamental concept measured by these indicators is indeed impartiality.

But what is meant by government impartiality? Impartiality can be understood in at least two senses:

- in a narrow sense: the absence of conflicts of interest. For formal Rule of Law to exist, impartiality is necessary (though not sufficient). In this sense, impartiality is understood as one element of the formal Rule of Law;
- in a broad sense: a more complex virtue, ensured both by rules on conflicts of interest and by other requirements of the formal Rule of Law. For impartiality to exist, the Rule of Law is necessary (though not sufficient). In this sense, the formal Rule of Law is the means through which impartiality is secured.

It is not clear which sense of impartiality is being used in this context. I will therefore try to determine whether Rothstein's (ROTHSTEIN 2011; ROTHSTEIN 2014) definition of "impartiality", explicitly recalled by Versteeg and Ginsburg (VERSTEEG, GINSBURG 2017), helps to clarify which notion is at stake. With regard to impartiality, Rothstein states:

- (a) «impartiality principle implies and encompasses the rule of law, while the opposite is not true» (ROTHSTEIN 2011, 25);
- (b) «"impartiality in the exercise of public power" [...] is defined as follows: "When implementing laws and policies, government officials shall not take anything about the case/citizen into consideration that is not beforehand stipulated in the law or policy"» (ROTHSTEIN 2014, 738).

By "impartiality", Rothstein seems to refer to a value that can be achieved through the Rule of Law (since impartiality is what implies and encompasses the Rule of Law, rather than being merely one of its formal elements) – hence, to a broad notion of impartiality. The Rule of Law is therefore necessary for impartiality to exist. This begins to outline the relationship between the Rule of Law and impartiality. The (formal) Rule of Law is a means to achieve the end (impartiality): in Rothstein's reconstruction, it would seem to be a causal relationship.

From this reconstruction, however, I partly distance myself. Lacking sufficiently solid evidence to demonstrate a means-end relationship between the Rule of Law and impartiality, I limit myself to maintaining that there exists a phenomenal connection between them: the perception of impartiality suggests the presence of the Rule of Law. To use an analogy, government impartiality stands to the Rule of Law as moving leaves stand to the wind. Let me explain: the Rule of Law is associated with government impartiality for the same reason that, when we want to know whether there is wind, we look at the leaves on the trees. In other words, the perception of impartiality

⁶ For a more in-depth discussion of the relationship between the Rule of Law and impartiality, and more specifically of impartiality as a dimension of the Rule of Law, see KRAMER 2025.

is associated with the presence of the Rule of Law, just as the perception of moving leaves is associated with the presence of wind.

This does not mean that, if there is Rule of Law, there is necessarily impartiality – just as it does not mean that if there is wind, there are necessarily leaves moving (the leaves might be shielded by a barrier we do not see). Conversely, it is not necessarily the case that if there is impartiality, it is due to the Rule of Law – just as moving leaves are not always caused by the wind (someone could be blowing on them, or they might move because of an earthquake).

This means that relying on impartiality as an indicator of the Rule of Law is both over-inclusive and under-inclusive. Yet why rely on such an indicator? Because it remains a reliable one. If we want to know whether there is wind, we look at the leaves because we believe that if the leaves move, it is probably due to the wind, and if they do not move, it is probably because there is no wind.

In summary: is there a conceptual relationship between impartiality and the Rule of Law? No. A causal one? Yes – in the sense that the Rule of Law can be (and usually is) one of the factors that determine governmental impartiality. However, I believe that the adjective that best qualifies the relationship between impartiality and the Rule of Law is phenomenal: perception of impartiality is a good indicator of the presence of the Rule of Law. For this reason, surveys assessing the presence or absence of the Rule of Law often consider impartiality.

There remains one final issue to address: government impartiality is a concept usually associated with the judicial and administrative spheres – but does it also concern the legislative sphere? Isn't it contradictory to speak of impartiality with reference to the legislature? Isn't legislative activity always, in some sense, partial? If it is easy to imagine what impartiality means in the judicial and administrative contexts, legislative impartiality appears to be a slippery concept. I believe that impartiality can be an attribute of the legislature insofar as it ensures that legislators do not act in situations of conflict of interest (even though different rules on conflicts of interest apply to them) and, more generally, do not act primarily to serve their own personal gain. In this sense, the concept of impartiality and legislative activity are not irreconcilable. One can, in fact, legislate in a partisan way (due to one's political orientation and ideas) and at the same time not act primarily for one's own personal interest. In this sense, Cupit (CUPIT 2000) characterizes impartial action as action that is not influenced by considerations such as personal preferences or special personal relationships.

2.2 *Government Impartiality and the Limits of the RoL Indicators*

At the beginning of this work, I expressed the need to find a sufficiently shared definition of the Rule of Law. I turned to the RoL indicators because many of these are opinion-based.

This method is problematic for two reasons:

- (1) the definitions of the Rule of Law (and the parameters used to measure it) adopted by the four private organizations differ from one another;
- (2) the parameters for measuring the Rule of Law are defined a priori by these organizations and are not constructed by the respondents themselves (they are therefore not opinion-based).

Before addressing (1) and (2), it should be made clear that my aim is not to reconstruct the ordinary use of the expression Rule of Law from the definitions provided by four private organizations, but rather from the results of the indicators produced by these organizations – which conduct surveys and use them to compile rankings.

As for (1), even though the definitions differ, convergence in the results might suggest that the indicators measure the same underlying phenomenon. How else could such convergence be explained? It might, of course, be a coincidence. However, empirical evidence – showing that data on belief in government impartiality coincide with data on belief in the presence of the Rule of Law (TEORELL et al. 2011) – seems to indicate that this is not a mere coincidence, but that there is a common element these indicators capture (as shown earlier, according to one thesis, that common element is impartiality (VERSTEEG, GINSBURG 2017)).

If the first limitation in accepting the RoL indicators as tools capable of providing a sufficiently shared definition of the Rule of Law was the diversity of all the conceptions of the Rule of Law behind each RoL indicator, the fact that a concept unifying all the indicators has been identified leads us to conclude that this limitation has been overcome.

(2) Seems harder to overcome. To speak of a sufficiently shared definition of the Rule of Law, it is necessary to be aware of what is usually meant by the expression “the Rule of Law”. To be aware of this, it initially seemed that the RoL indicators were perfect candidates because many of them are opinion-based (through interviews with experts and, in the case of the WJP, also with non-experts). However, the fact that the RoL indicators are opinion-based is misleading: interviews are not conducted to define the Rule of Law but to determine the level of the Rule of Law in a certain country. In this sense, the definitions of the Rule of Law are determined *a priori*, and there is nothing opinion-based in their definition. In other words, respondents’ opinions are used to calculate the level of the Rule of Law, not to determine what the Rule of Law actually is.

Is it possible to overcome this limitation, or was the idea of defining the Rule of Law through the RoL indicators just a mirage? Perhaps to move forward, it is useful to try to root the Rule of Law in something that allows us to know what the common perception is. We have seen how the RoL indicators work: they, after establishing what the elements characterizing the Rule of Law should be, conduct interviews – primarily with experts but also with non-experts. However, we are not interested in knowing how much Rule of Law there is in a state. Rather, we are interested in knowing what defines the Rule of Law. At the same time, we have seen that the RoL indicators, despite having different conceptions of the Rule of Law, end up converging in their results.

At this point, we can advance a hypothesis: regardless of what the various RoL indicators believe are the distinctive elements of the Rule of Law, the interviewed individuals end up attributing a higher score to states where they believe there is an impartial government, thereby demonstrating that what they believe to be the distinctive aspect of the Rule of Law is precisely impartiality. In this way, the RoL indicators regain the authority necessary to provide a good definition of the Rule of Law, if by “definition” we mean what is usually understood by a certain expression.

In summary, point (2) can also be addressed through the argument of result convergence: regardless of the specific parameters used by the Rule of Law indicators, and even though respondents answer questions referring to those particular parameters, what they actually have in mind when responding is impartiality.

In conclusion, this is a method that has its limitations, but it can nonetheless be usefully employed to indicate what people have in mind when they think about the Rule of Law.

3. Conclusions

Our starting point is the RoL indicators. We have seen that these indices are based on surveys, conducted primarily through interviews with experts. In this regard, it is useful to consider how the WJP Index is understood: the WJP explicitly acknowledges that its index is perception-based, since it relies partly on opinion-poll data; yet expert assessments are also perception-based, as the experts who evaluate the RoL have very few genuinely objective measures at their disposal. The same applies to corruption: Transparency International’s Corruption Perceptions Index openly states that it is a subjective indicator, not intended to measure corruption directly but to capture perceptions of corruption (VERSTEEG, GINSBURG 2017, 121).

The most relevant point here is that the Rule of Law is not defined on the basis of objective data but on subjective perception. In this sense, a government is considered impartial if it is perceived as such. The scarcity of objective criteria for assessing impartiality does not imply that expert judgments are arbitrary.

Returning to the methodological framework I have adopted: to understand what the Rule of Law is, we must clarify what is ordinarily meant by the Rule of Law. According to both an initial

intuition and the opinion of experts, the Rule of Law corresponds to government impartiality. To measure government impartiality, we rely on opinions – primarily those of experts – and can therefore conclude that these opinions are grounded in subjective perception.

To summarize, in the attempt to formulate a perception-based definition of the Rule of Law, and assuming that the analysis of RoL indicators might help provide such a definition, it has been observed – on the basis of a convergence in results among the various indices that measure the Rule of Law, as well as with the Transparency International Index – that these indicators appear to measure a common variable. This variable has been identified as “government impartiality”, insofar as it captures the broader concept that encompasses both corruption and the risk of arbitrariness and oppression by public authorities, the latter being the central theme of classical discussions of the Rule of Law. Some empirical evidence (TEORELL et al. 2011) supports this intuition: when experts and non-experts are asked what the Rule of Law is, their responses converge with those they give when asked about government impartiality.

We can therefore conclude that the Rule of Law coincides with the perception of an impartial government. Believing that the government acts impartially means expecting that it does not pursue particular interests. Schematically, the Rule of Law, according to this elaboration, consists of two elements:

- (a) the expectation that there is a government;
- (b) that acts impartially.

The most significant result of this analysis is the identification of a perception-based definition of the Rule of Law. That the Rule of Law coincides with government impartiality is, of course, a controversial claim; this is the most problematic aspect of the entire argument. Yet, based on the correspondences observed among the different RoL indicators, it appears that expert evaluations ultimately converge on a key point: the Rule of Law is present when the government is perceived as impartial.

References

- BINGHAM T. 2010. *The Rule of Law*, Allen Lane.
- CUPIT G. (mns.) 2000. *When Does Justice Require Impartiality?*, paper presented at the 50th annual conference of the Political Studies Association, UK, April 10-13.
- DAVIS K.E. 2004. *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, in «Michigan Journal of International Law», 26, 2004, 141ff.
- DAVIS K.E. 2014. *Legal Indicators: The Power of Quantitative Measures of Law*, in «Annual Review of Law and Social Science», 10, 2014, 37 ff.
- FULLER L. 1964. *The Morality of Law*, Yale University Press.
- GINSBURG T. 2011. *Pitfalls of Measuring the Rule of Law*, in «Hague Journal on the Rule of Law», 3(2), 2011, 269 ff.
- KAUFMANN D., KRAAY A., MASTRUZZI M. 2010. *The Worldwide Governance Indicators: Methodology and Analytical Issues*, in «World Bank Policy Research Working Paper», 5430, 2010, 1 ff.
- KRAMER H.M. 2025. *Impartiality*, in BELLAMY R., KING J. (eds.), *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press, 157 ff.
- MØLLER J., SKAANING S-E. 2014. *The Rule of Law: Definitions, Measures, Patterns and Causes*, Palgrave.
- RAZ J. 1979. *The Authority of Law: Essays on Law and Morality*, Oxford University Press.
- ROTHSTEIN B. 2011. *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective*, University of Chicago Press.
- ROTHSTEIN B. 2014. *What Is the Opposite of Corruption?*, in «Third World Quarterly», 35 (5), 2014, 737 ff.
- TASHIMA W. 2008. *The War on Terror and the Rule of Law*, in «Asian American Law Journal», 15, 2008, 245 ff.
- TEORELL J., DAHLSTRÖM C., DAHLBERG S. 2011. *The QoG Expert Survey Dataset*, University of Gothenburg: Quality of Government Institute.
- VERSTEEG M., GINSBURG T. 2017. *Measuring the Rule of Law: a Comparison of Indicators*, in «Law & Social Inquiry», 42 (1), 2017, 100 ff.
- WALDRON J. 2016. *The Rule of Law*, in ZALTA E.N., NODELMAN U. (eds.), *Stanford Encyclopedia of Philosophy (Fall 2023 Edition)*, Metaphysics Research Lab, Stanford University.

PART II.

The Rule of Law:
Its Crisis and Its Enemies

On the Origins of the Difficulties Faced by Constitutional Democracies (with an Appendix on Democracy, Constitutionalism, *Rechtsstaat*, Rule of law: Some Historical-conceptual Aspects)

GIORGIO BONGIOVANNI

Professore ordinario in Filosofia del Diritto.

Università di Bologna.

E-mail: giorgio.bongiovanni@unibo.it

ABSTRACT

The difficulties faced by Western democracies are one of the most hotly debated topics in contemporary legal and political discourse. This text attempts to identify the origins of these difficulties by highlighting two main aspects: the loss of balance between the constituent elements of constitutional democracies (sovereignty and limits to sovereignty, freedom and solidarity) and the impact of globalisation on national political systems. The analysis of these two aspects, preceded by an examination of some of the main political, social and legal transformations, highlights, on the one hand, the progressive detachment of political choices from constitutional objectives and, on the other hand, the drastic reduction in the decision-making spheres and tasks of states and the very sharp increase in economic, financial and legal constraints on residual decisions. The current process of deglobalisation does not seem to be leading to greater decision-making and intervention space for national democracies. In the appendix, based on R. Bin's analysis, the German/European model of the *Rechtsstaat* and the Anglo-Saxon model of the rule of law are compared in order to show that the former has its origins in a focus on social aspects that is lacking in the latter.

Le difficoltà delle democrazie occidentali sono uno dei temi più discussi nella riflessione giuridico-politica contemporanea. Il testo cerca di individuare le origini di queste difficoltà individuando due aspetti principali: la perdita dell'equilibrio tra gli elementi costitutivi delle democrazie costituzionali (sovranità e limiti alla sovranità, libertà e solidarietà) e l'impatto della globalizzazione sui sistemi politici nazionali. L'analisi di questi due aspetti, preceduta da una disamina di alcune delle principali trasformazioni politiche, sociali e giuridiche, mette in luce, da un lato, il progressivo distacco delle scelte politiche dagli obiettivi costituzionali e, dall'altro lato, la drastica riduzione degli ambiti decisionali e dei compiti degli Stati e il fortissimo aumento dei vincoli, economici, finanziari, giuridici, sulle decisioni residue. L'attuale processo di deglobalizzazione non sembra condurre a un maggiore spazio decisionale e di intervento per le democrazie nazionali. Nell'appendice vengono confrontati, sulla base dell'analisi di R. Bin, il modello tedesco/europeo del *Rechtsstaat* e quello anglosassone della *rule of law* al fine di mostrare che il primo ha alla sua origine un'attenzione per gli aspetti sociali che manca al secondo.

KEYWORDS

democracy, constitution, globalisation, discipline

democrazia, costituzione, globalizzazione, disciplina

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



On the Origins of the Difficulties Faced by Constitutional Democracies (with an Appendix on Democracy, Constitutionalism, *Rechtsstaat*, Rule of law: Some Historical-conceptual Aspects)

GIORGIO BONGIOVANNI

1. *Introduction* – 2. *The Main Changes* – 3. *Liberal Democracy and Constitutional Democracy* – 4. *The Two Sides of Constitutional Democracies and the Problem of Their Balance* – 5. *Globalisation and Democracy* – 5.1 *The Narrow Scope of Choices and the Logic of Discipline* – 5.2 *Changes in (the World of) Law* – 5.3 *Globalisation and the West: Heterogenesis and Trilemma* – 6. *Conclusions: Democracy and De-globalisation*.

1. *Introduction*

Writing about the difficulties of democracies and their origins is an activity that runs the risk of being like carrying coals to Newcastle or owls to Athens¹: these are topics that have been extensively analysed and are the subject of a flourishing literature². However, an investigation into their origins may be useful, perhaps even necessary, to better understand the transformations undergone by contemporary democratic systems, to try to assess whether these transformations are leading to a definitive change or only a trend, and to outline possible responses to these difficulties and changes³.

In this contribution, we will attempt to evaluate these processes in light of the structure of constitutional democracies and, therefore, of the «degenerations in what have long been considered strong democracies» (CALHOUN et al. 2022). The analysis of the origins will focus on two aspects that can be seen as central and that refer to the «global and domestic pressures on liberal democracy»: on the one hand, the dual nature (dual system of legitimacy) of constitutional democratic systems and the progressive loss of their balance and, on the other hand, the influence of globalisation on the legal, decision-making and social structure of these systems⁴.

The paper is structured as follows: the second paragraph will attempt to provide, on the basis of recent political, legal and socio-economic literature, a schematic list of the main changes that have taken place in constitutional democratic systems. The third paragraph will attempt to explain the reasons for the need to use the term constitutional democracy and to evaluate the changes with respect to that of liberal democracy. The fourth paragraph is devoted to the first source of the difficulties, namely the transformations that have led to the imbalance in the dual structure of constitutional democratic systems: these are, in particular, the changes in the sphere of political representation and in the relations between powers. The fifth paragraph will examine the role of globalisation in shaping democracy: this is a decisive role that profoundly affects the

¹ Use the image of redundancy, ZAMAGNI 2022.

² See, *ex multis*, CALHOUN et al. 2022, RUNCIMAN 2018, HARPER 2022, LEVITSKY, ZIBLATT 2019, BALKIN 2017, VAN BEEK (ed.) 2019, 2022, BERMEO 2016, DIAMOND 2015, whose titles refer to degeneration, end, crisis, retreat, threat, pressure, recession and constitutional ruin.

³ KLINGEMANN et al. 2022, 448, see a division in their research into two moments: «The first is descriptive: Is there evidence to assume that democracies have undergone a substantial change in the past two or three decades? The second question deals with the consequences of such changes. Are there any reasons to believe that these consequences constitute a crisis or a challenge to democracy?».

⁴ The basic idea, JÖNSSON 2022, 12, is that «the evolution of democracy in individual countries is determined not only by domestic factors but also by global circumstances».

decision-making sphere and causes a major change in the structure and social conditions. The conclusions outline the possible lines of evolution for democracies: the trend, which is not definitive, is towards a transition to an electoral/majoritarian democracy with plebiscitary tendencies and attenuated constitutional safeguards⁵.

2. The Main Changes

The transformations of democratic constitutional systems can be grouped into general areas which, although overlapping, have a dimension that is respectively a) political (particularly in the sphere of representation), b) social, c) political-institutional and legal. a) *Political representation*: i) one of the most significant aspects is the crisis of the political party as an instrument of political participation and a link between society and the state. With the transformation of mass parties⁶ into catch-all parties⁷ and then cartel parties⁸, parties (particularly in Europe) are gradually losing these roles and their legitimacy. In the first case (catch-all), parties abandon their ideology (“de-ideologisation”) and tend to propose similar political programmes: this leads, partly as a result of the greater importance of the media, to the strengthening of the role of leadership and its personalisation⁹; in the second case, the party changes its reference point (“relocalisation”), which becomes the state and no longer society. This shift from social actor to state actor (MELPIGNANO 2023, 92) makes the party a «vote-seeking and office-seeking organisation» aimed, in a self-referential framework (ZOLO 1992), at “maximising results” and consensus. This occurs through an «invasion of the state by parties and their subsequent infiltration into certain sectors of society» (through “clientelism and patronage”)¹⁰, with «the verticalisation of functions and the concentration of resources at the centre and in the leadership», a “top-down dynamic” for decision-making, an “instrumental relationship” between party members aimed at achieving a «direct advantage (remuneration)» or «indirect advantage (honours, extra-political career, material benefits)», and a tendency towards short-term political choices. The result is the loss of legitimacy of the party, now considered “unrepresentative” and lacking «a democratic and participatory internal life»¹¹. ii) Electoral *disaffection* and *detachment* from institutions. Very briefly, there is an “undeniable negative trend” (IGNAZI 2019, 225) in electoral participation in Europe (albeit with varying decreas-

⁵ PEDULLÀ, URBINATI 2024, speak of “elective autocracy”.

⁶ According to IGNAZI 2019, 167, 169, the «typical characteristics of a mass party» are: «many members, 24-hour activism, self-sacrifice and militancy, attentive and responsible leaders, honesty and integrity, etc.» This becomes the general model to the extent that «the “good party” by definition is the mass party: any other configuration is merely a corrupt form of that model» and that «the myth of the mass party still holds».

⁷ IGNAZI 2019, 167, according to which this occurs when the «cultural, social and political premises» of the mass party cease to exist, i.e., with reference to KIRCHHEIMER 1966, «the era in which there were rigid class divisions and more differentiated denominational structures».

⁸ IGNAZI 2019, 203, who, with reference to KATZ, MAIR 1995, emphasises that «the dynamic [...] underlying the emergence of the cartel party» lies in «the acquiescence of parties in cooperating with each other and with vested interests through state mediation, combined with their detachment from the most vital sectors of society». There are other names for the cartel party, such as professional-electoral party, franchise party, and company party.

⁹ IGNAZI 2019, 180-181, notes that «the autonomisation of the leadership and its incipient personalisation [...] led to the demobilisation of members» and, at the same time, freed «the ruling groups from internal party constraints, both horizontally vis-à-vis the party’s collegial bodies (central committees, executive committees, etc.) and vertically vis-à-vis the grassroots».

¹⁰ IGNAZI 2019, 304, according to which «this “colonisation” did not recede in the era of neoliberalism: it adapted, moving from the economic sectors and insinuating itself into the administrative and bureaucratic sectors and other public spheres, which were in any case controlled by the parties».

¹¹ IGNAZI 2019, 269, 200, notes that «parties appear to be self-referential, distant and proto-oligarchic organisations, disconnected from society and far removed from the needs of the people» and also “unreliable” and “problematic”.

es and situations) and a different incidence of democracy support indices¹². The latter generally record three related aspects, the first relating to democracy as an ideal/value and the other two to democracy as a regime in the sense of its coincidence with the ideal and its performance, i.e. its ability to provide effective treatment of the «basic functions of government». The first index in liberal/constitutional democracies is generally high and stable, the second is declining¹³, while the third (performance – instrumental acceptance), which should be considered “of key importance”, is often very low¹⁴. The latter index, which is particularly significant «in countries suffering from major economic and political problems» and in cases of «dissatisfaction with the regime», can probably lead, if low, to «the emergence and strengthening of populist parties» (KLINGEMANN, CANAN-SOKULLU 2022, 385-286). iii) *Populism*. This is one of the most important and most studied phenomena of political transformation in democratic systems, which has developed significantly in its contemporary form since the 1990s. A concise definition of populism is that «all forms of populism include some kind of appeal to “the people” and a denunciation of “the elite”». More explicitly, populism is seen as «a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people» (MUDDE, ROVIRA KALTWASSER 2017, 5-6).

Very similar, albeit with some differences, is the definition provided by ALBERTAZZI, MCDONNELL (2008, 3, 4), according to whom populism is «an ideology which pits a virtuous and homogeneous people against a set of elites and dangerous “others” who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity and voice». On this basis, some distinctive characteristics of populism can be identified: iiia) the people are seen as homogeneous, unified and virtuous. This can refer to different visions (common people, nation, ethnicity, etc.)¹⁵; iiib) as a *thin* ideology, populism is «highly compatible not only with any political ideology (Left or Right, reactionary or progressive, reformist or revolutionary) and any economic programme» (ALBERTAZZI, MCDONNELL 2008, 3, 4)¹⁶. iiic) the expression of this will is «usually led by a charismatic leader who is portrayed as knowing instinctively what the people want» (ALBERTAZZI, MCDONNELL 2008, 5). Leaders present themselves as true interpreters of the “will of the people” and as the only ones capable of realising it directly¹⁷; iiid) the unity and ho-

¹² KLINGEMANN et al. 2022, 451, note that these indices «are the major indicators to determine resilience or retreat» of democratic systems.

¹³ KLINGEMANN et al. 2022, 452-453, show that «globally, support for democracy as an ideal form of government reaches an average of 0.78 and is stable over time (2005/09: 0.78; 2010/14: 0.78; 2017/20: 0.79). With a mean value of 0.58, support for the democratic regime in one’s own country is lower and (mildly) on the decline (2005/09: 0.61; 2010/14: 0.57; 2017/20: 0.56)».

¹⁴ KLINGEMANN, CANAN-SOKULLU 2022, 286, note that «on average 30% of Germans and 67% of Italians express dissatisfaction with regime performance, saying that they are fairly or not at all satisfied with the way democracy is working in their own country».

¹⁵ This translates, particularly for right-wing populism, into a resurgence of nationalism. According to VAN BEEK 2022, 65, this populism «submerged as it is in the past, or in retrotopia» seeks to create (IGNAZI 2019, 212) «a common national or subnational identity, from which all substantial diversity, a harbinger of division, is banned», i.e., FUCHS, KLINGEMANN 2019, 8, «a sharp frontier between the inside and the outside».

¹⁶ MUDDE, ROVIRA KALTWASSER 2017, 6, note that «populism almost always appears attached to other ideological elements, which are crucial for the promotion of political projects that are appealing to a broader public». According to VAN BEEK 2022, 65, this happens «by combining their own “thin” ideology with “thick” ideologies such as nationalism, socialism, federalism, fascism or conservatism».

¹⁷ According to VAN BEEK 2022, 65, «the characteristic anti-establishment rhetoric of populism turns into something of an encumbrance for populist leaders when they themselves become the political elite. They adopt two ways of dealing with this pesky inconvenience. The first is to remain in a permanent campaign mode by pointing fingers at alleged anti-government agents plotting against them and the state. The second method is to redefine the political elite by arguing that the real power continues to reside elsewhere, that is, with the media, the judiciary, the financial elite or the technocratic classes».

mogeneity of the people expresses a will that represents the common good: this monist idea «and especially its notion of a “general will” may well lead to the support of authoritarian tendencies» (MUDDE, ROVIRA KALTWASSER 2017, 18), such as the «rejection of the rules of the game», the «denial of the legitimacy of opponents» (MAFFETTONE 2019, 56) and above all (URBINATI 2020), «the attempt to decisively weaken the instruments of guarantee (constitutional courts, the judiciary, pluralism)». Populist parties and leaders «constitute the internal challenge for democracy» in that support for «popular sovereignty and majority rule» is generally accompanied by a sceptical view of “liberal democracy”: as “monists”, they are «highly sceptical about minority rights and the politics of compromise»¹⁸.

b) *Society*: i) One aspect of social change is the progressive *increase in inequality*. The general trend is that «after declining for many decades», «income and wealth inequalities have been on the rise nearly everywhere since the 1980s» (BLANCHARD, RODRIK 2021): globally (2023 data for income and 2022 data for wealth), for example, 50% of the population owns 2% of wealth and receives about 8% of total income, while 10% of the population owns 77% of total wealth (of which 1% of the population owns 40%) and receives 53,5% of total income (of which 20,5% of the population owns 20,5%). In the US, 50% of the population owns 1,5% of wealth and receives about 13% of total income, while 10% of the population owns 70% of total wealth (of which 1% of the population owns 47%) and receives 35% of total income (of which 20,7% of the population owns 20,7%). In Europe, 50% of the population owns 3,3% of the wealth and receives about 18% of the total income, while 10% of the population owns 60% of the total wealth (of which 1% of the population owns 36%) and receives 36,6% of the total income (of which 13,3% of the population owns 36%). In Italy, 50% of the population owns 2,5% of the wealth and receives about 16,6% of the total income, while 10% of the population owns 56% of the total wealth (of which 1% of the population owns 22%) and receives 37% of the total income (of which 1% of the population owns 13,3%)¹⁹. The evolution of income differences was summarised as follows, based on final data for 2019 (BLANCHARD, RODRIK 2021): «the income shares of the richest 1% in Western Europe and the United States increased from around 8% in the 1970s and 1980s to 11% [13,3] and 20% [20,7], respectively, today. In 1980, the income share of the bottom 50% stood at 20% in both regions. Over the subsequent three and a half decades, this figure dropped to 12,5% [13] in the United States and 18% in Europe». Although Europe presents better data, the trend remains the same. In Italy, from 2010 to 2016, «the Gini index, a summary measure of the degree of inequality in distribution, rose from 0.67 to 0.71», and “fell slightly” in the following period; during the same period, «the share of net wealth owned by the richest 5 per cent of households rose from 40 per cent to 48 per cent». At the end of 2022, «the richest 5 per cent of Italian households held 46 per cent of total net wealth, while the poorest 50 per cent owned less than 8 per cent» (NERI et al. 2024)²⁰. As far as income is concerned, in Italy «inequality [...] grew sharply in the early 1990s», reaching, for «net wages of the working-age population», a growth in the «Gini index from 0.25 in 1989 to 0.32 in 2020» and, in the same vein, the index of «disposable income for the 25-55 age group [...] from 0.28 in 1989 to 0.34 in 2020» (CHECCHI, JAPPELLI 2023)²¹. To this must be added «persistent wage stagnation»: despite the fact that «nominal wages grew by 107,5% between 1991 and 2022, real wage levels remained virtually unchanged, showing growth of just 1%»²². ii) The second aspect of social change is the «*accelerating*

¹⁸ FUCHS, KLINGEMANN 2019, 8-9, who speak of a «process of authoritarianisation by populist parties and their leaders».

¹⁹ Data taken from WID – WORLD INEQUALITY DATABASE.

²⁰ The OXFAM REPORT 2024, 17, refers to this as the «persistent reversal of fortune», i.e. the enrichment of the richest part of the population at the expense of the least well-off. The 2025 report shows that wealth comes from positional rents: «just consider that over a third (36%) of billionaires fortunes come from inheritance».

²¹ In WID – INEQUALITY IN 2024: a Closer Look at Six Regions, it is highlighted that Italy ranks fourth among all European countries in terms of inequality levels.

²² OXFAM 2024, 29, 9, reports «a decline that in 2022 placed Italy in 22nd position among OECD countries in terms of real average annual wages, marking a drop of 13 places in the ranking compared to 1992», and that «low wages mean

pace of migrations» (VAN BEEK 2022, 5) that happened in the 1990s and peaked in the 2015 “European refugee crisis”. Migration flows had different origins (mainly from former Soviet bloc countries and the Balkans from the 1990s onwards – in 2004 and 2007, some of these countries joined the EU)²³, Africa, Asia, the Middle East, Central and South America) in the 2000s. At the beginning of 2012, «foreign nationals (non-EU citizens) residing in the 27 countries of the European Union [...] numbered approximately 20,7 million, representing 4,1% of the total population» (BETTIN, CELA 2015). This proportion has grown steadily²⁴: according to data for 2023, there are currently 42 million people born outside the EU and 27 million non-EU citizens, representing 8,5% and 6,1% of the total population (448 million)²⁵, while the five countries with the highest number of foreigners are Germany (more than 10 million), France (5,4 million), Spain (5,2 million), Italy (5 million) and Austria (1,5 million). In the United States, 14% of residents were born abroad; iii) the third aspect is the *impact of strong technological innovation* which, based on the development of information technology, robotics and artificial intelligence, has brought about profound changes in the world of work. The consequences are different depending on whether the innovations are a «form of alternative (replacement) to [...] work [or] whether the new technology develops as a means of increasing the efficiency of [...] work (complementarity)»²⁶. In the first case, there would be a loss of jobs, while in the second, jobs could increase. It seems much more likely that the direction will be towards job losses²⁷: what can be observed, however, is that increases in employment are recorded «in labour-intensive and low-wage sectors (commerce, care, catering, tourism), and are accompanied «by a considerable increase in involuntary part-time work among women and men and [by] a decrease in hours worked»: all this has contributed «to widening the area of *in-work poverty*». This means that despite «poverty remaining typically concentrated among the “unemployed” (unemployed, underemployed, inactive and retired), over the years the number of individuals who, despite having a job or belonging to a household in which there are employed persons, find themselves in relative or absolute poverty has grown» (MODICA SCALA 2022, 133).

c) *Political-institutional and legal*: i) the *difficulty of democratic systems in resolving (governing) social and economic issues*²⁸. This situation can be highlighted in light of the ineffectiveness of the policies implemented in Western countries to combat economic problems (and the further complications they have generated). In Europe, for example, this has been referred to as “structural reform”, i.e. «a grab bag of policies meant to enhance productivity and improve the functioning of the supply side of the economy». It is a model that aims «to sweep away impediments to the functioning of labor, goods, and services markets – to make it easier for firms to fire unwanted employees, to break business and union monopoly power, to privatize state assets, to reduce reg-

that many workers, despite working long hours, remain trapped in the spiral of poverty».

²³ These are Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Slovenia, Hungary, Bulgaria and Romania.

²⁴ According to the website IOM, UN MIGRATION (<https://dtm.iom.int/europe/arrivals>), which records arrivals by land and sea, after the peak in 2015 with more than 1 million immigrants, flows have been fairly stable, never falling below 100 000 migrants (with peaks of 380 000 in 2016 and 290 000 in 2023). More comprehensive and much broader figures are available from EUROSTAT, <https://ec.europa.eu/eurostat/web/interactive-publications/migration-2024#migration-to-the-eu>.

²⁵ EUROPEAN COMMISSION, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe_it.

²⁶ MAFFETTONE, VECCHIONE 2020, who note that «the dynamics linked to technological change have different effects on *skilled* and *unskilled* workers».

²⁷ An estimate by BANNÒ et al. (2021) reports a risk of job losses in Italy of 33,4% (7,1 million jobs) in an occupation-based approach, which is reduced to 18,1% (3,4 million jobs) if the approach is task-based. The most recent surveys assess the impact of Artificial Intelligence and the risk that its introduction will also jeopardise many skilled jobs. See, for example, CASTIGLI 2024.

²⁸ LANE 2023, 3, argues that «systemic inadequacies of democratic government have given rise to a political legitimacy deficit. Political elites have become “decoupled” from social classes. Ruling elites have dominated politics, and political parties have been unable to respond positively to public demands».

ulation and red tape, to remove licensing fees and other costs that deter market entry, to improve the efficiency of the courts, to enforce property rights, to enhance contract enforcement, and so on» (RODRIK 2017a, 51). What's more, «the grab bag is even bigger. Often, for example, structural reform includes changes in taxes²⁹ and social security programs with an eye toward fiscal sustainability». (RODRIK 2017a, 51) This “expansionary austerity”³⁰, in addition to producing serious social effects (as in Greece) and “reverse” wage effects (from the poor to the rich), offers no guarantee of success (RODRIK 2017a, 52 ff.)³¹. ii) The *complication of the system of sources of law*. In legal theory, this aspect has been analysed in terms of post-law (*post-diritto*) and interlegality. Both approaches emphasise the presence of «legal regimes of different origins [which] coexist and multiply in a complicated and often confusing polycentric framework of a plurality of authoritative instances» (ZACCARIA 2022, 7) which determines the presence of a «pluralism of sources, public and private, no longer arranged in a rigid hierarchical relationship», but which «interact and often compete with each other»³². In the same vein, the observation emphasises «the crisis of boundaries, or rather of the distinction that made modern law complete and self-contained, and therefore comparable to a system: that distinction between internal and external, between norms and facts, is increasingly weakening in the face of the proliferation of intersections and overlaps of legality, even if these must be described, conversely, as plural, fragmented, conflicting, competing and heterogeneous» (CHITI et al. 2022, 7). iii) A further change relates to the *loss of centrality of parliament*, the decline in the quality of legislation³³, and the parallel *increase in the regulatory power of the government*. This is a “common process” that sees a decline in the role «of political representation, as well as in the culture of debate and dialogue and the quality of legislative activity» and «the progressive and incessant centralisation of political power in the government, which in turn is combined with personalisation and verticalisation within the government itself» (CIOLLI 2024)³⁴. This is happening both with the increase in the «regulatory role of the government»³⁵, a phenomenon that «includes

²⁹ HELLIER 2023, 86, shows that «governments can set taxation schemes which are regressive at the top with possibly negative rates on the highest bases (income, wealth), even if they are equality-oriented and pro-redistribution».

³⁰ MAFFETTONE, VECCHIONE 2020, who also analyse the American model of the “debt economy” based on «low interest rates in order to encourage household and corporate borrowing».

³¹ Democratic government has also been questioned at a theoretical level: because of the way they work, democracies could lead to wrong and irrational choices. This thesis argues that «given how little voters know and how badly they process information, it is not surprising that democracies frequently choose bad policies». Even if voters do not directly decide on political choices, «they significantly change the probability that different policies will be implemented»: there is therefore a good chance that democracy, as a system, will lead to wrong choices. See BRENNAN 2016, 202.

³² ZACCARIA 2022, 7, shows that the «theoretical pair consists of the binomial deconstruction-pluralism, in the sense that the deconstruction of the traditional 20th-century legal order has gradually been combined with a process of greater pluralistic openness, with the opening up of the legal dimension to the presence and action of a greater number of public and private subjects: old and new actors now coexist, in an open process, on the increasingly complex stage of the “legal game”».

³³ LUPO 2019, notes that «statute law has become increasingly “precarious”: that is, it needs amendments, adjustments and rethinking, which occur shortly after its entry into force, often even a few days later; and there is a proliferation of what are metaphorically referred to as maintenance, testing and servicing of legislation; while the legislator itself struggles to conceive and prepare legislation that is in any way destined to last. In other words, the legislator struggles to bring about the “negotiated legislation” that it aspires to produce, as it is far from easy to effectively involve and integrate the main interests at stake. It often acts in an ad hoc manner, inspired by contingent and short-term considerations, adjusting, postponing or even rethinking recent or very recent legislative measures on the basis of their shortcomings and difficulties of application and, above all, as a result of the reactions they provoke». BAR-SIMAN-TOV 2015 highlights the «frequent deviations from the rules governing the legislative process, and excessive use of unorthodox legislative procedures that short-cut the normal legislative process, such as fast-track and omnibus legislation».

³⁴ CIOLLI 2024 notes that «a characteristic common to processes of democratic regression is the loss of centrality of parliaments».

³⁵ In particular in parliamentary democracies and in countries, such as Italy, where this role is enshrined in the Constitution.

both primary and secondary legislative acts adopted by the government (i.e. decree-laws, legislative decrees and regulations) and the powers (of initiative, amendment, planning and intervention in the Commission and in the Assembly) of the Government in the legislative process», and «the role that the Government plays in the regulatory processes of the European Union, not only in the implementation of EU law, but also and above all in its formation» (LUPO 2019). In the latter case, where governments «act as legislators in EU decision making», it has been highlighted that «in the multilevel system of the European Union (EU), national governments have been empowered at the expense of parliaments». This is the case, for example, in «negotiations among member states with encompassing redistributive consequences, such as the reforms enacted during the Eurozone crisis or the negotiations on the financial framework and the Covid-19 recovery package», due to the fact that the positions of governments «find little democratic anchoring of the preference formation process [prior to the negotiations] through the involvement of national parliaments or other domestic actors» (TARLEA et al. 2024).

3. *Liberal Democracy and Constitutional Democracy*

The main contemporary democracies, particularly those in the West, are constitutional democracies, which are often referred to in current literature as liberal democracies. This latter term is undoubtedly appropriate³⁶, but in some respects it risks overlooking important elements of contemporary systems. Liberal democracy refers to a political system «marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property», i.e. what «might be termed constitutional liberalism»³⁷. However, the idea of liberal democracy and liberal constitutionalism can be open and undefined: this seems to be particularly true with regard to the rights protected. Although liberal constitutionalism «is often treated as synonymous with constitutionalism itself», its essential aspects are not always clear³⁸. In the main reconstructions, as already mentioned, it can be said that liberal democracy «is principally meant to secure four essential pillars: the institution of “checks and balances” through the imposition of limitations on the powers of government; adherence to the rule of law; protection of a core of fundamental rights; and assuring certain guarantees necessary for the maintenance of a working democracy»³⁹. Economic and social rights are not always considered part of the core fundamental rights: as has been noted, even though «several post-Second World War liberal constitutions comprise certain social and economic rights calling for the provision of some welfare benefits which plainly comport some distributive justice component», the link between liberal constitutionalism and such rights «may be best understood as being merely contingent» (ROSENBERG 2022). This aspect, the contingency of the link between socio-economic rights

³⁶ To the point that the change in essential aspects of democracy has been labelled as the transition to an “illiberal democracy”. See ZAKARIA 1997, which refers, at that time, to Peru, Slovakia, the Philippines and the countries of the former Yugoslavia. The term, as is well known, was then taken up, in a positive sense, by Orbán in 2014.

³⁷ ZAKARIA 1997, 22, which specifies that liberal constitutionalism «is theoretically different and historically distinct from democracy».

³⁸ THIO 2012, who notes that «its content remains ambiguous».

³⁹ ROSENBERG 2022, who adds that «insofar as the right to equality is included among the core ones that are afforded constitutional protection, this also assures some minimum of justice which may be largely formal if constitutional equality extends only to rights and procedures without regard to manifestly widely unequal material conditions or consequences» and that liberal democracy ensures «a series of rights, such as freedom of speech, due process, and freedom of religion, that are essentially universal in scope. Outside of the core, there is more contestation». According to MULIERI 2024, the definition of liberal democracy has been developed according to different guidelines, but they have a «fundamental point that unites each of these approaches», namely «the search for a balance between the defence of certain fundamental freedoms and the guarantee that decision-making mechanisms ensure a good level of dependence on electoral choices».

and liberal democracy, risks overshadowing a decisive aspect of contemporary democratic-constitutional systems (especially European ones). This is, in particular, the “guiding” dimension of post-war constitutions, i.e. their aspect as a “project” to be realised (FIORAVANTI 2014). This makes the rights and principles contained in the constitution binding not only in terms of guaranteeing civil and political rights in the relationship between the individual and the state, but also in terms of realising rights linked to social equality in relation to both the expansion of civil rights and the realisation and implementation of social rights. Of course, it is possible to take a narrow view of these aspects of constitutional democracies and conceive of the constitution as a mere framework (*rahmen*)⁴⁰ or as a “limit”, as has been accurately pointed out, «presuppose a kind of division of legal space [in which] one part of legal space is occupied by the constitution; another part of legal space is occupied by ordinary legislation». From this perspective, «these two spaces are conceived as separate and, all things considered, independent of each other [...] Legislation is therefore conceived as an activity that is essentially free in its aims, left to the free play of democratic politics, which can only be subject to *external* limits». Normally, the legislator finds himself in a “constitutionally indifferent” space, within which he can move freely⁴¹. This possibility exists unless the legislation «affects a constitutionally protected interest» and there is a «clear conflict with a clear constitutional precept»⁴².

4. *The Two Sides of Constitutional Democracies and the Problem of Their Balance*

The first important factor contributing to the difficulties and changes in constitutional democracies is the progressive decline in the balance between its two main sides: on the one hand, the attribution of sovereignty to the people and, on the other, the simultaneous limitation of this power by the rights and principles contained in the constitution. Constitutional democracy «is not simply a mere agreement on the rules of the political game (procedural values) [but] constitutes, instead and above all, a precise set of fundamental values» that establish «a comprehensive system of fundamental legal limits – both procedural and substantive» (SPADARO 2007). These systems, based on the coexistence of limits on power and the democratic principle, therefore have the “contradictory role” of establishing strong political power (attributed to the people) and at the same time “limiting” it⁴³. The two contrasting sides are therefore (a) popular sovereignty and (b) constitutional limits positivised in principles and rights⁴⁴. From a historical point of view, the constitutional democracies of the post-World War II period are the result of a process that led to the creation of «a new and unprecedented form» (FIORAVANTI 1999, 158) of legal and political organisation in which the values and needs of two different traditions are brought together⁴⁵: that of democratic sovereignty and that of constitutionalism (in its two variants of guarantee and guidance)⁴⁶. The plurality of rights (freedom, political, social) present in constitutional democra-

⁴⁰ The concept of the constitution as *rahmenordnung* is from BÖCKENFÖRDE 1990. According to DI MARTINO 2016, 19, this view «stems from the liberal idea that individual freedom corresponds to a pre-state sphere that the state is obliged to preserve» and sees fundamental rights as “*Abwehrrecht[e]*”.

⁴¹ PINO 2015, according to whom «these two spaces are conceived as separate and, all things considered, independent of each other: civil law, administrative law, tax law, criminal law and procedures are depicted as areas that are completely autonomous from the constitution, each with its own logic, institutions and guiding principles».

⁴² PINO 2015, which identifies two other conceptions of the constitution: as a “foundation” and as an “axiology”.

⁴³ HOLMES 1998 distinguishes between the disabling and enabling functions of the constitution.

⁴⁴ FIORAVANTI 2001, 918, speaks of the “double foundation” of democratic constitutions.

⁴⁵ FIORAVANTI 2001, 818, for whom this was something «difficult to conceive in our constitutional tradition», i.e. constructing systems in which «to reconcile what has historically belonged to two different camps for two centuries: democracy on the one hand, and the constitution on the other».

⁴⁶ The reference is to the Anglo-Saxon model of guarantee and the French model of guidance. In the first case, constitutional norms have the task of regulating the dynamics of society, i.e. of being the common “theatre of com-

cies represents both the guarantee of the autonomy of the individual, of his or her possibility of participating in the political process, of independence from need, and the goal of realising a need for justice, for substantial equality and therefore for a project of society that politics and law have the task of realising⁴⁷.

The dual nature of constitutional democracies gives rise to their parallel dual legitimacy: political decisions are valid on the basis of the principle of democratic sovereignty and that of respect for and implementation of constitutional principles and rights. There are therefore «two patterns of justification of collective decisions» (MARTÍ 2005): the democratic procedure (popular sovereignty) and rights (limits of sovereignty).

These two aspects refer not only to two historically different fields (democracy and constitution), but also imply a strong tension, almost a contradiction, between their modes of legitimisation⁴⁸. Collective decisions are, on the one hand, legitimised on the basis of the decision, following a specific procedure and method, of the representatives of the sovereign people, while, on the other hand, legitimacy is linked to a series of substantive contents that refer to «independent substantive standards of rightness», i.e. to a «thicker theory of justice» (MARTÍ 2005).

Possible tensions and conflicts concern: a) «the reconciliation between values associated with individual autonomy [rights] and those linked to democracy»: even if «the protection of fundamental rights [and] the development of democracy» are «values [...] that cannot be renounced as they are valuable political achievements of modernity [...] we must face the fact that both values, or sets of values, conflict with each other, at least in certain cases, and that we need a solution to resolve this sort of tragic dilemma»⁴⁹; b) possible failure to implement constitutional principles by political sovereignty: this may occur in relation to the limitation of certain rights, the failure to implement important aspects of constitutional rights, such as social rights, and certain constitutional principles, such as those linked to a substantive vision of equality⁵⁰. This may occur due to the latency of political power or the assertion of political sovereignty as an expression of the will of the people. In such cases, the two levels of legitimacy of decisions can be seen as *independent* and as expressions of different and competing needs: on the one hand, the will of the people may be limited to the affirmation of interests or values that are in any case partial, but considered to be

petition” between social and political forces, of protecting individual rights, and are constructed on the basis of the balance and mutual limitation of powers (an organisation that seeks to limit power through its distribution among different institutional actors and the provision of checks and balances). In the second case, the rules provide for a “policy”, a “political programme” that must be “implemented” through the action of the political authority and must shape the direction of society’s development. For this analysis, see FIORAVANTI 2014.

⁴⁷ PRETEROSSO 2023, 298, in this regard, speaks of the «constitutive duality of the democratic constitution» which «cannot contemplate only the limitation of power [...] but must provide for and plan its organisation and, even more so [with reference to «its axiological-material core»], its finalisation».

⁴⁸ MARTÍ 2005 speaks of a «dilemma between democratic proceduralism and substantivism». MARTÍ 2008, 131, emphasises «the tensions or conflicts that exist between the protection of fundamental rights or human rights, on the one hand, and the development and unfolding of democracy, on the other».

⁴⁹ COSTA 2006, 9, speaks of the «difficult balance between rights and law, between *ratio* and *voluntas*», i.e. between “sovereign *voluntas*” and its constraint «to a higher *ratio*». For MARTÍ 2008, 134, 133, 136-137, «the very fact of conceiving fundamental rights as “limits of democracy” reveals the idea of tension or conflict between one value and another», and «this [...] despite the fact that, paradoxically, in many other cases the two values seem to imply each other»: this is the “paradox of the preconditions of democracy». In fact, for «the democratic procedure to be effective and legitimate, it is necessary not only to comply with the procedural rules that govern it, but also to satisfy the preconditions of the process itself, that is, the conditions necessary for the effectiveness of the process, which are very similar to the issues protected by fundamental rights. And so, the more democratic, and therefore legitimate, a decision-making procedure is, the greater the number of preconditions that must be guaranteed *ex ante*, and consequently the fewer decisions that will have to be taken once the procedure has been established».

⁵⁰ FIORAVANTI 2023, 143, emphasises the presence of two principles, autonomy and solidarity, which refer respectively to the «exaltation of civil society of private individuals» and the «collective logic of projects oriented towards social justice».

those of the people, and may not express (and may even contradict) constitutional values, while, on the other hand, the protection of constitutional principles and rights becomes a fundamental task of the judiciary (Constitutional Court and other courts); c) who can and must decide, within the institutional structure of constitutional democracies, in the event of conflict or different interpretations⁵¹ of constitutional precepts between political power and judicial power. The latency of political power or the assertion of the primacy of the sovereignty of the people can lead to a separation between political decision-making and control by the courts (constitutional and non-constitutional).

However, there are conditions of equilibrium that allow constitutional democracies to remain stable. In a nutshell, these are political, social and institutional aspects that these systems, as social projects, seem to imply: a) the *stability* of the constitutional compromise in relation both to adherence to the principles, rights and values contained in the constitution and to the commitment to their development and the progressive realisation of the objectives of the constitutional pact, in particular those relating to social rights and equality; b) the presence and effectiveness of political parties: these must not only be the channel for political participation (as a link and a forum), but also the protagonists in the implementation of the constitution (FIORAVANTI 1990). Parties should guarantee the relationship between voters and elected representatives and the participation of individuals in political life (making possible «a tendency towards constant political commitment» and «not episodic but continuous participation») and, at the same time, be both bearers of partial interests and “total parties” (MORTATI 1949) insofar as they are directed towards the realisation of constitutional principles⁵². Parties with this triple role (participation, representation of social interests, implementation of the constitution) are central to the functioning and balance of constitutional democracies⁵³; c) stability and dialogue between the various actors (parliament, government, constitutional and judicial courts) within the institutional framework.

These conditions have gradually deteriorated. This is particularly true of: a) the constitutional compromise and agreement on constitutional values, which have encountered serious difficulties in relation to the project of expanding social equality, which seems to have taken the opposite direction: the global prevalence of neoliberal policies based on freedom of enterprise (see § 5.2) has led, as we have seen, to a sharp increase in inequality and the strong prevalence of the principle of private autonomy over that of solidarity (FIORAVANTI 2023, 143). There are also serious concerns regarding multiculturalism, bioethical issues and civil rights: immigration has been seen mainly as a problem and paths towards cultural dialogue and inclusion as something superfluous, bioethical issues have become moments of conflict between values (starting with the questioning of acquired rights such as abortion) and the extension of LGBTQ+ rights is encountering serious difficulties. b) The transformation of political parties, which have gradually proven to be deficient both in terms of the link between society and political decisions and in terms of the achievement of constitutional objectives. In their self-referential dimension, their commitment to implementing constitutional principles and rights is becoming less and less evident. Since the crisis of the mass party, parties have proved to be «capable only of mediating interests in a limited and specific way, without claiming to place this within a more organic programme». This dynamic has left «the space of rights and principles uncovered» and given a «powerful impetus [...] to the development of fundamental rights» by the judiciary (BISOGNI 2023, 204, 206, 207). This role of the judiciary does not depend solely on the «substitution exercised towards a legislator who is now too often

⁵¹ On the conflict between democratic principles and constitutional rights, LOUGHLIN 2022, 97, asks the question «Which of these principles has primacy?» and considers it «one of the most perplexing questions of modern politics».

⁵² SIMONETTI 2024, referring to MORTATI 1967, emphasises that «party pluralism or dualism would not be possible “if it did not take place within the same fundamental ideology, i.e. on the basis of substantial agreement between the various opposing forces on certain fundamental principles”».

⁵³ COSTA 2014, according to whom the party is «an indispensable hub» for the functioning of constitutional democracy.

forgetful of the constitutional dimension», but can be seen as «a physiological effect of the constitutional state of the present», i.e. of the crisis of the “monist-party-centric” model based on certain conditions of equilibrium and, above all, on the central role of parties⁵⁴. All this translates into a new dual aspect of the legal-political experience: the roles of the various institutional actors are separated: while politicians determine the majority position, often outside constitutional objectives, judicial bodies and constitutional courts have «the task of giving concrete form to the constitution and affirming the fundamental rights contained therein» (FIORAVANTI 1998). In this context, two different visions of the constitution also emerge: on the one hand, political sovereignty understood primarily as an “arena of conflict” (framework/limit); on the other, jurisdiction as a set of principles and rights that must be implemented. In the event of a different interpretation of the Constitution by judges and the political power, the question arises as to who should ultimately decide. c) In addition to the change in the relationship between the judiciary and the political power, the balance of powers has, as already indicated, shifted significantly in favour of the executive and the delegation of important regulatory matters to independent authorities.

5. Globalisation and Democracy

The second and, according to almost unanimous opinion, most important source of the problems facing contemporary constitutional democracies is the phenomenon of globalisation⁵⁵. This refers to the third wave of globalisation (or the first true globalisation), also known as hyperglobalisation (RODRIK 2011) or neoliberal globalisation (D’ATTORRE 2023)⁵⁶. This phenomenon emerged in the late 1980s and, despite the fact that «globalisation is not a linear and stable process, but proceeds in waves and successive cycles, interspersed with phases of retreat» (D’ATTORRE 2023), it was «perceived as a new phenomenon and predicted to have an inexorable spread»⁵⁷. In a nutshell, it is a process that, aided by rapid and significant technological progress, has seen «the politically enforced deregulation of foreign trade and direct investment» and «the internationalisation of the capital market» (BETZ, HEIN 2023, 2). Based on a series of political decisions «namely the reduction of the once high, politically imposed barriers to the cross-border flow of goods, services and capital» (BETZ, HEIN 2023, 10, 9) and the drastic reduction in the costs of «transport and communication [...] for the exchange of goods, services and ideas», a system of «global interdependence and networking of all societies on Earth through trade, capital, labour and ideas»⁵⁸ has developed.

In a nutshell, globalisation has led to: i) a significant increase in the number of economies involved in international trade and, at the same time, the fact that «numerous new participants in

⁵⁴ FIORAVANTI 2018, 451, speaks of an «order with undecided sovereignty». See BISOGNI 2023, 203.

⁵⁵ AMATO 2021, 1, 6, for example, directly links the emergence of the idea of majority democracy and the questioning of the rule of law by the will of the majority with «the economic and social consequences of globalisation in our western societies». In essence, «the globalised economy [...] has been the main reason for the widespread anxieties and dissatisfactions to which we owe the new brand of majoritarian democracy» and intolerance «towards the precepts of the rule of law».

⁵⁶ The first is that of the late 19th century, while the second is linked to the Bretton Woods agreements. The latter made it possible for «growing economic interdependence» to coexist with «sufficient room for manoeuvre for nation states to implement redistributive policies that could protect the most vulnerable social groups from the costs of globalisation. In other words, the liberal international order had been explicitly designed to ensure the coexistence of globalisation and the welfare state» (POLETTI 2022).

⁵⁷ BETZ, HEIN 2023, 1, who add «recently (since around 2015), this optimism has been replaced by predictions of a reversal or at least stagnation of processes of increasing global economic networking and a partial deglobalisation/renationalisation».

⁵⁸ BETZ, HEIN 2023, 6-7, for whom this interdependence is «measured as the share of foreign trade, capital inflows and outflows in the GDP of the economies involved, payments for foreign technologies and patents and net immigration of workers».

the international market have significantly increased their share in world imports and exports» (BETZ, HEIN 2023, 11). At the same time, international trade governing bodies (WTO) and development support agencies (IMF, WB) have taken on a very important role; ii) the global division of the production chain of goods into different locations and countries (the splitting of value chains) with a view to saving on production processes thanks to the «cost advantage for certain manufacturing stages» of different locations and countries. (BETZ, HEIN 2023, 9, 11); iii) the financialisation of capital resulting from the opening of financial markets, i.e. the possibility of investing (and disinvesting) in the financial markets of different countries. This opportunity has resulted in the progressive use of capital in financial instruments and speculation at the expense of investment in production⁵⁹; iv) the reduction of the decision-making space of national (democratic) powers, which depends on the free movement of goods and capital, the fragmentation of production processes, the difficulty of intervening in global choices, and the reduction and privatisation of state tasks; v) the profound change in law and its sources in the relationship between private and public autonomy and between supranational regulation and national choices.

The last two aspects (reduction of decision-making space and modification of sources) are particularly relevant to the difficulties faced by democracies.

5.1 *The Narrow Scope of Choices and the Logic of Discipline*

The global dimension of “transnational interactions” has meant that «they can no longer be controlled, fenced in or driven forward solely by national agencies. Furthermore, this is associated with the fact that new, transnational actors are impacting on national societies, eroding their sovereignty or even undermining it from within» (BETZ, HEIN 2023, 7). This naturally means that «globalisation has fundamentally changed the conditions under which nation-state democracies function». In the global dimension, external problems and decisions by other governments, as well as the activities of transnational private actors (multinationals, banks) and international bodies (WTO, IMF, WB) are of internal relevance (FUCHS, KLINGEMANN 2019, 4, 5). In particular, the cross-border activities of private actors «undermined the effectiveness of state regulations and threatened to undermine national monetary, fiscal, currency, employment and tax policy» (BETZ, HEIN 2023, 13).

Globalisation leads to a general loss of sovereignty by nation states in favour of “private-sector actors” (BETZ, HEIN 2023, 13). This occurs at various overlapping levels: a) restriction of decision-making powers, b) the logic of public power regulation, c) difficulty in obtaining resources.

a) globalisation has «transferred major economic decisions to a sphere that is completely beyond the reach of the nation state», i.e. to multinational companies, international trade organisations and transnational agreements, «reducing the scope for intervention by national governments». This means that if the decision-making space of national democratic governments in the economic sphere becomes very limited, «most democratic activity inevitably ends up appearing superfluous» (CROUCH 2020). Furthermore, if «transnational corporations [...] do not like the regulatory or fiscal regime of a particular country, all they have to do is threaten to leave, and states, in need of investment, will compete to offer them favourable regulatory and fiscal conditions» (CROUCH 2020). «The sphere within which public opinion had a direct effect on the content of pol-

⁵⁹ SANDEL 2022, 306, 297, argues that «in the finance-dominated capitalism of the post-Reagan era, companies made money not by investing but by speculating on the future value of existing assets» and shows that «the Ford Motor Company, an icon of American manufacturing [...] in the early 2000s [...] made more money selling car loans than selling cars». According to RODRIK 2017b, the globalisation of finance was probably «the most egregious mistake after the 1990s»: not only does «globalisation [...] accentuate» the flaws of the market and government regulations («asymmetric information, bank runs, excess volatility, inadequate regulation»), but above all «there is a strong empirical association between financial globalisation and financial crises».

icy» is reduced, in particular «with regard to state intervention in the economy» (ROBERTS 2010, 11). As a result, the «locus of effective political power can no longer be assumed to be national governments»: «the scope for action by rulers of democratic nation states is becoming narrower, and the attribution of their accountability for social conditions is getting more difficult» (FUCHS, KLINGEMANN 2019, 5, 7).

The economic and social policy of democratic states operates within «economic and legal constraints» that are decided «in “cold” forums, outside the democratic circuit and far from social conflict [...] *Economic constraints* restrict the room for manoeuvre in public spending, borrowing, taxation, public investment, redistribution policies and social justice»⁶⁰. As we have seen (*supra* 2ci), this has led to the adoption of restrictive and austerity policies. It should also be added that the «increasingly financial [...] and oligopolistic configuration» of transnational companies (such as those in the digital sector) and the «gigantic concentration of financial wealth and media influence that this variant of capitalism manifests» has as a consequence an «enormously increased capacity to influence the political power of the state, emptying democracy of its effective power» (D'ATTORRE 2023).

b) The reduction and modification of the state's tasks («the logic of discipline») on the basis of «a distinctive programme of state renewal» that «did not simply aim to dismantle or downsize the state, but also to rebuild government so that it would be complementary to a liberalised and globalised economy» in order to «make the global economy work smoothly» (ROBERTS 2010, 4). In summary, this programme consisted of: the sale to private individuals of «major businesses that were once operated as government enterprises – airlines, electricity and telephone companies, mining and steel manufacturers, among others»⁶¹; the transfer of the management and development «of public infrastructure – roads, bridges, schools, hospitals, prisons, and so on» to private consortia⁶²; in setting up «institutional arrangements that would promote key parts of the pro-market creed, such as the need for sound money and fiscal discipline» (ROBERTS 2010, 4). In favour of this “logic” there is mainly «a deep scepticism about the merits of conventional methods of democratic governance, which are believed to produce short-sighted, unstable policies or policies designed to satisfy the selfish interests of powerful electoral blocs, well-organised interest groups and the bureaucracy itself». Linked to this is the remedy for this idea: the “depoliticisation” of certain areas of public life and their entrusting, as indicated, to «authority to technocrat-guardians» or more directly with the prohibition of certain political choices (ROBERTS 2010, 5). This «weakness of the nation state» has been considered «a virtue: if one firmly believes that governments are – almost by definition – incompetent and that large companies are always efficient, it follows that the weaker governments become and the more companies free themselves from their power, the better». This way of thinking, which is extremely widespread in political life, has contributed to the loss of importance of political democracy (see CROUCH 2020, chap. 1).

c) Globalisation substantially reduces the ability of nation states to raise resources through taxation and debt. This is due to the need, in «commercial competition with countries that have competitive advantages deriving from abundant low-cost labour», not to implement «increases [in taxation] that could have very significant marginal effects on the competitiveness of domestic companies already under stress»: «the internationalisation of production [...] by increasing the potential mobility of companies, also increases their bargaining power vis-à-vis the state» and «the possibility that companies will decide to relocate in search of better tax or regulatory con-

⁶⁰ BIN 2007, 47-48, speaks of «new dictatorships of international finance» whose “strategic objective” is to «exclude or at least limit the influence of decisions made by the representative circuit on the management of economic “rights”».

⁶¹ ROBERTS 2010, 3, who adds «government regulations that limited competition within major industries were pruned and sometimes completely eliminated».

⁶² ROBERTS 2010, 6, notes that this is done «while also providing legal guarantees that politicians would not try to interfere in their work».

ditions». This competition contributes to reducing, as we have seen, «the autonomy of states in defining macroeconomic policy» and their «ability [...] to finance policies by resorting to debt» due to the “disciplining effect” of “financial market integration” and the possibility «of moving amounts of money sometimes exceeding the entire GDP of some countries» (POLETTI 2022). The most direct consequence has been «the worldwide reduction in income and corporate taxes»⁶³ and therefore «a shift in the burden of taxation from capital to labour and consumption»: this «has led to a redistribution of the tax burden in favour of capital and to the detriment of labour» (POLETTI 2022).

The situation of democratic states in globalisation has been effectively described with the image of the “golden straitjacket” (FRIEDMAN 1999). This straitjacket is what is required, the conditions for participating in the global market. Once this direction has been taken, «the Golden Straitjacket narrows the political and economic policy choices of those in power to relatively tight parameters. That is why it is increasingly difficult these days to find any real differences between ruling and opposition parties in those countries that have put on the Golden Straitjacket. Once your country puts it on, its political choices get reduced to Pepsi or Coke – to slight nuances of taste, slight nuances of policy, slight alterations in design to account for local traditions, some loosening here or there, but never any major deviation from the core golden rules» (FRIEDMAN 1999).

5.2 *Changes in (the World of) Law*

The transformations of law are equally significant. As mentioned, they affect sources, the national/supranational relationship and the phenomenon of deconstitutionalisation. This has been characterised as «*the depoliticisation of the economy in a market-oriented way*», which represents «the other face of global law, accompanied by the *moralisation of law in a humanitarian way*» (D’ATTORRE 2023). This has meant both a decline in the role of the law and a growth in the role of private law, as well as the prevalence of transnational law over national law. Globalisation and therefore «the establishment of a more integrated world market with fewer barriers requires a global law that is increasingly uniform and pervasive in individual state legal systems, which can no longer respond solely to national interests and specificities» (D’ATTORRE 2023). This was particularly true for “transaction costs”, especially for “jurisdictional discontinuities”: «As overt trade barriers have come down, the relative importance of such transaction costs has grown» and it has been «estimated these costs to be a whopping 170 percent (in ad valorem terms) for advanced countries, an order of magnitude higher than import tariffs themselves» (RODRIK 2017a, 18).

Global law has therefore focused «increasingly on harmonising the various regulatory regimes in all areas, from health and plant protection standards to financial regulations»⁶⁴. This has been achieved «through international treaties [trade agreements] or through rulings by international courts and judicial bodies of various kinds and compositions» (D’ATTORRE 2023, referring to FERRARESE 2012). The role of the latter depends on the «difficulty of harmonising the law by political means» and is based on the possibility of «recognition and enforcement of foreign law», i.e. offering private economic actors «the option to choose domestic or foreign law as they please». This strategy, which has proved «most successful in protecting capital globally», is based in particular on the possibility for «private agents [...] to put in place conflict-of-law rules that endorse the choices that private parties make». These are “arcane” rules that are «specific conflict-of-law rules for every area of the law, such as contracts, torts, property rights, corporate law, and so forth»⁶⁵.

⁶³ BETZ, HEIN 2023, 13, who add the difficulties of taxation «in the face of cross-border, largely immaterial activities of digital conglomerates».

⁶⁴ RODRIK 2017a, 28, who sees hyperglobalisation as «the attempt to eliminate all transaction costs that hinder trade and capital flows. The World Trade Organization was the crowning achievement of this effort in the trade arena».

⁶⁵ PISTOR 2019, who notes that «for contract and corporate law, conflict-of-law rules have converged to a remarka-

This dimension of law has gradually emerged «as a kind of *spontaneous order* of society and the global market, which judges, lawyers and jurists simply give legal form to, without this implying any element of *artificial creation*. In this sense, global law presents itself not as an *order constructed* by specific economic interests or political will, but as the *legal sedimentation of the spontaneous self-regulation of the market*». Global market law seems to represent a kind of natural law whose directives can only be followed⁶⁶: it «presents itself as a right of society as opposed to the right of the state, and as such is freed from the arbitrariness of sovereign power, from the irrationality latent in political pressure on national legislative law, and from territorial boundaries and limitations» (D'ATTORE 2023). As already mentioned (see § 4), these changes entail a loss of the normative nature of the constitution, leading to what can be seen as a process of “de-constitutionalisation” (FERRAJOLI 2018, GIOLO 2020): decisions on social issues are made independently of constitutional guidelines and are subject to market demands (privatisation, budgetary balance, labour market deregulation, etc.). Constitutional norms, particularly those related to social rights, are interpreted in light of the “legal compatibility” imposed by market globalisation which, as we have seen, «removes the boundaries on the movement of property and wealth, which are free to circulate and choose to locate themselves where the conditions of “protection” are best» (BIN 2007, 48). In this way, «the fundamental economic component of liberal rights» is disconnected from the dimension of equality and solidarity that underpin the constitutional systems of the twentieth century, «breaking the compromise between individualism and inequality on the one hand, and public space and equality on the other»⁶⁷. In this context, even «the guarantees provided by constitutional rigidity have proved, in the long run, to be of little use» (BIN 2007, 47).

5.3 Globalisation and the West: Heterogenesis and Trilemma

Globalisation has given rise to «severe imbalances, both economic and political» (D'ATTORE 2023), financial and economic crises, and serious social problems. An almost perfect heterogenesis of ends has concentrated «the economic and social costs of globalisation [...] precisely in those societies that were thought to benefit most from it», i.e. in Western democracies. Faced with «a process of global wealth diffusion», there has been «the progressive impoverishment of the middle class within Western democracies» and, as we have seen, the sharp rise in inequality (*supra* 2bi). In these societies, there are “winners” and “losers”: «globalisation has brought enormous benefits» thanks to a process of increasing «the degree of concentration of wealth» for «certain specific social actors» and, at the same time, «the number of people living in poverty or economic and social insecurity has been increasing» (POLETTI 2022). To this must be added, in the face of the «growing demand for welfare policies» caused by the «increasing economic and social costs asso-

ble extent on the principle that the parties to a contract or the founding shareholders are free to choose the law by which they wish to be governed», adding that «the Trojan horse in these treaties is a dispute settlement mechanism that goes by the acronym ISDS (investor-state dispute settlement). It allows a foreign investor to bring a case for damages against the host state in an arbitral tribunal outside its territory. The language of the treaties is sufficiently open-ended to give arbitrators the power to grant damages for “unfair and inequitable treatment” that are on par with damages for expropriation». SANDEL 2022, 294, emphasises that «Fossil fuel companies have obtained the right to seek compensation if a country adopts new environmental standards that harm their profits».

⁶⁶ BIN 2007, 47, speaks critically of the “natural order” which is that «constituted by the laws of international trade, the Maastricht parameters, the evaluation criteria set by *rating* agencies, the *reports* of the OECD, and the liberal commandments of international financial institutions»: «these are “natural laws”, in the sense that they are “external” and “given” with respect to the decision-making circuit through which the political will of representative bodies is expressed [...] they are rules “revealed” by bodies representing economic interests, not “democratic” interests, imposed on political institutions and not modifiable by them».

⁶⁷ BIN 2007, 48, which adds that in this way this area «emigrates beyond the control of the democratic system» and how «“the daily referendum of the markets” replaces the traditional channels of political representation in evaluating the actions of governments».

ciated with economic liberalisation», the sharp decline, as we have seen, «in the ability of Western democracies to offer adequate protection within the constraints imposed by a hyper-globalised international economy» (POLETTI 2022).

The relationship between democracy and (hyper)globalisation and the ability of democracies to make autonomous choices in the economic and social spheres has been summarised (RODRIK 2011) in the form of a trilemma. At the base of a hypothetical triangle are sovereignty (“national self-determination”) on one side and democracy on the other, with globalisation at the apex. The trilemma consists of the following: it is not possible to have all three options at the same time, but it is possible to have i) sovereignty and globalisation without democracy (the relationship will be that of the golden straitjacket), ii) democracy and globalisation without sovereignty (here we will have a – futuristic – relationship of global governance, i.e. the idea of a global government), iii) democracy and sovereignty without (hyper)globalisation (here we will have the Bretton Woods compromise).

According to the same author, «Nowhere is this trilemma clearer than in Europe», where «the euro, which established a single currency among a subset of member states», represented «in effect [...] hyperglobalization on a European scale» (RODRIK 2017a, 66, 77). The euro is, in fact, the “logical extension” of the «an ambitious single market agenda that aimed to unify Europe’s economies, whittling away at national policies that hampered the free movement not just of goods but also of services, people, and capital» (RODRIK 2017a, 66, 77)⁶⁸. In this context, the democracies of the European Union have not chosen whether to «embark on political union or loosen economic union» (RODRIK 2017a, 8).

6. Conclusions: Democracy and De-Globalisation

Globalisation and the precarious relationship between the two sides of constitutional democracies have put these systems in difficulty: as we have seen, a sharp decline in the possibilities for intervention in the economic and social spheres – it deepens social divisions, exacerbates distributional problems and undermines domestic social bargaining (RODRIK 2017a, ix) – and the loosening of the relationship between capitalism and democracy⁶⁹, the political and economic importance of private law, the imbalance between the powers of the state, the crisis of representation, and the rise of populism: this has led to some elements of degeneration (de-constitutionalisation, centralisation of power, attempts to limit certain freedoms and the power of the judiciary). In systems where populist parties are in government or have strong vote shares (on the rise across Europe), can lead to electoral/majoritarian democracies, often with plebiscitary tendencies, in which the majority, as the power of the people, has primacy over other powers and where, in order to defend

⁶⁸ According to BISOGNI, D’ATTORRE 2023, 93-96, the EU is largely a *legal* union «in which the law is primarily called upon to ensure the integration and smooth functioning of the markets, together with the protection of fundamental economic freedoms. From the point of view of the relationship between politics and economics, the European legal space was founded primarily on the intangibility of freedom of movement (of persons, goods, services and capital), which is indispensable to the functioning of the single market, with respect to the residual margins of legislative discretion of the Member States». The European experience, based on the “technocratic structure” of the Maastricht Treaty, appears to focus on protecting the “self-organisation” of the market, the “principle of competition” and the «elimination of the element of political sovereignty». D’ATTORRE 2023, referring to GALGANO 2005 for the affirmation of the primacy of law over politics in the European integration process, notes how «it was the case law of the Court of Justice of the European Union, even before the Treaties and intergovernmental agreements, that gave European economic law a powerful neo-liberal twist».

⁶⁹ CROUCH 2020, ch. 2, asks whether capitalism and democracy today reinforce each other and even whether they are compatible.

that power, it is possible to diminish constitutional safeguards of rights⁷⁰. In Europe, examples include Hungary and Poland, and to these we can add the trends towards strengthening executive power and limiting judicial power and rights in Italy and the United States.

However, this drift is not automatic, and it is possible to identify some schematic points that could be useful in the opposite direction. Political representation can find alternative forms in the use of deliberative democracy tools (mini publics, citizens' assemblies, deliberative panels, expert committees) based on random selection and the strength of arguments (BÄCHTIGER et al. 2018). Similarly, the role of national democracies should be reviewed with a view to expanding their scope for economic and social intervention⁷¹: a new balance must be struck between democracy and globalisation, in which the latter is not exclusively a constraint on the former⁷².

This issue would also require an assessment of the current phase of globalisation's recession, i.e. deglobalisation. This is the phenomenon whereby, since the 2008 crisis, many «measures to restrict trade between G20 countries» have been and are being introduced, and «restrictions on international capital movements»⁷³ have increased and continue to increase, to the point of a possible «tariff war». This could lead to a «re-nationalisation of the worldwide social context, a relocation of decisive powers of control from international and supranational agencies to those spaces which enable a democratic collective will-formation, for which only the nation state is suitable»⁷⁴. However, this does not appear to be the path we are on: firstly, globalisation is not over and, on the contrary, a significant reduction in globalisation would have negative consequences on consumer goods prices, energy prices and employment; secondly, a tension seems to be emerging within capitalism between free traders and protectionists, which could lead to developments in different directions (BRANCACCIO, SUPPA 2019, 115); thirdly, the current slowdown has led to «geopolitical competition between the major global powers» (D'ATTORRE 2023) and not to the strengthening of national democracies.

In this context, a favourable path for European democracies is towards political integration that should «catches up with economic integration, or [...] the EU will remain dysfunctional» (RODRIK 2017a, 76), incapable of protecting democracy and responding to the transformations of globalisation.

Appendix

*Democracy, Constitutionalism, Rechtsstaat, Rule of Law. Some Historical-Conceptual Aspects*⁷⁵

1. The distinction between liberal and constitutional democracy can also be articulated in relation to the different dimensions of rule of law. To do this, it is necessary to relate the four concepts indicated in the title from their historical bearing and the implications of the different conceptual conjugations (liberal/constitutional). In particular, after recalling the distinction between twentieth-century constitutionalism and liberal constitutionalism (already seen in the text), the distinction between *Rechtsstaat* (*État de droit*, *Stato di diritto*) and rule of law (which are not just synonyms) will be analyzed. This distinction will make it possible to highlight how underlying the German reflection on *Rechtsstaat* is a critical need for what socially prevents the full development of the

⁷⁰ On the ways in which the tools of constitutionalism («designs, concepts, and principles») can be used for autocratic purposes, see DIXON, LANDAU 2021.

⁷¹ RODRIK 2011, 246ff, argues in this direction for a return to the Bretton Woods balance.

⁷² Some indications in this sense can be found in POLETTI 2022.

⁷³ BRANCACCIO, SUPPA 2019, 114, calculate, when they write, 1196 of the first type (trade) and a further 12 per cent of the second (finance) and note that, initially, «these restrictive measures were adopted not only by relatively small economies such as Malaysia and Argentina, but also by giants such as Russia, India, China and, above all, the United States of America».

⁷⁴ BETZ, HEIN 2023, 208, who note that this could favour «a re-appropriation of the commanding heights of the economy by the state» and «a relativisation of absolute property rights».

⁷⁵ This analysis is based on BIN 2016.

freedom of individuals and therefore that of the control of private and not only public power⁷⁶.

2. As mentioned (*supra* § 3), the main distinction between constitutionalisms concerns the different relationship between state and society, and fundamental rights. In the case of the twentieth-century one, as seen, the constitution also has a function of “guiding” society and provides a broad catalog of social rights, while for the liberal one, the constitution has a function of “guaranteeing” the dynamics of society and social rights are not a decisive aspect of it. A similar distinction can be found between the initial conception of *Rechtsstaat* and that of rule of law. We will briefly consider the theory of R. von Mohl and that of A.V. Dicey.

2.1. Underlying the notion of *Rechtsstaat* is the need, in Mohl’s thinking, to “juridicize” the police state (*Polizeistaat*)⁷⁷. The latter, which should be seen, in the constitutional reality of German states, as characterized by an order whose criterion is the «Wohlfahrt, the welfare of the subjects»⁷⁸ but which nevertheless maintains forms of inequality and does not guarantee equal rights and freedoms. Mohl’s proposal of *Rechtsstaat* (1832-1833) is linked to the idea that it is that «which suits itself to a society developing through its members’ energies and initiatives» and that «the value of individual and collective resources was enhanced by strengthening individual freedom». Freedom is not a «mere “empty domain” free from external intrusions but was substantiated in the individual’s positive and expanding actions»: this requires «to back the individual by removing hindrances he may not be able to overcome on his own» (COSTA 2007, 92)⁷⁹. *Rechtsstaat* therefore has a material and a formal dimension: the former refers to the fact «that the state must pursue positive (“just”) goals», while the latter does so with respect to the «binding to law and statute law» (STOLLEIS 1992, 260) of these goals/goals. The main purpose of the state is not only «the maintenance of the legal order [...] as a necessity and a good in itself», but also «the support of reasonable ends, where and to the extent that the own means of individuals or groups already gathered in smaller circles are not sufficient»⁸⁰, while the realization of the state’s purposes in legal forms was based on a few basic principles: «where the rights and obligations of citizens are disposed of or punishments are inflicted, a law passed in accordance with the constitutional procedure in force is necessary» (STOLLEIS 1992, 260)⁸¹.

⁷⁶ BIN 2016 discusses the polemical significance of the early use of the term *Rechtsstaat* and its view as a “fighting word”. COSTA 2007, 93, notes that this term was, in the first half of the nineteenth century, a «key word underpinning constitutional reforms» and that, as we shall see, «in the second half of the century it underwent a depoliticization and technicalization process».

⁷⁷ According to STOLLEIS 1992, 258, Mohl seeks to «link late absolutist police science with the postulates of the constitutional movement».

⁷⁸ SCHIERA 1982, 1003, who reconstructs, with reference to Prussia, the path of formation of German police states, the characteristics of this type of state, and the establishment in liberal historiography of a pejorative view that emphasizes «the obsessive and oppressive aspect of “state interventionism”».

⁷⁹ According to BIN 2016, underlying this idea is the need for «guarantee of equality of individuals and protection of rights and property from economic and cetual power exercised by other individuals. The rule of law was invoked as a bulwark of the security of citizens, because not the state, but society, the people, and the arrogance of private individuals constituted the threat to individuals».

⁸⁰ BIN 2011, shows that Mohl «strictly conditions the configurability of the rule of law on the presence of an effective limitation of political power by popular representation. Law can be accepted as self-restraint only if it is the product of a public process in which individuals are called upon to participate through an effectively representative system».

⁸¹ According to DI MARTINO 2018, Mohl «rejects an idea of the rule of law [*Rechtsstaat*] limited to the defensive guarantee of individual rights and includes in its definition the contents and ends of the state. The apex principle of the system is always individual liberty, but the instruments for achieving it are numerous: while the tasks related to the defense of the individual’s legal sphere are entrusted to the jurisdiction (*Justiz* or *Rechts-polizei*), those related to the support of individual liberty belong to the administration (*Hülf-polizei*). While Mohl’s position appears indebted to themes developed during Enlightened absolutism, it also represents an early attempt to respond to the emerging social question». For RIDOLFI 2022, «the liberal Mohl, a few years Stahl’s senior, developed in the same years a theory of the rule of law [*Rechtsstaat*] that was even more attentive to social changes, and primarily to those associated with the unleashing of a raging process of industrialization, taking up the conceptual core of the police state, and meaning by

2.2. One can summarize the original idea of rule of law in «three basic characteristics [...]: (1) the supremacy of ordinary law; (2) equal status before the law; and (3) the derivation of constitutional rights from the individual rights proclaimed by courts of justice and parliament» (GOZZI 2007, 239, referring to DICEY 1885). What characterizes this approach is the fact that rights are «in England, the product of a “julgenerative” process that comes from society and its judicial structures, not from a voluntary normative act or constituent body». It is a «social order *spontaneously* established by society» (BIN 2016): for DICEY (1982, 121), «the “rule of law”, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land». The social order thus establishes the minimal and limited role of public power.

3. The establishment of the *Rechtsstaat* in nineteenth-century Germany did not follow the lines of von Mohl’s proposal and went, in the *Nachmärz* – after 1848/49, in a different direction. The conservative view of Friedrich Julius Stahl took hold, according to which «The state should be a *Rechtsstaat*; that is the slogan and, in truth, the driving force behind the development of modern times. It should precisely define the scope and limits of its authority and the free sphere of its citizens in accordance with the law, and secure them inviolably, and it should not realize (enforce) ethical ideas through state action, i.e. directly, beyond the scope of the legal sphere. This is the concept of the “*Rechtsstaat*”» (STAHL 1856 quoted according to STOLLEIS 1992, 278)⁸². Nineteenth-century liberalism adopted this view and, in so doing, «loosened the link between the material idea of the *Rechtsstaat* and political participation and after 1849 largely abandoned it. The *Rechtsstaat* was no longer synonymous with political freedoms, active participation of citizens and material equality, but was limited to the formal definition and guarantee of the citizens’ sphere of freedom: “The character of the *Rechtsstaat* guarantees only the inviolability of the legal order, but not its content”. The concept of the formal *Rechtsstaat*, thus depoliticized, is, so to speak, the residual liberal program after 1848» (STOLLEIS 1992, quoting STAHL 1847). The *Rechtsstaat* (and other European states governed by the rule of law) can be reduced to the «limitation of public power through the imposition of the constraint of the law and the guarantee of judicial protection [including for acts of public administration] against any infringement of the private sphere» (BIN 2016). The result is a «vision of the *Rechtsstaat* distorted by liberal ideology, which postulates a strict separation of the state from civil society: public institutions have only the task of defending the *social order*, certainly not of changing it», a social order that «is the product of the relationships that are “spontaneously” established in society» (BIN 2016).

3.1. In the second half of the twentieth century, the *Rechtsstaat* was profoundly transformed with the passage of rigid constitutions in the major European countries (Italy, Germany, France, Spain, and others) giving rise to the constitutional rule of law. The constitutions are characterized by a strong presence of not only civil and political rights, but also and especially social rights (*sozialer Rechtsstaat*), and «the affirmation of substantive equality alongside formal equality»⁸³.

this the desirability of the state actively intervening to restore balances that had been shattered through no particular fault of its citizens. In this way, albeit in an extremely embryonic way, Mohl laid the groundwork for the transition from the nineteenth-century liberal to modern *sozialer Rechtsstaat*».

⁸² DI MARTINO 2018 cites STAHL 1878: «the *Rechtsstaat* must precisely determine and make absolutely certain, in the manner of law (*in der Weise des Rechts*), the trajectory and limits of its activity as well as the free sphere of citizens, and it must not further realize ethical ideas in a direct manner through state means (thus by coercion)».

⁸³ BIN 2016, which also notes that «the old principles of the rule of law in the liberal tradition (legality, judicial protection of rights, separation of powers, formal equality) have now been incorporated into the constitutional text, receiving as their endowment specific mechanisms that transform them into precise rules».

The principles and rights contained in constitutions are posited, as we have seen (*supra* par. 3), as “guide” for the development of society and are, among other things, guaranteed by the existence of the constitutionality review. This is a pluralistic framework of rights and principles that not only extends the «catalog of “negative” freedoms, “liberal” rights, formal equality» (BIN 2016), but also allows for the consideration of different interpretations, possible collisions between rights and different aspects of the same right⁸⁴. The constitutional rule of law overcomes «the separation of social and political order of the liberal *Rechtsstaat*» and replaces it with the «democratic program of social transformation» provided by constitutional principles» (BIN 2016).

4. How has the idea of rule of law evolved? It can be said, first, that this concept has acquired a great centrality to the point of replacing in current usage that of *Rechtsstaat* (constitutional or otherwise). In some analyses, the rule of law is enriched and, as has been noted, often, «refer to just about every political ideal which has found support in any part of the globe during the post-war years», in particular, protection of human dignity and allocation of rights (civil, political, social)⁸⁵, and also democracy, privacy, justice. It can be said, that progressively the rule of law became part of «a “cluster of ideals” that constitutes the core of modern political morality, and in which each term integrates with the others and is substituted for them, as if they were interchangeable concepts: “democracy, human rights and perhaps also the principle of free market”»⁸⁶. In this dimension of “ideal” it becomes difficult to understand «how many and what values are included in the notion of rule of law» (BIN 2016), to the point that it has been seen as «“an unruly horse”, because the content of the rule of law has been hotly disputed» (POSTEMA 2022, 17). There are of course two prevailing views, one formal and the other substantive: the former «means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge» (HAYEK 1944 quoted according to RAZ 2009) to which must be added the requirements that law must have («be general, consistent, prospective, accessible, intelligible, and stable»), and often «standards for governmental institutions, especially courts (the judiciary must be independent of political pressures especially from the executive branch of government, and that courts respect familiar principles of due process»); the second adds to the formal aspects the protection of individual rights⁸⁷ that «do not merely form the content of positive law, but they are the wider background and integral aspect of its fabric» and, although not always, the requirement of democracy and that of orientation to principles of justice (ADAMIS 2021). The formal dimension seems patently insufficient⁸⁸, but for the more articulate and encompassing one, the question remains as to its extension to private powers, that is, whether its core («to temper the exercise of power to avoid to the extent possible its arbitrary exercise», POSTEMA 2022, 20) is related only to the public sphere or goes beyond it. In thinking about rule of law, there is an awareness that the task is «to protect individuals against what would otherwise be undeterred privations against them—not [only] by overreaching state officials, but [also] rather by undeterred private individuals, corporations, or entities» (POSTEMA 2022, 32, quoting WEST 2011). What remains doubtful is how to make this task possible in the dimension of economic relations and the different conformation of law that has developed with globalization: the feeling is that at this level this reflection «valorizes “de-statialized” traits of rule of law to make

⁸⁴ This has been matched by the wide spread of judgments (rulings) based on balancing and proportionality.

⁸⁵ RAZ 2009, 210, with reference to «the International Congress of Jurists meeting in New Delhi in 1959», who adds that these are «ideals which bear little or no relation to the one it originally designated».

⁸⁶ BIN 2016 with reference to WALDRON 2004.

⁸⁷ Often, POSTEMA 2022, 16, the reference is to «international human rights norms and standards».

⁸⁸ For RAZ 2009, 211, «A nondemocratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies».

it the centerpiece of the theoretical edification of a global law in which legality and the protection of rights can be disengaged from the traditional scheme of state sovereignty» and relies on the judgments of judges and courts and a «dense nebula of administrative and international bodies, customary norms, and market rules» (BIN 2016) to establish international legality. What seems to reappear in this direction is the idea of spontaneous social normativity, and what seems to disappear from the scene are social rights and the possibility of substantive equality.

References

- ADAMIS V. 2021. *Populism and the Rule of Recognition. Challenging the Foundations of Democratic Legal Systems*, in «Populism», vol. 4.
- ALBERTAZZI D., McDONNELL D. 2008. *Introduction: The Sceptre and the Spectre*, in ID. (eds.), *Twenty-First Century Populism. The Spectre of Western European Democracy*, Palgrave Macmillan.
- AMATO G. 2021. *Introduction*, in AMATO G., BARBISAN B., PINELLI C. (eds.), *Rule of Law vs Majoritarian Democracy*, Hart.
- BÄCHTIGER J., DRYZEK S., MANSBRIDGE J., WARREN M.E. (eds.) 2018. *The Oxford Handbook of Deliberative Democracy*, Oxford University Press.
- BALKIN J.M. 2017. *Constitutional Rot*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992961.
- BANNÒ M., FILIPPI E., TRENTO S. 2021. *Rischi di automazione delle occupazioni: una stima per l'Italia*, in «Stato e mercato», 3.
- BAR-SIMAN-TOV I. 2015. *Mending the Legislative Process. The Preliminaries*, in «Theory and Practice of Legislation», 3, https://www.researchgate.net/publication/293768057_Mending_the_Legislative_Process_-_the_Preliminaries.
- BETZ J., HEIN W. 2023. *Globalization. Prerequisites, Effects, Resistance*, Springer.
- BERMEO N. 2016. *On Democratic Backsliding*, in «Journal of Democracy», 1.
- BETTIN G., CELA E. 2015. *L'evoluzione storica dei flussi migratori in Europa e in Italia*, http://www.unescochair-iauav.it/wp-content/uploads/2015/01/UR-AN_Bettin-Cela_def.pdf.
- BIN R. 2007. *Che cos'è la Costituzione?*, in «Quaderni costituzionali», 1.
- BIN R. 2011. *Stato di diritto*, in *Enciclopedia del diritto*, Annali IV, Giuffrè, <https://www.robertobin.it/ARTICOLI/StatodidirittoEDD.pdf>.
- BIN R. 2016. *Rule of law e ideologie*, in PINO G., VILLA V. (a cura di), *Rule of Law. L'ideale della legalità*, Il Mulino, <https://www.robertobin.it/ARTICOLI/RuleOfLaw.pdf>.
- BISOGLI G. 2023. *Della geometria giuridica ovvero del 'posto' dei giudici nello "Stato costituzionale del presente"* in GREGORIO M., SORDI B. (eds.), *Lo Stato costituzionale. Radici e prospettive*, Giuffrè.
- BISOGLI G., D'ATTORRE A. 2023. *La (de-)costruzione giuridica dell'Europa. Un'introduzione*, in «Ragion pratica», 1.
- BLANCHARD O., RODRIK D. 2021. *Introduction: We Have the Tools to Reverse the Rise in Inequality*, in ID. (eds.), *Combating Inequality. Rethinking Government's Role*, The MIT Press.
- BÖCKENFÖRDE E-W. 1990. *Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik*, in «Der Staat», n. 1.
- BRANCACCIO E., SUPPA D. 2019. *Un "social standard sui movimenti internazionali di capitale"*, in «Il Ponte», 2.
- BRENNAN J. 2016. *Against Democracy*, Princeton University Press.
- CALHOUN C., GAONKAR D.P., TAYLOR C. 2022. *Degenerations of Democracy*, Harvard University Press.
- CASTIGLI M. 2024. *IA e lavoro, più produttività ma anche più disuguaglianze: lo scenario*, <https://www.agendadigitale.eu/mercati-digitali/ia-e-lavoro-piu-produttivita-ma-anche-piu-disuglianze-e-inoccupabili/>.
- CHECCHI D., JAPPELLI T. 2023. *Disuguaglianza in Italia: cosa è cambiato in trent'anni*, <https://lavoce.info/archives/102183/disuguaglianza-in-italia-cosa-e-cambiato-in-trentanni/>.
- CHITI E., DI MARTINO A., PALOMBELLA G. (eds.) 2022. *L'era dell'interlegalità*, Il Mulino.
- CIOLLI I. 2024. *Le democrazie sotto stress e il pasticciaccio brutto del premierato*, in «Costituzionalismo.it», 1.
- COSTA P. 2006. *Democrazia politica e Stato costituzionale*, Editoriale scientifica.
- COSTA P. 2007. *The Rule of Law: A Historical Introduction*, in COSTA P., ZOLO D. (eds.), *The Rule of Law: History, Theory and Criticism*, Springer.
- COSTA P. 2014. *La democrazia costituzionale e il suo passato*, <https://digspes.uniupo.it/it/didattica/cattedra-alessandro-galante-garrone/corso-tutte-edizioni>.

- CROUCH C. 2020. *Post-Democracy After the Crises*, Polity Press.
- D'ATTORRE A. 2023. *Metamorfosi della globalizzazione. Il ruolo del diritto nel nuovo conflitto geopolitico*, Laterza.
- DIAMOND L. 2015. *Facing Up to the Democratic Recession*, in «Journal of Democracy», 1.
- DICEY A.V. 1982. *Introduction to the Study of the Law of the Constitution*, Reprint 8th ed., Liberty Classics (1st ed. 1885).
- DI MARTINO A. 2016. *La doppia dimensione dei diritti fondamentali*, in «Rivista Gruppo di Pisa», 2.
- DI MARTINO A. 2018. *I rapporti tra la dottrina italiana e quella tedesca durante il fascismo intorno allo stato di diritto*, in «Rivista AIC», n. 1.
- DIXON R., LANDAU D. 2021. *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy*, Oxford University Press.
- FERRARESE M.R. 2012. *Prima lezione di diritto globale*, Laterza.
- FERRAJOLI L. 2018. *Manifesto per l'uguaglianza*, Laterza.
- FIORAVANTI M. 1990. *Costituzione, amministrazione e trasformazioni del ruolo dello Stato*, in SCHIAVONE A. (ed.), *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, Laterza.
- FIORAVANTI M. 1998. *Costituzione e popolo sovrano*, Il Mulino.
- FIORAVANTI M. 1999. *Costituzione*, Il Mulino.
- FIORAVANTI M. 2001. *Il principio di eguaglianza nella storia del costituzionalismo moderno*, in ID., *La scienza del diritto pubblico*, Giuffrè.
- FIORAVANTI M. 2014 [1991]. *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*, Giappichelli.
- FIORAVANTI M. 2018 [2016]. *Il legislatore i giudici di fronte alla costituzione*, in ID., *La costituzione democratica. Modelli e itinerari del diritto pubblico nel XX secolo*, Giuffrè.
- FIORAVANTI M. 2023. *La duplice vocazione del costituzionalismo*, in «Diritto e questioni pubbliche», 1.
- FRIEDMAN T.L. 1999. *The Lexus and the Olive Tree: Understanding Globalization*, Farrar, Straus and Giroux.
- FUCHS D., KLINGEMANN H.-D. 2019. *Globalization, Populism and Legitimacy in Contemporary Democracy*, in VAN BEEK U. (ed.) *Democracy under Threat A Crisis of Legitimacy?*, Springer International Publishing.
- GALGANO F. 2005. *La globalizzazione nello specchio del diritto*, Il Mulino.
- GIOLO O. 2020. *Il diritto neoliberale*, Jovene.
- GOZZI G. 2007. *Rechtsstaat and Individual Rights in German Constitutional History*, in COSTA P., ZOLO D. (eds.), *The Rule of Law: History, Theory and Criticism*, Springer.
- HARPER L. (ed.) 2022. *The Crisis of American Democracy: Essays on a Failing Institution*, Vernon Press.
- HAYEK F.A. 1944. *The Road to Serfdom*, Routledge.
- HELLIER J. 2023. *Globalization and Inequality in Advanced Economies. Trade, Tax Base Mobility, and Policy Implications*, Springer.
- HOLMES S. 1998. *Passioni e vincoli. I fondamenti della democrazia liberale*, Edizioni di Comunità.
- IGNAZI P. 2019. *Partito e democrazia. L'incerto percorso della legittimazione dei partiti*, Il Mulino.
- JÖNSSON C. 2022. *From the End of History to the End of the World? A Tale of Unforeseen Global Changes*, in VAN BEEK U. (ed.) *Democracy under Pressure. Resilience or Retreat?*, Palgrave Macmillan.
- KATZ R.S., MAIR P. 1995. *Changing Models of Party Organization and Party: The Emergence of Cartel Party*, in «Party Politics», 1.
- KIRCHHEIMER O. 1966. *The Transformation of the West European Party System*, in LA PALOMBARA J., WEINER M. (eds.), *Political Parties and Political Development*, Princeton University Press.
- KLINGEMANN H.-D., BERG-SCHLOSSER D., HOFFMANN-LANGE U., VAN BEEK U. 2022. *The Return of History*, in VAN BEEK U. (ed.) *Democracy under Pressure. Resilience or Retreat?*, Palgrave Macmillan.
- KLINGEMANN H.-D., CANAN-SOKULLU E. 2022. *Democracy Under Pressure? Support of Democracy in Germany and Italy*, in VAN BEEK U. (ed.) *Democracy under Pressure. Resilience or Retreat?*, Palgrave Macmillan.
- LANE D. 2023. *Global Neoliberal Capitalism and the Alternatives. From Social Democracy to State Capitalisms*, Bristol University Press.
- LEVITSKY S., ZIBLATT D. 2018. *How Democracies Die*, Crown.

- LOUGHLIN M. 2022. *Against Constitutionalism*, Harvard University Press.
- LUPO N. 2019. *Considerazioni conclusive. Sulla (complessiva) crescita del ruolo normativo del Governo e sulle difficoltà della funzione legislativa*, in «Osservatorio sulle fonti», 2, <http://www.osservatorio-sullefonti.it>.
- MAFFETTONE P., VECCHIONE G. 2020. *Scelte istituzionali e radici economiche del populismo*, https://www.centroeinaudi.it/images/abook_file/or-BDL227_Maffettone-Vecchione.pdf.
- MAFFETTONE S. 2019. *Politica*, Le Monnier.
- MARTÍ J.L. 2005. *The Sources of Legitimacy of Political Decisions: Between Procedure and Substance*, https://www.academia.edu/12139265/The_Sources_of_Legitimacy_of_Political_Decisions_Between_Procedure_and_Substance.
- MARTÍ J.L. 2008. *La democrazia deliberativa e i diritti a garanzia della procedura*, in «Ragion Pratica», 1.
- MELPIGNANO M. 2023. *L'incerto futuro del divieto di mandato imperativo tra regolamenti parlamentari e giurisprudenza costituzionale*, in «Rivista Gruppo di Pisa», 2.
- MODICA SCALA G. 2022. *Il reddito di cittadinanza tra welfare e metamorfosi del lavoro: una prospettiva giuslavoristica*, XXXIV ciclo di dottorato, <https://amsdottorato.unibo.it/id/eprint/10271/>.
- MOHL R. 1832-33. *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, 2 Bde, Tübingen.
- MORTATI C. 1949. *Concetto e funzione dei partiti politici*, in «Quaderni di Ricerca», 1, http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2015/10/Mortati_Nomos-2_2015.pdf.
- MORTATI C. 1967. *Istituzioni di diritto pubblico*, Giuffrè.
- MUDDE C., ROVIRA KALTWASSER C. 2017. *Populism. A Very Short Introduction*, Oxford University Press.
- MULIERI A. 2024. *Contro la democrazia illiberale. Storia e critica di un'idea populista*, Donzelli.
- NERI A., SPURI M., VERCELLI F. 2024. *I conti distributivi sulla ricchezza delle famiglie: metodi e prime evidenze*, https://www.bancaditalia.it/pubblicazioni/qef/2024-0836/QEF_836_24.pdf.
- OXFAM. 2024. *Disuguaglianza. Il potere al servizio di pochi*, <https://www.oxfamitalia.org/disuguaglianza-il-potere-al-servizio-di-pochi/>.
- PEDULLÀ G., URBINATI N. 2024. *Democrazia afascista*, Feltrinelli.
- PINO G. 2015. *Tre concetti di costituzione*, in «Rivista di Teoria e Critica della Regolazione Sociale», <https://iris.unipa.it/bitstream/10447/203046/1/Pino,%20Tre%20concezioni%20della%20costituzione.pdf>.
- PISTOR K. 2019. *The Code of Capital. How the Law Creates Wealth and Inequality*, Princeton University Press.
- POLETTI A. 2022. *Antiglobalismo. Le radici politiche ed economiche*, Il Mulino.
- PRETEROSSO G. 2023. *Il doppio lato della costituzione*, in GREGORIO M., SORDI B. (eds.), *Lo Stato costituzionale. Radici e prospettive*, Giuffrè.
- RAZ J. 2009. *The Rule of Law and its Virtue*, in ID., *The Authority of Law*, Oxford University Press (2nd ed.).
- RIDOLFI G. 2022. *Lo Stato di diritto in Germania e in Europa: una storia complessa, confusa e dimenticata*, in «Diritti Comparati», <https://www.diritticomparati.it/lo-stato-di-diritto-in-germania-e-in-europa-una-storia-complessa-confusa-e-dimenticata/>.
- ROBERTS A. 2010. *The Logic of Discipline. Global Capitalism and the Architecture of Government*, Oxford University Press.
- RODRIK D. 2011. *The Globalization Paradox. Democracy and the Future of the World Economy*, W. W. Norton & Company.
- RODRIK D. 2017a. *Straight Talk on Trade. Ideas for a Sane World Economy*, Princeton University Press.
- RODRIK D. 2017b. *The Great Globalisation Lie*, in «Prospect», <https://www.prospectmagazine.co.uk/essays/45478/the-great-globalisation-lie>.
- ROSENBERG M. 2022. *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism*, Oxford University Press.
- RUNCIMAN D. 2018. *How Democracy Ends*, Profile Books.
- SANDEL M.J. 2022. *Democracy's Discontent. A New Edition for Our Perilous Times*, Harvard University Press.
- SCHIERA P. 1982. *Stato di polizia*, in BOBBIO N., MATTEUCCI N. (a cura di), *Dizionario di politica*, UTET.
- SIMONETTI H. 2024. *Partiti politici e riflessione giuridica sulla forma-partito nella storia d'Italia (1848-*

- 1946), in «Rivista AIC», 2.
- SPADARO A. 2007. *La crisi delle costituzioni di “compromesso” e il ruolo dei cattolici in Europa*, <http://www.associazionedeicostituzionalisti.it/materiali/convegni/torino300307/spadaro.html>.
- STAHL F.J. 1847. *Der Christliche Staat und sein Verhältnis zu Deismus und Judenthum*, Berlin.
- STAHL F.J. 1856. *Die Staatslehre und die Principien des Staatsrechts*, 1. Abschn. 1. Cap. Das Wesen des Staates, Heidelberg (3. Aufl.).
- STAHL F.J. 1878. *Die Philosophie des Rechts*, Bd. II, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, Mohr (5a ed.).
- STOLLEIS M. 1992. *Geschichte des öffentlichen Rechts in Deutschland*. Zweiter Band: *Staatsrechtslehre und Verwaltungswissenschaft 1800-1914*, Beck.
- TARLEA S., BAILER S., KUDRNA Z., WASSERFALLEN F. 2024. *Executive power in European Union politics*, in «Governance», 1, https://www.researchgate.net/publication/368310929_Executive_power_in_European_Union_politics.
- THIO L-A. 2012. *Constitutionalism in Illiberal Polities*, in ROSENFELD M., SAJÓ A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press.
- URBINATI N. 2020. *La democrazia e il rischio populista*, in HENRY B., LORETONI A., PIRNI A., SOLINAS M. (eds.), *Filosofia Politica*, Mondadori.
- VAN BEEK U. 2022. *Back to the Future: The Rise of Nationalist Populism*, in VAN BEEK U. (ed.) *Democracy under Pressure. Resilience or Retreat?*, Palgrave Macmillan.
- VAN BEEK U. (ed.) 2019. *Democracy under Threat. A Crisis of Legitimacy?*, Palgrave Macmillan.
- VAN BEEK U. (ed.) 2022. *Democracy under Pressure. Resilience or Retreat?*, Palgrave Macmillan.
- WALDRON J. 2004. *The Rule of Law as a Theater of Debate*, in J. Burley (ed.), *Dworkin and his Critics*, Blackwell.
- WEST R. 2011. *The Limits of Process*, in J.E. FLEMING (ed.), in «Nomos» vol. 50: *Getting to the Rule of Law*.
- WID – WORLD INEQUALITY DATABASE. 2024. https://wid.world/world/#sptinc_p99p100_z/US;-FR;DE;CN;ZA;GB;WO;QE;IT/last/eu/k/p/yearly/s/false/3.7/40/curve/false/country.
- WID – INEQUALITY IN 2024: a Closer Look at Six Regions. 2024. <https://wid.world/news-article/inequality-in-2024-a-closer-look-at-six-regions/>.
- ZACCARIA G. 2022. *Postdiritto. Nuove fonti, nuove categorie*, Il Mulino.
- ZAKARIA F. 1997. *The Rise of Illiberal Democracy*, in «Foreign Affairs», n. 6.
- ZAMAGNI S. *Il trilemma politico della democrazia e la prospettiva dell'economia civile*, <https://www.youtube.com/watch?v=7ImUHkBKj2g>.
- ZOLO D. 1992. *Il principato democratico. Per una teoria realistica della democrazia*, Feltrinelli.

How Not to Be Populist. Anti-hegemonic Individualism and the Crisis of Democracy and of the Rule of Law

MARCO MAZZONE

University of Catania, Italy.

E-mail: marco.mazzone@unict.it

ABSTRACT

Individualism (Christopher Lasch's "narcissism", Émile Durkheim's "anomie") – that is, the tendency of individuals to *retreat within the confines of the self, by pursuing selfish (as opposed to shared) values and goals* – has been identified as one of the causes of the crisis of democracy. In this article, I first argue for the need to specify and differentiate that category. It is one thing for those subjected to current forms of social governance to fail to adhere to shared values; it is another for the groups participating in them to carve out privileges for themselves. I will therefore focus on the first type, which I call "the individualism of the subordinated", asking whether populism is the only possible political response to it. In this sense, I will examine the defense of populism in Laclau's *On Populist Reason*, highlighting some of its external and internal problems. Finally, I will suggest a possible alternative, following the model proposed in Acemoglu and Robinson's *The Narrow Corridor*.

L'individualismo (il "narcisismo" di Christopher Lasch, l'"anomia" di Émile Durkheim) – ossia la tendenza degli individui a ritirarsi entro i confini del sé perseguendo valori e fini egoistici, in luogo di quelli condivisi – è stato indicato come una delle cause della crisi della democrazia. In questo articolo sostengo innanzitutto la necessità di specificare e differenziare tale categoria. Una cosa è che coloro che sono sottoposti alle attuali forme di governance sociale non aderiscano a valori condivisi; altra cosa è che i gruppi che vi partecipano si ritaglino privilegi per sé. Mi concentrerò pertanto sul primo tipo, che chiamo "individualismo dei subordinati", chiedendomi se il populismo sia l'unica possibile risposta politica. In questo senso, esaminerò la difesa del populismo in *On Populist Reason* di Laclau, mettendone in luce alcuni problemi esterni e interni. Infine, suggerirò una possibile alternativa, seguendo il modello proposto in *The Narrow Corridor* di Acemoglu e Robinson.

KEYWORDS

crisis of democracy, rule of law, individualism, populism, society

crisi della democrazia, Stato di diritto, individualismo, populismo, società

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



How Not to Be Populist. Anti-hegemonic Individualism and the Crisis of Democracy and of the Rule of Law

MARCO MAZZONE

1. *Introduction* – 2. *Individualism as an Obstacle to Participation* – 3. *Asymmetrical Individualisms* – 4. *The Individualism of the Subordinated: Between Populism and Social Organization* – 4.1 *Laclau and Populism* – 4.2 *Acemoglu and Robinson, and the Organization of Dissent*.

1. *Introduction*

In recent decades, the literature on the “crisis of democracy” and/or “rule of law crisis” has become a flourishing industry – an indication of widespread and arguably well-founded concern¹. Among the attempts to explain this phenomenon, the notion of *individualism* has gained some traction: the idea that individuals increasingly retreat within the confines of the self, to the detriment of shared values and rules, and the behaviors necessary to uphold them. This explanation seems to capture a genuine fault line within democratic systems of governance. However, it is crucial to examine it rigorously, especially if we aim to effectively address the problem. When dealing with complex realities, it is rarely a good idea to seek out overly simplistic or one-dimensional explanations.

I aim to take this warning seriously by exploring the idea that individualism accounts for only part of the issue – or more precisely, that the concept needs to be further differentiated. It is misleading to apply the label of individualism indiscriminately to all citizens of Western democracies, as though there were no distinction between those who benefit from current forms of governance and those who primarily bear their costs. In other words, we must consider the difference between hegemonic and anti-hegemonic forms of individualism. Framing the issue from this perspective allows us to pose the question of democratic participation in differential terms. There is a significant difference, after all, between encouraging collective responsibility among those who possess the means and opportunities to assume it, and creating the conditions for participation among those who are largely excluded from collective dynamics. This distinction between two forms of individualism – and thus two forms of *non-participation* – is the focus of the present article.

In the next section, I outline some general formulations of individualism as an obstacle to democratic participation. Section 3 introduces the distinction between hegemonic and anti-hegemonic individualism, set against the background of the idea that the “social contract” – so to speak – is asymmetrical from the outset, regardless of the form of government to which individuals grant

* A preliminary version of this paper was presented at the conference *Rule of law: in books, in minds*, held in Bologna on 7-8 July 2025, within the framework of the PRIN 2022 project *CLEAR*, directed by Corrado Roversi. I wish to thank Corrado Roversi and the other organizers for the invitation, as well as all participants for their valuable contributions to the discussion. I am particularly indebted to Marco Brigaglia, Pierluigi Chiassoni, Andrej Kristan, Alberto Puppo, Corrado Roversi, and Marco Segatti for their insightful remarks. Among these, one suggestion was to examine the relationship between the concept of individualism advanced here and Durkheim’s notion of anomie. This remains a task for future work; for the present, I would simply note that this notion appears especially relevant to the analysis of one of the two forms of individualism I attempt to distinguish, namely what I term the “individualism of the subordinated”.

¹ It is important to clarify that the concepts of *democracy* and *the rule of law* are distinct, yet inextricably intertwined when discussing democratic systems of government: in these contexts, issues of participation are largely linked to the question of the extent to which individuals adhere to collective rules. That said, this article does not aim to analyze separately the different levels at stake – political and legal. Rather, I will limit myself to outlining the phenomenon of social psychology that I call “individualism”, and to considering some possible effects on systems of social rules, specifically on democracy as a system of rules. A more detailed analysis must be left for another occasion.

sovereignty. I consider conceptual tools (provided by Hart and Searle) for distinguishing between subjects who perceive themselves – and are perceived – as aligned with the existing political order, and those who perceive themselves – and are perceived – as subordinated to it. Finally, in Section 4, I turn to what might be termed the “individualism of the subordinated”, examining its relationship to populism and exploring alternative ways of engaging with it. A crucial question for constructing an alternative to populism, I will argue, is whether democratic systems are capable of institutionalizing dissent – by promoting forms of social organization among subordinates that prevent the effects of unrestrained individualism.

2. *Individualism as an Obstacle to Participation*

Each of the topics I am about to address, including the relationship between democracy and individualism, has generated an immense body of literature. We must therefore necessarily limit ourselves to a selection of exemplary authors, chosen in light of our specific objectives.

To begin, Francis Fukuyama (FUKUYAMA 1999) initiated a reflection on the notion of “social capital”, to be considered alongside the more established concepts of “physical” and “human capital”. Social capital is defined as «a society’s stock of shared values» (FUKUYAMA 1999, 22). Fukuyama’s core idea is that «true communities are bound together by the values, norms, and experiences their members share» (FUKUYAMA 1999, 23), and that – contrary to widespread expectations – loosening these strong social bonds in the name of individual liberty tends to bring about the dissolution of meaningful relationships:

«The trade-off between personal freedom and community [...] does not seem obvious or necessary to many. As people have been liberated from their traditional ties to spouses, families, neighborhoods, workplaces, and churches, they have expected to retain social connectedness. But they have begun to realize that their elective affinities, which they can slide into and out of at will, have left them feeling lonely and disoriented, longing for deeper and more permanent relationships» (FUKUYAMA 1999, 23).

In short, by weakening the strong ties characteristic of traditional societies, the push toward individual freedom may leave individuals more isolated and personally disoriented. At the same time, it renders them less capable of pursuing shared goals:

«As people soon discovered, there are serious problems with a culture of unbridled individualism, in which the breaking of rules becomes, in a sense, the only remaining rule. [...] Social capital is] the prerequisite for all forms of group endeavor that take place in a modern society, from running a corner grocery store to lobbying Congress to raising children. A society dedicated to the constant upending of norms and rules in the name of expanding individual freedom of choice will find itself increasingly disorganized, atomized, isolated, and incapable of carrying out common goals and tasks. [...] the consequence is a rise in crime, broken families, parents’ failure to fulfill obligations to children, neighbors’ refusal to take responsibility for one another, and citizens’ opting out of public life» (FUKUYAMA 1999, 22-23).

As we can see, Fukuyama frames the issue in terms of «the breaking of rules»: the erosion of both formal and informal norms that regulate collective life. Giovanni Orsina (ORSINA 2018) also analyzes the aspiration to individual freedom as a factor that weakens collective bonds and values, adding a further consideration: the individualistic drive toward self-gratification (or «narcissism», to use LASCH’s 1979 category) may have deep roots in the very nature of democracy, as Tocqueville had already suggested.

«Democratic institutions awaken and flatter the passion for equality without ever being able to satisfy it entirely. Every day, at the moment when people believe they have grasped complete equality, it escapes from their hands and flees, as Pascal says, in an eternal flight. [...] The chance to succeed rouses the

people; the uncertainty of success irritates them. They get agitated, grow weary, become embittered» (DE TOCQUEVILLE 2010, 136).

In other words, democracy inherently tends to generate irritation and resentment, insofar as it stimulates individual aspirations that can never be fully satisfied. Orsina links this psychological outcome to a dynamic described by ORTEGA Y GASSET (1993), in which the normative idea of individual rights, as it spreads through the social fabric, undergoes a transformation – from regulative ideals into drives demanding immediate gratification.

«The sovereignty of the unqualified individual, of the human being as such, generically, has now passed from being a juridical idea or ideal to be a psychological state inherent in the average man. And note this, that when what was before an ideal becomes a component part of reality, it inevitably ceases to be an ideal. The prestige and the magic that are attributes of the ideal are volatilised. The levelling demands of a generous democratic inspiration have been changed from aspirations and ideals into appetites and unconscious assumptions» (ORTEGA Y GASSET 1957, 23; quoted in ORSINA 2018, 35).

Following HART (2012), ROVERSI (2023) offers a converging analysis of the potential “pathologies of legal systems”, rooted in cognitive dynamics. His general thesis is that «an essential part of the ideal of the Rule of Law is people’s fidelity to it, namely, “a general willingness to submit to law’s governance and to give deference to its limits and requirements” [...] (POSTEMA 2022, 66)» (ROVERSI 2023, 26). According to Roversi, this «willingness to submit to law’s governance» may be undermined by three distinct cognitive challenges:

«[1] a widespread incapacity on the part of members of the legal community to understand that in supporting the law [...] they are involved in a collective endeavor, and that they are so involved for a reason that relates to what they are, to their normative identity as persons [...] [2] a reduced ability to understand the symbolic nature of rituals, objects, and roles: the fact that some objects, persons, and behaviors can *mean* much more than what they concretely are and that they do so mean because we collectively support that meaning. [3] Finally, an incapacity to control our reactive impulses, delegate reactions at a collective level, and take the perspective of others» (ROVERSI 2023, 24).

The first point – the inability to perceive the connection between participation in a collective endeavor and one’s normative identity as a person – significantly echoes Fukuyama’s concerns about the dissolution of a cultural model grounded in strong social bonds. The second – the diminished capacity to grasp the symbolic nature of social roles, and thus the ideal meaning of rules – recalls Ortega y Gasset’s reflections on the dissolution of «the prestige and the magic that are attributes of the ideal». Lastly, the third point – the inability to control one’s impulses and adopt the perspective of others – may be viewed simply as a behavioral consequence of the first two.

To conclude this overview, it is worth mentioning Mark Lilla’s (LILLA 2017) critique of «identity politics», which he sees as the left’s political response to the spread of individualism. The core thesis of his book is that identity politics is inadequate for articulating a comprehensive vision of society, economy, and culture, and as such cannot constitute – let alone replace – a political platform for left-wing parties. This view is well captured by the book’s epigraph, a quote from Senator Edward Kennedy: «we can and we must be a party that cares about minorities without becoming a minority party. We are citizens first». According to Lilla, in American society (on which his analysis is focused):

«the use of the notion of identity has gradually shifted from indicating minority rights to becoming a vehicle for purely individualistic demands, thus dissolving any possibility of constructing a common-good oriented political program. Identity – Lilla summarizes – is Reaganism for lefties. In the background is the idea of a proliferation of the “culture of narcissism”» (MAZZONE 2024a, 104).

3. *Asymmetrical Individualisms*

The previous section seems to suggest the following picture. Individualism replaces strong social bonds with weak ones, marked by low solidarity, and deprives the norms that govern our communities of their symbolic value². As a result, it significantly weakens our ability to adopt others' perspectives and to exercise self-restraint in pursuit of a shared good. From this standpoint, restoring the strength of the norms underpinning the rule of law would seem to require reinforcing citizens' commitment to them.

At this point, as a working hypothesis, one might be tempted to distinguish between social groups, suggesting that some are not affected by individualism – since they tend to comply with the rule of law – while others, less integrated into its value system, are more prone to individualistic behavior. HART's (2012) distinction between “ordinary citizens” on the one hand, and “legal officials and experts of the legal system” on the other, might be interpreted in this light. The distinction is, however, ambivalent. As ROVERSI (2023, 10) observes in relation to dictatorships and totalitarian regimes, “in these systems, officials must be trained and indoctrinated to become cooperative supporters of the status quo to the point of fanaticism” – which shows that adherence to norms is not intrinsically virtuous. Still, one might attempt to salvage the hypothesis by positing that, *within democratic regimes*, the commitment of “officials and experts” to norms is indeed a positive value. In that case, conformity to rules would represent a form of civic virtue, a counterpoint to the individualism of those who resist them.

Yet this working hypothesis has a major flaw. It assumes that, in democratic contexts, adherence to norms is inherently aligned with the collective good. But there are at least two scenarios in which this alignment breaks down. Norms may be designed primarily to serve the interests of hegemonic groups – i.e., the individuals who belong to them. Or, alternatively, the ways in which norms are applied, enforced, or left unenforced may disproportionately benefit such groups. In what follows, I will not distinguish between these two situations, as they tend to share both causes and consequences. If either occurs to a significant extent – even within democratic systems – then the relevant distinction is not between subordinate individualists and rule-abiding non-individualists, but between hegemonic and anti-hegemonic forms of individualism.

If this is the case, the challenge of revitalizing citizen participation in the rule of law takes on a different shape. It is not primarily about persuading subordinate individuals to recognize the value of the normative system. It is rather about acknowledging that the system itself traces a fault line within society, privileging certain individuals and groups over others.

In short, the issue is not merely to change how subordinated individuals perceive the norms, but – at least in part – to change either the norms that subordinate them or the way they are enforced.

Consider, by way of example, a sector of strategic importance for democratic societies: the education system. As has been noted:

«In its first report on social mobility in 2020, the World Economic Forum placed Italy last among industrialized countries [...]. Such low social mobility [...] fuels resentment and social envy, which are the roots of populism» (MARATTIN 2024, 125; my translation).

This quotation effectively captures the link between low social mobility and insufficient – or even antagonistic – engagement with collective norms. But two caveats are in order. First, this phenomenon is by no means unique to Italy. Second, low social mobility does not seem to be a blind mechanism operating independently of human responsibility. On the contrary, those in subordinate positions are often right to see it as the result of actions taken by hegemonic actors.

² On the notion of “symbolic value”, see MAZZONE 2024b.

Consider, for instance, the growing distrust toward the university system in the United States, which has been described as:

«the training ground of the technocratic ruling class, founded on the principle of meritocracy: a mechanism ostensibly designed to select those with the highest intellectual quotient, it has in fact been co-opted by patrician families to secure good jobs for their children, thereby stalling the social elevator» (PETRONI 2024, 39-40; my translation).

In short, if the social elevator is stalled, this is not necessarily due to chance.

It is important to clarify that in invoking responsibility here, I am not making a moral judgment. Such judgments are often one-sided, whereas responsibility is typically shared and cause-effect relations are circular. Moreover, moral fault is essentially individual. For these reasons, it only makes sense on a case-by-case basis to ask to what extent subordinated individuals are held back primarily by domination, and to what extent by their own refusal to pursue pro-social goals.

The question that concerns me here is different: should the formation of hegemonies that hinder social mobility be considered a structural feature of human societies – even within democratic frameworks? Clearly, this question involves individual behavior only insofar as it has systemic effects.

It is at this level that the important analysis by ACEMOGLU and ROBINSON (2019) is situated. Their central claim is that:

«for liberty to emerge and flourish, both state and society must be strong. A strong state is needed to control violence, enforce laws, and provide public services that are critical for a life in which people are empowered to make and pursue their choices. A strong, mobilized society is needed to control and shackle the strong state» (ACEMOGLU, ROBINSON 2019, XVII).

State strength is described as necessary to “control violence” and “enforce laws” on individuals³. But this strength itself tends to devolve into a “Despotic Leviathan” unless it is restrained by a strong and mobilized society.

The authors describe despotism as a manifestation of the “will to power”, which may take the form of oppression and violence. But they also examine how domination can occur in subtler ways, such as through the abuse of privilege. Consider, for example, the pages devoted to Ibn Khaldun, the Arab historian and philosopher (1332-1406), who anticipated the so-called “Laffer curve” (foundational to Ronald Reagan’s economic policy): the idea that only up to a certain point does increasing tax rates result in higher revenues. Khaldun expressed it this way: “at the beginning of the dynasty, taxation yields a large revenue from small assessments. At the end of the dynasty, taxation yields a small revenue from large assessments” (quoted by ACEMOGLU, ROBINSON 2019, 108). His thesis stems from observations of Arab society and, in particular, the increasing abuse of power by ruling elites:

«When the dynasty continues in power and their rulers follow each other in succession ... the Bedouin qualities of moderation and restraint disappear. Royal authority with its tyranny, and sedentary culture ... make their appearance ... individual imposts and assessments upon the subjects, agricultural laborers, farmers, and all the other taxpayers, increase» (quoted by ACEMOGLU, ROBINSON 2019, III).

³ No less important is the third component, “provide public services”. Another central thesis of the book is that human groups, aware of the risks posed by the Leviathan, often generate a “cage of norms” that inhibits individual initiative – and with it, any accumulation of knowledge and resources that could enable emancipation from immediate needs, the provision of services, and thus social progress. Delegating power to a Leviathan is therefore a necessary, though not sufficient, step toward progress and freedom. For our present purposes, however, this aspect can be set aside.

More specifically regarding the power of “officials and experts” in Hart’s sense, Acemoglu and Robinson devote some fascinating pages to John Lydus, a Byzantine official during the reign of Justinian, who left us a vivid account of the bureaucracy of his time:

«The bureaucracy ran on, as John put it, a complex set of “customs, forms and language” and members of it wore “distinctive regalia”, uniforms of military origin. They had to deal with regulations and procedures and “registers, titles and duties”. John was also keen to point out that it had an esprit de corps and an identity that separated it from “ordinary people”» (ACEMOGLU, ROBINSON 2019, 159).

John Lydus expressed pride in belonging to a well-structured group of “officials and legal experts”, clearly set apart from the “ordinary people”. But the authors are quick to note that such membership conferred advantages that went beyond what the law formally authorized:

«What John describes is an extensive bureaucracy with well-defined rules, functioning within an elaborate legal system. Of course it was not immune to personal influence, and it didn’t work out exactly as the rules specified. John himself got his job not entirely on the basis of merit, but with the help of his [...] contact Zoticus. Moreover, many of the senior positions were reserved for elites, particularly people from the senatorial class, and there was certainly some corruption» (ACEMOGLU, ROBINSON 2019, 160).

In sum: the formation of dominant groups not only generates privilege but tends to make the exercise of privilege seem natural and right, eventually leading to its expansion or abuse. This is evident both in the dynasties described by Khaldun and in the Byzantine bureaucracy – as well as, as noted earlier, in the U.S. education system. What Khaldun calls the «Bedouin qualities of moderation and restraint» suggest that such abuses are prevented only as long as dominant groups voluntarily adhere to a traditional moral code based on suspicion toward privilege. Once that phase ends – as we will see in the next section – dominant groups can only be constrained by the active resistance of “ordinary people”.

In short, the distinction between “ordinary people” and “legal experts and officials” points to a political fault line separating groups with partially divergent experiences and interests. These give rise to different forms of individualism: systemic and anti-systemic. This fault line also helps explain why SEARLE (2010) felt the need to clarify the notion of “collective recognition or acceptance” that underpins his theory of institutional facts. In a community, an institutional fact – such as a system of norms – exists only to the extent that it is collectively recognized. But this seemed to imply that all members of a society willingly endorse the system of norms. To dispel this misunderstanding, SEARLE (2010, 57) notes that his notion of “collective recognition” is compatible with «cases where one thinks the institution is a bad thing».

The “recognition” of norms by subordinated individuals is, in many cases, precisely of this kind. This is not without reason: for the subordinated, norms are the very instruments of their subordination, and their individualism manifests itself as *resistance*; whereas the individualism of hegemonic groups is (partly) expressed *through* the system of norms.

4. *The Individualism of the Subordinated: Between Populism and Social Organization*

We have described, in a preliminary way, individualism as an obstacle to the sharing of collective systems of norms. However, a necessary clarification has since emerged: while individualism indeed fosters anti-system behavior among subordinated groups, hegemonic groups are instead characterized by pro-system forms of individualism. In other words, systems of norms generate a fracture within the social body, for the simple reason that some individuals are merely subjected to them, while others benefit from the privileges tied to their administration. We could say that “social contracts” are necessarily asymmetrical.

In this section, I aim to analyze the individualism of subordinated groups and its natural connection to populism. Based on this analysis, I will suggest that one possible alternative is the social organization of dissent.

4.1 Laclau and Populism

In Section 1, we described the loosening of social bonds as a characteristic feature of individualism. As is well known, the theme of individual isolation – and its political consequences – is central to Hannah Arendt's reflection in *The Origins of Totalitarianism*. To use a well-known quote: «Totalitarian movements are mass organizations of atomized, isolated individuals» (ARENDT 1973, 323).

More broadly, Arendt speaks of:

«an unorganized, structureless mass of furious individuals who had nothing in common except their vague apprehension that [...] the most respected, articulate and representative members of the community were fools and that all the powers that be were not so much evil as they were equally stupid and fraudulent» (ARENDT 1973, 315).

This passage succinctly captures the link between social atomization («an unorganized, structureless mass»), anti-system sentiment, and what Roversi termed «an incapacity to control our reactive impulses» («furious individuals»).

The discourse on populism inherits this idea of atomized individuals and their visceral resentment toward the status quo. Without offering an explicit definition of “populism” – a notoriously complex task – I will simply follow the main lines of Ernesto Laclau's analysis in *On Populist Reason*. Given Laclau's theoretical orientation, this allows us to approach populism in a light that is not prejudicially negative. To anticipate my argument: Laclau's attempt to rehabilitate populism depends on his initial assumption that society “does not exist”, in the sense that it does not precede politics. Politics, therefore, has no choice but to construct the imaginary “people” it addresses. I intend to contrast this view with that of ACEMOGLU and ROBINSON (2019), discussed earlier: from their perspective, politics contributes to freedom and progress only when it faces a strong, organized society. In short, the populist mobilization of atomized individuals appears inevitable only insofar as we abandon from the outset the idea of a social organization of the subordinated. Let us follow this reasoning in more detail.

Laclau's stated goal with respect to the notion of “populism” is:

«to invert the analytical perspective: instead of starting with a model of political rationality which sees populism in terms of what it lacks – its vagueness, its ideological emptiness, its anti-intellectualism, its transitory character – [my objective is] to enlarge the model of rationality in terms of a generalized rhetoric (what [...] can be called “hegemony”) so that populism appears as a distinctive and always present possibility of structuration of political life» (LACLAU 2005, 13).

This reevaluation of populism – through an expanded notion of rationality – is also intended as a reevaluation of the subjects to whom it appeals. Laclau examines the classical literature on the masses, from Gustave Le Bon to Hippolyte Taine, rejecting their tendency to describe them as made up of «“vagabonds”, “ruffians” and “brigands” – that is, by forces which escape every kind of social rationality» (LACLAU 2005, 32).

According to Laclau, it is Freud who introduces a decisive theoretical shift in our understanding of the relationship between individuals and masses, thanks to two decisive moves. The first is the minimization of the distinction between the individual and the social dimensions, since «the individual, from the beginning of his or her life, is invariably linked to somebody else» (LACLAU 2005, 52). The second is the appeal to «*libido* [rather than rationality] as the key category explaining the nature of the social bond» (LACLAU 2005, 53). What Laclau calls an expansion of the concept

of rationality thus appears as a radical critique of the traditional one, as is clarified by the following quote from MOUFFE (2000, 95-96):

«By privileging rationality, [theories of democracy] leave aside a central element which is the crucial role played by passions and affects in securing allegiance to democratic values [...]. The failure of current democratic theory to tackle the question of citizenship is the consequence of their operating with a conception of the subject which sees individuals as prior to society, bearers of natural rights, and either utility-maximizing agents or rational subjects».

Following Freud, Laclau's individuals are not rational subjects that preexist the libidinal relationship constitutive of the social. More precisely, this constitution is described in terms of the development Lacan brings to Freud's theories. Lacan introduces the notion of the "empty signifier" – alongside the need for a leader, already recognized by Freud. According to Laclau, it is this empty signifier that, by establishing a relation of equivalence among otherwise distinct individual demands, produces the libidinal aggregation of individuals into a "people" – the political act *par excellence*, as it founds society as a whole.

Also in this respect, Laclau insists, it would be a mistake to interpret the dynamics of populism in terms of a political or cognitive deficit:

«The empty character of the signifiers that give unity or coherence to a popular camp is not the result of any *ideological or political underdevelopment*; it simply expresses the fact that any populist unification takes place on a radically heterogeneous social terrain»; «The language of a populist discourse – whether of Left or Right – is always going to be imprecise and fluctuating: not because of any *cognitive failure*, but because it tries to operate performatively within a social reality which is to a large extent heterogeneous and fluctuating» (LACLAU 2005, 98 and 118; emphasis added).

Nonetheless, in other contexts Laclau adopts the image of a lack – more precisely, a weakly constituted will or identity – to justify the need for populism as a mechanism of representation: «If we had a fully constituted will – of a corporative group, for instance – the representative's room for manoeuvre would indeed be limited» (LACLAU 2005, 158). Conversely, politics is necessarily populist because it deals with «weakly constituted identities whose constitution requires, precisely, representation in the first place» (LACLAU 2005, 160).

In short, it is the absence of social organization that makes populism necessary as a political mechanism for individuals' self-representation – one that elevates them to a perception of themselves as a "people". It is this absence that renders the individuals described by Freud and Lacan devoid of any social identity prior to that political device, and therefore in need of empty signifiers that may represent them:

«It is only with the Freudian/Lacanian description of the working of the unconscious that representation becomes ontologically primary – as we have seen, names retrospectively constitute the unity of the object. And it is difficult to find a terrain which reveals this constitution better than the constant fluctuations in naming the "people". The main difficulty with classical theories of political representation is that most of them conceived the will of the "people" as something that was constituted before representation» (LACLAU 2005, 163-164).

And yet, it is precisely here that we find a fundamental ambiguity in Laclau's position. On the one hand, his thesis is descriptive – and its premise can be debated on empirical grounds: if individuals lack the strong identity that social organization provides, then there is no alternative to populism as a mechanism of self-representation. On the other hand, adopting the Freudian/Lacanian model of the subject imposes a theoretical constraint a priori: individuals are seen as inherently and necessarily lacking a social organization that precedes populist representation.

Granted, Laclau acknowledges that Freud himself limits his own model, admitting the possibility of forms of social organization other than mass adhesion – forms that mirror the structure of the organized individual, endowed with a strong identity: «we have those passages in which [Freud] opens up the possibility – as an alternative mode of social aggregation – that, *through organization*, society acquires the characteristics of the individual» (LACLAU 2005, 57; emphasis added).

Nevertheless, Laclau immediately neutralizes this concession:

«So how are we to conceive of this opposition between two modes of social aggregation – one based in “organization”, by which society acquires the secondary characteristics of the individual; the other grounded in the libidinal tie with the leader? Do they apply to different kinds of group? Or, rather, are they social logics which, to various extents, enter into the constitution of all social groups? I think that this second hypothesis is the correct one» (LACLAU 2005, 58).

This Solomonic conclusion – entirely reasonable in itself – is nevertheless used by Laclau to present populism as the very essence of politics: not as one pole within politics, opposed to the organization of social needs, but as its foundational structure. The idea that social needs might be addressed through organizational forms is largely absent from the book, and when it does appear, it is only in a negative light, as in the following passage:

«Thus the defeat of the “democratic promise” implicit in American populism adopted the pattern we have seen throughout this book: the dissolution of equivalential links and the differential incorporation of sectors within a wider organic society – “transformism”, to use Gramsci’s term» (LACLAU 2005, 207).

Since needs are necessarily different from one social group to another, their fulfillment by an organized society can only dissolve the potential unity of the people. But in doing so, it also weakens – or even extinguishes – the *critical* political drive generated by the populist device.

4.2 *Acemoglu and Robinson, and the Organization of Dissent*

In short, for Laclau politics is not merely the administration of specific needs; it concerns, rather, the individual’s fundamental need to feel part of the social totality. However, this necessarily entails a permanent antagonistic – or “critical” – dynamic, one that not only draws on dissatisfaction and resentment, but actively fuels them as a driving force. To unify the “people”, politics must continuously take the form of anti-politics.

Two distinct strands converge in this anti-systemic movement. On the one hand, there is the antagonism directed at hegemonic forces – including “officials and experts” – and their privileges. On the other, there is a deep suspicion of social organization and the satisfaction of needs as such, seen as complicit with domination (a manifestation of “transformism”, in Laclau’s terms) – but also, strategically, as weakening the critical political thrust. In both respects, the status quo as a normative system appears as the enemy – against which the people must be mobilized in order to ensure their unity. As DE CAROLIS puts it (2023, 127; my translation), politics becomes the art of «mobilizing the masses against [organized] civil society».

Now, Laclau’s argument captures a real point – one we have already highlighted. To the extent that systems of governance are able to redistribute the fruits of the growth they produce, the impetus for change is inhibited, and the privileges of hegemonic groups become entrenched – with ultimately negative consequences for society as a whole. So is there no way out of this dilemma? Must we choose between populism, which incites the individualism of the subordinate classes against civil society and its normative systems; or the defense of the status quo, which allows the individualism of hegemonic groups to expand unchecked?

A possible way out is suggested by Acemoglu and Robinson: the self-organization of subordinate individuals, capable of confronting elites and their systems of norms.

«In Britain, [...] women's rights were not given but taken. Women [...] mobilized. They engaged in direct action and civil disobedience. [...] Gaining rights was a consequence of their organization and empowerment. [...] The story of women's liberation isn't unique or exceptional. Liberty almost always depends on society's mobilization and ability to hold its own against the state and its elites» (ACEMOGLU, ROBINSON 2019, XIX).

At the same time, Acemoglu and Robinson do not conceal how difficult it is not only to achieve, but also to maintain the balance required – what they, drawing on *Through the Looking-Glass* by Lewis Carroll, call the “Red Queen effect”: like the Red Queen and Alice, Leviathan and society must constantly run at the same speed in order to remain in balance, and to stay within that “narrow corridor” which enables development. In other words, society must curb the constant tendency toward a “Despotic Leviathan”, by instead producing a “Shackled Leviathan”. But this effort is not purely critical – it is also constructive, and as such it requires forms of self-restraint:

«Yet it is important to recognize the precarious nature of the Red Queen effect. In all of that reaction and counterreaction, one party may pull ahead of the other, yanking both out of the corridor. The Red Queen effect also requires that the competition between state and society, between elites and non-elites, isn't completely zero-sum, with each side trying to destroy and dispossess the other. So in all of that competition, some room for compromise, an understanding that there will be a counterreaction after every reaction, is critical» (ACEMOGLU, ROBINSON 2019, 66).

In practice, the two forces involved must accept a degree of cooperation: they must participate jointly in the management of public affairs – without avoiding conflict, but being partially willing to mediate it. If Europe was able to enter the “narrow corridor” of development, according to the authors, it was due to:

«a fortuitous balance between the powers of central authority and those of common men (not women, unfortunately). It is this balance that put Europe into the corridor, setting in motion the Red Queen effect in a relentless process of state-society competition. The balance was a consequence of two things. First, the takeover of Europe at the end of the fifth century by democratically organized tribal societies centered on assemblies and norms of consensual decision making. Second, the legacy of critical elements of state institutions and political hierarchy absorbed from the Roman Empire and the Christian church» (ACEMOGLU, ROBINSON 2019, 153).

Only relatively stable forms of organized dissent – such as, at the origins of European development, the “assembly politics of Germanic tribes” – make it possible to reintegrate subordinate individuals into political participation. This is also the direction suggested by ESPOSITO (2023, 40-41; my translation) in discussing Machiavelli's valorization of social conflict:

«The social conflict, defended by Machiavelli against all previous and subsequent philosophy, is not valued by him because it is destructive of institutions, but rather, on the contrary, because it is reconstructive of them. [...] Conflict is valuable, it has a productive value, only if it serves to establish an order capable of integrating and enhancing it».

In short, the issue is not the redistribution of resources. It is about reopening spaces for participation and/or emancipation – consider, again, the question of social mobility. Only under this condition can we hope to transform the individualism of the subordinate classes into participation in normative systems.

References

- ACEMOGLU D., ROBINSON J.A. 2019. *The Narrow Corridor: States, Societies, and the Fate of Liberty*, Penguin.
- ARENDT H. 1973. *The Origins of Totalitarianism*, Harcourt Brace & Company (originally published in 1951).
- DE CAROLIS M. 2023. *Convenzioni e governo del mondo*, Quodlibet.
- DE TOCQUEVILLE A. 2010. *Democracy in America: Historical-Critical Edition of De la démocratie en Amérique*, Liberty Fund.
- ESPOSITO R. 2023. *Vitam Instituere. Genealogia dell'istituzione*, Einaudi.
- FUKUYAMA F. 1999. *The Great Disruption*, Profile Books.
- HART H.L.A. 2012. *The Concept of Law* (3rd Ed.), Clarendon Press (originally published in 1961).
- LACLAU E. 2005. *On Populist Reason*, Verso.
- LASCH C. 1979. *The Culture of Narcissism*, Norton & Company.
- LILLA M. 2017. *The Once and Future Liberal. After Identity Politics*, Harper Collins.
- MARATTIN L. 2024. *La missione possibile*, Rubbettino Editore.
- MAZZONE M. 2024a. *Is Mediation Violence? A Critique of Identity Politics*, in «Rivista Italiana di Filosofia del Linguaggio», Special Issue, 2024, 104 ff.
- MAZZONE M. 2024b. *The dynamics of institutional performatives: Between practical reasoning and symbolic value*, in «International Review of Pragmatics», 16, 2024, 163 ff.
- MOUFFE C. 2000. *The Democratic Paradox*, Verso.
- ORSINA G. 2018. *La democrazia del narcisismo*, Marsilio.
- ORTEGA Y GASSET J.O. 1993. *The Revolt of the Masses*, Norton & Company.
- PETRONI F. 2024. *Nell'occhio della rivolta*, in «Limes», 12, 2024, 39 ff.
- POSTEMA G. 2022. *Law's Rule: The Nature, Value, and Viability of the Rule of Law*, Oxford University Press.
- ROVERSI C. 2023. *On the Cognitive Foundations of Legal Reality*, in «Diritto & Questioni Pubbliche», Special Publication, 2023, 173 ff.
- SEARLE J.R. 2010. *Making the Social World*, Oxford University Press.

The Rule of Law and Its Enemies

PIERLUIGI **CHIASSONI**

University of Genoa, Italy.

E-mail: pierluigi.chiassoni@unige.it

ABSTRACT

The paper purports to provide an elementary survey concerning the rule of law and the forms of legal-political organizations faring as its enemies. It contains two parts. The first part contains the outline of a theory of the rule of law built upon an archetypal model and encompassing five varieties arranged on a scale of progressive rule-of-lawness: namely, quasi-minimum, minimum, more-than-minimum, quasi-maximum, and maximum rule of law. The second part articulates the outline of a theory of maximum rule of law's enemies. It proceeds, tentatively, in three steps. First, it singles out four ideal typical varieties of autocratic government: to wit, full legalistic autocracy, prima facie legalistic autocracy, discretionary legalistic autocracy, and full decisionist autocracy. Second, it surveys Bovero's theory of elective autocracies as (close) instances of full legalistic autocracies. Third, and finally, it casts some light on the main features of Big Tech dictatorship.

Il saggio intende offrire una rassegna elementare sullo Stato di diritto e sulle forme di organizzazione giuridico-politica che ne rappresentano i nemici. Il lavoro si articola in due parti. La prima parte presenta il profilo di una teoria dello Stato di diritto costruita su un modello archetipico e comprendente cinque varietà disposte lungo una scala di progressiva rule-of-lawness: quasi-minimo, minimo, più-che-minimo, quasi-massimo e massimo Stato di diritto. La seconda parte sviluppa il profilo di una teoria dei nemici del massimo Stato di diritto. L'analisi procede, in via esplorativa, in tre passaggi. In primo luogo, individua quattro varietà idealtipiche di governo autocratico: autocrazia pienamente legalistica, autocrazia prima facie legalistica, autocrazia legalistica discrezionale e autocrazia pienamente decisionista. In secondo luogo, esamina la teoria di Bovero sulle autocrazie elettive quali (quasi) istanze di autocrazie pienamente legalistiche. In terzo e ultimo luogo, mette in luce le principali caratteristiche della dittatura delle Big Tech.

KEYWORDS

Rule of law, government of laws, government of men, quasi-minimum rule of law, minimum rule of law, more-than-minimum rule of law, quasi-maximum rule of law, maximum rule of law, full legalistic autocracy, prima facie legalistic autocracy, discretionary legalistic autocracy, full decisionist autocracy, elective autocracies, Big Tech dictatorship

Stato di diritto, governo delle leggi, governo degli uomini, Stato di diritto quasi-minimo, Stato di diritto minimo, Stato di diritto più-che-minimo, Stato di diritto quasi-massimo, Stato di diritto massimo, autocrazia legalistica integrale, autocrazia legalistica prima facie, autocrazia legalistica discrezionale, autocrazia decisionistica integrale, autocrazie elettive, dittatura delle Big Tech

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



The Rule of Law and Its Enemies

PIERLUIGI CHIASSONI

1. *Crumbling Hopes* – 2. *What Is Rule of Law?* – 3. *The Archetypal Model* – 4. *Quasi-Minimum Rule of Law* – 5. *Minimum Rule of Law* – 6. *More-Than-Minimum Rule of Law* – 7. *Quasi-Maximum Rule of Law* – 8. *Maximum Rule of Law* – 9. *Which Enemies the Rule of Law?* – 10. *Full Legalistic Autocracy* – 11. *Prima Facie Legalistic Autocracy* – 12. *Discretionary Legalistic Autocracy* – 13. *Full Decisionist Autocracy* – 14. *Real Autocracies* – 15. *Elective Autocracies* – 16. *Big Tech Dictatorship*.

«The government of laws never succeeded in totally superseding the government of men, and vice versa»
N. Bobbio¹

1. *Crumbling Hopes*

At the end of his 1918 Munich conference “Politics as a Vocation” (*Politik als Beruf*), after recalling in vivid shades the present situation of crisis and grim future prospects following to the end of the First World War, Max Weber points to the properties that should characterize men and women having “the calling for politics”:

«Politics is a strong and slow boring of hard boards. It takes both passion and perspective. Certainly, all historical experience confirms the truth – that man would not have attained the possible unless time and again he had reached out for the impossible. But to do that a man must be a leader, and not only a leader but a hero as well, in a very sober sense of the word. And even those who are neither leaders nor heroes must arm themselves with that steadfastness of heart which can brave even the crumbling of all hopes. This is necessary right now, or else men will not be able to attain even that which is possible today. Only he has the calling for politics who is sure that he shall not crumble when the world from his point of view is too stupid or too base for what he wants to offer. Only he who, in the face of all this, can say “In spite of all, let’s keep going!” has the calling for politics»².

The age we live exhibits strong analogies to the one Max Weber depicts. At present, the hopes of those who long for universal peace and global rule of law are crumbling. Not only because of widespread adverse political practices, which always existed, but also, what is more troubling, because of the open, wide, bald, meticulously pursued, methodically propagated, vindications of war and unashamed abuses to the rule of law³.

* Revised version of the paper presented at the 17th Central and Eastern European Forum for Young Legal, Political and Social Theorists, “Law and State in Contemporary Times”, September 25-26, 2025, Faculty of Law, University of Split, Split, and at the “Jornada Internacional de Derecho Público y Filosofía del Derecho”, Facultad de Derecho, Universidad de La Habana, La Habana, Octubre del 29-31, 2025. I wish to thank participants at both events for their questions and comments. The paper has been written as a contribution to the CLEAR Project of Investigation (“Concept of the Rule of Law. Empirical and Analytical Research”, funded by the European Union, Next Generation EU) realized, under the guidance of C. Roversi (principal investigator), M. Brigaglia and A. Kristan, by research teams of the Universities of Bologna, Palermo, and Genova in the years 2023-2025. I wish to thank an anonymous referee for many helpful comments and suggestions.

¹ BOBBIO 1983b, xxiv.

² WEBER 1919, 48 (translation slightly modified).

³ A few well-known examples among many. Encouraged by Western appeasement to the 2014 taking over of Crimea, on February 2022 Russia decided to wage an aggression war (“special military operation”) against Ukraine. The President of the United States of America has recently decided to change the name “Department of Defence” into “Department of War”. The same Government is waging an internal war against irregular migrants using meth-

In the face of this, echoing the title of a well-known book by Karl Popper, this paper will be devoted to the rule of law and its enemies.

It contains two parts, which will be devoted to providing the outline, respectively, of a theory of the rule of law (§ 2-8 below), and of a theory of those legal-political organizations that fare as rule of law's enemies (§ 9-16 below).

Throughout the paper, I will adopt the standpoint of the scholar who, assuming counterfactually a quasi-total ignorance upon the issue, purports to provide people, in particular those whose hopes are crumbling, with tools that may be used for getting perhaps a bit clearer understanding of what the rule of law is, and why it makes sense, here and now, standing for it "in spite of all": demanding its timely implementation, unmasking the deceptive strategies adopted by its adversaries, and denouncing anti-rule of law political programs, movements, and governments as social phenomena that are intimately contrary to the principles of humanitarian ethics (liberty, equality, solidarity).

1. *Outline of a Theory of the Rule of Law*

2. *What Is Rule of Law?*

A theory of the rule of law must elucidate what the rule of law is.

If, aiming at that goal, we begin our inquiry by asking "What is the rule of law?", we start by posing a metaphysical query about the essential properties characterizing the *thing* rule of law: about what makes something to be *rule of law* and not something else.

If, however, as it looks methodologically more advisable, we adopt an analytic approach, that metaphysically formulated question must preliminarily be converted into a conceptual question⁴. This is not anymore about the essential properties of the *thing* rule of law. It is, rather, about the words "rule of law". It asks for their actual meaning: for what is meant, or can be meant, here and now, by the phrase "rule of law" and the several expressions that are usually assumed to fare as its homologous in other languages. Like, for instance, "estado de derecho", "estado do direito", "état de droit", "jogállamiság", "právního státu", "právný štát", "pravnu stat", "pravnu stata", "praworządność", "Rechtsstaat", "stato di diritto", "statului de drept", etc.

A linguistic survey about the uses – ordinary and specialized alike – of rule-of-law expressions highlights their remarkable indeterminacy. By "rule of law" different people, and different thinkers, mean different things; not always, nor for everyone, recommendable⁵. When people invoke

ods proper to a dictatorship. The same Government is also applying "sanctions" against judges and prosecutors of the International Criminal Court, the organizations cooperating to its inquiries on the conduct of the government of Israel in Palestine, UN officials responsible of "unpleasant" reports on the Gaza situation, foreign judges responsible for the "unpleasant" trial of a President's friend. Dealing with presumed drug-traffickers operating in a South American country, instead of arresting the suspects and eventually bringing them in front of courts to make their criminal responsibility to be duly assessed, the same Government has ordered to kill them by military force (on this mischievous practice, see, e.g., COLE 2025, 45-46). The Government of Israel acted and still is acting towards the population of the Gaza Strip in ways that independent legal experts consider amounting to crimes of war, crimes against humanity, and crimes of genocide. The Italian Government did not comply with an order of arrest issued by the prosecutor office of the International Criminal Court, favouring the safe return home of a Libyan high-rank official charged with gross violations of human rights. The Hungarian Government withdraw from the Rome Treaty on the International Criminal Court.

⁴ As it is well-known, the conversion of metaphysical problems into conceptual ones does not exhaust the inquiry. It is a preliminary step, needed to put it on the solid ground of linguistic experience and avoid it going astray. Furthermore, as John L. Austin emphasizes, a sharpened awareness about words goes along with a sharpened understanding of the phenomena to which the words refer. I purport to offer a primer to analytic method in CHIASSONI 2021, 7-49.

⁵ See, for example, GROSSI 2020.

or attack “the rule of law”, it is not clear what exactly they are praising or attacking, which deity from the Olympus of legal and political philosophy they are urging us to worship or throw into the dust⁶.

What, then, is or can be meant, here and now, by “rule of law”?

A first trivial remark towards clarification emphasizes that the word “rule”, as it appears in the expression “rule of law” at stake, does *not* mean *prescription, norm, instruction, principle, or standard of conduct*, as it does when occurs in phrases like “rule of thumb”, “moral rule”, “legal rule”, “rule of the game”, etc. Rather, the word “rule” means here *control, dominion, government*, as it does when used in expressions like “British rule”, “Home rule”, “dictatorial rule”, etc. The trivial remark suggests, therefore, that the phrase “rule of law” is tantamount, roughly, to “dominion of law”, “government of law”, “lordship of law”, “primacy of law”, “preeminence of law”, or even “government of laws”, and refers to legal-political organizations where what regulates human affairs is “(the) law” or “the laws”, and not “(the) men”⁷.

What does it mean, however, to be “ruled by law”, being under the “government of law(s)”, and *not* under “the government of men”?

At a first glance, the idea of a government of law(s) can be understood in three different but related ways.

First, a government of law(s) is a form of legal-political organization where political power (the power of making decisions binding for a whole collectivity) is *under the law (sub lege)*; where the law is, or ought to be, the king (*nómos basiléus*).

Second, a government of law(s) is a form of legal-political organization where political power is *exercised by means of laws (per leges)*;

Third, a government of law(s) is a form of legal-political organization where political power is *both under the law (sub lege) and exercised by means of laws (per leges)*⁸.

What does it mean, however, for a government to be “under” or “subject to” “the law”? What does it mean for political power to be exercised “by means of laws”?

To provide an answer, I will proceed in two steps. I will begin by introducing an archetypal model of laws-based dominion over human affairs, and, by way of a reconstruction grounded on it, I will distinguish, and briefly consider in turn, five different forms of rule of law, namely:

1. the quasi-minimum rule of law;
2. the minimum rule of law;
3. the more-than-minimum rule of law;
4. the quasi-maximum rule of law;
5. the maximum rule of law.

The five varieties are meant to compose a very tentative theory of the rule of law. Together, they aim to further the conceptual mastery of the elusive linguistic and institutional phenomenon “rule of law” by enabling any interested person to single out different forms arranged on a scale where each element represents a different degree of rule-of-lawness. In the scale, as we shall see, the quasi- or less-than-minimum rule of law corresponds to the first and lowest level, representing

⁶ This point is emphasized, e.g., by BOBBIO 1983b, xii-xiii; TROPER 1992, 267-269; COSTA, ZOLO 2002b, 5-6; ZOLO 2002, 19; BINGHAM 2010, 5: «As the debate broadened, differing concepts of the rule of law were put forward until a time came when respected commentators [including J. Raz, J. Finnis, J. Shklar, T. Carothers, J. Waldron, and B. Tamanaha] were doubtful whether the expression was meaningful at all»; DWORKIN 2012, 5. On the rule of law, see also, e.g.: CELANO 2022; DE ASÍS ROIG 1999, 221-232; European Commission for Democracy through Law (Venice Commission) 2011; KRISTAN 2017, 11-45; MORESO 2020, 155-173; RAZ 1977, 214-219; RAZ 1990, 331-339; TAMANAH 2007; WALDRON 2016.

⁷ See, e.g., BOBBIO 1983a, 169-195; ZOLO 2002, 17-88.

⁸ See, e.g., BOBBIO 1983a, 175-176; SCALIA 1989, 1176; BINGHAM 2010, 8; CELANO 2022, 140.

the weakest variety; contrariwise, the maximum rule of law corresponds to the fifth and highest level, representing the strongest one. The different degrees of rule-of-lawness depend on considerations of instrumental rationality. They correspond to the respective adequacy of the five forms of rule of law to a goal that I will assume to be evident and paramount. The goal can be defined, tentatively, as follows: *realizing what is necessary to ensure the effective legal guarantee of the equal social dignity of each and every human being*⁹.

A methodological remark seems in order, before proceeding. The five varieties may be considered as mirroring, at least in part, the historical and evolutionary pattern of rule of law institutions. Their philosophical background, however, is not legal evolutionism, but, rather, the Hobbesian arithmetic of social states of affairs based on the rational calculus (by addition, subtraction, substitution) of institutional properties¹⁰. As such, the theory aims at conveying a simple suggestion. From an explanatory viewpoint, it makes no sense, and would be an utter waste of time, debating about which of these different forms corresponds to the “true” or “genuine” ideal of the rule of law, to the “essence” of the rule of law, to the rule of law “properly so called”. What matters is, rather, being aware that no fewer than five varieties can be conceived. And that each one of them corresponds to a different level of legal protection afforded to human persons.

3. The Archetypal Model

The archetypal model represents the founding block of the present theoretical outline. It originates out of Lon Fuller’s 1964 book *The Morality of Law*¹¹.

Arguing for a teleological concept of law inside of a «procedural natural law» perspective¹², Fuller proposes to conceive the law as the social «institution» whose «purpose» consists in «subjecting human conduct to the guidance and control of general rules»¹³.

He claims that «subjection to legal rules» can be realized – never completely, but always up to a certain degree, that can be satisfactorily high –, if, and only if, the social regulation of human conducts abides by eight standards he calls «the principles of legality». These are the principles of generality, promulgation, no-retroactivity, clarity, consistency, compliability, temporal constancy, and applicative congruence¹⁴. According to them, human behaviors are subject to «legal rules», if, and only if, they are subject to norms («rules») that are:

1. *general in scope*, concerning *classes* of subjects and *classes* of behaviours, existing individual norms being the result of the application of general norms to individual cases (principle of generality);
2. *made public* and *knowable* to their addressees by adequate means (principle of promulgation);
3. *not ex post facto*, to wit, not about behaviors that occurred previously to their enactment and publication (principle of no-retroactivity);
4. phrased in such a way as to be *understandable* by their addressees or, at least, the legal counsels thereof (principle of clarity);

⁹ Something more on the way of precisifying this value I will say at the end of § 8 below.

¹⁰ An evolutionary and synthetic approach is adopted in ZOLO 2002, which aims to provide an account of the rule of law-*stato di diritto* as the end-product «of a centuries-old process» internal to the «structures of the modern state» (34).

¹¹ FULLER 1964, 33-94, 96-106, 152-186.

¹² FULLER 1964, 96-97.

¹³ FULLER 1964, 146, see also 4, 53, 96.

¹⁴ FULLER 1964, 38-44, 46-91.

5. *not mutually repugnant* or incompatible (principle of consistency or no-contradiction);
6. *enjoining compliant behaviors*, namely, conducts that it is within the human capability of their addressees to perform (principle of compliability or not requiring the impossible);
7. *stable over time* (principle of temporal constancy);
8. *applied to individual cases in ways that are congruent* to their formulation, i.e., that enforce the purposive meaning of the «declared rules» as it can be ascertained and predicted by considering known interpretive principles (principle of applicative congruence)¹⁵.

Contrariwise, by the same eight principles of legality, a social organization *fails* to subject human conducts to the guidance and control of rules, if human behaviors are subject to:

1. *individual ad hoc rules*, not the result of the application of pre-existing general rules to individual cases (purely individual rules);
2. *secret general rules*, unknowable to their addressees before the very moment they are applied to their behaviours (secrecy);
3. *ex post facto general rules*, enacted and promulgated after the occurrence of the behaviors they pretend to regulate (retroactivity);
4. *obscurely formulated general rules*, which can be understood neither by their addressees, nor by their legal counsels (obscurity);
5. *mutually repugnant general rules*, providing their addressees with inconsistent behavioral instructions (inconsistency);
6. *general rules prescribing not compliant behaviors*, which are beyond their addressees' human possibility of compliance (impossible behaviors);
7. *general rules changing very frequently over time* (temporal instability);
8. *general rules applied to individual cases in ways that unpredictably depart from their formulation* (incongruent application).

It must be noticed that, in Fuller's view, the principles of legality are as many benchmarks of *lawness*. They work as criteria for «creating law», for «making law possible», and, accordingly, for judging whether, and up to which point, a social organization has, or has not, *law*; is, or is not, a *legal organization*¹⁶.

¹⁵ FULLER 1964, 46-91.

¹⁶ FULLER 1964, 39: «A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract». Fuller presents the principles of legality (lawness) as composing the «internal» or «inner» «morality of law», since they would make of law an institution that is apt to promote justice and has a substantive moral dimension of its own («an observance of the demands of legal morality can serve the broader aims of human life generally»: 162). The latter would consist in a commitment to a moral «view of man itself»: «To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following

However, as we shall see in a moment, the archetypal model can also be regarded as a very handy model for a variety of those legal orders that are *governments of laws*: namely, the variety corresponding to the idea(l) of a government *by means of* general and abstract rules (*per leges*)¹⁷.

4. Quasi-Minimum Rule of Law

A legal-political organization is a *quasi-minimum* or *less-than-minimum rule of law*, if, and only if, it characterizes for vesting legal authorities with ambivalent normative competences.

On the one side, legal authorities have *prima facie* duties of legality. They ought *prima facie* to enact general, promulgated, not *ex post facto*, clear, consistent, compliable, and temporally constant norms; they ought *prima facie* to apply these norms in ways that are congruous with their formulations.

On the other side, however, legal authorities are also vested with *all things considered discretionary powers* whose exercise can fly in the face of their *prima facie* duties of legality. In fact, by using these powers, legal authorities *can* – are allowed to, are permitted to, are authorized to – *override* their *prima facie* duties, acting as follows:

1. they *can* regulate human behaviors by issuing *purely individual norms of conduct*, which do not implement previously established general norms and, in case of conflict, do prevail over them (power of enacting arbitrary individual norms);
2. they *can* enact general norms that their addressees are not able to know until they are applied to their behaviors (power of enacting secret general norms);
3. they *can* enact retroactive general norms at will (power of enacting *ex post facto* general norms);
4. they *can* enact general norms that are ambiguous, vague, semantically indeterminate, and even totally unintelligible (power of enacting obscure norms);
5. they *can* enact general norms that are mutually incompatible, providing people with baffling (contrary or contradictory) instructions without providing clear resolution criteria (power of enacting inconsistent general norms);
6. they *can* enact general norms prescribing impossible behaviours, whose performance lies outside of human capabilities (power of enacting general norms requiring the impossible);
7. they *can* modify existing general norms at will, even at very short intervals of time (power of enacting general norms also very inconstant through time);
8. they *can* apply existing general norms in any way they consider fit, even though it may be totally at odds with their formulation (power of incongruous application of general norms).

A quasi-minimum rule of law, it must be noticed, is apt for being realized in different degrees.

On the one hand, the more the legal authorities abide by their *prima facie* duties of legality, tak-

rules, and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent» (162, italics added). This claim, as a claim about the substantive moral dimension of the government by laws (*per leges*), is analysed, e.g., in BOBBIO 1983a, 177-178.

¹⁷ See BOBBIO 1983a, 175-176.

ing them to be most of the time *all things considered* duties, the more the legal system comes close in fact, from the standpoint of its law in action, to a minimum rule of law.

On the other hand, and contrariwise, the more the legal authorities depart from their *prima facie* duties of legality, regarding them to be *most of the time* all things considered *overridable*, the more the legal system comes close, from the standpoint of its law in action, to a discretionary legalistic autocracy (see § 12 below).

In any case, the very possibility for legal authorities to override their *prima facie* duties of legality, and exercise discretionary normative powers, makes apparent why this variety of rule of law is *quasi-* or *less-than-minimum*: why it dwells on the lowest level in the scale of rule-of-lawness.

5. Minimum Rule of Law

A legal-political organization is a *minimum rule of law*, if, and only if, its norms about the powers and duties of legal authorities meet all the requirements of the archetypal model. In particular, pursuant to Fuller's principles of legality, in a minimum rule of law legal system, legal authorities are subject to the following duties:

1. they *cannot* (are forbidden to) issue *purely individual rules*, i.e., rules that are not the result of the application of pre-existing general rules to individual cases (absolute prohibition of arbitrary purely individual norms);
2. they *ought to* enact rules for *classes* of peoples and *classes* of behaviors, unless stronger compelling reasons obtain for enacting individual abstract rules (conditional relative injunction of eminently general norms)¹⁸;
3. they *cannot* (are forbidden to) enact *secret general rules* (unconditional absolute prohibition of secret general rules);
4. they *cannot* (are forbidden to) enact *ex post facto general rules*, unless stronger compelling reasons obtain (relative prohibition of retroactive general rules);
5. they *cannot* (are forbidden to) enact *obscurely formulated general rules* (absolute prohibition of unintelligible rules);
6. they *cannot* (are forbidden to) enact *mutually repugnant general rules*, unless stronger compelling reasons obtain and suitable resolution criteria are previously made available (relative prohibition of normative inconsistencies);
7. they *cannot* (are forbidden to) enact *general rules prescribing impossible behaviors* (absolute prohibition of unviable norms);
8. they *cannot* (are forbidden to) change *general rules frequently over time*, unless stronger compelling reasons obtain (relative prohibition of temporal inconstancy);
9. they *cannot* (are forbidden to) apply *general rules* to individual cases in ways that *unpredictably and incongruously depart from their formulations*, unless stronger compelling reasons obtain (relative prohibition of incongruent application).

¹⁸ See VON WRIGHT 1963, ch. 1.

On the scale of rule-of-lawness, this form of legal-political organization can be regarded as corresponding to the second level, that of the *minimum* rule of law. On three counts.

First. The nine requirements are formulated in such a way as to be compatible with a legal organization characterized by the absence of an organic distinction (separation, division) between the legislative and judiciary power. They do not rule out the possibility of a legislator-judge: a legal authority acting as a legislator that enacts general and public norms, on the one hand, and then judicially applies them to individual cases, on the other.

Second. The relative prohibition of incongruent application of general norms to individual cases does not, by itself, imply any guarantee of a fair trial, in front of an impartial judge, with the assistance by legal counsel, and the possibility of appeal to a higher court.

Third. The nine requirements are formulated in such a way as to be compatible with the enactment of general, public, no *ex post facto*, clear, consistent, compliable, stable legal norms, which *can have any content whatsoever*. Even the most repugnant one from the standpoint of the equal dignity of every human person. The minimum rule of law, even as here precisified, corresponds therefore, as anticipated, to that variety of the government of law(s) consisting in the government *by laws* (*per leges*). It cuts no ice, though, on the way of a government *under* or *subject to* the law (*sub lege*). In a minimum rule of law, rulers have full power to do whatever they consider convenient, provided they abide by the principles of legality: provided they do it *per leges*. Classes of people can (deontically) be put to death because of trifle behaviors (say, singing in the rain) or personal conditions (being of a certain ethnic group) the rulers deem “unwelcome”, provided this happens respecting the full vigor of legality principles¹⁹.

The introduction of stronger institutional limits on the way of turning a government *by laws* also into a government *under the law* marks the passing to ever less minimum forms of rule of law.

6. More-Than-Minimum Rule of Law

A legal-political organization is a *more-than-minimum rule of law*, if, and only if, it exhibits the following properties.

First. It meets all the requirements of the minimum rule of law. Legal authorities have the duty to abide by the principles of legality, making general, public, non-retroactive, intelligible, consistent, compliable, relatively stable, and congruously applied norms.

Second. It also meets a set of additional requirements that includes:

1. clear-cut organic separation between legislation and jurisdiction;
 2. clear-cut functional separation between legislation and jurisdiction;
 3. a certain, weak, judicial independence;
 4. judicial control upon ordinary administrative acts.
1. *Organic separation between legislation and jurisdiction.* The constitution, it does not matter whether written or unwritten, requires instituting an organ devoted to the exercise of the legislative function (the legislature) and a distinct body of officials devoted to the exercise of the jurisdictional function (the judiciary).
 2. *Functional separation between legislation and jurisdiction.* The legislature is competent to enact general norms, usually in the form of statutes, and is forbidden from deciding individual contro-

¹⁹ To be sure, in its judicial capacity, the government is bound, by the principle of applicative congruence, to apply general norms in ways that be tuned to their formulations. However, in its legislative capacity, the government can make the general norms it likes. *Quod principi placuit, legis habet vigorem*.

versies. Judges are only authorized to issue individual norms, inside of judicial decisions, that ought to be the result of the application of general norms enacted by the legislature.

3. *Weak judicial independence.* Once appointed, judges enjoy of some forms of guarantees from the control of the executive or legislative branch.
4. *Judicial review of administrative acts.* Judges have the power of controlling the legality of administrative acts impinging on peoples' rights or legitimate interests.

It is worth noticing that more-than-minimum rule of law corresponds, roughly, to what Piero Calamandrei, in his 1940 conference *Fede nel diritto* [Faith in the Law], presents as the system of *legislatively formulated law* («diritto a formulazione legislativa») and opposes to the system of *judicially formulated law* («diritto a formulazione giudiziale»)²⁰.

It is worth the while considering which by then existing legal orders Calamandrei presents as instantiating the one or the other system, or something very close to them, respectively.

On the one hand, Nazi Germany and Soviet Russia feature as systems where the law is ultimately formulated by politically appointed, politically faithful, and politically controlled judges, on a case-by-case basis, according to political convenience. Existing general laws are, contrariwise, virtually irrelevant: a façade covering the reign of unlimited judicial-political discretion.

On the other hand, Fascist Italy features as a system where the law is (still) legislatively formulated. Where there (still) exist both a legislature that creates law in the form of general statutes (which may amount to whole codes) and a separate body of (relatively) independent professional judges who apply the general statutes to people assisted by professional (relatively) independent counsels.

It is reasonable to suppose that Calamandrei was consciously providing an idealized picture of the Italian legal system of the time, in an attempt to defend (the remains of) the ideal of legislatively formulated law against the ongoing, powerful, totalitarian trend towards a system of judicially formulated law. It is reasonable to suppose, furthermore, that such a strategic intent of his made him consciously to “overlook” aspects of the Fascist regime that were amenable to the other system.

Nonetheless, Calamandrei's position is very useful to the present purpose. For it shows, based on experience, how inadequate the more-than-minimum rule of law can be from the standpoint of the protection of equal human dignity. Fascist Italy was an autocratic government. A one-party dictatorship like Nazi Germany and Soviet Russia. In fact, it represented the violent, murderous, warmongering, archetype of (in Kelsen's terminology) «middle-class» or «bourgeois» one-party dictatorship²¹. Calamandrei emphasizes that a more-than-minimum rule of law (in his own terms: a system of legislatively formulated law) protects human dignity, in so far as it treats people as planning and responsible agents providing them with legal certainty; in so far as it regulates their conducts by considering classes of behaviors, treating legislatively like cases alike; in so far as it makes the legal professions (jurists, judges, attorneys at law) necessary, and charged with the paramount task of promoting the idea of law as the common property of every component of the community. In so claiming, however, Calamandrei had to pass over in silence, *inter alia*, the utterly degrading and dreadful certainty that the racist 1938 laws “guaranteed” to the Italian Jews as to their legal status and civil capabilities²².

²⁰ CALAMANDREI 1940.

²¹ On one-party dictatorships, see the short but sharp survey in KELSEN 1934, § 50. This section, which is missing in the German original (KELSEN 1925), was added to the Spanish edition, upon Kelsen's request, by the translator and legal philosopher L. Legaz Lacambra. In Norberto Bobbio's words, «Fascism had violence in its body. Violence was its ideology» (BOBBIO 1961, 153); see also BOBBIO 1975, 598-624.

²² The burning side of that adamant legal certainty is masterfully captured in the tales of BASSANI 1971.

7. Quasi-Maximum Rule of Law

A legal-political organization is a *quasi-maximum* or *less-than-maximum rule of law*, if, and only if, it jointly abides by three sets of requirements, namely:

1. minimum rule of law requirements;
 2. more-than-minimum rule of law requirements; and
 3. legislative democratic state requirements.
1. *Minimum rule of law requirements.* First, a quasi-maximum rule of law satisfies all the requirements of the minimum rule of law in a strengthened and improved form. In particular, it is a government by laws – general, public, non-retroactive, clear, compliable, consistent, relatively stable, and congruously applied norms – that undertakes the commitment (the “ought”) to treat every human person as a legal subject, endowed in principle with equal legal capability and entitled to equality before the law²³.
 2. *More-than-minimum rule of law requirements.* Secondly, a quasi-maximum rule of law also satisfies the specific requirements of the more-than-minimum rule of law, again in a strengthened and improved form. It characterizes in fact for a commitment to:
 - a. strong judicial independence;
 - b. judicial impartiality;
 - c. principles of natural justice;
 - d. an impartial management of criminal prosecution.
 - a. *Strong judicial independence.* The independence of the judiciary from the executive and legislative branches ought to be ensured in the greatest possible way by “guarantee laws” providing for appointment through politically neutral procedures (e.g., public competitions), career advancement not depending on political fiat, and quasi-immovability from office (e.g., by tenured appointment “during good behavior”).
 - b. *Judicial impartiality.* Justice ought to be administered by a body of impartial judges (*nemo iudex in causa sua*) endowed with adequate legal training.
 - c. *Principles of natural justice.* Judicial proceedings ought to comply with the principles of natural justice or due process. Procedural norms should guarantee the right of every person to easy access to courts for the vindication of her rights or legitimate interests; the right to a competent technical defense; the right to equality before the bench; the right to adversarial proceedings (*audiatur et altera pars*, cross-examination of witnesses, etc.); the right to the legality and adequacy of evidence; the right to an adequate justification of judicial decisions; the right of appeal to higher courts.
 - d. *Impartial criminal law prosecution.* The criminal law sector ought to be characterized by mandatory prosecution and the absence in principle of any discretion whatsoever on the part of law enforcement authorities (public prosecutors, police officers) with regard to the classes of crimes or classes of persons subject to investigation, prevention, or repression²⁴.

²³ See, e.g., ZOLO 2002, 37-38.

²⁴ See, e.g., RAZ 1977, 214-219; ZOLO 2002, 39-40; WALDRON 2016; BINGHAM 2010.

3. *Legislative democratic state requirements.* Thirdly, and finally, a quasi-maximum rule of law also satisfies a set of additional institutional and substantive requirements, meant to promote and make effective, so far as possible, the ideal of government *under the law* (*sub lege*). These requirements encompass:

- a. formal democracy;
 - b. weak constitutionalism; and
 - c. a restricted set of weakly protected constitutional rights.
- a. *Formal democracy.* A quasi-maximum rule of law is a democratic legal order. It characterizes for popular sovereignty (the supreme political power belongs to the people and only to the people); election of parliament through universal, equal, secret, and free suffrage; collective decisions assumed by majority principle; general laws considered as the expressions of the “general will” of the people conveyed by periodically elected and popularly legitimized representatives.
- b. *Weak constitutionalism.* A quasi-maximum rule of law is a weak constitutional legal order. It characterizes for a constitution that is (conceived by the legal culture as being) *purely flexible* and considers *statutory law* as the *supreme* source of law.
- c. *A restricted set of weakly protected constitutional rights.* Finally, the constitution of a quasi-maximum rule of law characterizes for ascribing to people (usually, to citizens) a set of *civil* and *political* rights, dating to the dawn of modern constitutionalism (free speech, religious freedom, personal freedom, freedom of association, universal eligibility to political charges, voters’ freedom, minorities’ guarantees, etc.). These rights represent the “prerequisites” of democratic government. Because of the assumed purely flexible character of the constitution, however, the guarantee of constitutional rights is ultimately entrusted to the “general will” of the supreme legislative body self, which is presumed never to violate them, and, eventually, to case-by-case judicial decisions along the lines of English rule of law as depicted by Albert V. Dicey in his 1885 treatise *Introduction to the Law of the Constitution*²⁵.

The pure flexibility of the constitution, even though combined with democracy, accounts for the *quasi-maximum* character of this variety of rule of law. In fact, nothing in such a constitutional order prevents a powerful and regularly elected political majority from lawfully passing laws that abridge constitutional rights, depart from the principles of legality, and abolish or pervert the very “rules of the game” of the democratic government²⁶.

8. *Maximum Rule of Law*

Finally, a legal-political organization is a *maximum rule of law*, if, and only if, it jointly satisfies two sets of properties.

First. It abides by all the requirements of the minimum and more-than-minimum rule of law, as strengthened and improved in a quasi-maximum rule of law.

²⁵ See DICEY 1885, Part Two; on Dicey’s conception of the rule of law, see, e.g., BOBBIO 1983a, 169-194; SANTORO 2002; BINGHAM 2007; BINGHAM 2010, 3-5; WALDRON 2016.

²⁶ On democracy’s suicide, see, e.g., Kelsen 1932. It must be noticed, in passing, that if one takes seriously the idea of certain constitutional rights as *prerequisites* of democracy, one should conceive the flexible constitution of a democratic state as only *partially* flexible: as containing a *flexible part*, which the legislator can modify at will, alongside to a *petrified part*, which the legislator is absolutely forbidden from modifying.

Second. It also abides by the specific requirements of quasi-maximum rule of law (democracy, constitutionalism, constitutional rights) though in a strengthened and improved form. In this respect, the maximum rule of law characterizes for three distinguishing, mutually intertwined, properties:

1. integral democracy;
2. strong constitutionalism; and
3. an enlarged set of strongly protected constitutional rights.

1. *Integral democracy.* A maximum rule of law is a legal-political organization committed to an integral conception of democracy.

An integral conception of democracy opposes to, and rejects, the *formal* or *procedural* conception as vying for a partial and inchoate form of democracy.

The *formal conception* presents (“true” or “pure”) democracy as consisting essentially in a set of *formal* “rules of the game”, about the *Whom* and *How* of the political life of a society (*how* electing *whom* to political charges; *how* and *by whom* the making of valid collective decisions), the proper working of which requires (“presupposes”) the guarantee of a restricted set of political and civil rights, which nonetheless are ultimately entrusted to the good will of the people’s “general will” as expressed in parliament (see § 7 above).

The *integral conception*, contrariwise, claims formal democracy to be ultimately unfit to the task of guaranteeing effective political equality and every citizen’s equal social dignity. It emphasizes that the democratic “rules of the game” ought to determine not only the *Whom* and *How*, but also the *What* of political life. That they should carefully single out the matters about which extant political majorities *are not free* to decide – the *imperative cage* of elective majority’s power; the *preserve* (*coto vedado*²⁷); the *sphere of the undecidable*²⁸ –, on the one hand, from those matters about which they *are free* to decide (the *permission area* of democratic power, the *sphere of the decidable*), on the other. The imperative cage corresponds, roughly, to the duty of guaranteeing the effective and universal enjoyment of constitutional (“fundamental”) rights. An enlarged catalogue of fundamental rights represents, accordingly, not just a set of (assumedly) disposable “prerequisites” of the democratic game, as it occurs in a quasi-maximum rule of law, but, rather, a fundamental, indispensable, at the same time finalistic and instrumental, element of integral democracy²⁹.

2. *Strong constitutionalism.* A maximum rule of law is a strong constitutional legal order. It regards *constitutional law* as *supreme* and characterizes for a constitution that is (conceived by the legal culture as) *partly rigid* and *partly petrified*.

The constitution is *rigid* (subject to amendment by way of a reinforced procedure), insofar as its provisions concern the permission area of democratic power.

It is *petrified* (not modifiable by the amendment procedure) where its provisions design the imperative cage by establishing fundamental rights and imposing the corresponding full-fledged duties of compliance (in the forms of duties of non-violation and duties of realization) to institutions of primary guarantee (like, e.g., the national legislature), and cope with the latter’s fatal defaults by means of institutions of secondary guarantee (like, e.g., constitutional courts) competent to strike down unconstitutional statutes and censoring unconstitutional gaps³⁰.

²⁷ The term “coto vedado” (*preserve*) comes from Ernesto Garzón Valdés theory of democracy: see, e.g., GARZÓN VALDÉS 1989a, 143–164; GARZÓN VALDÉS 1989b, 209–213.

²⁸ The term “sfera del non decidibile” (*sphere of the not decidable*) comes, as it is well known, from Luigi Ferrajoli’s theory of democracy: see, e.g., FERRAJOLI 2016; FERRAJOLI 2021; FERRAJOLI 2025.

²⁹ See, e.g., BOBBIO 1996, 110–115, at 110: «I could define it [...] “integral democracy”: not only formal, but also substantial, not only instrumental but also finalistic, not only as a method but also as a set of undefeasible inspiring principles»; BOBBIO 1976, 70–75, accounting for his idea of “formal democracy”; FERRAJOLI 2021.

³⁰ See FERRAJOLI 2016.

3. *An enlarged set of strongly protected constitutional rights.* Finally, the constitution of a maximum rule of law characterizes for ascribing to people (to every citizen, every human person, every capable human person) an enlarged set of fundamental rights, going well beyond the *civil* and *political* rights of early constitutionalism. Indeed, fundamental rights out of four distinct categories ought to be ascribed: namely, freedom, social, political, and civil rights. *Freedom rights* encompass, among others, the right to life and the right to (perpetual and universal) peace, as an individual right against governments and supranational organizations alike. *Social rights* include the rights to health, education, adequate food, a minimum income for leading a decent life, a decent dwelling place. *Political rights* concern participation to the working of the democratic system. *Civil rights*, finally, concern property, motherhood and fatherhood, family relations, work relations, and economic entrepreneurship. People should also be entitled to fundamental rights concerning certain goods. On the one hand, to the enjoyment of *fundamental* natural, artificial, and strictly personal goods. On the other hand, to be free from the presence and obnoxious effects of *lethal* goods³¹.

This enlarged set of fundamental rights designs, as I said, the imperative cage harnessing extant political majorities' power (the preserve, the sphere of the undecidable): political authorities can decide *neither* to violate them, *nor* of abstaining from making them effective. The maximum rule of law purports to provide such a cage with a maximum of protection by enshrining it into a rigid-petrified and judicially guaranteed constitution³².

One final remark "on behalf" of maximum rule of law is in order. The presence of an enlarged set of fundamental rights is a feature made *necessary* by the existence of a *strict synergetic relation* between democracy and fundamental (freedom, social, political, and civil) rights, taking the shape of a *bidirectional instrumental connection*.

On the one hand, there can be no (effective) democracy without an effective guarantee of fundamental rights.

On the other hand, there can be no effective guarantee of fundamental rights without (an effective) democracy, without effectively vesting political power in each and every citizen³³.

In sum, from the standpoint of the integral conception of democracy, democracy and fundamental rights stand, and fall, together.

The bidirectional instrumental connection between democracy and fundamental rights can also be seen as a connection between realizing democracy, on the one side, and realizing the values that give substance to the ideal of protecting the equal social dignity of each and every human being (§ 2 above), on the other. Very roughly speaking, those values are the individualist and hu-

³¹ See FERRAJOLI 2025, containing an updated version of a Project for a Constitution of the Earth where, at art. 48, fundamental goods encompass air, potable water and its sources, rivers, lakes, seas, big forests, big glaciers, life-saving drugs, vaccines, the vital parts of the human body, etc. By contrast, according to art. 52, lethal goods are «unlawful goods» encompassing nuclear weapons, fire-arms, homicidal drones, heavy drugs, radioactive waste, etc.

³² The protection of fundamental rights also requires the enactment of sub-constitutional laws that, for instance: guarantee the presence of public information channels, subject to the control of independent authorities, and guided by the principles of empirical truth, source verification, and effective adversarial proceedings; contrast the spreading of fake news in private channels; ban the private financing of political parties and election campaigns beyond a modest amount (say € 1000 maximum per person/entity) and establish a system of public financing proportional to electoral success; guarantee the presence and effective working of public schools and public universities, open to all on the basis of merit scholarships; guarantee fiscal fairness by means of a progressive tax system.

³³ See, e.g., BOVERO 2022, 82, where "democracy" is defined as the regime whose rules concerning the ascription and exercise of political power establish that «each and every individual who has the political duty to obey to the laws ([...] the generally binding norms which are the output of collective decisions) [...] has the right-power, equal and equivalent to that of anybody else, to participate directly or indirectly to the process of laws (norms) production and creation of the organs of collective decision».

manistic values of the enlightenment, of humanitarian liberalism, and of liberal socialism³⁴.

Enlightenment values sum up in Immanuel Kant's motto «*Sapere aude!* Have the courage to make use of your own intellect!»³⁵, which brings along the idea of «liberating human beings from fear and installing» and preserving «them as [their own] masters»³⁶.

Humanitarian liberalism is the individualist ethical stance, inside of liberalism broadly conceived, that opposes to *anti-humanitarian liberalism*.

The former promotes human freedom in all dimensions of human life and conceives human beings as *homines civiles* who are entitled to realize their own life's projects inside of democratic constitutional states granting fundamental liberties and social rights.

The latter, contrariwise, is primarily concerned with economic freedom and conceives human beings as *homines oeconomici* who are entitled to realize their own life's projects inside of the market and market-subservient political organizations. It is an anti-humanitarian, Darwinian ethics, seeing the paramount value of market freedom to require and justify the limitation of political rights of democratic participation, the abolition of social rights, and the very curtailment of other freedom rights, if contrary to markets' and business's freewheeling³⁷. At such a point that the label "liberalism" may even appear an inappropriate and misleading fraud.

Liberal socialism pursues the goal of human equality as the emancipation of every human being from the slavery of need and brutish life, and conceives it as something that should be realized inside of peaceful, liberal-democratic, political organizations granting social rights³⁸.

One last precision, suggested by the present predicament of humankind. The maximum rule of law should be conceived as a form of government that, to be effective, requires to be realized not only at the level of national states, but also at a supranational, global level³⁹.

I have come to the end of the last stop of my swift journey through five forms of rule of law. This prompts a final remark. If we consider the several varieties from the standpoint of their respective adequacy to the goal of the effective legal protection of the equal social dignity of each and every human person (§ 2 above), only one of them is apparently able to pass the muster. This is the maximum rule of law, simultaneously realized at the national and supranational levels. Accordingly, in the second part of my paper, while casting a swift eye on rule of law's enemies, I will devote to the enemies of maximum rule of law, bringing to the fore their eventual similarities to forms of rule of law different from the maximum one.

II. Outline of a Theory of Rule of Law's Enemies

9. Which Enemies of the Rule of Law?

The history of legal-political institutions is, for the most part, the history of rule of law's enemies. In a masterly historical-theoretical survey dedicated to the notion of *government of men*, Norberto Bobbio singles out nine varieties: (1) tyranny; (2) paternalistic government; (3) despotic government; (4) democratic peoples' despotism; (5) the government of the wise legislator; (6) the government of the hero founder of the state; (7) commissarial dictatorship; (8) sovereign dictatorship; and, as a combination of the former, (9) the government by a charismatic leader⁴⁰.

³⁴ See, e.g., Kelsen 1920; Kelsen 1955, 1-101; Bobbio 1996; Bobbio 1985; Bovero 2000, ch. 2; Bovero 2022, 69-72, 105-106.

³⁵ Kant 1784, 17.

³⁶ Horkheimer, Adorno 1969, 1.

³⁷ On these two varieties of liberalism, though under different labels, see, e.g., Bobbio 1981, 115-139; Bovero 2022, 77-92.

³⁸ On liberal socialism, see, e.g., the essays in Bovero, Mura, Sbarberi (eds.) (1994).

³⁹ See Ferrajoli 2022; Ferrajoli 2025, Part Two.

⁴⁰ Bobbio 1983a, 179-192.

Tyranny (Caesarism, Bonapartism) is the illegitimate, absolute (legally unlimited), and arbitrary (depending on the ruler's own will and caprice) dominion typically arising out of a *coup d'état* by a political leader and influential demagogue aided by the populace.

Paternalistic government is the absolute and arbitrary rule of a (usually legitimate) sovereign over its subjects, where these are considered and treated as creatures in a perpetual condition of minority, needing, like the forever immature daughters and sons in a family, of the paternal guidance of the state as to the best life for them to live.

Despotic government is the absolute and arbitrary rule of a (usually legitimate) sovereign posing itself as the master who owns its subjects and their properties and can dispose of them at will, as of servants or things⁴¹.

Democratic peoples' despotism is the «new» form of «despotism» that, according to Alexis de Tocqueville, threatens «democratic peoples». In a famous passage of his 1835 *De la démocratie en Amérique*, he depicts it as follows:

«Let's imagine under which new aspects despotism might present itself in the world: I see a vast multitude of like and equal men that just rotate upon themselves, in view of procuring to themselves small and vulgar pleasures by which they satiate their soul [...] Above them stands an immense and tutelar power, which undertakes upon itself the task of ensuring them the enjoyment of their goods and watching over their fate. It is *absolute, meticulous, systematic, far-sighted, and meek*»⁴².

The government of the wise legislator and the government of the hero founder of the state correspond to the temporary good rule of outstanding personalities, usually leaving to their people well-ordered, far-sighted, and beneficent institutions.

Commissarial dictatorship is the temporary, legitimate, constitutionally-conform, rule of an appointed official vested with extraordinary power in view of efficaciously coping with a situation of emergency that puts at risk the very existence of the state, and aimed at ensuring the state's survival (*salus rei publicae*) along its original institutional design.

Sovereign dictatorship is the illegitimate, absolute, and arbitrary rule of a man or group of men taking over the state in time of social unrest and political emergency⁴³. Party dictatorships and military *de facto* governments provide abundant examples⁴⁴.

Finally, the government by a charismatic leader – a category belonging to Max Weber's theory of political power – represents «a sort of historical synthesis of all the forms of government of men»: the great demagogue, the national hero, the great military chief, opposing both traditional and legal-rational forms of power. In Bobbio's words, it is the output of «great historical crisis»; it «burns everything in the short and intense times that lapse in between an end and a beginning,

⁴¹ «Dans le despotisme, un seul, sans loi et sans règle, entraîne tout par sa volonté et par ses caprices» (MONTESQUIEU, 1748, 131).

⁴² BOBBIO 1983a, 181, italics added. The passage belongs to TOCQUEVILLE 1835b, ch.VI of Part IV, 431-438, which *vaut toujours le voyage*. To give an idea, let me quote a few key passages more (from 432 and 435): «Il semble que, si le despotisme venait à s'établir chez les nations démocratiques de nos jours, il l'aurait d'autres caractères: il serait *plus étendue et plus doux*, et il *dégraderait les hommes sans les tourmenter* [...] il ne brise pas les volontés, mais il les amollit, les plie, et les dirige ; il force rarement d'agir, mais il s'oppose sans cesse à ce qu'on agisse ; il ne détruit point, il empêche de naître ; il ne tyrannise point, il gêne, il comprime, il énerve, il éteint, il hébète, et il réduit enfin chaque nation à n'être plus qu'un troupeau d'animaux timides et industrieux, dont le gouvernement est le berger. J'ai toujours cru que cette sorte de servitude, réglée, douce et paisible [...] pourrait se combiner mieux qu'on ne l'imagine avec quelques-unes de formes extérieures de la liberté, et qu'il ne lui serait pas impossible de s'établir à l'ombre même de la souveraineté du peuple» (italic added).

⁴³ BOBBIO 1983a, 189-191, referring to Carl Schmitt's theory of dictatorship and adopting its terminology.

⁴⁴ Four properties are usually invoked as characterizing party dictatorship: a single political party, led by a charismatic leader, inspired by a certain ideology, takes over the state and rules by means of terror. Terror is also the notorious mark of military *de facto* governments.

decadence and regeneration, the old order that disappears and the new one that painstakingly makes its way. If his dominion is usually ephemeral, his task is extraordinary»⁴⁵.

Leaving aside the government of the wise legislator, the government of the hero founder of the state, and commissarial dictatorship, if we focus on the remaining varieties of government of men Bobbio considers (tyranny, paternalistic government, despotic government, Tocqueville's democratic despotism, sovereign dictatorship, and the government by a charismatic leader), we cannot avoid an overwhelming question: *Where do these various sorts of government of men differ from maximum rule of law in ways that are at odds with it?*

Apparently, three interconnected counts of difference between maximum rule of law, on the one side, and governments of men, on the other, are worthwhile considering:

1. autocracy;
2. opportunistic legalism;
3. anti-humanitarianism.

1. *Autocracy*. Rulers (the holders of political power, be they hereditary, elected, appointed, or self-appointed) are not under, or subject to, the law (*sub lege*). Rather, they are *above* the law (*super leges*). Ordinarily, they are not law-takers, nor law-appliers, but, rather, law-makers. They are *autocrats* in two different ways. First, they are people who, *alone* inside of a political society, have power *on themselves* (etymological meaning of "autocrat"). Secondly, they exercise an *absolute* and *arbitrary* power *on all others* members of the society (current meaning of "autocrat").
2. *Opportunistic legalism*. Rulers are not bound by the principles of legality of the archetypal model (§ 3 above). Nonetheless, they may find it *convenient* ruling by means of general and abstract norms (*per leges*). Their abiding by principles of legality is, in any case, utterly self-serving.
3. *Anti-humanitarianism*. From a substantive point of view, rulers reject individualist and humanitarian values: they deny the equal social dignity of every human person and oppose humanistic fundamental – freedom, social, political, and civil – rights.

Upon these differences, the governments that represent institutional alternatives to the maximum rule of law can be regarded as *autocratic* or *authoritarian* governments, in a wide sense of these terms. A theory of the forms of legal-political organization faring as maximum rule of law's enemies, therefore, can be conceived as *a theory of autocracy or political authoritarianism*.

By way of a very tentative theoretical (re)construction, it seems useful singling out four varieties of autocracy or authoritarian government (in a wide sense):

1. full legalistic autocracy;
2. *prima facie* legalistic autocracy;
3. discretionary legalistic autocracy;
4. full decisionist autocracy.

It goes without saying that the four forms of autocratic government are to be considered as ideal-types: tools for conceptually capturing, understanding, and explaining the reality of legal-political institutions and legal-political thinking⁴⁶.

⁴⁵ BOBBIO 1983a, 191-192.

⁴⁶ SCHEPPELE 2018, 545-583, at 548, defines the «phenomenon» he proposes to call "autocratic legalism" as obtaining when «electoral mandates plus constitutional and legal change are used», by a charismatic leader and its parliamentary majority, «in the service of an illiberal agenda».

10. Full Legalistic Autocracy

A legal-political organization is a *full legalistic autocracy*, if, and only if, *autocratic* and *anti-humanitarian* rulers adopt the principles of legality as imposing *all-things-considered* duties, and, accordingly, they exercise their powers by means of general, public, not *ex post facto*, clear, consistent, compliable, stable, and congruously applied norms.

A full legalistic autocracy can be regarded as a mixed form of government. It exhibits, at the same time, features both of the government of men and of the government of law(s).

On the one side, it is a government of men, where rulers are above the law and have free reins as to the content of the laws they enact.

On the other side, it is a government of law(s) restrictively understood as a government by laws (*per leges*). Realizing, from *this* perspective, a *minimum rule of law* (§ 5 above).

Due to its full commitment to legality, a full legalistic autocracy can be regarded as dwelling, in an ideal scale, on the lowest degree of autocracyness: as representing, from *that* standpoint, a form of *minimum autocracy*.

11. Prima Facie Legalistic Autocracy

A legal-political organization is a *prima facie legalistic autocracy*, if, and only if, *autocratic* and *anti-humanitarian* rulers adopt the principles of legality as imposing only *prima facie* duties: *i.e.*, duties that are overridable in case of convenience.

Like full legalistic autocracy, a *prima facie* legalistic autocracy features as a mixed form of government that combines aspects both of the government of men and of the government of law(s). In particular, in its government of law(s) side, it realizes a *quasi-minimum rule of law* (§ 4 above).

Unlike full legalistic autocracy, however, its commitment to legality is weaker, and its autocracyness stronger. It represents therefore, from *that* standpoint, a form of *more-than-minimum autocracy*.

12. Discretionary Legalistic Autocracy

A legal-political organization is a *discretionary legalistic autocracy*, if, and only if, *autocratic* and *anti-humanitarian* rulers adopt a *thoroughly opportunistic attitude* as to the principles of legality.

Legal authorities never have the duty, not even a *prima facie* one, of exercising their powers *per leges*. Resorting to general, public, not *ex post facto*, clear, consistent, compliable, stable, and congruously applied norms is *always* the output of discretionary decisions.

From the perspective we are now considering, a discretionary legalistic autocracy does not correspond to any form of rule of law whatsoever: not even to a *quasi-minimum rule of law* (§ 4 above). It may come close to it, though, insofar as, in the pursuit of their plans, rulers choose to enact norms that satisfy the principles of legality in a statistically significant number of cases.

If compared with full and *prima facie* legalistic autocracy, discretionary legalistic autocracy exhibits a much stronger degree of autocracyness. It fares, therefore, from *that* standpoint, as a form of *quasi-maximum autocracy*⁴⁷.

⁴⁷ Discretionary legalistic autocracy captures, so to speak, the dark side of Fraenkel's "dual state". See FRAENKEL 1983.

13. *Full Decisionist Autocracy*

Finally, a legal-political organization is a *full decisionist autocracy*, if, and only if, *autocratic* and *anti-humanitarian* rulers adopt an *attitude of complete and systematic rejection* of the principles of legality.

Legal authorities have the duty never to exercise their powers *per leges*. Resorting to general, public, not *ex post facto*, clear, consistent, compliable, stable, and congruously applied norms is prohibited.

Unlike full, *prima facie*, and discretionary legalistic autocracy, a full decisionist autocracy is no *mixed government*: not even in the very weak and wholly opportunist form that characterizes discretionary legalistic autocracy.

Full decisionist autocracy represents, therefore, the *absolute* or *pure form* of government of men. It can be regarded, accordingly, from *this* point of view, as a *maximum autocracy*, corresponding to the highest degree of autocracyness.

14. *Real Autocracies*

The four forms of autocracy are, as I said, ideal types. It is apparent that they possess an uneven explanatory capacity in relation to the reality of legal-political institutions.

Full decisionist autocracy represents, as we have seen (§ 13 above), the pure, absolute, extreme variety of government of men. The notion is useful insofar as our aim is setting forth an exhaustive theoretical map avoiding conceptual vacuums. However, such a form of government looks unrealizable in coping with present human societies. Accordingly, at least in the here and now of extant government techniques, it points to an empty class⁴⁸.

By contrast, *prima facie* and discretionary legalistic autocracies are ideal types possessing an evident explanatory virtue.

Plenty of real instances close to *prima facie* legalistic autocracy can be provided. Think at those autocratic regimes that superseded constitutional regimes, without completely abolishing the pre-existing rule of legality principles over certain matters. Think, for example, at the Fascist regimes in Italy, Spain and Portugal, and at most of the military *de facto* governments in Africa, Asia, and Latin America.

Plenty of real instances close to discretionary legalistic autocracy can be offered too. Think, for example, at revolutionary party dictatorships like Soviet Russia, Communist China, and North Korea.

What about full legalistic autocracy? Has it any actual explanatory capacity, or is it just another conceptual signpost, pointing to an empty class, like full decisionist autocracy?

At a first blush, full legalistic autocracy seems an unlikely form for actual governments. Why should an autocratic regime bother about fully respecting the principles of legality?

Upon consideration, however, full legalism may not be a weird institutional choice at all. At least, whenever an autocratic regime purports to *conceal* its autocratic nature and *present itself* as a “true” and “full” government of law(s), a “true” and “full” democracy, a “true” and “full” rule of law. Accordingly, full legalistic autocracy is likely to be instantiated, closely if not perfectly, by fake, pretended, forms of democracy and rule of law.

In the history of political thought, one such form goes under the name of “tyranny of the majority” (“majority despotism”, “majority dictatorship”)⁴⁹. In recent times, however, the support-

⁴⁸ Realizing a full decisionist autocracy requires the possibility of exercising a capillary control over the behaviours of each single individual, combined with the possibility of issuing individual orders at any time, and sanctioning individual violations on the spot. A far scarier situation than in Orwellian 1984, which, unfortunately, the present pace in the progress of surveillance capitalism and society is making ever less unrealizable. See, e.g., ZUBOFF 2019; BRIA 2025, I, II.

⁴⁹ Alexis de Tocqueville uses the term “tyrannie de la majorité” (tyranny of the majority) to refer to a situation

ers of this form of government have introduced the label “majoritarian democracy”, which, they claim, would stand for the “true” and “full” form of democracy: the one finally “restoring the scepter to the people-prince”, in opposition to obsolete, windbag, inconclusive, and paradoxically anti-popular “consensual” or “consociate” democracy.

In a series of essays from the year 2015 to date, Michelangelo Bovero argues the label “majoritarian democracy” to be misleading and proposes to use instead, as theoretically more adequate substitutes, a few neologisms of his own invention. These are *pleonocracy* (literally: the power or government of the most) and *majoritarian elective autocracy*, both referring to a specific variety of *elective autocracy*⁵⁰.

Elective autocracy features, at present, as one of the most insidious enemies of maximum rule of law. This makes it worthwhile paying a visit to Bovero’s theory.

15. Elective Autocracies

Bovero distinguishes two varieties of elective autocracy: *monocratic elective autocracy* and *majoritarian elective autocracy* or, as we have seen, *pleonocracy*⁵¹.

Monocratic elective autocracy is a legal-political organization where the electoral body, which corresponds to the whole set of citizens of age, periodically elects an autocrat, to whom it grants full power until the next elections (if there will be any). Bovero identifies this type of government by means of what he calls a «thought experiment»:

«Let us try to think at the two possible functions of political elections by universal suffrage that I have pointed out – electing parliament, electing the head of the government – as a sharp alternative, an *aut-aut*: either one is selected, or the other is selected, but not both. We will have constructed the purely hypothetical image of two irreducible types of regime: in the first one, a collegial body, representing all the political orientations that are present in a society, elaborates collective decisions, and the decision that arises from parliamentary dialectic will be law; in the second one, a monocratic body, designated by a part (not always, in fact, a majority) of the electorate, determines collective decisions, and the law will be *quod principi placuit*»⁵².

According to Bovero, *monocratic elective autocracy* represents the form of state legal order towards which «contemporary real democracies» are tending, driven as they are by powerful neoliberal, plutocratic, populist, plebiscitary, and personalist pressures⁵³.

In the meantime, however, before the rules of monocratic elective autocracy become positive constitutional law, a constitutional democracy is likely to transform itself into a *pleonocracy* or

where the legislature is «the slave» of the «passions» of the political «majority» it represents, and its power is countered neither by a separated executive power («qui ait une force qui lui soit propre»), nor by a judiciary power independent from both (TOCQUEVILLE 1835a, 375-379). The tyranny of the majority is not to be confused with the democratic peoples’ despotism Tocqueville depicts in the second volume of his work (see § 9 above). There, as it appears from a passage I quote in footnote 43, Tocqueville seems to be pointing to a form of bureaucratic, organizationally centralized, despotism which establishes itself and thrives *behind* the façade of a democratic, popular sovereignty, regime. Something like the Big Tech dictatorship I will consider in the last paragraph (§ 16 below).

⁵⁰ «A regime that boasts to be a precious variety of the genus democracy: the so-called majoritarian democracy. And that I believe should be recognized instead as a *form of elective autocracy*, disguised in democratic clothes. Using my classical-style neologism: a *pleonocracy*» (BOVERO 2017, 389-403, at 402). See also BOVERO 2015, 1-18; BOVERO 2018, 11-45; BOVERO 2022, especially chs. IV to VIII; BOVERO 2023, 21-35; BOVERO 2024, 135-138.

⁵¹ We may also think, of course, at forms of elective oligarchic autocracy.

⁵² BOVERO 2015, 10.

⁵³ BOVERO 2015, 11; BOVERO 2000, ch. 8 e 9; BOVERO 2022, 134-135.

majoritarian elective autocracy: typically, through the enactment of apposite electoral laws and the establishment of appropriate constitutional practices and customs.

A pleonocracy would represent, in sum, the form of government that establishes itself in the transition process from constitutional democracy (maximum rule of law) to monocratic elective autocracy⁵⁴.

Taking stock of Bovero's analysis, the principles that characterize the material constitution and ideology of a pleonocratic form of government can be recounted, very roughly, as follows.

1. All political power ought to be vested into a parliamentary majority and its (charismatic) leader; furthermore, such an attribution should be regarded as being, in principle, indisputable and irreversible until the next general elections come.
2. The function of general elections should be meant to consist, not in electing a parliament that be representative of the whole society, but, rather, in electing a ruling, virtually plenipotentiary, majority led by a (charismatic) leader featuring as the head of the executive.
3. The elected majority and its leader should be regarded as the exclusive depositories of popular legitimacy and the exclusive or privileged interpreters of the will and sentiments of the people.
4. The elected majority should provide unconditional support to its (charismatic) leader, turning parliament into a handy tool for the executive's policies.
5. The popularly legitimized executive should be understood as a "mandate executive". A vote of no confidence against it, if admitted by the formal constitution, must lead to the dissolution of the chambers and the calling of new elections. Because of their tight, organicist, political connection, the parliament and the executive *simul stabunt, simul cadent*.
6. The most suitable electoral system to ensure elections whose outcome is the designation of a mandate executive consists in the uninominal majoritarian system, or, in any case, in a system characterized by "majority bonuses" capable of transforming («transubstantiating») electoral minorities into invulnerable political majorities. Contrariwise, the proportional electoral system must be abolished as the remain of a romantic and inconclusive political past.
7. The entire constitutional and political life of the nation should abide by two fundamental principles: "Winner takes all" (Spoil System) and "Governability – and the stability of the executive – is the supreme good".
8. Parliamentary minorities should be put in a condition of virtually complete irrelevance during the whole mandate. Their rights should be conceived in very narrow terms. Ordinary acts of opposition and critique to the ruling majority, its executive, and its charismatic leader should be energetically stigmatized as unlawful "plots" and "maneuvers" attempting at "illegitimately" "overthrowing" the legitimate government. Minorities should be regarded as being entitled just to a weak right eventually to win in the next elections. The extant political majority should be regarded as having the right to change the electoral law and manipulate the electoral process in such a way to prevent minorities from winning the elections, or, if that is not possible, severely limiting the effects of their electoral victory.

⁵⁴ We may also think, of course, at the form of oligarchic elective autocracy. I will consider this possibility at § 16 below.

9. Organs of control and guarantee (like constitutional courts, courts of accounts, an independent judiciary, independent prosecution offices, an independent central bank, an independent statistical office, an independent public information and broadcasting system, etc.) should be progressively dismantled or anyway disempowered, in view of guaranteeing to the ruling majority and its (charismatic) leader the possibility of implementing their agenda so far as possible without facing annoying trammels “the people would not understand”.
10. Fundamental liberty rights should be exercised in ways not offensive to the ruling political majority, its (charismatic) leader, and, above all, the wishes, feelings, and sensibilities of the People they exclusively interpret and represent⁵⁵.

The principles above shed light on why pleonocracy poses as an insidious threat to maximum rule of law. On two counts.

First. The ruling majority and its (charismatic) leader conceive of themselves as being *above* the law. In force of the full democratic legitimacy they boast to enjoy, they regard the constitution, though formally rigid, as *virtually flexible*: as being liable, in particular, to implicit revisions by ordinary laws that piecemeal-wise modify and restrict the meaning of constitutional clauses⁵⁶.

Second. Pleonocracies characterize for the adoption of an anti-humanitarian ethics.

On the one hand, due to the full democratic legitimacy they claim to enjoy, political majorities consider themselves as *higher in social dignity* than political minorities. These are downgraded to the status of “enemies” of the people and/or “fools” standing on the “wrong side of History”.

On the other hand, political majorities also take an opportunist stance towards freedom rights. They see freedom, properly, as the right to think and behave as the majority likes. They do not endorse freedom rights as morally and legally worthwhile *per se*. Rather, they just *tolerate* freedom rights. And usually make their best to put checks on them in the name of jealous twin deities like “Law and Order”, “Law and Security”, “Security and governability”, etc.

16. *Big Tech Dictatorship*

I will conclude this tentative survey on the enemies of maximum rule of law by casting a swift glance on a phenomenon that, if considered from its present stage of development and likely future orientation, looks as aiming, at best, at establishing a *universal oligarchic autocracy* graciously vesting, in some political societies, democratic robes concealing elective majoritarian, oligarchic, or monocratic autocracies⁵⁷.

External observers refer to the phenomenon as “technofeudalism”, “technocapitalism”, “technofascism”, “technomonarchism”, or “technopopulism”⁵⁸, to emphasize that the new forms

⁵⁵ BOVERO 2015, 7-II; BOVERO 2017, 389-403; BOVERO 2018, 27-43; BOVERO 2022, 131-132.

⁵⁶ On tacit constitutional changes, see GIANFORMAGGIO 1995, 265-270.

⁵⁷ A hint of this can perhaps be gathered from a passage of the authors I am going to consider in this paragraph: Peter Thiel. In *Your Suffrage Isn't in Danger. Your Other Rights Are* (THIEL 2009b), he writes: «It would be absurd to suggest that women's votes will be taken away or that this would solve the political problems that vex us. While *I don't think any class of people should be disenfranchised, I have little hope that voting will make things better. Voting is not under siege in America, but many other rights are. In America, people are imprisoned for using even very mild drugs, tortured by our own government, and forced to bail out reckless financial companies*», italics added.

⁵⁸ See, e.g., VAROUFAKIS 2024; DE BIASE 2025; DI CESARE 2025; MULIERI 2025. On the phenomenon, see also, e.g., BENANTI 2025; BRIA 2025; DA EMPOLI 2025; SCHAAKE 2024; SLOBODIAN 2023; SLOBODIAN 2025; VENANZONI 2025. On the authoritarian trend in politics, see, e.g., APPLEBAUM 2024; MULIERI 2024. “Neo-feudalism” is also used to refer to the properties characterizing the relations between providing big business firms, on the one hand, provided consumers, customers, on the other, whatever the market (from house renting to buying a washing machine).

of autocratic government share a strict nexus of dependence on the services provided by big and extremely powerful private technological firms operating on a planetary scale (Big Tech)⁵⁹.

Contrariwise, prominent Big Tech notables and officials present themselves as supporters of a “technological Republic”⁶⁰.

I propose to call the form of government Big Tech partisans stand for, the rule of big technological corporations over national governments and societies, *Big Tech dictatorship*.

On a tentative survey, Big Tech dictatorship characterizes for seven main properties. It is a (1) *globalist*, (2) *private law-gear*, (3) *technolatric*, (4) *superman libertarian*, (5) *anti-political*, (6) *wildly capitalist*, and (7) *government-parasitic* form of totalitarian political dominion.

1. *Globalism*. Big Tech dictatorship aims, first of all, at exercising its influence not just at the level of a single society or national state, but, possibly, at the global level: in *any part* of the Earth and even *beyond* the Earth. These further areas should encompass the «new spaces» that technology has made and will make available for human life. Like, for instance, the cyberspace, the outer world (Mars and other colonizable planets), and the seabed⁶¹.

2. *Private law-gear*. Big Tech dictatorship poses, secondly, as a form of *private law geared* dominion over governments and human societies. This occurs in three ways.

First, the very idea of a global sphere of public law, characterized by global legal institutions, functions, and rules resulting from international treaties and customary law is incompatible with Big Tech’s worldview. They stand in fact for international and supranational relations that tend to be *devoid* of international or supranational public law and the forms of legal organizations that foster it (like, e.g., United Nations, UNESCO, FAO, the WHO, etc.)⁶².

Second, the tools Big Tech use to build and exercise their global dominion come from a universal and as far as possible unlimited private law, which should develop and thrive in a context of overall deregulation. These are the usual tools of market economy: (almost) absolute private property rights and (almost) absolute contractual freedom, within the framework of a pro-business soft law produced and administered by Big Tech themselves or their agents⁶³.

Third, Big Tech resort to the sanctity of absolute private property rights and contractual freedom to ensnare governments and individuals into unequal contractual bonds, opposing undefeasible “natural” limits to the legitimate and necessary public takings of (at least) some of the essential services they offer.

3. *Technolatriy*. Big Tech dictatorship is, thirdly, a form of dominion characterized by the *adoption of a technolatric ethics*. By means of dignitaries and officials, Big Tech emphasize that information

⁵⁹ As we all know, Big Tech provide software and artificial intelligence services that capillary affect: (1) the working of governments at international, national, and local level, from national defence, intelligence and counterinsurgency to the organization of county health services and space explorations; (2) the ways ordinary people live their daily lives; (3) the ways for governments and organized private interests to control, manipulate, and steer ordinary people’s lives in all their dimensions (cultural, economic, moral, political, religious, social, etc.).

⁶⁰ See KARP, ZAMISKA 2025. The account in the text will be focussed on Karp’s, Thiel’s, and Zamiska’s positions.

⁶¹ See THIEL 2009a, 3.

⁶² Taking the lead from Leo Strauss’s claim that «the most just society cannot survive without “intelligence”, i.e., espionage» and that «espionage is impossible without a suspension of certain natural rights», P. Thiel comments that if we want peace and other goods of life: «Instead of the United Nations, *filed with interminable and inconclusive parliamentary debates that resemble Shakesperean tales told by idiots*, we should consider Echelon, the secret coordination of the world’s intelligence services, as the decisive path to a truly global *pax Americana*» (THIEL 2007, 189-218, at 208, italics added). In passing, Echelon was not «the secret coordination of the world’s intelligence services», unless by “world’s intelligence services” we mean the secret services of the USA and UK, with the participation of those of Canada, Australia and New Zealand.

⁶³ On soft law, see NUÑEZ VAQUERO 2025.

technologies have made the digital society possible. They boast of possessing the keys – which, it should be noted, are strictly *engineering* in nature – that have changed, and will continue to change, «the course of human history»⁶⁴. They assume, therefore, to have the moral and civic duty to bring their technological know-how to bear on the shaping of the national policies of the United States and allied Countries⁶⁵.

4. *Superman libertarianism*, 5. *rejection of politics*, 6. *wild capitalism*. Big Tech dictatorship characterizes, furthermore, for the triplet properties of superman libertarianism, rejection of traditional politics, and a radical commitment to wild capitalism.

Superman (*Übermenschlich*) libertarianism claims ambitious, high-IQ, and proactive individuals to be (they alone) morally entitled to be free and sovereign over themselves. Politics, however, usually engages in a mortal contest («a deadly race») with individual «liberty»⁶⁶ and «technology»⁶⁷. Accordingly, leaving aside the alternative of escaping from the present world as a world ruled by politics⁶⁸, superman libertarians should promote and procure the extinction of politics, at least as it has been conceived from Protagoras's age until now. In particular, it should be clear to them that only the superseding both of «social democracy» and of «totalitarian or fundamentalist states»⁶⁹ can promote the building and propagation of «the machinery of freedom that makes the world safe for capitalism»⁷⁰. Capitalism – meaning by that untrammelled capitalists' ventures – represents in turn the natural setting for the flourishing of individuals' «authentic freedom» and full sovereignty over themselves, as well as for technological development and technological rule.

7. *Government-parasitism*. Big Tech dictatorship is, finally, a form of dominion that characterizes for *government-parasitism*. At least at present, Big Tech do not aim at replacing national governments. They aim, rather, at changing, «rebuilding», «reconstructing» them into «technological republics», the core of which should consist in a *technological-military complex*, the digital age heir of the military-industrial complex of older days⁷¹. Big Tech aim, accordingly, at ruling over human societies, all over the reachable world, by means of subservient governments. To this goal, they regard constitutional democracy as utterly unfit⁷². The technological republic is likely

⁶⁴ See KARP 2025.

⁶⁵ «The engineering elite of Silicon Valley has an affirmative obligation to participate in the defense of the nation and the articulation of a national project – what is this country, what are our values, and for what we stand – and, by extension, to preserve the enduring yet fragile geopolitical advantage that the United States and its allies in Europe and elsewhere have retained over their adversaries» (KARP, ZAMISKA 2025, xiv; see also 10-11, where technological values are enlisted).

⁶⁶ THIEL 2009b: «I believe that politics is way too intense. That's why I'm a libertarian. Politics gets people angry, destroys relationships, and polarizes peoples' vision: the world is us versus them; good people versus the other. Politics is about interfering with other people's lives without their consent. That's probably why, in the past, libertarians have made little progress in the political sphere»; THIEL 2009a, 3: «I no longer believe that freedom and democracy are compatible».

⁶⁷ THIEL 2009a, 3.

⁶⁸ This possibility Peter Thiel considers in THIEL 2009a, 2-4.

⁶⁹ THIEL 2009a, 3.

⁷⁰ THIEL 2009a, 4.

⁷¹ KARP, ZAMISKA 2025, 3-15.

⁷² In a passage of a paper, P. Thiel, after assuming the crisis of, notice, nothing less than «the modern West» («Let us recapitulate. The modern West has lost faith in itself»), poses an overwhelming question: «Is there a way to fortify the modern West without destroying it altogether, a way of not throwing the baby out with the bathwater?». It is not clear which answer Thiel offers. It is clear, however, that in his view no answer can come from constitutional democracy: «a direct path forward – writes Thiel – is prevented by America's constitutional machinery. By «setting ambition against ambition» with an elaborate system of checks and balances, it prevents any single ambitious person from reconstructing the old Republic. America's founders enjoyed a freedom of action far surpassing that of America's

to be, rather, something close to some form of elective autocracy, to which Big Tech would provide lavishly retributed advice, services, and personnel⁷³. It may also happen that some Big Tech fat cats serve as ministers or high rank bureaucrats in elective autocratic governments. In such a case, Big Tech directly take part in the realization of their universal autocratic conspiracy.

subsequent politicians. Eventually, ambitious people would come to learn that there is little one can do in politics and that all merely political career ends in failure. The intellectual paralysis of self-knowledge has its counterpoint in *the political paralysis embedded in our open system of government*» (THIEL 2007, 207, italics added).

⁷³ In his August 4, 2025, *Letter to Shareholders*, after boasting the extraordinary business success of Palantir, the technological firm he co-founded with Peter Thiel, as the output of an «unapologetically specific culture [...] that gave rise to» software programs «all of which have already changed the course of human history», Alexander Karp (KARP 2025) refers to the United States as «the most consequential country in the West», whose «culture» «enables companies like ours to come into existence and excel», and claims that such culture «must be protected. The United States is not, and should not be permitted to become, *a soft compromise and amalgam of global values and tastes* [...] a tolerance of everything, a shallow embrace of all views and perspectives as equally valid, often and unfortunately devolves into a belief in nothing» (italics added). This statement is apparently at odds with the «role» that, according to Karp and Zamiska, «Silicon Valley can and should play in the advancement and reinvention of a national project, both in the United States and abroad – of what, beyond a firm and uncontroversial commitment to liberalism and its values, including the advancement of individual rights and fairness, constitutes our shared vision of the community to which we belong» (KARP, ZAMISKA 2025, xv; see also II: «the legitimacy of the American government and democratic regimes around the world will require an increase in economic and technical output that can be achieved only through the more efficient adoption of technology and software. The public will forgive many failures and sins of the political class. But the electorate will not overlook a systemic inability to harness technology for the purpose of effectively delivering the goods and services that are essential to our lives»). Which “liberalism”? Which “individual rights”? Which “fairness”? The Authors leave it in the dark. And make vague communitarian-sounding claims, appeals to the need for «broader forms» of «collective identity», and reference to the «nation-state» as «the most effective means of collective organization» (KARP, ZAMISKA 2025 e.g., 14, 189, 198, 200-201, 201-204, 214) or to «our current nihilism as a culture» (214). Tacitly acknowledging the ethical desertification and the destruction of social solidarity brought about by the successful neoliberal, wild capitalism, revolution from the late 1970s onward, they end by arguing that «the path forward will involve *a reconciliation* of a commitment to the free market, and its atomization and isolation of individual wants and needs, with the insatiable human desire for some form of collective experience and endeavor [...] The reconstruction of a technological republic [...] will require a re-embrace of collective experience, of shared purpose and identity, of civic rituals that are capable of binding us together [...] It might have been just and necessary to dismantle the old order. We should now build something together in its place» (KARP, ZAMISKA 2025, 217-218). On Big Tech’s state-capture strategy, see, e.g., BRIA 2025.

References

- APPLEBAUM A. 2024. *Autocracy, Inc. The Dictators Who Want to Run the World*, Allen Lane.
- BASSANI G. 1971. *Five Stories of Ferrara*, Harcourt.
- BENANTI P. 2025. *Palantir vuole uccidere la democrazia? Nella testa del suo fondatore Peter Thiel, una delle figure più misteriose e potenti della Silicon Valley*, in «Corriere della Sera», available at: https://www.corriere.it/sette/25_novembre_24/palantir-peter-thiel-democrazia-09b9704d-a7a2-427d-b317-b41f9c7d0x1k.shtml.
- BINGHAM T. 2010. *The Rule of Law*, Penguin Books.
- BOBBIO N. 1961. *Il regime fascista (I)*, in AA.VV., *Trent'anni di storia italiana. Lezioni con testimonianze presentate da Franco Antonicelli*, Einaudi.
- BOBBIO N. 1975. *L'ideologia del fascismo*, in CASUCCI C. (ed.), *Il fascismo. Antologia di scritti critici*, Il Mulino, 1982, 598-624.
- BOBBIO N. 1976. *Perché democrazia?*, in ID., *Quale socialismo? Discussione di un'alternativa*, Einaudi, 70-75.
- BOBBIO N. 1981. *Liberalismo vecchio e nuovo*, in ID., *Il futuro della democrazia*, Einaudi, 115-139, (1995).
- BOBBIO N. 1983a. *Governo degli uomini o governo delle leggi?*, in ID., *Il futuro della democrazia*, Einaudi, 169-195 (1995).
- BOBBIO N. 1983b. *Introduzione*, in FRAENKEL E., *Il doppio stato. Contributo alla teoria della dittatura*, Einaudi.
- BOBBIO N. 1985. *Liberalism and Democracy*, Verso, (1999).
- BOBBIO N. 1996. *Democrazia integrale*, in ID., *Tra due Repubbliche. Alle origini della democrazia italiana*, Donzelli, 110-115.
- BOVERO M. 2000. *Contro il governo dei peggiori. Una grammatica della democrazia*, Laterza.
- BOVERO M. 2015. *Autocrazia elettiva*, in «Costituzionalismo.it», 2, 2015, 1-18.
- BOVERO M. 2017. *Pleonocrazia. Una critica della democrazia maggioritaria*, in «Teoria politica», Nuova serie, Annali VII, 2017, 389-403.
- BOVERO M. 2018. *Pleonocrazia. Una crítica de la democracia mayoritaria*, INE.
- BOVERO M. 2022. *Salus mundi*, Castelvechi.
- BOVERO M. 2023. *Anakyklosis. Incubi di barbarie ritornata*, in «Teoria politica», Nuova serie, XIII, 2023, 21-35.
- BOVERO M. 2024. *Se il popolo sceglie il capo. Prologo*, in «Teoria politica», Nuova serie, XIV, 2024, 131-135.
- BOVERO M., MURA V., SBARBERI F. (eds.) 1994. *I dilemmi del liberalsocialismo*, La Nuova Italia Scientifica.
- BRIA F. 2025. *Il colpo di stato della tecnologia autoritaria*, in «Le Monde diplomatique - Il manifesto», XXXI, 11, 1, 11.
- CALAMANDREI P. 1940. *Fede nel diritto*, Laterza, (2008).
- CELANO B. 2022. *El gobierno de las leyes. Ensayos sobre el Rule of Law*, Marcial Pons.
- CHIASSONI P. 2021. *The Methodology of Analytic Jurisprudence*, in «Analisi e Diritto», 2, 2021, 7-49.
- COLE D. 2025. *Getting Away with Murder*, in «The New York Review of Books», October 23, 2025, 45-46.
- COSTA P., ZOLO D. (eds.) 2002a. *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli.
- COSTA P., ZOLO D. 2002b. *Premessa*, in COSTA P., ZOLO D. (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli.
- DA EMPOLI G. 2025. *L'heure des prédateurs*, Gallimard.
- DE ASÍS ROIG R. 1999. *Modelos teóricos del Estado de Derecho*, in «Doxa», 22, 1999, 221-232.
- DE BIASE L. 2025. *La politica preda del tecnocapitalismo*, in «Il Sole-24 Ore», September 16.
- DI CESARE D. 2025. *Tecnofascismo*, Einaudi.
- DICEY A.V. 1885. *An Introduction to the Study of the Law of the Constitution*, MacMillan.
- DWORKIN R. 2012. *The Rule of Law*, in European Commission for Democracy Through Law (Venice

- Commission), Conference on “The Rule of Law as a Practical Concept”. Reports, Lancaster House, March 2, 2012.
- European Commission for Democracy Through Law (Venice Commission) 2011. *Report on the Rule of Law*, available at: <https://rm.coe.int/1680700a61> (adopted by the Venice Commission at its 86th plenary session, 25-26 March 2011).
- FERRAJOLI L. 2016. *La democrazia costituzionale*, Il Mulino.
- FERRAJOLI L. 2021. *La costruzione della democrazia. Teoria del garantismo costituzionale*, Laterza.
- FERRAJOLI L. 2022. *Per una Costituzione della Terra. L’umanità al bivio*, Feltrinelli.
- FERRAJOLI L. 2025. *Progettare il futuro. Per un costituzionalismo globale*, Feltrinelli.
- FULLER L.L. 1964. *The Morality of Law*, Yale University Press.
- GIANFORMAGGIO L. 1995. *Filosofia e critica del diritto*, Giappichelli.
- GARZÓN VALDÉS E. 1989a. Representación y democracia, in «Doxa», 6, 1989, 143-164.
- GARZÓN VALDÉS E. 1989b. Algo más acerca del «coto vedado», in «Doxa», 6, 1989, 209-213.
- GROSSI P. 2020. *Oltre la legalità*, Laterza.
- HORKHEIMER M., ADORNO T.W. 1969. *Dialectic of Enlightenment. Philosophical Fragments*, Stanford University Press (2002).
- KANT I. 1784. *An Answer to the Question “What Is Enlightenment?”*, in KLEINGELD P. (ed.) 2006. *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press.
- KARP A.C. 2025. *Letter to Shareholders*, August 4, 2025.
- KARP A.C., ZAMISKA N.W. 2025. *The Technological Republic. Hard Power, Soft Belief and the Future of the West*, The Bodley Head.
- KELSEN H. 1925. *Allgemeine Staatslehre*, Springer.
- KELSEN H. 1932. *Difesa della democrazia*, in ID., *Essenza e valore della democrazia*, Giappichelli (2003).
- KELSEN H. 1934. *Teoría general del Estado*, Editorial Labor.
- KELSEN H. 1955. *Foundations of Democracy*, in «Ethics», 66, 1955, 1-101.
- KRISTAN A. 2017. *Desde el Estado hasta la ideología judicial. Antimanual*, Palestra.
- MONTESQUIEU C. 1748. *De l’Esprit des lois*, Garnier-Flammarion, 1979.
- MORESO J.J. 2020. *Estado de derecho*, in ID., *Lo normativo: variedades y variaciones*, Centro de Estudios Políticos y Constitucionales, 155-173.
- MULIERI A. 2024. *Contro la democrazia illiberale. Storia e critica di un’idea populista*, Donzelli.
- MULIERI A. 2025. *Tecnomonarchi. Gli ideologi della nuova destra all’attacco della democrazia*, Donzelli.
- NUÑEZ VAQUERO A. 2025. *On the “Soft Law” Concept*, in «Review of European Administrative Law», available at: <https://realaw.blog/2025/03/14/on-the-soft-law-concept-by-alvaro-nunez-vaquero/>.
- RAZ J. 1977. *The Rule of Law and Its Virtue*, in ID., *The Authority of Law. Essays on Law and Morality*, Clarendon Press, 214-219 (1979).
- RAZ J. 1990. *The Politics of the Rule of Law*, in «Ratio Juris», 3, 1990, 331-339.
- SANTORO E. 2002. *Rule of Law e “libertà degli inglesi”*. *L’interpretazione di Albert Venn Dicey*, in COSTA P., ZOLO D. (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli, 173-223.
- SCALIA A. 1989. *The Rule of Law as a Law of Rules*, in «University of Chicago Law Review», 56(4), 1989, 1175-1188.
- SCHAAKE M. 2024. *The Tech Coup. How to Save Democracy from Silicon Valley*, Princeton University Press.
- SCHEPPELE K.L. 2018. *Autocratic Legalism*, in «The University of Chicago Law Review», 85, 2018, 545-583.
- SLOBODIAN Q. 2023. *Crack-Up Capitalism. Market Radicals and the Dream of a World without Democracy*, Penguin.
- SLOBODIAN Q. 2025. *Hayek’s Bastards. The Neoliberal Roots of the Populist Right*, Allen Lane, London.
- TAMANAH B. 2007. *A Concise Guide to the Rule of Law*, St. John’s University School of Law, Legal

- Studies Research Papers, available at: <https://content.csbs.utah.edu/~dlevin/conlaw/tamana-ha-rule-of-law.pdf>.
- THIEL P. 2007. *The Straussian Moment*, in HAMERTON-KELLY R. (ed.), *Politics and Apocalypse*, Michigan State University Press, 189-218.
- THIEL P. 2009a. *The Education of a Libertarian*, in «Cato Unbound», available at: <https://www.cato-unbound.org/2009/04/13/peter-thiel/education-libertarian/>.
- THIEL P. 2009b. *Your Suffrage Isn't in Danger. Your Other Rights Are*, in «Cato Unbound», available at: <https://www.cato-unbound.org/2009/05/01/peter-thiel/suffrage-isnt-danger-other-rights-are/>.
- TOCQUEVILLE A. DE 1835a. *De la démocratie en Amérique I*, Gallimard (1961).
- TOCQUEVILLE A. DE 1835b. *De la démocratie en Amérique II*, Gallimard (1961).
- TROPER M. 1992. *Le concept d'État de droit*, in ID., *La théorie du droit, le droit, l'État*, Presses Universitaires de France, 267-269 (2001).
- VAROUFAKIS Y. 2024. *Technofeudalism. What Killed Capitalism*, Penguin Books.
- VENANZONI A. 2025. *Avec Palantir, le plan "ontologique" d'Alex Karp et Peter Thiel pour créer un état digital*, in «Le Grand Continent», available at: <https://legrandcontinent.eu/fr/2025/08/06/palantir-ontologie/>.
- VON WRIGHT G.H. 1963. *Norm and Action. A Logical Enquiry*, Routledge & Kegan Paul.
- WALDRON J. 2016. *Rule of Law*, in *Stanford Encyclopedia of Philosophy*.
- WEBER M. 1919. *Politics as a Vocation*, in ID., *Essays in Sociology*, in GERTH H.H., WRIGHT MILLS C. (eds.) 1946, Oxford University Press.
- ZOLO D. 2002. *Teoria e critica dello Stato di diritto*, in COSTA P., ZOLO D. (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli.
- ZUBOFF S. 2019. *The Age of Surveillance Capitalism*, Profile Books.

Between Dissensus and Dispute: Variations in the Rule of Law Discourse

M. VICTORIA KRISTAN

Università di Bologna.

E-mail: victoria.inostroza@unibo.it

ABSTRACT

This article proposes a conceptual framework to distinguish between two forms of disagreement about the Rule of Law: *dissensus* and *dispute*. Dissensus refers to variations in how the Rule of Law is interpreted or applied, while still preserving its internal coherence and normative structure. In contrast, dispute marks a deeper conceptual rupture – where key principles such as judicial independence or the constraint of arbitrary power are strategically undermined, resulting in what the paper terms as a malfunction of the *organic unity*. Building on Moreso's notion of the Rule of Law as part of an organic constitutional system, the article narrows this idea to focus on the internal coherence of the Rule of Law itself. Drawing on cases from the European Union, Hungary, and Russia, the article shows how legal discourse and institutional practices reveal divergent engagements with the Rule of Law across political regimes. While some systems reflect dissensus, others strategically redefine the concept to legitimize non-democratic governance. The dissensus/dispute distinction serves as an analytical tool to assess when legal variation reflects legitimate interpretive diversity and when it signals a fundamental breakdown in the Rule of Law's normative function.

Questo articolo propone un quadro concettuale per distinguere tra due forme di disaccordo sul Rule of Law: il dissenso e la disputa. Il dissenso riguarda le variazioni nell'interpretazione o nell'applicazione del Rule of Law, che tuttavia continuano a preservare la sua coerenza interna e la sua struttura normativa. La disputa, invece, indica una rottura concettuale più profonda: principi fondamentali come l'indipendenza giudiziaria o il controllo del potere arbitrario vengono deliberatamente compromessi, generando quella che l'articolo definisce una disfunzione dell'unità organica. Partendo dalla nozione di Moreso del Rule of Law come parte di un sistema costituzionale organico, l'articolo ne restringe la portata per concentrarsi sulla coerenza interna del Rule of Law in quanto tale. Attraverso esempi tratti dall'Unione Europea, dall'Ungheria e dalla Russia, si mostra come il discorso giuridico e le pratiche istituzionali rivelino modalità divergenti di interazione con il Rule of Law nei diversi regimi politici. In alcuni casi emerge un dissenso, in altri si assiste a una ridefinizione strategica del concetto, volta a legittimare forme di governo non democratiche. La distinzione tra dissenso e disputa si propone quindi come uno strumento analitico per valutare quando la variazione giuridica rappresenta una legittima diversità interpretativa e quando invece segnala un cedimento radicale della funzione normativa del Rule of Law.

KEYWORDS

rule of Law, dissensus, dispute, organic unity, malfunction

rule of Law, dissenso, disputa, unità organica, disfunzione

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



Between Dissensus and Dispute: Variations in the Rule of Law Discourse

M. VICTORIA KRISTAN

1. *Introduction* – 2. *Rule of Law, between Dissensus and Dispute* – 3. *Three Different Political Systems: Supranational Democracy, Electoral Populism and Non-democratic Polity* – 3.1 *Supranational Democracy. Ursula von der Leyen (Speech on the State of the Union, 2022)* – 3.2 *Electoral Populism. Hungary: Rule of Law as National Sovereignty* – 3.3 *Non-democracy. Russia: Rule of Law as State Power* – 4. *Conclusion*.

1. Introduction

In recent years, one of the central concerns in European governance has been the erosion of the Rule of Law. This is evident, for instance, in the adoption of the Rule of Law conditionality mechanism by the European Union¹. Yet identifying when a state has genuinely breached or complied with the Rule of Law is far from straightforward. Both liberal and illiberal leaders routinely assert that their governments are upholding the Rule of Law², even when facing credible allegations to the contrary. Such claims generate a complex interpretive challenge: while some governments may sincerely seek to align their legal frameworks with the ideals of the Rule of Law, others instrumentalize the concept rhetorically to legitimize practices that, in substance, subvert or hollow it out.

These contested assertions of compliance raise fundamental questions about how the Rule of Law is interpreted and applied across different political regimes³. How do democratic, populist, and non-democratic systems each conceptualize and operationalize the Rule of Law? Are there identifiable patterns in how its core elements function – or fail to function – within these diverse contexts?

This article looks at how different political systems interpret and apply the Rule of Law in different ways⁴. It draws a distinction between two kinds of disagreement: one is about the conceptual import or meaning, and the other about its applications. Disagreement about the applications – hereinafter *dissensus* –⁵ happens when there's a shared understanding of the concept of the Rule of Law, but there are differences about its proper scope of application. In such disagreements, the core idea still holds together as a common background. But when the disagreement is about the very meaning or conceptual import of the Rule of Law, we're dealing with a deeper kind of conflict – hereafter *dispute* – a conflict where, even if the same term is used, it no longer refers to a shared ideal⁶. Instead, discussions about the rule of law no longer presuppose a shared concept

¹ HALMAI 2019, 171-188.

² SAJÓ 2021, 237.

³ For a distinction between interpretation and application, see, e.g., GUASTINI 2010.

⁴ See, for instance, PEERENBOOM 2003.

⁵ Some scholars, such as COMAN 2022; 2024 and FASONE et al. 2024, use the concept of *dissensus* to capture forms of contestation against liberal democracy, including challenges to the Rule of Law. Fasone, Dirri & Guerra, for instance, distinguishes between weak and strong forms of *dissensus* (see FASONE et al. vi). However, I argue that *dissensus* – whether weak or strong – does not fully capture the distinction at stake here.

⁶ The distinction between *dissensus* and *dispute* presupposes a minimal conceptual structure that defines what counts as the Rule of Law in the first place. In this context, I take the concept to refer to key principles such as judicial independence or the constraint of arbitrary power that are widely recognized as constitutive of the Rule of Law's normative identity (RAZ 1977; FULLER 1964; WALDRON 2008; KRYGIER 2011). These principles form the internal structure necessary for the concept to retain semantic integrity. As long as they remain intact, disagreement concerns only the interpretation or application of the Rule of Law and thus constitutes *dissensus*. However, when any of these elements is fundamentally undermined or strategically redefined, the disagreement shifts into *dispute*, signaling a transformation of the concept itself rather than a variation within it.

which is able to guide or unify legal and political practices, but various, at times partly incompatible, though homonymous concepts of the Rule of Law⁷.

The distinction between dissensus and dispute serves as an analytical tool for distinguishing between contexts where disagreements occur within the framework of a unitary concept of the Rule of Law and those where an alternative interpretation fundamentally undermines a unitary framework. In other words, dissensus reflects a tension between competing conceptions of the Rule of Law, whereas dispute signals a deeper conflict over the very concept itself. But this distinction presupposes a more basic claim – namely, that the Rule of Law must be understood as an *organic unity*⁸. This means that the Rule of Law is understood as a cohesive and integrated notion where its various desiderata are interdependent and mutually reinforcing. In fact, the integrity and effectiveness of the Rule of Law depend on the harmonious functioning of all its elements⁹. Viewing the Rule of Law as an organic unity underscores the interdependence and mutual reinforcement of its various elements¹⁰. This conception is inspired in part by MOORE (1903) and DANCY (2004), but draws primarily on MORESO's (2021) account of the Rule of Law as part of an organic triad – alongside democracy and fundamental rights – which together reinforce and sustain constitutional democracy. In his view, the Rule of Law contributes to a broader normative architecture, functioning in close interaction with democracy and fundamental rights to form a coherent whole. While I take from Moreso the idea that certain normative structures operate *organically*, I apply this insight more narrowly and differently: I contend that the Rule of Law itself – independent of its relations to other values – ought to be understood as an organic unity. By describing the Rule of Law as an *organic unity*, I mean to capture an internal, immanent structure – one that is best understood from within rather than through its external relations to other normative values. My perspective shifts attention from the functional interplay between the Rule of Law and democracy or fundamental rights, toward the internal logic and interdependence of its constitutive elements.

While *organic unity* is the central concept I employ to analyse the structure of the Rule of Law, it is not the only theoretical lens capable of capturing the phenomena at issue. Given that this paper deals with the distinction between *dissensus* and *dispute*, it is appropriate to situate organic unity in relation to theories that address the conditions for agreement and disagreement. In this respect, organic unity bears a noteworthy parallel to Baumtrog's notion of *entrenched agreements*¹¹. Both concepts identify the foundational conditions that must be preserved in order for disagreement to remain meaningful within a shared normative or linguistic framework. In the case of the Rule of Law, *organic unity* expresses the idea that its constitutive elements – judicial independence, legal predictability, and the constraint of arbitrary power – are not merely additive or optional features, but mutually reinforcing components of a single normative ideal. The Rule of Law retains its identity as a coherent concept only if these elements function together as an integrated whole. Likewise, Baumtrog characterises *entrenched agreements* as deep, pre-theoretical commitments that make rational disagreement possible. These are not explicit propositions about which actors con-

⁷ In this case, disagreements are perhaps best described as metalinguistic negotiations. See, e.g., WATSON 2023, 487–524. See also RAMÍREZ LUDEÑA 2016, 39–62.

⁸ While the notion of *organic unity* follows its established use in the literature on the Rule of Law, particularly in Moreso's account of constitutional democracy as an *organic system* (MORESO 2021), my understanding departs from his in scope and focus – an observation I owe to Chiara Valentini. Whereas Moreso conceives the Rule of Law as one element within an organic triad that also includes democracy and fundamental rights, my account treats *organic unity* as an internal property of the Rule of Law itself. It refers to the functional interdependence among its constitutive elements, understood as parts of a coherent ideal rather than as components of a broader constitutional ensemble.

⁹ Which does not presuppose that all desiderata of the rule of law (in all possible combinations) are never in conflict with one another.

¹⁰ See KRISTAN 2024.

¹¹ See BAUMTROG 2019, 94–112.

sciously agree, but rather implicit normative assumptions that structure the practice itself and provide the background against which disagreement can occur intelligibly¹².

This conceptual convergence reveals that both ideas serve to identify the threshold beyond which disagreement ceases to be internal to a shared framework and becomes a dispute over the very concept at issue. In Baumtrog's framework, once entrenched agreements are no longer shared, disagreement is not merely about competing views within the same conceptual space, but rather about fundamentally different frameworks, rendering rational persuasion impossible. Likewise, when the organic unity of the Rule of Law is dismantled, disagreement no longer concerns its application or interpretation, but instead signals a transformation of the concept itself (dispute). What remains may still be called "Rule of Law", but it no longer refers to the same normative ideal. In Baumtrog's account, *entrenched agreements*¹³ are the underlying commitments that make rational disagreement possible within a shared practice. In the context of the Rule of Law, *organic unity* refers to the necessary interdependence of its core elements – judicial independence, legal predictability, and the constraint of arbitrary power – which must operate together if the concept is to retain its internal coherence and normative structure. In both cases, once these foundational conditions are no longer present, disagreement is no longer a matter of internal variation but indicates that the concept itself has been replaced or fundamentally altered¹⁴.

Building on this distinction, a crucial dimension of the distinction between dissensus and dispute lies in the concept of semantic integrity – that is, the preservation of a stable and coherent meaning of the Rule of Law across different institutional and political contexts¹⁵. Dissensus, as understood here, entails disagreement within a shared conceptual framework. Even when legal systems differ in their emphasis, the semantic integrity of the Rule of Law remains intact. Its core components are still understood and applied as interdependent and mutually reinforcing. By contrast, in contexts of dispute, this integrity begins to unravel. The Rule of Law may continue to be invoked rhetorically, but the normative content of the original referent is redefined or hollowed out to serve political ends. This is not merely a disagreement over how well the Rule of Law is being implemented, but a transformation of what the concept itself is taken to mean¹⁶. The result is conceptual multiplication, a breakdown of semantic integrity: a point at which the Rule of Law is no longer used to refer to a shared ideal, but instead becomes a discursive tool detached from its foundational elements. The loss of semantic integrity is the result of a shift from dissensus to dispute, and serves as a key indicator of the malfunction of the organic unity.

Although this paper develops a theoretical argument, it incorporates selected political discourses and statements from leaders as illustrative examples that support the analysis. These examples help to show both how electoral populist and non-democratic regimes claim adherence to the Rule of Law and how their understanding of it is fundamentally flawed – despite asserting their own interpretation of the concept. While some elements of the Rule of Law may still be present, and regimes may profess adherence to the ideal of the Rule of Law or disagreement about its interpretation, their particular ways of framing and applying it can result in legal frameworks that ultimately undermine or negate the Rule of Law itself.

¹² See also BAUMTROG 2023; CASEY 2020.

¹³ BAUMTROG 2019, 615.

¹⁴ I am grateful to the reviewer for raising this point, which helped me clarify the conceptual structure of this argument.

¹⁵ The notion of *semantic integrity* refers to coherence in meaning – the preservation of a stable conceptual structure that allows interpretive disagreement to remain intelligible. In this sense, *semantic integrity* delineates the threshold between interpretive dissensus and conceptual dispute: it is the condition that prevents what Dworkin termed the "semantic sting" (DWORKIN 1985) from turning disagreement into conceptual disintegration. The idea also resonates with Kramer's analysis of the semantics of legal normativity, according to which the stability of legal meaning underpins the law's capacity to perform its normative function (KRAMER 2018).

¹⁶ See nt. 6.

2. *Rule of Law, between Dissensus and Dispute*

Leaders from different political systems frequently claim adherence to the Rule of Law, asserting that their governance aligns with its elements while simultaneously advancing their own interpretations of the concept¹⁷. This raises a fundamental problem: by redefining the Rule of Law to fit their political agendas, particularly in electoral populist or non-democratic regimes, leaders can maintain a rhetorical commitment to the ideal while, in institutional practice, undermining its core elements. In particular, we are witnessing a political moment in which «[...] governments not only try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries' laws or constitution» (WALDRON 2008, 5) but where governments are deploying their own conceptions of the Rule of Law to claim that they are fulfilling the ideal.

From the theoretical perspective, while one can think that academic studies are usually detached from the actual practice of law, this does not mean that they have no influence (WALDRON 2020, 17). For example, the literature on restoring the Rule of Law (KRISTAN 2024; SAJO 2023)¹⁸ has increasingly focused on its potential application in real-world legal and political contexts. Because of this influence, it is important to note that the characterization of the Rule of Law as an essentially contested concept¹⁹, makes it difficult to establish a commonly accepted definition.

This conceptual indeterminacy is not accidental but structural. Following Gallie's seminal analysis of essentially contested concepts (GALLIE 1956), the Rule of Law qualifies as such a concept because it involves complex, evaluative criteria that admit of multiple, reasonable interpretations, each rooted in competing normative visions of legality and governance. Yet, as WALDRON (2002) has noted, it is precisely the concept's aspirational nature – its orientation toward ideals such as non-arbitrariness, predictability, and institutional restraint – that makes it vulnerable to manipulation. This allows actors to claim allegiance to the Rule of Law while hollowing out its substance. Moreover, TAMANAHA (2004) has described how the Rule of Law has historically been subject to oscillation between formalist and substantive understandings²⁰, ranging from minimalist, rule-following definitions to more ambitious accounts that embed liberal democratic values. Rather than indicating progress or conceptual refinement, this variability often reflects deeper ideological struggles. Thus, while the multiplicity of interpretations can enrich theoretical discourse, it also creates a fertile ground for contestation – especially when the Rule of Law is invoked in defence of practices that appear to violate its spirit. The essential contestability of the Rule of Law is therefore not merely a feature of academic debate but a condition of its political life.

In particular, the ambiguity surrounding its meaning, combined with the proliferation of competing approaches – ranging from minimalist, “thin” conceptions to more substantive, “thick” versions – enriches and informs the academic debate, however, at the same time, it risks creating a level of conceptual obscurity that is particularly problematic in times when the Rule of Law is continuously under threat.

¹⁷ This does not assume that there is a single, uncontested “true” version of the Rule of Law; rather, it acknowledges the concept's interpretive flexibility, as reflected in the wide range of legal traditions and institutional designs across political systems. However, such flexibility is not without limits. While the Rule of Law can accommodate variation in emphasis or implementation, not all interpretations remain faithful to its core structure and normative purpose. The analysis therefore focuses on whether a given interpretation preserves the systemic coherence – or what this paper refers to as the organic unity – of the Rule of Law's constitutive elements, such as judicial independence, legal predictability, and constraints on arbitrary power. When these elements continue to function in an integrated and mutually reinforcing manner, variation reflects functional dissensus. By contrast, when an interpretation entails a conceptual rupture, this systemic coherence is lost, resulting in a malfunction or degradation of the organic unity and rendering the Rule of Law dysfunctional and ineffective as a meaningful constraint on political authority.

¹⁸ SAJÓ 2023.

¹⁹ WALDRON 2021.

²⁰ For the distinction between formalist and substantive conceptions of the rule of law, see e.g. CRAIG 1997.

Nevertheless, the fact that the Rule of Law is considered an essentially contested concept, does not mean that it is an “anything goes”. While there is room for debate over its precise contours, not all characterizations genuinely fit within the concept. This is where the distinction between dissensus and dispute becomes particularly relevant.

The distinction between dissensus and dispute serves as an analytical tool for distinguishing between contexts where disagreements occur within the framework of a unitary concept of the Rule of Law and those where an alternative interpretation fundamentally undermines a unitary framework. In other words, variations in the Rule of Law may arise either from dissensus – a debate over its application and emphasis (COMAN 2022) – or from a deeper dispute about its constitutive elements. In the first case, dissensus, variations in the Rule of Law applications affect the relative strength of its constitutive elements without dismantling its organic unity. Similarly, differences in ordering or emphasis – such as prioritizing judicial independence over legal certainty – may shape its implementation, but the framework remains intact. In contrast, dispute represents a conceptual rupture, where the disagreement is not about variations in how the elements of the Rule of Law are ordered or applied, or also, how well the Rule of Law is upheld but whether a given interpretation aligns with one and the same concept at all. In such cases, despite rhetorical claims of adherence, the Rule of Law is effectively hollowed out, with key elements either selectively applied or structurally dismantled, resulting in a malfunctioning organic unity in which the components no longer function as a coherent and integrated system. At this point, the Rule of Law loses its internal unity altogether – it no longer operates as a system, but as a set of disconnected or contradictory elements.

When one element is absent or deliberately undermined – such as the erosion of judicial independence – other elements, like legal predictability, are also weakened. This disruption leads to, as I mentioned, a malfunctioning of the organic unity, ultimately resulting in a failure to uphold the Rule of Law as a coherent system²¹.

When variations arise from dissensus they reflect differences in the interpretation of the emphasis of some elements of the Rule of Law, while still preserving the fundamental structure of the Rule of Law. In these cases, all constitutive elements remain present, though they may function with varying degrees of strength since the Rule of Law has (limited) room for flexibility. For example, some systems might emphasize judicial independence more strongly than others, while others might prioritize legal certainty or access to justice. Despite these differences, the Rule of Law continues to operate as an organic unity²². But dissensus²³ implies disagreement *within a shared* – though not fixed or universal – *conceptual framework*²⁴, whereas in this case, an alternative

²¹ To clarify this point, it is important to distinguish between two senses in which *dissensus* can be understood. First, dissensus may be descriptive, referring to variations in how the elements of the Rule of Law are ordered or applied within a shared conceptual space, without necessarily ranking these implementations. In this sense, dissensus captures the pluralism of legal cultures and institutional traditions that coexist under the umbrella of the Rule of Law. Second, dissensus may be evaluative, in the sense that even within this shared space, certain configurations may be judged as more robust, complete, or normatively defensible realizations of the Rule of Law ideal. For example, while both systems A and B may adhere to the principle of judicial independence, system A might provide stronger safeguards against executive interference, making it a *better* realization in evaluative terms.

²² However, not all variation necessarily amounts to *dissensus* in the strict sense. In some cases, actors are not truly contesting which elements make up the Rule of Law or whether they ought to be protected. Rather, the variation may stem from deeper cultural, historical, or institutional differences that lead to shifts in emphasis without amounting to genuine disagreement. These may be better understood as expressions of legal culture rather than conceptual or normative dissensus.

²³ See COMAN 2022, where she argues that dissensus over the rule of law shapes the EU’s related policy tools and policy more generally, and by the same token, the EU’s modes of governance and who governs. However, my understanding of dissensus is different: one that entails graduality into the enforcement of the elements of the rule of law.

²⁴ My argument does not assume a single, rigid framework that all must accept, but rather defends the idea that some minimal structure is necessary for the concept to retain coherence and normative force. In this sense, identi-

interpretation effectively negates the Rule of Law as a value in itself. Here, the disagreement is not about how well the Rule of Law is being upheld but whether a given understanding even aligns with one and the same concept at all. When a regime's alternative interpretation neglects the core elements that define the Rule of Law – such as judicial independence, legal predictability, or the constraint of arbitrary power – this represents a conceptual rupture, not just a weaker fulfilment of the ideal. This type of dispute also results in a malfunctioning organic unity of the Rule of Law, where regimes claim adherence to the Rule of Law while, in practice, subverting its fundamental tenets. In such cases, the interconnected nature of the Rule of Law is broken, leading to a situation where its individual elements exist, or part of them are in place, in name but fail to work together as a cohesive system. For instance, if a government insists it upholds the Rule of Law while simultaneously undermining judicial independence – for instance by packing the Court or allowing arbitrary rule, this is not merely an imperfect realization of the concept – it is a redefinition that strips the Rule of Law of its normative role.

In fact, dispute about the concept of the Rule of Law correlates with violations of the Rule of Law, where the conceptual rupture leads to an intentional dismantling of its core elements. Violations of the Rule of Law, sometimes, represent systemic actions that undermine judicial independence, enable arbitrary rule, or strip legal norms of their binding force. In such cases, the Rule of Law is strategically subverted, resulting in a malfunctioning organic unity that ultimately nullifies its function as a constraint on power and implies its degeneration.

This is where dissensus aligns with organic unity. In cases where variations in the Rule of Law emerge from different emphases or priorities, or where certain elements are weaker due to a lack of resources necessary for full implementation, the integrity of the Rule of Law remains intact. Differences of this nature do not break the interdependence of its core elements; instead, they reflect adaptive responses to contextual constraints within a shared normative framework. In contrast, dispute corresponds to a malfunction of the organic unity, which arises when one or more fundamental components are undermined or selectively dismantled, leading to a systemic breakdown, a malfunction of the organic unity, rather than an adaptive variation. Unlike organic unity, which allows for flexibility while preserving coherence, its malfunctioning suggests that the disvalue of individual violations does not merely accumulate but multiplies as they interact, amplifying the damage to the system as a whole. For example, judicial independence is not an isolated feature but is intrinsically linked to other Rule of Law elements: if the judiciary loses its autonomy, legal predictability weakens, constraints on executive power diminish, and arbitrary rule becomes more feasible. The consequence is a fundamental rupture – a transformation of the legal order into a fragmented system where the Rule of Law exists in name but not in function. This distinction clarifies why some legal systems, despite their flaws, remain resilient, while others succumb to the weight of interconnected violations. Dissensus allows for variation within a functioning legal system, whereas dispute signals a strategic manipulation of legal norms that results in the degeneration of the organic unity, where the legal framework no longer operates as an effective constraint on power.

3. *Three Different Political Systems: Supranational Democracy, Electoral Populism and Non-democratic Polity*

Although this paper advances a theoretical argument, the way political systems engage with the Rule of Law in practice offers concrete illustrations of the distinction between dissensus and dispute. Political leaders across regimes often invoke the Rule of Law rhetorically to legitimize their

fying when an interpretation moves from dissensus to dispute is not a claim to absolute conceptual authority, but a judgment about when the concept ceases to guide practice in a meaningful way.

actions. However, the frequency and style of such invocations tell us little unless we examine what these regimes actually *do* with the concept – how legal institutions function, whether the separation of powers is maintained, and whether legal accountability is preserved.

This section focuses on speeches and statements together with institutional and systemic practices surrounding the Rule of Law within three distinct types of political regimes: supranational democracies, electoral populisms, and non-democratic polities, demonstrating the practical relevance of the distinctions developed in the previous section. In supranational democracies²⁵, engagement with the Rule of Law tends to involve genuine efforts at institutional realization, even if marred by occasional deficiencies. In electoral populist regimes, the Rule of Law is often invoked rhetorically while being selectively applied or strategically hollowed out. In non-democratic polities, the concept may be co-opted entirely, used to legitimize authority while systematically dismantling the principles it stands for.

3.1 *Supranational Democracy. Ursula von der Leyen (Speech on the State of the Union, 2022)*

The European Union exemplifies dissensus, where contestation over the Rule of Law occurs within a shared normative and institutional framework. Disagreements often arise not over the value of the Rule of Law itself, but over how it ought to be implemented in specific contexts. A prominent example is the ongoing debate among member states over the appropriate balance between judicial activism and judicial restraint, particularly in relation to the authority of national constitutional courts versus the primacy of EU law²⁶. For instance, in the 2020 PSPP ruling, the German Federal Constitutional Court challenged a decision of the Court of Justice of the European Union (CJEU), raising concerns over the boundaries of judicial review and the scope of EU competence. While this case stirred institutional tensions, it remained within the realm of legal pluralism and did not threaten the foundational elements of the Rule of Law within the EU. This internal dynamic is reinforced by the institutional commitment to uphold the Rule of Law as a living framework of democratic accountability, most clearly articulated in Ursula von der Leyen's 2022 State of the Union address. In her speech, she declared: «The Rule of Law is the guarantor of fundamental rights and freedoms. It ensures judicial independence, protects minorities, and holds governments accountable. It is not an abstract principle but a living reality that underpins democracy». Von der Leyen's rhetoric underscores the EU's vision of the Rule of Law as a proactive tool – one that prevents arbitrary power, ensures legal predictability, and provides institutional safeguards.

Central to this commitment is the Rule of Law Conditionality Mechanism²⁷, introduced in 2021, which links EU financial support to compliance with core Rule of Law – and also democratic – standards²⁸. This measure reflects the EU's stance that the Rule of Law is not merely a legal norm but a structural condition for membership. In this sense, even amid tensions and disagreements, the EU remains firmly within the boundaries of organic unity, with institutions working to address deficiencies while preserving the overall coherence of the Rule of Law.

3.2 *Electoral Populism. Hungary: Rule of Law as National Sovereignty*

Hungary, by contrast, represents a case of dissensus as a dispute, though one that often masquerades as a dissensus over degree. In public discourse, Prime Minister Viktor Orbán claims adherence to the Rule of Law, yet his framing reveals a fundamentally different understanding of

²⁵ Also in electoral democracies.

²⁶ PETERSEN, CHATZIATHANASIOU 2021.

²⁷ See https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en, accessed on 15-04-2023.

²⁸ See DIRRI, GUERRA 2024.

the concept – one rooted in national sovereignty rather than universal legal standards. In his 2021 speech on the Future of Europe, Orbán declared: «Brussels bureaucrats do not have the right to tell us how to run our country. Hungary is a sovereign state that respects the Rule of Law, but we reject foreign interference disguised as legal oversight». Similarly, in his 2024 address, he asserted: «Instead of peace, we have war; instead of security, we have a rule of law ruckus; instead of prosperity, we have financial blackmail»²⁹.

These statements exemplify how Orbán redefines the Rule of Law as a defensive mechanism to protect Hungary from external (especially EU) influence. His rhetoric reframes legal oversight as foreign interference, asserting a version of the Rule of Law that is detached from supranational norms and institutional accountability. This represents dissensus as rejection in disguise: while Orbán maintains the language of the Rule of Law, he rejects its shared normative foundation, thereby substituting the original concept with an alternative one that functions as a political tool for justifying illiberal governance.

But how does political discourse align with actual institutional change? Following Viktor Orbán's 2010 electoral victory, Hungary underwent what Gábor Halmai calls a “constitutional counter-revolution” – a deliberate effort to dismantle the institutional foundations of liberal constitutionalism and the Rule of Law. The governing Fidesz party, holding a two-thirds parliamentary majority, enacted a new constitution – the *Fundamental Law* – without political consensus or public deliberation. This document replaced the 1989 transitional constitution and marked a clear break with the earlier liberal-democratic order. Central to this transformation was the systematic weakening of institutional checks and balances, most notably through the curtailment of the Constitutional Court's powers, the politicization of the judiciary³⁰, and the imposition of legal rules that entrenched the ruling party's power. As Halmai emphasizes, this was not a case of institutional malfunction but rather a deliberate strategy to remove accountability mechanisms and erode the separation of powers, thereby displacing the foundational principles of the Rule of Law with an illiberal, majoritarian model of governance (HALMAI 2023, 613-614).

One of the most dangerous institutional moves for the Rule of Law is judicial capture. As András Sajó³¹ reconstructs, achieving judicial capture is a key strategy in the broader transformation of constitutionalist legacy. Rather than outright abolishing courts or overtly suspending judicial review, these regimes manipulate institutional rules, staffing procedures, and retirement norms to gradually neutralize judicial independence. As Sajó notes, illiberal governments «do not destroy the Rule of Law; they co-opt it» (SAJÓ 2021, 147). This is done by appointing loyalists, altering the jurisdiction and competences of courts, and restructuring judicial councils to ensure political influence over judicial careers. These changes often come under the guise of modernization or efficiency, making them difficult to contest externally, especially when procedural formalities are maintained. The result is a judiciary that preserves its external trappings of independence while becoming increasingly compliant with executive interests. In this way, judicial institutions are not eliminated but transformed into instruments of non-democratic governance, offering legalistic legitimacy to deeply illiberal practices.

In addition to institutional restructuring, Halmai shows how the Hungarian government strategically uses language to invoke the moral authority of justice while promoting selective and politically expedient interpretations of the past. Through the manipulation of transitional justice and memory politics, these narratives serve as instruments of political control rather than genuine reconciliation. He explains that The Fourth Amendment to the *Fundamental Law*, for instance,

²⁹ <https://miniszterelnok.hu/en/speech-by-prime-minister-viktor-orban-on-the-176th-anniversary-of-the-hungarian-revolution-and-war-of-independence-of-1848-49/>; See also <https://abouthungary.hu/blog/pm-orban-when-they-question-the-rule-of-law-they-step-on-our-honor>.

³⁰ See SCHEPPELE 2018.

³¹ SAJÓ 2021, 147.

introduced *Article U*, which frames Hungary's Communist past through selective and legally ambiguous narratives. While purporting to deliver justice for historical crimes, these measures were crafted in ways that circumvented prior Constitutional Court rulings and international legal standards, particularly regarding the statute of limitations and retroactive punishment. This legal engineering served not only to criminalize political opposition symbolically – especially targeting the Socialist Party as the alleged successor of the Communist regime – but also to instrumentalize history as a political weapon. The creation of a Committee of National Memory with unchecked powers further illustrates how state control over historical discourse complements the broader erosion of legal safeguards and pluralism (HALMAI 2023, 615-617).

Under this rhetorical interpretation and institutional changes, the Rule of Law is used to legitimize practices such as court-packing, media control, and constitutional amendments that weaken checks and balances while maintaining the appearance of legal order. As a result, the Hungarian “Rule of Law” exhibits signs of a malfunctioning organic unity, where key elements of the Rule of Law – though formally preserved – no longer function in an interdependent, cohesive way. What remains is a disconnected legal structure.

3.3 *Non-democracy. Russia: Rule of Law as State Power*

In Russia, the Rule of Law is not simply distorted or reinterpreted but openly redefined as a means of consolidating non-democratic power. This represents a clear case of dispute about the meaning of the Rule of Law, where the Rule of Law is invoked only to reinforce executive authority. In a striking 2010 interview, President Vladimir Putin dismissed normative understandings of the Rule of Law, stating:

«Listen, all our opponents clamor for the rule of law. What is the rule of law? It is compliance with existing legislation. What does existing legislation say about marches? You need to obtain authorization from the local authorities. You got one? Go ahead and demonstrate. If you didn't – you don't have the right to demonstrate. If you do anyway – you will get a baton to the noggin' [*poluchite po bashke dubinoi*]. End of story!»³².

Putin's conception of the Rule of Law reduces it to strict adherence to state-imposed regulations, with no reference to constitutionalism, judicial independence, or rights-based protections. His rhetoric highlights the instrumental use of legal norms as mechanisms of control rather than as safeguards against abuse³³. The phrase “baton to the noggin'” makes the coercive nature of this legalism explicit, illustrating a regime where legal authority is indistinguishable from executive will, at least for the most notorious cases such as the Yukos case³⁴ or the Naval'nyj case³⁵. Regarding these cases, Alena Ledeneva³⁶ and Kathryn Hendley explained that these are cases of “telephone law”. Telephone law is described as a practice «by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law»³⁷. According to Hendley, however, this practice does not apply to every case. In fact, there is a difference between politicized cases, where the stakes are high and political manipulation is common, and everyday legal disputes, where the courts often function more nor-

³² Vladimir Putin cited in “Vladimir Putin: dayu vam chestnoye partiinoe slovo” Kommersant, August 30, 2010, <http://kommersant.ru/doc/1495411>, retrieved from POPOVA 2017.

³³ For a similar argument regarding international law, see BAAZ 2016.

³⁴ THOMPSON 2005, 159.

³⁵ [2018] ECHR 1062, NAVAL'NYJ v. RUSSIA - 29580/12 (Grand Chamber - No violation - Right to a fair trial) (15 November 2018).

³⁶ LEDENEVA 2008, 324; HENDLEY 2009.

³⁷ HENDLEY 2009, 242.

mally, leading to a coexistence of “rule of law” and “rule by law” in Russia, representing a dual system³⁸. Of course, this argument is confined to the element of judicial independence³⁹. Popova, for example, argues that «Putin’s Russia is far from the liberal constitutionalism associated with the rule of law. Neither does it have the non-democratic constitutionalism sometimes called rule by law». In fact, she states that in Putin’s Russia, the law serves political purposes – it is used to signal policy goals, manage elites, and reinforce the regime. While legally consequential, its application is often arbitrary and instrumental rather than consistent or principled. Major legal reform toward constitutionalism is unlikely, even after Putin. If change occurs, it may take the form of *authoritarian constitutionalism*, where law is used to preserve elite interests or a more assertive judiciary emerges. Conversely, if the regime weakens, the courts may be used even more aggressively against dissenters and rivals⁴⁰.

This approach embodies a rupture from the normative structure of the Rule of Law. There is no room for a well-functioning organic unity of the Rule of Law, as the core elements – judicial independence, predictability, constraint on arbitrary power – are systematically dismantled. Legal institutions function not as checks on power, but as extensions of it, creating a state in which the Rule of Law exists only in name. Russia thus exemplifies the degradation of the organic unity in its most severe form: a regime where the Rule of Law is not merely violated, but strategically emptied of meaning, retooled to legitimize repression and eliminate opposition.

4. Conclusion

This paper has proposed a conceptual framework for understanding how the Rule of Law is interpreted, applied, and – at times – strategically manipulated across different political regimes. Central to this framework is the distinction between dissensus as a matter of degree and dissensus as a dispute, which allows us to distinguish between disagreements that remain within a shared normative structure and those that reflect a rejection of the Rule of Law’s foundational principles. In the former, the Rule of Law retains its organic unity: the interdependent elements of legality, such as judicial independence, legal predictability, and accountability, continue to function as a coherent system, even if their relative weight is contested. In the latter, the Rule of Law does not

function anymore as an organic unity, where these same elements are selectively applied or deliberately dismantled, leading to a fragmented legal order that no longer constrains power.

From a legal-theoretical standpoint, political discourse – particularly speeches and public statements by state leaders – offers a valuable entry point for assessing how the Rule of Law is conceptually framed and operationalized within different regimes. These articulations are not merely rhetorical flourishes; they function as interpretative claims about the nature, scope, and purpose of legal order. In this sense, political speech acts as a form of legal argumentation, offering insight into how regimes position themselves within (or outside of) the shared conceptual framework of the Rule of Law. By examining such discourses, we can observe how constitutional reasoning, principles of legality, and claims of normative legitimacy are mobilized to either reinforce or distort the Rule of Law’s foundational elements. These claims are often couched in familiar legal

³⁸ SAJÓ 2021, 258. Contra: POPOVA 2017, 65.

³⁹ In fact, «[i]n Hungary, the Russian Federation, South Africa, and Turkey, constitutional courts sometimes deployed their adjudicative functions extremely ambitiously, reaching into the realms of the strongly symbolic and supra-political as well as the purely political. In all such cases we can locate a confluence of institutional strength, strong and personalized leadership, and a contested political context that provided the court the opening it needs into politics proper». BROWN, WALLER 2016, 819.

⁴⁰ SAJÓ 2023.

language, but their semantic function diverges significantly depending on whether they support systemic coherence or mask structural violations.

Crucially, the concept of organic unity helps clarify when such interpretive variation reflects normatively acceptable diversity and when it signals a deeper conceptual rupture. A legal order maintains its integrity when its constitutive elements – judicial independence, legal certainty, constraints on arbitrary power – operate in mutual support, even if contested in degree or emphasis. This is the condition of internal normativity: the Rule of Law is sustained not by rigid uniformity, but by the reciprocal reinforcement of its principles. By contrast, degradation of the organic unity arises when these elements are no longer integrated within a coherent normative structure, but are selectively invoked, weakened, or abandoned altogether. From a theoretical perspective, this is the moment when formal legality is severed from legal normativity, and the Rule of Law ceases to function as a meaningful constraint on arbitrary power. The distinction between dissensus as variation and dissensus as rupture is therefore indispensable – not only for political analysis, but for understanding the conditions under which the Rule of Law can claim to exist at all.

References

- BAAZ M. 2016. *International Law is Different in Different Places: Russian Interpretations and Outlooks*, in «International Journal of Constitutional Law», 14, 2016, 262 ff.
- BAUMTROG M. 2019. *Deep Agreements*, in «Episteme», 16, 2019, 94 ff.
- BAUMTROG M.D. 2023. *The Basic Components of Agreement*, in «Informal Logic», 43, 2023, 257 ff.
- BROWN N.J., WALLER J.G. 2016. *Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges*, in «International Journal of Constitutional Law», 14, 2016, 817 ff.
- CASEY J. 2020. *Adversariality and Argumentation*, in «Informal Logic», 40, 2020, 77 ff.
- COMAN R. 2022. *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges*, Palgrave Macmillan.
- COMAN R. 2024. *Backsliding Populist Governments in the Council: The Case of the Hungarian Fidesz*, in «Politics and Governance», 12, 2024, 8161.
- CRAIG P. 1997. *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *The Rule of Law and the Separation of Powers*, Routledge, 95 ff.
- DIRRI A., GUERRA Y. 2024. *Il Regolamento Europeo sulla Condizionalità Legata al Rispetto dello Stato di Diritto. Impatto e Criticità Applicative sul Processo di Integrazione Europea: The European Conditionality Regulation Linked to the Rule of Law. Impact and Critical Issues Over the European Integration Process*, in «DPCE Online», 61, 2024.
- DANCY J. 2004. *Ethics Without Principles*, Oxford University Press.
- DWORKIN R. 1985. *Law's Empire*, Belknap Press of Harvard University Press.
- FASONE C., DIRRI A., GUERRA Y. 2024. *EU Rule of Law Procedures at the Test Bench*, Palgrave Macmillan.
- FULLER L.L. 1964. *The Morality of Law*, Yale University Press.
- GALLIE W.B. 1956. *Essentially Contested Concepts*, in «Proceedings of the Aristotelian Society», 56, 1956, 167 ff.
- GUASTINI R. 2010. *Le Fonti del Diritto: Fondamenti Teorici*, Giuffrè Editore (Vol. 49).
- HALMAI G. 2019. *The Possibility and Desirability of Rule of Law Conditionality*, in «Hague Journal on the Rule of Law», 11, 2019, 171 ff.
- HENDLEY K. 2009. *'Telephone Law' and the 'Rule of Law': The Russian Case*, in «Hague Journal on the Rule of Law», 1, 2009, 241 ff.
- KRAMER M.H. 2018. *Hart and the Metaphysics and Semantics of Legal Normativity*, in «Ratio Juris», 31, 2018, 396 ff.
- KRISTAN M.V. 2024. *The Day After a Broken Democratic Polity*, in «Global Constitutionalism», 14, 2024, 468 ff.
- KRYGIER M. 2011. *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, in FLEMING J.E. (ed.), *Getting to the Rule of Law*, New York University Press, 64 ff.
- LEDENEVA A.V. 2008. *Telephone Justice in Russia*, in «Post-Soviet Affairs», 24, 2008, 324 ff.
- MOORE G.E. 1903. *Principia Ethica*, Cambridge University Press.
- MORESO J.J. 2021. *Lo Normativo: Variedad y Variaciones*, Centro de Estudios Políticos y Constitucionales.
- PEERENBOOM R. (ed.) 2003. *Asian Discourses of Rule of Law*, Routledge.
- PETERSEN N., CHATZIATHANASIOU K. 2021. *Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU law (EPRS Study PE 692.276)*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs.
- POPOVA M. 2017. *Putin-Style "Rule of Law" & the Prospects for Change*, in «Daedalus», 146, 2017, 64 ff.
- RAMÍREZ LUDEÑA L. 2016. *Disagreement Without Agreement? A Critique of Plunkett and Sundell's Metalinguistic Proposal*, in «Isonomía», 44, 2016, 39 ff.
- RAZ J. 1977. *The Rule of Law and its Virtue*, in «The Law Quarterly Review», 93, 1977, 195 ff.
- SAJÓ A. 2021. *Ruling by Cheating: Governance in Illiberal Democracy*, Cambridge University Press.

- SAJÓ A. 2023. *On the Difficulties of Rule of Law Restoration*, CEU Democracy Institute Working Papers, 9.
- SCHEPPELE K.L. 2018. *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union*, in «Communist and Post-Communist Studies», 51, 2018, 189 ff.
- TAMANAH B.Z. 2004. *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.
- WALDRON J. 2002. *Law and Disagreement*, Oxford University Press.
- WALDRON J. 2008. *The Concept and the Rule of Law*, in «Georgia Law Review», 43, 2008, 1 ff.
- WALDRON J. 2021. *The Rule of Law as an Essentially Contested Concept*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 121 ff.

From the Rule of Men to the Rule of Law and Back Again: Some Skeptical Insights about the Temptation of Judge-Made Social Justice

ALBERTO PUPPO

ITAM, Mexico.

E-mail: apuppo@itam.mx

ABSTRACT

To avoid being overwhelmed by debates dominated by emotions and “wholesale” moral intuitions, it is advisable to take a step back to revisit the concept of the rule of law and its ideological and historical origins. This inquiry, tracing the reflections of Harold Laski, Franz Neumann, and E.P. Thompson, uncovers an apparent paradoxical stance. The defense of the formal virtues of the rule of law by certain Marxists is understandable insofar as equality before the law proves to be a lesser evil. The alternative, in fact, is a universe dominated by ideals of social justice whose realization depends on market dynamics and judicial subjectivity, thereby risking the consolidation of existing power structures.

Per non lasciarsi travolgere in dibattiti dominati da emozioni e da intuizioni morali “all’ingrosso”, è consigliabile fare un passo indietro per rivisitare il concetto di stato di diritto e le sue origini ideologiche e storiche. Questa indagine, ripercorrendo le riflessioni di Harold Laski, Franz Neumann ed E.P. Thompson, porta alla luce una posizione apparentemente paradossale. La difesa da parte di certi marxisti delle virtù formali dello stato di diritto è comprensibile nella misura in cui l’uguaglianza davanti alla legge risulta essere un male minore. L’alternativa, infatti, è un universo dominato da ideali di giustizia sociale la cui realizzazione dipende da dinamiche di mercato e dalla soggettività giudiziale, rischiando così di rafforzare le strutture di potere esistenti.

KEYWORDS

Legalism, dual state, marxism, social justice, intersectionality

Legalismo, stato duale, marxismo, giustizia sociale, intersezionalità

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall’Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all’impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



From the Rule of Men to the Rule of Law and Back Again: Some Skeptical Insights about the Temptation of Judge-Made Social Justice

ALBERTO PUPPO

1. *Introduction* – 2. *The Rule of Law in the General Context of English Judicial System* – 2.1 *The Rule of Law between Majesty and Divine Mercy* – 2.1.1 *The Sacred Character of the Process* – 2.1.2 *The Virtue of Formal Justice* – 2.1.3 *The Pitfall of Arbitrary Mercy (the Oriental Shadow)* – 2.2 *An “Unqualified Human Good”?* – 3. *Harold Laski: A Constructive Critique of the Rule of Law* – 3.1 *Why Laski? A Brief Biographical Note* – 3.2 *The Individual Judgment on the Moral Quality of Legal Norms* – 3.3 *Scrutinizing Historical Facts: a Case for Methodological Positivism?* – 4. *The Golden Rule Against Arbitrariness: Judicial Review and Equality Before the Law* – 4.1 *The Danger: The Executive’s Tendency to Avoid Controls* – 4.2 *The Rule of Law Dissolved in the Dual State* – 4.3 *The Promise of Material Justice: The Magical Weapon of the Ruling Class* – 5. *Conclusions* – 5.1 *The Foundational Tension: Abstract Norms vs. Concrete Personalities* – 5.2 *Identities, Principles, and the Market of Vulnerabilities* – 5.3 *The Paradoxical Defence: Marxist Normativism vs. Neoliberal Principlism* – 5.4 *Legal Certainty vs. Ideological Re-signification: A Case of Resistance.*

1. *Introduction*

The volume of work dedicated to defining the “best” concept – or the best conception – of the rule of law, or to comparing different conceptions, is immense¹. In this regard, I agree with LOUGHLIN (2024, 512) when he states «the rule of law [...] has become a slogan in search of a concept». To avoid needless repetitions, a new work must necessarily establish certain boundaries and adopt methodological decisions. In this brief introduction, I will justify the choice to use history to understand the ideological and virtuous dimensions of the rule of law.

My starting point is twofold. On one hand, I draw from a sharp, polemical, and absolutely intriguing work: Judith Shklar’s book *Legalism* (SHKLAR 1964)², which exposes certain aspects of Anglo-Saxon (and wider) legal culture. On the other hand, I use a thoughtful work, David Dyzenhaus’s *The Long Arc of Legality* (DYZENHAUS 2022), which is characterized by great historical depth.

Shklar’s main critique, reformulated in a later contribution after more than twenty years of academic observation, can be summarized as follows: «contemporary theories fail because they have lost a sense of what the political objectives of the ideal of the Rule of Law originally were and have come up with no plausible restatement. The upshot is that the Rule of Law is now situated, intellectually, in a political vacuum» (SHKLAR 1998 [1986], 21). It is precisely this “political vacuum” that renders *thick* conceptions especially vulnerable and calls for a skeptical re-examination.

* Earlier versions of this text were presented and discussed at the conference Rule of Law: in books, in minds (University of Bologna, July 7-8, 2025) and at the “Séminaire Théorhis” (Centre de théorie et analyse du droit, University of Paris Ouest-Nanterre, October 16, 2025). I am grateful to the participants on those occasions for their valuable comments. I also wish to extend my sincere thanks to the reviewers and editors of this Journal for their careful work. At an early stage of the project, I was guided by a suggestion from Rodrigo Camerena, which prompted me to undertake a close reading of E.P. Thompson. The text has subsequently benefited, for stylistic revision and linguistic polishing, from the assistance of AI tools.

¹ I will use “concept” and “conception” interchangeably since the confusion surrounding the nature of the rule of law makes it difficult to draw the limits of a concept against which different conceptions could then be compared. For an analysis in terms of concept and conceptions, particularly focusing on Dworkin and Raz, see LOUGHLIN 2018, 662. A good reconstruction of all conceptions can be found in ROSE 2004. For a systematization of legalist and non-legalist conceptions, see BARBER 2004. For other bibliography, see PUPPO 2016.

² Pau Luque dedicated a beautiful prologue to the second edition in 1986 (LUQUE 2021).

A starting point for such a re-examination is to ask a fundamental question informed by Shklar's diagnosis: does a more robust – “substantive” – conception of the rule of law, one that includes requirements like respect for human rights or democracy in its very definition, actually lead to better social justice outcomes? Shklar's work provides a crucial key here because “substantive” conceptions that demand significant social justice from the rule of law correspond to neither of the two major traditions that Shklar identifies (with “some interpretive license”): neither the rationalist Aristotelian tradition nor the institutionalist tradition of Montesquieu (SHKLAR 1998 [1986], 21). The latter, arguably, has been passed down from Dicey³ (considered the “father” of the expression – though not the concept – “rule of law”) to the present day under the often-derogatory epithet of “formalist” or *thin*.

The reference to Montesquieu will help me to establish a first conceptual point, although it is entirely negative: «In contrast to Aristotle's rule of reason, Montesquieu's Rule of Law is designed to stand in stark contrast not only to simple “oriental” despotism but also to the dual state [...]» (SHKLAR 1998 [1986], 22). This statement says nothing positive about the nature of the rule of law. In my view, this is precisely where the nature of the rule of law lies: it is a rejection of something, a refusal that can only be understood by reconstructing the historical conditions of its emergence. To unpack this constitutive “rejection”, we must examine the two negative poles Montesquieu sets up against the Rule of Law: “oriental despotism” and the “dual state”.

The reference to Oriental despotism often invokes the justice of the Kadi, a concept critically evoked by Supreme Court Justice Frankfurter to reassert the judges' duty to follow rules rather than be led by considerations of individual convenience or justice in a specific case: «This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency»⁴.

The term “dual state”, on the other hand, refers to a fundamental book written by Ernst Fraenkel (FRAENKEL 1941), a book largely ignored by rule of law scholars: «That Fraenkel's work informed neither the exchange between Hart and Fuller [...] nor subsequent debate in philosophy of law is [...] one of the great missed opportunity in philosophy of law» (DYZENHAUS 2022, 322).

Following Dicey's invitation to «turn from the formalism of lawyers to the truthfulness of our constitutional historians» (DICEY 1915, 11) – I shall examine a much-debated assertion by the Marxist historian E.P. Thompson: «But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good» (THOMPSON 1975, 266). This statement has been widely criticized⁵, yet it stands as what has been called «one of the greatest defences ever mounted of that concept (and one of the very few penned by a self-described Marxist)» (COLE 2001, 181)⁶.

Once we accept that the characteristics consistently associated with the rule of law can only be grasped through history, a further step becomes inevitable: the rule of law appears in history not as a mere fact or an institution, but as an idea and an ideology⁷: «the rule of law existed as an ideal *avant la lettre* de Dicey» (LINO 2018, 740)⁸.

An elegant way to frame the rule of law as an ideology is perhaps offered by Raz (RAZ 1979 [1977]), who describes it as a virtue. Like any virtue, it is embedded in a particular conception of

³ The reference work is DICEY 1915.

⁴ Justice Felix Frankfurter, Dissenting Opinion, *Terminiello v. Chicago*, 337 U.S. 1 (1949), available at <https://supreme.justia.com/cases/federal/us/337/1/> (accessed June 20, 2025). Regarding the abuse of the metaphor and the historically inadequate nature of references to the figure of the Kadi, see RABB 2015.

⁵ The most famous is certainly HORWITZ 1977.

⁶ It must be noted that in the footnote, the author mentions another Marxist who defends the rule of law: Franz Neumann, whose contribution I will return to. See *infra* § 5.2.

⁷ Even though this aspect cannot be explored in depth, I will limit myself to distinguishing two senses of “ideology”: one neutral and one negative. From a neutral point of view, an ideology «represents the imaginary relationship of individuals to their real conditions of existence» (ALTHOUSSER 1971 [1970], 162).

⁸ See also LOUGHLIN 2018, 659; 2024, 512.

the good and in the social practices thought to realize that good. Yet many scholars of the rule of law, it may be argued, omit to specify which conception of the good they regard as “best”.

But Raz says something even more interesting: it is a virtue not so much because it helps us achieve the good. Rather, it is a virtue in the sense that it limits the harm produced by the underlying mechanism: the law. If law, generally speaking and based on historical observation, tends to generate something negative, then we can imagine a set of protections to limit that harm. In this sense, Raz, recognizing the numerous risks of arbitrary exercise of legal power, emphasizes how «the rule of law does help to curb such forms of arbitrary power» (RAZ 1979 [1977], 220). He is very clear in conceiving the rule of law as a more or less achievable idea, thus aligning with the “ideological” treatment of the rule of law: «In so far as conformity to the rule of law is a moral virtue it is an ideal which should but may fail to become a reality» (RAZ 1979 [1977], 224). If Raz’s position, like that of the majority of authors who defend the “original” idea of the rule of law, is essentially liberal, understanding the Marxist defense of the rule of law requires a major effort.

This effort begins with a historical reconstruction. Therefore, following Thompson, I will first reconstruct the English legal context that generated the idea of the rule of law and gave it positive value, despite its undeniably bourgeois dimension (§ 2). The same context can help to explain Laski’s reflections on state authority. Like Thompson, Laski – though equally critical – allows us to focus on those few aspects of the rule of law whose sacrifice would come at a very high cost, even for those who fight politically for social changes rather than defend the status quo (§ 3). Then, I will show that the reasons for defending the rule of law, with its flawed formalism, are always the same: the danger of judicial despotism (Orientalism) and the Dual State. To do so, I will rely on the reflections of Fraenkel and Neumann. The latter, in a move that anticipates Thompson, criticized the bourgeois aspect of the rule of law; nevertheless, he understood its crucial importance, especially within his own context: that of a Jewish Marxist lawyer under the Nazi regime. These authors understood and described the moment when the formal rule of law(s) is suspended in the name of a higher ideal of justice (the Nazi one) (§ 4). Finally, in conclusion, I will suggest that the new trend pushing to make the rule of law thicker – to turn it into a battleground for greater social justice – is a tendency that can only seduce those who ignore history. This path inevitably leads to prioritizing certain conceptions of substantive justice: those held by the ruling elites. If there is a way to change society in a sense more favorable to the disadvantaged, perhaps that way is the “traditional” one, whether through gradual legislative reform or revolution. Particularistic judicial interventions, while generating self-satisfaction in the lawyers who solicit them and in the judges who grant them, neutralize the social forces that, instead of organizing collectively, seek access to individual solutions. Whether this is good or bad will depend on the ideology of the person judging the phenomenon. My only goal here is to introduce a skeptical perspective (§ 5).

2. *The Rule of Law in the General Context of English Judicial System*

While it would be interesting to reconstruct a thousand details, I will limit myself to a few key points. First, following Douglas HAY (1975), I will distinguish three components of the judicial institution, one of which is undoubtedly the rule of law (2.1). I will then move on to analyze the reasoning that leads E.P. THOMPSON (1975) to defend the rule of law, even after legitimately demonstrating its classist nature (2.2).

2.1 *The Rule of Law between Majesty and Divine Mercy*

Hay distinguishes three dimensions of justice, which translate into three sets of rules or prerogatives. The jurisdictional system is characterized by its rituals (2.1.1.), by justice (2.1.2.), and by mercy (2.1.3.).

2.1.1 *The Sacred Character of the Process*

The ritualistic aspect requires little comment. It is what lends majesty to the process, a way of sacralizing something essentially irrational. It is an «elaborate ritual of irrationality» (HAY 1975, 27): «In its ritual, its judgments and its channelling of emotion the criminal law echoed many of the most powerful psychic components of religion. The judge might (...) emulate the priest in his role of human agent, helpless but submissive before the demand of his deity» (HAY 1975, 29)⁹.

This system could be supported by acts of faith, or it could seek another, perhaps more rational, kind of support. It was the struggles of the eighteenth century, especially in the field of criminal law, that helped to establish the principles of the rule of law (HAY 1975, 32).

2.1.2 *The Virtue of Formal Justice*

The relevance of virtues is clearly evoked by Hay, as he alludes to the need for a «bench that was both learned and honest»; this virtue ensured «even the poorest man was guaranteed justice in the high court» (HAY 1975, 32). The empirical accuracy of this statement is not important right now¹⁰. One of the ingredients for ensuring this protection was the observance of procedural rules, even the most formal ones.

The legal system (and the criminal system in particular) ceased to be simply the «creature of a ruling class» and became a «power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself» (HAY 1975, 33). An element that reinforced this popular sentiment is another classic characteristic of the rule of law: «Equality before the law». This meant, specifically, that even influential and powerful people could be convicted: «The crime was punished with unremitting severity even though it was often committed by impecunious lawyers of good family» (HAY 1975, 33)¹¹.

The conclusion of this evolution was the following: «The law was held to be the guardian of Englishmen, of all Englishmen. Gentlemen held this as an unquestionable belief: that belief, too, gave the ideology of justice an integrity which no self-conscious manipulation could alone sustain» (HAY 1975, 35).

We must now consider another dimension that, as I will show, proves to be a constant threat to the rule of law, even if it often appears to be a more immediate source of justice. The “prerogative of mercy” belongs not only to the king but also to the justices of the peace.

2.1.3 *The Pitfall of Arbitrary Mercy (the Oriental Shadow)*

The use of mercy opens the door to the risk of arbitrariness, precisely what Beccaria denounced: judges use their prerogative to decide based on their own subjectivity. The importance of this dimension could completely erode the rule of law-based system. Hay recalls how Weber, analyzing the work of the justices of the peace, compares it «to ‘Arabic khadi justice’» (HAY 1975, 40).

For now, I will limit myself to recalling how a French judge perceived the English mercy system – a perception that helps us understand the atmosphere of the great change brought about by the French Revolution. Charles Cottu described what he saw during a visit to a criminal court: «they make no effort to obtain proofs of the crime, confiding its punishment entirely to the hatred or re-

⁹ According to Robert Jacob, «[el] ritual eucarístico provee el paradigma a la producción de la verdad judicial en el *common law*. Porque el *common law* continúa a su manera, simplemente habiendo reemplazado el juicio de Dios por el jurado, la producción de una verdad judicial que es una verdad de tipo sacramental, que es una verdad del deber ser» (JACOB 2016, 33). More generally, on the phenomena of the sacralization and desacralization of law, see PUPPO, SUCAR 2023.

¹⁰ See, for instance LANGBEIN 1983.

¹¹ Hay evokes the case of Dodd, an individual who, even after his death in 1777, lived on in the popular consciousness to symbolize the fact that «the law treated rich and poor alike» (HAY 1975, 33).

sentment of the injured party» (COTTU 1822, 37)¹². This sentence concentrates many issues that I will return to in the conclusions: 1) the rationality of evidence-taking; 2) empathy as a judicial virtue (or vice); 3) resentment as a source of populism (criminal, and beyond); 4) the victim as a source of law.

Because the legal ideal associated with the rule of law has been criticized for its classist nature, especially by Marxists, it becomes interesting to reconstruct the defense of the rule of law by the Marxist E.P. Thompson (Hay's mentor). This defense earned him, as even Waldron had to note, the harsh criticism of the Harvard "crits" (WALDRON 2023, 166; 2021, 131, specifically footnote 9).

2.2 An "Unqualified Human Good"?

History teaches that the legal system has always been an expression of the power of a single class. And yet, within the context of such potentially unlimited domination, the rule of law intervenes precisely as a virtue that mitigates harm. For this reason, it should not be discarded without caution, as its absence would not mean social justice but an even more damaging exercise of power.

The context in which Thompson wrote allows us to connect his reflections even more closely to those of Neumann who, having experienced the collapse of the Weimar Republic firsthand and later studied under Laski, shared this lineage of critical but apprehensive thought. The link becomes explicit in Hay's observation: «Thompson believed the 1970s to be an authoritarian moment, with a strong smell of Weimar» (HAY 2021, 212).

Here, the crucial point is not whether Thompson's position is compatible with Marxism. What matters is how the rule of law can be a preferable state of affairs, even from the viewpoint of someone highly critical of the liberal, bourgeois, and classist state. The question is precisely: preferable to what? The answer has already implicitly emerged: it is preferable to a world where power lies in the hands of the ruling class and is, moreover, exercised without limits. In short, eliminating the rule of law does not eliminate the power that it "celebrates" and helps to exercise; eliminating or weakening it would only give free rein to the savage exercise of those same powers.

To avoid misunderstanding, Thompson reiterates a solid point of any Marxist analysis: «the rule of law is only another mask for the rule of a class» (THOMPSON 1975, 259)¹³. But once the obvious has been stated, a cautious analysis is necessary. Thompson's first observation is sharp: it may be obvious that law is an instrument of oppression, but would anyone think that «the rulers had need of law, in order to oppress the ruled»? (THOMPSON 1975, 261). Law is merely a tool, not the cause, of oppression. Therefore, even though he agrees that «the law [...] may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation», we must delve deeper, as limiting oneself to this impression means mystifying reality (THOMPSON 1975, 262).

The first characteristic of law that must be noted is that the way law oppresses is quite different from "gross manipulation" (THOMPSON 1975, 263). Thompson does not claim his observation is universal; however, it would apply, at least, to England. To evaluate law and the rule of law, we must judge them in light of the centuries of absolutism that preceded them. What does this observation suggest? The ruling class began to exercise power through "legal forms", forms that had an inhibiting effect. The resulting conclusion is the one we have already announced: «there is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, between arbitrary extra-legal powers and the rule of law» (THOMPSON 1975, 264-265).

¹² Cottu notes, however, in a footnote, that cases of murder constitute an exception (COTTU 1822, 38).

¹³ Laski, whom I will also return to, expresses this with disarming clarity: «At bottom, only the Marxian interpretation of law can explain the substance of law. There cannot, that is, be equality before the law, except in a narrowly formal sense, unless there is a classless society. For the unstated assumption of all law in any society in which the instruments of production are privately owned is the inherent necessity of maintaining the system of class-relations through which the privileges of private ownership are secured to their possessors» (LASKI 1938, VIII).

The same dangerous illusion persists today. Many contemporary critics of the rule of law's mere formalism – those who would the rule of law to include social justice requirements and not be limited to ensuring that set of rules and institutions that were imposed, not without difficulty, in England and later in other states – suffer from a form of historical amnesia.

According to Thompson, instead of being a serious defect, the rule of law is a «cultural achievement of universal significance» and an «unqualified human good» (THOMPSON 1975, 265-266). What is important to emphasize is not so much the conclusion (which, coming from a Marxist, remains notable), but rather the direct warning to those who dare to minimize this good – who are even more numerous today than they were then: they commit «a desperate error of intellectual abstraction» (THOMPSON 1975, 266).

The antidote against an excess of abstraction (which allows for harsh criticism of a certain institutional arrangement due to a cognitive inability to assess its goodness, rather than just pointing out its flaws) is history. What I said in the introduction about the proliferation of conceptions, increasingly demanding in terms of substantive justice, seems to align with Thompson's warning. When one ignores the history of institutions and the complexity of the societies in which they function, one can say almost anything.

At this point, it is worth asking: is this just a historical exercise? Are these isolated statements? A closer look at one of the authors in the Dicey tradition allows us to give a more theoretical breadth to Thompson's relatively intuitive conclusions. Put differently: to find a similar position, we only need to look among the many authors who have written and reflected on state authority, seeking out those who have not ignored history. For this reason, I chose Harold Laski.

3. *Harold Laski: A Constructive Critique of the Rule of Law*

It is within this historical context that the analysis of Harold Laski gains its full clarity. Given his trajectory (3.1), Laski can be considered a focal point connecting England, the United States, Germany, and France. Reconstructing his ideas – those of a liberal socialist who became a Marxist – confirms some important nuances, the same ones captured by Thompson: the importance of the rule of law as protection of the most vulnerable people against the perversion of power (3.2), and the need of approaching the rule of law under the scrutiny of historical facts (3.3).

3.1 *Why Laski? A Brief Biographical Note*

One of the reasons Laski deserves particular attention is his biography, which allowed him to live through two World Wars while developing an extremely rich body of communication across various contexts (at least: France, Britain, Germany and the US). Laski was so influential that he generated the expression “Age of Laski”, referring to the years 1920-1950; Léon Blum compared him to Montesquieu or Tocqueville (NEWMAN 1993, 354-355)¹⁴.

Given Laski's near absence from the usual references of legal philosopher¹⁵, a question spontaneously arises: what interrupted my own ignorance of this author? Once again, I must thank Judith Shklar. Citing the excerpt that evokes his ideas will serve to introduce his thought. As noted, Shklar insists on a certain (and ideological) blindness to the rule of law deficiencies. It is in this context that she turns to Laski: «Even before turning to Marxism, Harold Laski assumed that no amount of personal impartiality could save the English judiciary from its upper-class outlook»

¹⁴ When he visited Italy as a representative of British Socialism, Benedetto Croce travelled from Naples to Rome specifically to meet him (MARTIN 1953, 183).

¹⁵ In my personal journey, I first encountered it in a text by the legal historian Horwitz (HORWITZ 1997, 578-579). But, being cited by a historian to illustrate an aspect of UK political history, it had not been given due attention.

(SHKLAR 1964, II; the philosopher refers to a text dedicated to the methods of judicial appointment, published in 1926: LASKI 1932, ch. VII).

What must be highlighted is the “even before”. While it is obvious that a Marxist analysis sees the judicial institution as an expression of the ruling class’s power (as we have already observed), that such a statement comes from a “moderate” author is noteworthy. A deeper understanding of Laski’s thought thus allows us to grasp the rule of law, so to speak, without projections – neither optimistically liberal nor pessimistically Marxist. The rule of law with its flaws (e.g., the illusion of judicial independence and impartiality) but also with its virtues, at least when compared with other forms of power organization.

Laski’s output is immense, and therefore I do not intend to offer an exhaustive reconstruction of his thought here. I will only attempt to convey the essence of his position, which is simultaneously critical of and charitable toward the rule of law.

3.2 *The Individual Judgment on the Moral Quality of Legal Norms*

The starting point for understanding Laski’s approach is an observation made from the perspective of the recipient of the state’s legal norms:

«He examines what is done in its name and makes a judgment upon the moral quality of the order he is asked to obey. He knows, that is, that legal power, as such, is at every instant subject to perversion. No Government is, for him, entitled to permanent credit merely because it is a Government. It is liable to error, to perversion, to deliberate misuse of power. It may, consciously or unconsciously, identify the interest of a class or a group or a party with the interest of the community, and legislate upon the basis of that supposed identity. It may do this in good faith; it may do this, also, in bad faith» (LASKI 1932, 249).

Once this starting point is clarified, the role played by the rule of law becomes understandable. It is also interesting that Laski, despite writing in the Anglo-Saxon context, also uses the term *Rechtsstaat* (LASKI 1932, 250)¹⁶. The same emerges from the explicit statement by Neumann, in the thesis supervised by Laski himself, when he refers to the state «in which laws but not men were to rule (the Anglo-American formula) – i.e., the *Rechtsstaat* (the German formula)»; the sovereignty of such a state was necessary, above all, for Neumann, «to destroy local and particularist forces, to push the church out of temporal affairs» (NEUMANN 1936, 22).

This very establishment of a legal framework begets its own fundamental tension, shifting the focus from the structure of power to the problem of individual acceptance. The recipients of the norms, much like Hart’s protagonist of “social acceptance”, wonders if and why they should conform to the norms¹⁷. Laski is not mistaken: it is an essentially psychological and historical issue, and thus contingent. Regardless of the content of any legal norm, our ideal recipient of norms, before offering his allegiance to positive law, «have sought in every age institutional means of limiting the power of their governors» (LASKI 1932, 250).

If sovereigns claim legitimate authority, they must demonstrate certain virtues – the Razian virtue of the rule of law being undoubtedly one of them. Translated into contemporary theoretical terms, Laski’s argument holds that satisfaction of Raz’s dependence thesis cannot be presupposed¹⁸. Laski also criticizes the Hobbesian argument that obedience is necessary to avoid anarchy.

¹⁶ This suggests that, despite the differences, the rule of law and the *Rechtsstaat*, at least for Laski, are merely two different expressions referring to the same phenomenon – or at least the essential and common part of a set of phenomena: «both concepts provide similar answers to similar questions» (BARBER 2003, 444).

¹⁷ HART 1994 [1961]; PUGGIONI 2022.

¹⁸ Although it cannot be explored in depth here, I would venture to say that Laski’s theory of authority should satisfy the critics of Raz’s theory. For one example: HERSHOVITZ 2011. For an analysis of Laski’s theory in light of Raz’s theory of authority, see: MUÑIZ-FRATICELLI 2014; PUGGIONI 2022.

According to Laski, it cannot be assumed *a priori* that the government, with its legal norms, is acting in the name and for the good of the collectivity:

«That judgment, obviously, must be pronounced by those who are to be affected by it. To say that they must accept it because its rejection imperils peace is to argue that order is, and always must be, the highest good. I do not see that it is possible to take this view on any scrutiny of historical facts» (LASKI 1932, 252).

This scrutiny leads us directly to Laski's core methodological point: any statement about state authority cannot remain in the void of theoretical assumptions but must be grounded in historical facts.

3.3 Scrutinizing Historical Facts: a Case for Methodological Positivism?

Laski accompanies his appeal to "historical facts" with fleeting references to those who resisted Charles I in 1642, the French Revolution, or even Russia in March 1917.

He suggests that states have always exercised power "for particularistic ends" in the past and will continue to do so in the future. For this reason, the people – as the recipients of the norms – must never abandon their judgment on the goodness of the laws. This stance is rooted in a distinct methodological approach. His position perfectly aligns with methodological positivism, as when he states that «legal claims are merely legal, and, as such, have no necessary connection with justice» (LASKI 1932, 253); his positivism is expressed even more explicitly elsewhere: «The sovereign State makes positive law; it does not make a law in which there is any inherent relation to justice. Such a positive law is merely an expression of power; power is morally neutral until its substance is examined» (LASKI 1932, 261). His disciple Neumann captures this core idea with extreme brevity, anticipating Shklar, when discussing the ethical value of the rule of law: «Paradoxically enough, this ethical function lies in the rigid divorce of legality from morality» (NEUMANN 1942, 362).

From this separation of law and morality follows a specific diagnosis of the central problem. The real challenge is the internationalization of law, not its moralization. On this crucial point, Laski and Kelsen find common ground in their shared pacifist outlook. Unsurprisingly, then, Laski converges with Kelsen on the international project, despite offering a profound critique of Kelsen's "formalism"¹⁹.

Laski's theoretical framework is ultimately pragmatic. His friendship with Holmes and certainly his familiarity with American pragmatism²⁰ allow him to assert that the quality of every act of the sovereign will derive from its consequences, which must be analyzed from different perspectives; one social group may consider a certain policy adequate, but another group may not. Although there may be legal unity (we might say: in Kelsen's sense), this legal unity does not necessarily correspond to moral unity (LASKI 1932, 259). The pluralism of moral values is reflected in distinct judgments regarding the legitimacy of individual norms. It can be said that, if the state exhibits the virtue of the rule of law, all norms partially reflect the authority that comes from the sovereign's own submission to its norms and procedures. As we saw with Hay, the fact that criminal norms apply to everyone, even the rich and the noble, generates good reasons among the poorer classes not to consider criminal law abusive.

At this point in the argument, we must open a parenthetical note that will show the disconcerting relevance of Laski's thought. This relevance is twofold: in methodological terms, it shows his dialogue with the legal theory of his contemporaries, particularly Kelsen, whom he criticizes for excessive formalism and his illusion of purity. Yet, precisely by citing Kelsen, he shifts the

¹⁹ On the difficulties that arise when attempting to project the state-level virtue of the rule of law into the international sphere, I refer to PUPPO 2016. On some characteristics proper to international "governance" that make it a structure profoundly incompatible with the virtues of the rule of law, and on some good reasons for rejecting the fulfillment of international obligations, see also PUPPO 2013, 2018, 2019.

²⁰ «This theory of internal limitation upon the action of authority is essentially a pragmatic one» (LASKI 2020 [1919], 26).

discussion to the international level, alluding to that “international rule of law” which has only relatively recently become an object of study for specialists.

«A State, therefore, cannot legally will what it pleases; it can only will what is consistent with the superior will of the international community. Its personality is a capacity in its rulers to act for that end, but for no other end.

From this, I infer the supremacy of international law over the law of any given individual State. I assume that a jurisprudence which seeks to be scientific has no alternative but to regard the community of States as what has been termed a *civitas maxima* the law of which is primary over all other law. States, in this conception, appear to me as provinces of this *civitas maxima* whose authority is derived from the rules discovered to be necessary for the maintenance of the common international life» (LASKI 1932, 268. In the omitted footnote, he refers to Kelsen 1989 [1920])²¹.

In the new preface to the third edition of *A Grammar of Politics*, in 1934, the same type of analysis is conducted with more decisive tones that reveal his Marxism:

«Capitalism, in a word, is rooted in a system which makes power the criterion of right and war the ultimate expression of power. No reconciliation is possible between its necessary policies and the idea of a world-community founded upon the sovereign State's surrender of its right to be judge in its own cause» (LASKI 1938, no page).

The dominant analyses of State authority are therefore unsatisfactory – John Austin, for example, but we could add a whole tradition of Anglo-Saxon analytical legal theory extending up to a few decades ago – because they do not go beyond the borders of the nation-state (cf. WALDRON 2013). But, above all, they are unsatisfactory because they tend to resolve the issue in a purely formal manner, forgetting that the problems of jurisprudence «have an origin which is meaningless apart from a system of special historic conditions in Western Europe» (LASKI 1932, 270)²².

Concluding this presentation of Laski's main insights, we can see that his methodological stance – which insists that law cannot be understood in isolation from its social and historical context – resonates powerfully with a contemporary position like Jeremy Waldron's. It is not about confusing positive law and morality. It is about clearly establishing the necessity of studying the legal phenomenon starting from a historical horizon that only makes sense if an end is identified. Just as WALDRON (2023, 40-41) argues, against Raz's conception, that the concept of the rule of law conceptually precedes that of law, Laski concludes:

«A theory of law, in fact, which does not start by postulating an end for law, can never explain why law ought to be obeyed; and there is, surely, no point in making rules except upon the assumption that they are entitled to obedience. If we assume that law is made in order to satisfy human demands at that maximum which is socially possible we have at least a criterion by which to create an effective system of values» (LASKI 1932, 274).

²¹ On Kelsen's theory, and especially for a reading of it robustly anchored in history and pacifism, see PUPPO 2020a. For some critical observations on the compatibility of this pacifist vision with his defense of democracy, see also PUPPO 2024.

²² In this sense, according to the sharp reflection of LOUGHLIN (2018, 659), Shklar's bitter critique of Dicey is unfair: «Dicey's concept of the rule of law was indeed peculiarly English, but Shklar was wrong to disparage it as an 'unfortunate outburst of Anglo-Saxon parochialism'. He did not presume to present a general constitutional theory. Since his objective was to provide an account of the basic principles of British constitutional law, he understandably depicted the rule of law as a trait of national character».

It might seem that the insistence on values, on an end for law, necessarily invites a substantive conception of the rule of law. But it would be a mistake to draw such a conclusion. In fact, this value, whatever it may be, must be analyzed in light of that set of formal and procedural characteristics that marked the emergence of the rule of law in the British context. Laski sees its limitations, but seeing the limitations also helps to see the virtues, especially from a Marxist perspective. The greatest vice has already been evoked: the daily work of the courts consists in «protect the interests of the existing order», i.e., «the wants and needs of those who dominate the economic system at any given time» (LASKI 1932, 278). Despite this, the authority of law can still be built upon «its conscious effort to respond in an equal way to the widest demands it encounters» (LASKI 1932, 295). Laski does not deny the difficulty of this task, nor its “nobility”. A balanced response must be nourished by comparing different historical experiences. This very method leads Laski to acknowledge the paradox and not to overlook the “greatness of legalism” that Shklar identifies:

«The great paradox revealed here is that legalism as an ideology is too inflexible to recognise the enormous potentialities of legalism as a creative policy, but exhaust itself in intoning traditional pities and principles which are incapable of realisation. This is [...] the perennial character of ideologies. It should not, however, in this case, lead one to forget the *greatness of legalism* as an ethos when it expresses itself in the characteristic institutions of the law» (SHKLAR 1964, 112, my emphasis).

For Laski, the stability guaranteed by the rule of law does not justify everything; innovation is necessary, although, he specifies: «I do not ask the lawyer to be a knight-errant for dubious causes, I do not plead that he should be a fanatic for innovation» (LASKI 1932, 296). The last section will be precisely dedicated to analyzing this image – with its oriental undertones – given that the contemporary judicial universe is highly populated by *knight-errants* and *dubious causes*, all seasoned with some version of moral perfectionism. The rule of law, with its flaws, remains perhaps the only refuge against the arbitrariness of the ruling classes, even (and especially) when powerful interests adopt the guise, and the rhetoric, of vulnerability.

4. *The Golden Rule Against Arbitrariness: Judicial Review and Equality Before the Law*

For those who adhere to its ideology, the rule of law defines absolute evil in one word: arbitrariness. From Beccaria to Hart, this is the recurring nightmare – the almost natural human tendency towards subjective judgment. Thus, the rule of law emerges, humbly, as an alternative to the arbitrariness implied by human government, dominated by emotions and sympathies (4.1). This antidote, often underestimated, is constantly at risk of dilution, as the paradigmatic case of the Nazi State demonstrates (4.2.). Yet the danger goes unrecognized, concealed by the demagogic skill of the dominant class beneath the attractive promise of material justice (4.3).

4.1 *The Danger: The Executive's Tendency to Avoid Controls*

It's well known that Dicey constructed his idea of the rule of law in opposition to the French system, which he viewed as an example of arbitrariness²³. Laski, precisely because he was familiar with the French, English, and American systems, was aware that the concept of arbitrariness is subjective: «It is clear, for instance, that into the idea of justice arbitrary control cannot enter; but it is not less clear that opinion may differ as to what is arbitrary control» (LASKI 2020 [1919], 25).

Dicey, it must be recalled, reproached the French for the fact that not all acts and not all people were subject to the ordinary jurisdiction. Indeed, the French system, since the time of Napoleon

²³ It must be noted that Dicey would later modify his judgment on the French case. On that evolution, see WALTERS 2016.

and the creation of the Conseil d'État, has been characterized by the presence of an administrative jurisdiction. For Dicey, this constituted a violation of the principle of equality before the law.

However, Laski, who was familiar with French Law, particularly Duguit and Hauriau, knew that Dicey's conclusion was hasty. The problem wasn't administrative justice, which had, in fact, been able to control governments by arguing the "*excès de pouvoir*", and also satisfy the population's needs, especially thanks to the clearly socialist-tinged theory of public service²⁴. The real problem, perhaps the only real one, is the constant possibility of the executive escaping judicial control. Dicey himself, in the introduction added in 1918, demonstrated, on the one hand, awareness of the scarce control exerted by ordinary English judges over the executive, and, on the other, the possibility that the French system might offer better guarantees: «It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the Government of the day, might not enforce official law with more effectiveness than any Division of the High Court» (DICEY 1915, xlviii).

Laski radicalizes this doubt:

«What is needed is rather the frank admission that special administrative courts, as on the Continent, are needed, or the requirement of a procedure in which the rights of the private citizen have their due protection. What, in any case, is clear is the fact that the official will not, in any other way, be substantially subject to the rule of law» (LASKI 1919, 463).

For Laski, then, the biggest problem of the rule of law is not its alleged "humility" in the social sphere, but its insufficient application: «Careful analysis of the responsibility of a public servant suggests that the rule of law means less than may at first sight appear» (LASKI 1919, 450). Any system in which the executive is ultimately allowed to evade all forms of control, which permits the executive to act without ensuring that citizens' interests are protected, is dangerous: «the irresponsibility of a government official in this aspect is, at bottom, excused only by introducing exactly that notion of state which it is the purpose of the rule of law to avoid» (LASKI 1919, 459).

4.2 *The Rule of Law Dissolved in the Dual State*

This situation that Laski alludes to is none other than the Dual State described by FRAENKEL (1941), in which the normative state (subject to rules) coexists alongside the prerogative state:

«On the one side was the 'normative state', which contained whatever remained of the law and the institutions of the Weimar legal order together with the statutory regimes enacted after 1933 and implemented through those institutions. On the other side was the 'prerogative state', which consisted of the apparatus of the Nazi Party wherein the leader's will [...] was the ultimate source of authority» (DYZENHAUS 2022, 322)²⁵.

The Dual State, understood in a broad sense, also describes seemingly harmless realities, such as those where certain segments of the population see their needs interpreted as superior to others, in light of certain moral conceptions. Even without the terrifying image of a Nazi party in government, the rule of law is eroded by any emergency (ecological, humanitarian. and so on), as the

²⁴ It seems that Laski found great inspiration in Duguit's work for his theory of authority, centered on the needs of real people, and not on fictions: «the only justification of any policy is the contribution it makes to the social need» (LASKI 1917, 1190).

²⁵ Also for Fraenkel, the rule of law and the *Rechtsstaat* seem interchangeable: «The Normative State, however, is by no means identical with a state in which the 'Rule of Law' prevail, i.e., with the *Rechtsstaat* of the liberal period» (FRAENKEL 1941, 71).

effect is the same: to create two parallel paths, where one responds to equality before the law (its forms and its slowness: legislative change), while the other responds to superior needs for justice (and the speed of change through executive and judicial means). Whether it is Nazi justice or vegan justice, only our sympathies (or our empathies) change, not the impact on the rule of law. Agamben, for example, explicitly evoked Fraenkel's notion of the Dual State to describe certain characteristics of the COVID era:

«The paradigm of law is replaced by that of vague clauses and formulas, such as “state of necessity,” “security,” “public order,” which, being indeterminate in themselves, need someone to intervene to determine them. We no longer deal with a law or a constitution, but with a fluctuating force-of-law that can be assumed, as we see today, by commissions and individuals, doctors or experts completely external to the legal order» (AGAMBEN 2021).

All dangers converge towards the creation of a particularistic justice system, corresponding to the image, already evoked, of “*kadi justice*”, a justice that cannot exist without, to reuse Laski's image, a lawyer acting as a “knight-errant for dubious causes”, being a “fanatic for innovation”. The dubious cause, analyzed in light of who funds it²⁶, is often supported by wild powers that want to impose a certain form of material (in)justice, often exceeding the formal and rational limits of abstract and general law.

The shift in the legal paradigm, which can be fatal, was magnificently captured by Franz Neumann regarding Nazi legal theory:

«Even the principle of equality before the law, the fundamental principle of the *Rechtsstaat*, is rejected. National Socialist legal theory replaces the legal person by the ‘concrete personality’, demagogically calling upon Hegel as its authority, forgetting that Hegel had refused to discard formal equality before the law [...]» (NEUMANN 1942, 365).

It will be necessary to delve into this transition from the abstract legal person to the “concrete personality”, also in light of the reference to Hegel – more important than it seems, both philosophically and legally – to understand the dangers that still threaten the rule of law. First, however, it is appropriate to reconstruct the panorama described by Fraenkel and Neumann, whose work «is testimony to the strength of analysis of individuals who had a keen sense of justice and the rule of law» (OETTE 2017, 834). As recently recalled in a splendid work on the Frankfurt School, «Neumann practiced and wrote widely about law, working fiercely with other left-wing lawyers, including his Berlin law partner Ernst Fraenkel, to defend Weimar against right-wing critics» (SCHEUERMAN 2021, 313).

It's necessary to return to the choice of expressions that, for Fraenkel, describe the two dimensions of the State coexisting in the Dual State: the “normative state” and the “prerogative state” are expressions, especially the former, that say a lot. They are not just “labels”: this opposition captures the essence of the “National-Socialist communal theory”. The rejection of the rule of law is inseparable from anti-Semitism, given that, for the Nazis, normativism and the rule of law were an expression of Judaism opposing the realization of welfare and (Nazi) justice:

«The foremost requirement of ‘German’ thinking is an uncompromising opposition to ‘Jewish’ intellectuality, which is condemned because its main concepts are said to be abstract and universal. The proposition that there should be norms of general validity in order to protect the individual's liberty from infringement by the political sovereign, the dictum that the individual can only be punished in accordance with the law, the doctrine of equality before law – all these ideas are labelled and condemned

²⁶ Regarding this drift, especially in the United States, which consists of the creation of a true market for “just causes” a market in which “social justice” is sold, see PAN 2025.

as ‘Jewish’ normativism. The coldly impersonal and abstract norm which is rationally arrived at and rigidly fixed does not guarantee the welfare of the community and hence is prejudicial to the triumph of ‘justice’» (FRAENKEL 1941, 140).

It’s not superfluous to recall that Hegel considered Kant “Jewish”, probably for his insistence on the universalism of moral norms and his cosmopolitanism: «Kant’s thought, whose Protestant filiation is so evident, was very quickly interpreted as profound Judaism. Let us recall that he was immediately greeted as a kind of Moses, and that Hegel saw in him an ashamed Jew» (DERRIDA 2008 [1991], 272).

It is perhaps superfluous to specify that this anti-normativist philosophy tends to coincide with Schmitt’s philosophy, to which Fraenkel constantly refers, emphasizing the continuity between the Weimar positions and those expressed during the Nazi regime, particularly in *Über die drei Arten des rechtswissenschaftlichen Denkens* (*On the three types of juristic thought*) (FRAENKEL 1941, 143): «the juristic theory of the fascist state is decisionism» (NEUMANN 1942, 365).

The Dual State makes two forces coexist: the strength of rules and the equality before their application; the strength of material justice realized beyond formal procedures. Fraenkel develops his theory on the coexistence of these forces based on a meticulous analysis of jurisprudence, grasping the transition towards the total annulment of all guarantees for Jews, except in rare cases where protecting Jews meant protecting the market. The position of the judges in a 1937 case must be literally reproduced:

«In a trial hearing on family law the Naumburg Appellate Court (*Oberlandesgericht*) on April 20, 1937 had decided that ‘the law now – no less than before – is binding for every judge. He may, of course, interpret it within the framework of a racially oriented conception of law, but he cannot disregard it without very good reasons. Such judicial conduct is indispensable if the law is to possess stability and calculability. This feature must be regarded as essential to the state even when in individual cases they obstruct the dispensation of material justice. Even the interests of the ethnic community in the maintenance of German racial purity cannot afford to ignore the pressing demand that the law be applied and legal stability be preserved.’» (FRAENKEL 1941, 88-89).

4.3 *The Promise of Material Justice: The Magical Weapon of the Ruling Class*

As the German judges say, material justice can be obstructed by the rule of law. Such reflection is among the most common among defenders of substantive conceptions of the rule of law. Unsurprisingly, this judicial view, reconstructed by Fraenkel – almost a “normativist resistance” – was censored by the Nazi Minister of Justice, as it could ensure protection, even to Jews. Such radical view rapidly prevailed that same year. As mentioned, the only reason to ensure a minimum of protection for Jews was the risk that its denial would interfere with the market and entrepreneurial freedom. Since «a strict application of the procedures of the Prerogative State would have disturbed the normal course of economic life», «[o]nce Jews had been eliminated from the economic life, it was possible to deprive them of all legal protection without adversely affecting the economic system» (FRAENKEL 1941, 89-90). Neumann states it with extreme brevity: «A precipitate liquidation of Jewish holdings would have disrupted German economic life» (NEUMANN 1942, 103). Thus, «[i]n 1937 the Supreme Labor Court [...] justified the denial of all legal protection to the Jews by saying that ‘the racial principles expounded by the National-Socialist Party have been accepted by the broad mass of the population, even by those who do not belong to the party’» (FRAENKEL 1941, 92).

If the duality of the State is clear with Fraenkel, the subversive mechanism through which Nazi material justice erodes the rule of law becomes clearer with Neumann. Vague clauses and the invocation of principles are so many Trojan horses that allow the little justice for the most vulnerable, ensured by the rule of law, to be besieged and then destroyed.

Anticipating Thompson, Neumann shows the two economic faces of the rule of law. As a good Marxist, he first recalls that:

«The rule of law is, moreover, necessary as a pre-condition of capitalist competition. The need for calculability and dependability in the legal system and in administration was one of the motives for restricting the power of the patrimonial princes and of feudalism, leading ultimately to the establishment of Parliament with the help of which the bourgeoisie controlled the administration and budget while participating in the modification of the legal» (NEUMANN 1936, 40).

Yet «this class rule was calculable, predictable, and, hence, not arbitrary» (NEUMANN 1936, 46). Not only that: the Weimar experience had shown the capacity of the bourgeois rule of law to accommodate institutions favourable to the most fragile classes:

«the poor and the workers benefited to a large extent from the rationality of law. This was all the more true after the development of a system of law permitting poor persons to sue without cost which after 1918 experienced an extraordinary expansion and made the legal system of the Weimar period the most rationalized system in the world. It was rational not only in the sense of creating calculability but also in an eminently social sense, in so far as the advantages of rational law also benefited the working classes and the poor» (NEUMANN 1936, 46).

This observation must be read in light of Nazi legal theory. Behind the rational law which, «after all, serves also to protect the weak» (NEUMANN 1942, 365), are the socialists who, in the German philosophical tradition, are largely Jewish, even if, as Marxists, they are absolutely anti-religious. Whether one places oneself with Hans Kelsen²⁷ on more moderate liberal-socialist positions, or with Gustav Landauer²⁸, killed in the Munich riots, on more anarchist positions, or on more scholastically Marxist positions like the philosophers gathered in the Frankfurt School, the State and its law are seen for what they are: «Law is merely an *arcanum dominationis*, a means for the stabilization of power» (NEUMANN 1942, 365). Only the rationality of the rule of law – and a normativist and cosmopolitan interpretation of the State – can limit the damage caused by power.

The second noteworthy aspect is the lucid analysis of the erosive effect of the principles of judicial application. Neumann identifies the *free law school* (*Freirechtsschule*) as responsible for the destruction of rational law, the subtle entry onto the scene of a new form of natural law. General clauses and principles are its weapons.

«An unexpressed natural law came to be applied without restriction or inhibition. The period from 1918 to 1933 was characterized by the almost universal acceptance of the doctrine of free discretion (*Freirechtsschule*), by the breakdown of the rationality and calculability of law [...] by the victory of legal standards of conduct over true legal norms. [...] By their reference to extra-legal values they destroyed the formal rationality of law. They gave the judge amazingly broad discretionary powers [...]» (NEUMANN 1942, 364).

This topic would deserve further discussion, but I will conclude here to establish the bridge to current events, characterized by apparent social progressivism:

²⁷ Despite the open criticism of Kelsen's theory by both Laski and Neumann, who deemed it guilty of “naive purity” a commonality of purpose exists among Neumann, Fraenkel, and Kelsen. In this regard, see DYZENHAUS 2023, 273. For a political reading of Kelsen's theory, centered on Judaism, see PUPPO 2020a. I venture to suggest, interpreting Neumann's words, that the criticisms of Kelsen were mainly motivated by the fact that, in difficult times, his hiding behind purity left the field open to Schmitt's decisionism: «The pure science of law has done as much as decisionism to undermine any universally acceptable value-system» (NEUMANN 1942, 46).

²⁸ On Landauer, see MENDES-FLOHR, MALI 2015.

«Before 1918 the “free law” school demanded discretionary power for the judge in order to infuse progressive ideas into a reactionary legal system. But already in 1911 Max Weber warned: “It is moreover not at all certain that the classes which today enjoy only negative privileges, particularly the working class, can expect the gains from an informal administration of law that the jurists assume will flow from it”» (NEUMANN 1936, 55-56).

The same phenomenon developed in the United States, with the Law and Society movement and a certain idea of progressivism tied to judicial activism. From there, it spread throughout the American continent, thanks also to the academic colonialism of Yale and Harvard. The already cited Morton Horwitz sees the Warren Court as a good example of progressivism, a way of using constitutional interpretation to realize social policies (HORWITZ 2025 [1998]). Horwitz truly trained generations of jurists in the Anglo-Saxon world, making this way of viewing judicial activism mainstream²⁹.

The dominant trend seems to have underestimated the fact that «[a] legal system which derives its legal propositions primarily from these so-called general principles [...] is nothing but a mask under which individual measures are hidden» (NEUMANN 1936, 29). What I previously emphasized, concerning the “concrete personality” that came to replace the legal person with the Nazis, is fueled by these individual measures. But these individual measures are so many tools to reinforce power and to weaken the working classes who were gaining ground thanks to legislative reforms:

«The rediscovery of “general principles” serves to destroy a system of positive law which had incorporated many important social reforms; it destroys the rationality of law. [...] The conclusion is justified, therefore, that in a monopolistic economy “general principles” operate in the interest of the monopolists. The irrational norm is calculable enough for the monopolist since his position is so powerful that he is able to manage without the formal rationality of the law» (NEUMANN 1936, 57-58)³⁰.

5. Conclusions

The preceding analysis reveals a perverse relationship between a rhetoric invoking social justice for every “concrete personality” and a neoliberal legal practice that strengthens the power of a few by making vulnerability little more than a sector of the global market. In these final remarks, I would like to tie together a few central ideas. I will begin by recalling the foundational conflict between the abstract legal person and the concrete, situated self – a tension that has long shaped legal and political theory (5.1). This tension finds a powerful, and troubling, new expression in today’s politics of identity, which often transforms social justice into a marketable form of vulnerability (5.2). Yet history offers a striking counterpoint: some of the most compelling defences of the rule of law’s formal constraints came not from its liberal champions, but from its Marxist critics (5.3). The stakes of this debate become clear in a concrete legal conflict, where courts are asked to choose between adapting law to evolving social principles and upholding its formal certainty (5.4).

²⁹ SUGARMAN 2011, 504: «Horwitz was an inspiration to those seeking to treat law as part of society, to transcend both the traditional chasm between law and justice and the dominant ahistorical tendencies in law schools».

³⁰ Obviously, HORWITZ 1977, 566, would not be of the same opinion; according to him: «[b]y promoting procedural justice [the rule of law] enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage».

5.1 *The Foundational Tension: Abstract Norms vs. Concrete Personalities*

The first line of reflection is the opposition perhaps easiest to grasp. On one side, Kant's universal subject, inseparable from the idea that the person, as a moral subject, has primacy. From there, especially thanks to the Platonic interpretation of his ideas, all forms of legal universalism have developed, the most famous being that of Kelsen (PUPPO 2020a, 2020b). On the other, the spirit that is embodied in history, the people as a concrete reference: nationalism and not cosmopolitanism. We can recall how Laski, citing Kelsen, insisted that the rule of law can only make sense if conceived on a global scale, i.e., with states subjected to rules.

This opposition is revived in Weimar in the debates between Kelsen and Schmitt. This aspect must be underlined for various reasons. Firstly, Fraenkel opposes the *normative state* to the *prerogative state*. The sovereign's prerogative, as known since the Roman *iustitium*, is to declare the state of exception (PUPPO 2013). There is therefore a strong conceptual relationship between normativism and the rule of law, as well as between decisionism and its negation, i.e. authoritarianism. Laski perfectly understood where the battle lies when, in a 1926 letter to Justice Holmes, speaking of Kelsen, he described him as being in a battle against Hegel: «I was impressed but not convinced, by a clever German book by one Hans Kelsen of Vienna, *Allgemeine Staatslehre* which puts the Hegelian case with, I think, great ability» (DEWOLFE HOWE 1953, 830). Although the Kelsenian idea that every state is a *Rechtsstaat* has often been underestimated, his normativism means precisely this: the dissolution of raw power into legal norms. If law is not conceived as a set of norms, then the rule of law is not even conceivable. The Dual State, therefore, is nothing but the Kelsenian State subverted by the Schmittian State.

This theoretical opposition is not a relic of the past. It actively shapes a contemporary logic that recasts justice in identitarian terms and transforms social claims into instruments of market governance.

5.2 *Identities, Principles, and the Market of Vulnerabilities*

This foundational tension finds its contemporary manifestation in the opposition between liberalism/universalism and communitarianism/identity politics, replaying the conflict between the abstract legal person and the concrete individual and communities. Charles Taylor takes the stage of the debate, starting from a reading of Hegel, to account for the particular situation of multicultural societies and from there meditate on identity politics.

Here, however, one must avoid a trap, and this is where Neumann's words about Hegel help us. Neumann accuses the Nazis of making a demagogic use of Hegel. In fact, Neumann reminds us that Hegel never denied the importance of formal equality before the law. What does this mean? It means that one must not confuse two ways of accounting for multiculturalism and concrete suffering. It can be done through legislation, in which case equality before the law is not violated, or by allowing every particular case to be resolved in light of the concrete intersection between different identities, based on an *ad hoc* balancing of different legal principles. Problems arise if the law-makers create conditions of indeterminacy and then allows good lawyers to fight to favour their clients before administrators and judges who are more or less empathetic with their causes.

This difference between the abstract level of general rules and the concrete level of judicial "empathy" finds a perfect illustration in the modern concept of intersectionality, «the new face of identity politics» (SHI 2018, 274)³¹. Its analytical power can be harnessed in two very different

³¹ For an in-depth analysis of the concept of intersectionality, see BELLO 2020. I developed an initial critique of the identitarian excesses of intersectionality in PUPPO (mns-a). On the relationship between intersectionality and neoliberalism, see SHI 2018. More generally, on the mutual critique between proponents of intersectionality and Marxists, see BOHRER 2018.

ways. Used as a tool for legislation – to reshape the social structures that produce vulnerability – it need not compromise equality before the law. But when deployed as a “profile” in judicial proceedings, where it is meant to determine the “fairest” outcome for each “concrete personality”, it risks betraying those it claims to protect. The truly vulnerable, who lack access to sophisticated legal representation, are the first to suffer.

Here, a misleading rhetoric on the central role of victims intervenes; Shklar herself wrote important pages on this topic. The two dimensions – legislative reform and judicial adjudication – must not be confused, even on a strictly moral level; SHKLAR (1990) argues that one must listen to the voices of those who claim victim status; but this must be done to revise our principles of justice, not therefore to resolve concrete cases. The experience of the intersectional victim must inspire new legislation, moving from principles of justice constructed from a particular attention to the victims’ experiences. But the experience of victims must not become a source of law, especially since «victims are neither always capable nor willing to identify themselves correctly» (KAUFMANN 2020, 591). Given this indeterminacy, the risk is that resentment is confused with injustice, a phenomenon that is at the origin of a punitive populism³² that adds cruelty to what already exists. This clearly shows that the attention owed to victims does not mean, for Shklar, an attention directed by criminal law, and even less by judges: «Although Shklar is calling on us to listen to all experience of injustice, her primary concern is to place limits on (rather to expand indefinitely) the scope for judgment, condemnation, and punishment of such injustices. Otherwise, we become arrogant, cruel, and tyrannical» (FIVES 2020, 170).

Exemplary punishment does not matter to victims but to activists: the risk is that attention is paid to the experiences of activists and not to the experiences of victims³³. A corollary of this risk is the faculty, promoted in the market of vulnerabilities, of self-attribution of identity and the resulting victim status, intersectional or not. This situation perfectly describes reality: victims do not really matter; they are only necessary means to acquire power in the market of vulnerabilities³⁴. For real victims (perhaps not for those who self-proclaim themselves as such), even for Shklar, the rule of law remains preferable (SHKLAR 1998 [1986]). Far worse is the authoritarian statism characterized by «a decline in the rule of law and in judicial punishment of well-defined offences in favour of surveillance and pre-emptive policing of the potentially disloyal and deviant» (DIMICK 2021, 170).

5.3 *The Paradoxical Defence: Marxist Normativism vs. Neoliberal Principlism*

This neoliberal perversion – which correlates identity politics with neoliberal governmentality – operates through a specific, corrosive mechanism: it systematically converts collective grievances into individual claims, dissolving the very subject of solidarity. This systematic dissolution of the collective into competing individual claims clarifies what, throughout this work, emerged as a seemingly inconceivable position: the Marxist defending the rule of law. For the Marxist, the true enemy is neither the legal norm nor the “State” as such, but a certain idea of the State. Without delving into Marxist debates about a future with or without “law”³⁵, it is enough to observe how, in Weimar, liberal socialists, like Kelsen, or Marxists, like Neumann, converged in identifying the value of rules – the rationality of normativism – as the primary antidote against the savage force of power. Every erosion of the “positivism of rules” is a step towards the victory of principles and

³² Regarding this judicial drift, especially in Latin America, see PUPPO 2018.

³³ «American Abolitionists were not themselves the victims of slavery, and, she observes, ‘in no way could they identify with the slaves, be part of their society, or become blacks’» (FIVES 2020, 164, quoting SHKLAR 1993, 195).

³⁴ For a preliminary exposition and discussion of these ideas, see PUPPO (mns-b).

³⁵ My personal opinion would correspond to Laski’s position: «the juridical is, in Laskian terms, both the object and the means by which the revolutionary process takes place» (PUGGIONI 2025, 185).

the material justice they express. But, as perfectly shown by Neumann, the victory of principles is not the victory of the most vulnerable: it is the indirect victory of the privileged classes.

Current reality confirms this analysis: principialism makes law pliable, and its primary beneficiaries are those with the greatest “argumentative” power. They no longer need decree a state of exception; it suffices to employ creative interpretation and invoke some *ad hoc* criterion of material justice. Even when it seems that segments of vulnerable populations receive some type of benefit, this favours the dominant class since the fact of obtaining it, or not, results from individual actions which, even if successful, do not compromise the collective social status quo. There is a «correlation between the logic of contemporary identity politics and neoliberal techniques of governmentality. Neoliberalism constitutes an assault on collective solidarity» (SHI 2018, 277). Although intersectional analysis originated as a structural analysis with goals compatible with Marxism and feminism, the identity drift turns intersectionality into a weapon in the hands of the dominant class, which funds fragmented activism and “sells” social justice to obtain, as compensation, the neutralization of collective social actions. Here the dominance of the concrete personality returns, over both the liberal individual subject and the socialist collective subject:

«The subject of neoliberalism is the entrepreneur of the self; the burden for care falls completely on the individual. The neoliberal authenticity-fantasy states that the only thing of importance is the inner-core of the self, which is inviolate. ...The neoliberal subject is the subject of trauma; revealing the true self has become an imperative in a confessional culture, in which recognition of suffering is equatable to personhood» (SHI 2018, 288).

When this drama is staged in courtrooms, the application of the cold, general, and abstract rules is itself perceived as a kind of insult. In this theatre, the popularity of a ruling is merely its rating in the market of sympathies. It seems, for example, that citizens in the United States penalize the Supreme Court when it protects the rights of groups they do not “like” (ZILIS 2022). Applying the law can offend. The judge, caught in this bind, may feel compelled to re-construct it and re-signify every word to align the meanings with each “concrete personality” perceived sensitivity.

A particularly revealing test of this tension arose from an unexpected quarter: the claims of a historically dominant group – men – to victim status. The resulting case, however, had the salutary effect of reawakening in English judges their historical allegiance to the rule of law.

5.4 *Legal Certainty vs. Ideological Re-signification: A Case of Resistance*

The great success of principles in the judicial sphere has led to the development of what GUASTINI (2011) has called “legal construction”. Here, I only want to emphasize two observations by Guastini: on the one hand, jurists have developed the art of making ambiguous words that would not be so, and thus making an “easy case” a “hard case”. Such *ad hoc* production of ambiguity is never innocent but responds to theoretical and often genuinely ideological choices. The *lawyer’s knife* is therefore always lying in wait.

This peril was perfectly grasped and averted by the judges of the English Supreme Court in a widely debated case concerning the meaning of the word “sex” in anti-discrimination law. While the general debate often took a demagogic and ideological course, the Court, with notable sobriety, upheld the fundamental principle of legal certainty. Much like those German judges in 1937 who resisted sacrificing their “formal legal conscience” to the demands of Nazi material “justice”, English judges reaffirmed the core of the rule of law: legal certainty overrides ideological re-signification. In doing so, they betrayed the expectations of those who thought that superior demands for justice allowed for attributing a completely new (social) meaning to a term whose meaning (biological) had never been questioned. In the specific case, the conflict was between a male prerogative, argued from dubious principles, and the defence of female vulnerability, grounded in the stability of rules. The Court’s reasoning was unequivocal and merits full reproduction:

«175. It is significant, however, that there is only one definition of sex. The concept of sex is of foundational importance in the EA 2010. The words sex and woman appear across different parts of the Act and in many sections. It would be surprising if the words sex and woman were intended to have different meanings in different sections or parts of the EA 2010, as the Inner House concluded, especially given the definitions of “man” and “woman” in section 212(1) of the EA 2010. Indeed, it would offend against the principle of legal certainty and the need for a meaning which is constant and predictable, especially in the context of an Act with the purposes we have identified, and which has such practical everyday consequences for so many individuals and organisations in society.

176. The general rule, as we have said, is that words or terms used more than once in the same legislation are taken to have the same meaning whenever they appear, and the general purpose of an interpretation provision is to fix the meaning of such a word or term throughout the legislation in question. This presumption can be rebutted where the context requires, even where a saving for context does not appear in the definition section. But this is likely to be rare and giving a variable meaning to a defined term is generally only done where it is clear that there is a genuine drafting error resulting in differential usage of the word or term in the text of the legislation [...]»³⁶.

It would be wise for the contemporary universal devotees of the “right to the free development of personality” – a mantra invoked by the privileged claimant in this case, and often weaponized against the application of the austere general law – to recall that the Nazis, too, championed the free development of the concrete personality: that of the Aryan community.

³⁶ For *Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* <https://supremecourt.uk/cases/uksc-2024-0042>.

References

- AGAMBEN G. 2021. *Intervento al convegno degli studenti veneziani contro il greenpass l'11 novembre 2021 a Ca' Sagredo*. Available at <https://www.quodlibet.it/giorgio-agamben-intervento-al-convegno-degli-studenti-veneziano->.
- ALTHOUSSER L. 1971 [1970]. *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in ID. "Lenin and Philosophy" and Other Essays, Aakar Books (transl. in en. by B. Brewster; ed. or. *Idéologie et appareils idéologiques d'État. (Notes pour une recherche)*, in «La Pensée», 151, 1970, 3 ff.).
- BARBER N.W. 2004. *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?* in «Ratio Juris», 17, 4, 2004, 474 ff.
- BARBER N.W. 2003. *The Rechtsstaat and the Rule of Law*, in «The University of Toronto Law Journal», 53, 4, 2003, 443 ff.
- BELLO G. 2020. *Intersezionalità. Teorie e pratiche tra diritto e società*, Franco Angeli.
- BOHRER A. 2018. *Intersectionality and Marxism: A Critical Historiography*, in «Historical Materialism», 26, 2, 2018, 46 ff.
- COLE D.H. 2001. "An Unqualified Human Good": E.P. Thompson and the Rule of Law, in «Journal of Law and Society», 28, 2001, 177-203.
- COTTU C. 1822. *On the administration of criminal justice in England; and the spirit of the English government*, Stevens.
- DERRIDA J. 2008 [1991]. *Psyche: inventions of the other II*, Stanford University Press.
- DEWOLFE HOWE M. (ed.) 1953. *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski*, Volume II, 1916-1935, Harvard University Press.
- DICEY A.V. 1915. *Introduction to the Study of the Law of the Constitution*, 8th ed., Macmillan.
- DIMICK M. 2021. *Pashukanis' commodity-form theory of law*, in O'CONNELL P., ÖZSU U. (eds.), *Research Handbook on Law and Marxism*, Elgar, 115 ff.
- DYZENHAUS D. 2023. *Franz Neumann and Ernst Fraenkel on the Liberal Democratic Constitutional Project*, in «AJIL Unbound», 117, 2023, 269 ff.
- DYZENHAUS D. 2022. *The Long Arc of Legality*, Cambridge University Press.
- FIVES A. 2020. *Judith Shklar and the liberalism of fear*, Manchester University Press.
- FRAENKEL E. 1941. *The dual state: a contribution to the theory of dictatorship*, Oxford University Press.
- GUASTINI R. 2011. *Interpretare e argomentare*, Giuffrè.
- HART H.L.A. 1994 [1961]. *The Concept of Law*, Clarendon.
- HAY D. 1975. *Property, Authority and the Criminal Law*, in HAY D., LINEBAUGH P., RULE J.G., WINSLOW C. (eds.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Allen Lane.
- HAY D. 2021. *E.P. Thompson and the Rule of Law: Qualifying the Unqualified Good*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 202 ff.
- HERSHOVITZ S. 2011. *The Role of Authority*, in «Philosophers' Imprint», 11, 7, 2011, 1 ff.
- HORWITZ M.J. 2025 [1998]. *The Warren Court and Democratic Constitution*, Georgetown University Press.
- HORWITZ M.J. 1997. *Why is Anglo-American Jurisprudence Unhistorical?* in «Oxford Journal of Legal Studies», 17, 4, 1997, 551 ff.
- HORWITZ M.J. 1977. *The Rule of Law: An Unqualified Human Good?* in «The Yale Law Journal», 86, 3, 1977, 561 ff.
- JACOB R. 2016. *¿Es el common law el mejor sistema jurídico en el mejor de los mundos globalizados posibles? Libres reflexiones sobre los desarrollos de la teoría del derecho y sus desafíos actuales*, in «Isonomía», 44, 2016, 11 ff.
- KAUFMANN K. 2020. *Conflict in Political Liberalism: Judith Shklar's Liberalism of Fear*, in «Res Publica», 26, 2020, 577 ff.

- KELSEN H. 1989 [1920]. *Il problema della sovranità e la teoria del diritto internazionale. Contributo per una dottrina pura del diritto*, Giuffrè (trans. in it. by A. Carrino; ed. or. *Das Problem der Souveränität und die Theorie des Völkerrechts*, JCB Mohr, 1920).
- LANGBEIN J.H. 1983. *Albion's Fatal Flaws*, in «Past & Present», 98, 1983, 96-120.
- LASKI H. 2020 [1919]. *Authority in the Modern State*, Yale University Press.
- LASKI H. 1938 [1925]. *A Grammar of Politics*, Yale University Press.
- LASKI H. 1932. *Studies in Law and Politics*, Allen and Unwin.
- LASKI H. 1919. *The Responsibility of the State in England*. To Roscoe Pound, in «Harvard Law Review», 32, 5, 1919, 447 ff.
- LASKI H. 1917. *A Note on M. Duguit*, in «Harvard Law Review», 31, 1, 1917, 186 ff.
- LINO D. 2018. *The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context*, in «Modern Law Review», 81, 5, 2018, 739 ff.
- LOUGHLIN M. 2018. *The Apotheosis of the Rule of Law*, in «Political Quarterly», 89, 4, 2018, 659 ff.
- LOUGHLIN M. 2024. *The Rule of Law: A Slogan in Search of a Concept*, in «Hague Journal on the Rule of Law», 16, 3, 2024, 509 ff.
- LUQUE P. 2021. *Prólogo a Shklar J., Legalismo: derecho, moral y juicios políticos*, traducción de Horacio Pons, Clave Intelectual.
- MARTIN K. 1953. *Harold Laski (1893-1950): A Biographical Memoir*, Viking Press.
- MENDES-FLOHR P., MALI A. (eds.) 2015. *Gustav Landauer: Anarchist and Jew*, De Gruyter Oldenbourg.
- MUÑIZ-FRATICELLI V.M. 2014. *The Problem of Pluralist Authority*, in «Political Studies», 62, 3, 2014, 556 ff.
- NEUMANN F. 1942. *Behemoth: the structure and practice of national socialism*, Victor Gollancz.
- NEUMANN F. 1936. *The governance of the rule of law: an investigation into the relationship between the political theories, the legal system, and the social background in competitive society*. PhD thesis, London School of Economics and Political Science.
- NEWMAN M. 1993. *Harold Laski: A Political Biography*, Springer.
- OETTE L. 2017. *Document and Analyze: The Legacy of Klemperer, Fraenkel, and Neumann for Contemporary Human Rights Engagement*, in «Human Rights Quarterly», 39, 4, 2017, 832 ff.
- PAN J.C. 2025. *Selling Social Justice: Why the Rich Love Antiracism*, Verso Books.
- PUGGIONI P.G. 2022. *Consent, Sovereignty, and Pluralism: Harold Laski's Doctrine of Allegiance in British Legal Philosophy*, in «Ratio Juris», 35, 4, 2022, 345 ff.
- PUGGIONI P.G. 2025. *Class Conflict, Democracy, and Revolution by Consent: Harold J. Laski on Marx and the Transformation of the Law*, in «Canadian Journal of Law & Jurisprudence», 38, 1, 2025, 183 ff.
- PUPPO A. (mns-a). *Verso un mercato delle vulnerabilità? Dalla multiple soggezione a strutture oppressive alle performance dei soggetti intersezionali*, relazione presentata nel workshop *Chi manca nella stanza e perché non è qui? Lotte intersezionali oltre i confini di specie*, coordinato da Barbara Giovanna Bello e Gabriella Petti, Genova, 5 luglio 2024.
- PUPPO A. (mns-b). *Da Kelsen all'intersezionalità: il miraggio della giustizia nel deserto dei doveri*, testo discusso nel seminario *Rule of law e intersezionalità*, Università di Palermo, 7 maggio 2024.
- PUPPO A. 2024. *L'incompatibilité entre liberté politique et paix: autour d'une ingénuité kelsenienne*, in HERRERA C.M. (ed.), *La vocation du juriste universitaire*, Institut francophone pour la Justice et la Démocratie, 303 ff.
- PUPPO A. 2023. *La Grundnorm de Kelsen: el sagrado no ser de la normatividad del derecho*, in PUPPO A., SUCAR G. (eds.), *El derecho, lo sagrado, el nihilismo*, Tirant lo Blanch, 451 ff.
- PUPPO A. 2020a. *Dover essere, stato mondiale e filosofia profetica della storia: appunti su Kelsen e Cohen*, in «Ragion pratica», 2, 2020, 463 ff.
- PUPPO A. 2020b. *The Sollen as Otherwise than Being. Notes on Hermann Cohen, Hans Kelsen and Emmanuel Lévinas*, in BUNIKOVSKI D., PUPPO A. (eds.), *Why Religion? Towards a Critical Philosophy of Law, Peace and God*, Springer Nature, 175 ff.

- PUPPO A. 2019. *Local Priority in Constitutional Argumentation: Threat or Healthy Contribution to International Law?*, in HERDY R. et al. (eds.), *The Role of Legal Argumentation and Human Dignity in Constitutional Courts*, *Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)*, Franz Steiner Verlag, 101 ff.
- PUPPO A. 2018. *Empathy, not Truth: Can a Dialectical and Skeptical Argumentation Enhance Both Democracy and Human Rights Courts?*, in «Crítica - Revista hispano-americana de Filosofía», 50, 149, 2018, 89 ff.
- PUPPO A. 2016. *Reasonable stability vs. Radical Indeterminacy: a Disanalogy between Domestic Rule of Law and Humanity-Based International Law*, in «Revus, Journal for Constitutional Theory and Philosophy of Law», 30, 2016, 81 ff.
- PUPPO A. 2013. *Estado de excepción: algunas consideraciones acerca de héroes garantistas y participantes patológicos*, in GONZÁLEZ DE LA VEGA R., LARIGUET G. (eds.), *Problemas de Filosofía del Derecho. Nuevas Perspectivas*, Temis, 19 ff.
- PUPPO A., SUCAR G. (eds.) 2023. *El derecho, lo sagrado, el nihilismo*, Tirant lo Blanch.
- RABB I.A. 2015. *Against Kadijustiz: On the Negative Citation of Foreign Law*, in «Suffolk U. L. Rev.», 48, 2015, 343 ff.
- RAZ J. 1979 [1977]. *The Rule of Law and its Virtue*, in ID., *The Authority of Law*. Clarendon, 210 ff.
- ROSE J. 2004. *The Rule of Law in the Western World: An Overview*, in «Journal of Social Philosophy», 35, 4, 2004, 457 ff.
- ROSS A. 2018 [1953]. *On Law and Justice*, edited and with an introduction by Jakob v. H. Holtermann; translated by Uta Bindreiter, Oxford University Press.
- SCHEUERMAN W.E. 2021. *The Frankfurt School and the Rule of Law*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 312 ff.
- SHI C.C. 2018. *Defining My Own Oppression: Neoliberalism and the Demands of Victimhood*, in «Historical Materialism», 26, 2, 2018, 271 ff.
- SHKLAR J.N. 1998 [1986]. *Political Theory and the Rule of Law*, in ID., *Political Thought and Political Thinkers*, University of Chicago Press, 21 ff.
- SHKLAR J.N. 1993. *Obligation, Loyalty, Exile*, in «Political Theory», 21, 2, 1993, 181 ff.
- SHKLAR J.N. 1990. *The Faces of Injustice*, Yale University Press.
- SHKLAR J.N. 1964. *Legalism: Law, Morals, and Political Trials*, Harvard University Press.
- SUGARMAN D. 2011. *'Great Beyond His Knowing': Morton Horwitz's Influence on Legal Education and Scholarship in England, Canada and Australia*, in HAMILTON D.W., BROPHY A.L. (eds.), *Transformations in American Legal History, II. Essays in honor of Professor Morton J. Horwitz*, Harvard University Press, 505 ff.
- THOMPSON E.P. 1975. *Whigs and Hunters: The Origin of the Black Act*, Allen Lane.
- WALDRON J. 2023. *Thoughtfulness and the Rule of Law*, Harvard University Press.
- WALDRON J. 2021. *The Rule of Law as an Essentially Contested Concept*. in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 121 ff.
- WALDRON J. 2013. *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?* in DUARTE D'ALMEIDA L., JAMES EDWARDS J., DOLCETTI A. (eds.), *Reading HLA Hart's The Concept of Law*, Hart Publishing, 209 ff.
- WALTERS M.D. 2016. *Public law and ordinary legal method: Revisiting Dicey's approach to droit administratif*, in «University of Toronto Law Journal», 66, 1, 2016, 53 ff.
- ZILIS M.A. 2022. *How Identity Politics Polarizes Rule of Law Opinions*, in «Political Behavior», 44, 1, 2022, 179 ff.

The “Psychology” of *Rechtsstaat*: from a Sharp XIX-Century Distinction from Authoritarianism to the Collapse of One into the Other during Weimar Republic

GIOVANNI **BISOGNI**

University of Salerno, Italy.

E-mail: gbisogni@unisa.it

ABSTRACT

The article is a contribution to a research project. Its basic contention is that *Rechtsstaat* is psychologically more counterintuitive than its competitor (e.g., sovereigntism; populism), and the reason for this would be the higher cognitive load required for conceptually processing the former. To demonstrate that contention, it was necessary to clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for competitor. This separation turned out to be difficult and the conjecture about this is that the latter does not exhibit radically different values and catchwords, but use the same basic concepts of the former, manipulating their meaning. So, a test for this conjecture is to investigate – that is the article’s aim – a real case of procedurally legal transition from a *Rechtsstaat* regime to autocracy: the dissolution of the Weimar Republic and the rise to power of Nazism. And unfortunately, the test is successful: if *Rechtsstaat*’s legality is not coupled with legitimacy, even a dictatorship can rightly call itself a *Rechtsstaat*.

L’articolo costituisce un contributo a un progetto di ricerca. La sua tesi di fondo è che il *Rechtsstaat* sia psicologicamente più controintuitivo rispetto ai suoi concorrenti (ad esempio, sovranismo e populismo), e che la ragione di ciò risieda nel maggiore carico cognitivo richiesto per la sua elaborazione concettuale. Per dimostrare questa tesi, è stato necessario separare chiaramente una rete di termini che catturano gli elementi concettuali essenziali del *Rechtsstaat* da una rete analoga riferita ai suoi concorrenti. Tale separazione si è rivelata difficile; la congettura avanzata è che questi ultimi non presentino valori e parole chiave radicalmente differenti, ma utilizzino gli stessi concetti fondamentali del *Rechtsstaat*, manipolandone il significato. Un banco di prova per questa congettura è quindi l’analisi – che costituisce l’obiettivo dell’articolo – di un caso reale di transizione procedimentalmente legale da un regime di *Rechtsstaat* all’autocrazia: la dissoluzione della Repubblica di Weimar e l’ascesa al potere del nazismo. Purtroppo, il test risulta confermato: se la legalità del *Rechtsstaat* non è accompagnata dalla legittimità, anche una dittatura può legittimamente definirsi un *Rechtsstaat*.

KEYWORDS

Rechtsstaat, rule of law, Weimar Republic, legal formalism, legality, legitimacy

Rechtsstaat, stato di diritto, Repubblica di Weimar, formalismo giuridico, legalità, legittimità

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall’Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all’impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



The “Psychology” of *Rechtsstaat*: from a Sharp XIX-Century Distinction from Authoritarianism to the Collapse of One into the Other during Weimar Republic

GIOVANNI BISOGNI

1. Introduction – 2. *The Rising of Social Psychology and Its Impact on Legal Science* – 3. *Kelsen and Crowd Psychology* – 4. *From Rechtsstaat to Dictatorship: Hermann Heller* – 5. *Beyond Weimar*.

1. Introduction

When I was invited to take part to the seminar, I asked how to contribute to the research project. The response was to test a conjecture.

The basic contention of research project is that *Rechtsstaat* is psychologically more counterintuitive than its competitor (e.g., sovereignty; populism), and the reason for this would be the higher cognitive load required for conceptually processing the former. To demonstrate that contention, it was necessary to clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for competitor. This separation turned out to be difficult and the conjecture about this is that the latter does not exhibit radically different values and catchwords, but use the same basic concepts of the former, manipulating their meaning. So, a test for this conjecture is to investigate – that is my task – a real case of procedurally legal transition from a *Rechtsstaat* regime to autocracy: the dissolution of the Weimar Republic and the rise to power of Nazism.

I was happy to accept this invitation. Weimar was my first love – my first book was devoted to some prominent legal scholars of that age (BISOGNI 2005) – and, as they say, you never forget your first love.

The invitation made me return to it, but with a different, rather intriguing view, because it prompted me to look at this period from an unusual perspective: the connection between psychology, law, and State.

From a historical point of view, that connection is well-founded. And indeed, the birth of mass society made the continental legal science method – the so-called *juristische Methode* – increasingly out of date and prompted legal scholars to broaden their horizons towards new disciplines that studied mass behaviour, namely crowd psychology (section 1). In section 2, we will analyze how one of the greatest 20th century legal scholars – Hans Kelsen – assesses the contribution of crowd psychology to legal field: through Kelsen, we will see that this contribution is useful but limiting for legal scholar and, above all, does not help understand the rising practice of the (ab) use of *Rechtsstaat* to establish authoritarian regimes. Section 3 will demonstrate that the origin of this practice had more to do with the history of concepts than with social psychology: *Rechtsstaat* notion was losing its normative “worth”, getting more and more formalistic. Hermann Heller, another important author of the Weimar age, describes this shift very effectively: a bourgeoisie, frightened by mass society, no longer believes in the values behind *Rechtsstaat* concept and is satisfied by a procedural compliance with it, even if it channels authoritarian contents. It is this shift to explain why illiberal regimes use the same basic concepts as the notion of *Rechtsstaat*, but interpret them differently: so, there is no coincidence if post-war constitutionalism (section 4) rejected the “simple” notion of *Rechtsstaat* to embrace a “qualified” notion of it (social *Rechtsstaat*; democratic *Rechtsstaat*; constitutional *Rechtsstaat*) – a notion more cognitively demanding but consistent with contemporary society pluralism.

2. The Rising of Social Psychology and Its Impact on Legal Science

The psychology-law-State connection is historically justified for two reasons.

The first is the political and constitutional relevance of mass society between XIX and XX centuries. Nobody could ignore it because cities' landscape was changing: industrialization; public transport for workers; working-class urbanization and so on. But of course, it was not just a material phenomenon, but a social one too – corporations, public companies, trade unions, political parties, general strikes – and a political one – claim for labor regulations (on working hours, on child and women's work) and particularly for the extension of electoral suffrage.

It was a fascinating spectacle – see, for example, Futurism and its emphasis on all that was dynamic, fast –, but at the same time a frightening one due to its novelty and because it seemed beyond the scope of rationality, as it was understood until then.

That's the reason why enlarging knowledge to embrace and decipher mass behaviour got a pressing matter, and psychology was on the first line that way. In the late XIX century a new branch of it began to emerge: social psychology, which took the name of “crowd psychology” from the title of the work published in 1895 by the French psychologist, Gustave Le Bon, *Psychologie des Foules* (literally: psychology of crowds) (LE BON 1895) – a huge success at the time.

It is not my intention here to summarize the history of this sub-discipline: it would take us far away. It may suffice to point out that, retrospectively, it was quite naive, clearly deterministic, full of Lombrosian nuances (after all, a contribution to this field of study was offered by Cesare Lombroso himself) and by no means free from political aims – how crowds functioned, what threat they might represent to institutions that until then represented a social and economic élite and were elected by a part of it, and, last but not least, also to know what machinery could be used to govern and manipulate them (MOSCOVICI 1985; VAN GINNEKEN 1992).

At the same time, however, it had a positive impact too. To the extent that empirical dimension was taken into account, albeit primitively, it had a demystifying and unsettling effect on some disciplines that, for structural and historical reasons, had not updated their paradigm with respect to this phenomenon.

This was precisely the case with legal science – and we come to the second reason. The psychology-law-State connection is historically justified also due to the crisis of XIX century legal science – my view here is limited to German legal science, not only because I have been asked to deal with the Weimar age, but also because at that time German legal science was influential in continental Europe. One of its most important tenets was the so-called “*juristische Methode*”, coupled with “*Wertlosigkeit*”: to be such, a jurist had to practice his own method, specifically legal, without any sort of combination with other disciplines, and this self-sufficiency was based – subjectively – on the prohibition of being conditioned by moral, political or economic evaluations and – objectively – on the obligation to separate legal concepts and categories from the contingent moral, political or economic contents that the positive law in force could convey¹.

By the end of the 19th century, such an approach had produced a striking formalism both *de jure condito* and *de jure condendo*.

De jure condito. Take, for instance, the contract. For XIX century economy was essentially a real-estate one, the contract was designed as a strictly individualistic act. But at the end of the century, it ended up being unfit to regulate a new practice: negotiating wages and duties for all the employees of a factory or an industrial group through trade union representatives, and not individually – what we call now “collective labor agreements”, but, in the opinion of one of the “founding fathers” of German labor law, Philipp Lotmar, the law in force was more or less silent about them and accordingly legal science was struggling to square them into new categories (LOTMAR 1900).

De jure condendo. Take, for example, civil liability that no one denied was able to regulate that

¹ See, for private law, WIEACKER 1995, and, for public law, STOLLEIS 1999.

kind of tort represented by accident at work. However, as is well known, civil liability required the plaintiff – i.e., the worker, that usually could not afford lawsuit costs – to prove: 1. the existence of a damage; 2. the unlawfulness of it; 3. causation and 4. the employer's culpability. Unsurprisingly, one of the first concessions to trade union claims was accident insurance, that was mandatory for a large number of employers – a legal duty to contract: again, something inconceivable for a liberal mindset².

In short, the world was changing and at a speed and extent that legal science could not (but sometimes: did not want to) keep up with. Hence the need to abandon the safe “fortress” of the “*juristische Methode*”: it was necessary to open up to concreteness, to *materiality* of social life, so to say, and through this openness legal science could not but cross the path of crowd psychology.

But it was a path to tread carefully, as we can see through one of the leading figures of Weimar age: Hans Kelsen.

3. Kelsen and Crowd Psychology

In 1922 Kelsen published a long article in the journal *Imago* entitled *Der Begriff des Staates und die Sozialpsychologie. Mit besonderer Berücksichtigung von Freuds Theorie der Masse*. The journal was edited by Freud himself and had a meaningful subtitle: «Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften» (KELSEN 1922a) and what Kelsen does is precisely an application of psychology to the science of law and to the doctrine of the state – a critical application, however.

The article, as often happens with Kelsen, is very interesting from both a historical and theoretical point of view: it should be contextualized with respect to both the conditions of psychoanalysis at the time and to Kelsen's research goals and his conception of law and the state³. It is not necessary here to go into detail, except to the extent that at first glance this article would seem to confirm our conjecture, even without the empirical test requested (the fall of Weimar Republic analysis).

Kelsen surveys social psychology from its founder, Gustave Le Bon, to Freud's 1921 essay *Massenpsychologie und Ich-Analyse* (FREUD 1921). Kelsen's opinion about this science is not so enthusiastic, although he greatly appreciates the cognitive contribution made by Freud's writing.

Strictly speaking, social psychology should not exist, according to Kelsen. The psyche is only individual and there is no “collective” or “social” psyche *in rerum natura*. The psychological study of social relations should always start from an individual perspective, without hypostatizing entities with their own structure and psychological consciousness (KELSEN 1922a, 6 and 7). Thus, for Kelsen, Freud is right: a human being can be said to belong to a mass only if he develops an individual relationship, libidinal in character, through which he identifies himself with the object of the same relationship, losing the sense of his own individuality and acquiring that of belonging to a whole made up of all those who feed the same relationship (KELSEN 1922a, 13).

Kelsen shares the importance Freud gives to the object of mass libido: the *leader*, understood in both a material and an ideal sense. In a mass context, the leader is to the individual as, in the family, the father is to the child: just as «a little boy identifies himself with his father by wishing he were like him and might take his place in everything, when in short he takes his father for his ideal» (KELSEN 1922a, 16), so a mass member identifies himself with the leader, who embodies the ideal to which to conform his own behaviour and from whom he expects just criticism in the event of deviation from the model he indicates and offers. The consequence is that, for Freud, as for Kelsen, psychoanalytically speaking the mass is the re-edition of a very ancient, primitive

² See, for example, the strong opposition by National Liberals against the Accident Insurance Bill presented by Bismarck to *Reichstag* in 1884. On the formation of welfare state in Germany see STOLLEIS 2014.

³ Kelsen himself in the article (KELSEN 1922a, 1) refers to his own work *Der soziologische und der juristische Staatsbegriff* (KELSEN 1922b). On Kelsen and psychology see BUSCH 2016, FEICHTINGER 2016.

phenomenon: the *horde led by a chief* which «still wishes to be governed by unrestricted force; it has an extreme passion for authority; in Le Bon's phrase, it has a thirst for obedience. The primal father is the group-ideal, which governs the ego in the place of the ego-ideal» (KELSEN 1922a, 18).

It is now clear why this article appears to confirm straightforwardly our conjecture. First, from a cognitive point of view, a *Rechtsstaat* regime fails to stand out from an authoritarian state because a horde-dynamic runs under the machinery of both. And we must admit that, since this dynamic works intuitively better in the latter, it possesses a competitive advantage over the former. Second, a conclusion like that would be entirely consistent with Kelsen's legal theory. The socio-psychological relevance of the horde-dynamic would mirror the notion of law as coercive organization and would give a further explanation to another, well-known Kelsenian thesis: the legal-philosophical indistinguishability between a *Rechtsstaat* regime and an authoritarian one. If a state exists, it possesses a legal system, no matter if democratic or autocratic: therefore, Kant's claim to transform a state-subject into a citizen should be deemed essentially unnatural, because *Rechtsstaat* is anti-paternalistic, because it clashes with a psychological pattern according to which, whenever mass relations come into play, there is always in action a chief leading a horde.

This interpretation would be convincing, but it would amount to a misunderstanding of Kelsen's thought.

First, Kelsen's legal theory does not give any relevance to the reasons for obedience. Such reasons lie on the so-called *Sein* level (Is); instead, law (and state, too) are *Sollen* (Ought) entities: so, the existence of law does not necessarily depend on a specific psychological attitude towards it. To put it differently (and briefly), for Kelsen a legal system is valid when it is broadly effective – via the fundamental norm – and a legal system is effective when it is obeyed, but the reasons that sociologically or psychologically prompted obedience, for Kelsen, do not affect the legal nature of the system. A legal system is legal even if people at large do not obey out of fear of punishment, but – for example – due to a widespread, deep-rooted religious conscience.

Of course, this view could be discounted as recessive in current legal theory. If we aim to understand something about law, norms should be understood not as Kelsen claimed – i.e., the normative sense of an act falling in *Sein* domain –, but as reasons for action and, significantly, Hart remarked that rule-acceptance is a practice which, although not to be reduced to a psychological experience of obligation, is factual in nature (HART 1994 [1961], 57).

However, even if contemporary legal theory is right, we could not say that «the key to the science of jurisprudence» – to use John Austin's words – is the horde-dynamic.

Indeed, the idea that law and the state ultimately can only function on the basis of the paternal authority of a leader leaves unanswered a basic question: why law and the state are inexorably bound to this adolescent phase with no chance of emerging from it and getting adulthood. In other words, if *any* state can be reduced to a primitive horde, then Western legal and political thought's efforts to separate, for instance, the government of laws from the government of men, to shape law and state according to values like freedom and dignity of the human being, ends up resembling the well-known myth of Sisyphus: always and unconditionally predestined to fall back into the primitive condition. And, as always Kelsen rightly notes, the horde-dynamic explains the formation of a mass and the behaviour of an individual in it quite convincingly, but it is an explanation that can apply to *any* mass, not just that of the state:

«The wholly legal idea of the state can only be understood in its own specific judicial conformity, but not psychologically, as may the processes of the libidinal ties and associations which are the material of social psychology. The psychic processes by which the formation of leaderless groups is achieved (that is, of groups in which the individuals who are reciprocally identified substitute an abstract idea instead of the idea of the concrete personality of the leader for their ego-ideal) is, however, similar in all cases, whether it involves the idea of a nation, a religion, or a state» (KELSEN 1922a, 23 and 24).

To grasp the relevant distinction between «a nation, a religion, or a state», for Kelsen, we must leave the domain of the unconscious. No doubt some citizens can relate to their own state in libidinal terms, but if we theorize law and the state only from this point of view, we risk plunging into the Hegelian «night in which all cows are black». Law and the state are too complex, too “artificial” to be reduced to the “naturalness” of a psychological perspective, even a social-psychological one, and this perspective is too narrow to understand their specificity and to distinguish them from other social phenomena such as the nation or religion:

«These social phenomena» – Kelsen adds – «appear as *differentiated* institutions only from the point of view of their specific content, only in so far as they are conceived of as ideational systems, as specific thought-trends, as *mental contents*, and not as psychic processes maintaining and realizing these contents» (KELSEN 1922a, 24).

4. *From Rechtsstaat to Dictatorship: Hermann Heller*

So, following the path of crowd psychology we have not made much progress.

True, in mass society a horde-dynamic is often at work behind obedience to the state. But that dynamic makes no difference between religion, the nation, the state and – we might add – between *Rechtsstaat* and its competitor: from this point of view, the effort to conceptually distinguish the former from the latter turns to be pointless⁴. And after World War I, this distinction was getting more a tremendously *real* issue than a matter of psychology alone: a full-hearted advocate of authoritarianism could rise to power through the procedures of *Rechtsstaat* (elections, legislative process, etc.), transforming it into a legal dictatorship with no *coup d'état* – Italy, for instance, was one of the first countries to go along this path. In other words, our problem – clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for its competitor – was increasingly concerning the “ideational systems”, the “mental contents” referred to by Kelsen.

We can find the best formulation of this problem in Gustav Radbruch’s handbook of legal philosophy:

«How is it possible for the state to be bound by its own law? How are rights of the individual against the state, how are constitutional and administrative law — and constitutional and administrative legal wrong — how is a government of laws, possible? This problem has traditionally been raised by asking whether law “precedes” the state or the state “precedes” law, that is, whether the state owes its power of command, as to its extent and limits, to the law, or whether contrariwise the validity of the law is determined and conditioned by the will of the state» (RADBRUCH 1950, 201).

Now, a possible way out was suggested by Kelsen himself, who identified – as mentioned above – law and the state. However, according to Radbruch this was not a solution, but rather a dele-

⁴ As we can see in Karl Olivecrona’s thought – member of Scandinavian legal realism –, who made psychology the empirical basis for the study of law and for a critique of the alleged “scientificity” of legal scholars of the time (OLIVECRONA 1941). In Olivecrona, psychology has a structural role, and it aims to explain the functioning of “any” legal system, no matter what contents and values it expresses, no matter it is a *Rechtsstaat* or a dictatorship: «Every instance of the kind of relationship we term “power” is a psychological relation. The lever of power is always a psychological influence of one person on another. This may appear as a frail instrument. In reality, however, its strength is stupendous, given the proper conditions. It is the instrument by which every country is governed in peace and war, the instrument through which order and security is maintained and through which armies are driven to battle against each other» (OLIVECRONA 1941, 219 and 220). Unsurprisingly it is not so detailed (he writes that his «is not intended as a book on psychology», OLIVECRONA 1941, 31): not only there is no reference to horde, but even Freud is never mentioned. For this reason, it is not so useful in verifying or falsifying our conjecture.

tion of the problem: «The doctrine of identity is of purely analytical significance for purposes of definition but is of no legal philosophical substance for purposes of policy» (RADBRUCH 1950, 202). Indeed, Kelsen's thesis could be «incontestably» accepted only «in a purely juridical view» (RADBRUCH 1950, 202): the state could hardly be anything other than its own law only in what Radbruch labels as the “ideal” dimension – that is, the “Ought” domain. But – Radbruch adds – the relationship between law and the state had also “real” relevance – in the “Is” domain – and extending the solution on the “ideal” level to the “real” one ends up being an undifferentiated use of terms such as, for example, “science”, that

«on the one hand means the standard of truth for the activity of gathering knowledge, by which shortcomings in knowledge are measured as unscientific, and on the other hand it means the historical cultural concept which, neutral as to values, embraces scientific truth and scientific error» (RADBRUCH 1950, 203).

Thus, «the doctrine of identity» provided no clear distinction between *Rechtsstaat* and dictatorship, and during the Weimar age – but for our enquiry too – *this* was the problem of *Rechtsstaat*:

«Now the question of the priority of the law or the state refers on the one hand to the normative concept of the law, and on the other hand to the concept of the state in reality. These two concepts are by no means identical but, on the contrary, involve the highest tension, viz., the tension which usually exists between a norm and a reality but which is here still further increased» (RADBRUCH 1950, 204).

So, it was impelling to shed light on the «legal philosophical substance for purposes of policy» of the *Rechtsstaat* concept. It was impelling to understand how it was possible that in the 1930s, after a century of *Rechtsstaat* theory and practice, that “substance” was lost to the point that one of the greatest legal scholars of the 20th century – and, no doubt, a sincere advocate of democracy – ended up downgrading the *Rechtsstaat* concept to an analytical, merely descriptive formula, through which any state, even a dictatorship, is a *Rechtsstaat*.

The answer comes from another “classic” of Weimar age: Hermann Heller.

For some time now Heller is experiencing a sort of revival, mainly due to his political criticism to liberalism⁵. But, beyond this renaissance, I strongly suggest his works because he is the best guide to Weimar legal literature – he provides a comprehensive overview of both Kelsen's and Schmitt's thought, while maintaining a position all his own and, after the Second World War, Schmitt regarded him as «damals der beste Kopf in Deutschland»⁶.

In 1930, Heller wrote an essay entitled *Rechtsstaat oder Diktatur?* (HELLER 1992 [1930]), where we can find the answer.

Heller starts from an opposite consideration to Kelsen's. Historically, the *Rechtsstaat* notion had a clear «legal philosophical substance for purposes of policy», in Radbruch's terms: it was created *precisely against* dictatorship. Only in the early post-war period this notion seems to have lost not only appeal – many were convinced that dictatorship was the most appropriate form of state for post-war mass society –, but even heterogeneity with respect to authoritarian regimes, turning into an empty shell⁷.

⁵ See MENENDEZ 2015: the issue presents a special section revolving around the English translation of Heller's article *Autoritärer Liberalismus*, originally published in 1933.

⁶ Quoted in PASQUINO 1983, 138; on Heller see MÜLLER, STAFF 1984, POMARICI 1989, DYZENHAUS 1997.

⁷ Put in Hartian terms, the problem raised by Heller affected the well-known «internal point of view» (HART 1994 [1961], 88 ff.): the internal point of view of a long political and legal practice based on values such as freedom and equality. No doubt, even if the «minimum content of natural law» (HART 1994 [1961], 193 ff.) is restricted to a small part of society, law is the state, and the state is law from an external point of view. But for Heller, it was necessary to understand why «bis zum Ausgang des Weltkrieges war der Rechtsstaat in Europa eine Selbstverständlichkeit gewesen» and yet in the post-war period, «wenn es auch nicht allzu wichtig zu nehmen ist, daß ein bekannter

Heller very effectively outlines the historical-conceptual steps leading to this result.

Rechtsstaat, in his view, came into being to meet two demands, the first preceding the French Revolution, the second emerging with it.

The first one was economic in character and is called modern capitalism (HELLER 1992 [1930], 445 and 446). After Max Weber's masterful contribution, there is little to say: capitalism needs uniform rules across borders, which means an increasingly general and abstract regulation and less and less tailored to that patchwork that was the corporate society of *ancien régime*. As a result, modern capitalism finds essential a single rules-creating authority in the country – exactly those national monarchies which sought to centralise law-creation from the 16th century onwards and ever more intensively in the following centuries.

The second demand appears in the 1700s and has an “axiological” nature, so to speak (HELLER 1992 [1930], 447 and 448). In short, it is called freedom: freedom to manage one's own moral and material life without interference from other individuals and above all from institutional agencies like the Church; but also, freedom from heteronomy, that is, the idea that each person is sovereign of himself and no one is naturally subject to others because, as Article 1 of the Declaration states, «men are born and remain free and equal in rights». Therefore, any obligation must always be founded on this individual sovereignty, either directly – and that is the contract – or indirectly – and that is the law produced this time no longer by the monarch, but by individual sovereigns put together, i.e., the people.

The result is a notion that – borrowing the same terms used at the beginning of this article – exhibits values and catchwords radically other than authoritarianism's. They are: the popular or *latu sensu* democratic source of law; the supremacy of law over all public powers; the separation of powers (particularly, the independence of judge) because all the powers in one hand represent a serious threat to freedom; the idea, as a consequence of art. 1, that the law «must be the same for all, either that it protects, or that it punishes», i.e. the rule by general norms (and not by particular decree); and last but not least, the content-independence of laws since they are expression of individual sovereignty, and heteronomy would once again appear if there is an authority other than the people entitled to dictate law's content.

It is worth noting that these catchwords were not open to manipulation by possible alternative political models. Due to the success of bourgeois capitalism over pre-modern types of economy and due to the bourgeoisie's grip on institutions through census suffrage, the social environment could hardly change to the point of creating dissonance with respect to the two demands at the foundations of *Rechtsstaat* – and even within them. Instead, that environment was extremely stable, ruled by a numerically small and culturally homogeneous social class – in Heller's words, a «geistig und wirtschaftlich erstarkten Bürgertum» (HELLER 1992 [1930], 448), where “economy” and “freedom” developed in a mutually consistent way. The result is a context – a *materiality* – that made the basic concepts of *Rechtsstaat* rather intuitive, and the cognitive load required to process those catchwords relatively “low”, keeping them away from misinterpretation.

This can be seen very clearly in relation to the last of the properties of the *Rechtsstaat* concept listed above: the content-independence of law. This means that a law is valid if it is enacted by the competent authority – i.e., the popular, *latu sensu* democratic law-giver – regardless of its content. This is a *formal* notion of law, usually referred to as “legality”, but – this is the point to emphasize – it was not a *formalistic* notion, due to what we have called the “materiality” behind *Rechtsstaat* understanding in XIX century. It ensured that legality also expressed “legitimacy”: a law could have any content because its source was the people, i.e., those men born and remaining free and equal in

deutscher Staatsrechtslehrer die Diktatur als die spezifisch moderne Staatsform, den Rechtsstaat aber als veraltetes Verfassungsklischee bezeichnet, so ist die Möglichkeit einer solchen Behauptung dennoch symptomatisch» (HELLER 1992 [1930], 445). Heller added, with reference to Kelsen, that «die leeren Abstraktionen dieses nomokratischen Denkens tragen nicht wenig dazu bei, gerade unter einer nach sittlichen Begründungen suchenden und wirklichkeits-hungrigen Jugend den Diktaturgedanken zu befördern» (HELLER 1992 [1930], 451).

rights, and this made it completely unthinkable to have a law that was openly discriminatory, for example, against Jews, Roma, homosexuals. Heller admits that this “materiality” was shared only by those who possessed «Bildung und Besitz» when «der Besitz noch gebildet und die Bildung noch besitzend war» (HELLER 1992 [1930], 448). But, as Heller adds, «das mußte sich im Zeitalter des entwickelten und organisierten Kapitalismus grundlegend ändern» (HELLER 1992 [1930], 448).

By the end of the 19th century, capitalism had made the working class self-aware and strong enough to make a claim: to be part of those men «born and remaining free and equal in rights» and to be entitled to vote just like «Bildung und Besitz» social class. The result was a deadly paradox for the *Rechtsstaat*:

«Der wirtschaftlich Schwache versucht mittels der Gesetzgebung, den wirtschaftlich Starken zu fesseln, ihn zu größeren sozialen Leistungen zu zwingen oder ihn gar aus dem Eigentum zu verdrängen. So hat der Kapitalismus das demokratische Prinzip zu Konsequenzen geführt, die dessen eigenen Schöpfer, das Bürgertum, in seiner Herrschaft bedrohen» (HELLER 1992 [1930], 448).

A bourgeoisie that in this condition – Heller adds – «beginnt am Rechtsstaatsideal zu verzweifeln und seine eigene geistige Welt zu verleugnen» (HELLER 1992 [1930], 449). It realizes that “inventions” like political legitimacy from below, elections, content-independence of law and so on can be used not only by other social classes, but above all *against* it – to undermine its economic power and to convey a sense of justice other than freedom and inspired by greater material equality. The social environment is no longer the same as in the previous century and, from a psychological point of view, yields dissonance within the bourgeois cognitive world. The first demand at the origins of the *Rechtsstaat* concept – the one previously labelled as “economic” and centered on capitalism – gets more and more inconsistent with the second – the one defined as “axiological” and focused on freedom –: unconditionally complying with the latter means jeopardizing the former; it could be discarded in favor of an autocracy at the service of capitalism, but psychologically this would be too burdensome – by now *Rechtsstaat* is the “form-of-life”, in Wittgenstein terms, of the bourgeoisie and what feeds its social respectability. The consequence is what we might call a defense mechanism, except that it is an intentional strategy based on the rejection of the materiality underlying the *Rechtsstaat*: its forms, its procedures, its “rituals” are left unchanged, but on condition that who rises to power interprets *Rechtsstaat* catchwords to preserve the bourgeoisie’s economic rule, even at the cost of freedom’s sacrifice.

It is from now on that the formal notion of law turns to be formalistic:

«Von nun an ist es bis nach der Revolution von 1918 unbestrittene Lehre, dass z.B. der die Gleichheit vor dem Gesetz garantierende Art. 4 der Preußischen Verfassung von 1850 nicht etwa ein Willkürverbot für den Gesetzgeber bedeute, sondern sich nur an den das fertige Gesetz anwendenden Beamten wende. Damit hatte das Gerechtigkeitsideal für den Gesetzgeber seine Geltung verloren und war herabgesunken zu einer formellen Verwaltungsmaxime, die ohne Rücksicht auf den gerechten oder ungerechten Inhalt des Gesetzes dessen berechenbare Anwendung auf den Einzelfall verlangte. Nun kam es nur noch auf diese Rechenhaftigkeit und bourgeoise Sekurität des Gesetzes an, nicht mehr auf seine Richtigkeit» (HELLER 1992 [1930], 449).

The “materiality” underpinning the formal notion of law has dissolved: legality is no longer followed by legitimacy. The former has become a facade: it suffices to have independent judges subject “only” to the law, and to rule by general norms to be a member of the club of nations with a *Rechtsstaat*. By now law can *really* have any content: even an autocrat is able to declare to adhere to the principle of legality, but only to convey a legitimacy completely other than at the origins⁸.

⁸ Of course, Kelsenian thesis – any state is a *Rechtsstaat* – by no means implies a bias towards autocracy. According to Kelsen, the struggle for the *Rechtsstaat*’s “rechtsphilosophisch-politische Gehalt” (in Radbruch’s terms) should be

That was what happened in Germany in 1933. Nazism, more effectively than Fascism, rose to power through legal means – and Hitler knew very well how essential conformity to legal forms was to strategically stabilize his political success.

The *Reichstag* was not stormed like the Winter Palace. Hitler was legitimately appointed chancellor by President Hindenburg following the crisis of the von Schleicher cabinet, and, I might add, without any march on Berlin.

As known, art. 48, par. 2, RV, authorised the President to enact decree suspending some fundamental liberties (for instance, personal freedom, inviolability of property, secrecy of correspondence, freedom of opinion, freedom of assembly and association), when «im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird». And it was the President Hindenburg who, following the *Reichstag* fire, issued such a decree which suspended those liberties “bis auf weiteres”, in order to reaffirm the authority of the state against “kommunistischer staatsgefährdender Gewaltakte”.

The (in)famous *Gesetz zur Behebung der Not von Volk und Reich* of 24 March 1933, today known as *Ermächtigungsgesetz*, was a very regular (from a procedural point of view) constitutional amendment, passed by a 2/3 majority of the *Reichstag*. And even after that the regime was careful not to replace the BGB – the German Civil Code – or to affect the principle of judicial subjection only to law. As Ernst Fraenkel noted in his still relevant interpretation of the functioning of the Nazi state (FRAENKEL 1969), this represented one of the two faces of it: the «Normenstaat», the normative state, the state based on general norms, functional only to the first of the two demands at the origin of *Rechtsstaat* – the economic one, expressed by modern capitalism. The axiological demand of the regime was quite different and ran along a different track, called by Fraenkel «Massnahmenstaat», the prerogative state, the state of pure arbitrariness practiced by the various agencies that competed for political supremacy within the regime.

Of course, *Rechtsstaat oder Diktatur?* was not only expository, but also constructive. Heller suggested to save the *Rechtsstaat* idea from this formalistic decline through a “re-materialisation” of it: by recognising the claim for social justice coming from the “economically weak party” and culminating in a renewed *Rechtsstaat*, the “soziales Rechtsstaat” (HELLER 1992 [1930], 450).

True, but it is another story. It is a story that begins *after* Weimar; but above all, it is the story of *something different*, which we could call the story of “qualified” *Rechtsstaat* (social *Rechtsstaat*; democratic *Rechtsstaat*; constitutional *Rechtsstaat*). As far as “simple”, “unqualified” *Rechtsstaat* is concerned, its history ends here. At best, it is a partisan notion now: it is being labelled as “liberal” – «bürgerlicher Rechtsstaat», a descriptive name for a kind of state coming from the past⁹. At worst, it is a mere slogan, useful to “sell” a deliberately vague and indeterminate materiality to justify highly questionable politics – to the point that from a theoretical and perhaps even historical perspective there is little interest in delving into the post-1933 debates on whether the new regime could be categorized as a *Rechtsstaat*: it would only be an exercise of erudition and, as Michael Stolleis rightly noted (STOLLEIS 2004, 349 ff.), it was essentially an academic power fight¹⁰.

fought on the level of what he calls “legal politics” and not on the level of “science of law” – and Heller himself sees in Kelsen one of the few advocates of «dieser Glaube an eine entleerte Nomokratie, die Utopie des ewigen Friedens durch endgültige Vergesetzlichung aller Individualität» (HELLER 1992 [1930], 451). But Heller warns at the same time that «die leeren Abstraktionen dieses nomokratischen Denkens tragen nicht wenig dazu bei, gerade unter einer nach sittlichen Begründungen suchenden und wirklichkeitshungrigen Jugend den Diktaturgedanken zu befördern» (HELLER 1992 [1930], 451).

⁹ See, for example, SCHMITT 2008, 167 ff.

¹⁰ Something like that happened in Italy too with a debate revolving around the question whether Fascist state was to be classified as an example of a *Rechtsstaat* (see BODDA 1935; ALLORIO 1942).

5. Beyond Weimar

Conclusively, I was asked to test a conjecture, and unfortunately the test is successful. If *Rechtsstaat*'s legality is not coupled with legitimacy – and only the bourgeoisie believed in it, as happened in XIX century –, both *Rechtsstaat* and authoritarian state do not exhibit radically different values and catchwords, but share the same basic concepts: even a dictatorship can rightly call itself a *Rechtsstaat*, to establish not even a government of men, but of organised gangs, as Nazi regime was.

Let me add an afterword.

It is no surprise that none of the main post-World War II constitutions adopted the “simple”, “unqualified” *Rechtsstaat* formula. Not the Italian Constitution, nor the French one. Not the German one, which uses the «demokratischer und sozialer Bundesstaat» formula (and speaks of *Rechtsstaat* only in relation to the *Länder* (and, later, to EU)¹¹. In the Spanish Constitution the “Estado de Derecho” formula figures in the Preamble, but art. 1 specifies that Spain is an «Estado democrático y social de Derecho». Nor does the Portuguese Constitution, which identifies the Republic as an «Estado de direito democrático».

It might be interesting to test the conjecture in relation to these formulas, but it would obviously be another research project. Yet, I do not think that the outcomes of this future project would be different than the current ones. As demonstrated before, in Weimar legality ends up divorcing from legitimacy in relation to “simple” *Rechtsstaat*, converting legal concepts into formalistic ones, and something similar seems to be happening to the post-World War II “qualified” *Rechtsstaat*. Indeed, it does not seem that social *Rechtsstaat* can still be counted among the *naturalia rei publicae* if we remind Margaret Thatcher’s slogan «there is no alternative» and the following years of rampant neo-liberalism. Democratic *Rechtsstaat* also seems to be in trouble if illiberal democracies are now a common phenomenon and not the contingent deviation from a trend of absolute regularity – and the rich literature on the topic is good evidence in this respect. And finally constitutional *Rechtsstaat* does not perform better if one of its main theorists – Gustavo Zagrebelsky – in the introduction to the recent reprint of his book, *Il diritto mite*, feels compelled to specify that this formula should be not intended as a normative conception – a desideratum for the future, in search of implementation –, but the description of a state-of-affair – a state-of-affair that unfortunately many describe in another way (ZAGREBELSKY 2024, chs. X and XI).

If this picture is true, we may say that XIX century was the golden age of *Rechtsstaat*, when it required no qualifier, when legality and legitimacy were two sides of the same coin, when a higher cognitive load to process it was unnecessary, and it was much less counterintuitive than today. And we may add that it is hard for the “qualified” notion of *Rechtsstaat* to aspire to the “psychological” success achieved by the “simple” notion of it during XIX century not only because the “qualified” nature of the current notion, so to say, “weakens” the intuitiveness of the original formula, but also because the former lacks the cultural homogeneity that had enabled the success of the latter – after all, as the previous review of comparative law shows, the “qualified” notion of *Rechtsstaat* is manifold, while the “simple” one was at singular.

But the perspective should be reversed. Instead of evaluating current formulas on the yardstick of a (supposedly) successful one, we should admit that history has changed, and we can no longer retain those “psychological” beliefs that only the XIX century context could nurture. The “qualified” notion of *Rechtsstaat* is hard to be psychologically processed precisely as *deliberately*

¹¹ Indeed, it is meaningful that the “simple” *Rechtsstaat* formula, disappeared at national level, reappeared in 1992 in European Union law. And based on what we have said, this re-surface can be interpreted either as a rejection of the “qualified” *Rechtsstaat* formula and thus as a return to the (neo)liberal *Rechtsstaat* or simply as an umbrella formula aimed to get consensus from all member states – a consensus that would have been more difficult to achieve in front of the “qualified” *Rechtsstaat*. In short, a bit like Jacques Maritain said about human rights at the UN: «Yes – they said – we agree about the rights but on condition that no one asks us why» (MARITAIN 1949, 9).

counterintuitive from the outset. It consists of heterogeneous and open-textured basic concepts: as a result, it is based on a mixed and pluralistic – and therefore more fragile – legitimacy, which requires consciousness, commitment, care, especially against possible manipulation.

As Zagrebelsky rightly puts:

«Un diritto e una costituzione pensati per situazioni storiche che non esistono più (come fanno coloro che deplorano le difficoltà del nostro tempo e rimpiangono immaginarie età dell'oro) e forse esisteranno ma non esistono ancora (come fanno coloro che sperano in un futuro migliore del presente): questo, sì, sarebbe un modo per fare ideologia costituzionale guardando indietro oppure in avanti e ignorando lo stato delle cose. Il nostro tempo costituzionale è difficile. Occorre prospettare soluzioni né nostalgiche né utopistiche ai problemi che esistono. Ma, prima di tutto occorrerebbe leggere diversamente la realtà nella quale il diritto si trova ad operare per svolgere la funzione che gli è propria. Questa realtà è riassumibile in una sola parola: pluralismo» (ZAGREBELSKY 2024, XI-XII).

References

- ALLORIO E. 1942. *L'ufficio del giurista nello Stato unitario*, in «Jus. Rivista di scienze giuridiche», 3, 1942, 274 ff.
- BISOGNI G. 2005. *Weimar e l'unità politica e giuridica dello Stato. Saggio su Rudolf Smend, Hermann Heller, Carl Schmitt*, Edizioni Scientifiche Italiane.
- BODDA P. 1935. *Lo stato di diritto. A proposito di alcune recenti opinioni*, Giuffrè.
- BUSCH H-J. 2016. *The individual and the democratic state. Remarks on Kelsen's reception of Freud and its importance for a critical political psychology and the development of democracy*, in BRYAN I., LANGFORD P., MCGARRY J. (eds.), *The foundation of the juridico-political. Concept formation in Hans Kelsen and Max Weber*, Routledge, 140 ff.
- DYZENHAUS N. 1997. *Legality and legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller*, Clarendon Press.
- FEICHTINGER J. 2016. *Intellectual affinities: Ernst Mach, Sigmund Freud, Hans Kelsen and the Austrian anti-essentialist approach to science and scholarship*, in BRYAN I., LANGFORD P., MCGARRY J. (eds.), *The foundation of the juridico-political. Concept formation in Hans Kelsen and Max Weber*, Routledge, 117 ff.
- FRAENKEL E. 1969. *The Dual State. A Contribution to the Theory of Dictatorship*, Octagon Books.
- FREUD S. 1921. *Massenpsychologie und Ich-Analyse*, Internationaler Psychoanalytischer Verlag (en. ed. *Group Psychology and Analysis of Ego*, The International psychoanalytical press, 1922).
- HART H.L.A. 1994. *The Concept of Law. With a Postscript edited by Penelope A. Bulloch and Joseph Raz*, Clarendon Press (1961).
- HELLER H. 1992. *Rechtsstaat oder Diktatur?*, in ID., *Gesammelte Schriften*, vol. 2, Mohr, 443 ff (1930).
- KELSEN H. 1922a. *Der Begriff des Staates und die Sozialpsychologie. Mit besonderer Berücksichtigung von Freuds Theorie der Masse*, in «Imago. Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften», 8, 1922, 97 ff. (en. ed. *The Conception of State and Social Psychology. With Special Reference to Freud's Group Theory*, in «The International Journal of Psycho-Analysis», 5, 1924, 1 ff.).
- KELSEN H. 1922b. *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, Mohr.
- LE BON G. 1895. *Psychologie des Foules*, Alcan (en. ed. *The Crowd: A Study of the Popular Mind*, T. Fisher Unwin, 1895).
- LOTMAR P. 1900. *Die Tarifverträge zwischen Arbeitgebern und Arbeitnehmern*, in «Archiv für soziale Gesetzgebung und Statistik», 15, 1900, 1 ff.
- MARITAIN J. 1949. *Introduction*, in *Human Rights. Comments and Interpretations*, Columbia University Press.
- MENENDEZ A.J. 2015. *Hermann Heller NOW*, in «European Law Journal», 21, 2015, 285 ff.
- MOSCOVICI S. 1985. *The Age of the Crowd: A Historical Treatise on Mass Psychology*, Cambridge University Press (tr. by J.C. Whitehouse; or. ed. *L'âge des foules. Un traité historique de psychologie des masses*, Fayard, 1981).
- MÜLLER C., STAFF I. (eds.) 1984. *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller*, Nomos.
- OLIVECRONA K. 1941. *Law as Fact*, Oxford University Press.
- PASQUINO P. 1983. *Presentazione a Heller H., Democrazia politica e omogeneità sociale*, in «Quaderni piacentini», 10, 1983, 138 ff. (or. ed. *Politische Demokratie und soziale Homogenität*, in *Probleme der Demokratie*, Walter Rotschild, 1928, 35 ff.).
- POMARICI U. 1989. *Oltre il positivismo giuridico. Hermann Heller e il dibattito sulla Costituzione weimariana*, Prismi.
- RADBRUCH G. 1950. *Legal Philosophy*, in WILK K. (ed.) *The legal Philosophies of Lask, Radbruch, and Dabin*, Harvard University Press (tr. by K. Wilk; or. ed. *Rechtsphilosophie*, Quelle & Meyer, 1932).
- SCHMITT C. 2008. *Constitutional Theory*, Duke University Press (tr. by J. Seitzer; or. ed. *Verfassungslehre*, Duncker & Humblot, 1928).

- STOLLEIS M. 1999. *Geschichte des öffentlichen Rechts in Deutschland. 2. Staatsrechtslehre und Verwaltungswissenschaft (1800-1914)*, Beck.
- STOLLEIS M. 2004. *A history of public law in Germany (1914-1945)*, Oxford University Press (tr. by T. Dunlap; or. ed. *Geschichte des öffentlichen Rechts in Deutschland. 3. Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur, 1914-1945*, Beck, 1999).
- STOLLEIS M. 2014. *Origins of the German Welfare State. Social Policy in Germany to 1945*, Springer (tr. by T. Dunlap; or. ed. *Geschichte der Sozialpolitik in Deutschland seit 1945. 1. Grundlagen der Sozialpolitik*, Nomos, 2001, 199 ff.).
- VAN GINNEKEN J. 1992. *Crowds, Psychology, and Politics, 1871-1899*, Cambridge University Press.
- WIEACKER F. 1995. *A History of Private Law in Europe: with particular reference to Germany*. Clarendon Press (tr. by T. Weir; or. ed. *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung*, Vandenhoeck & Ruprecht, 1967).
- ZAGREBELSKY G. 2024. *Il diritto mite. Legge, diritti, giustizia*, Einaudi.

Are There Populist Constitutional Heuristics? Some Tentative Answers, and Their Implications for a Research Project

LEONARDO PIERDOMINICI

University of Bologna, Italy.

E-mail: leonardo.pierdominici@unibo.it

ABSTRACT

This article engages with the research agenda of the CLEAR project by questioning whether contemporary populist and sovereigntist movements articulate a genuine alternative model of constitutionalism and the rule of law. It argues that populist constitutional discourse does not generate novel conceptual categories, but instead advances a constitutional counter-narrative based on the instrumental reinterpretation of established constitutional concepts. Drawing on comparative constitutional analysis and theories of autocratic legalism and abusive constitutional borrowing, the paper shows how notions such as sovereignty, democracy, and majority rule are strategically simplified and hollowed out. In this perspective, populism exploits the cognitive and normative complexity of the rule of law highlighted by CLEAR, not to replace it, but to subordinate it to decisionist logics. The article concludes that the key analytical task lies in contrasting the normative density of the rule of law with its populist distortions rather than in searching for an autonomous populist constitutional theory.

Il contributo si confronta con l'agenda di ricerca del progetto CLEAR e si propone di verificare se i movimenti populistici e sovranisti contemporanei effettivamente elaborino un autentico modello alternativo di costituzionalismo e di *rule of law*. La tesi sostenuta è che il discorso costituzionale populista non produca nuove categorie concettuali, ma si configuri piuttosto come una contro-narrazione costituzionale fondata sulla manipolazione e sulla reinterpretazione strumentale di concetti già consolidati nel lessico del costituzionalismo. Attraverso il ricorso all'analisi costituzionale comparata e alle teorie dell'*autocratic legalism* e dell'*abusive constitutional borrowing*, il saggio mostra come nozioni quali sovranità, democrazia e governo della maggioranza vengano sistematicamente semplificate e private della loro densità normativa. In questa prospettiva, il populismo non mira a sostituire il modello della *rule of law*, bensì ne sfrutta la complessità cognitiva e normativa per assoggettarlo a logiche decisioniste. Si conclude pertanto che la principale sfida consista non tanto nel ricercare una teoria costituzionale populista autonoma, quanto piuttosto nel confronto critico tra la densità normativa della *rule of law* e le sue distorsioni populiste.

KEYWORDS

Rule of law, populist constitutionalism, autocratic legalism, constitutional discourse, normative density

Stato di diritto, costituzionalismo populista, legalismo autocratico, discorso costituzionale, densità normativa

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



Are There Populist Constitutional Heuristics? Some Tentative Answers, and Their Implications for a Research Project

LEONARDO PIERDOMINICI

1. *Introduction* – 2. *Sovereigntist Legal Theory: Specific New Concepts or Instrumentalization?* – 3. *Abusive Constitutional Borrowing, Autocratic Legalism and the Rule of Law* – 4. *As a Conclusion*.

1. *Introduction*

The research hypothesis underpinning the CLEAR project is both original and intellectually compelling. CLEAR seeks to explore – also through empirical methods – the conceptual structure of the rule of law as an ideal, contrasted with an alternative model of constitutional organization that the same proponents broadly describe as “decisionist”, “sovereigntist”, “populist”. The core hypothesis is that the rule of law constitutes a cognitively demanding and normatively dense construct, far more complex to comprehend and operationalize than models focused primarily on decisionism, in which concerns for legal guarantees and constraints are relegated to the background.

To rigorously test this hypothesis, however, it is necessary to undertake a theoretical reconstruction of the key conceptual pillars underpinning this alternative, “decisionist” paradigm. It is precisely at this juncture that the CLEAR project intersects with my own research.

Together with Giuseppe Martinico, I co-edited a volume in 2023 entitled *Miserie del sovranismo giuridico. Il valore aggiunto del costituzionalismo europeo* (“The Poverty of Legal Sovereigntism: The Added Value of European Constitutionalism”)¹. The book sought to address what we termed the “poverty of legal sovereigntism” in its various dimensions. We critiqued what we termed “legal sovereigntism” for its reductionist and instrumental strategy aimed at hollowing out European constitutional values; for its confinement to a purely destructive posture (*pars destruens* with no *pars construens*); and for its epistemological limitations.

The researchers affiliated with CLEAR, many of whom are legal philosophers, expressed particular interest in this latter dimension. They asked whether our inquiry had succeeded in identifying any new, distinctive conceptual categories generated by legal sovereigntism as a coherent alternative to traditional constitutionalism.

As a contribution to their important project, I offer here some tentative answers to that question, grounded in my perspective as a comparative public lawyer. My answers indicate a diversity of disciplinary approaches, which is very interesting from a methodological point of view and for future research. My answers also underscore the value of methodological pluralism and disciplinary cross-fertilization – an aspect that, in itself, adds significant depth to the CLEAR initiative.

2. *Sovereigntist Legal Theory: Specific New Concepts or Instrumentalization?*

It is both natural and intellectually stimulating that legal philosophers direct their inquiries toward the identification of new legal conceptual frameworks. In this regard, comparative lawyers too have their own propensities: they may also be considered theorists, albeit with a marked incli-

* Thanks are due to the conveners of the conference “Rule of Law: in Books, in Minds. Concepts of the Rule of Law: Empirical and Analytical Research”, held in Bologna on July 7-8, 2025, as well as to the anonymous reviewers, all of whom provided valuable feedback, comments, and suggestions.

¹ MARTINICO, PIERDOMINICI 2023.

nation toward more empirically grounded research based on the observation of political doctrinal trends in different legal orders. Indeed, the approach taken in *Miserie del sovranismo giuridico* to examine sovereigntist and populist legal thought within the context of European constitutionalism was, in this sense, empirical in nature. And as we will see, this orientation aligns closely with recent trends in comparative public law scholarship across global academic communities.

One of the arguments advanced in that book was the following: there is no such thing as a sovereigntist and populist theory of the constitution; on the opposite, there is a strong tendency towards a constitutional counter-narrative advanced by sovereigntists and populists, based on their instrumental manipulation of the categories of constitutionalism.

The same argument was refined and further exposed by Martinico himself in other works².

How is it possible, in this respect, to write “on the opposite”? Can we truly describe, in this perspective, such constitutional counter-narrative as an “opposite” phenomenon to a true sovereigntist and populist constitutional theory?

In my view, it is surely possible – particularly when considering the lack of conceptual innovation involved. Sovereigntist and populist discourse does not generate a novel vocabulary of constitutional theory. Instead, it engages in a strategic appropriation and reconfiguration of pre-existing constitutional concepts. These actors neither replace nor significantly develop new conceptual tools; rather, they rely on established constitutional language, which they manipulate – sometimes hollowing out its meaning from within – while preserving its external form.

This is not merely a theoretical observation; it reflects a deliberate strategic posture, as recognized by a growing body of scholarship examining the complex relationship between constitutionalism and populism.

Earlier approaches in public law scholarship often portrayed the relationship between populism and constitutionalism in starkly antagonistic terms³. More recently, however, the academic conversation has evolved considerably, giving rise to more nuanced and analytically sophisticated interpretations. Within this shifting landscape, a number of scholars have argued that populism – though operating within certain limits – appropriates the normative and institutional architecture of constitutionalism itself, deploying it to destabilize and recalibrate the legal and value-based hierarchies that underpin constitutional democracies⁴.

This dynamic becomes particularly evident in the tension between the principle of popular sovereignty and other foundational elements of constitutional orders – such as the same adherence to the rule of law, the separation of powers, and the protection of minority rights. Populist movements frequently redefine democracy in reductive terms, equating it with unqualified majority rule and deploying it as a “trump card” to subordinate or displace other core constitutional principles⁵.

Giuseppe Martinico wrote of two strategies followed by sovereigntists and populists: mimetism and parasitism⁶.

I find his theories particularly relevant for our purposes here.

He employs the notion of *mimetism* to describe the capacity of certain political movements to cloak themselves in the language of constitutionalism, all the while reconfiguring it for instrumental purposes. It refers to a strategic posture adopted by populist actors who, rather than directly opposing constitutional texts, endeavour to project an appearance of compliance, thereby

² MARTINICO 2021.

³ CORRIAS 2016, 6: «Constitutional theorists have not devoted a lot of attention to the phenomenon of populism [...] There may be two interpretations of this silence. Either constitutional theory has nothing to say about populism, in which case the silence is justified, or constitutional theory does have something to say, in which case the silence is unjustified and (potentially) problematic».

⁴ See for instance TUSHNET, BUGARIĆ 2021, SAJÓ 2021, KRYGIER et al. 2022.

⁵ ROSANVALLON 2020.

⁶ MARTINICO 2021.

securing a veneer of constitutional legitimacy. This approach lends credence to analytical frameworks that reject a rigidly binary or antagonistic conception of the populism-constitutionalism relationship. Put differently, populists seek to appropriate the vocabulary and symbolic authority of constitutionalism while concurrently advancing a divergent interpretive paradigm⁷.

A notable and well-known illustration of this strategy can be found in the speech delivered by then-Prime Minister Giuseppe Conte at the United Nations on 26 September 2018: «When someone accuses us of sovereigntism and populism, I always like to remind them that sovereignty and the people are both evoked in Article 1 of the Italian Constitution, and it is precisely in that provision that I interpret the concept of sovereignty and its exercise by the people. This approach does not alter Italy's traditional position within the international community and, consequently, vis-à-vis the United Nations. Security, the defence of peace and the values that best uphold it, the promotion of development and human rights are goals that we share and intend to pursue with courage and conviction, both nationally and globally». This excerpt offers a clear example of an effort to legitimise populist and sovereigntist rhetoric by appealing to constitutional principles. At the same time, it is essential to highlight the selective – and arguably tendentious – invocation of Article 1 of the Italian Constitution. Conspicuously omitted, perhaps intentionally, is the second clause of the provision, which famously stipulates that popular sovereignty must be exercised “in the forms and within the limits” established by the Constitution itself. In other words, in the populist-sovereigntist perspective, general concepts remain and are re-interpreted; constitutional “forms and limits” fade away.

Populist rhetoric tends to rely on such reductive notion of democracy, which populists equate exclusively with majority rule: the popular will is elevated as the sole, absolute, and unchallengeable source of political and legal legitimacy, immune to mediation or institutional constraint. The society is portrayed as divided between a morally virtuous “majority” and a delegitimised “other” (corrupt elites): and the democracy becomes a “trump card”, invoked to override all competing constitutional norms and principles. These discursive patterns are rooted in a monolithic conception of the majority, construed not only as numerically dominant but also as possessing inherent moral superiority. As astutely observed: «Populists combine anti-elitism with the belief that they possess a superior understanding of what it means to be a true citizen of their nation»⁸.

These insights echo prior reflections on how populist actors strategically appropriate constitutional categories in the service of crafting an alternative constitutional narrative.

A paradigmatic case is that of Hungary, where the notion of democracy has been intentionally severed from its liberal roots, resulting in the emergence of the counter-concept – often characterised as an oxymoron – of “illiberal democracy”. As widely acknowledged, Viktor Orbán and his party, Fidesz, have undertaken a sweeping transformation of Hungary's constitutional framework, consolidating an illiberal regime in which the Constitutional Court, once an independent arbiter, now largely mirrors the government's political agenda⁹.

It is worth attending to the language employed by Prime Minister Orbán in a 2014 speech:

«Honourable Ladies and Gentlemen, in order to be able to do this in 2010, and especially these days, we needed to courageously state a sentence, a sentence that, similar to the ones enumerated here, was considered to be a sacrilege in the liberal world order. We needed to state that a democracy is not necessarily liberal. Just because something is not liberal, it still can be a democracy. Moreover, it could be and needed to be expressed, that probably societies founded upon the principle of the liberal way to organize a state will not be able to sustain their world-competitiveness in the following years, and more likely they will suffer a setback, unless they will be able to substantially reform themselves».

⁷ MARTINICO 2021 16 ff.

⁸ MARCHLEWSKA et al. 2018.

⁹ HALMAI 2024.

Once again, we observe the reinterpretation – if not outright distortion – of a foundational tenet of constitutionalism: the concept of democracy. In this context, democracy is reimagined in ways that serve to construct and legitimise an alternative constitutional narrative. The explicit repudiation of liberal constitutionalism evident in such discourse is inextricably tied to a broader process of conceptual erosion – a systematic strategy adopted by populist governments to hollow out core constitutional categories from within.

This semantic and normative distortion supports what Martinico has termed the second strategic modality of populists in power: *parasitism*¹⁰.

As articulated by other scholars as well¹¹, parasitism captures the ability of populist actors to reconfigure the normative infrastructure of constitutional democracies by manipulating democratic procedures to subvert their foundational values. In this framework, democracy is no longer one principle within a constellation of constitutional commitments – such as the rule of law, the respect for individual rights, the protection of minorities – but is elevated to a hegemonic value, equated with unqualified majority rule and deployed to override competing principles.

Constitutionalism has the majority rule as a basic principle. But “majority” is not an obvious concept as it can seem. This is demonstrated by famous cases such as the 1995 referendum on the independence of Quebec, the 2006 Montenegrin independence referendum, the 2016 United Kingdom European Union membership referendum, in which the criteria for the composition and identification of majorities and the rise of a “clear majority” were heavily debated.

Treating “the majority” as an objective or politically neutral standard, upon which to base decisions of foundational constitutional importance, is a fallacy. In robust democratic systems, certain domains are intentionally insulated from the authority of transient political majorities. This principle is enshrined in many constitutional orders through the entrenchment of fundamental rights, which are rendered impervious to amendment even by supermajorities, thereby safeguarding them from majoritarian encroachment.

But in sovereigntist and populist theories, majority becomes just a self-evident arithmetical concept, with no further complication.

Finally, it must be observed that the same concept of sovereignty is part and parcel of the constitutional counter-narrative advanced by sovereigntists and populists; and it is a primary object of their instrumental manipulation of the categories of constitutionalism.

The concept of sovereignty occupies a well-established place in the theoretical repertoire of constitutional law and political theory. It is linked to the idea of the existence, in every legal order, of a supreme authority: so that, internally, sovereignty entails hierarchy within a state, and, in the external sense, it entails autonomy of every state vis-à-vis the others.

This broadly framed definition necessitates historical contextualization. In the aftermath of the Treaty of Westphalia, it bore a specific significance, which has since evolved considerably by the close of the twentieth century. As is frequently observed, no contemporary state can be deemed sovereign in the manner states were understood to be prior to the Second World War¹². The rise of transnational governance frameworks and institutions, the entrenchment of a globalized economic order, and the advent of supranational entities characterized by shared sovereignty – such as the European Union – have all contributed to a marked attenuation of the classical notion of state sovereignty. The protracted historical trajectory that culminated in the establishment of a global order predicated upon sovereign nation-states reached its denouement with the catastrophic excesses of the Second World War, which rendered apparent the imperative of imposing certain constraints on state sovereignty as a means of averting future atrocities and systemic injustices.

¹⁰ MARTINICO 2021, 19 ff.

¹¹ URBINATI 1998, FOURNIER 2019.

¹² MACCORMICK 1999.

This development bore significant implications in a technical-constitutional sense. The principle of openness emerged as a foundational element of contemporary constitutional frameworks, as a codification of the need for multilateralism. By “openness” one refers to a constitutionally enshrined disposition of receptivity – *Freundlichkeit* – towards legal norms and sources which, from a formal standpoint, originate outside the domestic legal order and are not the direct product of national institutions and the democratic will of the people as expressed through national mechanisms of law-making¹³.

Sovereignism purports to forget all this, through the untimely rediscovery of an exaggeratedly rigid interpretation of autonomy connected to sovereignty.

As Ferrajoli put it, sovereignism may be defined as «the assertion of national and popular sovereignty against the subordination of politics to international, and specifically European, constraints»¹⁴. In its more recent legal articulation, this assertion challenges the idea that domestic law could be subordinated to supranational and international legal orders.

Sovereignists seek to “take back control” from transnational governance groups and multilateral agreements, restoring the pre-Second World War “closed” idea of sovereignty.

This has a lot to do with populist stances as well – and in fact, although populism and sovereignism are distinct categories, they exhibit a significant degree of overlap, as captured by those scholars who have coined the term “PopSovism”¹⁵.

In this vein, a common denominator among populist and sovereignist perspectives is the portrayal of the European Union as the epitome of a homogenizing global order that allegedly threatens national cultural values (according to proponents of right-wing “identitarian” sovereignism)¹⁶ or the very existence of the state and social justice (according to advocates of left-wing, *soi disant* “democratic” sovereignism)¹⁷, by constraining political choices and limiting the space for social conflict.

But sovereignists now have as an object of controversy any international institution, for example the European Court of Human Rights¹⁸ or the World Health Organization¹⁹.

And what is relevant, they do so by claiming to be champions of a “true” Europe, which they contrast with the European Union or the Council of Europe²⁰, and of true “sovereignty”, meant as a mere shield with instrumental obliteration of the principle of openness which is now typical of constitutionalism after the Second World War.

This illustrates that, in doing so, they always re-employ, by bending them, old concepts, without ever forging new ones.

3. Abusive Constitutional Borrowing, Autocratic Legalism and the Rule of Law

The phenomenon I am hinting at forms part of a broader and increasingly visible trend in comparative constitutionalism: the subversion of liberal democratic frameworks through the instrumental use of constitutional forms. Far from representing an outright rejection of constitutionalism, this development exemplifies its appropriation and distortion from within. Two theoretical

¹³ CARROZZA 2007.

¹⁴ FERRAJOLI 2019, I: «“Sovranismo” è un neologismo entrato di recente nel lessico del dibattito politico. Designa una specifica versione del nazionalismo legata al suo nesso con il populismo. Grosso modo si intende di solito, con questa espressione, la rivendicazione della sovranità nazionale e popolare contro la dipendenza della politica da vincoli internazionali e specificamente europei».

¹⁵ DE SPIEGELEIRE et al. 2017.

¹⁶ See e.g. BECCHI 2019.

¹⁷ See e.g. SOMMA 2020.

¹⁸ BINDMAN 2015.

¹⁹ CISLAGHI 2025.

²⁰ BECCHI 2019.

constructs – *abusive constitutional borrowing* and *autocratic legalism* – have emerged as particularly useful in capturing the legalistic mechanics of contemporary democratic decay.

They are crucial for understanding our main argument as well: no new conceptual arsenal, just manipulation of the traditional one.

Though analytically distinct, *abusive constitutional borrowing* and *autocratic legalism* often converge in practice, revealing how illiberal actors strategically redeploy constitutional norms to consolidate power while preserving the outward appearance of legality.

The concept of *abusive constitutional borrowing* has garnered growing scholarly attention for its ability to explain how authoritarian-minded governments selectively adopt and manipulate foreign constitutional norms, institutions, or practices not to advance the values these instruments were designed to serve, but to undermine them. As articulated by scholars such as Rosalind Dixon and David Landau²¹, this phenomenon entails the appropriation of constitutional devices from other jurisdictions – rights catalogues, judicial models, or structural arrangements – decontextualised from their normative frameworks and repurposed to legitimise illiberal governance. It represents an instrumentalization of comparative constitutionalism, and a paradox of modern constitutionalism in general: the deployment of democratic mechanisms in service of authoritarian objectives. Abusive borrowing operates not in defiance of legality, but through its simulation – drawing legitimacy from the very language and forms that, under liberal readings, were meant to constrain power.

Closely related yet conceptually broader is Kim Lane Scheppele's influential theory of *autocratic legalism*²². This term captures the process by which elected leaders exploit their democratic mandates to incrementally erode liberal institutions through formally legal means. Unlike traditional coups or blatant constitutional ruptures, autocratic legalism relies on legislative majorities, constitutional amendments, and judicial restructuring to entrench executive dominance. It highlights the transition from rule-breaking to rule-repurposing: rather than abolishing legal systems, illiberal regimes hollow them out, co-opting legality to give an air of procedural legitimacy to measures that would, under normal democratic conditions, be deemed incompatible with the rule of law. Importantly, autocratic legalism underscores the capacity of the law not only to constrain but to enable authoritarianism, particularly when wielded by actors intent on subverting its liberal spirit.

Despite their theoretical distinctions, the two frameworks are deeply interconnected. *Abusive constitutional borrowing* can be understood as one of the principal techniques through which *autocratic legalism* operates. The former offers a taxonomy of external referents used to justify illiberal reforms; the latter describes the broader strategic logic by which legality itself becomes a tool of repression. In both cases, the language of constitutionalism is retained while its substance is transformed. This mimetic strategy – a sort of constitutional simulacrum – creates a dual challenge: it not only destabilises domestic liberal institutions but also renders external critique more difficult. When illiberal regimes dress authoritarian consolidation in the garments of legality and comparative legitimacy, distinguishing genuine reform from democratic erosion becomes a complex hermeneutic task.

Concrete examples of this dual phenomenon abound, particularly in the post-communist states of Central and Eastern Europe. Hungary under Viktor Orbán is, again, a paradigmatic case. Following a decisive electoral victory in 2010, the Fidesz party enacted the 2011 Fundamental Law, a new constitution drafted without meaningful opposition input. Though procedurally valid, the new constitutional architecture embedded ideologically charged provisions and significantly curtailed institutional independence²³. Justified through appeals to national identity and sovereignty,

²¹ DIXON, LANDAU 2021.

²² SCHEPPELE 2018.

²³ SCHEPPELE 2018 549 ff.; see also PANOV 2020.

and drawing on selective elements of American and German constitutional practice²⁴, the document served to consolidate power while preserving the external features of a constitutional democracy. Institutional reforms soon followed: the Constitutional Court was expanded and packed with loyalists, its jurisdiction restricted, and its jurisprudence effectively annulled. Each move was undertaken through legal mechanisms and defended with reference to comparative models, yet the cumulative effect was a profound erosion of constitutional checks.

Poland offers a closely related, if contextually distinct, illustration²⁵. Since gaining power in 2015, the Law and Justice Party (PiS) has systematically transformed the Polish constitutional landscape. Citing democratic legitimacy and comparative examples, the government refused to publish binding Constitutional Tribunal decisions, reappointed judges in violation of established procedures, and created a Disciplinary Chamber to oversee judicial conduct – later found to be incompatible with EU law. These changes were framed as necessary correctives to past dysfunctions but in reality operated as instruments of executive control. Again, the legitimacy of constitutional borrowing was weaponised: by selectively invoking foreign precedents, the government obscured the regressive nature of its reforms and insulated itself from both domestic and international scrutiny. Still, it formally preserved *prima-facie* adherence to the rule of law: so that, paradoxically, the current government has its own problems in restoring substantial rule of law by formally having to breaching it, in doing so²⁶.

Turkey under Recep Tayyip Erdoğan provides a further, albeit more overt, manifestation of this phenomenon. In the aftermath of the 2016 coup attempt, the Turkish government declared a state of emergency and issued thousands of emergency decrees, many of which were subsequently legalised through constitutional amendments approved by referendum in 2017. These changes dismantled the parliamentary system and concentrated power in the presidency. While framed in legalistic terms and formally enacted, the reforms effectively eliminated meaningful opposition, curtailed judicial independence, and stifled civil society²⁷.

In all these cases, the core dynamic is the same: the constitutional form is preserved, even formally emphasised, while its liberal-democratic content is steadily dismantled.

A shared feature across European jurisdictions is the deployment of *constitutional identity discourse* to justify illiberal transformation. Invoking Article 4(2) of the Treaty on European Union, which affirms the EU's obligation to respect Member States' national identities, governments in Hungary and Poland have defended their actions as expressions of sovereignty and cultural authenticity²⁸. In this framing, liberal norms are recast as external impositions, and constitutional borrowing becomes an act of resistance rather than alignment. The result is a distorted version of pluralism, one in which the universality of democratic principles is denied in favour of parochial reinterpretations – further complicating the task of legal and normative critique. In any case, such deployment is the mirror of the instrumental practice I am describing and criticizing.

From a theoretical perspective, these developments challenge the foundational assumptions of comparative constitutional law. The optimism that once accompanied constitutional transplants – based on the belief in a shared grammar of democratic governance – has given way to a more sober recognition of constitutional mimicry and manipulation. The Eastern European experience reveals that the origins or formal features of a constitutional institution are no guarantee of its democratic function. Norms can be emptied of content and repurposed in ways that betray their original intent. In this context, legal analysis must move beyond formalism and adopt a more context-sensitive, historically grounded, and normatively engaged approach.

²⁴ See on the instrumental appropriation of foreign doctrinal constitutional concepts KELEMEN, PECH 2019.

²⁵ SCHEPPELE 2018, 552 ff.; see also PANOV 2020.

²⁶ FARKAS, KÁDÁR 2023.

²⁷ O'DONOHUE 2023.

²⁸ FARAGUNA 2017.

What is required is not merely a taxonomy of violations but a deeper understanding of how power operates through law²⁹.

In conclusion, *abusive constitutional borrowing* and *autocratic legalism* represent two interlocking dimensions of a broader authoritarian strategy: the internal colonisation of constitutionalism. Through the selective invocation of comparative norms and the formal observance of legal procedures, illiberal regimes manufacture legitimacy while dismantling liberal democracy. Recognising this dynamic is a first step. Responding to it requires new analytic tools, stronger normative commitments, and a rethinking of the very premises upon which comparative constitutionalism is built. The challenge is not only to defend constitutionalism against its enemies, but to discern its true allies among those who speak its language.

4. As a conclusion

In light of the considerations outlined above, I reaffirm the view that there is no such thing as a sovereigntist or populist theory of the constitution. On the contrary, what emerges is a pronounced tendency toward a constitutional counter-narrative advanced by sovereigntist and populist actors, grounded in their strategic manipulation of the categories of constitutionalism. Legal sovereigntism does not generate novel or distinctive conceptual categories that could serve as a coherent alternative to traditional constitutionalism. Contemporary populist and sovereigntist movements aim to subvert liberal-democratic frameworks through the instrumental appropriation of constitutional forms, gradually eroding liberal institutions by means that are formally legal.

Other authors have argued that this approach would amount to an autonomous, albeit “implicit”³⁰, theory. In my view, however, this is not the case insofar as the strategy clearly consists in keeping the arguments within the semantic framework of liberal constitutionalism, while simultaneously reconfiguring or rearranging its terms in such a way as to transform their substantive content. We are thus confronted with an «*idéologie peu substantielle*»³¹, that is, a «*thin-centered ideology*»³², lacking a «*solide corps de doctrine, de textes fondateurs et d’auteurs de référence*», and with no «*philosophie globale, fournissaient du sens, offraient une vision du monde*»³³.

My notations are not intended to suggest that the CLEAR project lacks legitimate or valuable research objectives. On the contrary, its inception is both timely and intellectually stimulating. Nevertheless, I recommend that the project consider, within its research agenda, certain implications arising from the comparative analysis briefly discussed above.

It is indeed both relevant and meaningful to compare the conceptual structure of the rule of law – understood as a normative ideal, with alternative models of constitutional organization characterized as “decisionist”, “sovereigntist”, or “populist”. However, the search for foundational conceptual pillars underpinning such alternative paradigms may prove frustrating. A more productive approach would be to contrast traditional constitutional concepts with the distorted reinterpretations that sovereigntist and populist movements seek to impose upon them.

Such a comparison would aptly illustrate the core hypothesis of the CLEAR project: namely, that the rule of law constitutes a cognitively demanding and normatively rich construct – one that is significantly more complex to grasp and operationalize than paradigms grounded in decisionism. As I have endeavored to show, the so-called “new” interpretations of key concepts such as sovereignty, majority, people, and democracy are in fact instrumental oversimplifications of their

²⁹ SCHEPPELE 2018, 581 ff.

³⁰ CORRIAS 2016, 7: «*It seems as if constitutional theory has not taken the (often implicit) constitutional tenets of populism seriously*».

³¹ LAZAR 2025, 30.

³² MUDDE, ROVIRA KALTWASSER 2017, 19.

³³ LAZAR 2025, 31.

classical meanings. It is therefore possible to argue that sovereigntist and populist actors exploit the very complexity of the traditional rule of law – its intellectual and normative density – not to propose an alternative conceptual framework, but rather to promote a simplified and reductionist one.

References

- BECCHI P. 2019. *Manifesto sovranista: per la liberazione dei popoli europei*, Giubilei Regnani.
- BINDMAN G. 2015. *When judges disagree - the ECHR and British sovereignty*, in «openDemocracy», available at the website <https://www.opendemocracy.net/en/opendemocracyuk/when-judges-disagree-echr-and-british-sovereignty/>.
- CARROZZA P. 2007. *Constitutionalism's Post-modern Opening*, in LOUGHLIN M., WALKER N. (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 169.
- CISLAGHI C. 2025. *Sovranismo: compatibile con la salute?*, in «Epidemiologia&Prevenzione. Rivista della Associazione italiana di epidemiologia», available at the website <https://epiprev.it/blog/come-sta-la-sanita-sovrano-compatibile-con-la-salute>.
- CORRIAS L. 2016. *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, in «European Constitutional Law Review», 2016, 6.
- DE SPIEGELEIRE S., SKINNER C., SWEIJS T. 2017. *The Rise of Populist Sovereignism: What It Is, Where It Comes from, and What It Means for International Security and Defense*, Centre for Strategic Studies.
- DIXON R., LANDAU D. 2021. *Abusive Constitutional Borrowing Legal Globalization and the Subversion of Liberal Democracy*, Oxford University Press.
- FARAGUNA P. 2017. *Constitutional Identity in the EU—A Shield or a Sword?*, in «German Law Journal», 1617.
- FARKAS E., KÁDÁR A. 2023. *Restoring the Rule of Law By Breaching It Hungary's Judicial Reform and the Principle of Legality*, in «Verfassungsblog. On matters constitutional», available at the website <https://verfassungsblog.de/restoring-the-rule-of-law-by-breaching-it/>.
- FERRAJOLI L. 2019. *L'alleanza perversa fra sovranismi e liberismo*, in «Costituzionalismo.it», 1.
- FOURNIER T. 2019. *From rhetoric to action, a constitutional analysis of populism*, in «German Law Journal», 2019, 362.
- HALMAI G. 2024. *From Liberal Democracy to Illiberal Populist Autocracy: Possible Reasons for Hungary's Autocratization*, in «Hague Journal on the Rule of Law», 2024, 439.
- KELEMEN D., PECH L. 2019. *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, in «Cambridge Yearbook of European Legal Studies», 2019, 59.
- KRYGIER M., CZARNOA A., SADURSKI W. (eds.) 2022. *Anti-Constitutional Populism*, Cambridge University Press.
- LAZAR M. 2025. *Pour l'amour du peuple. Histoire du populisme en France, XIX^e-XXI^e siècle*, Gallimard.
- MACCORMICK N. 1999. *Questioning Sovereignty*, Oxford University Press.
- MARCHLEWSKA M., CICHOCKA A., PANAYIOTOU O., CASTELLANOS K., BATAYNEH J. 2018. *Populism as identity politics: Perceived in-group disadvantage, collective narcissism, and support for populism*, in «Social Psychological and Personality Science», 2018, 151.
- MARTINICO G. 2021. *Filtering Populist Claims to Fight Populism The Italian Case in a Comparative Perspective*, Oxford University Press.
- MARTINICO G., PIERDOMINICI L. (eds.) 2023. *Miserie del sovranismo giuridico. Il valore aggiunto del costituzionalismo europeo*, Castelvechi.
- MUDDE C., ROVIRA KALTWASSER C. 2017. *Populism: a Very Short Introduction*, Oxford University Press.
- O'DONOHUE A. 2023. *Law versus Democracy: Court Capture, External Allies, and Democratic Backsliding in Turkey*, available at SSRN at the website <https://ssrn.com/abstract=4465840>.
- PANOV S. 2020. *The Effect of Populism on the Rule of Law, Separation of Powers and Judicial Independence in Hungary and Poland*, in VIDMAR J. (ed). *European Populism and Human Rights*, Brill.
- ROSANVALLON P. 2020. *Le siècle du populisme. histoire théorie critique*, SEUIL.
- SAJÓ A. 2021. *Ruling by Cheating, Governance in Illiberal Democracy*, Cambridge University Press.
- SCHEPPELE K.L. 2018. *Autocratic Legalism*, in «University of Chicago Law Review», 2018, 545.
- SOMMA A. 2020. *Sovranismo democratico. Dal vincolo esterno alla giustizia sociale*, in «L'Ircocervo», 132.

TUSHNET M., BUGARIĆ B. 2021. *Power to the People: Constitutionalism in the Age of Populism*, Oxford University Press.

URBINATI N. 1998. *Io, il popolo. Come il populismo trasforma la democrazia*, Il Mulino.

PART III.

The Rule of Law in Minds

The Cognitive Load of an Internal Point of View over the Rule of Law

CORRADO ROVERSI

University of Bologna, Italy.

E-mail: corrado.roversi@unibo.it

MARCO BRIGAGLIA

University of Palermo, Italy.

E-mail: marco.brigaglia@unipa.it

ANDREJ KRISTAN

University of Bologna, Italy.

E-mail: andrej.kristan@unibo.it

LUISA LUGLI

University of Bologna, Italy.

E-mail: l.lugli@unibo.it

NATALIA SCAVUZZO

Autonomous University of Madrid, Spain.

E-mail: natalia.scavuzzo@uam.es

ARIANNA ROSSI

Sant'Anna School of Advanced Studies, Italy.

E-mail: arianna.rossi@santannapisa.it

FABIO RUWETT

Visual designer.

E-mail: fabio@ruwett.it

GLENN DE MUYNCK

University of Bologna, Italy.

E-mail: glenn.demuynck2@unibo.it

ABSTRACT

The Rule of Law is increasingly challenged by populist models of government that offer simple and direct solutions unencumbered by rules. The CLEAR project investigates this phenomenon through the lenses of legal philosophy and cognitive psychology, advancing the hypothesis that the Rule of Law entails a higher cognitive load than its main alternative, which we call Populist Authoritarianism. Experimental results confirm that non-experts perceive Rule of Law concepts as more abstract and harder to process, whereas legal education significantly reduces this cognitive burden. To make these values more accessible, the project has developed “legal design” guidelines grounded in empirical data and produced an animated video for high school students, in which storytelling in a relatable school setting is used to transform the concept of Rule of Law into a concrete, contextualized, and emotionally resonant experience.

Lo Stato di diritto è sempre più messo in discussione da modelli di governo populistici che offrono soluzioni semplici e dirette, non vincolate da regole. Il progetto CLEAR indaga questo fenomeno attraverso le lenti della filosofia del diritto e della psicologia cognitiva, avanzando l'ipotesi che lo Stato di diritto comporti un carico cognitivo più elevato rispetto alla sua principale alternativa, che definiamo Autoritarismo populista. I risultati sperimentali confermano che i non esperti percepiscono i concetti dello Stato di diritto come più astratti e più difficili da elaborare, mentre la formazione giuridica riduce significativamente questo onere cognitivo. Per rendere questi valori più accessibili, il progetto ha sviluppato linee guida di legal design fondate su dati empirici e ha realizzato un video animato rivolto agli studenti di liceo, nel quale, attraverso l'uso dello storytelling in un contesto scolastico familiare, il concetto di Stato di diritto viene veicolato tramite un'esperienza concreta, contestualizzata ed emotivamente coinvolgente.

KEYWORDS

Rule of law, populist authoritarianism, cognitive load, internal point of view, empirical jurisprudence

Stato di diritto, autoritarismo populista, carico cognitivo, punto di vista interno, giurisprudenza empirica

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



The Cognitive Load of an Internal Point of View over the Rule of Law

CORRADO ROVERSI, MARCO BRIGAGLIA, ANDREJ KRISTAN, LUISA LUGLI, NATALIA SCAVUZZO, ARIANNA ROSSI, FABIO RUWETT, GLENN DE MUYNCK

1. Introduction: A Battle for the Rule of Law – 2. Introducing the Project CLEAR – 2.1 The Intuition: The Battle for the Rule of Law as a Battle on Cognition – 2.2 The Objective: To Understand the Cognitive Load of the Rule of Law and Reduce It – 2.3 The State of the Art: The Rule of Law Studies before CLEAR – 3. Theoretical and Methodological Issues – 3.1 Defining the Rule of Law and Its Antithesis... and the Role of Legal Expertise – 3.2 Experimental Jurisprudence on the Internal Point of View? – 3.3 Is this Paternalism? – 4. The Experiments – 4.1 The Experimental Paradigms and their Underlying Ratio – 4.2 Materials – 4.3 Hypotheses – 5. Discussion of the Experimental Results – 6. Data-informed Legal Design for the Rule of Law – 6.1 Principles of Legal Design – 6.2 Using Data to Create Legal Design Guidelines for the Rule of Law – 6.3 The Outcome: A Video in the Educational Context – 7. Conclusion.

1. Introduction: A Battle for the Rule of Law

We live in an era in which the idea of unbridled, threatening power seems to be conceived as the distinctive mark of leaders, and hence is assumed to be particularly attractive for the electorate, where there is any, or simply “the people”, where the former is not allowed to exist. Political debates in the Western world are increasingly saturated with the idea that legal procedures, conditions, and criteria – in a word: rules – assumed before decisions are made are limits to decisional power, coming to the detriment of effective intervention in problem-solving: They are the tools of bureaucracy, they say, impairing real development, weakening the action, vision, and will of strong individuals.

Of course, such ideas are not new. It was a mark of Fascisms to sanctify action, decision, will, and leaders over rules, limits, and conditions, which were instead conceived as values of the bourgeois social model, a model seen as corrupt, unjust, and unhealthy. Central among those bourgeois values was the ideal of the Rule of Law: no one can claim to be above the law, and all are equal before the law. When the world had to recover from the ruins of the unconceivable destruction that Fascisms brought to the world – a horror that was actively sought and conceived as the natural outcome of that ideology of limitless will and action – the ideal of the Rule of Law was taken up again as a central core of the new world order, and made even more substantial at both international and national levels, giving rise to the United Nations and the constitutional democracies of continental Europe. Now, again, it is under attack. The tension between an illusion of quick solutions based on instant action, on the one hand, and an ideal of reflective, slow – at times even suboptimal, but warranted – solutions based on shared procedures, on the other hand, is emerging again. And the second, again, is losing ground.

The battle for the Rule of Law has several dimensions. Political, first of all, because problems are real, and they need to be solved, and we must find ways to ensure that the supremacy of rules does not make this impossible. Economic, because the realization of a Rule of Law has several economic consequences, most of which are positive, but some may seem detrimental for a quick and efficient enterprise. We think, however, that this battle is also cultural, a struggle between conceptions shared by groups of people: on the one hand, the idea that rules are a value, because they ensure predictability of decisions and safeguard us against the arbitrary will of those who are in power; on the other hand, the idea that rules and guarantees can be detrimental to effective action and political representation of people’s will and collective values. The extent to which the Rule of Law will be reduced in the near future in Western countries will depend on which of these two conceptions will prevail among ordinary people and officials.

We side with the Rule of Law, and, given our academic positions, we want to fight the cultural battle. The main reason why we think that rules (and, of course, rights) should always be conceived as supreme, and to limit the exercise of political power in all circumstances, is that only within a shared framework of rules can pluralism of views, conceptions, and values flourish: equal treatment before the law and rule-governed decision-making are a pre-condition for the co-existence of different traditions, cultures, and values, and this is not possible if those pre-conditions are not guaranteed. Hence, we believe that defending the ideal of the Rule of Law is not equivalent to defending one political ideology among many; the Rule of Law is the framework in which the diversity of political ideologies can coexist without any one ideology dominating.

Given this background, we submitted a research project proposal in 2022 to obtain grants from the European Union and the Italian Ministry of Education and Research. We suggested that the cultural battle in favour of the Rule of Law could be fought in a pretty simple way, namely, by effectively communicating that ideal to citizens. This was an interdisciplinary proposal, in which philosophy of law and cognitive psychology were put to work together: the former to define the conceptual “building blocks” of the Rule of Law properly, and the latter to study how people in reality process those concepts. The project was titled “Concept of the Rule of Law: Empirical and Analytical Perspectives (CLEAR)”. In 2023, the Ministry announced that we had received the grant, and in this paper, we present the results.

2. *Introducing the Project CLEAR*

2.1 *The Intuition: The Battle for the Rule of Law as a Battle on Cognition*

There are many ways to fight the cultural battle in defence of the Rule of Law. Normative arguments about its justification can be deployed, for example, or sociological arguments about its positive impact on the social community can be framed. These are common strategies for addressing the topic from an academic perspective and are quite effective because both can support institutional design in favour of the ideal. Our approach, by contrast, is conceptual and communicative: it starts from the intuition that the concept of the Rule of Law is complex and difficult, and that we should study how people ordinarily conceive it to improve its understanding.

Indeed, the idea of the Rule of Law seems intuitively distinct from other political ideals, such as democracy or equality. It is grounded in a metaphor (how can the law, properly speaking, “rule”?), demands a significant degree of abstraction (what exactly do we mean by this thing called “the Law”?), and asks us to embrace the merits of a domain – the legal one – that is highly technical, formalized, and dominated by experts: a realm where ordinary citizens do not find it advisable to venture without assistance. And, surprisingly enough, when you ask these experts to define the idea, countless disputes arise about which elements are more fundamental (Limitation of power? Separation of powers? Certainty of law? Formal equality before the law? Protection of fundamental rights?), and even about whether there is a common conceptual core behind it¹.

¹ This aspect has been aptly treated in the specialized English-language literature under the title of the rule of law’s contestedness at least since RADIN 1989. It was later developed in connection with W. B. Gallie’s notion of “essentially contested concepts”, by FALLON 1997. See also GALLIE 1955-1956. The most popular reference, however, is WALDRON 2002. Our project is connected with a subsequent question: how this contestedness might be reduced. One of the present authors has previously addressed this challenge through conceptual analysis (KRISTAN 2017); here, we pursue it through a combined conceptual and cognitive-empirical approach.

It is no wonder that, when it comes to communicating the idea of the Rule of Law for educational purposes, the result can easily suffer the same problems typically associated with defining the concept. Consider, for example, the videos designed by the German-American artist, author, and animator Christoph Niemann on behalf of the European Commission to answer the question, “What Is the Rule of Law?” in an intuitive manner². All the videos are beautiful, of course, but the question is whether they are effective in conveying the concept. They use the analogy of sports games and show us the consequences of unfair treatment under the rules of a game, of changing the rules of a game arbitrarily, and so on. The problem, however, is that the Rule of Law is not a game. While these videos are certainly masterfully designed and even fun, by transposing the idea into a ludic environment, they fail to convey the importance and urgency of defending the Rule of Law, as they do not concretely show what it means in people’s everyday lives. Metaphors are frequently employed to render abstract ideas more concrete by substituting a word or phrase denoting the object of inquiry with a term referring to a different, more tangible object that nonetheless shares a relevant similarity with the former. In the case of the aforementioned videos, however, the gameplay metaphor transposes the notion of ordinary life in a rule-based polity into a domain that not only leaves the idea equally abstract but also de-contextualizes it. Games are activities we engage in for fun; ruling the political community and ensuring our rights are much more serious problems.

The problem of defining, understanding, and communicating the concept of Rule of Law is particularly relevant because political ideologies that do not consider the Rule of Law as a value – like those based on a more or less explicit defense of authoritarianism, or populism – seem much more understandable, less technical, and more concrete. If you ask someone to understand that a decision must be taken to solve a problem, and that this can be made quickly and effectively by the leaders in power, this seems straightforward. If, on the other hand, you ask someone to understand that the decision must undergo a complex scrutiny according to pre-defined rules, because otherwise in the long run this may lead to arbitrariness and not all cases are treated alike, and hence our rights are not guaranteed... this seems to require a much more cumbersome process of complex reasoning.

The project CLEAR was born on this assumption, that we found intuitively plausible: one of the reasons why the Rule of Law falls out of relevance and importance in the understanding of citizens of Western democracies, whereas populism and authoritarian attitudes find more and more appeal, is that the first is too hard to understand correctly, whereas the second rely on cognitively easier notions. If that is true, everyone interested in fighting the cultural battle in support of the Rule of Law should find a way to make it easier to understand. And if at least part of the problem is cognitive, part of the battle we must fight must start with an analysis of cognition.

2.2 *The Objective: To Understand the Cognitive Load of the Rule of Law and Reduce It*

A central notion for understanding the project is cognitive load: the effort required by the human mind to carry out a cognitive task, e.g., understanding a concept. In this context, we specifically refer to cognitive load as it relates to language comprehension and representation. When designing CLEAR, we realized that our basic intuition, as described above, could be framed by using that central notion: the general hypothesis, then, became that the idea of the Rule of Law may require a heavier cognitive load on the part of ordinary citizens than that needed by alternative, more authoritarian and populist models of organization of political authority. The main advantage of this reformulation, in our view, was that cognitive psychology provides methods for measuring

² The videos can be found here: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en#want-to-learn-more-watch-our-series-of-six-animations. The reader may also check Niemann’s personal website at <https://www.christophniemann.com/about/>.

cognitive load; hence, ultimately, our intuition could be subjected to experimental investigation. We reasoned that if participants in an experimental study exhibited a heavier cognitive load when processing the concept of the Rule of Law than when processing the concepts of authoritarianism or populism, we would conclude that our intuition had been empirically supported. But this was not enough. Our aim was not only to demonstrate the cognitive complexity involved in understanding the Rule of Law, but also to identify at least some of the reasons for this complexity, so as to reduce it. Hence, we had to frame our experiments accordingly.

Formulated in this way, the research question and the methodological problems involved in building the experiments were distinctly psychological, with cognitive sciences being the domain in which they had to be addressed. However, legal philosophy could not be avoided when addressing the research question properly. What did we mean by the Rule of Law, and how could we single out the proper conceptual components of the notion? These questions had to be addressed to set up the experiments effectively. Moreover, we were assuming that there is a relevant alternative to the Rule of Law, which is less cognitively demanding, a model of organization of political authority that could be taken to be its opposite, its denial. But how could we frame this alternative, and how should one proceed to single out a set of conceptual elements that capture some of its most significant features? These questions require a significant amount of conceptual analysis, a task typically reserved for legal and political philosophers. So CLEAR could not but be a strongly interdisciplinary project.

Finally, as mentioned, we wanted the project to be significant in the cultural battle in defence of the Rule of Law; hence, we assumed that the empirical results obtained from the experiments could be used to improve the communication of the ideal to ordinary citizens. Was this a reliable assumption? Could we translate the experimental data into guidelines for an improved communication of the Rule of Law? This is a practical question, very much connected with that field of study that aims at conveying legal content more effectively and that is known as “legal design”. Could we imagine a legal design of the idea of the Rule of Law drawing inspiration from our experimental data?

Hence, to summarize, CLEAR was designed as a research project with three objectives, each connected with the task of answering a few distinctive research questions: one theoretical, one experimental, and one practical.

1. *The first objective, which was legal philosophical*, was to identify some conceptual elements of the Rule of Law and of an alternative model, a model that had to be both theoretically grounded and relevant for the contemporary political dynamics. We did not aim at identifying the conceptual core of the Rule of Law and its alternative, but rather to build a theoretically grounded hypothesis about some of the conceptual elements that could be taken to be representative of the two models while also admitting an experimental treatment. Of course, this required a significant degree of simplification. Here, the relevant research questions were:
 - a. Which concepts can convey the idea of the Rule of Law while being sufficiently simple to be treated experimentally?
 - b. Which model of organization of political authority is incompatible with the Rule of Law, yet presents itself as a viable alternative in the contemporary political arena? What are the main features of this model?
 - c. Which concepts can convey the idea of the alternative model while being sufficiently simple to be treated experimentally?
2. *The second objective, which was experimental and cognitive-psychological*, was to empirically determine whether the cognitive load experienced by participants when processing the conceptual

elements of the Rule of Law is greater than the cognitive load experienced when the same participants process the conceptual elements of the alternative political model. There was a kind of circularity between the research questions under (1) and those that we planned to address in order to fulfill this second objective, but it was a virtuous circularity: the experimental protocols set boundaries for our theoretical research, and they also had to be able to test our original conjecture. In this way, even though we knew that the conceptual elements identified in order to be empirically testable would have provided us only with a simplified version of the two models, still, they would have been sufficient to test our hypothesis. Here, the relevant research questions were:

- a. Can we identify experimental paradigms that accurately and reliably measure and compare cognitive load, and if so, what are they?
 - b. Can we turn the conceptual elements of the Rule of Law and its alternative model into experimental materials that can be used within the experimental paradigms without significant explanatory loss, and if so, what are these materials?
3. *The third objective*, which was *practical-operational*, was to derive recommendations and guidelines from these experimental measures to improve the communication of the Rule of Law. Here, the relevant research questions were:
- a. Can we develop experimental protocols that not only measure cognitive load, but that can also give insights into the reasons why cognitive load is heavier or lighter, so as to be the ground for practical recommendations about how to relieve that load? If so, what are these protocols?
 - b. What legal design recommendations and guidelines can be derived from these experimental insights to better communicate the concept of the Rule of Law to citizens?

We had two years of research to answer these questions. Before we turn to discuss how we addressed the main theoretical and methodological problems, let us present a summary review of the current state of research on the Rule of Law.

2.3 *The State of the Art: The Rule of Law Studies before CLEAR*

Ever since the expression “the Rule of Law” received its canonical articulation in late nineteenth-century English constitutional thought – most notably by A. V. Dicey³ – it has been predominantly used to denote a set of requirements, principles, or institutional features that legal systems are said to instantiate to a greater or lesser extent. This mode of presentation should not obscure the fact that the ideas underlying the expression are much older, tracing back at least to Aristotle’s reflections on law and reason in politics, to medieval conceptions of legality and limits on power, and to early modern constitutionalism. Yet from Dicey’s own formulation through later elaborations, the Rule of Law has largely been approached in enumerative terms, often in the form of what is described as a “laundry list” of components⁴.

While these lists differ in content, emphasis, and directions of fit, they share a common structure: the Rule of Law is treated as a complex ideal decomposable into distinct elements, each of which can be specified, interpreted, and assessed independently. Comparable enumerative ap-

³ DICEY 1885.

⁴ The expression is Waldron’s (WALDRON 2011, 3 ff.).

proaches have also developed outside the English-speaking world, around cognate concepts such as *Rechtsstaat* and *État de droit*, among others, which emerged within different constitutional and intellectual traditions, but display strikingly similar patterns of conceptualisation⁵. The literature that has grown around these traditions is vast and methodologically diverse, encompassing work across law, philosophy, and the social sciences. Rather than offering an exhaustive survey⁶, this section of our paper reconstructs the state of the art by identifying and reconnecting the main distinctions that structure contemporary Rule-of-Law research, with the aim of bringing into view their underlying assumptions, their points of convergence and divergence, and the different *analytical*, *doctrinal*, and *empirical* questions they are designed to address.

The proliferation of enumerative accounts has not resulted in a single dominant list of Rule-of-Law requirements⁷. On the contrary, it has given rise to a series of recurrent internal distinctions that structure the literature. Most prominently, lists of Rule-of-Law components are often divided between *formal* and *substantive conceptions*⁸, depending on whether they restrict themselves to procedural and institutional qualities of law or incorporate requirements concerning the content of legal norms⁹. Note that this formal/substantive divide is not a dichotomy. Indeed, it is often presented interchangeably as the opposition between *thin* and *thick conceptions*¹⁰, which turns on the extent to which the Rule of Law is understood either independently of, or in conjunction with, broader moral and political values such as democracy, fundamental rights, or social justice. A further distinction is usefully drawn between *classical* and *institutional conceptions*¹¹: the former are centred on constitutional constraints on public power, whereas the latter emphasise the effective functioning of legal institutions and the practical operation of law in both public and private relations¹².

While classical conceptions fit with the bulk of analytical and doctrinal approaches in the literature, institutional conceptions have proven particularly congenial to empirical operationalisation. They underpin a large body of work concerned with the measurement of the Rule-of-Law compliance through indexes, scorecards, and checklists that translate institutional performance – such as judicial independence, procedural efficiency, enforcement capacity, or legal certainty – into observable and comparable variables. The empirical approaches employed in this context have themselves diversified, ranging from large-scale data analysis with computational techniques to survey-based and experimental designs, often used in combination. This strand of research is closely associated with efforts to *promote the Rule of Law*, especially in transnational processes of integration and economic development. At the same time, it has generated an extensive *critical literature*¹³, which interrogates not only the conceptual assumptions, normative commitments, and practical consequences of Rule-of-Law measurement, but also the very idea and practice of its promotion. More

⁵ See at least HAYEK 1955 and CARRÉ DE MALBERG 1920. HEUSCHLING 2002 offers a comparison of the three traditions.

⁶ The following references, selected for illustrative purposes, attest to the diversity of the literature produced over the past fifty years alone: KRIEGLER 1979; SHKLAR 1987; RADIN 1989; LAPORTA 2007; NADER, MATTEI 2008; PFERSMANN 2001, 53–78; TAEKEMA 2021; POSTEMA 2023; RUNDLE 2023; WALDRON 2023; TUORI 2024, 589–614; VALENTINI 2025; KRISTAN 2026.

⁷ The number of requirements notably varies from three to as far as eighteen (see, e.g., WALDRON 2023, 14; KRYGIER 2019, 748).

⁸ Most notably, CRAIG 1997. For a pushback to this framing, see SHKLAR 1987, 22 distinction between Aristotelian and Montesquieuan conceptions, and Waldron's cross-cutting emphasis of a proceduralist conceptualisation in, e.g., WALDRON 2023.

⁹ See, e.g., FULLER 1964 or RAZ 1979 for formal conceptions, and DWORKIN 1978 or PAVEL 2021 for substantive ones.

¹⁰ See CRAIG 1997, but contrast with TAMANAHA 2004, 91, who treats the formal and the substantive as broad categories that each encompass thinner and thicker conceptions.

¹¹ AUERSPERGER MATIĆ 2019.

¹² See KRYGIER 2023 or KING 2024 for the extension of the rule-of-law requirements to horizontal relations between private actors.

¹³ In addition to NADER, MATTEI 2008, see at least MEIERHENRICH, LOUGHLIN 2021 for critiques from conservatives, feminists, critical legal studies, critical race theory, among others.

recently, empirical approaches have also been mobilised in studies of *erosion, capture, and destruction* of the Rule of Law, where the same instruments that serve promotional purposes are redeployed to diagnose systemic decline and assess the vulnerability of legal orders under populist or authoritarian pressures.

This diversity of lists, classificatory schemes, and considerations of measurement has, in turn, prompted a second-order literature concerned not primarily with the content of the Rule of Law and its compliance, but with what kind of concept the Rule of Law itself is and what kinds of disagreement it generates. Here, debates arise over whether the Rule of Law should be understood as an essentially contested concept or as a concept admitting of a shared core with peripheral variation¹⁴; whether disagreements concern the content of the concept or the scope of its application; and whether such disagreements are best characterised as descriptive, evaluative, or normative. These meta-conceptual discussions do not replace particular accounts of the Rule of Law, but rather reflect and systematise the persistent plurality of ways in which its components are identified, organised, appraised, or deployed across different contexts.

Like first-order literature, meta-conceptual discussions also track the distinction between analytical perspectives and empirical investigations. Although analytical approaches clearly prevail, empirical work at the meta-conceptual level is no longer confined to indirect inference or illustrative case studies. Recent research has begun to investigate empirically how the Rule of Law itself is understood, valued, and traded off by non-experts, thereby transforming questions traditionally addressed through conceptual analysis into objects of empirical inquiry. Consistent with the diversification mentioned above in first-order empirical legal studies, this line of research likewise benefits from a combination of text-as-data (i.e., computational) approaches and experimental design. Survey-based conjoint designs, in particular, have been used to examine which elements citizens associate with the Rule of Law, how they prioritise its components, and under what conditions they are willing to sacrifice them¹⁵. This emerging strand shows that disagreements about the Rule of Law are not only theoretical or doctrinal, but are also manifested at the level of attitudes, preferences, and behavioural trade-offs. What remained unexplored, however, is the cognitive dimension underlying these patterns: the effort required to process Rule-of-Law concepts, the sources of their relative difficulty, and the extent to which such cognitive burdens help explain the comparative appeal of simpler, more immediate alternatives. It is this gap – at the intersection of conceptual analysis and empirical investigation into cognitive processing – that the CLEAR project was designed to address.

3. *Theoretical and Methodological Issues*

3.1 *Defining the Rule of Law and Its Antithesis... and the Role of Legal Expertise*

Answering Research Question (1a) (“Can a single set of concepts be identified that are at least necessary, if not sufficient, to understand the idea of Rule of Law?”) was not easy. The idea of the Rule of Law can be conceived in very different ways, as we have just seen in the previous section.

Despite this diversity, we shared the intuition that some conceptual elements could be taken to be common to the different conceptions. To support this intuition, we adopted a straightforward approach. We invited legal and political philosophers who have expertise on the topic, during seminars and congresses we organized, to provide tentative lists of the conceptual elements they considered essential to articulating the idea of the Rule of Law¹⁶. We also recorded video inter-

¹⁴ See at least BURGESS 2017 and the references from our footnote 1 above.

¹⁵ ENGST, GSCHWEND 2021. GUTMANN et al. 2025.

¹⁶ Here is the list of seminars and congresses with dates and locations: Carmen Pavel, “Taking Hamlet Out of the

views with leading scholars and collected what we regarded as particularly authoritative responses concerning the central features of the Rule of Law¹⁷. In addition, we conducted a free-listing anonymous survey in Italian and Spanish with over 100 participants, both with and without legal expertise¹⁸, asking them to name the principal elements they associate with the Rule of Law. This allowed us to identify a set of elements that were mentioned most frequently. We then compared these results with the intuitions shared within our research group. Consequently, we chose to complement the empirical data with our group's theoretical understanding of the Rule of Law by incorporating a few additional concepts that we considered necessary and relevant, even if they were not among the most frequently cited.

Our experimental paradigms required us to translate concepts into concise terms and expressions, which were presented to participants before they performed a task (see § 3.1 below). Hence, the common conceptual elements that we found to be sufficiently shared had to be compressed into a list of terms and expressions that was adequately expressive of the Rule of Law and at the same time sufficiently short to be examined by a single participant, along with the one devoted to the alternative model, in a reasonable amount of time (not more than 30-45 minutes)¹⁹. Ultimately, we determined that a list of ten key terms and expressions related to the Rule of Law could effectively convey the concept: this was our answer to Research Question (1a). Here is the list of the ten words and expressions in Italian, along with their English translation:

Play: In Defense of a Substantive Conception of the Rule of Law", held online on January 22, 2024; Donald Bello Hutt, "Rule of Law and Political Representation", held at the University of Bologna on February 2, 2024; M. Victoria Kristan, "Violations of the Rule of Law: A Typology" (in Italian), held online on March 22, 2024; "Knowing the Rule of Law", a congress held in Italian at the University in Bologna on April 10, 2024 (speakers: Corrado Roversi, Marco Brigaglia, Andrej Kristan, José Juan Moreso, Marco Goldoni, Anna Maria Borghi, Luisa Lugli); "Rule of Law in the Light of Celano's Legal Theory", a congress held in Italian, English, Spanish at the University of Genoa on June 19-22, 2024 (speakers: Michel Troper, Leonardo García Jaramillo, Giuseppe Rocché, Matija Žgur, Mauricio Maldonado, María Beatriz Arriagada, José Juan Moreso, Miguel Fernández); Giuseppe Martinico, Leonardo Pierdominici, Corrado Caruso, "Aspect of Legal Sovereignism" (in Italian), held online on September 5, 2024; Michael Sevel, "The Values of the Rule of Law", held online on November 18, 2024; Deniz Tokmak, "The Erosion of the Rule of Law: Lessons from Turkey's Shift to Hyper-Presidentialism", held online on December 11, 2024; "Experiences of Crisis. A Historical Survey of the Crisis of the Rule of Law", a congress held in Italian at the University of Palermo on January 16-17, 2025 (speakers: Marco Brigaglia, Corrado Roversi, Andrej Kristan, Mariano Croce, Giovanni Bisogni, Graziella Romeo, Mario Varvaro, Pierangelo Buongiorno, Monica de Simone, José Juan Moreso, Victoria Inostroza, Aldo Schiavello).

¹⁷ The interviewed scholars were: Brian Bix (University of Minnesota), Matthias Klatt (University of Graz), Pablo Navarro (CONICET, Argentina), M. Victoria Kristan (University of Bologna), Michelangelo Bovero (University of Torino), and Pierluigi Chiassoni (University of Genova). All received the same set of questions, namely: "What are, in your opinion, the most important elements of the Rule of Law? Not necessarily a complete list, but the most important in both an ethical-political sense and a structural sense"; "What are, in the current context, the main lines of 'crisis', 'fractures', 'fragility' of the Rule of Law?"; and "In your opinion, in the current context, what is the model that has the best chance of emerging as an alternative to the Rule of Law? What would be the central characteristics of this model and the reasons for its success?". The interviews can be accessed here: <https://www.ruleoflawclear.eu/>.

¹⁸ We developed an anonymous questionnaire, which was sent to experts (n = 25) and non-experts (n = 25) in each language to test which ideas they associated with the Rule of Law and with an alternative model. The group of experts consulted included senior law students, master's and doctoral candidates, university professors, practising attorneys, judges, and judicial system employees. The non-expert participants were drawn from a wide range of both university-educated and non-university-educated professions. The instructions for the participants were first to think of the concept of the "Rule of Law", and to write all the words/expressions that come to mind in relation to this concept. Afterwards, we asked them to think of an alternative model, different from the "Rule of Law" and also write all the words/expressions that came to mind in relation to this concept. Although anonymous, it was distributed in a targeted manner to ensure diversity in terms of gender, educational level, and social class.

¹⁹ The duration of the experimental session was limited to 30-45 minutes to reduce attentional decline, fatigue effects, and motivational drop. This procedure was adopted to ensure high data quality and to comply with ethical principles of participant well-being, in line with the Declaration of Helsinki.

- *Prevedibilità* - Predictability
- *Regole* - Rules
- *Diritti* - Rights
- *Tolleranza* - Tolerance
- *Imparzialità* - Impartiality
- *Limiti* - Limits
- *Separazione dei poteri* - Separation of powers
- *Uguaglianza* - Equality
- *Tutela* - Protection
- *Garanzia* - Guarantee

We found this list to be sufficiently representative of the main conceptual components of the Rule of Law because the latter can be expressed in terms of the former: the Rule of Law is a model of organization of political power aimed at making its decisions predictable and non-arbitrary, by way of rules that are taken to be supreme and counter-measures like the separation of powers. According to this model, political power must be limited so as to protect and guarantee the fundamental rights of citizens. This model serves the values of tolerance, impartiality, and equality. The list of terms hence expresses in a very synthetic way, so as to admit experimental treatment, a simplified but still explanatory reconstruction of the main components of an institutional design inspired by the Rule of Law, the social expectations it is meant to meet, its grounds of legitimacy, and its core values.

Notice that most of these terms are not technical. Of course, we could have included legal principles like “presumption of innocence” or “legal certainty” in the list, but doing so would have demonstrated our hypothesis in a very trivial way. If the list of expressions used to convey the concept of Rule of Law had been a catalogue of technical notions that only legal experts could understand, we would have ended quite inevitably with the conclusion that ordinary citizens do not adequately understand them. We wanted instead to show something more profound and more fundamental: even if cast in ordinary, non-technical, and familiar language, the idea of Rule of Law is difficult to understand, more difficult than the alternatives. For this reason, we included in the list terms like limits, rules, guarantees, and protection, and, in general, all the expressions included are ordinary, non-technical expressions, even though, of course, they can bear a more technical meaning in legal language. The only possible exception to this is the idea of “separation of powers”, which requires some degree of constitutional culture. This concept was mentioned quite frequently in the anonymous surveys conducted in Italy and Spain, and it appeared among the most commonly cited by respondents both with and without legal expertise. Although in the Spanish questionnaire it was mentioned more often by experts, this was not the case in the Italian responses.

This reflection on the role of legal knowledge in understanding and interpreting the Rule of Law enabled us to refine the original hypothesis. Given that legal experts ordinarily deal with, and give specific technical interpretation of the concepts that appeared in our list, the idea emerged that perhaps legal education and practice could have been taken to reduce the cognitive load of these concepts: the more you use the concepts, the more you become accustomed to use them and process them, and perhaps you even develop a stronger emotional attachment to them. In previous articles that some of us had written on the cognitive elaboration of institutional concepts (VILLANI et al. 2022; ROVERSI et al. 2022), we had found experimentally, and discussed theoretically, the fact that legal experts indeed rate these concepts as lighter on some cognitive dimensions connected with cognitive load. Hence, we reasoned, if ordinary citizens without legal knowledge had found concepts related to the Rule of Law more difficult to process than those associated with the alternative model, perhaps this effect would have been mitigated with people having a legal education. Similar expertise effects have been demonstrated in neuroscientific studies examining electrophysiological responses to domain-specific concepts. BECHTOLD et al. (2019), for instance, reported that mathematics experts exhibited less negative N400 amplitudes to mathematical

words than non-experts, consistent with more efficient semantic processing in the expert group. Similarly, TROYER and KUTAS (2017) observed a reduced N400 effect in Harry Potter experts relative to non-experts when participants processed Harry Potter-related language. Taken together, behavioral and neural findings converge in showing that greater expertise is associated with facilitated processing of domain-specific information. This introduced a new, crucial parameter that we intended to measure experimentally: how does the cognitive load implied in processing the concept of Rule of Law change with the increase of legal expertise? For this reason, we undertook to test three different groups of people: students in disciplines other than law, serving as non-experts, students in their first year of law studies, serving as semi-experts, and students in their fifth year of law studies, serving as experts. In Italy, students in their first year typically take the exam in Constitutional Law and Philosophy of Law after one semester, which implies that they can be assumed to have at least a basic understanding of the elements of the Rule of Law. Through this distinction, we aimed to measure the impact of legal knowledge on the understanding of the Rule of Law in a dynamic manner, from its emergence to its subsequent development.

What about the alternative model? How did we answer Research Question (1b) (Which model of organization of political authority is incompatible with the Rule of Law, yet presents itself as a viable alternative in the contemporary political arena? What are the main features of this model?)? In the several seminars and workshops that we held during the first year of CLEAR, it became apparent that some of the political concepts we initially regarded as the antithesis of the Rule of Law – such as populism, for example, or the more recent sovereigntism – in reality are not necessarily so. It is certainly possible to imagine a sovereigntist model based on national supremacy that respects the Rule of Law, and even populism, properly speaking, is more a model about the sources of legitimate power than a model about the way power must be exercised. The more we attempted to use these two as the relevant models that we had to consider as alternatives to the Rule of Law, the more the nuances and difficulties in framing the opposition became clear. However, populism and sovereigntism play a crucial role in the contemporary global political dynamics, tilting towards a disrespect of supranational law – the case of EU Law is paradigmatic, particularly when this requires member states to fulfil standards related with the Rule of Law –, hence we were not prepared to dismiss them as essential reference points for our alternative to the Rule of Law.

In defining the alternative model, we proceeded in a way not different from that adopted in the case of the Rule of Law. When asking experts in legal and political philosophy about the features of the Rule of Law, we also asked what they regarded as a radically alternative model to it. And the anonymous survey in which we asked both experts and laypeople to indicate which terms or phrases they associate with the Rule of Law also included a question about the possible features of an alternative model²⁰. As it happened, when defining the list for the Rule of Law, we had to balance the outcome of the polls and direct questions to experts with the intuitions shared in the research group. If sovereigntism and populism cannot properly be taken to be the opposite of the Rule of Law, we realized that there exists a model of organization of political power that is clearly alternative to the Rule of Law, because it is precisely the model to fight against which the Rule of Law was conceived in the Seventeenth and Eighteenth centuries: this is absolutism, the idea of an unbridled sovereign power. Absolute monarchy, however, is not so relevant today, and we reasoned that we would have lost our grip on the contemporary political struggle if we had taken that as the appropriate alternative political model. The question then became: could we find a model sufficiently close to absolutism to serve as a genuine alternative to the Rule of Law, and sufficient-

²⁰ The question was so formulated: “Think of an alternative model, different from the ‘Rule of Law’. Please write in the field below all the words/expressions that come to mind in connection with this concept. After each word/expression, press *Enter* and then write the next one. There is no right or wrong number of items to produce; what matters is to write the relevant ones without spending too much time thinking about them”.

ly connected with contemporary sovereigntism and populism to be relevant as an explanatory category for contemporary political dynamics? And our final answer was: an exercise of autocratic power, based on the reclaim of the prerogatives of the sovereign State against international law, and grounded on a populist appeal to the will of the people and the good of the Nation as interpreted by the leader. We called it “Populist Authoritarianism”, and we assumed that there is at least one, if not many, examples of this model available in the world, and responsible for the current deconstruction of the fundamental principles of the Rule of Law²¹.

On this basis, we addressed Research Question (1c): Which concepts can convey the idea of Populist Authoritarianism while being sufficiently simple to be treated experimentally? A problem in addressing this question by asking people, “What are the features of a model alternative to the Rule of Law?” immediately emerged. Most people answered by citing negative, detrimental features of the model, like “dictatorship”, “anarchy”, “regime”, or “abuse of power”. But, of course, these are elements attributed to the alternative model only if this is considered from the point of view of their opponents. Our hypothesis required a comparison of the cognitive load involved in understanding the two models, and those terms and expressions did not describe the alternative model, but rather qualified it negatively. We wanted the terms and expressions used to convey the alternative model to the experimental participants to be descriptive of its inner mechanisms and values, just like in the case of the Rule of Law, to ensure that the effects observed were due to cognitive processing of the conceptual content of the political model rather than affective arousal. In fact, emotional content is known to modulate attention and increase processing time, acting as a confounding factor in the measurement of cognitive load. For this reason, to compare the cognitive load of the two models, we had to take the perspective of someone trying to understand the rationale behind both. Among many negative words and expressions provided to us by experts, two gave us this important insight: “shared values” and “nation, country”. These words are not necessarily negative, but defenders of Populist Authoritarianism typically use them. Could we find others? We decided to deepen our investigation by examining the discourse of political leaders who advocate for models of state organization that are critical of, or explicitly reject, the traditional Rule of Law. We analyzed speeches by political figures who we consider representative of this critical stance, including Viktor Orbán, Donald Trump, Matteo Salvini, Javier Milei, and Vladimir Putin, to identify recurring terms and phrases²². In addition, we organized a seminar on sovereigntism entitled “Aspects of Legal Sovereigntism”²³. During this event, participants referenced a number of theorists who advocate for sovereigntist approaches. Hence, we decided to apply our terminological analysis to the works of theorists and ideologues who promote contemporary sovereigntist models²⁴.

In the end, we came up with this list of terms and expressions, shared by the research group:

- *Volontà* - Will
- *Decisione* - Decision
- *Popolo* - People
- *Tradizione* - Tradition
- *Patria* - Fatherland

²¹ The expression “Populist Authoritarianism” is not meant to draw a sharp conceptual distinction from models discussed in the literature under labels such as “Authoritarian Populism” or “Autocratic Legalism”. It is instead employed as a broader heuristic term, intended to capture a range of related configurations of government, including those phenomena.

²² To track the frequency and patterns of these terms, we used the AI-based textual analysis platform *Voyant Tools*: <https://voyant-tools.org>.

²³ As mentioned above, the seminar was held online, in Italian, on September 5, 2024. The speakers were Giuseppe Martinico, Leonardo Pierdominici, and Corrado Caruso.

²⁴ SOMMA 2021, BECCHI 2018, SALVINI 2024.

- *Efficacia* - Effectiveness
- *Leader* - Leader
- *Unità nazionale* - National unity
- *Ordine* - Order
- *Crisi* - Crisis

We found this list to be sufficiently representative of the main conceptual components of Populist Authoritarianism in a way that elegantly mirrored our conceptual reconstruction of the Rule of Law: clearly simplified, but still explanatorily useful for the purpose of testing our original conjecture. According to this conceptual reconstruction, Populist Authoritarianism is a model of organization of political power aimed at expressing collective will through decisions taken by leaders. According to this model, political power must be expressive of the will and interests of the people and realize them with efficacy, so as to guarantee social order and solve any crisis. This model serves the traditional values of the Fatherland and its unity.

Here, as in the Rule-of-Law list, the terms included were not technical, hence we could assume that the possible difference in cognitive load when processing the two lists would not be due to differences in familiarity with the words and expressions included, but rather to their conceptual content. And, conversely, if we had found that legal experts showed a cognitive load with the Rule-of-Law list lighter than that involved in processing this list of very basic, ordinary notions, we could have demonstrated a more significant impact of legal education, determined by a real conceptual change rather than simply a more frequent use of legal language.

In framing these two lists of terms and expressions, we encountered another significant complexity, which emerged from the contributions of comparative constitutionalists in the mentioned seminar²⁵. With particular regard to contemporary sovereigntism, they argued that it is plausible to assume that supporters of this model employ some terms and expressions that are particularly relevant to the Rule-of-Law tradition, but in a sense transform their conceptual import by applying them differently. Four examples that emerged in the discussion were the concepts of democracy, freedom, identity, and power. Democracy is a value that is central to the Rule of Law. Still, it is also systematically advocated by supporters of sovereigntism, who interpret constitutional limits as subject to, not boundaries of, democratic will, and typically argue that supranational law can be detrimental to the realization of that will in sovereign countries. The same could be said about identity, which, of course, can be interpreted as constitutional identity in the sense of a realization of shared rules, principles, and values connected with the Rule of Law, but also as the traditional, national identity that sovereigntists claim to defend. Freedom can be intended as a fundamental right of individuals protected by the Rule of Law as a limit to the exercise of arbitrary political power, or as the freedom of people against boundaries and rules that are perceived to be “external” and not democratic, or also as a kind of unbridled, individual freedom that requires the elimination of the “bureaucracy” of rules. Finally, the term “power” can be used by highlighting its limits, as with “limitation of power” or “separation of powers”, or by showing its effectiveness, as in “the power of the people”. This is the reason why these terms – democracy, identity, freedom, and power – do not appear in the Rule-of-Law list, even though they appeared quite frequently in the questionnaires we had submitted.

In conclusion, we formulated a list of terms and expressions that we believed conveyed the main conceptual elements of the Rule of Law, and we identified an alternative model of political organization that could be expressed through an alternative list of terms and expressions. At that point, we were ready to proceed with the studies, but two more methodological questions required

²⁵ We are particularly grateful to Corrado Caruso, Giuseppe Martinico, and Leonardo Pierdominici for their insightful feedback on this topic. For further details on the perspective they shared with us during CLEAR, see L. Pierdominici, *Are There Populist Constitutional Heuristics?* in this volume.

our attention. The first concerned the disciplinary status of our inquiry – namely, whether research of this kind could properly be situated within experimental jurisprudence (§ 3.2). The second concerned the possible charge of paternalism implicit in our objective of enhancing the public understanding of the Rule of Law through cognitive interventions (§ 3.3).

3.2 *Experimental Jurisprudence on the Internal Point of View?*

The first question we found relevant was whether the kind of enquiry we were about to undertake, by making experiments in collaboration with cognitive psychologists on the cognitive load of the concept of Rule of Law, can be properly situated in the field of experimental philosophy, and more in particular of experimental philosophy of law, or, as it is now called, experimental jurisprudence.

The type of research we have undertaken can be considered as falling within the field of “experimental philosophy” (KNOBE, NICHOLS 2008), and more specifically “experimental jurisprudence” (TOBIA 2022, 2025) broadly understood. This is primarily due to the composition of the group – both legal philosophers and psychologists – and the methodology adopted, which brought together typically philosophical methods – the analysis of legal concepts and the formulation of very general, speculative hypotheses about legal-political dynamics – and empirical methods – the transformation of such general, speculative hypotheses into more specific hypotheses susceptible to empirical testing on the basis of validated experimental protocols.

Understood in this broad sense, the label “experimental jurisprudence” certainly applies to our research. However, some qualifications are necessary. Most works in experimental philosophy in general, and experimental jurisprudence in particular, focus on a more specific task: conducting surveys on the intuitions that certain categories of subjects have regarding targeted philosophical problems, including, in particular, problems concerning the determination of the extension and intension of lexical concepts. The latter has become the standard modality of experimental jurisprudence: a form of conceptual analysis in which the “armchair” methods traditionally employed by legal philosophers (introspecting their understanding of the concept at issue and their intuitions about its proper application, and identifying shared understandings and intuitions based on their knowledge of the context and conversations with colleagues) are replaced with experimental methods drawn from psychology (larger number of subjects, controlled conditions, statistical processing of responses, etc.).

If understood in this narrow sense, experimental jurisprudence is not extraneous to our research. A subset of it was indeed a freelisting survey, in which we asked subjects to indicate the elements they associated with the Rule of Law (and with Populist Authoritarianism) – a piece of experimental conceptual analysis. The identification of typical elements of the Rule of Law (and of Populist Authoritarianism), however, was not aimed at providing a fully-fledged empirical reconstruction of the concept, but it was rather a preliminary step in view of a different goal: measuring the cognitive load required to process the elements associated with the Rule of Law, as a proxy of the difficulty in understanding the idea of the Rule of Law (and its merits). The question we have dealt with is therefore straightforwardly and uncontroversially empirical: not the meaning of a term and the structure of a concept, but their psychological processing.

The fact that our question was empirical does not imply that answering it cannot be relevant for legal philosophy: as said, we defend a view of our discipline that is open to contributions from the empirical sciences, and we believe that empirical research can be set up by legal philosophers in collaboration with empirical scientists to enrich the description and explanation of the referents of concepts used in philosophy of law. Indeed, this project continues a line of inquiry in which empirical methods have been employed to investigate the cognitive underpinnings of key legal-philosophical concepts.

As already mentioned, in previous studies, some of us (Corrado Roversi and Luisa Lugli) have made experiments using psycholinguistic paradigms to study H.L.A. Hart’s concept of internal point of view (see in particular ROVERSI et al. 2022). In that enquiry, Roversi and Lugli started with

the assumption, made by Hart, that a crucial aspect of the internal point of view of legal experts and officials, in complex legal systems, is a linguistic practice involving legal concepts made possible by rules, secondary rules in particular. Hence, Roversi and Lugli believed that a proper description of this internal point of view could be enriched by an experimental analysis of how the cognitive dimensions by which legal experts process legal-institutional concepts differ from those employed by non-experts. In the end, Roversi and Lugli found experimental results that indeed supported Hart's analysis and also the distinction between an epistemic and a practical aspect of the internal point of view. In general, legal experts find legal-institutional concepts more concrete and more contextualized than non-experts, and they attach a stronger emotional valence to them. Moreover, while non-experts perceive the strong emotional valence of general social concepts like justice, punishment, or validity, they seem not to be able to transfer this valence to legal concepts like contract, Parliament, or President: experts, on the contrary, draw the emotional connection more clearly. Those of us who had framed that study saw this research on the Rule of Law as an ideal continuation of it, namely, as a sort of experimental study on the internal point of view over the Rule of Law.

3.3 *Is this Paternalism?*

The second methodological problem that lingered behind this research, and that we could not avoid considering, was the potential charge of paternalism associated with our idea of strengthening the Rule of Law by improving its understanding among citizens using cognitive-based techniques. Aren't citizens autonomous enough, one might ask, to decide what it is that they want to understand and accept? However, in the end, we found that the risk of paternalism in our case was small and that it was justified in any case. The reason why it was small is that, as it will become clear in § 6, the kind of legal design we have come up with in the light of our experimental data was conceived as having an educational purpose, and hence as a very transparent and clear kind of nudge, if any. But we also thought that this kind of support to the Rule of Law would have been justified even if it employed more opaque techniques, because, as already mentioned at the beginning, the Rule of Law is not a specific value that, if instilled into citizens, hampers their autonomy, but rather the institutional framework that makes it possible for citizens exactly to exercise their autonomy in its greater extension without limiting that of others. To defend the Rule of Law is not paternalism, but precisely the opposite: it means to protect the conditions under which no government can be paternalistic.

4. *The Experiments*

4.1 *The Experimental Paradigms and their Underlying Ratio*

Let us show now how we answered Research Question (2a), namely, the problem of identifying experimental paradigms that could reliably measure the cognitive load associated with the two models.

In psycholinguistics, conceptual complexity is often linked to the difficulty of representing the word's referent. According to the embodied cognition account (BARSALOU 1999; 2008; 2009), reading or hearing a word engages neural systems similar to those used in perceiving its referent – for instance, the word *cup* reactivates sensorimotor patterns tied to seeing a cup. Thus, the brain appears to “relive” the experience through language. Concepts with stable sensorimotor grounding are therefore processed more efficiently, as supported by extensive empirical evidence.

To reliably assess and compare cognitive load in processing Rule of Law and Populist Authoritarianism models, we adopted two paradigms, both rooted in the psycholinguistic perspective.

The first was a rating task, in which participants evaluated each word on a 7-point Likert scale across six dimensions that measure the extent to which the concept is connected to a sensorimotor

representation – for example, the degree of abstractness/concreteness, or the ease with which the human body can physically interact with the object or entity denoted by the word or expression. The second paradigm was a semantic categorization task. Participants read each word and decided whether it referred to a concept related to the governance of a country. Crucially, they were instructed to base their decisions on factual reasoning rather than on ethical or political judgments, independent of their personal political stance.

Assuming that both paradigms aim to measure cognitive load, we selected these two distinct tasks because the first captures an explicit, subjective evaluation of specific dimensions related to cognitive load, whereas the second assesses participants' implicit behaviour (e.g., reaction times) during a task that implicitly requires access to the deeper semantics of the word. Together, these measures may provide a comprehensive assessment of the cognitive effort required to process each word. Notably, both paradigms were implemented to also examine potential differences in expertise across the selected participant groups.

4.2 Materials

For both paradigms, experimental stimuli consisted of 10 words from the Rule of Law domain (e.g., *Uguaglianza - Equality*; *Tutela - Protection*) and 10 words from the Populist-Authoritarianism domain (e.g., *Patria - Fatherland*; *Volontà - Will*), as identified and described in § 3.1. For the second experiment, due to the nature of the task, a control list of 20 additional words was added (e.g., *Amicizia - Friendship*; *Silenzio - Silence*).

For the rating task (VILLANI et al. 2019; 2022), the dimensions selected as proxies for cognitive load were: abstractness-concreteness, body-object interaction, contextual availability, familiarity, social metacognition, and valence. Alongside the analyses of participants' ratings for each word on the six dimensions, we also conducted a cluster analysis to examine how words naturally group together. This data-driven approach allows us to see which words are perceived as similar across all cognitive-load-related dimensions. Words with similar ratings tend to form clusters, which provides an additional, more visual way to confirm whether the theoretical categories – Rule of Law versus Populist-Authoritarian – are reflected in participants' perceptions. If these two types of concepts are indeed processed differently, we would expect them to appear in separate clusters.

In the second experiment, participants responded to the words of the two lists and the control list presented individually. The task required participants to decide whether each word referred to a concept related to the governance of a country.

4.3 Hypotheses

Given the experimental paradigms we had framed and our theoretical framework, the hypotheses behind our research were translated into the following experimental hypotheses.

1. Rating on the six cognitive dimensions.

- a. FAM: Non-experts will find the terms and expressions of the Populist-Authoritarianism list *more familiar* than those of the Rule-of-Law list, whereas the opposite will hold for experts. Here, and with all the other dimensions below, semi-experts were included to examine whether the observed pattern exhibits a gradual continuum from non-experts to experts.
- b. ABS-CNR: Non-experts will find the terms and expressions of the Populist-Authoritarianism list *more concrete* than those of the Rule-of-Law list, whereas the opposite will hold for experts.

- c. CA: Non-experts will find the terms and expressions of the Populist-Authoritarianism list *more contextualizable* than those of the Rule-of-Law list, whereas the opposite will hold for experts.
- d. MESO: Non-experts will find the terms and expressions of the Populist-Authoritarianism list less dependent on instructions of others to be understood (in cognitive-psychological terms, *less dependent on social metacognition*) than those of the Rule-of-Law list, whereas the opposite will hold for experts.
- e. BOI: Non-experts will find the terms and expressions of the Populist-Authoritarianism list easier to interact with (in cognitive-psychological terms, *more open to body-object interaction*) than those of the Rule-of-Law list, whereas the opposite will hold for experts.
- f. VAL: Non-experts will find the terms and expressions of the Populist-Authoritarianism list *having higher positive emotional valence* than those of the Rule-of-Law list, whereas the opposite will hold for experts.

2. Reaction times.

- a. Non-experts will show *faster reaction times* while processing the terms and expressions of the Populist-Authoritarianism list than in the case of the Rule-of-Law list, whereas the opposite will hold for experts. Semi-experts were included to examine whether the observed pattern exhibits a gradual continuum from non-experts to experts.

3. Cluster analysis.

- a. We did not have any specific hypothesis regarding cluster analysis, because we hoped that it could give us further hints for a proper description of the differences in the way experts, non-experts, and semi-experts conceptualize the Rule of Law and Populist Authoritarianism. However, we hoped that the analysis would support our conceptual reconstruction of the two models.

5. Discussion of the Experimental Results

Details about the experimental paradigms and experimental results, with averages, statistical significance, and graphs, are given in a separate, forthcoming paper²⁶. Here, we will limit ourselves to discussing the results in relation to the hypotheses framed above.

Overall, we can say that our experimental data confirm the main hypothesis behind CLEAR. The cognitive dimensions that are most typically connected with cognitive load, namely, familiarity, abstractness/concreteness, and context availability, show the pattern that we expected: non-experts find the terms and expressions associated with the Rule of Law less familiar, more abstract, and less contextualizable than those of Populist Authoritarianism. In contrast, among experts, this pattern was reversed as Rule-of-Law concepts seemed to be more contextualizable, more familiar, and equally concrete as the Populist Authoritarianism ones. Moreover, non-experts show lower reaction times when processing the latter than when processing the former. On the

²⁶ The data, along with videos and further materials that explain our approach, will also be accessible on the website of project CLEAR at <https://www.ruleoflawclear.eu> and on a YouTube channel at <https://www.youtube.com/@rule-of-law-clear>.

other hand, experts process the Rule-of-Law list more quickly and find the terms and expressions included therein more familiar and contextualizable than those associated with Populist Authoritarianism. Semi-experts are in the middle between experts and non-experts, both in degree of familiarity with the Rule-of-Law list and with regard to reaction times, and in general – perhaps not surprisingly, given their role as students at the beginning of their university courses – they perceive feedback from others to be most significant for understanding all the terms and expressions considered. This supports our original intuition: non-experts find the terms and expressions associated with Populist Authoritarianism easier to understand than those related to the Rule of Law, but legal education reverses the trend into its opposite through a high degree of problematization and instruction from others. In the end, law experts process the terms and expressions associated with the Rule of Law with the lowest degree of cognitive load. The Rule of Law is more difficult to understand than Populist Authoritarianism, but education in law and legal matters can rebalance this disadvantage.

Note that this is not connected with the problem of justifying or embracing one of the two models: the data about emotional valence are pretty clear in this regard. All our participants – be they experts, non-experts, or semi-experts – in a sense declared their adherence to the Rule of Law by attaching a much higher positive emotional value to the terms and expressions in the associated list. Still, non-experts find them challenging to understand. We mentioned above (§ 3.2) the distinction between an epistemic and practical internal point of view, which traces back to Neil MacCormick’s distinction between a “cognitively” and “volitionally” internal point of view (MACCORMICK 1978, 292). Here, the data show that, even when non-experts express their adoption of a practical internal point of view towards the Rule of Law, they still do not perceive themselves to be fully internal epistemically. The connection between the two starts to emerge only with legal education. This evidence can be interpreted to support Hart’s insistence on the crucial role of legal officials and legal experts in adopting a full-fledged internal point of view to support the existence of a legal system. However, our results also show an interesting picture of the dynamics of cognitive load depending on legal education: while non-experts show signs of higher cognitive load when processing the Rule of Law than in the case of Populist Authoritarianism, and experts show the opposite pattern, in the case of semi-experts there is an overall increase of reaction times while the pattern moves towards that of experts. This, paired with the significant difference between perceived social meta-cognition in experts and semi-experts, provides evidence to support at least two conjectures about the epistemic internal point of view towards the Rule of Law. First, the internal point of view is the product of a process of emergence, hence its attribution is not an all-or-nothing matter: Hart’s distinction between “ordinary citizens” and “legal experts and officials” must be shaded into different degrees of internality, a conclusion that confirms our previous results on institutional concepts and the internal point of view (see ROVERSI et al. 2022, sec. 4.2). Second, the emergence of the internal point of view is connected with a sort of epistemic caution, perhaps a glimpse of that “critical reflective attitude” which Hart assumed to be a crucial feature of the internal agent, and this caution is intertwined with epistemic delegation, a perception that we depend on others, presumably experts, to get things right. These conjectures enrich Hart’s picture of the dichotomy “external vs internal point of view” in a significant way.

Intuitively, one might expect that the results regarding emotional valence and the practical internal point of view over the Rule of Law could vary depending on the political orientation of our participants. However, this conclusion is not supported by our data. Although we were unable to recruit participants from across the full political spectrum, we asked our experimental participants to express their political placement on a spectrum from left to right on a scale from 1 to 10, and we performed an analysis to determine if our data varied by this factor. The answer is no. Our results are not affected by political orientation. Interestingly, there is an effect of political orientation on the cognitive dimensions of abstractness/concreteness and emotional valence, but this holds in general, not in connection with one of the two lists in particular: participants declaring a right-wing political orientation tend to rate all terms and expressions as being more positive and more concrete.

It is important to note that these results are supported by two different experimental paradigms: that based on the ratings given by participants on different cognitive dimensions, and that based on reaction times when performing a task. The two paradigms are complementary, because ratings are, of course, dependent on biases and personal evaluations, but reaction times involve a process of elaboration that is implicit, hence not so easily accessible by the participants who perform it and by their biases in evaluation. The fact that the two paradigms confirm the same result, therefore, provides mutual support to both. Moreover, cluster analysis on the ratings given by legal experts tends to put terms and expressions in the Rule-of-Law list together, and this can be taken as an indirect support to the original formulation of that list.

The results of the cluster analysis are not straightforward to interpret, beyond the general observation that they tend to support the division of terms and expressions between the two lists for experts. What is particularly interesting, however, is that while both experts and non-experts show clearly differentiated clusters in terms of cognitive load – with no overlap – semi-experts present a different pattern. In their case, the clusters partially overlap. This suggests that semi-experts do not display a strong differentiation in the distribution of cognitive load across the terms and expressions considered. In other words, they do not distinguish as clearly between Rule-of-Law and Populist-Authoritarianism concepts along the various dimensions connected with cognitive load. This result aligns with our findings on social metacognition, which show that semi-experts experience greater uncertainty about the meaning and interpretation of the terms and, as a result, report a stronger need to rely on others than experts do – regardless of the list. Their lack of clear conceptual differentiation is also reflected in the data about reaction time: semi-experts are generally slower than experts when evaluating terms from both lists. Taken together, these patterns suggest that semi-experts may have developed a broad sense of uncertainty regarding the meaning and interpretation of these concepts.

Importantly, this heightened sense of epistemic uncertainty among semi-experts may represent a crucial anchor point for interventions aimed at reducing dogmatism and polarization (ROLLWAGE, FLEMING 2021) and, in turn, promoting the uptake of Rule-of-Law concepts. As described above, our data indicate a gradual trend: from a cognitive advantage for Populist-Authoritarianism concepts among non-experts, to an advantage for Rule-of-Law concepts among experts, with semi-experts positioned in between. Metacognition may play a mediating role in this trajectory, as increased awareness of one's knowledge gaps could reduce the conceptual rigidity observed in non-experts in favour of Populist-Authoritarianism concepts. That said, this interpretation must be treated with caution. While our analyses revealed a significant metacognitive difference between semi-experts and experts, the corresponding trend between non-experts and semi-experts – though numerically present – did not reach statistical significance. Disentangling the potential role of metacognition in shaping these patterns is therefore an important avenue for future research. If future studies confirm this role, classroom-based interventions could be developed aimed at increasing pupils' metacognitive uncertainty about the more easily grasped Populist-Authoritarianism concepts while strengthening the more complex Rule-of-Law concepts in the process.

In general, our data strongly support the original intuition, and they do so in a way that seems relevant for our practical outcome – contributing to the cultural battle for the Rule of Law by providing elements that make this concept more accessible. Of course, our data show that legal education is strongly relevant for the education of citizens in Western constitutional democracies – at least if we intend to keep the Rule of Law as part of their necessary grammar – hence a straightforward argument could be built to support an educational reform by which all high school programmes should include an introduction to public and constitutional law, when these topics are absent, and educators should devote time and reflection on how to better include and expand as much as possible treatment of these topics in existing curricula. A way must be found to make the terms and expressions connected with the Rule of Law more familiar to everyone, and to introduce as early as possible in the education and development of democratic citizens the cautious, problematic approach that semi-experts show when they begin their legal studies.

Our data, however, can also be used to support the Rule of Law in a complementary direction. Educational interventions that upskill individuals are necessary but often require longstanding reform and a cultural shift. They may be complemented by other types of interventions that may reduce the distance between the legal approach and laypeople. Legal experts find the terms and expressions associated with the Rule of Law easier to understand because they perceive them as referring to concrete notions in a clear, perceivable context, with a stronger emotional value. When we arrived at this conclusion drawn from experimental data, we realized that a relevant question to culturally support the Rule of Law was: is it possible to communicate the elements of the Rule of Law more effectively, by making them more concrete, contextualized, and emotionally charged to citizens without dedicated legal education? Now that we knew the reasons why the cognitive load associated with the Rule of Law is higher for non-experts and lower for experts (Research Question 3a), we intended to understand whether these insights could be fruitfully used to improve the communication of the elements of the Rule of Law (Research Question 3b). Specifically, we sought to formulate guidelines for a cognitive-based legal design in support of the Rule of Law. The following section turns to what we did in CLEAR to address this problem.

6. Data-informed Legal Design for the Rule of Law

6.1 Principles of Legal Design

Legal design is a nascent discipline that has been variously defined, but there is agreement on the fact that it applies «a human-centred design approach to the challenges and structures of the legal system»²⁷ (HAGAN 2020, 3). Since the law mainly deals with abstract rules and norms while design intertwines with the tangible, lived experiences of human beings, these two domains may seem very distant. However, they both share the goal of addressing complex human issues and maximizing individual outcomes within a system (HAGAN 2020, 4). To do so, legal design applies a broad range of evidence-based methods and shared principles to a multitude of legal artifacts that encompass documents, products, services, policies, and laws to make them more straightforward, engaging, and user-friendly²⁸. Such legal artifacts constitute material manifestations of the law's rationale, values, and ideologies and shape the interaction between the individual and the law (KOULU 2024).

One of the main Copernican turns initiated by the introduction of a human-centered perspective to the legal system is the necessity of considering the needs of all the “users” of the law beyond the traditional categories that, as mentioned earlier, are associated with it, such as lawyers, judges, and legal practitioners. The law is often incomprehensible and unusable by those who have not received dedicated training, despite the reality that *ignorantia legis non excusat*. There are many domains of life where human beings interact with legal norms without resorting to a legal practitioner (e.g., when concluding contracts or when setting one's own privacy preferences on a device) and thus need to have at least some understanding of it. In light of the data presented in these pages, effective legal communication and shared legal education acquire a renewed importance for strengthening the Rule of Law in contemporary democratic societies. This goal is in line with the proactive approach adopted by legal design as it intends to drive desirable outcomes, rather than merely addressing the consequences of failure and punishment.

The paradigm shift brought about by legal design has been caused, in part, by the central role that visual culture increasingly plays, fuelled by the digitalization of all domains of socie-

²⁷ Such a predominant perspective has been criticized, because of the many other conceptualizations of design and related research methods that can enrich the legal design spectrum. Discussing this issue is not the goal of this article – thus, we refer the reader to LE GALL 2021.

²⁸ See in this regard the *Legal Design Manifesto* (2018) (available at: <https://www.legaldesignalliance.org/>).

ty (BERGER-WALLISER et al. 2017). The visual turn has found fertile ground in legal research and practice, where the combination of words and graphical means enhances the effectiveness of legal communication, which has traditionally been text-based and devoid of visualizations. Legal design is not confined to document design and visualization, but encompasses many other tangible manifestations of the law (“legal artifacts”). However, multiple visual means can serve legal purposes, as variously explored and demonstrated by legal design scholars and practitioners (see, e.g., ROSSI et al. 2019; HAAPIO, PASSERA 2021). In this contribution, we find it helpful to focus on design patterns that can communicate complex legal information to a varied audience.

Design patterns are reusable, extensible solutions to commonly occurring problems. Originating in architecture and software engineering, these patterns have been adapted to legal contexts to improve interdisciplinary communication, share best practices, and inspire innovation (HAAPIO, HAGAN 2016). Legal design patterns have established themselves as purposeful tools to enhance the clarity, usability, and accessibility of complex legal content, such as contractual clauses and privacy terms that are often written “by lawyers for lawyers”. The patterns can act as explainers, clarifying the meaning of clauses or contracts; support layering, which emphasizes key points while minimizing peripheral details; and guide layout choices to ensure content is readable, legible, and easily navigable. Patterns also facilitate navigation, helping individuals locate relevant information efficiently, and promote organizing strategies that structure content to be more practical and user-oriented (ROSSI et al. 2019).

Visual representation patterns incorporate visuals to reduce cognitive load in processing complex legal information. Visual communication complements verbal text by providing an external representation of abstract relationships, disambiguating meaning rather than substituting written content. This process reduces comprehension costs through “computational offloading” (HAAPIO, PASSERA 2021), pre-processing information into meaningful models, and relieving readers from constructing associations independently. Examples include flowcharts depicting conditional workflows and comic contracts illustrating agreements through character-driven narratives for low-literacy audiences. The effectiveness of these visual techniques finds theoretical support in cognitive science. Research foundations derive from dual coding theory (PAVIO 1971), which posits that human cognition operates through two functionally independent yet interacting systems: verbal memory and image memory. When words evoke corresponding images, both systems activate simultaneously, creating linked memory traces. This dual encoding enhances recall and comprehension, as imagery potentiates verbal material retention. Legal design thus optimizes cognitive processing by leveraging both linguistic and visual channels.

6.2 Using Data to Create Legal Design Guidelines for the Rule of Law

Legal design can meaningfully support the Rule of Law by addressing the core challenges in legal comprehension, contextualization, and engagement that CLEAR’s empirical research has uncovered.

First, it enables the *concrete representation* of abstract legal concepts such as those related to the Rule of Law, thereby enhancing both understanding and memorization. Through visual communication techniques, legal design reduces cognitive load and facilitates more straightforward interpretation of legal norms.

Second, it provides *appropriate contextualization* by embedding legal information within real-world scenarios, making it more relatable and actionable for diverse audiences. This is particularly evident in the use of videos and storytelling, which situate legal content within everyday experiences and foster emotional resonance.

Third, legal design can increase the impact and memorability of legal messages by adding or *strengthening their emotional value*. This is particularly true when storytelling is employed: narrative-driven media can engage individuals not only cognitively but also affectively, encouraging reflection and ethical-legal awareness (BOTES, ROSSI 2024).

Fourth, to maximize these benefits, *legal design interventions must be carefully tailored*: designers

should reflect not only on *how* information is presented, but also *when*, *where*, *on which channel*, *for whom*, and *why*. Rather than merely delivering information, legal design can aim to tell stories and create opportunities for discussion and engagement.

Fifth, the effectiveness of each intervention should be empirically evaluated, ensuring that design choices lead to meaningful improvements in legal understanding and behavior.

Under these conditions, legal design offers a multidimensional strategy to reinforce the rule of law by making legal systems more comprehensible, contextualized, and emotionally resonant.

6.3 *The Outcome: A Video in the Educational Context*

Since its birth, the audiovisual medium has had a role in shaping our culture and our imagination across our society, affecting different fields of study. For example, the transformation of the cities during the twentieth century, and the consequent life change, has been accompanied by certain representations in movies, sometimes visionary, sometimes dystopian, that contributed to defining the image of the city as we perceive it today (LEONE 2010). It is interesting to notice how the audiovisual medium has been sometimes used in technical and specific contexts, like in the urbanistic discipline, to operate analysis and to convey messages (CIACCI 2001). A similar thing can be said for cartoons. From a mere form of entertainment, they soon became an active means of cultural expression. Just to make some popular examples, *The Simpsons*²⁹ became capable of rendering a specific critique of a whole society, while the animated movie *Persepolis*³⁰, which tells the biographical story of a French-Iranian woman, touching on sensitive political issues, was awarded at the 2007 Cannes Film Festival and received universal praise from critics. Animated videos proved themselves to be a powerful tool to transmit knowledge and ideas. In recent years, video content spread all over the internet, and so did many educational projects that take advantage of the synthetic form of the animated drawing to convey complex ideas in a simple and effective way. One example is *TedEd*³¹, an educational program that has a wide section of brief animated videos covering specific topics with a simple and catchy title. Another successful example is *Kurzgesagt*³², a project that proposes longer animated videos with a unique graphic style, covering subjects from astrophysics to social problems with a specific attention to research and the involvement of scientists. These examples share one key point: they successfully manage to make complex concepts easier to understand, intercepting an audience that is sensitive to certain topics but doesn't have time and mental resources to deeply study the subject.

In an increasingly visual culture, videos are also employed in different types of legal communication as a means to enhance content accessibility, audience engagement, and comprehension. Videos can provide a concise overview of the key points within lengthy legal documents, such as privacy policies, serving as an appealing first layer of information, where more details remain available on demand (ROSSI et al. 2019). By focusing on specific topics that benefit from audiovisual clarification, videos help demystify complex legal language and structures. Their format is often perceived as less time-consuming than reading full-text documents, thereby encouraging user engagement. Moreover, videos convey the tone and emotional context. Importantly, they also serve as inclusive tools, offering accessible legal information to individuals with limited literacy or unfamiliarity with legal terminology.

Storytelling in legal videos can significantly advance the Rule of Law by fostering empathy, enhancing comprehension, and encouraging engagement. Unlike traditional legal communication,

²⁹ The famous animated sitcom created by Matt Groening in 1989.

³⁰ Marjane Satrapi and Vincent Paronnaud (SATRAPI, PARONNAUD 2007), based on the graphic novel by Satrapi.

³¹ This program is part of Ted, a non-profit focused on dissemination that developed a format for conferences. <https://ed.ted.com/>.

³² German for "in a nutshell". <https://kurzgesagt.org/>.

which often relies on abstract and impersonal language, narrative formats allow viewers to connect emotionally and cognitively with legal content. Neurocognitive research demonstrates that when listeners engage with a story, their brain activity aligns with that of the narrator, and stronger neural synchrony leads to more effective communication (STEPHENS et al. 2010). This alignment enables the listener to internalize the narrative and gain insight into the lives and perspectives of others, which is essential for cultivating empathy and understanding (NEILE 2009) within a pluralistic legal system. Moreover, stories act as portals to unfamiliar experiences, enabling audiences to imagine alternative realities and critically reflect on existing legal norms (HANSEN 2021). By embedding legal principles within emotionally resonant and contextually rich narratives, storytelling in videos not only makes the law more accessible but also reinforces its legitimacy and relevance in everyday life, which can strengthen the foundations of the Rule of Law.

Of course, the effectiveness of videos depends on careful content selection and technical considerations, such as device compatibility, screen size, and viewing context. Accessibility should be ensured through subtitles or silent-mode display. Thus, it is essential to follow best practices in video production, including the use of interactive navigation tools, subtitles, and accessibility features, to ensure inclusivity and usability across contexts.

These considerations, along with the legal design guidelines drawn from our empirical research, provided the rationale for producing within CLEAR a video about the Rule of Law for educational purposes. As said, the animated video and the use of images in general presented a further advantage that was particularly interesting for the goals of CLEAR. The results of the research indicate that low cognitive load was associated with a perception of the terms as more concrete. Therefore, we wanted to present the information in a very concrete way to try to lower cognitive load. An image can represent an abstract concept, but structurally, it is always an image of *something*. Consequently, the exercise of translating concepts into images forced us to do exactly what we aimed for: switching from an abstract plane to a concrete one.

The first step was to define the goal of the video. Our intention was to use the information gathered in the research to make a video designed to better explain the Rule of Law, so that people could learn some of its key concepts with lower cognitive load. This approach was aligned with the guidelines previously defined for the institutions and could possibly work as an example.

The next step was to define the audience of the video. Since the purpose of the video was educational, a perfect match was identified in high school students. This consideration led to the idea of explaining the Rule of Law in a school context, which is rife of marks and exams. This would have had an impact in making the abstract concepts we wanted to cover more concrete and relatable to a familiar experience, thus lowering the cognitive load of the students. Defining the context in a school also has the advantage of possibly reaching a wider audience, since many could relate the story in the video to their own school experience. It could be argued that students could represent a difficult audience, since they are often unwilling to listen to content that comes from what is perceived as authority. This may be true when the content is presented in the form of a classical lesson, but it is important to consider how the information is delivered. Starting with a human-centered design approach, we wanted to take the students' point of view, identify an area of interest, and use it to capture attention and explain the concepts. For example, we identified notes and the perception of injustice as areas of primary interest to them. Following this, we defined the title as "Do You Know How to Defend Yourself from an Unjust Note?" (translated from the Italian original: "Sai come difenderti da un voto ingiusto?").

This approach has some benefits. First, it is a question, and it directly catches people's attention. Secondly, the title does not contain any direct reference to law or politics, which could activate an immediate preconception in the audience (e.g., the assumption that this is a lesson that must be studied). This is why the term Rule of Law is not mentioned until the end of the video, since we wanted to apply a bottom-up approach that moves from concrete representations to abstract concepts: first, we define a concrete situation made of actors, problems, and solutions, then we give it a name.

The problem-solution approach is also a common and effective way to make people empa-

thize with the story, which goes as follows: a new professor takes place in the classroom, and it is immediately clear he's a peculiar type of professor. He doesn't follow clear rules, and nobody understands what criteria are used to evaluate the tests. Since he wants to be popular, he generally gives good notes to everyone, and nobody protests. However, one day, a student makes a joke, and the professor gets offended. This results in a bad note for the student on the next test. She tries to defend her test, but, since the rules were not clear, it is easy for the professor to justify the note arbitrarily. At this point, the dean arrives with the rule book, explaining that whoever makes decisions must do so according to the rules and forcing the professor to apply specific criteria that lead the student to get at least an average note.

The video also makes use of analogies to render some concepts:

- the professor and the student are sitting on opposite plates of a balance, then the rule book falls on one plate, rebalancing it;
- the professor and the student are driving on two streets crossing each other, at the end of which there are their finish lines. They need to stop at the traffic lights in order not to crash into each other, but following the lights, they manage to both reach what they want³³;
- the writing "power" tries to expand, but a few hands draw walls around to contain it, and these walls create a house in which the student, the professor, and the dean are all present.

These images, while using the metaphor as a communication technique, are to be intended more like *visual metaphors*. This is important because a metaphor could potentially lead to a drastic change of context, drifting away from the concreteness that we were looking for. In our case, the metaphor is important to explain concepts, but it doesn't take the audience to a completely different context, which is possibly difficult to relate to daily life.

Character design and irony also play a fundamental role in keeping the attention high and in making people empathize with the story. The characters in the story are not just good or evil; they are human beings who want something: the professor wants to be popular, and the student wants to be promoted. With concrete images, the video tries to explain rules as a solution to the tension between different actors who want different things. In the end, they can all work together to establish and maintain a way of organizing society that is better for everyone.

Once a storyboard and an animatic³⁴ had been produced, we showed this first prototype to a few high school students and gather their feedback on the clarity of the content and of the purposes of the video. Future work should assess the effectiveness of the video more thoroughly with the prospect audience, for example the young people's comprehension of the concept of Rule of Law and the recall of the associated concepts.

The final version of the animated video can be found at <https://www.ruleoflawclear.eu/impact-and-application/>.

7. Conclusion

Overall, CLEAR arrived at three significant achievements. The first achievement is *theoretical*: the project made it possible to reflect on the conceptual elements of the Rule of Law, and on whether

³³ Of course, this analogy could present some problems if the audience was very young, since they would not be accustomed to driving in a city. Nonetheless, we believe that teenagers in high school are already used to it, given that the dynamic of traffic lights is familiar even for pedestrians who have no driving experience.

³⁴ An animatic is a pre-production tool that brings together all the sketched scenes that compose a storyboard and puts them in succession in a video draft with a preliminary soundtrack or voiceover. This is useful to test some aspects like timing, pace, and flow before fully animating the scenes.

and how it is possible to identify a model of organization of political power that is the antithesis of the Rule of Law. We realized that some elements of the Rule of Law are a question of values, some involve structural, institutional frameworks, and others assume very basic notions, like rule, or guarantee, and protection from abuse. We saw that there is a set of political ideas that could at first sight be taken to be “the alternative” to the Rule of Law, but not all of them are; some of these ideas must be connected together to be the real alternative, and some use the same notions that supporters of the Rule of Law use in a different way. We identified authoritarianism as the real model which is opposite to the Rule of Law, and populism and sovereigntism as possible attributes that can be added to the first, while retaining their conceptual autonomy. Populism and sovereigntism can exist without authoritarianism, and hence in principle they could comply with the Rule of Law. Authoritarianism, however, seems to be sovereigntist by definition, and it is typically populist in the contemporary political arena.

The second achievement of CLEAR is certainly *experimental*: we now have data about the way in which legal experts, non-experts, and semi-experts process terms and expressions that are central to the Rule of Law and its alternative, Populist Authoritarianism. These data are gathered based on two complementary experimental paradigms and are confirmed independently of political orientation. What these data show is not trivial: Populist Authoritarianism relies on notions that are easier to understand than those connected with the Rule of Law, and we need legal education to foster an attitude of problematization and reliance on others aimed at understanding and internalizing the proper elements of the Rule of Law. Moreover, on more technical jurisprudential grounds, these data provide further support to an experimental reconstruction of the internal point of view of legal experts, confirming previous findings according to which a crucial part of the epistemic internal point of view is the capacity to contextualize the relevant legal notions, thus making them more concrete and familiar. A new, original element that these data introduce for general jurisprudence is an experimental support to the distinction between practical and epistemic internal point of view, and to the idea that the former can be adopted without the capacity to adopt the latter.

The data also open a significant space for CLEAR’s third *practical* achievement, namely, the construction of guidelines for a cognitive-based legal design in support of the Rule of Law. An important objective of this design, according to the data we gathered, is to make the crucial conceptual components of the Rule of Law more accessible, engaging, and rooted in a lived experience by putting them in a concrete and well-known context. This means avoiding abstract proclamations and showing their real consequences on the ordinary life of specific users of the law (in our example: students).

Of course, these achievements should not be taken as the final word on these matters: CLEAR leaves open several further questions and avenues for research. It could be asked, for example, whether the complexity of the Rule of Law can be studied under different experimental paradigms, thus showing further important aspects of the overall phenomenon. Perhaps the Rule of Law is more difficult to understand because it introduces a logic of indirect, mediated action rather than of straightforward achievement of a result? Or perhaps it is more difficult to understand because a logic of negation governs it (you *cannot* do this because there are limits, rules....) rather than a logic of affirmation (you *can* do this, you *can* achieve this directly and straightforwardly...)? Could these conjectures be supported on theoretical and experimental grounds? And could they lead to an even more effective legal design in support of the Rule of Law?

Further, the examination on psycholinguistic grounds of “the alternative” to the Rule of Law as a model that must be understood in its ratio, debatable as it may be, rather than only as the blurred logical cluster of all kinds of negative evaluations, is a promising line of research that seems to align well with findings from evolutionary psychology which show that authoritarianism may be a psychological tendency that is deeply rooted in evolution (CLAESSENS et al. 2020) and biology (LEWIS, BATES 2014). More specifically, it has been suggested that the tendency for authoritarianism is closely linked to the evolution of cooperative behaviour in humans: since cooperation

requires social conformity, this evolutionary adaptation may have predisposed humans to align with established social structures and to minimize perceived threats to group cohesion (OSBORNE et al. 2023). In addition, such a predisposition toward conformity may, in turn, contribute to reduced critical evaluation of new information and greater cognitive inflexibility (VAN HIEL, PANDELAERE, DURIEZ 2004). Empirical studies support this hypothesis, showing that individuals with stronger authoritarian inclinations often demonstrate lower cognitive flexibility and rely on less demanding cognitive strategies for processing information. Taken together, this research suggests that authoritarianism is not merely a collection of negative traits but rather a fundamental human tendency with deep evolutionary roots and, thus, deserves attention as such.

We hope that these avenues will be explored in the future. CLEAR was a wonderful and stimulating journey for us all, and most of all a meaningful one. As said, we believe the Rule of Law is under serious threat today, and its relevance is no longer as clear-cut as it once was, in comparison to the appeal of political models and paradigms that rely on force and make arbitrary, yet swift and visible, decisions. We also believe that it is a duty of intellectuals and academics to explain this ideal and to defend it with all means. It is the Rule of Law that limits the arbitrariness of power and opens the space of reasons in the political and legal arena. It has been the most wonderful and outstanding achievement of Western European legal culture in the last four centuries. In the face of bullies or even utter criminals who are currently acting in the international arena and claiming the right to do as they please simply because they possess brute power, let us all stand in defense of that ideal.

References

- AUERSPERGER MATIĆ A. 2019. *Two Concepts of the Rule of Law*, in «Ljubljana Law Review – Zbornik znanstvenih razprav», 79(2), 2019, 9-34.
- BARSALOU L.W. 1999. Perceptual Symbol Systems, in «Behavioral and Brain Sciences», 22(4), 1999, 577-660.
- BARSALOU L.W. 2008. *Grounded Cognition*, in «Annual Review of Psychology», 59, 2008, 617-645.
- BARSALOU L.W. 2009. *Simulation, Situated Conceptualization, and Prediction*, in «Philosophical Transactions of the Royal Society B», 364, 2009, 1281-1289.
- BECCHI P. 2018. *Italia sovrana*, Sperling & Kupfer.
- BECHTOLD L., BELLEBAUM C., EGAN S., TETTAMANTI M., GHIO M. 2019. *The Role of Experience for Abstract Concepts: Expertise Modulates the Electrophysiological Correlates of Mathematical Word Processing*, in «Brain and Language», 188, 2019, 1-10.
- BERGER-WALLISER G., BARTON T.D., HAAPIO H. 2017. *From Visualization to Legal Design: A Collaborative and Creative Process*, in «American Business Law Journal», 54(2), 2017, 347-392.
- BOTES M., ROSSI A. 2024. *At the Verge of 'Is' and 'Could Be': Storytelling as Medium to Develop Critical Ethical Skills*, in HILDT E., LAAS K., BREY E.M., MILLER C.Z. (eds.), *Building Inclusive Ethical Cultures in STEM*, Springer International Publishing, 313-330.
- BURGESS P. 2017. *The Rule of Law: Beyond Contestedness*, in «Jurisprudence», 8(3), 2017, 480-500.
- CARRÉ DE MALBERG R. 1920. *Contribution à la théorie générale de l'État*, CNRS Éditions.
- CIACCI L. 2001. *Progetti di città sullo schermo*, Marsilio.
- CLAESSENS S., FISCHER K., CHAUDHURI A., SIBLEY C.G., ATKINSON Q.D. 2020. *The Dual Evolutionary Foundations of Political Ideology*, in «Nature Human Behaviour», 4, 2020, 336-345.
- CRAIG P.P. 1997. *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in «Public Law», 3, 1997, 467-487.
- DICEY A.V. 1885. *Introduction to the Study of the Law of the Constitution*.
- DWORKIN R. 1978. *Political Judges and the Rule of Law*, in «Proceedings of the British Academy», 64, 1978.
- ENGST B.G., GSCHWEND T. 2021. *Citizens' Commitment to Judicial Independence: A Discrete Choice Experiment in Nine European Countries*, Mimeo.
- FALLON R. 1997. *'The Rule of Law' as a Concept in Constitutional Discourse*, in «Columbia Law Review», 97, 1997, 1-56.
- FULLER L.L. 1964. *The Morality of Law*, Yale University Press.
- GALLIE W.B. 1955-56. *Essentially Contested Concepts*, in «Proceedings of the Aristotelian Society», n.s. 56, 1955-56, 167-198.
- GUTMANN J., KANTOROWICZ J., VOIGT S. 2025. *How Do Citizens Define and Value the Rule of Law? A Conjoint Experiment in Germany and Poland*, in «Journal of European Public Policy», 32(4), 2025, 899-925.
- HAAPIO H., HAGAN M. 2016. *Design Patterns for Contracts*, in SCHWEIGHOFER E. et al. (ed.), *Networks. Proceedings of the 19th International Legal Informatics Symposium*, Österreichische Computer Gesellschaft OCG, 381-388.
- HAAPIO H., PASSERA S. 2021. *Contracts as Interfaces: Visual Representation Patterns in Contract Design*, in KATZ D.M., DOLIN R., BOMMARITO M.J. (eds.), *Legal Informatics*, Cambridge University Press, 213-238.
- HAGAN M. 2020. *Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System*, in «Design Issues», 36(3), 2020, 3-15.
- HANSEN K.S. 2021. *Optimistic Fiction as a Tool for Ethical Reflection in STEM*, in «Journal of Academic Ethics», 19(3), 2021, 425-439.
- HAYEK F.A. 1955. *The Political Ideal of the Rule of Law*, Bank of Egypt.

- HEUSCHLING L. 2002. *État de droit, Rechtsstaat, Rule of Law*, Dalloz.
- KING J. 2024. *The Rule of Law*, in BELLAMY R., KING J. (eds.), *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press, 297-315.
- KNOBE J., NICHOLS S. (eds.) 2008. *Experimental Philosophy*, Oxford University Press.
- KOULU R. 2024. *In Search of Living Law: How Should We Design for (Digital) Legal Interaction?*, in «Digital Society», 3(2), 2024, 31.
- KRIEGER B. 1979. *Les esclaves et l'État*, Payot.
- KRISTAN A. 2017. *Estado de Derecho, Desde el Estado hasta la ideología judicial: Antimanual*, Palestra (ch. 1).
- KRISTAN M.V. 2026. *Violations of the Rule of Law, A Typology to Guide Decision-Makers*, in «Law and Philosophy», 45, 2026.
- KRYGIER M. 2023. *The Ideal of the Rule of Law and Private Power*, in TUSHNET M., KOCHENOV D. (eds.), *Research Handbook on the Politics of Constitutional Law*, Edward Elgar Publishing, 14-29.
- LAPORTA F. 2007. *El imperio de la ley: una visión actual*, Trotta.
- LE GALL A. 2021. *Legal Design beyond Design Thinking: Processes and Effects of the Four Spaces of Design Practices for the Legal Field*, in DUCATO R., STROWEL A. (eds.), *Legal Design Perspectives. Theoretical and Practical Insights from the Field*, Ledizioni.
- LEONE D. 2010. *Sequenze di città. Gli audiovisivi come strumento di studio e interpretazione della città*, Franco Angeli.
- LEWIS G.J., BATES T.C. 2014. *Common Heritable Effects Underpin Concerns over Norm Maintenance and In-Group Favoritism: Evidence from Genetic Analyses of Right-Wing Authoritarianism and Traditionalism*, in «Journal of Personality», 82, 2014, 297-309.
- MACCORMICK N. 1978. *Legal Reasoning and Legal Theory*, Oxford University Press.
- MEIERHENRICH J., LOUGHLIN M. (eds.) 2021. *The Cambridge Companion to the Rule of Law*, Cambridge University Press.
- NADER L., MATTEI U. 2008. *Plunder: When the Rule of Law Is Illegal*, Blackwell Publishing.
- NEILE C.S. 2009. *Storytelling and Social Change: Introduction to the Special Issue*, in «Storytelling, Self, Society», 5(2), 2009, 69-71.
- OSBORNE D., COSTELLO T.H., DUCKITT J., SIBLEY C.G. 2023. *The Psychological Causes and Societal Consequences of Authoritarianism*, in «Nature Reviews Psychology», 2(4), 2023, 220-232.
- PAIVIO A. 1971. *Imagery and Verbal Processes*, Holt, Rinehart & Winston.
- PAVEL C.E. 2021. *Law Beyond the State: Dynamic Coordination, State Consent, and Binding International Law*, Oxford University Press.
- PFRSMANN O. 2001. *Prolégomènes pour une théorie normativiste de "l'État de droit"*, in JOUANJAN O. (ed.), *Figures de l'État de droit. Le Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l'Allemagne*, Presses Universitaires de Strasbourg, 53-78.
- POSTEMA G. 2023. *Law's Rule*, Oxford University Press.
- RADIN M.J. 1989. *Reconsidering the Rule of Law*, in «Boston University Law Review», 69(4), 1989, 781-822.
- RAZ J. 1979. *The Rule of Law and Its Virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford University Press.
- ROLLWAGE M., FLEMING S.M. 2021. *Confirmation Bias Is Adaptive When Coupled with Efficient Metacognition*, in «Philosophical Transactions of the Royal Society B», 376(1822), 2021, <https://doi.org/10.1098/rstb.2020.0131>.
- ROSSI A., DUCATO R., HAPIO H., PASSERA S. 2019. *When Design Met Law: Design Patterns for Information Transparency*, in «Droit de la Consommation = Consumenterecht: DCCR», 122-123, 2019, 79-121.
- ROVERSI C., UBERTONE M., VILLANI C., D'ASCENZO S., LUGLI L. 2022. *Alice in Wonderland: Experimental Jurisprudence on the Internal Point of View*, in «Jurisprudence», 14(2), 2023, 143-170.
- RUNDLE K. 2023. *Revisiting the Rule of Law*, Cambridge University Press.
- SALVINI M. 2024. *Controvento*, Piemme.

- SHKLAR J.N. 1987. *Political Theory and the Rule of Law*, in HUTCHINSON A.C., MONAHAN P. (eds.), *The Rule of Law: Ideal or Ideology*, Carswell.
- SOMMA A. 2021. *Quando l'Europa tradì se stessa*, Laterza.
- STEPHENS G.J., SILBERT L.J., HASSON U. 2010. *Speaker-Listener Neural Coupling Underlies Successful Communication*, in «Proceedings of the National Academy of Sciences», 107(32), 2010, 14425-14430.
- TAEKEMA S. 2021. *Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship*, in «Law and Philosophy», 40, 2021, 33-66.
- TAMANAH B. 2004. *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.
- TOBIA K. 2022. *Experimental Jurisprudence*, in «University of Chicago Law Review», 89(3), 2022, 735-802.
- TOBIA K. 2025. *Experimental Jurisprudence*, in *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/experimental-jurisprudence/>.
- TROYER M., KUTAS M. 2017. *It's All in Your Head: Effects of Expertise on Real-Time Access to Knowledge during Written Sentence Processing*, in GUNZELMANN G., HOWES A., TENBRINK T., DAVELAAR E.J. (eds.), *Proceedings of the 39th Annual Conference*.
- TUORI K. 2024. *Rule-of-Law Soft Law of the Venice Commission*, in SAEJAN M. (ed.), *The Revival of the Rule of Law Issue*, Intersentia, 589-614.
- VALENTINI C. 2025. *Per un costituzionalismo deliberativo*, Il Mulino.
- VAN HIEL A., PANDELAERE M., DURIEZ B. 2004. *The Impact of Need for Closure on Conservative Beliefs and Racism: Differential Mediation by Authoritarian Submission and Authoritarian Dominance*, in «Personality and Social Psychology Bulletin», 30, 2004, 824-837.
- VILLANI C., D'ASCENZO S., BORCHI A.M., CORRADO R., BENASSI M., LUGLI L. 2022. *Is Justice Grounded? How Expertise Shapes Conceptual Representation of Institutional Concepts*, in «Psychological Research», 86, 2022, 2434-2450.
- VILLANI C., LUGLI L., LIUZZA M.T., BORCHI A.M. 2019. *Varieties of Abstract Concepts and Their Multiple Dimensions*, in «Language and Cognition», 11(3), 2019, 403-430.
- WALDRON J. 2002. *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, in «Law & Philosophy», 21(2), 2002, 137-164.
- WALDRON J. 2011. *The Rule of Law and the Importance of Procedure*, in Fleming J.E. (ed.), *Getting to the Rule of Law*, NYU Press, 3 ff.
- WALDRON J. 2023. *Thoughtfulness and the Rule of Law*, Harvard University Press.
- WALDRON J. 2024. *From Form and Procedure to Substance*, in «Law and Philosophy», 43, 2024, 603-618.

Legal Certainty, the Private Sector, and Empirical Studies: A Preliminary Approach

JORDI FERRER BELTRÁN

University of Girona, Spain.

E-mail: jordi.ferrerb@udg.edu

CAROLINA FERNÁNDEZ BLANCO

University of Girona, Spain.

E-mail: carolina.fernandez@udg.edu

VÍCTOR GARCÍA YZAGUIRRE

University of Tarapaca, Chile.

E-mail: garciayzaguirre@gmail.com

NATALIA SCAVUZZO

Autonomous University of Madrid, Spain.

E-mail: natalia.scavuzzo@uam.es

ABSTRACT

This article revisits the concept of legal certainty as it is currently approached in contemporary continental legal culture. It proposes a broader perspective that relates legal certainty to human development and frames it as a complex normative ideal, sustained not only by the State but also through the active involvement of private actors and key individuals. The discussion includes the illustrative case of private soft law, which reveals how legal certainty is shaped across multiple levels of social and institutional practice. In addressing these dimensions, the paper highlights the growing relevance of empirical studies, particularly those exploring how legal concepts are understood and processed by citizens, as valuable tools for deepening our understanding of how legal certainty functions in real contexts and how it can be efficiently promoted.

Questo articolo riconsidera il concetto di certezza del diritto così come è attualmente affrontato nella cultura giuridica continentale contemporanea. Propone una prospettiva più ampia che collega la certezza del diritto allo sviluppo umano e la inquadra come un ideale normativo complesso, sostenuto non solo dallo Stato ma anche mediante il coinvolgimento attivo di attori privati e di individui chiave. La discussione include il caso esemplificativo della *soft law* privata, che mostra come la certezza del diritto venga plasmata a più livelli della pratica sociale e istituzionale. Affrontando queste dimensioni, il contributo evidenzia la crescente rilevanza degli studi empirici – in particolare quelli che esplorano come i concetti giuridici siano compresi ed elaborati dai cittadini – come strumenti preziosi per approfondire la nostra comprensione del funzionamento della certezza del diritto nei contesti reali e di come essa possa essere promossa in modo efficiente.

KEYWORDS

legal certainty, rule of law, soft law, empirical research

certezza del diritto, stato di diritto, soft law, ricerca empirica

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



Legal Certainty, the Private Sector, and Empirical Studies: A Preliminary Approach

JORDI FERRER BELTRÁN, CAROLINA FERNÁNDEZ BLANCO, VÍCTOR GARCÍA YZAGUIRRE, NATALIA SCAVUZZO

1. Introduction – 2. On Legal Certainty – 3. Legal Certainty and the Rule of Law – 4. Actors responsible for the promotion of Legal Certainty – 4.1 Actors within the Rule of Law and Legal Certainty: Horizontal and Vertical Relations – 4.2 Private Actors – 4.2.1 The Private Sector as a Beneficiary of Legal Certainty – 4.2.2 The Private Sector as Responsible for Strengthening Legal Certainty – 5. The case of private soft law – 6. Is Empirical Jurisprudence Relevant to Fostering a Culture of Legal Certainty?

1. Introduction

Legal certainty is a central topic in jurisprudence, closely linked to various widely discussed themes such as legal sources, legal interpretation, legal argumentation, the justification of legal decisions, rational legislation, and so on. However, providing a well-structured analysis of legal certainty is challenging, as it requires a comprehensive understanding of the dynamics involved and how these elements function in practice. This, in turn, demands a deeper study of how legal norms are followed by citizens and applied by legal officials in everyday legal practice – something that meets beyond the capacity and scope of traditional analytic jurisprudence.

This work revisits the basic notions of legal certainty as currently understood within contemporary continental legal culture, highlighting its connection to the rule of law. It proposes a broader perspective that, on the one hand, links legal certainty with human development, and on the other hand, views it as a complex ideal state whose maintenance involves not only the State and its government but also certain key individuals and private organisations. This is clearly shown in the case of *soft law*. The central thesis is that expanding the concept of legal certainty requires a revision of the methodologies used to understand it, measure it, and promote it more effectively. This comprehensive analysis calls for dialogue with the most advanced and empirically grounded studies on the subject, particularly those that, through experimentation, explore how citizens perceive legal institutions and the cognitive load of key legal concepts essential to legal certainty.

The structure of this paper is as follows. Section two presents a conceptualisation of legal certainty and its inherent complexities. Section three explores the distinction between, and the convergence of, two central concepts that have often been used interchangeably: legal certainty and the rule of law. Section four introduces a novel approach to identifying the actors responsible for maintaining and promoting legal certainty, including specific individuals and stakeholders from the private sector. Section five illustrates this perspective through an analysis of the case of *soft law*. Finally, Section Six emphasises the importance of engaging with empirical research as an essential means of addressing the complexities discussed throughout the paper.

2. On Legal Certainty

One of the key characteristics commonly associated with the concept of legal certainty is the ability of individuals to know what the law is. In this way, the cognoscibility of law enables individuals to plan and anticipate the legal consequences of their actions, as well as the ways in which the

state exercises its coercive power¹. It is important to note that the “cognoscibility of law” does not have a univocal meaning². Cognoscibility encompasses various issues related to the knowledge and communication of law, including the material cognoscibility of legal texts or legal sources³, and intellectual cognoscibility, which refers to intelligibility – namely, the understanding of the meaning of normative texts, i.e., the norms derived from these texts through interpretation⁴.

Legal certainty requires the possibility of exercising a «legal-rational control of the reconstructive argumentative structures of general and individual norms»⁵. This means that legal certainty applies not only to the outcomes – namely, the content of a norm, which must be clear, free from problematic ambiguities, and accessible – but also to the processes through which those outcomes are reached, both in the drafting of normative statements and in the formulation of norms through interpretation.

The ability to know the law constitutes only the so-called “static aspect of legal certainty”. However, legal certainty can also be analysed from a broader or “dynamic” perspective. This perspective relates to the problem of action over time and establishes the state of things that must be ensured for the law to protect citizens’ rights retrospectively and prospectively⁶. This ideal includes calculability and reliability. Reliability refers to the law’s ability to secure citizens’ rights over time, ensuring the protection of their past actions. Calculability, on the other hand, entails citizens’ capacity to anticipate and assess the consequences of their actions in the future, as well as the gradual and foreseeable process of legal change⁷.

Calculability is achieved when citizens can estimate the future consequences of their actions, and legal change is neither abrupt nor drastic. This means that legal changes should be predictable and announced in advance, preventing unpleasant surprises for citizens. Furthermore, calculability is enhanced when rational control can be exercised over legal decisions, both in the judicial and administrative spheres. This implies that decisions must be based on logical and coherent reasoning, which creates the need for proper justification and reasoning, especially when judicial precedents are modified. The transparency and accessibility of judicial processes and rulings are also key elements of legal certainty, as they enable individuals to anticipate the legal consequences of their actions⁸.

If we consider both perspectives, we can observe that legal certainty can be defined as a state of affairs that arises when the three branches of government, along with other public entities and certain private actors, fulfil the requirement of carrying out their functions in a manner that provides individuals and legal entities with the ability to know the law (cognoscibility), as well as legal reliability and calculability, thereby enabling the exercise of their rights and the fulfilment of their obligations⁹.

This approach to legal certainty does not directly refer to the qualities of legal norms or the behavioural expectations of state agents or specific individuals. Rather, it concerns a factual situation with these qualities or behavioural expectations as a precondition. In this sense, legal certain-

¹ For an analytical study of legal certainty, see ÁVILA 2012 and FERRER BELTRÁN et al. 2025. For a comprehensive study of legal certainty from various perspectives, see CRUZ MORATONES et al. 2015, and FERRER BELTRÁN, FERNÁNDEZ BLANCO 2018.

² GUASTINI 2017, 399; GUASTINI et al. 1987.

³ Material cognoscibility encompasses normative accessibility, the scope of normative content, and normative identification; see FERNÁNDEZ BLANCO, FERRER 2015 “Proyecto de Indicadores de seguridad jurídica”, *Seguridad Jurídica y democracia en Iberoamérica*, pp. 219-220.

⁴ GUASTINI 2011; SANDRO 2022.

⁵ ÁVILA 2012, 580.

⁶ ÁVILA 2015.

⁷ ÁVILA 2012, 581 ff.

⁸ SEGATTI 2024.

⁹ FERRER BELTRÁN, FERNÁNDEZ BLANCO 2015/2021.

ty is understood as a “state of affairs” – that is, as the reality experienced by citizens in relation to their confidence in the legal system and their ability to foresee the legal consequences of their actions¹⁰. Thus, from this factual approach, asserting that there is a high level of legal certainty means affirming that individuals in a given place and time have the capacity to anticipate the legal consequences of their actions with a certain degree of certainty. This ability to anticipate consequences may be general (for example, knowing whether, upon committing offence X, it is possible, likely, or unlikely that pre-trial detention will be ordered). However, it may also apply to a specific or particular group (for instance, importers of goods may reasonably foresee that the applicable tariffs are predetermined and that they will not be unexpectedly subjected to different tariffs when attempting to finalise the importation into a country). A central aspect of this approach to legal certainty is that it can be seen as a matter of degree and that it is possible to identify legal systems in which this state of affairs is more strongly present, as well as others where its weakness is more pronounced.

The idea of legal certainty as a *state of affairs*¹¹ is compatible with the widespread view that legal certainty is also an *ideal or a normative concept*¹² – an ideal concerning the creation and application of law. In this sense, legal certainty involves a set of requirements and obligations imposed on state and private agents who have the capacity to promote it. These requirements are primarily legal in nature, although they also entail political and institutional preconditions.

The distinction between understanding legal certainty as a *state of affairs* or as an *ideal* thus depends on the subject’s perspective: for the inhabitants and beneficiaries of legal certainty, it constitutes a state of affairs, whereas for state agents and other private actors capable of influencing legal certainty, it represents an ideal to be pursued and promoted.

Beyond its strictly legal implications, legal certainty also plays a pivotal role in broader socio-economic frameworks, particularly in relation to human development. As an ideal, legal certainty has the potential to guarantee the effectiveness of rights and good governance, thereby serving as a fundamental instrument for human development¹³. We argue that legal certainty is a driving force behind development that goes beyond economic growth and concerns, for example, the idea of development as expansion of *human capabilities*¹⁴ or the United Nations, Sustainable Development Goals (SDGs). For a long time, development was primarily regarded as an economic matter, closely linked to the growth of industries, gross domestic product per capita, and other monetary indicators. However, towards the end of the last century, a new idea emerged that changed the direction of analysis: institutions – that is, the “rules of the game” within a society – could be the key to understanding both development and underdevelopment.

This paradigm shift was spearheaded by economic neo-institutionalism, which proposed that institutions, or the rules of the game in a given society, were fundamental to explaining economic phenomena such as growth or stagnation¹⁵. This new approach brought to the forefront the importance of legal certainty and the rule of law in the development of nations. Slightly later, the concept of human development emerged, driven primarily by the economist Amartya Sen. This idea offered a broader vision of development – one that extends beyond economic growth to include dimensions such as health, education, and overall human well-being. For Amartya Sen, development is more than simply material wealth: it is a process of expanding the real freedoms

¹⁰ GOMETZ 2005, 4-5 and 293-295. See also GOMETZ 2015.

¹¹ GOMETZ 2005, 50-51 also FERRER BELTRÁN, FERNÁNDEZ BLANCO 2015, 245.

¹² From this perspective, it has been interpreted as a norm-principle ÁVILA 2012, 94-95; 2015. LIFANTE similarly conceives it as a one of the types of principles described by ATIENZA and RUIZ MANERO 1991, 103-105 (the 4th type of principle): that is, as a norm that expresses one of the fundamental values of the legal system, similarly to equality or freedom LIFANTE 2015, 17.

¹³ See FERRER BELTRÁN et al. 2025.

¹⁴ SEN 2000.

¹⁵ NORTH 1995.

that individuals enjoy¹⁶. This perspective highlights that human development is not reducible to economic figures but consists of the conditions that allow people to lead lives they have reason to value and choose freely¹⁷.

This last aspect is of particular interest to us for a central reason: everything that individuals can do in exercising their capabilities – or in the pursuit of expanding them – critically depends on respect for individual autonomy¹⁸.

Clearly, in a context of fragile legal certainty, individual autonomy is curtailed, and we cannot fully exercise it for two main reasons. First, individual decisions themselves may be constrained by legal uncertainty. For example, a citizen who was unaware that the deadline for submitting a political candidacy had been shortened cannot exercise their right to participate in public life and thus cannot realise the life plan they have reason to value. Secondly, the fragility of legal certainty also manifests in the difficulty of anticipating the consequences of our autonomous decisions¹⁹.

In other words, legal certainty is both a guarantee of autonomy – as the possibility of pursuing the life we have reason to value (a core of human development) – and of the ability to rationally anticipate the consequences of our autonomous decisions. In conclusion, we believe that legal certainty has enormous potential to promote human development and thus to foster a multidimensional model of development that encompasses the physical, intellectual, emotional, and social well-being of individuals throughout their lives, thereby enhancing their welfare and autonomy.

Another important shift in the conception of legal certainty is the growing recognition of the role of individuals, not merely as passive beneficiaries, but as active contributors to, and bearers of responsibility for, its maintenance and strengthening²⁰. Both the role of individuals in its maintenance and its significance for human development make it essential to distinguish legal certainty from other ideals pursued by contemporary Western societies. The study of legal certainty has received less attention than other ideals sought by these societies, such as democracy, respect for human rights, and the rule of law, for example. It is crucial to recognise that legal certainty is, in many cases, a contributing condition for the realisation of these other ideals. At the same time, fulfilling the requirements necessary for legal certainty must take place within the framework of the rule of law.

The means to achieve this state of legal certainty may be reflected in duties or prohibitions imposed on public officials and some private agents, as well as in tools or practices that strengthen trust in the legal system and the respect for law in society. One of the current most central challenges facing legal certainty is promoting a culture of legal certainty, in which adherence to this ideal becomes embedded within the social fabric as a social practice, ensuring that society demands it.

To better grasp the structural conditions under which legal certainty can be preserved and promoted, we now turn to its relationship with the rule of law.

¹⁶ SEN 2000. The influence of this position, promoted by Sen and the Human Development approach, is remarkable, and for several years now, attention has been focused on poverty as a multidimensional problem rather than one solely linked to income.

¹⁷ Although the concept of Human Development has departed from the traditional path that strongly equated development with economic growth, per capita income, or improvements in certain productive aspects of the economy, it still retains some core historical elements of development thinking, which can be identified as follows: a) human development recognises the importance of economic growth; b) it also recognises the crucial role the market plays in contemporary society. It is significant that SEN, when designing the Human Development Index (HDI), included Gross National Product (GNP) per capita as one of the three factors – specifically the one measuring wealth or standard of living – and later also used differences in per capita income (and in education) to assess inequality.

¹⁸ Always bearing in mind that this autonomy has limits, primarily the respect for the autonomy of others and the obligation to assume the consequences of one's autonomous decisions.

¹⁹ It can be observed that legal certainty has a direct impact on the existence of relevant options, which is one of the main conditions for autonomy, alongside rationality and independence. About autonomy and the relevant options and how they are dependent on the contextual and relational environment see ÁLVAREZ 2015.

²⁰ We will address this issue on section 4.

3. Legal Certainty and the Rule of Law

We understand that the three ideals – rule of law, democracy, and legal certainty – intersect continuously and, in some cases, act as preconditions or contributing factors for the realisation of each other²¹. Before addressing these interconnections, we will briefly introduce the concepts we will use to identify such links.

The core of the rule of law may be simply expressed as follows: «The rule of law means that government officials and citizens are bound by and abide by the law»²². This basic core, while directly linked to the efficacy of the law²³, has significant implications regarding how laws should be created and applied: namely, respect for the principle of legality. This entails that all public officials, employees, and agents of the state must respect the law and the Constitution. This also implies the need to respect the separation of powers (for it would make little sense to have a government subject to the laws if it could change those laws at will and without following due process). The central idea, then, is that behaviour must be guided by law, and governments must be *of* the law and *by* the law. Legal certainty relies heavily on the fulfilment of the rule of law to ensure that the legal system is free from tyranny and despotism²⁴.

Meanwhile, we adopt a basic conception of democracy, one that may be universally accepted regardless of ideological orientation. In this context, democracy is defined as a type of regime characterised by a set of rules related to the ownership and exercise of political rights. Thus, democracy is understood as a system in which all individuals subject to the political obligation to obey the legal order and public authorities possess the equal right and power, whether directly or indirectly, to participate in the creation of laws and in the formation of political decision-making bodies²⁵.

For democracy to be fully realised, certain levels of compliance with and respect for the rule of law and legal certainty must be achieved. These elements are essential for guaranteeing an environment in which all individuals can exercise their political rights equitably and predictably. By strengthening the rule of law and legal certainty, we move towards a more robust and representative democracy in which all citizens have the opportunity to contribute to political decision-making processes. Therefore, the realisation of democracy requires a certain degree of compliance with, or respect for, both the rule of law and legal certainty.

We therefore understand that there is a functional relationship between the rule of law, legal certainty, and democracy. This relationship can be described as follows: the rule of Law is necessary for legal certainty to exist without tyranny or despotism, and both the rule of law and legal certainty are, generally, necessary conditions for democracy to be realised.

The relationship among the rule of law, legal certainty, and democracy is multifaceted, and its in-depth study would require a dedicated approach to fully explore its many dimensions. Hence, this section will only present some of the key aspects of this relationship, those which are most relevant for the scope of this work.

²¹ A similar idea can be found in MORESO 2020, where the author argues that the rule of law entails the integration of three interrelated ideals: imperium of the law (procedural rule of law), democratic self-government, and the protection of human rights. Thus, the rule of law would represent the legal form of constitutional democracy.

²² TAMANAHA 2012, 233.

²³ We adopt here the terminology most used by Spanish-speaking legal theorists. In other linguistic traditions – such as the Italian tradition – the terms efficacy and effectiveness are often used with meanings opposite to those employed in this text. Moreover, multiple distinct senses of the term efficacy have been identified within those traditions. Similarly, in the sociology of law, the concept of effectiveness tends to correspond to what we refer to here as efficacy, while efficacy is often understood as the actual attainment of the outcomes intended by the legislator.

²⁴ In this regard, GUASTINI explains that the rule of law stands in opposition to despotic and arbitrary government and is therefore characterised by the principles of liberty and legality, see GUASTINI 2014, 326.

²⁵ BOVERO 2015, 41.

Firstly, as mentioned earlier, neither the rule of law nor legal certainty are all-or-nothing concepts, but rather manifest in degrees²⁶. This gradual nature is partly since both legal certainty and the rule of law are composed of various elements that may be present to a greater or lesser extent²⁷. For instance, at a given moment, a State may struggle to secure or maintain the independence of its judiciary, and still face no significant difficulties in legislative production (i.e. the laws enacted are consistent with the constitution and higher laws). Likewise, in terms of legal certainty, a state may be in a situation where judicial interpretations on a specific issue are inconsistent, yet there may be no problems with excessive legislative production.

As noted earlier, the rule of law is a necessary but not sufficient condition for a model of legal certainty that is incompatible with despotism and tyranny. Moreover, a certain degree of strength in both legal certainty and the rule of law is necessary for democracy to exist.

Let us consider a few examples of these interrelationships:

a) It is conceptually possible – though not desirable – to imagine a scenario in which legal certainty (in terms of reliability and predictability) exists, but some essential mechanisms of the rule of law fail. Consider, for example, the imposition of martial law, where its duration is defined, the grounds for its application are clearly established, and judges apply it consistently. Nevertheless, the law has not been enacted by a body competent to do so and is contrary to a constitutional provision. This would not constitute a government of the laws and by the laws. Therefore, for such a government to exist, legal certainty alone is insufficient; the minimum requirements of the rule of law must also be met to avoid tyranny and despotism.

b) It is also conceivable to imagine a strong rule of law and high levels of legal certainty without these being embedded in a democratic regime. All the formal or procedural features of the rule of law could theoretically exist within an autocratic system, and nothing inherently prevents such a system from providing reliability and predictability to individuals and legal persons.

What is more difficult to imagine, however, is the inverse: the existence of democracy without at least a minimal level of respect for the rule of law and legal certainty. If the democratic process, as previously defined, is constitutionally or legally enshrined, then the proper functioning of the rule of law and legal certainty appears to be both necessary and sufficient for democracy to be realised.

c) The prior existence of the rule of law and legal certainty is essential for safeguarding democracy (when democracy is the system established by the legal framework). Otherwise, political rights could be arbitrarily altered, legislation on political parties could change in ways that prevent predictability for candidates and voters, access to justice for violations of political rights could be denied, or jurisprudence on these matters could vary to such an extent that there would be no reasonable way to foresee judicial outcomes based on prior case law.

4. *Actors Responsible for the Promotion of Legal Certainty*

4.1 *Actors within the Rule of Law and Legal Certainty: Horizontal and Vertical Relations*

The rule of law is a legal-political ideal that governs both horizontal and vertical relationships. Our proposed classification identifies different kinds of relationships that the rule of law structures, emphasizing the critical role of legal certainty.

²⁶ This idea can be seen originally in RAZ 1979.

²⁷ This is why, for example, indexes or indicators can be developed to assess the strength of the rule of law. Similarly, the legal certainty Indicators Project developed by the Cátedra de Cultura Jurídica serves as a useful map to guide us in identifying which aspects of legal certainty are strong or in need of improvement.

Horizontal relations are those that are established between different actors on the condition that none of them is a state entity or a state actor or is acting as a state actor or representative of the state at that time. In other words, horizontal relationships structure the links between natural persons, between natural persons and private legal persons and between private legal persons. The condition is that the natural persons do not act as agents or representatives of the state and that the legal persons are of a private nature. The strength of the rule of law in horizontal relations is of paramount importance, since it is in this type of relations that most private law activities are carried out (contracts, tort liability, corporations, commercial activities, etc.). The proper functioning of the rules of private law is crucial for the possibility of human development and individual autonomy.

Vertical relations, in turn, refer to the interactions between the state (including its authorities, agents acting in an official capacity, state bodies and agencies, and public legal entities) and private natural or legal persons. State-to-state relations are also considered a form of vertical relations structured by the rule of law. Four types of vertical relationships can therefore be distinguished, all of which are characterised by the presence of the state as at least one of the parties involved.

Type one vertical relations: This relationship is a relationship between state and subject (S-S). Most approaches have focused on the limits that the rule of law imposes on the state agents and structures. Although it is not accurate to see it exclusively in this sense, this type of obligation is generally associated with the “abstention” of the state. In this dimension, the rule of law acts as a check on tyranny, a guarantee of the freedom and other rights of citizens. This type of relationship has been associated with what some authors call the “liberal rule of law”²⁸.

Type two vertical relations: Far less attention has been paid to the obligations that individuals owe to the state (subject-to-State, Su-S). These obligations include – but are not limited to – taxes and social security contributions, which are particularly important, as well as many other obligations, such as, for example, those related to the traffic regulations and compliance with environmental regulations. Although these are obligations imposed by the state on individuals and businesses, their fulfilment or breach clearly affects other members of society – citizens, businesses and so on.

Type three vertical relations: The third type of vertical relationship is that which imposes positive duties on the state in favour of natural and legal persons (State to subjects, S-Su relationship). These types of obligations – security, health, education and others – have generally been considered as state obligations aimed at fulfilling other types of rights of inhabitants and citizens, different from those that constitute the typical liberal core. These relations have been labelled as a part of welfare state within the framework of the rule of law. However, it is important to bear in mind that the vertical relations of the third type also have other components that are not only related to social welfare – although they are of course clearly part of it. Thus, type three vertical relations include not only social rights, but also other positive duties of the state that are not necessarily linked to subjective rights of individuals, but to other obligations, such as ensuring internal and external security, promoting infrastructures that contribute to the economic development of the country (roads, railway networks, promoting areas suitable for industries, etc.), establishing relatively efficient systems for preventing natural disasters, ensuring the protection of the environment, and so on.

Type four vertical relationships: The last form of vertical relationship is the one that occurs when the actors involved are exclusively state actors (S-S). This type of relationship is at the heart of the rule of law. Indeed, any definition of the rule of law begins with the most central and indispensable feature of the rule of law: the appropriateness of the behaviour of rulers and inhabitants to what the laws provide. It is obvious that the proper behaviour of rulers is determined by rules

²⁸ FERRAJOLI 1989, 901.

dictated by other organs or by a higher authority of the same organ. Vertical relationships of type four are instrumental to the other types of relationships previously described. For example, an administrative officer must enforce the collection of a fine imposed by their superior for a type-two vertical relationship to be fulfilled; or a judge must rule on a precautionary measure considering certain parameters established by the legislator in order to restore the breach of a horizontal relationship. Furthermore, it is within type-four vertical relationships that accountability mechanisms between the different branches of the State arise.

4.2 *Private Actors*

Private actors are classically recognised as beneficiaries of legal certainty. However, the scale and scope of the impact of certain activities of some private actors make it necessary to reflect on how and to what extent they can influence legal certainty.

By responsible private actors, we mean any legal entity under private law or natural person engaged in a for-profit or non-profit activity that has a high potential impact on legal certainty, i.e. high-impact private actors. High impact private actors are those that have one or more of the following three characteristics: a) they provide a public service; b) they have the power to influence the way in which public policy is designed or implemented²⁹; or c) they are large companies or large individual investors.

The importance of recognising the dual face of private actors, both as recipients and as responsible for legal certainty, allows for a broader view of the concept of legal certainty and its close relationship to human development. Thus, it is important that private actors enjoy the benefits of legal certainty, as they are an important driver of productivity, employment and growth.

At the same time, the activities of private actors can have a major impact on sustainability, climate and the effectiveness of individual rights in general. It is from this perspective that fostering and promoting effective partnerships in the public, public-private and civil society spheres is target 17 of goal 17 of the SDGs.

4.2.1 *The Private Sector as a Beneficiary of Legal Certainty*

Legal certainty is central to the ability of the private sector to develop its activities appropriately. This is important from two points of view. On the one hand, an environment of predictability and trust in institutions is necessary for complex decision-making and increased long-term investment. Therefore, attention to investment and private sector development is central to the growth of various industries and markets. Strengthening legal certainty also indirectly supports economic and human growth and development.

On the other hand, while legal certainty is central to big business and attracting capital, it shows its essential link to human development when we turn to small and medium enterprises. While their investments are lower, they also have fewer resources to deal with the institutional instability that results from legal uncertainty. In this way, strengthening legal certainty supports the effectiveness of fundamental rights such as the right to work and the right to an adequate standard of living. More concretely, legal certainty enables the private sector – especially small and medium-sized enterprises (SMEs) – to operate in an environment of predictable legal rules and stable institutional expectations. This reduces transaction costs, facilitates access to credit, and minimizes the risk of litigation, thereby creating conditions for economic inclusion and job creation. When legal norms are clear, stable, and consistently applied, businesses can plan, engage

²⁹ Important charitable or privately funded public policy funding organisations – e.g. Bill and Melinda Gates Foundation, the Rotary Club or Médecins Sans Frontières (MSF) – may be included in this group.

in long-term investments, and establish secure contractual relationships with employees and suppliers. These dynamics are crucial not only for economic growth but also for safeguarding rights such as the right to work, access to social protection, and a decent standard of living. In contexts of legal uncertainty, SMEs are often the most vulnerable, as they lack the resources to manage regulatory volatility. Therefore, strengthening legal certainty becomes a key enabler of human development by enhancing both individual autonomy and collective economic resilience.

4.2.2 *The Private Sector as Responsible for Strengthening Legal Certainty*

However, the role of private actors in relation to legal certainty is not limited to that of beneficiaries. In fact, they also bear significant responsibilities in its promotion.

We refer to these actors as *high-impact private actors*. The impact of their actions on legal certainty arises primarily to the extent that their participation in the market under the conditions under which they offer a good or provide a service fulfils the requirements of legal certainty (they meet the requirements of accessibility, publicity, stability, predictability and reliability). In this sense, the legal certainty of a community is measured not only by how the state acts in its vertical relations, but also by how the providers of goods and services relate to their customers and beneficiaries (horizontal relations).

Secondly, as providers of goods and services that are indispensable for the satisfaction of the rights of the country's inhabitants, they are a necessary condition for the creation of wealth and development. In this respect, on the one hand, when they act in synergy with States, they are suitable agents to implement public policies and enable the fulfilment of rights. In this sense, private agents play an important role in the implementation of type three vertical relationships, where the State proactively guarantees rights or other functions such as the classic “police power” (*pouvoir de police*). In this type of state obligation, there is necessarily a confluence of obligations on the state to act and obligations to limit the activity of private parties to properly fulfil these obligations³⁰.

On the other hand, they are one of the main actors that could optimise and/or interfere with the way in which individuals can exercise their rights. For example, by owning large amounts of capital, they can influence how a particular market operates (they have type three vertical obligations to avoid monopolistic or oligopolistic practices). They also have a high degree of influence on consensus building and the dissemination of information and are therefore also relevant actors for the creation of a culture of legal certainty. One area in which large companies, for example, have an important responsibility is the verification, completeness and reliability of the information they pass on to their users.

Thirdly, the private sector can also create legal uncertainty in the opposite direction, e.g. when its representatives promote or participate in acts of corruption in which public officials are also involved. In this sense, private actors are responsible for ensuring that anti-corruption rules are complied with and that participation in the market takes place in accordance with the applicable rules.

Fourthly, private actors with great influence have proven that they can create regulatory instruments. According to Katharina Pistor's research³¹, private actors can generate norms, especially

³⁰ In continental European administrative law, the notion of *pouvoir de police* (police power) refers to the general authority of the state to impose restrictions on individual rights to preserve public order, safety, health, morality, and other collective interests. While the term police power also exists in common law systems – most notably in U.S. constitutional law – its scope, legal basis, and holders differ significantly. In the United States, police power is a legislative prerogative of the federated states, whereas in broader common law contexts (such as the United Kingdom), comparable functions are exercised through specific regulatory competences delegated to administrative agencies or local authorities. Consequently, there is no exact equivalent, and the concept should be translated with caution depending on the institutional context.

³¹ PISTOR 2019.

through the creation of new financial instruments that establish privileges, obligations and benefits that did not exist before. In other sense, there are agents who create soft law that has found a high degree of acceptance and thus compliance by various public and private actors in different circumstances. This point will be discussed in more detail below.

In the context of the importance of private actors for the rule of law and legal certainty, the importance of supranational actors that have the *de facto* ability to influence and/or the normative competence to affect the exercise and functions of states and the way in which their inhabitants make decisions is particularly relevant. More specifically, we refer to all those actors that operate in more than one state and that can generate obligations, commitments or influences that affect the way in which the sovereignty of each state and the autonomy of everyone is exercised.

A distinction can be made between public and private supranational actors. Public supranational actors include, on the one hand, states (as subjects of international law) and the international organisations to which they belong. However, there are also supranational private actors, such as multinational companies. These are influential private actors whose activities have an impact on two or more public states. As we have already explained, these high-impact companies (and the international associations to which they may belong) are not only beneficiaries of the legal certainty, but also bear a special responsibility for strengthening legal certainty. Thus, in certain circumstances, when faced with coordination problems or situations of indeterminacy, these companies issue regulations that attempt to resolve them and guide the behaviour of other private and public actors.

A concrete illustration of how private actors influence legal certainty is found in the phenomenon of private soft law, which will be examined in the following section.

5. *The Case of Private Soft Law*

In current practices, private actors, as previously noted, are not merely passive recipients of regulation – that is, recipients and evaluators of the degree of legal certainty and rule of law that a State may offer. They are agents who, through their practices, shape the degree of concretisation of both elements in each context. One of the most relevant practices in this regard involves the creation of norms that are subsequently followed by other private actors as well as public actors.

The specialised literature refers to this type of norm as cases of private soft law. This section will offer a brief characterisation of such practices to clarify the point.

On what soft law is and how to identify it, there are multiple ongoing debates. As a proposal aiming to synthesise the various discussions on the matter, soft law may be understood as norms that guide the behaviour of their addressees and that are characterized by: (a) being created through procedures not provided for in the formal sources of law³²; and (b) their breach does not give rise to formal or public sanctions, nor does their compliance condition the validity of public or private acts. This, of course, is not a new phenomenon; what is relatively new, however, is the technical language that has recently emerged to discuss it. In short, soft law has operated and

³² At the international level, for example, it refers to all instruments issued by subjects of international law that are not listed in Article 38.1 of the Statute of the International Court of Justice. United Nations General Assembly, 2019, paragraph 8.

For a survey of the current discussions on what is and how to identify soft law norms see INIESTA DELGADO, NÚÑEZ VAQUERO 2025 and ELIANTONIO et al. 2023.

will continue to operate as an alternative strategy for regulating behaviour³³, and it will depend on those who exercise power over others to decide whether to adopt it and how to implement it.

Soft law norms are «rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects»³⁴. In this regard, it is important to note that the notion of normative binding force is theoretically complex³⁵. What specialised literature generally refers to when employing this expression is the following:

First, the content of soft law norms does not alter the set of rights and duties of their addressees. More precisely, these norms do not generate new Hohfeldian legal positions, whether favourable or unfavourable; rather, they provide a guide for conduct regarding how to exercise a liberty or competence³⁶. This means that it influences the way a person should act³⁷.

The expression “does not alter” conveys two ideas: (i) Soft law norms, having been issued through processes different from those for the creation of hard law (for example, without following the procedures for creating an international treaty or a constitutional or legislative norm), cannot expressly or tacitly repeal hard law norms³⁸; and (ii) soft law norms do not possess formal or material hierarchical superiority over hard law norms³⁹. The absence of formal hierarchical superiority means that soft law norms do not regulate the procedures by which hard law norms are produced⁴⁰. The absence of material hierarchical superiority means that, in cases of conflict between soft law and hard law norms, the former do not override the latter⁴¹.

Second, specialized literature usually points out that, when institutionally resolving normative problems, the use of soft law norms is not sufficient to justify⁴²: (i) the order to perform or refrain from an action to satisfy a soft law norm; (ii) the imposition of sanctions and/or compensatory duties (such as financial or symbolic reparations) for not complying with a soft law prescription; (iii) the declaration of validity of an institutional act based on its conformity with soft law norms; or (iv) the declaration of invalidity of an institutional act based on its non-conformity with soft law norms. Indeed, recipients of soft law norms may perform actions or create states of affairs incompatible with the standards (whether because they are obeying another mandate or simply exercising their autonomy or sovereignty) without generating negative normative consequences.

³³ CHINKIN summarizes some of the main reasons for using it: to avoid national requirements for treaty ratification; to circumvent international regulations on treaty-making; to create a system for regulating conduct that can be easily modified or abandoned at low cost; and to foster public discussion or gain time for it (or as a possible temporary agreement in the face of stalled negotiating positions). See CHINKIN 2000, 26-27, 41-42. See also SHELTON 2000, 12 ff.

³⁴ SNYDER 1994, 198.

³⁵ For a proposal to clarify the notion of “binding” from the perspective of analytical legal theory, and for an analysis of each meaning as applied to soft law, see ESCUDERO 2012, 132 ff.

³⁶ See CONSEIL D'ÉTAT 2013, 64. ABBOTT et al. 2000, 401.

³⁷ Two clear examples of this point are the 1975 Helsinki Final Act, in which the parties stated that the adopted provisions did not constitute an agreement subject to International Law, and the 1992 Declaration of Principles on Forest Sustainable Management, which explicitly stated that it “did not have binding force.”

³⁸ One aspect that remains to be analyzed in the specialized literature concerns the consequences of redundancy between soft law and hard law norms. Let us suppose that, in a first stage, a prescriptive soft law norm was issued. In a second stage, this norm was reiterated in a hard law norm (thus creating a redundancy problem: two norms regulating the same type of action with the same normative consequence). In a third stage, the hard law norm is repealed. This situation raises several questions: does such a repeal imply a tacit repeal of the soft law norm? If it does not imply such a repeal, does the soft law norm continue to serve as a guide for the exercise of freedom, or does it cease to do so because the course of action it prescribed has been expressly rejected by the legislator? We will address these issues in greater depth in future research.

³⁹ GUASTINI 1997, 463-482.

⁴⁰ This also implies that the relationship between hard law and soft law does not activate the rules of *lex posterior* or *lex superior*.

⁴¹ On the notion of defeat as overcoming, see GARCÍA YZAGUIRRE 2023a. For examples of the material superiority of hard law over soft law, see SENDEN 2004, 243 ff.

⁴² See ABBOTT et al. 2000, 408 ff.

Under these conditions, in what ways are soft law norms used? They can have at least two uses: experimental and para-legislative. Regarding the experimental use, soft law norms can be useful for evaluating the consequences of certain actions without incurring legal costs. Since the development and negotiation of such norms involve lower risks – including political risks – compared to those associated with hard law norms, soft law often functions as a preliminary step toward the establishment of a new normative figure or the modification of existing hard law. In other words, soft law norms act as precursors, allowing for the anticipation of the practical and regulatory effects that could arise if they were transformed into hard law, thus avoiding the immediate imposition of sanctions or invalidities⁴³.

As for the para-legislative use, soft law norms can serve as guidance for behaviour. This guidance can take at least two forms: (i) soft law norms can be employed as normative premises to be adopted, meaning they operate effectively – that is, recipients are aware of their existence and, on the strength of such regulation, decide to act in accordance with the desired state of affairs outlined therein⁴⁴; or (ii) soft law norms can serve, if so decided by a legal interpreter, as argumentative support to strengthen the justification of the chosen normative premise. In other words, they can be used in the external justification of the norm applied in a particular case.

This guidance, depending on the degree of acceptance by its recipients, can be implemented either temporarily or permanently.

As for its temporary nature, this is partly manifested through what we have referred to as its experimental function. Prescriptions proposed through soft law are implemented with the purpose of evaluating their effects and, subsequently, deciding whether to transform them into hard law or let them fall into disuse.

The permanent character is observed in situations where it is not necessary to transform soft law into hard law to increase its degree of compliance. In these cases, the mechanisms used to achieve its effectiveness have been sufficient for behaviour regulation without requiring further adjustment. Here, the experimental function fades, as both issuers and recipients no longer view soft law as a merely transitional proposal but as a behavioural guide that addresses their coordination problems, uncertainties, and conflicts.

This para-legislative use is often accompanied by strategies to incentivise its effectiveness. These strategies are varied but usually focused on implementing external pressure mechanisms that foster compliance with soft law norms, such as actions that generate reputational damage within the relevant community for non-compliance. In this sense, the effectiveness of soft law norms increases the more they are employed, as those wishing to participate in that community must comply in order to interact properly⁴⁵.

Private soft law has had a significant impact on how both public and private agents guide their behaviour. Some examples include:

In international trade, the International Commercial Terms (INCOTERMS) are rules created by the International Chamber of Commerce (ICC), a global private organisation founded in Paris in 1919. INCOTERMS define the distribution of costs, risks, and obligations between seller and buyer. Their objective is to specify the point of delivery of goods, the moment of risk transfer,

⁴³ Soft law norms also facilitate experimentation with how addressees would react to normative changes. An illustrative case is the Open Method of Coordination (OMC) of the European Union. Through the OMC, obligations of communication and reporting were established in various areas, aiming to promote transparency. Member States were required to report on their policies within the framework of multilateral monitoring, allowing the Council to issue recommendations in cases where it considered that the policies were not aligned with its guidelines.

⁴⁴ See HIERRO 2003.

⁴⁵ For a list of possible reasons (to be verified in practice) why an agent might follow a soft law norm, see WEISS BROWN 2000, 538 ff.; GOLDMANN 2008; 1889; STEFAN et al. 2019, 21-24; and SHELTON 2000, 13-14. For an analysis of the different ways in which judges (both national and supranational) have used (and not used) soft law norms, see SENDEN 2004; Conseil d'état, 2013.

and responsibilities concerning transportation, insurance, and customs clearance. For instance, under FOB terms, the seller assumes costs and risks until the goods cross the ship's rail at the port of shipment; under DDP terms, the seller bears costs and risks up to the designated destination, including customs formalities for importation. Although non-binding, INCOTERMS have had – and continue to have – significant practical relevance, often being incorporated into commercial contracts by reference. As such, they represent a successful case of private soft law due to their ability to standardise practices and reduce disputes over contractual obligations.

Similarly, the UNIDROIT Principles of International Commercial Contracts offer a set of rules for the formation, validity, and performance of cross-border agreements. These principles are frequently cited in contractual clauses as interpretative sources that complement obligations derived from INCOTERMS.

The Arbitration Rules of the International Chamber of Commerce also serve as a model for dispute resolution. Although not part of national legal systems, they are incorporated by reference in arbitration agreements and govern proceedings from the filing of the request to the issuance of the award.

In financial regulation, toward the end of the last century, a group of private banks coordinated to issue mutually applicable standards, leading to the creation of the Wolfsberg Group, aimed at combating terrorist financing. This group has issued a set of voluntary principles and guidelines intended to strengthen anti-money laundering and counter-terrorism financing programs.

As for technical standards, the standardised regulation for Financial Reporting Information has been created and maintained by the International Accounting Standards Board (IASB), an independent private body. Its purpose is to provide a set of principles and definitions (such as “asset”, “liability”, and “income”) that guide the preparation, interpretation, and application of International Financial Reporting Standards (IFRS). Although not binding per se and not imposing formal sanctions, IASB decisions serve as authoritative references for issuers of financial information, regulators, and auditors, helping to resolve interpretation issues, experiment with new criteria before formal adoption as IFRS, and ensure consistency and comparability in financial statements globally.

In the technical domain, the International Organisation for Standardisation (ISO) is a private, non-governmental entity composed of national standardisation bodies from over 160 countries. Its objective is to provide a model for quality management systems that organisations can voluntarily adopt to improve processes, ensure customer satisfaction, and facilitate interoperability and international trade. Although lacking direct legal force and not requiring formal transformation into hard law, ISO standards have achieved high compliance levels through accredited certification schemes, external audits, and market recognition that confer prestige and competitive advantage. One of the most impactful standards has been ISO 9001, which has significantly influenced product and institutional design in quality management.

Now, one issue that must be clarified is what private soft law implies regarding the requirements of legal certainty. First, the generation of soft law does not always require democratic deliberation that allows public discussion on the means chosen to solve practical problems. This presents on the one hand, a legitimacy problem concerning the regulatory means, and on the other hand, a form of regulation that remains outside the control of those authorised to issue general norms. This situation poses a risk to democratic and rule of law ideals related to legal certainty, which, as discussed, are essential for its proper promotion⁴⁶.

Second, since soft law is produced through non-formal normative production processes, it carries the risk of failing to ensure adequate accessibility, publicity, and stability. Consequently, it may not enhance the degree of legal certainty in its static dimension (i.e., allowing each addressee to foresee, at a given time and place, what legal reasons will be used to evaluate their actions or

⁴⁶ See CHINKIN 1989, 862-865; KRÖGER 2007; TRUBEK et al. 2005, 2.

omissions). Similarly, it may not guarantee reliability, as legal interpreters (and private entities) are not bound by such norms. These risks are not exclusive to soft law – they also exist in hard law – but they tend to be more pronounced in the soft law context.

Third, notwithstanding the identified risks, soft law has demonstrated an important role in promoting legal certainty, as it responds to the need for adaptability and effective responses to rapid and often unpredictable social and economic changes. It reduces the risks and time needed to implement measures. Soft law enables private organisations to respond more quickly to emerging issues. In a context of constant change, the capacity to implement efficient and adaptive solutions is vital for maintaining legal stability and predictability.

Fourth, soft law allows recipients – whether public or private entities – to propose new principles, explicitly confirm and articulate existing principles, or clearly identify the principles to which they object. In doing so, soft law can play a significant role in the formation and evolution of norm acceptability.

Fifth, soft law constitutes a way for the private sector to participate in solving coordination problems and addressing legal indeterminacy. Through soft law, the private sector actively engages in creating norms that guide both private and public entities, potentially increasing acceptance and effectiveness by offering organised responses to practical needs they themselves identify and manage.

Having analysed the normative and structural dimensions of legal certainty, we now turn to a more methodological concern: how can empirical research enhance our understanding and promotion of this ideal?

6. *Is Empirical Jurisprudence Relevant to Fostering a Culture of Legal Certainty?*

The preceding sections have shown that legal certainty is not only a product of institutional design and the actions of public authorities, but also of the behaviour of private actors and the regulatory practices – formal or otherwise – that emerge in society. From the conceptual framework in section 2, through its link to the rule of law in section 3, to the mapping of actors and the illustrative case of private soft law in sections 4 and 5, a central idea has been emphasised: legal certainty is both a normative ideal and a state of affairs, dependent on multiple agents and deeply connected to human development. This plural and dynamic character of legal certainty demands that our analysis go beyond conceptual and normative theory to consider how it operates in real contexts and how it is perceived by those subject to it.

Therefore, if legal certainty depends on a complex web of state and private actions, as well as on the social acceptance and internalisation of certain practices, then understanding and promoting it requires empirical knowledge of how these elements are experienced and processed by citizens. Empirical jurisprudence offers the methodological tools to complement conceptual analysis, enabling the measurement, observation, and testing of key components such as predictability, accessibility, and reliability. By linking the conceptual and normative foundations explored in the previous sections with concrete evidence about perception and behaviour, empirical research becomes an essential bridge between the theoretical understanding of legal certainty and its practical strengthening in contemporary legal systems.

In this light, legal theory, with its distinctive methodology of conceptual analysis, serves as a crucial space for reviewing and redefining our legal concepts in ways that better illuminate the complexities of our social practices, thereby fostering a sharper understanding of our legal and social reality. However, examining phenomena such as private soft law demonstrates that the role of legal theorists can – and perhaps should – extend further. The reconceptualization of legal certainty opens new avenues of inquiry that go beyond traditional conceptual analysis, it reveals the considerable scope that remains for empirical research in this domain.

There is currently significant debate about the relationship between legal theory and experimental and empirical jurisprudence, particularly regarding methodology and the relevance of empirical studies to topics that have traditionally been the exclusive domain of legal philosophers, largely because they have relied solely on the analytical method⁴⁷. This paper does not aim to offer premature conclusions on the matter. Rather, it seeks to suggest that, for issues such as legal certainty, empirical and experimental studies may usefully complement aspects that conventional methodologies in jurisprudence have tended to overlook or exclude from their domain, considering them at best as part of peripheral disciplines, as sociological studies.

Empirical research in the field of legal certainty is by no means a novel development. On the contrary, one of the most sustained lines of inquiry has focused on the construction of legal certainty indicators, aimed at making visible the extent to which legal certainty is achieved across different jurisdictions⁴⁸. These indicators are designed to measure various dimensions of the concept – from institutional transparency and procedural clarity to the stability and accessibility of legal norms – thus providing a comparative framework for evaluating legal systems. Although such approaches are sometimes criticised for oversimplifying complex legal phenomena, they have played an important role in operationalising legal certainty as a measurable, policy-relevant objective.

In addition to research focused on the development of indicators, a micro-level perspective – particularly that offered by cognitive psychology – provides a complementary approach to understanding how legal certainty is perceived and processed by individuals. In particular, research that investigates the cognitive dimensions involved in the understanding of concepts like “norms”, “contracts”, “rights”, “duties”, “validity”, “liability”, “procedure”, “parliament”, “justice” as well as the cognitive load these carry depending on citizens’ familiarity with such terms – due principally because of their education, their professional formation, and work area – is of great interest⁴⁹. Whilst these studies do not provide redefinitions of legal concepts *per se*, they do offer a more reliable account of how legal language is actually used and understood within particular social groups. In this respect, they support a more grounded analysis of linguistic practices – one based on empirical evidence rather than solely on the theoretical assumptions of legal scholars. In turn, they yield deeper insights into key components of legal certainty – for instance, how citizens perceive the much-theorised principle of predictability, understood as the capacity of individuals to anticipate the legal consequences of their actions.

Moreover, such findings may offer valuable tools for assessing and gauging the extent to which legal certainty is both achieved and perceived by the public. In doing so, they could contribute to the development of more accurate and contextually relevant indicators of legal certainty. These indicators may serve not only as instruments for institutional evaluation – enabling legal actors and policymakers to identify problematic areas within the legal practice – but also as a basis for rethinking legal certainty itself.

This would be, for example, a potential line of development to be explored by those who create, or intend to create, private soft law with a high degree of influence. Indeed, empirical studies may be useful in two ways. First, they can help to better understand the degree of impact such norms have had on a given practice. If private actors seek to address coordination problems more effectively, or to offer more efficient solutions to practical issues, empirical information may be of use in enabling these actors to achieve their aims more effectively. Secondly, it would enable them to devise more effective strategies for the design and implementation of soft law norms. This is because empirical information can be useful in formulating soft law provisions that are acceptable to a large number of addressees. In this sense, it constitutes a means of making their work more efficient.

⁴⁷ On the matter see BROŽEK et. al. 2001.

⁴⁸ FERRER BELTRÁN, FERNÁNDEZ BLANCO 2015.

⁴⁹ ROVERSI et. al. 2023.

Rather than conceiving it solely as a formal or doctrinal principle, this perspective invites an understanding of legal certainty as a socially embedded phenomenon, whose effectiveness is intimately tied to cognitive accessibility and the public's ability to grasp and anticipate the law's application.

As has been mentioned, one of the central challenges that legal certainty faces today is the need to cultivate a culture of legal certainty⁵⁰. It is essential that both public and private actors, including civil society, actively foster and promote this culture. In this context, empirical research such as that conducted by the CLEAR project – which explores the cognitive dimensions and cognitive load associated with concepts like the rule of law and related notions such as rules, decision, rights, separation of powers, impartiality – may be critical both for institutional design and for encouraging a culture of legal certainty within civil society⁵¹. Access to as much information as possible about how people perceive the rule of law, and the terms generally associated with it may prove highly valuable for designing effective strategies to strengthen legal certainty. Particularly if private legal citizens have, as has been argued, a central role in the promotion and maintenance of legal certainty.

From a perspective of legal design and effective legislation aimed at fostering the more static aspects of legal certainty, as well as in the formulation, evaluation, and implementation of public policies directed at improving the ideal state of legal certainty, it is crucial to consider how citizens' perceptions of the law shape their compliance and attitudes. If the rule of law is to be effective, it is essential to understand how citizens represent the norms, the emotional weight they assign to them, and how these perceptions influence their behaviour. In this line, it has been noted that «Behavioural analysis adds a new dimension to policy design. That of the cognitive and decision-making feasibility of the objectives embedded in the policy. Behavioural analysis seeks to test at the psychological level which policy instrument may be more effective in achieving the policy-maker's goal»⁵².

Even if one refrains from taking a definitive stance on the philosophical significance of such empirical approaches for the core and still fundamental method of conceptual analysis, and for legal theory more broadly, their practical relevance is becoming increasingly indisputable. From the perspective of legal certainty, they present a promising avenue for enhancing our understanding and fostering the promotion of legal certainty within contemporary legal practices.

⁵⁰ For a detailed analysis of this challenge, FERRER BELTRÁN et al. 2025.

⁵¹ <https://www.ruleoflawclear.eu/>.

⁵² VIALE 2021, 20 (Translation by the authors).

References

- ABBOTT K., KEOHANE R., MORAVCSIK A., SLAUGHTER A., SNIDAL D. 2000. *The Concept of Legalization*, in «International Organization», 54 (3), 401 ff.
- ÁLVAREZ S. 2015. *La autonomía personal y la autonomía relacional*, in «Análisis Filosófico», 35, 2015, 13 ff.
- ATIENZA M., RUIZ MANERO J. 1991. *Sobre principios y reglas*, in «Doxa. Cuadernos de Filosofía del Derecho», 10, 1991, 101 ff.
- ÁVILA H. 2015. *Indicadores de seguridad jurídica*, in CRUZ MORATONES C., FERNÁNDEZ BLANCO C., FERRER BELTRÁN J. (eds.), *Seguridad jurídica y democracia en Iberoamérica. Volumen I*, Marcial Pons.
- ÁVILA H. 2012. *Teoría de la seguridad jurídica*, Marcial Pons.
- BOVERO M. 2015. *Seguridad jurídica y democracia: una perspectiva peórico política*, in CRUZ C., FERNÁNDEZ BLANCO C., FERRER J. (eds.), *Seguridad jurídica y democracia en Iberoamérica*, Marcial Pons, 41 ff.
- BROŽEK B., HAGE J., VINCENT N.A. (eds.) 2021. *Law and Mind. A Survey of Law and the Cognitive Sciences*, Cambridge University Press.
- CHINKIN M. 1989. *The Challenge of Soft Law: Development and Change in International Law*, in «The International and Comparative Law Quarterly», 38, 1989, 850 ff.
- CHINKIN M. 2000. *Normative Development in the International Legal System*, in SHELTON D. (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 21 ff.
- CONSEIL D'ÉTAT. 2013. *Le droit souple*. Available in: <https://www.conseil-etat.fr/actualites/etude-annuelle-2013-le-droit-souple> (consulted on May 7, 2025).
- CRUZ MORATONES C., FERNÁNDEZ BLANCO C., FERRER BELTRÁN J. (eds.) 2015. *Seguridad jurídica y Democracia en Iberoamérica*, Marcial Pons.
- ELIANTONIO M., KORKEA-AHO E., MÖRTH U. (eds.) 2023. *Research Handbook on Soft Law*, Research Handbooks in Law and Politics series, Edward Elgar Publishing.
- ESCUDERO R. 2012. *El concepto de Soft Law*, in MORESO J., MARTÍ J. (eds.), *Contribuciones a la filosofía del derecho: imperia en Barcelona 2010*, Marcial Pons, 127 ff.
- FERRAJOLI L. 1989. *Diritto e ragione. Teoria del garantismo penale*, Editori Laterza.
- FERRER BELTRÁN J., FERNÁNDEZ BLANCO C., GARCÍA YZAGUIRRE V., SCAVUZZO N. 2025. *La Seguridad jurídica para el desarrollo humano: desafíos en Iberoamérica*, Marcial Pons.
- FERRER BELTRÁN J., FERNÁNDEZ BLANCO C. 2015. *Proyecto de indicadores sobre Seguridad Jurídica en Iberoamérica* in CRUZ C., FERNÁNDEZ BLANCO C., FERRER BELTRÁN J. (eds.), *Seguridad jurídica y democracia en Iberoamérica*, Volume I, Marcial Pons.
- GARCÍA YZAGUIRRE V. 2023. *Non-Application and Justified Violation of Norms. A Proposal for the Study of Defeasibility in the Theory of Law*, in «Analisi e diritto», 2, 2023, 153 ff.
- GOLDMANN M. 2008. *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, in «German Law Review», 9 (11), 2008, 1865 ff.
- GOMETZ G. 2015. *Seguridad jurídica y democracia en Iberoamérica*, Marcial Pons in CRUZ C., FERNÁNDEZ BLANCO C., FERRER BELTRÁN J. (eds.), *Seguridad jurídica y democracia en Iberoamérica*, Marcial Pons, 29 ff.
- GOMETZ G. 2025. *La certezza giuridica come prevedibilità*, Giappichelli.
- GUASTINI R. 1997. *Gerarchie normative*, in «Materiali per una storia della cultura giuridica», 2, 1997, 463 ff.
- GUASTINI R. 2011. *Interpretare e argomentare*, Giuffrè Editore.
- GUASTINI R. 2014. *La sintassi del diritto* (2nd ed.), Giappichelli.
- GUASTINI R. 2017. *Ignorantia Iuris*, in «Rivista trimestrale di diritto e procedura civile», 2, 2017, 399 ff.
- GUASTINI R., MARZIALE G., STRANO M., AINIS M., TARCHI R. 1987. *La riforma della «Gazzetta Ufficiale»: Problemi risolti e problemi aperti*, in «Il Foro Italiano», 110, 1987, 376 ff.
- HIERRO L. 2003. *La eficacia de las normas jurídicas*, Ariel.

- INIESTA DELGADO J.J., NÚÑEZ VAQUERO Á. (eds.) 2025. *Soft Law: aspectos teóricos y problemas prácticos*, Marcial Pons.
- LIFANTE I. 2015. *Ignorancia del derecho y seguridad jurídica*, in «Teoría y Derecho», 18, 2015, 16 ff.
- MORESO J. 2020. *Estado de derecho in Lo normativo*, Centro de estudios constitucionales y políticos, 155-173.
- NORTH D. 1995. *Instituciones, cambio institucional y desempeño económico*, Fondo de Cultura Económica.
- PISTOR K. 2019. *The Code of Capital*, Princeton University Press.
- RAZ J. 1979. *The Rule of Law and its Virtue*, in *The Authority of Law*, Oxford University Press, 210-228.
- ROVERSI C., UBERTONE M., VILLANI C., D'ASCENZO S., LUGLI L. 2023. *Alice in Wonderland: Experimental Jurisprudence on the Internal Point of View*, in «Jurisprudence», 14 (2), 2023, 143 ff.
- SANDRO P. 2022. *The Making of Constitutional Democracy. From Creation to Application of Law*, Hart Publishing.
- SEGATTI M. 2024. *Equal Access to Justice*, Springer.
- SENDEN L. 2004. *Soft Law in European Community Law*, Hart Publishing.
- SEN A. 2000. *Desarrollo y libertad*, Planeta.
- SHELTON D. 2000. *Introduction: Law, Non-Law and the Problem of "Soft Law"*, in SHELTON D. (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 1 ff.
- SNYDER F. 1994. *Soft Law and Institutional Practice in the European Community*, in MARTIN S. (ed.), *The Construction of Europe: Essays in honour of Emile Noël*, Dordrecht: Kluwer Academic Publishers, 197 ff.
- STEFAN O., AVBELJ M., ELIANTONIO M., HARTLAPP M., KORKEA-AHO E., RUBIO N. 2019. *Eu Soft Law in the EU Legal Order: A Literature Review*. Available in: <https://ssrn.com/abstract=3346629> (consulted on May 7, 2025).
- TAMANAH B.Z. 2012. *The History and Elements of the Rule of Law*, in «Singapore Journal of Legal Studies», 2012, 232 ff.
- TRUBEK D., COTTRELL P., NANCE M. 2005. *Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity*. Available in: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=855447 (consulted on May 7, 2025).
- VIALE R. 2021. *Che cos'è l'analisi comportamentale delle politiche pubbliche*, in VIALE R., MACCHI L (eds.) *Analisi comportamentale delle politiche pubbliche. Nudge e interventi basati sulle scienze cognitive*, Il Mulino.
- WEISS BROWN E. 2000. *Conclusions: Understanding Compliance with Soft Law*, in SHELTON D. (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 535 ff.

On the Psychological Basis of the Rule of Law: from Beccaria to Institutional Experimentalism

MARCO SEGATTI

University of Genoa, Italy.

E-mail: marco.segatti@edu.unige.it

ABSTRACT

This paper (tentatively) discusses, what it calls, the psychological basis of the rule of law. To do so, the paper begins with an analysis of Beccaria's influential arguments at the beginning of *Dei delitti e delle pene* on why legitimate sovereignty requires the separation of powers. Then, the paper proposes an alternative conception of political legitimacy, which it calls *Institutional experimentalism*, and which incorporates *both* Beccaria's central insights, *as well as* three classic critiques to key details of its overall project.

Questo articolo (in via provvisoria) discute ciò che definisce le basi psicologiche dello Stato di diritto. A tal fine, inizia con un'analisi degli argomenti influenti di Beccaria all'inizio di *Dei delitti e delle pene* sul perché una sovranità legittima richieda la separazione dei poteri. Quindi propone una concezione alternativa della legittimità politica, che chiama *Sperimentalismo istituzionale*, e che incorpora sia le intuizioni centrali di Beccaria sia tre critiche classiche ad alcuni dettagli chiave del suo progetto complessivo.

KEYWORDS

Beccaria, rule of law, institutional experimentalism, political legitimacy, political psychology

Beccaria, stato di diritto, sperimentalismo istituzionale, legittimità politica, psicologia politica

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



On the Psychological Basis of the Rule of Law: from Beccaria to Institutional Experimentalism

MARCO SEGATTI

1. *Introduction* – 2. *Beccaria's Central Argument on the Separation of Powers: Genesis and Implications* – 3. *Three Arguments against Beccaria* – 3.1 *The Rawls-Nussbaum Critique* – 3.2 *The Mill-Dewey Critique* – 3.3 *The Chiassoni-Leiter Critique* – 4. *An Alternative Conception of Political Legitimacy: Institutional Experimentalism* – 4.1 *Elements of a Theory of Political Legitimacy: the Aristotelian Principle* – 4.2 *Segue: An Experimental Conception of Practical Intelligence* – 4.3 *Segue: Mob, People, and Public* – 4.4 *Segue: the Claims of a Legitimate Political Authority* – 5. *IE's Fundamental Advantages* – 5.1 *Thickening Beccaria's Conception of Liberty* – 5.2 *Experimental Arguments for Government by General Rules* – 6. *Three Objections to IE* – 6.1 *First Objection: on the Necessity of Judicial Interpretation* – 6.2 *Second Objection: the Problem of Insular Collectivism* – 6.3 *Third Objection: Political Legitimacy for Martians?* – 7. *Conclusion*.

1. *Introduction*

This paper (tentatively) discusses what I shall call the psychological basis of the rule of law. By psychological basis of the rule of law I mean this: the conception of human personality which is necessary to stabilize people's fidelity to the rule of law, relative to some specific political or normative argument on its importance.

To reconstruct this, the paper begins with an analysis of Beccaria's influential arguments at the beginning of *Dei delitti e delle pene*¹ (DDP, for short) on why legitimate sovereignty requires legislatures (and legislatures only) to govern by general rules (and general rules only), and magistrates and magistrates only, to decide on individual cases by applying those general rules (and those general rules only, with an explicit prohibition of interpretation).

For Beccaria's arguments to work, the paper finds, we need to assume three psychological principles: 1) *the principle of tradition* – namely, the idea that past activities (including past evaluations and past social interactions) are sticky, because they reduce people's cognitive effort and awareness in performing these activities, thus pushing them to repeat previous deliberations, even when contrary to their self-interest; 2) *the principle of love for liberty* – namely, the idea that people love their liberty, with such an intensity that they would disapprove a general rule which permanently eliminates an option from their choice-set, even when they do not expect to choose the option now, or in the future, unless the general rule itself is shown to be necessary to protect the extension of some other liberty; 3) *the principle of despotic taste for domination* – namely, the idea that people's love for liberty is purely self-centered, and only rarely (if ever) carries over to their fellowmen. On the contrary, people have a particular taste for restricting *other people's* liberties instead, because they have a despotic taste for dominating others.

Combine these three principles together, and, I argue, one can explain why Beccaria thinks that a society governed by the *principle of necessity*² will tend to guarantee the greatest happiness for the greatest number, and why a government which respects the separation of powers will tend to produce a society which respects the principle of necessity. Government by general rules, protected by sanctions in cases of violations, and impartially enforced by legal officials in individual

¹ See BECCARIA 1984 [all translations from the original Italian, and which appear below in the text of this article are mine]. For a contemporary English translation (based on the Italian edition which I used), see BECCARIA 1986.

² As we shall see in a moment, this is my interpretation of Beccaria's principle of necessity: A social state is just if and only if the only limitations to liberty which it imposes are those that are necessary for the protection of the maximum extension of everyone's equal liberties.

cases shall tame people's taste for domination and reduce people's reliance on unreflective tradition, while optimally balancing people's individual liberty with its tranquil and secure enjoyment by all.

Then, after pointing to three classic arguments for skepticism about Beccaria's overall project, the paper proposes an alternative conception of political legitimacy, which I shall call "*Institutional Experimentalism*" (IE, for short). As we shall see, this alternative conception builds on both Beccaria's central arguments, as well as on the concerns of his critiques.

This is IE's fundamental thesis:

A political system is legitimate if and only if the people subject to its authority have good reasons to comply with the norms it produces, as a public experiment on the desirability of those norms.

At base, IE is built on an alternative conception of human social personality, informed by, what Rawls has called, the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, and whose practical intelligence is fallible and experimental. Beings of this kind, the paper argues, have an individual interest in the protection of their own, *as well as* other people's liberties, because they have an individual interest in the intelligent transformation of their own tastes and evaluations.

Put IE's central political thesis and the Aristotelian principle together and, I shall argue, there you have novel interpretations of old and respected arguments on the importance of general rules in reasonable government, the legitimate scope of judicial interpretation of legal texts, the harms of insular collectivism and polarization, and the need for a thick conception of liberty.

2. Beccaria's Central Argument on the Separation of Powers: Genesis and Implications

At the beginning of DDP, Beccaria draws a few institutional consequences from the general political principles presented by Beccaria earlier in the book. This section begins by the former consequences and works its way back to the latter principles to tease out what I called the psychological basis of Beccaria's rule of law. This is the first consequence, which Beccaria discusses (BECCARIA 1984, 33):

«[L]aws alone can decree the punishments for crimes, and this authority can reside only with the legislator, who represents the whole society united by a social contract; no magistrate (who is part of society) can with justice establish³ punishments against another member of the same society».

So, the legitimate sovereign, and the legitimate sovereign only, can determine sanctions (that is, restrict liberties). Why? Because the legitimate sovereign, and the legitimate sovereign only, represents the whole society. Thus, an individual magistrate that inflicts a sanction beyond (or

³ In his translation (see BECCARIA 1986, 9), David Young chooses the more literal "inflict". I follow Francioni's advice (see BECCARIA 1986, 33 at nt. 1) and correct Beccaria's choice of words to avoid confusions: magistrates are clearly authorized to *inflict* punishments in individual cases, according to Beccaria – it would be contradictory to say that they are not. What they must *not* do is "establish", "determine", or indeed "create" the rule which legislates what these punishments are, and the conditions upon which they are inflicted. A further difficulty is that ultimately Beccaria seems to be concerned *only* with magistrates who inflict *larger* punishments than the ones determined by the legislature and calls *that* an abuse. But his argument should work, just as well, in situations in which the magistrates inflict *smaller* punishments than the ones determined by the legislature. Of course this may depend on Beccaria's assessment that, in his time, sanctions were generally larger than what optimal deterrence (given the principle of necessity) would recommend. But unless he has an argument that, by and large, *all* legal systems *everywhere* tend to err on the side of overdeterrence, something is amiss in his formulation.

below?⁴) what the sovereign has established is, in fact, usurping the sovereign's powers and prerogatives, substituting the *right* punishment with arbitrary domination.

But why do we need magistrates at all then? That is, if the sovereign, when legitimate, represents the whole society, why is it that we should want to preclude its right to punish in individual cases and delegate the relative power to individual magistrates only (and thus creating the problem of supervision and control of the latter's job as well)? This is the second consequence (BECCARIA 1984, 34):

«[...]f every individual member is bound to the society, the latter is likewise bound to every individual member by a contract, which of its nature binds both parties. This obligation, which descends from the throne to the shack, which equally binds both the greatest as well as the most miserable men, only means that it is in the interest of everyone that all the pacts which are in the interest of the greatest number ought to be enforced. The sovereign, who represents the society itself, can only make general laws, which bind all members, but he cannot judge that someone has violated the social contract, because then the nation would be divided into two parts, one represented by the sovereign, who asserts the violation of the contract, and the other by the accused, who denies it. It is therefore necessary that a third party judge the truth of the fact. Hence the necessity of a magistrate, whose sentences are final and consist of mere assertions or denials of particular facts».

So, we need a third (i.e., an independent) party (the magistrate that is) to judge individual cases, because otherwise we would unnecessarily split society in two: the sovereign could not represent the whole society, because it would necessarily have to take sides in any individual conflict.

But notice: it is not just an abstract principle of social unity at stake, however. General laws, Beccaria says, bind everyone equally from the throne to the shack, because they ought to bind the greatest and the most miserable man alike. Splitting society in two, then, would mean to break law's promise of equal consideration. But how could that be? What difference does it make to rule by general rules or by individual orders? How could the sovereign respect social unity and equality while doing the former, and then throw everything away while doing the latter?

To unpack these arguments further, we need to work our way back to first principles and, first, identify the normative and political *desiderata* of a just society according to Beccaria, and then the psychological principles which explain why the separation of power is the best institutional technique to deliver those. Let's begin with the text again (BECCARIA 1984, 25, 26, 27):

«Laws are the conditions under which free and isolated men of this globe have united in society, tired of living in a continual state of war, and of enjoying a liberty rendered useless by the uncertainty of preserving it. They have sacrificed a part of it to enjoy the remainder with security and tranquility. The sum of all these portions of liberty sacrificed to the good of each forms the sovereignty of a nation, and the sovereign is their legitimate depositary and administrator.

[...]Any authoritative act from a man to another, which is not justified by absolute necessity is tyrannical. Here then is the foundation of the sovereign's right to punish crimes: the necessity of defending the deposit of public safety from particular usurpations [...]. Let us consult the human heart, and there we shall find the fundamental principles of the true right of the sovereign to punish crimes; for no lasting advantage is to be hoped for from moral policy, if it is not founded on the indelible sentiments of man. Any law that deviates from these will always encounter a contrary resistance, which in the end prevails; in the same manner, that a force, however slight, if continually applied, overcomes any violent motion communicated to a body».

Notice that there are two things going on here. First, Beccaria establishes the political principle which ought to inform what a just social arrangement should look like – the principle of necessi-

⁴ See nt. 3 for an explanation of where the doubt comes from.

ty. And, he adds, the right to punish *coincides* with this just social arrangement. But what is this principle of necessity? Here is a proposal for a re-formulation:

A social state is just if and only if the only limitations to liberty which it imposes are those that are necessary for the protection of the maximum extension of everyone's equal liberties.

But there is something else that is going on here. A just social arrangement, Beccaria says, is the *only* arrangement which can be stable over time. Call this the *principle of social stability*: any law that deviates from the indelible principles of the human heart, shall find a contrary force, opposed to it. And notice how justice and stability are wonderfully intertwined here (BECCARIA 1984, 29):

«[...T]he more just are the punishments, the more sacred and inviolable is the security, and the greater the liberty, which the sovereign preserves for his subjects».

So far then, we have a political or normative principle, stating the conditions of a just social arrangement, which Beccaria calls the *principle of necessity*. We also have a sociological principle, which I called the *principle of social stability*, and which connects the latter with the former: only a just social arrangement is stable, at least in the long run. And we have principles of institutional technique, which are required to organize our political communities in such a way to guarantee justice and, thus, social stability over time. This is the *principle of the separation of power* (the sovereign makes general law, and general laws only; whereas magistrates, and magistrates only, apply them in individual cases) and a *principle of popular sovereignty* too (the legitimate sovereign derives its legitimacy from a social contract)⁵.

We only miss one thing to connect everything together: we need to look for psychological principles which can explain how the “indelible sentiments” of human beings push them to accept legitimate authority *only* and *reject* illegitimate authority all together (at least in the long run). Beccaria here is extremely quick and does leave some questions open to interpretation⁶. But we can speculate on three psychological principles: the *principle of tradition*; the *principle of love for liberty* and the *principle of despotic domination* (BECCARIA 1984, 23, 25, 26, 27, 31):

«Men for the most part abandon the most important regulations to the daily prudence or discretion of those whose interest it is to oppose the most provident laws, which by nature make advantages universal, and resist that effort, by which they tend to condense into a few, placing on one side the height of power and happiness, and on the other all weakness and misery. Therefore, unless after having passed through a thousand errors in the things most essential to life and liberty, after a weariness of suffering the evils reached the extreme, they do not bring themselves to remedy the disorders that oppress them,

⁵ On Beccaria's contractualism, see IPPOLITO 2022.

⁶ But am I reading too much in the text? As I will make clearer in a moment, I am interpreting Beccaria through the lens of British Utilitarianism (and of American pragmatism and of John Rawls too!), who were clearly and constitutionally interested in finding out what these “indelible sentiments of man” are, and went out to discover them in a more explicit and systematic way (than Beccaria himself). While it is clear and beyond any doubt that Beccaria was *not* influenced by people like John Stuart Mill, or the American pragmatists or John Rawls (given their respective dates of birth), it is an interesting, well researched, but extremely complex issue whether he was influenced, and how much, by people like David Hume, Francis Hutcheson, John Locke and Francis Bacon, all of whom, either directly or indirectly, through support or opposition, had an influence on British Utilitarianism (and its general interest in what Beccaria calls, referencing Montesquieu, the “indelible sentiments of man”). On these and related matters, see FRANCONI 2019, 1990 and IPPOLITO 2022. Either way, it is an undisputable fact that Beccaria thought that it was tremendously important for political theory to discuss the indelible sentiments of human beings, and that his normative arguments depend, in no small part, on what these are or can be thought to become after institutional reforms of one kind or another.

and to recognize the most palpable truths, which precisely because of their simplicity escape vulgar minds unaccustomed to analyzing objects, but to receiving impressions of them all at once, more by tradition than by examination. [...] It was not enough to form this deposit [of sacrificed liberties: i.e., legitimate sovereignty], it was necessary to defend it from the private usurpations of each man in particular, who always tries to take from the deposit not only his own portion, but also to usurp that of others. There needed to be sensible motives, which were sufficient to dissuade the despotic mind of each man from sinking the laws of society back into the ancient chaos. These sensible motives are the penalties established against the infractors of laws. [...] It was therefore necessity that forced men to give up part of their freedom: it is therefore certain that each one does not want to put into the public deposit, but the smallest possible portion, that alone, which is sufficient to induce others to defend it. The aggregate of these smallest possible portions forms the right to punish; everything more is abuse and not justice [...]».

People love their liberties, and their secure and tranquil enjoyment, then. So much so, that these are the chips that they trade among each other to institute governments and public institutions (this is the *principle of the love for liberty*). Whenever we build a public institution, we trade the extension of one or more of our liberties, against their secure and tranquil enjoyment. But people's love for secure and tranquil liberties is *not* a political ideal. In fact, people would be quite willing, if given a chance, to secure their liberty and its tranquil enjoyment *without* having to offer any fair deal in return and rather usurp the liberties of others through sheer despotism and domination (this is the *principle of despotic domination*). More generally, habituation to social practices (even when unintelligent, or otherwise unfair) counts more than enlightened reflection, or even smart decision-making, in human deliberations (this is the *principle of tradition*).

Combine these three principles together and there you have an explanation of why the sovereign ought to govern by general rules only, why these should be applied by magistrates, and magistrates only, in individual cases, and why when public institutions guarantee *both* conditions, they tend to converge on a just social arrangement, which respects the principle of necessity. If the sovereign were to govern by individual orders, one would be quite willing to approve the repression of somebody else's liberties, since one doesn't care about the liberty of others – in fact, one typically *enjoys* the possibility of despotically bossing people around. But so would everyone else, breeding anarchy and chaos (and «*the violation of even one [pact] begins to authorize anarchy*», BECCARIA 1984, 34).

Contrariwise, if the sovereign governs by general rules only, and these are applied in individual cases by *apolitical* magistrates, then one would *not* approve the infringement of somebody else's liberty beyond the principle of necessity because one would not approve the corresponding infringement of *their own* liberty. General rules, when equally enforced by impartial judges, enable everyone's (egoistic) love for liberty to tame their despotic taste for domination and push their behavior in a direction which is beneficial to all – namely, a social state specified by the principle of necessity.

And yet, when left to their own devices (and their own practical deliberations), people cannot be trusted to pursue the social benefits of government by general rules, because they cannot be trusted to pursue their enlightened self-interest when tradition and short-sighted advantages pull them in an opposite direction. That's why we need "sensible motives" (i.e., sanctions) to steer us in the right direction, by anticipating the costs of socially harmful behavior, or the benefits of socially beneficial one, within present decision-making (BECCARIA 1984, 27):

«[...] Experience has shown that the multitude does not adopt stable principles of conduct, nor does it depart from that universal principle of dissolution, which is observed in the physical and moral universe, except by motives which immediately strike the senses, and which continually present themselves to the mind to counterbalance the strong impressions of partial passions, which oppose the universal good: neither eloquence, nor declamations, not even the most sublime truths, have sufficed to restrain for a long time the passions excited by the vivid impressions of present objects».

3. Three Arguments against Beccaria

This section discusses three critical arguments against Beccaria's overall project: 1) the *Rawls-Nussbaum critique*, raising concerns with Beccaria's conception of liberty; 2) the *Mill-Dewey critique*, which offers an alternative (and more optimistic) reading of the principle of tradition; 3) the *Chiassoni-Leiter critique*, which questions the feasibility of Beccaria's strong prohibition of judicial interpretation. Neither one of these arguments is specifically targeted at Beccaria, nor is it meant to radically alter its defense of the rule of law. Moreover, each one of these arguments has different implications for, and is concerned with, different aspects of Beccaria's central arguments. Put together, however, they offer well-grounded reasons for skepticism about important details of Beccaria's overall strategy. This is why, as we shall see in section 4, 5 and 6 below, my alternative proposal builds both on Beccaria's arguments, as well as on the three critiques discussed in this section.

3.1 The Rawls-Nussbaum Critique

In short: a reconstruction of key moments of both Rawls and Nussbaum's respective conception of human liberty condemns Beccaria's conception of liberty as thin, non-ordered and comprehensive⁷. As such, the latter can neither provide a reasonable normative account of the importance of liberty for a well-ordered society, nor can it explain its stability-conditions⁸.

Following Rawls, we may distinguish between the extension of one liberty (i.e., the number of socially uninhibited options at one's disposal) and the worth of a liberty (one's actual capacity, given one's resources and specific "conversion-rates", to transform these options into valuable functioning)⁹. Adapting Rawls' vocabulary, Beccaria's human beings seem to care about the extension of liberty *only* (hence, this is what I called a *thin* conception of liberty), where any liberty whatever counts as any other (hence, this is what I called a non-ordered conception) and where liberty is the *only* politically valuable thing (hence, this is what I called a comprehensive conception).

But is it reasonable to assume that people care about their liberty to, say, throw cigarettes' butts on public roads just as much as they care about, for example, the liberty to peacefully associate with others, or speak their minds up, or act on their intimate understanding of who they are and what they want? Similarly, is it reasonable to assume that people should *only* be ready to trade a restriction to the extension of one liberty in exchange for the expansion of the extension of another, and *never* in exchange for an increase in the worth of the same, or another, liberty?

⁷ It is important to remember that Beccaria could have easily objected to this characterization: his primary interest in DDP is, quite clearly, in the criminal law, whereas I am taking him to suggest that his conception of liberty and justice should be applied across all legal and political domains. I culpably do not have arguments on the best reading of Beccaria on this point, but with respect to the introduction and the first few chapters of DDP I do not think it is quite an easy case to make either way. So I consider the more extensive interpretation plausible, with the important qualification that this should not be taken as an attempt to demolish Beccaria's arguments in a historically accurate way, but rather to isolate points of friction within them with the aim of helping contemporary discussions (i.e.: don't be so silly to dismiss Beccaria based on my account, but read him with an eye, *inter alia*, on how to thicken, order, and limit his conception of liberty). See IPPOLITO 2024 and ZUCCA 2022 for recent discussions of Beccaria's conception of liberty within the criminal domain. Thanks to Alberto Ramaccioni Marini for his help in navigating this literature.

⁸ See, for example, RAWLS 2005 and NUSSBAUM 2006. This is, to be sure, an oversimplification of a centuries-long debate on alternative conceptions of liberty (as well as of Rawls and Nussbaum's contributions to it). For a recent analysis of a pluralist account of freedom, see RIVA 2024. I should note, if only in passing, that Beccaria's account is not (or not necessarily) an account of negative freedom, so that criticism against Beccaria's underlying conception of liberty in DDP may, or may not, carry over to contemporary defenses of negative freedom as a political ideal. To say the least, a defense of negative freedom doesn't necessarily defend a non-ordered and comprehensive conception of freedom, as defined in the text.

⁹ See RAWLS 2005, § 32.

Practically speaking, answer in the affirmative to these questions, and the implication would be that people should *never* care about the distribution of valuable resources, including, for example, the distribution of social esteem and respect. And that they do *not*, in fact, care about these things at all. But, for one thing, how does this square with their despotic taste for dominating others, and, correspondingly, the need to protect oneself against unwelcomed domination?

Notice that there are *two* aspects to this line of criticism. A thin, non-ordered, and comprehensive conception of liberty may (or may not) be normatively or politically appealing, all things considered. But if people's actual tastes and preferences are not cut out in this exact way, because people, for example, *do* care about the distribution of valuable resources, including social esteem, then the principle of necessity and the principle of separation of powers (as they are specified by Beccaria) would *not* be enough to recruit people's loyalty to positive law, breeding chaos and anarchy (and thus ultimately producing suboptimal restrictions of liberty).

If people cared for distribution more than they cared about the extension of some of their liberties, then they should be willing to trade a restriction to the *extension* of one liberty in exchange for an increase in the *worth* of the same, or another, liberty. Similarly, if people's taste for domination were tied to their longing for social esteem (e.g.: dominating others is a means to attain social esteem), then we should not be able to prevent despotic domination *without also* assuring mechanisms to reasonably distribute social esteem as well. In both cases, the optimal balance between the extension of liberty and its tranquil and secure enjoyment should look very different from what the principle of necessity prescribes, possibly tolerating restrictions to the extension of some liberty that are *not* necessary to protect the equal extension of everyone's equal liberties.

3.2 The Mill-Dewey Critique

Beccaria's human beings are short-sighted, because habituation to entrenched traditions generally prevents thoughtful reflection on individual and social advantages. And they are egoists as well, since the only interest they have in protecting other people's liberties depends on *their own* interest in pursuing their individual goals and aims (which are assumed to be already given and firmly established).

But perhaps people can also be brought up, and educated, within a culture of respect for everyone's equal liberties and learn to sublimate and expand (if not completely repress) their egoistic concerns, by cultivating habits of social reflection and mutual understanding¹⁰. Traditions may not only preclude thoughtful judgment and evaluation but also train people's habits of critical scrutiny and anti-dogmatic questioning.

Again, notice that there are two aspects to this line of criticism. Traditions may (or may not) be a legitimate source of political authority. But if our take on human social personality is not quite as pessimistic as Beccaria's, and we allow a role for specific traditions of, for example, free inquiry and mutual understanding in developing and cultivating people's taste for free institutions and equal respect, then perhaps we may come to approve restrictions to the extension of some liberty (e.g., the liberty of one parent to decide on the amount of formal education their child should attend to), which is *not* justified by the protection of the maximum extension of everyone's equal liberty, but by the attainment of some socially specified level of some actual human functioning (e.g., the abilities to read, write, calculate, and generally be conversant in civil and political matters). Arguably, these restrictions to liberty (above what should be prescribed by the principle of necessity) may even work as (partial, at least) substitutes for sanctions, thus reducing the amount of pain which is necessary to stabilize an ordered society¹¹.

¹⁰ See DEWEY 1922a, sec. I and MILL 1991 for arguments about this possibility (and the difficulties of making it a reality).

¹¹ Of course, this point owes a great deal to Beccaria himself (see BECCARIA 1984, chs. XLII and XLV), given the most visible role which education plays in his own conception of the right to punish, and its point (see, for example,

3.3 The Chiassoni-Leiter Critique

Beccaria's explicitly prohibits judges from interpreting the law. In fact, any judicial interpretation of the law usurps the legitimate sovereign and thus violates the principle of necessity (see BECCARIA 1984, 36, 37, 38).

This assumes that *one and only one* meaning can be attributed to any legal text¹². Moreover, general rules (produced by the legislature) can enable people's love for liberty to constrain their taste for domination, *if and only if* people can attribute the *same* meaning that the legislator attributed to the relevant legal text, regardless of whether it applies to themselves, or to their friends, or to their enemies¹³. Whereas if people's collective affiliations (be they political, religious, racial, ethnic, cultural, or else) are strong enough to push them to, as the old saying goes, *interpret* the law when their friends are involved, while *applying* it to their enemies, then no love for liberty can ever compensate people's taste for domination (arguably, the former may ignite the latter even further, as love for the liberty of "my people" may increase the intensity of my taste for dominating *other* peoples¹⁴).

Push the argument a little further, and there you have a rather more pessimistic interpretation of the first two critiques. People do not have a thin, non-ordered and comprehensive conception of liberty, and tend to attribute pervasive political authority to entrenched social traditions, not just because they are short-sighted egoists attempting to reduce the pains of reflective deliberation any way they can, but (also) because they especially care about their collective affiliations. So much so, in fact, that these affiliations threaten any notion of impartial enforcement of general rules: insular collectivism¹⁵, and *not only* egoistic individualism or short-sighted and unreflective social conformity, is what threatens Beccaria's model of the separation of powers.

4. An Alternative Conception of Political Legitimacy: Institutional Experimentalism

This section presents the proposal of a particular (pragmatist) conception of political legitimacy, which I shall call "institutional experimentalism". It is an original formulation of a thesis that nevertheless runs through the work of many pragmatists (and not only). For the sake of simplici-

FRANCIONI 2019, 17 and ID 1990). It remains to be seen, however, whether Beccaria's reconstruction of the force of tradition in human deliberations is consistent with the enormous importance that he gives to education. At first sight it is, of course, but it is important to remember that the force of tradition is used *here* (i.e.: in the first few pages of *DDP*) as an explanation of the fact that contemporary public institutions are unjust, and appear to be stable, despite the sociological *principle of social stability* discussed above – so, traditions work here by lending *inertia* to existing institutions, rather than by training people to be attentive to some aspect or other of their shared existence. Also, as we shall see in a moment, the *Aristotelian principle* would arguably advise to redirect educational efforts from the exclusive focus of helping people to see the long-term, self-interested, benefits in respecting the Rule of Law, to developing an interest in cultivating sophisticated tastes, and to recognizing the role which other people's freedoms have in such development. I owe recognition of these points (and related difficulties) to criticism by Luca Malagoli and István Csabay.

¹² See CHIASSONI 2019, 125 ff. for skeptical arguments about this possibility. Again, I am oversimplifying significantly more complex theoretical arguments and debates on the role and extent of interpretation in judicial reasoning in a long tradition of philosophical scholarship on the law, from Giovanni Tarello to Riccardo Guastini and Pierluigi Chiassoni. None of them, it is important to add, is opposed to Beccaria's project. But their arguments do indeed put pressure on some of its key details. On these matters see, at least, CHIASSONI 2021 and GUASTINI 2021.

¹³ See LEITER 2021 for skeptical arguments about this possibility.

¹⁴ Pablo Navarro has pointed out to me a wonderfully obnoxious Peronist saying which captures the point very well: "To our friends, everything. To our enemies, not even justice".

¹⁵ By "insular collectivism" I mean this: one's propensity to be stimulated by altruistic sentiments toward other people, depending on the fact that these people share some specific characteristic (be it race, religion, class, national affiliation, sex, gender, sexual orientation, profession, common interests or else), with a corresponding limitation of *all* altruistic sentiments for everyone who *doesn't* share the relevant characteristic, in view of a collective interest imputed to its preservation.

ty, and to facilitate the clarity of the proposal, I relegate the discussion, however synthetic, of the pragmatist sources, primary and secondary, to the footnotes. In the text, I shall focus, first, on a general formulation of the central political thesis of *IE* and then, I shall discuss the conceptual and theoretical tools necessary for its understanding. The next two sections will then discuss few advantages of *IE*, relative to Beccaria's overall strategy, and the three critiques discussed above.

In short, and to anticipate the conclusion of the argument: *IE* provides workable criteria for both thickening and ordering Beccaria's conception of liberty and very strong reasons that give importance both to the generality of legal norms, and to the separation of powers, while recognizing the necessity of judicial interpretation and the harms of insular collectivism. As we shall see in a moment, *IE* is built around an alternative conception of human social personality, informed by, what Rawls has called, the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, whose practical intelligence is fallible and experimental. Beings of this kind, I argue, have an individual interest in the protection of their own, *as well as* other people's liberties, because they have an individual interest in the intelligent transformation of their own tastes, preferences and evaluations. This individual interest, section 6 will argue, is the key theoretical tool, which shall (tentatively) ground the psychological basis of the rule of law on a firmer basis.

Let's start with a first formulation of *IE*'s central political thesis:

A political system is legitimate if and only if the people subject to its authority have good reasons to comply with the norms it produces, as a public experiment on the desirability of those norms.

What is *IE*, then? It is a political, and therefore normative, thesis that interprets the requirements of an authority's political legitimacy as conditions for the experimental acceptability of its orders¹⁶. As a first approximation, this means that we ought to attribute political legitimacy to an authority as a public and shared means to verifying the desirability of its orders. Guaranteeing experimental acceptability as a requirement of political legitimacy means to try and cultivate the institutional ability to correct errors, given the set of past decisions, and their effects.

To present this political thesis in a less approximate way, four further steps are necessary. First, we need three falsifiable (but not yet verified) hypotheses about the social psychology of human beings. All three of these hypotheses prominently figure in the tradition of American pragmatism, but not only. We thus need: 1) a theoretical model of the structure of human evaluations, which a long philosophical tradition calls the "Aristotelian principle"; 2) a conception, derived from this, of the practical intelligence of human beings, based on an experimental attitude toward practical evaluations; 3) a distinction between three forms of social interaction: social interaction as a mob, as a people, or as a public.

Given these first fundamental theoretical elements, we shall be able to take the fourth, and final step, and (4) clarify the minimal content of the political claims of a legitimate authority, according to *IE*.

¹⁶ Note that there is a slight, but important, shift from Beccaria's focus in his *principle of necessity*: whereas the latter is a thesis on what justice requires, *IE* is a thesis on political legitimacy *only*. So, while defending *IE*, I am not committed to any particular theory of justice (understood as a political theory of which procedures should be respected to produce which consequences so that a set of public institutions can count as just), but I am committed to a theory of political legitimacy (understood as a political theory of which conditions a set of public institutions should respect so that its decisions trigger obligations to comply on the part of its subjects). Whereas I take just institutions to be legitimate, legitimate institutions might not be just. At the same time, however, notice that *IE* has a few weightier (and more stringent) political implications than Beccaria's principle of necessity: as we shall see in a moment, *IE* tends to include some form of democratic government (as it should be, at least, *pro-tempore*, and allow for free and public feedback) to the necessary conditions for political legitimacy, whereas Beccaria's principle of necessity (arguably) might not.

4.1 Elements of a Theory of Political Legitimacy: the Aristotelian Principle

“Aristotelian principle” is the name John Rawls gives to a peculiar psychological principle that plays a fundamental role in the stabilization of a just society in Part III of *A Theory of Justice*¹⁷. Rawls elaborates a theoretical intuition common to a long (and plural) tradition of utilitarian and pragmatist thought, from David Hume¹⁸, John Stuart Mill¹⁹, William James²⁰ and John Dewey²¹ among the classics, to Martha Nussbaum²² and, perhaps, Gary Becker²³ among the contemporaries.

The fundamental intuition is that there is a very peculiar set of human skills, the development and accumulation of which does not *only* increase our productivity in carrying out some activity. Developing these skills also produces indirect and more remote effects, because it transforms our sensibilities and our taste (or preferences) in carrying out one or more activities. For example, when a child acquires and develops reading skills (superior to mere literacy), they do not *only* become more productive when they read something (they read more quickly, and/or retain and memorize better the information contained in what they read), but they *also* develop a more sophisticated taste for reading itself, as an activity that allows them to exhibit, to exercise and cultivate *further*, more sophisticated skills under their cognitive control.

As I mentioned already, the theoretical model underlying the *Aristotelian principle* is common to a long and plural tradition in social thought. This tradition itself displays several and deep disagreements about the practical and political implications of the existence and diffusion of the relevant principle in the social psychology of human beings. For my purposes, however, three further, and rather common, observations should be enough.

First, the *Aristotelian principle* allows us to elaborate a peculiar conception of practical learning, according to which the acquisition of at least *some* human skills is not simply limited to the satisfaction of already existing ends or desires but is aimed instead at transforming the latter as well, according to a standard of cultivation and personal development. Exemplifying the *Aristotelian principle* in one’s own activities means to display excellence and distinction in one’s own skills, and, at the same time, sensitivity and awareness in one’s evaluations. Human beings, Rawls had Mill say in the third part of *A Theory of Justice*, are progressive beings, with a peculiar taste for excellence and distinction.

Second, this conception of practical learning is a pluralistic conception, and imposes choices on the agent himself: there is no single list of activities capable of exemplifying the *Aristotelian principle*, incorporating and exhibiting the related skills. Therefore, the *Aristotelian principle* itself, understood as a psychological principle, admits multiple and, possibly, incompatible specifications – which therefore impose choices on the agents themselves.

Third, note the peculiar structure of the evaluations underlying the *Aristotelian principle* and, correspondingly, the structure of the objectives related to the completion of an activity, *once* the agent has acquired the skills that allow them to exemplify the *Aristotelian principle*. The goals of these activities have a fundamentally twofold structure. The agent formulates direct, or proxi-

¹⁷ See RAWLS 2005, § 65.

¹⁸ See HUME 1978. For the analysis of some relevant aspects of this tradition of interpretation in Hume’s thought, see CASTIGNONE 1964, 9 ff.; DELLA VOLPE 1933, 6, 7; KEMP SMITH 2005, 158-191 and GARRETT 1997, 237.

¹⁹ See MILL 1963 chs. III and IV, and MILL 1969, ch. IV.

²⁰ See, for example, JAMES 1891.

²¹ See DEWEY 1922a, sec. I and III, and DEWEY 1922b. See also SEGATTI 2024 for an attempt to further develop this account of the human personality and discuss its relevance for contemporary legal theory.

²² See, for example, NUSSBAUM 2001. This is an obituary in honor of Iris Murdoch, in which Nussbaum presents in a way, I believe, particularly clear, the kind of “moral athleticism” (This is Amartya Sen’s characterization), based on the exercise of paying attention, which runs through much of her ethical and political reflection, and which has certainly drawn inspiration from Murdoch’s own work.

²³ See BECKER 1996, the introduction.

mate, goals related to the production of more or less immediate results (achieving a specific goal, completing the activity, culminating one's efforts in a pleasant experience, etc.), and indirect, or more remote, goals, which are related to *the further* effects of one's choices, in relation to the maintenance, or further development of one's abilities.

4.2 *Segue: An Experimental Conception of Practical Intelligence*

From this formulation of the *Aristotelian principle*, we can easily derive an experimental conception of practical intelligence²⁴, through three further observations.

First, action oriented to carry out a practical experiment, like action governed by the *Aristotelian principle*, is directed to the expansion of one's sensibilities, and to increase one's awareness. An intelligent experiment, whether it fails or succeeds, is a paradigmatic example of an experience that transforms the sensibilities of those who participate reflexively in it, cultivating conscious control of their evaluations.

Second, the reasons supporting the choice to perform a practical experiment are second-order reasons (i.e., reasons about other reasons), *pro tanto* (i.e., reasons that can be defeated by other reasons), and exclusionary reasons (i.e., reasons that exclude the balancing of *other* reasons about what to do). If the reasons underlying a practical experiment were *not* second-order reasons, *pro tanto*, and exclusionary reasons they could *not* justify the experiment of anything!

Third, the goals of an action aimed at performing a practical experiment replicate the two-fold structure of the goals of an action governed by the *Aristotelian principle*: direct goals (which aim at the production of information about the consequences of one's evaluations and choices) and indirect goals (which aim at the modification of one's evaluations and choices). In this sense, the reasons that support an action aimed at a practical experiment are, as already mentioned, a clear example of exclusionary reasons. To run a successful practical experiment, one must withhold judgment on at least some subset of their reasons for acting *now*. And yet, the reasons for experimenting something do not *merely* exclude other reasons and certainly don't exclude other reasons in a *definitive* way. Rather, they *provisionally* exclude the *current* balancing of first-order reasons, to produce a *new* balancing in the *future*.

4.3 *Segue: Mob, People, and Public*

The third step consists in a distinction between three types of social interactions: social interaction as a mob, social interaction as a people, and social interaction as a public²⁵.

In social interaction *as a mob*, a collection of individuals acts independently of each other, in the absence of common awareness, and thus without controlling the aggregate effects of their individual actions.

In social interaction *as a people*, a collection of individuals recognizes and controls the aggregate effects of individual actions by merging the individual interests of each into the collective interest of the people, and, therefore, through the elimination of the former by the latter.

In social interaction *as a public*, a collective actor (the public) is provisionally constructed from individual actions, in response to the emergence of a common problem, to identify, evaluate, control and modify the indirect effects of individual actions.

Notice how individual action aimed at the creation of a public replicates the two-fold structure of the goals of an action governed by the *Aristotelian principle*. Like the latter, the former is directed at the expansion of individual sensitivity, and at increasing conscious control of one's own choic-

²⁴ See DEWEY 1922b.

²⁵ I reconstruct this distinction, which is not at all original, starting from the arguments of John Dewey in DEWEY 1927. I owe the recognition of this theoretical point to Hans Joas, and to his discussion of MEAD 2015.

es and their effects. This means that we can assess whether the creation of a public through the internalization of social rules favors, or inhibits, the development of the *Aristotelian principle* in individual actions. If we add at this point the experimental conception of practical intelligence, we can evaluate the intelligence of a social rule in relation to its ability to produce publics that enable, and do not inhibit, an experimental attitude toward the effects of the social rule itself.

None of the above means, however, that any public is, by definition, compatible with the *Aristotelian principle*, nor does it mean that any mob or people is incompatible with it or that social behavior as a mob, or as a people, by virtue of social rules internalized in such a deep way as to remain implicit, or below the level of conscious action, is necessarily unintelligent. The critical question lies, instead, in the ability of such social behavior to leave *open* the possible formation of publics, under what conditions, and with what results. An unequivocal sign (not the only one, to be sure), for example, of the lack of intelligence of social rules that assign specific social roles in relation to sex, gender, wealth, sexual orientation, religion, race, etc. lies precisely in the fact that they inhibit the creation of publics which can experimentally and reflexively collect, and discuss, the most relevant information to evaluate the very desirability of such rules.

In general, and *ceteris paribus*, the more inclusive the public created and maintained by a set of social rules is, the more such social rules will protect, without inhibiting, the development of the *Aristotelian principle* by its members, and an experimental attitude in individual actions. As one public becomes more inclusive, there will be more occasions of frustration of individual expectations about the consequences of one's actions, the opportunities to try and intelligently test alternative patterns of conduct will correspondingly increase, and individual sensitivity and awareness of the indirect effects of individual actions in interactions with others will increase as a result.

4.4 *Segue: the Claims of a Legitimate Political Authority*

Combining the first three steps, we can assert that, according to *IE*, a legitimate political authority does not demand compliance in virtue of its epistemic superiority, nor in virtue of the moral superiority of some definitively established decision-making procedure, and regardless of the results it allows to achieve. Nor does it demand compliance in virtue of a perfect fusion between collective and individual interests.

Rather, a legitimate political authority demands compliance, because it considers socially coordinated compliance *as a means* to carrying out public experiments, to attributing effects to its decisions, and, therefore, to being able to publicly evaluate their merits. At the same time, a legitimate political authority invites and recruits the widest variety of criticisms and objections to its decisions, to collect and then evaluate the widest variety of information about the desirability of the effects of its choices.

This implies that the necessary conditions for a political authority to be legitimate are that there are solid *feedback* mechanisms about the effects of past decision; information on these effects is publicly available and reliably recorded, and the authority itself is *pro-tempore*. We have reasons to perform one action (or to avoid performing another) as an experiment, *if and only if* we are willing to collect relevant information on its effects, and we are willing to be sensitive to the evaluation of such information when choosing in the *future*.

A political authority that inhibits the collection of information about the consequences of its decisions and is not willing to test its entitlement to govern in relation to the evaluation of such information, is, thus, an illegitimate authority. Such an authority does not provide good reasons to accept compliance with its orders as a public experiment around the desirability of such orders.

5. *IE's Fundamental Advantages*

So, what do we gain by introducing *IE* as a conception of political legitimacy, relative to Beccaria's arguments on the separation of powers, and its psychological basis? We shall begin by discussing

two general advantages. Then, the next section raises two objections and, in replying to these, discusses a few more advantages.

5.1 *Thickening Beccaria's Conception of Liberty*

The first advantage of *IE* is that while it does *not* offer a full conception of liberty, it does propose intelligent criteria for thickening, ordering as well as specifying Beccaria's thin, non-ordered and comprehensive conception. This is precisely what the *Aristotelian principle* can do. By identifying sets of abilities which intelligently transform and cultivate people's tastes and sensitivities, it can produce political arguments to recruit institutional support for their development.

Our political communities, we may say, have a duty to *directly* support people's development of the *Aristotelian principle*. Or, we may alternatively say, our political communities have a duty to *remove* the political, social or economic obstacles which preclude people's development of the *Aristotelian principle*. Or, and perhaps most minimally, we may say that our political communities ought *not* to impose political and social duties on us, which preclude our development of the *Aristotelian principle*.

Admittedly, these three alternative formulations may deliver incompatible plans of political action. And they are too vague to specify concrete political goals anyhow. But perhaps this is how it should be: a conception of political legitimacy shouldn't rule out alternative conceptions of justice, but rather screen their apparent reasonableness, and wait for public deliberation (and expediency) to sort things out.

Notice that this takes care of the *Rawls-Nussbaum* critique, as well as the *Mill-Dewey* critique. Combine the *Aristotelian principle* with the experimental conception of practical intelligence, that is, and there you have a more productive (and more optimistic) conception of people's implicit bias toward tradition. According to *IE*, tradition ought not to be a source of political authority, as we have seen. Rather, we should look at tradition as a public record of past practical experiments, waiting, if chance arises, to be overruled when we have reason to doubt either its reliability or its replicability. Our political communities, thus, ought to guarantee the effective conditions for thoughtful public evaluation of the reliability and the replicability of past attempts at coordinating social behavior.

5.2 *Experimental Arguments for Government by General Rules*

The second general advantage of *IE* is that it adds one strong argument for the importance of government by general rules, uniformly applied in individual cases by independent magistrates. According to Beccaria, we have seen, government by general rules guarantees an optimal balance between the extension of equal liberties and their tranquil and secure enjoyment, because it enables people's love for liberty to tame their taste for despotic domination.

But *IE* can *add* that is a good idea to govern by general rules because *without* general rules we could not accept compliance as a public experiment on the desirability of public policy. To accept compliance with an authoritative order as a public experiment, we need authoritative orders to function as common protocols of intervention. If these protocols were not general and uniformly applied, then, we would compromise both the reliability of pieces of information collected in individual cases, as well as the replicability of public interventions themselves. Without general rules, compliance with authoritative orders would offer neither reliable, nor replicable, experiments on these orders.

And notice: this much gives us strong reasons both for committing judges to the fidelity to positive law, as well as for committing legislatures to a strong principle of judicial independence. If judges were not independent, or if they were authorized to simply disregard positive law altogether, judicial application of law in individual cases would neither offer reliable information on the effects of general rules, nor would it allow for intelligent replication.

6. Three Objections to IE

So far, we have said nothing on how to help Beccaria meet, what we called, the *Chiassoni-Leiter* critique. In fact, we can easily reconstruct three objections to the first two general advantages of IE, by elaborating a bit further on such critique.

The first objection is that IE merely adds an argument about the importance of social governance by general rules, but it does not solve one its central problems: how to limit judicial discretion, given the relevance of interpretation in the production of general rules. It would be nice indeed if we could use general rules as protocols for public intervention, if only legislatures could produce a unique correspondence between legal texts and valid normative meanings and thus control judicial activity with the mere production of words. But is it possible to do that?

The second objection builds on IE's reply to the first objection. As we shall see in a moment, public experiments do *not* require a unique correspondence between legal texts and normative meaning. They *do* require uniform coordination between legislative and judicial officials, however. But how can there be uniform coordination between legislative and judicial officials, if legal interpretation is largely conditioned by insular collectivism – and, thus, one's belonging to one's group largely pre-determines one's interpretation of legal texts in controversial cases?

If this second objection went through, the only solution would seem to be to substitute insular collectivism with a more universal form of collectivism, radically transforming people's motivation-sets. But is this possible at all? And, relatedly, are we ready to forego Beccaria's egoistic love for liberty, and its resulting emphasis on the social benefits of individual rights?

The third objection is the most troubling of all: is the *Aristotelian Principle* a credible reconstruction of human social psychology? Or is it not rather a beautiful perhaps, but too idealistic and thus ultimately unworkable account of what drives people's interactions with others? Correspondingly, is IE an account of political legitimacy for Martians – some alien, very possibly nonexistent creatures who may even share some passing resemblance with us, but who are ultimately very different from us too?²⁶

6.1 First Objection: on the Necessity of Judicial Interpretation

The reply to the first objection consists in two further specifications of IE's argument on the importance of government by general rules. First, recall that, according to Beccaria, judges are prohibited from interpreting the law because the legislature, and the legislature only, represents society as a whole. This fits with a traditional view of popular sovereignty, which conceives legislatures (at least when elected by universal suffrage), as the chief (if not the sole) interpreters of the general will. This is why on Beccaria's argument, government by general rules requires a unique correspondence between legal texts and normative meaning. *Without* such unique correspondence, judges could not apply an *already existing* general will in individual cases.

But IE's argument on the importance of government by general rules doesn't require to establish a unique correspondence between legal text and normative meaning, because it doesn't require to conceive the application of these general rules to individual cases as the enforcement of an *already existing* general will. According to IE, government by general rule is a necessary condition of its political legitimacy, because general rules guarantee the reliability and the replicability of authoritative orders. Without general rules, authoritative orders cannot function as common protocols for public intervention. On the contrary, when authoritative orders can function as common protocols for public intervention, the application of general rules to individual cases en-

²⁶ I owe a better understanding of this objection to comments by, and discussions with, Marianela Delgado, Luca Malagoli, Marco Mazzone, Giuseppe Rocchè, Corrado Roversi and Michele Ubertaino.

ables the citizenry to form an intelligent public, because it enables the citizenry to impute *causal* effects to its normative evaluations.

And the citizenry doesn't need to believe on any unique correspondence between legal text and normative meaning to do that. All we need to believe in is that the *same* norm, however it has been produced, is applied to a *relevantly similar* class of cases. In fact, interpretative *choices* on the textual material of law can themselves be object of intelligent experimentation, if legal argumentation in a court of law is candid and explicit on the reasoning behind such choices themselves.

In sum, according to *IE*, fidelity to positive law doesn't require a strong prohibition against judicial interpretation, because *IE* doesn't require belief in (some would say, the fiction of) the existence of a well-defined general will, *before* the application of law to individual cases. Fidelity to positive law is a means to the formation of intelligent publics, which can experimentally evaluate the desirability of their normative evaluations. Or, if you will, fidelity to positive law is a means to the progressive formation of an intelligent general will.

Second, *IE* easily recognizes the legitimacy of several traditional argumentative strategies, which authorize judicial deviations from positive law. First, because the results of any experiment are cumulative, and depend on previous experimentation as well. Therefore, the criteria that grants acceptability *now* to a public experiment may not be sufficient in the *future* as requirements of legitimacy. It should not be surprising, therefore, that even starting from the same textual material, the evolution of judicial practice may accumulate interpretative stratifications to any legal text, both by adding new criteria of legitimacy as well as by discarding some older criteria. Second, because compliance with an order can be accepted as a public experiment if and only if there are minimally reasonable instrumental connections, between compliance and the hypothesis on trial²⁷. Third, because, as we have said, the existence of feedback mechanisms to public decisions is a necessary condition for the acceptability of any public experiment. And this means, conversely, that procedural limitations in the selection of elected public officials, relative to the political representation of specific groups *and* to specific political issues and concerns, may justify greater judicial supervision, restricting legislative prerogatives themselves²⁸.

6.2 Second Objection: the Problem of Insular Collectivism

The reply to the second objection is far less developed, and significantly more speculative. If legal interpretation is largely determined by, what I have called, insular collectivism, then general rules can neither enable people's love for liberty to tame popular taste for domination, nor can they function as common protocols for public intervention. This may put us in the uncomfortable position of trying to come up with a more universal kind of collectivism, and thus try and reform, instantly and radically, people's motivation-set in hope of forming an inclusive people, while putting individual rights at risk of obliteration by some superimposed collective interest.

IE's alternative (and still tentative) strategy begins by recognizing an individual interest in the protection of other people's liberties, tied to an individual interest in the intelligent transformation of one's own tastes, preferences or evaluations. *Given the Aristotelian principle*, people have an individual interest in the formation of intelligent publics, and in protecting the social conditions which enable such formation. This is so because by participating in intelligent publics, people have an opportunity to develop those abilities which exemplify the *Aristotelian principle* and thus cultivate their taste for excellence and distinction. And the recipe for contributing to the formation of intelligent publics is striving for the recognition and protection not only of one's own liberties, but of *other people's* liberties too.

²⁷ For a development of this point, see, *a contrario*, the argument in Justice Harlan's dissent in *Lochner v. New York*, 198 U.S. 45 (1905) in favor of the state of New York.

²⁸ See, for example, the classic argument in ELY 1980.

The key point then is that this individual interest in protecting other people's liberties is *not* an egoistic one, because it is not tied exclusively to one's *existing* tastes, preferences and evaluations. It can thus recruit more powerful argumentative resources than Beccaria's egoistic love for liberty to justify the imposition of social and political obligations – particularly, obligations to exert restraint in promoting one's own comprehensive values and affiliations in political affairs, while aggressively defend the social conditions which enable the formation of intelligent publics.

And yet, this individual interest does *not* easily collapse into any form of collectivism either and can thus avoid the superimposition of some collective interest, over and against everyone's individual interests themselves.

6.3 *Third Objection: Political Legitimacy for Martians?*

For all its limitations, the account of Beccaria's social psychology which I gave in this paper seems reasonably straightforward and unassuming. The upshot of this is that if his arguments hold water, then we have strong reasons to support the Rule of Law and the separation of powers, without having to assume (or even demand) too much about (or to) people's social psychology.

And yet, there are visible wrinkles in this account of Beccaria's social psychology: if people's insular collectivism is stronger than their love for liberty, Beccaria's institutional proposals are not enough to guarantee the stable protection of the principle of necessity. In and of itself, this observation doesn't lend any credibility to the *Aristotelian principle*, however. In fact, as we have seen in the second objection, if insular collectivism carries some weight in people's psychological make-up, *IE* seems on a par with Beccaria's principle of necessity: nice abstract formulations perhaps, but no real traction in people's political deliberations.

So, which is the best account? Is the intensity of insular collectivism stronger or weaker than people's love for liberty, their taste for despotic domination or their taste for excellence and distinction? To be as candid as possible, I have no good answer to this question. In fact, I am not even sure which fact (or, rather, collection of facts) would either prove or disprove definitive answers to the question²⁹. What's interesting, however, is that the *Aristotelian principle*, far from being a completely alternative account of human social psychology, actually helps explanations of people's love for liberty (in fact, even in the rather intense version which is necessary for Beccaria's argument to go through), their despotic taste for domination, as well as their longing for affiliation within some collective identity or other – but then adds an all-important qualification.

Consider: people love their liberty and may even come to rebel against inhibitions of options they don't plan to select, because they realize personal development means, at least in part, to allow oneself to change one's taste, even beyond one's current expectations. That doesn't mean that people might not be willing to dominate others, when given the chance. On the contrary, domination of others (either individually, or through some collective sublimation) could very well be a means to show excellence and distinction – and possibly even a *cheaper* means than doing the actu-

²⁹ But perhaps some of the empirical results of the research project to which this paper contributes (see ROVERSI et al. 2026), can be interpreted as being at least congruent with the *Aristotelian principle*. Consider: if, given two different activities (say, playing catch in your backyard, as opposed to playing proper baseball, in one of Rawls' examples), and the same level of understanding of their dynamics (indeed, a very tough measure to crack), people can be predicted to prefer the more complex one (in this case, baseball), then this preference could be interpreted as a sign that people do in fact have a weighty preference for excellence and distinction. If that's true, then perhaps the often-observed preference for "simplification" of political processes (usually attributed, in turns, as an explanation for the popular success of authoritarian populism) is not a preference for simplicity *per se*, but a preference for understanding over confusion. Help people understand the point of one political institution or other (help them form intelligent publics, that is), and the more complex and sophisticated its dynamics, the more they will be inclined to support it – just as they are more inclined to choose complexity over simplicity, given a similar level of understanding, in any other area of their lives.

al work (and corresponding sacrifice) of bettering oneself, without holding anyone down (and notice: laws and public institutions, especially when supported by entrenched social traditions might even lend a hand to make domination cheaper than personal development, *at least for some people*).

What the *Aristotelian principle* adds at this point is an explicit recognition that substituting personal development with domination might be cheaper in the short-run (thanks to contingent social conditions, or unintelligent traditions and legislation) but is not completely *free* either – what the dominating party foregoes is the satisfaction of sharing more thoughtful, cultivated and sophisticated tastes with their relevant others.

Can we make this theoretical recognition visible enough to permanently weigh in on Beccaria's *indelible human sentiments*? I genuinely do not know, but perhaps the *relative* success and stability of societies which managed to at least approximate their institutional set up to the ideals of the rule of law, and the separation of powers, is evidence that this is not entirely beyond the reach of a realistic human psychology. Indeed, perhaps even apparent frustration with these ideals, their relative success notwithstanding, is a sign that nothing is ever good enough for human beings³⁰: people's constant longing for personal and social improvement, regardless of past improvements and success, might be understood as a direct consequence of their taste for excellence and distinction. If this is true, then *IE* has a decent chance to intelligently guide practical and political thought on how to transform frustration at current conditions into a genuine commitment to shared improvement³¹.

7. Conclusion

This paper argued that for Beccaria's arguments on the importance of the Rule of law (and of the separation of powers in particular) to go through, we need to assume three psychological characteristics of the human personality – namely, what we called, the principle of tradition, the principle of love for liberty, and the principle of despotic domination. Put these principles together, and one can explain why Beccaria believes that legislatures ought to govern by general rules, and general rules only, why he believes that magistrates, and magistrates only, ought to apply the law in individual cases, and why he believes that by guaranteeing these institutional conditions, human societies tend to converge on a just, and stable, social arrangement, specified by the principle of necessity. Government by general rules enable people's love for liberty to tame their despotic taste for domination, while sanctions, if equally and impartially enforced by apolitical magistrates, provide the sensible motives to steer people away from short-sighted reliance on entrenched traditions.

After having reconstructed three classic critiques to key aspects of Beccaria's overall project (based, respectively, on his thin, comprehensive and non-ordered conception of liberty, his pessimistic conception of people's short-sighted reliance on entrenched social traditions, and his explicit prohibition of judicial interpretation of law), the paper proposed an alternative conception of political legitimacy, which it called *Institutional experimentalism*, built both on Beccaria's insights, as well as on the former three critiques. At base, *IE* supports a conception of political legitimacy which identifies legitimate authority with the conditions of the experimental acceptability of its orders.

This political conception itself, the paper argued, is built on a peculiar conception of the human personality, informed by what Rawls has called the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, and whose practical intelligence is fallible and experimental. Beings of this kind, the paper argued, have an individual interest in the protection of their own, *as well as* other people's liberties, because they

³⁰ And quite appropriately so, I should emphasize: *relative* success and stability is *not* justice.

³¹ I owe this point to comments by Marianela Delgado.

have an individual interest in the intelligent transformation of their own tastes, preferences and evaluations. It is this latter individual interest, the paper tentatively concluded, which offers our best shot to protect the rule of law and the separation of power, as it advises both *restraint* in promoting one's own comprehensive values and affiliations in political affairs, as well as *aggressive defense* of the social conditions which enable the formation of intelligent publics.

References

- BECCARIA C. 1984. *Dei delitti e delle pene*, in FIRPO L., FRANCONI G. (eds.) *Edizione Nazionale delle Opere di Cesare Beccaria*, Mediobanca (1764).
- BECCARIA C. 1986. *On Crimes and Punishments*, D. Young (ed.), Hackett Publishing.
- BECKER G. 1996. *Accounting for Tastes*, Harvard University Press.
- CASTIGNONE S. 1964. *Giustizia e bene comune in David Hume*, Giuffrè.
- CHIASSONI P. 2019. *Interpretation without Truth*, Springer International Publishing.
- CHIASSONI P. 2021. *Is Realism at odds with Constitutional Democracy?*, in CHIASSONI P. and SPAIC B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- DELLA VOLPE G. 1933. *La filosofia dell'esperienza di David Hume*, Vol. 2, Sansoni.
- DEWEY J. 1922a. *Human Nature and Conduct: An Introduction to Social Psychology*, Henry Holt and Company.
- DEWEY J. 1922b. *Valuation and Experimental Knowledge*, in «Journal of Philosophy», 31, 1922, 325-351.
- DEWEY J. 1934. *The Public and Its Problems*, Henry Holt and Company.
- ELY J.H. 1980. *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press.
- FRANCONI G. 1990. *Beccaria filosofo utilitarista*, in ROMAGNOLI S. and PISAPIA G.D. (eds.), *Cesare Beccaria tra Milano e l'Europa*, Cariplo-Laterza, 69 ff.
- FRANCONI G. 2019. *Beccaria e l'Inghilterra*, in «Diciottesimo Secolo», 4, 2019, 11-18.
- GARRETT D. 1997. *Cognition and Commitment in Hume's Philosophy*, Oxford University Press.
- GUASTINI R. 2021. *An Exercise in Legal Realism*, in CHIASSONI P. and SPAIC B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- HUME D. 1978. *Treatise of Human Nature*, NIDDITCH P.H. (ed.), Oxford University Press.
- IPPOLITO D. 2022. *La società degli individui. Beccaria filosofo contrattualista*, in «Diritto & Questioni Pubbliche», XXII, 1, 2022, 103-117.
- IPPOLITO D. 2024. *The Legal Artifice of Liberty: on Beccaria's philosophy*, in «Criminal Law and Philosophy», 18, 2024, 727-742.
- JAMES W. 1891. *The Moral Philosopher and the Moral Life*, in «International Journal of Ethics», 1, 1891, 330-354.
- KEMP SMITH N. 2005. *The Philosophy of David Hume: A Critical Study of its Origins and Central Doctrines*, Palgrave Macmillan (1941).
- LEITER B. 2021. *The Role of Judges in Democracies: A Realistic View*, in CHIASSONI P. and SPAIC B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- MEAD G.H. 2015. *Mind, Self and Society*, in MORRIS C.W. (ed.). *The Definitive Edition*, University of Chicago Press (1934).
- MILL J.S. 1963. *On Liberty*, in ROBSON J. (ed.). *Collected Works of John Stuart Mill*, XVIII, Toronto University Press (1859).
- MILL J.S. 1969. *Utilitarianism*, in ROBSON J. (ed.). *Collected Works of John Stuart Mill*, X, Toronto University Press (1861).
- MILL J.S. 1991. *The Subjection of Women*, in ID., *On Liberty and Other Essays*, Oxford University Press (1869).
- NUSSBAUM M. 2001. *When She Was Good*, in «New Republic», 225, 2001, 28-34.
- NUSSBAUM M. 2006. *Frontiers of Justice*, Harvard University Press.
- RAWLS J. 2005. *A Theory of Justice*, Belknap Press (1971).
- RIVA N. 2024. *Individual Freedom. A Pluralist Account*, in «Diritto e Questioni Pubbliche», 24, 2024, 133-151.
- ROVERSI C., BRIGAGLIA M., KRISTAN A., LUGLI L., SCAVUZZO N., ROSSI A., RUWETT F., DE MUYNCK G. 2026. *The Rule of Law and Its (Cognitive) Load: Experimental Jurisprudence on the Internal Point of*

View over the Rule of Law, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, Diritto e Questioni pubbliche / CLEAR (Special publication), 201-228.

SEGATTI M. 2024. *Norme, abitudini, e metodo sperimentale. Una rilettura di Logical Method and Law di John Dewey*, in «Ragion Pratica», 63, 2024, 509-531.

ZUCCA L. 2022. *Beccaria's Political Theory of Criminal Justice*, in DU BOIS-PEDAIN A. and ELDAR S. (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic*, Hart Publishing, pp. 21-38.

Democracy and the Rule of Law: Rethinking Epistemic Accessibility

FRANCESCO RIZZI BRIGNOLI

Università di Bologna, Italy.

E-mail: francesco.rizzi@unibo.it

ABSTRACT

This paper examines the rule of law as a case of epistemic inequality, focusing on the growing gap between legal experts and ordinary citizens. It argues that this epistemic asymmetry is not merely a practical problem but theoretically embedded in the very concept and functioning of the rule of law, influencing contemporary debates and raising critical questions about its democratic legitimacy. By revisiting the distinction between formal and substantive conceptions, the risk of technocratic rule, and the contested nature of the concept, the paper offers a revised epistemic account of the rule of law. It emphasizes the need for broader epistemic access to legal knowledge as a condition for meaningful democratic participation.

Questo articolo analizza lo stato di diritto come un caso di disuguaglianza epistemica, concentrandosi sul divario crescente tra esperti giuridici e cittadini comuni. Sostiene che tale asimmetria epistemica non sia soltanto un problema pratico, ma sia teoricamente incorporata nel concetto stesso e nel funzionamento dello stato di diritto, influenzando i dibattiti contemporanei e sollevando interrogativi critici sulla sua legittimità democratica. Riprendendo la distinzione tra concezioni formali e sostanziali, il rischio di un governo tecnocratico e il carattere controverso del concetto, il contributo propone una rivisitazione epistemica dello stato di diritto. Esso sottolinea la necessità di un accesso epistemico più ampio alla conoscenza giuridica come condizione per una partecipazione democratica effettiva.

KEYWORDS

Rule of law, epistemic accessibility, democratic legitimacy, common knowledge, fidelity to legality

Stato di diritto, accessibilità epistemica, legittimità democratica, conoscenza comune, fedeltà alla legalità

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



Democracy and the Rule of Law: Rethinking Epistemic Accessibility

FRANCESCO RIZZI BRIGNOLI

1. *Introduction* – 2. *Epistemic Tensions between Formal and Substantive Rule of Law* – 3. *Rule of law and Democracy* – 4. *Is It Such an Ambiguous and Contestable Concept?* – 5. *Conclusions*.

1. *Introduction*

The rule of law has long been understood as a safeguard against the arbitrary exercise of power (DICEY 1915) and as a means to guarantee legal certainty (FULLER 1969). Yet, for this ideal to function as such, the law must be not only formally valid but also epistemically accessible. Citizens must be able to understand the norms that govern them in order to orient their actions and participate meaningfully in democratic life. When legal complexity renders the law intelligible only to a narrow circle of experts, the rule of law no longer acts as a universal guarantee, but rather as a mechanism of exclusion. In this light, its promise of equal protection and accountability is undermined by an epistemic asymmetry that raises fundamental concerns about democratic legitimacy. In epistemic terms, it is not enough for the law to be publicly available simpliciter. For norms and remedies to guide action and make it possible to claim rights, they must become common knowledge: not only do I know that I have a right to X, but I also know that others know it, and that they know that I know it, and so on (LEWIS 1969; WEINGAST 1997). This higher-order awareness transforms mere publicity into a shared and effective structure for guiding action; without it, publicity remains formal and produces asymmetrical outcomes in practice. From this perspective, epistemic accessibility encompasses the reciprocity of legal understanding, not just its dissemination.

Jeremy Waldron defines the rule of law as a central ideal of political morality, linking it to the ascendancy of law and legal institutions within a governance system (WALDRON 2011, 2016)¹. Yet, he also highlights its nature as a site of conflict, where citizens' interests clash and interact within a normative framework that guarantees rights and duties. For this process to be genuinely democratic, however, all citizens must have access to legal knowledge and the institutional mechanisms that operationalize it. As Waldron emphasizes:

«The requirement of access [to the rule of law] is particularly important, in two senses. First, law should be epistemically accessible: it should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others. Secondly, legal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes, and protect them against abuses of public and private power» (WALDRON 2016).

This assertion highlights a fundamental tension: while the rule of law is designed to provide a stable and impartial normative framework, this accessibility is rarely fully guaranteed or achieved. The complexity and technicality of the rule of law and its functioning – let alone the theoretical debates surrounding it – can transform it into a source of epistemic inequality. As a result, when access to legal knowledge is concentrated within a small elite of experts, the rule of law ceases to function as a universal safeguard and instead reinforces epistemic barriers that exclude broader

¹ Waldron defines the rule of law as «a political ideal that governs how legal systems should operate» and emphasizes its role in ensuring non-arbitrary governance through law-based reasoning (WALDRON 2016).

democratic participation (TAMANAH 2009; MAY and WINCHESTER 2018). The issue of epistemic accessibility and differential legal knowledge is not an isolated concern but intersects with the major lines of debate on the rule of law. One might argue that epistemic inequality is a general problem of legal systems, rather than something specific to the rule of law. However, what distinguishes the rule of law from other areas of law is its normative foundation: for it to function as a safeguard against rights violations and abuses of power, it presupposes that the subjects of those rights must have knowledge of them. Without such epistemic access, the rule of law loses its core function: empowering citizens to defend their rights through legal means.

It is precisely this demand for accessibility that defines the rule of law within the broader structure of legal systems. Consequently, the epistemic asymmetry at play in the rule of law does not simply add to existing legal complexities but actively reshapes its democratic function. This challenge manifests in three key areas: (1) the epistemic nature of the rule of law and the distinction between formal and substantive conceptions, (2) the risk of a rule by experts as an intermediate configuration between the rule of law and rule by law, and (3) its contested and ambiguous nature. This paper argues that the epistemic asymmetry generated by the technicality of the rule of law is not a secondary issue or a mere byproduct of other theoretical tensions, but a fundamental structural problem. This asymmetry risks limiting citizens' ability to engage meaningfully in legal and political processes. The following sections will examine how this epistemic disparity shapes the definition and theoretical impact of each abovementioned key aspects of the rule of law. By adopting an epistemic lens, this paper seeks to contribute to the theoretical debate on the relationship between the rule of law and democracy (see MARAVALL and PRZEWORSKI 2003), questioning how the concentration of legal knowledge affects democratic participation and legitimacy.

2. *Epistemic Tensions between Formal and Substantive Rule of Law*

One of the main fault lines in the rule of law debate concerns the opposition between formal and/or procedural and substantive conceptions. Authors such as FULLER (1969), RAZ (1979) and HABERMAS (1995, 1997), who offer a formal and/or procedural reading of it, focus primarily on the structure and functioning of the legal system regardless of the substantive content of the rules. Along this line, it is well known that FULLER (1969) proposes eight formal components of the rule of law which constitute the "internal morality of law": generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence². They are essential components for a system of rules to effectively guide human conduct, and among the eight principles, those of publicity and intelligibility (or else clarity) possess a stronger democratic-epistemic dimension and function as common-knowledge generators: norms and remedies must circulate not only as information but as reciprocally recognized information. Publicity is crucial because it makes laws knowable to citizens, enabling them to participate in political life. Clarity, on the other hand, ensures that laws are comprehensible to all, not just experts, allowing citizens to guide their behaviour and critically evaluate regulations. Although other components also³ may indirectly facilitate the understanding of law, it is publicity and clarity that constitute the epistemic-democratic core of the rule of law, ensuring citizens' real access to legal knowledge. In a procedural view, the rule of law can take thinner or thicker forms (see BEDNER 2018), with RAZ's (1979) theory at the thin-

² A useful summary and analytical breakdown of Fuller's eight principles can be found in WALDRON (2008), who also discusses their normative implications. For each component's relevance to democratic functioning, see POSTEMA (2022).

³ Generality and consistency contribute to a stable and predictable legal framework that facilitates comprehension. Congruence between declared law and official action also has an epistemic dimension, as it enables citizens to form justified expectations regarding the application of the law.

ner end of the spectrum. Raz defines the rule of law as a specific – morally neutral – virtue that a legal system can possess, distinguishing it from other ideals such as democracy, justice, equality, human rights, or respect for human dignity. He claims: «the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man» (RAZ 1979, 210). Raz limits it to compliance with formal and procedural legality without explicitly including democratic or substantive elements: rule of law is exclusively about the ability of the legal system to bind the government, providing certainty, predictability and clarity, but without direct reference to democracy, human rights or social justice⁴. In contrast, Habermas (1995, 1997) proposes a “thicker” procedural version of the rule of law, introducing the democratic criterion of consent: for him, citizens must be able to recognize themselves not only as recipients but also as authors of laws. Although Habermas does not consider democracy and the rule of law to be coincidental, he believes that they are interdependent and mutually constitutive⁵. On the substantive side, authors such as Ronald Dworkin propose an even more robust thicker conception of the rule of law (DWORKIN 1986), according to which law must be interpreted consistently with fundamental moral principles such as justice, integrity and fairness. Mere adherence to procedural and formal criteria is not sufficient to fully realize the rule of law, which instead requires a substantive value basis to ensure the legitimacy of the legal system and the protection of citizens. Dworkin claims that: «The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; [...] that the rules in the rule book capture and enforce moral rights» (DWORKIN 1978). According to MARMOR (1991), the epistemic dimension of Dworkin’s substantive system emerges clearly from the central role of legal interpretation, which requires a deep moral understanding of the system and its purposes. In this perspective, the correctness of law is not resolved in merely technical or formal matters but depends on an epistemically informed judgment about underlying moral values. “Law as Integrity” thus urges judges to interpret previous decisions in a way that makes them consistent from the perspective of moral principles.

Therefore, along the axis that distinguishes formal from substantive conceptions of the rule of law, an epistemic dimension always emerges. A central question in this paper then focuses on which conception (formal or substantive) of the rule of law is most appropriate to meet the need for effective epistemic accessibility, which is not limited to a narrow elite of legal experts with privileged awareness, but involves the majority of citizens, rights holders and direct recipients of norms⁶. Following this perspective, the present paper draws inspiration from Waldron in reworking the distinction between formal and substantive rule of law by rethinking its relationship to democracy. The first step is to reject a sharp separation between formality (or proceduralism) and substantiality: instead, it is possible to recognize their mutual interdependence, as well as the still open debate on their relative weight in the definition of rule of law. Waldron himself acknowl-

⁴ It is worth noting that Raz has recently revised his earlier theory of the rule of law (RAZ 2019), shifting the focus from a list of formal principles to the core aim of preventing arbitrary government. In his new interpretation, Raz argues that the rule of law requires government action to reflect an intention to protect and promote the interests of the governed, acting as a guardian of the public interest. This perspective includes adherence to principles of public accountability and relies on conventions that assume government actions are taken in the interest of the governed. This revision underscores the importance of a government that acts with the intention of serving its citizens (see RAZ 2019, 7).

⁵ This refers to Habermas’s principle of “co-originality” between public and private autonomy, as developed in *Between Facts and Norms* (HABERMAS 1996), particularly in the sections discussing discursive legitimacy and legal formalism.

⁶ This distinction echoes the “thin” vs “thick” conceptions of the rule of law, where the degree of epistemic commitment to citizen comprehension varies significantly. See BEDNER (2018) in the *Elgar Encyclopedia*.

edges the existence of purely formal conceptions but also admits that many formal procedural aspects of the rule of law find justification in substantive values such as human dignity or freedom (WALDRON 2011)⁷. For example, the Fullerian requirement of generality can lead to considerations of justice, just as prospectivity can be linked to respect for individual autonomy. Similarly, this paper argues that the formal knowability of laws must be connected to their democratic accessibility since laws that are technically knowable are not always accessible to everyone. The epistemic dimension of the rule of law, therefore, is not only about normative clarity or public availability, nor just about moral integrity or systemic coherence – it also involves the deeper issue of who has access to legal knowledge and who is excluded from a small group of experts. Ensuring that laws are truly accessible requires more than formal transparency; it demands concrete tools for democratizing legal knowledge. This shift is crucial, as it directly affects both justice and democratic legitimacy⁸.

3. *Rule of Law and Democracy*

In discussing the epistemic dimension of the rule of law, a first objection might spontaneously arise: why consider the rule of law special or peculiar from the epistemic point of view, compared to other forms of law? Are not transparency, knowability and clarity common requirements for all branches of law that affect citizens? If the epistemic dimension of law is such a cross-cutting requirement, what then makes the rule of law particularly meaningful from a democratic-epistemic point of view? To address this objection, it is necessary to clarify the epistemic approach taken in this paper. The focus here is not on legal or constitutional epistemology strictly understood, that is, the theoretical branch that investigates how legal knowledge is autonomously constructed by legal experts. Instead, the focus is specifically on the question of the democratic nature of legal knowledge: that is, the analysis concerns how the rule of law structures and distributes access to legal knowledge and how this distribution directly affects citizens' political participation. This orientation fits into what can be called a political epistemology approach to democracy, which emphasizes the essential role of epistemic access in shaping and strengthening the democratic function of the rule of law. It is precisely in light of this specific epistemological-democratic approach that the more specific epistemic nature of the rule of law, as distinct from other forms of legal normativity, emerges most clearly.

As is also evident from the work of Gerald Postema, this epistemic specificity lies in its primary function of limiting arbitrary power through a widespread and equal distribution of access to legal knowledge among citizens (POSTEMA 2022). Although Postema does not explicitly dwell on the concept of epistemic accessibility in philosophical terms, he strongly addresses the issue of comprehensibility and intelligibility of law as a fundamental condition for the democratic functioning of the rule of law. His goal is avowedly to provide a «clear, publicly persuasive account» (POSTEMA 2022, x) of the rule of law ideal, precisely to counter what some critics dismiss as elitist rhetoric, unable to speak to those outside the inner circle of experts. His insistence on an “intuitive understanding” of the basic constituents of the rule of law, his emphasis on accessible language, and his emphasis on the role of public discussion spaces as sites of accountability suggest

⁷ WALDRON (2011) also differentiates between formal and procedural analyses in legal theory, but a full treatment of this distinction exceeds the scope of the present paper.

⁸ The distinction between formal and substantive conceptions of the rule of law echoes the broader tension between legality and legitimacy. However, democratic aspirations need not operate solely on the side of legitimacy: it is possible to conceive of a *democratic legality*, namely a form of legal normativity anchored in inclusive lawmaking, public deliberation, and accountability. In this view, legality and legitimacy are not inherently opposed, but dynamically correlated. The rule of law achieves its fullest democratic meaning when the legal order is both procedurally valid and publicly justified.

a deep awareness of the problems associated with the conceptual accessibility of the rule of law. In this sense, although Postema does not propose an epistemological theory of rule of law in the strict sense, his contribution offers a solid basis for interpreting the conceptual and practical accessibility of law as a necessary condition for citizens to «speak law to power» (POSTEMA 2022, 18). Only through this widespread and unmediated understanding is an effective exercise of democratic control over power made possible. Such epistemic capacity thus becomes an essential condition not only for an effective democratic exercise of power limitation but also for the construction of a strong and shared democratic convention around the rule of law itself. Epistemic democratization of law, from this perspective, is not only a desirable goal but an intrinsic requirement of the very normative nature of the rule of law.

«The rule of law subjects the exercise of ruling power to law [...]. Law achieves this form of sovereignty through the essential underwriting support of networks of accountability. These networks, we learn in this chapter, must be found within the structures of government itself (“horizontal accountability”) and outside government in the associations, institutions, and practices of civil society (“vertical accountability”). Law disciplines power by tethering its exercise to public norms. These norms direct conduct, and provide a deliberative framework for practical reasoning: the rule of law seeks to establish a rule of reason, or rather of reasons, addressed to those who exercise ruling power and to those subject to it. This requires that officials have legitimate public, law-grounded reasons for their actions, and are required regularly to give those reasons to the public; and those who are subject to ruling power are entitled to demand reasons, and adequate remedies for official violations of law, in forums created for that purpose» (POSTEMA 2022, 115)⁹.

The fact that law tethers the exercise of power to public norms means that law does not merely describe or permit certain actions of political power, but directly controls and regulates its exercise. In other words, the law regulates and constrains political power by obliging it to constantly refer to public norms (i.e., known, transparent and understandable to all) to justify its actions. These “public norms” are rules or principles that: (1) are known or knowable by citizens; (2) form the justificatory and deliberative basis for the exercise of power; and (3) ensure that the actions of political power are openly and transparently assessable. Postema, therefore, closely links the rule of law to the idea of public justification of political decisions. Law constrains power by mandating a public, rational and deliberative dimension of the decisions themselves, so citizens must have the opportunity to hold officials accountable under the law for violations and abuses. If widespread legal knowledge is crucial to ensure the democratic dimension and to limit the arbitrariness of political power, it is natural to delve into the relationship between the rule of law and democratic legitimacy more generally¹⁰.

It is from this perspective that the present paper moves beyond merely formal accounts of the rule of law. Rather than considering it as a neutral constraint on power or, conversely, as a tool of instrumentalization by political authority, this work proposes an intermediate view – one that

⁹ The omitted passage discusses how law disciplines power through principles such as legality, reflexivity, and exclusivity, each of which ties legal authority to institutional justification. Postema continues by emphasizing that when institutions reflect these principles, they provide citizens with both protection from arbitrary power and a path for recourse when that power is abused.

¹⁰ For a more classical account of the intrinsic relationship between democracy and the rule of law from a procedural perspective, see Jürgen Habermas’s notion of the co-originality of public and private autonomy (HABERMAS 1995, 1996). While not explicitly addressing epistemic accessibility, Habermas links the legitimacy of legal norms to their discursive formation, suggesting that only norms that all citizens could reasonably accept through rational deliberation can be considered legitimate. In this perspective, human rights and popular sovereignty are co-original and mutually reinforcing: human rights make the exercise of popular sovereignty legally possible, creating the conditions for a real civic practice of communicative freedom.

emphasizes the epistemic asymmetries that condition democratic participation in legal systems¹¹. These asymmetries reveal the extent to which the rule of law, while formally in place, may operate in exclusionary ways when legal knowledge is monopolized. This concern is particularly visible in the distinction between the rule of law and the rule by law, a central point in Brian Z. Tamanaha's analysis (2004)¹². The most minimal and thin interpretation of the rule of law, according to Tamanaha, is essentially a "rule by law" (TAMANAHA 2004, 92), where the state merely governs through laws. In this minimalist sense, any governmental decision, even arbitrary ones, can qualify as law, effectively reducing the rule of law to "government by law". Contemporary regimes such as China, according to some scholars, appear to embrace precisely this interpretation, where law serves political power rather than constraining it. Conversely, the broader Western tradition of the rule of law presupposes substantial legal constraints on government power. In this tradition, law is not merely an instrument for governmental use; rather, it limits government actions and prevents abuses of power. Tamanaha further notes that the "formal legality" approach advocated by theorists like HAYEK (1955) and RAZ (1979), while more sophisticated (demanding generality, clarity, and perspective norms), can nonetheless align with authoritarian regimes due to its exclusive emphasis on legal form rather than content¹³. Thus, the crucial distinction between rule of law and rule by law, as emphasized by Tamanaha, lies in whether legal norms effectively constrain governmental power: rule by law merely demands that government action be channeled through law, while rule of law requires that law itself stands above political authority.

Yet, even when this ideal is formally enshrined, a fundamental epistemic vulnerability persists. The law may remain structurally opaque and practically inaccessible to ordinary citizens, confined instead to the interpretative monopoly of legal experts. This condition opens the door to a hybrid configuration – neither democratic nor overtly authoritarian – which can be described as a *rule by experts*. In such a scenario, the supremacy of law is formally preserved, but the democratic quality of legal systems is undermined by epistemic asymmetries. Legal authority becomes increasingly technocratic, as complex statutory and doctrinal frameworks demand specialized knowledge. The result is a drift toward a governance structure where the locus of decision-making power is epistemically detached from the citizenry¹⁴. This phenomenon is particularly problematic when legal rationality is deployed as a shield against contestation. The institutional invocation of neutrality, proceduralism, or legal correctness often masks deeper political choices, effectively

¹¹ Several scholars have examined in the past two decades the relationship between democratic legitimacy, political authority and the rule of law (MARAVALL and PRZEWORSKI 2003; BEDNER 2018; GARGARELLA 2021; BELLO-HUTT 2021; SEVEL 2025) along several research trajectories, including distinctions between thin and thick conceptions of the rule of law, judicial independence, political accountability, representation, checks and balances, and particularly the contrast between rule of law and rule by law. Given thematic coherence and space constraints, this paper specifically addresses the latter distinction, placing epistemic asymmetry at the center of the analysis.

¹² For a detailed account of the rule by law tradition as it originates in Hobbes, see the paper of Dyzenhaus entitled "Thomas Hobbes and the Rule by Law Tradition" in MEIERHENRICH and LOUGHLIN (2021). Dyzenhaus argues that Hobbes represents the founding figure of this tradition, in which law derives its authority from sovereign command rather than from any moral or institutional check. While often contrasted with the rule of law ideal, Hobbes's model emphasizes a vision of legal order grounded in political authority and interpretability, where law serves to stabilize rather than constrain power.

¹³ This risk is also noted by Raz himself, who warned that formal legality alone may be compatible with authoritarian rule: «A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies [...] It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law» (RAZ 1979, 211).

¹⁴ For broader discussions on how technocratic governance reshapes the epistemic foundations of democratic participation, see HERZOG (2024), GARCIN and MOE (2024), and MÉNDEZ (2022). Although these works do not directly address the rule of law, they offer important insights into the democratic risks posed by concentrated cognitive authority and expert domination.

removing them from public debate. In this light, rule by experts does not constitute a mere empirical deviation from democratic ideals but reveals a structural risk embedded within the very architecture of the rule of law: that legal authority becomes detached from the epistemic accountability that democracy demands. POSTEMA (2022) implicitly addresses this challenge by insisting on the need for epistemic democratization within the legal system itself. His account of the rule of law centers on mutual accountability and public reasoning, suggesting that law cannot truly “rule” unless it remains accessible and contestable by the political community at large. Similarly, Tamanaha writes:

«Building a robust legal profession and legal tradition requires a legal education system that transfers legal knowledge and inculcates legal values in those whom it trains. Moreover, the system must attract and reproduce people who are committed to the law and to developing legal knowledge. A potential problem for this element exists in societies where only people from wealthy classes or selected groups have access to legal education or positions of authority in the legal system because this raises the risk that they will develop and utilise the law to advance their own interests at the expense of others, introducing distortions and bias into the law. Citizens will perceive the law as unbalanced, which weighs against the first element above, making it harder to develop a general cultural belief that the law should rule» (TAMANHA 2009, 12).

Accordingly, defending the rule of law requires more than protecting the independence of judges or the formal requirements of legality: it demands an institutional design that fosters public comprehension, democratic participation, and the epistemic empowerment of citizens. It is therefore essential to investigate how the conceptual vagueness and normative flexibility of the rule of law may inadvertently support this shift toward expert-dominated governance. The next paragraph will explore this issue, focusing on the internal tensions and contested meanings that make the rule of law both a normative ideal and a site of epistemic struggle.

4. *Is It Such an Ambiguous and Contestable Concept?*

Having examined the distinction between formal and substantive conceptions of the rule of law, its complex relationship with democracy, and the risk of its degeneration into rule by law, this paper shifts to its final focus. It is one of the most persistent theoretical debates surrounding this ideal: is the rule of law a coherent and normatively binding concept, or rather an ambiguous notion, vulnerable to rhetorical appropriation and instrumentalization? This question is far from marginal; it directly concerns the conceptual stability of a notion that has become central to contemporary democratic discourse. Among the voices that have sharply addressed this issue is Martin Loughlin, who describes the rule of law as a «slogan in search of a concept» (LOUGHLIN 2024, 8) reflecting its evolution from a legal term of art into a contested symbol of legitimacy. This is because of its ambiguity and the multiple interpretations it has acquired over time, moving from a specialized legal term to one of the vaguest catchphrases of contemporary public policy. This has characterized both common law and civil law systems. Regarding the former, the author recalls Dicey and how the “rule of law” had origins closely linked to legal tradition and the specialized expertise of jurists:

«Rather, it was the achievements of a cloistered body of lawyers, employing a distinctive methodology that moved from precedent to precedent, that was determinative in establishing the judicature as an independent authority beyond the competence and control of the crown. Maintaining a strong sense of the dignity of their role, these lawyers felt able to assert that, rather than being an expression of the

sovereign's command, the law comprised a type of 'artificial reason' that required 'long study before a man could attain to the cognizance of it'. And this for Dicey captured the essence of the rule of law» (LOUGHLIN 2024, 3)¹⁵.

However, Loughlin argues that this original conception, linked to the expertise of jurists, has turned into a «universal placeholder of thoroughly indeterminate meaning» (LOUGHLIN 2024, 7). The use of the term has extended beyond professional legal discourse, being adopted by different actors with different interpretations. The author sees a similar evolution in the concept of rule of law in civil law systems. In the post-conflict period, "Rechtsstaat" as such was largely abandoned in favor of an abstraction called "Rechtsstaat-sprinzip" with a multitude of components, suggesting a loss of a unified and clear concept, similar to the vagueness he attributes to the rule of law (LOUGHLIN 2024, 8). Loughlin points out how the wide range of opinions and perspectives on the meaning, purpose and value of the "rule of law" greatly complicates any inquiry into its current position. The "rule of law" has become a «resonant but vacuous phrase that expresses whatever values the heart desires» (LOUGHLIN 2024, 13). Its universalization and adoption by various actors have led to a loss of semantic precision, making it less accessible and understandable to ordinary citizens. Instead of retaining a clear and shared meaning, the rule of law has increasingly become a slogan – its ambiguity stems in part from the detachment of its original, expert-based understanding from the broader diffusion it later underwent. In this sense, Martin Loughlin's critical insight is that the rule of law's global significance and universal appeal are inseparable from its conceptual vagueness.

Compared to Loughlin, WALDRON (2021) presents an argument about the contestability of the "rule of law" based on the concept of an "essentially contested concept". Unlike Loughlin, who sees semantic vagueness primarily as a problem arising from the universalization and loss of specificity of specialized knowledge, Waldron sees contestation as an inherent and potentially positive feature of the concept itself. Picking up on W. B. Gallie's idea¹⁶, defining the "rule of law" as an essentially contested concept is not a criticism, but a way of highlighting how discussions of its meaning contribute to our understanding and evaluation of the systems, practices, and actions to which the concept is applied. Again, Waldron invokes the breadth of the rule of law (thick vs. thin, cf. § 2 of this paper) as an essential area element of contestation of the concept itself. There are disputes precisely about placing substantive political ideals, such as human rights, alongside formal and procedural aspects of the rule of law¹⁷. Waldron lays out, for example, the case of the World Justice Project (WJP) in its "Rule of Law Index" includes "Open Government" and "Fundamental Rights" in addition to limits on government powers and the quality of civil and criminal justice, assessing adherence to fundamental rights such as the right to life, freedom of expression and workers' rights. So, Waldron sees this very contestation as an engine of theoretical enrichment. The different conceptions, while disagreeing, contribute to a deeper understanding of the values underlying the rule of law. The fact that there is no canonical definition is not necessarily negative but reflects the complexity and continuing importance of the concept.

While Loughlin emphasizes the loss of a clear and shared meaning of the rule of law due to its conceptual vagueness, Waldron contends that the absence of a canonical definition is not necessarily problematic but rather reflects the concept's enduring relevance and complexity. Yet, in both cases, the problem of consensus is strictly semantic. As this paper argues, the issue of con-

¹⁵ Loughlin refers here to DICEY (1915), where the rule of law is closely associated with the legal profession and the notion of law as "artificial reason".

¹⁶ See GALLIE (1956), which Waldron draws on to argue that the contestation of the rule of law is a sign of its vitality and centrality to democratic theory.

¹⁷ Previously mentioned in this paper (see §2) in the form of Fuller's eight formal components, which constitute the internal morality of law.

testability cannot be reduced to a question of meaning alone. It must also be understood in light of the epistemic conditions that shape how the rule of law functions within democratic settings. In this respect, the analysis departs from the traditional conceptual debates by situating the rule of law within its relationship to democracy – understood not merely as another essentially contested concept, in GALLIE’s (1956) terms, but as a normative framework that actively redefines the conditions of legal intelligibility and accessibility. In this perspective, accountability networks operate as common-knowledge infrastructures: legality operates through public practices sustained by shared expectations and succeeds only when reasons, procedures, and remedies are not merely available but *known as known* across the polity¹⁸. The specifically democratic trait of the rule of law is not mere publicity but second-order knowledge that makes accountability effective. In this sense, an illustrative case is useful: consider two citizens who both have the same legal right to X. Citizen A knows she is entitled to X and knows – because it is publicly and repeatedly reported – that there is a specific protection mechanism M, how it works, the typical timelines, the success rates, and that people in her situation commonly activate it. Citizen B also knows that they are entitled to X, but does not know (nor expect others to know) that M exists or is realistically usable. In A’s world, the protection of rights is common knowledge: activating M is “socially normal” and officials expect people like A to do so. In B’s world, knowledge is private or fragmented: even with equal formal rights, expectations of outcomes, social signals, and official behaviour diverge over time. This shows that the absence of common knowledge is not a generic information defect, but an endogenous factor of epistemic inequality in the architecture of the rule of law. The result is a long-term differential benefit from the rule of law and a drift toward domination by those who lack the mutual awareness necessary to mobilize remedies.

For the same reason, Postema provides the normative counterpart of the epistemic framework outlined above: the resilience of the rule of law depends not only on the formal adherence of institutions but on a shared and widespread commitment to a culture of legality. In his formulation of the fidelity thesis, Postema states that «the rule of law can be robust in a polity only when all of its members, and not merely the legal or ruling elite, take responsibility for holding each other, and especially law’s officials, to account under the law» (POSTEMA 2022, 66). Postema’s “fidelity” presupposes mutual knowledge of rights, officials’ duties, and avenues of redress; it is not adherence to esoteric rules but a public practice supported by shared expectations that make reason-giving and contestation socially actionable. It is in this framework that fidelity – understood as a shared responsibility in demanding compliance with the rule of law – is revealed to be inseparable from an epistemic condition of accessibility. The perspective opened by Postema makes it possible to reformulate the question of the conceptual contestability of the rule of law in terms that are not only theoretical, but also relational and practical: what matters is not only whether there is an unambiguous definition of the concept, but whether there is a democratic community capable of collectively claiming the meaning and application of the law. Without a public, intuitive and widespread understanding of the law, such fidelity is not possible, and the rule of law risks becoming a technocratic tool, or worse, an empty formula for legitimacy.

Based on the distinction between broader and narrower conceptions of the rule of law – and on the risk that, in its thinner version, it may slide into rule by experts – this paper advances the following hypothesis: only an epistemically balanced relationship between the rule of law and democracy, in which legal knowledge is widely shared and accessible to citizens, can significantly mitigate the risks associated with contestability and conceptual vagueness. More specifically, a more equitable epistemic distribution can reduce the rule of law’s vulnerability to interpretive instrumentalization. In this sense, the democratization of legal knowledge is not an external add-on to an otherwise self-standing ideal: it strengthens both the formal-procedural and the substan-

¹⁸ Positive, empirically oriented accounts likewise emphasise the common-knowledge infrastructures that intervene in law to stabilise expectations in strategic interaction (Cf. HADFIELD et al. 2021).

tive-value dimensions of the rule of law, thereby enabling it to operate as a public safeguard rather than as an expert-dependent idiom. From this perspective, the contestability of the rule of law is not reduced to a merely theoretical dispute over conceptual meaning – as suggested by Loughlin and Waldron – but becomes a profoundly democratic issue, linked to how epistemic power to define, interpret, and apply the law is distributed in everyday practice. It is precisely within this framework that Postema's fidelity thesis acquires its epistemic-democratic relevance: a shared fidelity to legality is possible only if citizens can genuinely participate in legal knowledge.

5. *Conclusions*

This paper has shown that epistemic asymmetry cuts across three major debates about the rule of law: the formal/substantive divide, the drift toward rule by experts, and conceptual ambiguity. The rule of law functions as a democratic safeguard only if legal knowledge is publicly accessible and reciprocally shared. Epistemic accessibility is thus a structural condition of both legitimacy and democratic effectiveness, and contestability is political, tied to the distribution of epistemic power. Accordingly, the rule of law's democratic resilience turns on a collective fidelity to legality sustained by common knowledge – rules and remedies known as known, which turn publicity into coordination and accountability into ordinary practice.

References

- BEDNER A. 2018. *Rule of Law and the Problem of Culture*, in MAY C., WINCHESTER A. (eds.), *Handbook on the Rule of Law*, Edward Elgar Publishing.
- BELLO-HUTT D. 2021. *Rule of Law and Political Representation*, in «Hague Journal on the Rule of Law», 14, 2021, 1-25.
- DICEY A.V. 1915. *Introduction to the Study of the Law of the Constitution* (8th ed.), Macmillan.
- DWORKIN R. 1978. *Political Judges and the Rule of Law*, in «Proceedings of the British Academy», 64, 259-319.
- DWORKIN R. 1986. *Law's Empire*, Harvard University Press.
- FULLER L.L. 1969. *The Morality of Law*, Yale University Press.
- GALLIE W.B. 1956. *Essentially Contested Concepts*, in «Proceedings of the Aristotelian Society», 56, 167-198.
- GARČIN E., MOE H. 2024. *Defending Democracy: Prioritizing the Study of Epistemic Inequalities*, in «Political Communication», 2024, 870-876.
- GARGARELLA R. 2021. *Constitutionalism and the Rule of Law*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, 425 ff., Cambridge University Press.
- HABERMAS J. 1995. *On the Internal Relation Between the Rule of Law and Democracy*, in «European Journal of Philosophy», 3(1), 1995, 12-20.
- HABERMAS J. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press.
- HAYEK F.A. 1955. *The Political Ideal of the Rule of Law*, National Bank of Egypt.
- HERZOG L. 2024. *Citizen Knowledge: Markets, Experts, and the Infrastructure of Democracy*, Oxford University Press.
- LOUGHLIN M. 2024. *The Rule of Law: A Slogan in Search of a Concept*, in «Hague Journal on the Rule of Law», 16, 2024, 509-523.
- MARAVALL J.M., PRZEWORSKI A. (eds.). 2003. *Democracy and the Rule of Law*, Cambridge University Press.
- MARMOR A. 1991. *Interpretation and Legal Theory*, Clarendon Press.
- MÉNDEZ M.P. 2022. *An Epistemic Problem for Epistocracy*, in «Social Epistemology», 36(2), 2022, 153-166.
- MAY C., WINCHESTER A. (eds.). 2018. *Handbook on the Rule of Law*, Edward Elgar Publishing.
- PALOMBELLA G. 2009. *The Rule of Law as an Institutional Ideal*, in PALOMBELLA G., WALKER N. (eds.), *Relocating the Rule of Law*, 3-39, Hart Publishing.
- POSTEMA G. 2022. *Law's Rule*, Oxford University Press.
- RAZ J. 1979. *The Authority of Law*, Oxford University Press.
- RAZ J. 2019. *The Law's Own Virtue*, in «Oxford Journal of Legal Studies», 39(1), 2019, 1-15.
- SEVEL M. 2025. *The Values of the Rule of Law*, in SEVEL M. (ed.), *The Routledge Handbook of the Rule of Law*, Routledge, ch. 10.
- TAMANAH B.Z. 2004. *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.
- WALDRON J. 2008. *The Concept and the Rule of Law*, in «Georgia Law Review», 43, 2008, 1-61.
- WALDRON J. 2011. *The Rule of Law and the Importance of Procedure*, in FLEMING J.E. (ed.) *Getting to the Rule of Law*, NYU Press, 3 ff.
- WALDRON J. 2016. *The Rule of Law*, in *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/entries/rule-of-law/>.
- HADFIELD G.K., MEIERHENRICH J., WEINGAST B.R. 2021. *A Positive Theory of the Rule of Law*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*. Cambridge University Press, 236 ff.

- WEINGAST B.R. 1997. *The Political Foundations of Democracy and the Rule of Law*, in «American Political Science Review», 91(2), 1997, 245-263.
- LEWIS D. 1969. *Convention: A Philosophical Study*, Harvard University Press.
- WALDRON J. 2021. *The Rule of Law as an Essentially Contested Concept*, in MEIERHENRICH J., LOUGHLIN M. (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 121 ff.

The Authority of Law and Indirect Theories of Decision-Making

GIUSEPPE **ROCCHÈ**

University of Palermo, Italy.

E-mail: giuseppe.rocche@unipa.it

ABSTRACT

This paper focuses on indirect theories of decision-making, i.e. those theories that tell people to use a suboptimal decision-making procedure because in the long run this will be the best way to achieve the goals established by the theory. This scheme is central in two rather distant philosophical theories. The first is Raz' "Service Conception of Authority" – centred on the idea of exclusionary reasons –, while the second is Parfit's analysis of the structure of self-interest theory and consequentialism. The comparison is helpful because it brings to light some stark differences between two kinds of indirect theories: on the one hand, indirect theories that replace counter-intuitive decision-making methods with intuitive decisionmaking methods, and in addition have the possibility of being self-effacing and esoteric (concealing suboptimality); on the other hand, indirect theories that impose a counter-intuitive decision-method and are "genealogical". It is argued that obedience to authority and rule-based decision-making are parts of an indirect theory belonging to this second kind, and this may help explain the psychological difficulty people have in understanding the ideal of Rule of Law.

Questo articolo analizza le "teorie indirette della decisione", ossia quelle teorie che prescrivono all'agente di utilizzare una procedura decisionale sub-ottimale, sul presupposto che nel lungo periodo seguire la procedura sub-ottimale sia il miglior modo di raggiungere gli obiettivi che sono fissati dalla teoria. L'idea di teoria indiretta assume rilievo centrale in due riflessioni filosofiche lontane tra loro. La prima è la teoria dell'*autorità come servizio* di Raz – incentrata sull'idea di ragioni escludenti –, mentre la seconda è rappresentata dall'analisi della teoria dell'interesse personale e del consequenzialismo sviluppata da Parfit. Un raffronto tra queste due riflessioni è utile in quanto fa affiorare due tipi di teorie indirette: da un lato, le teorie indirette che prescrivono di sostituire un metodo di decisione contro-intuitivo con uno intuitivo, e che, inoltre, "cancellano" il carattere sub-ottimale della procedura decisionale prescritta; dall'altro lato, le teorie indirette che prescrivono l'adozione di un metodo di decisione che è esso stesso contro-intuitivo, e non ne nascondono il carattere sub-ottimale. Si sostiene che l'obbedienza all'autorità e il modello di decisione sottoposto a regole sono parte di una teoria indiretta di questo secondo tipo, e che questa loro caratteristica può aiutare a spiegare la resistenza psicologica che le persone possono avere nel comprendere l'ideale dello Stato di Diritto e battersi per esso.

KEYWORDS

Raz, rule of law, exclusionary reasons, service conception, Parfit, consequentialism

Raz, Stato di Diritto, ragioni escludenti, autorità come servizio, Parfit, consequenzialismo

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



The Authority of Law and Indirect Theories of Decision-Making

GIUSEPPE ROCCHÈ

1. *Introduction* – 2. *Exclusionary Reasons and Indirect Theories of Decision-making* – 3. *The Motivational Account* – 4. *Theories of Practical Reason and Methods About Decision-making* – 5. *Parfit: Theories That Are Indirectly Self-defeating* – 6. *Authoritative Directives, Rules, and Indirect Models of Decision-making* – 7. *Conclusions*.

1. *Introduction*

The idea behind this essay is that sometimes practical reasoning must get worse to get better. Why is this so and when is this the case? The answer to this question has to do with the limitations of people's rationality and with different strategies to cope with these limitations. I define "indirect theories of decision-making" as those theories that set certain goals to be achieved and tell people not to be motivated by the direct pursuit of these goals, but rather to pursue something else, because that is the best way to achieve the goals. In the following sections we will focus on two philosophical traditions in which this scheme is instantiated. The first is the theory of authority in general, and in particular the theory of the authority of law. The second is the debate about the structure of consequentialism, one of the most influential moral theories. The first strand has Joseph Raz as its champion, while, regarding the latter field of enquiry, the analysis will turn to Derek Parfit's sophisticated treatment of the issue.

Indirect theories of decision-making tell people not to look at practical reasons "in a broad frame". Instead, these theories tell people to focus on some reasons neglecting others, on the premise that this sub-optimal disposition will lead, at the aggregate level or in the long run, to the best outcome. In a certain way, they exploit the scheme of "*competence without comprehension*", using Daniel Dennett's enlightening expression. Dennett's point is that many behaviours which conform to reasons are adopted without the reasons being represented in the agents' minds. Competence without comprehension is the norm in non-human life: a termite castle and Gaudí's La Sagrada Familia are very similar, but while Gaudí had in mind the reasons for designing the structure in a certain way, the reasons for the structure of the termite castle are not present in the mind of any termite¹. Still, competence without comprehension is also at the root of many accomplishments of human societies. It led – to give a conspicuous example – to the development of the atomic bomb:

«In 1942, Leslie Groves was appointed director of what came to be called the Manhattan Project, and in three incredibly pressured years intertwining further R&D [research and development] with the colossal (and brand new) task of refining weapons grade uranium, thousands of workers were recruited, trained, and put to work, mostly controlling the newly invented machines for separating out the isotope uranium 235, which was a fraction of 1% of the previously refined uranium 238. At the height of operations over 130,000 people worked full time on the project, *and only a tiny percentage of them had any idea at all what they were making*»².

¹ DENNETT 2017, 51. It must be noted that, unlike the present essay, Dennett's discourse is not focused on moral or practical reasons.

² DENNETT 2017, 71 (*italics added*). Clearly, while termites do not consciously represent their task, the workers involved in the Manhattan Project (or involved in the construction of the Sagrada Familia) had a conscious mental representation of the specific tasks they were assigned. They looked at practical reasons in a narrow frame.

The analysis of indirect theories to be presented is aimed at highlighting what may be a source of instability in the Rule of Law.

According to an empirical hypothesis, upholding the Rule of Law requires the adherence to a set of values which is cognitively more effortful than the adherence to other values. The cognitive load of Rule of Law. This work focuses on an aspect of Rule of Law which is rule-based decision-making, arguing that the adherence to this model of decision-making may be cognitively demanding, partly because rule-based decision-making is a component of an indirect theory of decision-making.

Rule-based decision-making is conceived as an improvement in practical reasoning attained through its simplification. Since it is a simplification of practical reasoning, one may wonder why the use of rules results in a cognitive load for the agents and not in a psychological relief. In a nutshell, the answer is that although the simplification is real, agents often do not feel it; rather what they do feel is that their cognitive task has become more complex. We do not necessarily feel how risky our spontaneous ways of reasoning are, and replacing a risky but spontaneous process with a less natural deliberative strategy is a hard step to take. An even more laborious step if the subject is aware of the suboptimal character of rules.

Empirically speaking, this is nothing but a hypothesis and the present paper is not meant to provide empirical support for this. The perspective is merely theoretical: the comparison between the debate on consequentialism and that about the authority of law is used to distinguish two different types of indirect theories, so as to bring out some specific problems regarding obedience to directives and rules.

The paper is structured as follows. The next three sections are devoted to the analysis of Raz's theory of legitimate authority which offers the general framework for understanding the Rule of Law as an indirect theory of decision-making. Section 5 surveys Parfit's analysis of self-interest theory and consequentialism, contained in the first chapter of *Reasons and Persons*. Section 6 further develops Raz's account introducing the problem of rules, and then compares the two types of indirect theories emerging from the analysis.

2. Exclusionary Reasons and Indirect Theories of Decision-making

Does the law have or at least can it have authority over people? Raz's theory of authority is a branch of his general theory of practical reasons. His theses are not only an analytical reconstruction of the claims of law, but rather an enquiry into the moral relationship between conscientious agents and the law³. Because it is also a substantive enquiry and not only a piece of conceptual analysis about the claims of law, the authority of law that concerns Raz is less extensive than the authority that the law claims to have⁴. Accordingly, when Raz refers to "practical reasons" established by law, the expression is not to be understood as "legal reasons" or "reasons from the law's point of view", but as "moral reasons" or, following a more general terminology, "real reasons"⁵.

Raz distinguishes between naked power, *de facto* (effective) authorities and legitimate authorities. The concepts of *de facto* authority and legitimate authority depend on each other. Unlike naked power (such as a criminal organization), *de facto* authority claims to be a legitimate authority, so this concept requires the concept of legitimate authority to be understood⁶. On the other hand, a likely – though not necessary⁷ – condition for someone to have legitimate authority is that she is also a *de*

³ RAZ 1986, 63, 71.

⁴ RAZ 1986, 78.

⁵ See GUR 2018, 10–12.

⁶ RAZ 2009, 28; RAZ 2006, 1005.

⁷ RAZ 2006, 1005.

facto authority⁸. The following analysis will be centred on legitimate authority, so every reference to authority without specifications must be considered a reference to legitimate authority.

According to Raz, the normative force⁹ of legitimate authorities must be explained through two different types of reasons: first-order and second-order reasons for action. First-order reasons for action are reasons in favour of certain actions, while second-order reasons for action are reasons «to act for a reason or to refrain from acting for a reason»¹⁰. Exclusionary reasons are second-order reasons to *refrain* from acting for some reasons – that is, to *disregard* some reasons¹¹. While conflicts between first-order reasons are resolved according to the strength of the conflicting reasons, conflicts between first-order reasons and second-order reasons are resolved «by a general principle of practical reasoning which determines that exclusionary reasons always prevail, when in conflict with first-order reasons»¹². The resulting picture is that the directives issued by legitimate authorities are *pre-emptive reasons*, a conglomerate of a first-order reason for a certain action and a second-order reason to exclude some reasons – which may count against that action (or possibly in favour of it)¹³ –, and the scope of exclusionary reasons is determined by those first-order reasons on which the authority has the power to pronounce¹⁴. This idea is expressed by the *Pre-emption Thesis*: «the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them»¹⁵.

To understand Raz's view, which can be called the "Exclusionary Model"¹⁶ (because of the key role exclusionary reasons play in it), it is useful to contrast it with an alternative view about authoritative directives: the Weighing Model. According to the Weighing Model, authoritative directives are first-order reasons which should be added to the balance of other first-order reasons¹⁷. For the Exclusionary Model, instead, authoritative directives are reasons to act in a certain way and to refrain from acting on the merits of the case (that is, to act regardless of the balance of reasons¹⁸). The fact that a soldier has been ordered to appropriate the van of a civilian is not an additional reason in favour of the appropriation of the van that must be balanced with the reasons against, but a reason to appropriate the van and a reason not to consider the reasons within the scope of the authority in deciding what to do.

We may distinguish two very different arguments in favour of the Exclusionary Model. The first argument is conceptual, or, as it is also said, "phenomenological"¹⁹. If someone does what is correct on the balance of reasons by disobeying an unjust but still legitimate order it is common to respond to this conduct with a mixture of praise and blame ("decorating" and at the same time "court-martialling" the author). These mixed feelings are explained by the fact that there are reasons – like authoritative reasons – which operate at a different level than first-order reasons. According to the phenomenological argument, then, authoritative directives feature in

⁸ RAZ 1986, 56.

⁹ For the expression "normative force" I follow GUR 2018, 97 (nt.1), 100.

¹⁰ RAZ 1999 [1975, 1990], 39.

¹¹ RAZ 1999 [1975, 1990], 38.

¹² RAZ 1999 [1975, 1990], 40.

¹³ RAZ 1986, 42, 46; GUR 2018, 13.

¹⁴ RAZ 1989, 1194; GUR 2018, 13.

¹⁵ RAZ 1986, 46.

¹⁶ This expression has been introduced by VASSILIOU 2022, 843.

¹⁷ GUR 2018, 15. This is not the only way in which the Weighing Model may be understood. For example, Gur himself notes that for Donald Regan «authoritative directives do not themselves constitute reasons for action, but can only be indicative of existing reasons for action» (GUR 2018, 15, fn.61). It is not relevant for the present matter to complicate the issue, but I am indebted to an anonymous referee on this point.

¹⁸ RAZ 1999 [1975, 1990], 38.

¹⁹ RAZ 1989, 1165; RAZ 1999 [1975, 1990], 42 f.; see GUR 2018 (ch. V) for a general discussion of the argument and of some critical responses.

our experience as pre-emptive reasons, and not as simple first-order reasons. In other words, the Pre-emption Thesis is a conceptual or phenomenological truth.

But, while the phenomenological argument *may* prove that our concept of authority is bounded with the concept of exclusionary reason²⁰, it cannot establish that we actually have exclusionary reasons or pre-emptive reasons. As in moral error-theory, our beliefs, concepts and expressions may be the result of mistakes²¹. In order to prove that authoritative directives may be exclusionary reasons, a normative argument is needed: the functional argument. According to the functional argument, the function of authorities consists in making agents conform to the reasons that apply to them, and authorities can perform their function only if they are a source of pre-emptive reasons²². Here, the Pre-emption Thesis meets the *Normal Justification Thesis* according to which:

«the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly»²³.

Without a claim to completeness, political authorities provide their service because of the epistemic advantage they have over the subordinates, because they protect people from biases, because they secure schemes of social coordination and because they provide a common framework for social life: the *Service Conception of Authority*²⁴. But people can harness the service provided by authority only if they treat authoritative directives as pre-emptive reasons. In fact, it is argued that the Weighing Model – the alternative theory about the normativity of law – would be incapable of guaranteeing these valuable goods in a similar way²⁵.

The cost of the service is that people must no longer act on their personal moral assessment of the merits of important practical issues, and must follow authoritative directives even when they are wrong. Raz is rather firm on this bitter truth: «If every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear»²⁶.

The emerging picture is that the Service Conception of Authority is an indirect theory of decision-making. As I said in the introduction, the general idea of the indirect theories of decision-making is that sometimes the agent's ultimate goal is better achieved if the agent, instead of directly struggling to achieve the ultimate goal, pursues another goal. This general scheme is applied to the case of authoritative directives: in order to better respond to the background first-order reasons, the agent should aim to obey the authoritative directives instead of trying to balance reasons on its own.

Nor is Raz a stranger to this logic. In Raz's words

«Individuals should follow an indirect strategy, guiding their action by one standard in order to better conform to another»²⁷.

²⁰ By this I do not mean that the argument actually succeeds in demonstrating the phenomenological link between authority and exclusionary reasons. Moore, for example, notes that the same phenomenology of "mixed feelings" is present in conflicts between first-order reasons (MOORE 1989, 861).

²¹ MACKIE 1977.

²² GUR 2018, 97.

²³ RAZ 1986, 53.

²⁴ RAZ 1986, 56.

²⁵ RAZ 1986, 58, 75; GUR 2018, 98 ff., for the discussion of the Weighing Model see 102 ff.

²⁶ RAZ 1986, 61.

²⁷ RAZ 1986, 75.

Or, adopting the Razian distinction between conformity and compliance (which we will return to in the next section) conformity to first-order reasons – what matters – may be achieved by making people comply with authoritative directives instead of trying to comply with the balance of first-order reasons:

«advantages [in having authorities], I will argue, are always the result of indirect strategies of conformity with reasons, i.e. maximizing conformity with reasons not by trying to comply with them, but by following someone else's judgment about what one should do (...) The two basic arguments for authority depend on its ability, through concentrating expertise on various issues, to overcome common ignorance and on its ability to help solve common difficulties in securing coordination. Overcoming both problems requires adopting an indirect approach to conformity to reasons, that is, it requires securing conformity not through an attempt to comply»²⁸.

Although not alien to Raz's thought, the idea of an indirect method of decision-making has not been fully developed in the context of the theory of authority. It may be useful then to draw a comparison with other debates in which the scheme of indirect methods of decision-making emerges. In this article, I will focus on Parfit's analysis of the structure of self-interest theory and consequentialism.

But before moving in this direction two additional issues must be addressed. The former has to do with the current interpretation of the exclusionary reasons, that is, the *Motivational Account*²⁹. Focusing on the Motivational Account (section 3) is important in the present context to cast light on the role exclusionary reasons play in the agent's deliberative process. Still, the Motivational Account clarifies this role only to a limited extent. Therefore, section 4 focuses on certain ambiguities that the Motivational Account does not solve.

3. The Motivational Account

As delineated above, exclusionary reasons are reasons to disregard other reasons, that is, for not acting for certain reasons, or to refrain from acting for them. But what is the meaning of these and similar expressions? What does it mean to "disregard reasons" or "not act for a reason"?³⁰ These expressions need to be clarified. Raz explains his view in *Facing Up* and in *The Postscript to Practical Reasons and Norms*. In a few words, according to Raz "acting for a reason" means "being motivated by a reason", and then exclusionary reasons are «reasons for not being motivated in one's action by certain (valid) considerations»³¹.

In order to understand the Motivational Account, we must first introduce some closely related distinctions. The first is the distinction between two subjective relations that the agent may entertain with reasons for action: conformity and compliance. The second regards the nature of practical reasons: the distinction between normative reasons and motivating reasons.

If Derek has a reason to stay home because Jane needs moral support, and Derek stays home, Derek *conforms* with that reason. In general, «people conform with a certain reason if they perform that act in the circumstance in which that reason is a reason for its performance»³². If Derek not only stays home, but does so in order to give Jane moral support, we say that Derek *complies* with

²⁸ RAZ 1999 [1975, 1990], 195.

²⁹ For this expression see ADAMS 2021, 236.

³⁰ I follow here Muffato's helpful and thorough analysis (MUFFATO 2022, 513 ff.).

³¹ RAZ 1999 [1975, 1990], 185.

³² RAZ 1999 [1975, 1990], 179.

the reason. According to Raz, reasons for action are reasons for conformity, not for compliance³³. To be clear, they are normally also reasons for compliance, as far as compliance is a step toward conformity³⁴, and additionally Raz does not deny that compliance with reason can be a way to express the correct moral sensibility. Still, there are cases in which acting in a sort of unreflexive way is not only enough to do the right thing, but it is also the most desirable way to behave³⁵, and this may be taken as a proof (among others) that reasons for action are reasons for conformity.

Related to the same point is the distinction between normative and motivating reasons. A normative reason is a consideration counting in favour of a certain action, while a motivating reason is a reason for which, or on the basis of which a person performs a certain action³⁶. The connection between the idea of motivating reason and the above distinction between conformity and compliance is that when a person is complying with a certain reason, that reason is a motivating reason for the subject³⁷.

Against this background, the core idea of the Motivational Account is that exclusionary reasons are reasons for not being motivated by excluded reasons, that is, for not complying with the excluded reasons, *but* are not reasons for not conforming to the excluded reasons³⁸. They defeat certain considerations as motivating reasons, but not as normative reasons. Let's turn back to the example of the authoritative directive, in which the soldier has been ordered to appropriate a van belonging to a civilian. Postulating that the order is a reason for taking the van, that excludes reasons related to the military uselessness of this operation, we would say that the order defeats considerations related to military uselessness as motivating reasons. But it does not defeat them considered as normative reasons³⁹. Even after the authoritative directive has been issued, military uselessness remains a normative reason not to take possession of the civilian's van.

The contrast between motivating reasons and normative reasons explains the difference between exclusionary reasons and cancelling conditions⁴⁰, also called “disabling conditions”⁴¹. An agent promises to do a certain action to his friend, but then the friend releases the agent from the promise. While the promise was a reason for a certain action, the release from the promise is a reason for nothing at all, but it cancels the reason generated by the promise. In this case we must neither comply with *nor* conform to the promise, since the reason has been cancelled. While the cancelling conditions defeat certain reasons *qua* normative reasons, exclusionary reasons defeat them just as motivating reasons, leaving the normative force of the excluded first-order reason untouched. In Andrew Jordan's words:

«To sum up, the distinction between first-order reasons, exclusionary reasons, and disabling conditions could be understood as follows: First-order reasons stand in relation to actions and either favor or disfavor them. Exclusionary reasons, in contrast, stand in relation to the motives of an agent. They demand of an agent that she not act for certain first-order reasons. And disabling conditions stand in relation to first order reasons to turn off their normative force—that is, to make them non-reasons»⁴².

³³ RAZ 1999 [1975, 1990], 180

³⁴ RAZ 1999 [1975, 1990], 182.

³⁵ Raz here challenges the Kantian idea according to which «only respect for the moral law is an appropriate moral motive» (RAZ 1999 [1975, 1990], 181). The passage seems to challenge a peculiar motive rather the relevance of motive in general. Be that as it may, the critique to the Kantian approach resembles Bernard Williams' thinking (see WILLIAMS 1981 [1975]; see also SMITH 1994, 75 f.)

³⁶ WHITING 2015, 398.

³⁷ MUFFATO 2022, 514 f.

³⁸ RAZ 1999 [1975, 1990], 194; MOORE 1989, 856 ff.; RAZ 1989, 1156 ff.

³⁹ ADAMS 2021, 238.

⁴⁰ RAZ 1999 [1975, 1990], 27.

⁴¹ JORDAN 2018, 360.

⁴² JORDAN 2018, 349.

The Motivational Account clarifies, from a theoretical point of view, the mixed feelings aroused by the act of disobedience that has led to the performance of the correct action on the balance of reasons. Since exclusionary reasons defeat first-order reasons only as motivating reasons and not also as normative reasons, there is both a clear sense in which the agent did what she ought to do and another clear sense in which she failed to perform her duty.

A crucial case for understanding the Motivational Account – although somewhat mysterious and convoluted – is the case of the lucky error. Again, we must imagine an authoritative directive commanding the execution of an action that is different from that pointed out by the balance of reasons. The balance of all first-order reasons and the balance of unexcluded reasons point in different directions. The directive is wrong on the merit. But, even if wrong, the directive comes from a legitimate authority and is an exclusionary reason. In a situation like this, there is no chance that the agent can conform both to the balance of all first-order reasons and to exclusionary reason, as far as the agent “reasons correctly”. But assume that the agent, although not motivated by the balance of all the first-order reasons, *miscalculates* and performs the real good action, the action pointed out by the balance of the background first-order reason. In this case – Raz notes – the error is fortunate, because the agent managed to conform both to first-order reasons and to exclusionary reasons. This is because exclusionary reasons are not reasons for not conforming to the excluded reasons (in that case the situation described would have been truly tragic; there would have been no room for any lucky mistake), but merely for not complying with them, and in this case the agent has not complied with them, since she has not been motivated by the balance of all first-order reasons⁴³.

This is the Motivational Account. Exclusionary reasons seem to be part of a theory of decision-making, according to which authoritative directives are reasons to deliberate in a certain way, i.e. to avoid being motivated by certain considerations. Still, in the next section, it will be shown that the issue is more complicated. The Motivational Account may have left open many important questions.

4. *Theories of Practical Reason and Methods About Decision-making*

Criticizing Noam Gur’s account of the normativity of law, Andrej Vassiliou appeals to a distinction between theories of practical *reason* and methods of decision-making or theories of practical *reasoning*. Vassiliou writes:

«A theory of practical reason addresses the questions of what kinds of practical reasons obtain, when these reasons conflict with each other, how these conflicts are resolved and, most importantly, what agents ought to do in light of their different and commonly conflicting reasons. Conversely, the question that decision-making methods answer is not what agents ought to do, but how they should reach the right decision on what they ought to do»⁴⁴.

We are not interested here in the critique of Gur’s model. Suffice it to say that, according to Vassiliou, the Weighing Model and the Exclusionary Model are theories of practical reason, but this fact does not settle the issue of which method of decision-making (if any) is prescribed by those theories. It may be the case that the adoption of a theory of reason favours an isomorphic method of decision-making, but Vassiliou notes – echoing here Ruth Chang’s account – that this cannot be taken for granted; it is possible to advocate a certain account about reasons

⁴³ RAZ 1999 [1975, 1990], 185 f.

⁴⁴ VASSILIOU 2022, 946.

without a commitment in favour of the isomorphic method of decision-making⁴⁵. For example, it is possible to adhere to the Weighing Model or in general to a model prescribing «that what we ought to do is ultimately determined by the balance of our reasons when these reasons conflict»⁴⁶, without accepting that the appropriate decision-making procedure consists in balancing the weights of the conflicting considerations – that is, without adopting the isomorphic decision-making procedure.

Following this suggestion, theories of practical reason may legitimize different methods of decision-making, even methods of decision-making which do not resemble the content of the theory of reason. In other words, methods of decision-making may be conceived as tools to fulfil the goals identified by the theory of practical reason. In this sense, when there is no isomorphism between the method of decision-making and the theses about reasons for action, the background theory of reason would be an indirect theory of decision-making.

The distinction between theories of reason and models of decision-making may be misleading⁴⁷, still Vassiliou's idea that the Exclusionary Model is a theory of reason and not a method of decision-making has a strong implication for the present analysis.

A possible way – certainly not Vassilou's – to use the distinction between theories of reason and methods of decision-making would be to say that the Service Conception of Authority is an indirect theory of decision-making consisting of two levels.

First level (supreme level): a substantive theory of justice establishing the goals to be pursued, i.e. a theory about the background, first-order, reasons.

Second level (derived level): the Exclusionary Model (according to the Motivational Account).

The first (supreme) level is that of the theory of reason, while the second (derived) level is that of the decision-making method. The Service Conception would be an indirect theory of decision-making in which exclusionary reasons feature at the derived level of decision-making, the Exclusionary Model would be a model prescribing how to deliberate. It would tell people to perform an “exclusion task”, that is, to focus – with their mental control – on keeping some considerations – which for them are reasons – out of their deliberation.

Alternatively – and this may be Vassiliou's proposal – the Exclusionary Model may be understood not as a model prescribing a way to deliberate, but as a model which individuates some practical goals and legitimates the pursuit of these goals through different decision-making procedures. This means, in my opinion, that the levels of the Service Conception of Authority would not be two but three:

First level (supreme level): a substantive theory of justice establishing the goals to be pursued, i.e. a theory about the background, first-order, reasons.

Second level (derived intermediate level): the Exclusionary Model (according to the Motivational Account).

⁴⁵ VASSILIOU 2022, 954; CHANG 2016, 215 f.

⁴⁶ VASSILIOU 2022, 954.

⁴⁷ The distinction between theories of reason and models of decision-making may be problematic because it seems to imply that the methods of decision-making do not regard practical reasons at all. But Vassiliou's idea is rather that, although methods of decision-making do not give agents reasons for *action*, they give them reasons «to structure their deliberative process or the environment within which they deliberate in a particular way» (VASSILIOU 2022, 946). So understood the distinction may remain misleading as far as it seems to suggest that reasons to structure our deliberative process are not practical reasons in the full sense. It may be wondered how it would be possible to understand exclusionary reasons as reasons for action, once the Motivational Account has been adopted.

Third level (derived last level): the set of decision-making procedures that prevent the agent from being motivated by the excluded reasons.

The Motivational Account, in itself, does not rule out this possibility. This is the ambiguity I have anticipated above. In fact, if the exclusionary reasons are reasons for not being motivated by certain reasons, this does *not* imply that the agent must be motivated by exclusionary reasons; it does not imply that the agent must perform a certain mental activity when deliberating. In other words, although exclusionary reasons do not cancel first-order normative reasons, but merely deprive first-order reasons of the property of being motivating reasons, this fact does not imply that, according to the Exclusionary Model, exclusionary reasons must be in their turn motivating reasons⁴⁸: they may be just goals that legitimize the adoption of whatever method of decision-making may realize a state of affairs in which the agent is not motivated by the excluded first-order reasons.

The Motivational Account is ambiguous also in a second way. Even if exclusionary reasons are motivating reasons and so they must be present in the agent's deliberation, a question may be raised about which motivation is satisfactory. Is it enough to try to exclude certain considerations with the old-fashioned mental control, or must the agent prepare herself in a certain way, developing attitudes that will make her obey correctly and efficiently?⁴⁹

So, although one might get the impression that the Motivational Account outlines a method of deliberation that people must follow when confronted with authoritative directives, the truth, in my opinion, is more complicated. The Motivational Account clarifies only that exclusionary reasons are not cancelling conditions, but it remains unclear about which role has been assigned to exclusionary reasons in the deliberative process.

The discussion of the role of exclusionary reasons in the deliberative process is pertinent for an encompassing analysis of the Exclusionary Model and the indirect methods of decision-making. The idea would be, in effect, that not only the balance of background first-order reasons, but also exclusionary reasons, can be indirectly pursued. Moreover, if the levels of the Service Conception would be three and not two, the problem would arise as to how to justify the intermediate level – the one in which the exclusionary reasons operate. If, in order to respond to reasons, we must ultimately adopt certain decision-making strategies, why should we choose them on the basis of their suitability to achieve the balance of non-excluded reasons, rather than – bypassing the intermediate level – on the basis of their suitability to make us respond to the balance of background reasons?

Still, we do not need to complicate the issue now. We may treat the Exclusionary Model as a model of decision-making, since, even if its best reconstruction would be another, it is safe to assume that this model dictates *also* – at one point or in many cases – a certain method of decision-making, whereby the agent must try to disregard through her mental control those considerations that seem to her reasons for action, but which she also believes to fall within the scope of the authoritative directive.

5. *Parfit: Theories That Are Indirectly Self-defeating*

The debate about indirect consequentialism offers a sophisticated framework to understand the more general idea of indirect theories of decision-making. Indirect consequentialism is often

⁴⁸ I thank Nicola Muffato for the enlightening conversation on this point. On the evolution and oscillations of Raz's account see MUFFATO 2022.

⁴⁹ We may distinguish here between reasons working "on the spot" and reasons for preliminary activities. I owe this suggestion to Noam Gur.

conceived as a strategy to rescue consequentialism from the problem of alienation. The premise is that direct, simple, consequentialism would be flawed because it would require moral agents to be motivated by the maximization of the good, and thus it would lead people to alienate from the things that are important to them⁵⁰. On this premise, following Sidgwick, consequentialists reply that a «consequentialist agent need be committed to maximization of the good only as an objective criterion of rightness by which his actions can be assessed, rather than as directly providing a motive or a purpose which such an agent is to consciously adopt in performing any action»⁵¹.

In other words, consequentialism would be an indirect moral theory, because the maximization of the good serves as the criterion of rightness for evaluating both which actions ought to be performed and which motives agents ought to possess in order to act rightly, yet at the same time, it is not necessary for the maximization of the good to figure in the agents' motivations. The maximization of the good would be the criterion which legitimizes certain actions and certain motivations but not also the motivation required. According to consequentialism agents are not required to be motivationally guided by consequentialism, and, in some cases, they are even required not to be.

In what follows, I will refer to Derek Parfit's analysis contained in the first chapter of his masterpiece, *Reasons and Persons*. Although Parfit does not use the expression "indirect consequentialism", his analysis of the problem excels in terms of thoroughness and generality. In Parfit's analysis, on one hand, alienation is not the only problem for direct consequentialism that may motivate the turn towards indirect-consequentialism, on the other, the metamorphosis in indirect theories of reasoning is not a phenomenon circumscribed to consequentialism, but also regards other theories of practical reasons, in particular self-interest theory⁵².

Parfit opens *Reasons and Persons* by observing that critiques of various theories of rationality or morality rely on certain assumptions. But there is an exception. One peculiar critical argument is that the theory of rationality or morality is *self-defeating*. «This argument, uniquely, needs no assumptions. It claims that a theory fails even in its own terms, and thus condemns itself»⁵³.

Parfit believes that both self-interest theory and consequentialism are *indirectly* self-defeating. A theory is «*indirectly self-defeating* when it is true that, if someone tries to achieve his T-given aims [the aims given by the theory], these aims will be, on the whole, worse achieved»⁵⁴. In terms of motivations, a theory is indirectly self-defeating when an agent who is motivated by that theory ends up achieving the aims it prescribes less effectively than she would have by being motivated by a different theory. However – this is Parfit's contention –, being indirectly self-defeating is not, as it might seem, a problem for these theories.

The analysis starts discussing the case of self-interest theory. According to self-interest theory, our aim is that our life goes as well as possible⁵⁵. Different theories give different answers to the question about what self-interest consists of. Parfit enumerates three famous accounts: hedonism, the desire-fulfilment theory, and the objective list theory⁵⁶. The general idea is that if the agent acts motivated by the goal that her life should go as well as possible, the goal that her life will go as well as possible will be achieved worse⁵⁷.

Parfit distinguishes in this respect between two possible sources of this failure. The first

⁵⁰ WILLIAMS 1973, 128.

⁵¹ COCKING, OAKLEY 1995, 87. This reply is found for instance in RAILTON 1988.

⁵² Cocking and Oakley survey the most famous contributions about indirect consequentialism (COCKING, OAKLEY 1995, 87). See also WILAND 2007; and MCNAUGHTON, RAWLING 2025 which though not explicitly quoting Parfit is clearly referring to his work.

⁵³ PARFIT 1984, 3.

⁵⁴ PARFIT 1984, 5.

⁵⁵ PARFIT 1984, 3.

⁵⁶ See also GRIFFIN 1986.

⁵⁷ PARFIT 1984, 5. At p. 8 Parfit starts talking about "motives".

possibility relates to the case in which the agent tries to follow the theory but fails, doing what is worse for her. We may call this eventuality the “performance error” problem. In the second case, by contrast, although the agent reliably avoids choices that are contrary to her own good, her life is nevertheless worse than it would have been had she been guided by dispositions other than pure self-interest. For this unwelcome result to occur, it is not necessary for the agent to be always motivated by her self-interest; rather it suffices that she is “never self-denying” – i.e., that she never does what she believes would be worse for her⁵⁸. We may call this case, which stems from the fact that the agent is never self-denying and which does not involve any performance error, “the pure motivational case”.

The case of the performance error is not so much a reason to criticise the theory as it is a reason to criticise the person who made the error. More interesting for Parfit is the pure motivational case – the case where the agent does nothing that is worse for herself, but, since she is never self-denying, she achieves her aims in terms of self-interest less than if he had different motivations.

Still, it is important to dwell on the supposedly uninteresting case of performance error. Although Parfit observes that the agent’s incompetence in following the theory is not a fault of the theory but an agent’s fault, it is worth noting that failing to follow self-interest theory because it is too complicated might have been, even according to Parfit, an objection to self-interest theory. The difficulty to follow a theory is after all an argument against that theory. The reason why this is not an actual concern for self-interest theory is just that, as a matter of fact, self-interest theory is not difficult to follow⁵⁹. This detail is important because one of the limits of a decision-making process based on the balance of background first-order reasons lies in its inherent complexity. That said, though the performance error problem is nearer to the Razian analysis, in order to follow Parfit’s analysis we will focus on the pure motivational case.

How could our motivations doom us in this way? An example⁶⁰ provided by Parfit to illustrate this scheme has to do with a case of rescue. Imagine that the agent is stranded in the desert and manages to stop someone who may rescue her. The agent may offer the stranger a great reward for his help. Assume next both that the agent is never self-denying and that she is “transparent”, meaning that she is unable to deceive others. If she is never self-denying, it is true that later, when she will be safe at home, she will not give to the rescuer the reward. But if she knows it and she is transparent then it is also true that she is unable to promise the reward convincingly. The result is that the agent is left stranded in the desert, an outcome that is worse for her. Because of her transparency it would have been better for the agent in self-interest terms if she had been self-denying, because only in this way she could have been trustworthy⁶¹.

Self-interest theory is then self-defeating. Anyway, as already mentioned, according to Parfit, self-interest theory is self-defeating in a way that does not falsify it. Though being never self-denying is the motivation which somehow mirrors the imperative of self-interest theory and it is in this sense a rational motivation (assuming the correctness of self-interest theory), self-interest theory does not tell people to be never self-denying; rather, it advises cultivating a set of motivations that are optimal from the perspective of self-interest. People are not told to be never self-denying, and are encouraged to be so when it serves their self-interest. Therefore, self-interest theory is not failing in its own terms⁶². The pure motivational case shows rather that there are cases in which it is rational to cause ourselves to act on a set of motives which are in themselves irrational: rational irrationality.

⁵⁸ PARFIT 1984, 6.

⁵⁹ PARFIT 1984, 5.

⁶⁰ A fanciful example, like many, but one that should make the problem clear.

⁶¹ PARFIT 1984, 7.

⁶² PARFIT 1984, 8-12.

According to the scheme of rational irrationality, the agent has self-interest reasons to have motivations leading to actions which will be irrational, but whose possession is a way to generally improve the conformity to self-interest aims: in short, the actions may be deemed irrational, but not the agent⁶³. Imagine a writer whose strongest desire is that her novel be as good as possible. This agent is disposed to sacrifice her self-interest for this goal. Still, it would be worse for the writer, in self-interest terms, if her desire were weaker. This writer possesses the motivation that would be irrational for her to lose. Yet, when she works hard to the point of exhaustion and depression, it remains true that she is acting irrationally according to self-interest theory. Given self-interest theory, avoiding exhaustion and depression remains a reason for her, even though she has reasons to maintain the motivations that will lead her into those states⁶⁴. The parallel with the Motivational Account of the Exclusionary Model is straightforward: in both cases, certain factors cease to be motivating reasons while remaining normative reasons for action, and in both cases, this is the price the agent must pay for the general conformity to reasons.

But here there is another twist. Never being self-denying might be the result of people's *belief* in self-interest theory. If we suppose that people's motivation to be never self-denying derives from their belief in self-interest theory, and that they can never change their motivation as far as they believe in self-interest theory – i.e. they cannot (intentionally) do what they believe to be irrational –, this means that the very belief in self-interest theory has a bad effect in self-interest terms, and thus self-interest theory fails in its own terms⁶⁵. Parfit's answer to this objection is that, in this case, self-interest theory not only would give reasons to act on a set of motives incoherent with self-interest, but also would give practical reasons to believe in other theories about rationality. Self-interest theory would be *self-effacing*, a theory which removes itself from the scene, telling anyone to believe another theory, so far as having this belief is useful to have the set of dispositions that are best in self-interest terms⁶⁶. It must be noted that this legitimization of other theories about how to live our lives does not count as a full theoretical justification of these theories, rather the lesson to learn is that self-interest theory may dictate to believe in theories which are false; self-interest theory may dictate to have false beliefs⁶⁷.

As Parfit concludes:

«to be self-effacing is not to be self-defeating. It is not the aim of a theory to be believed. If we personify theories, and pretend that they have aims, the aim of a theory is not to be believed, but to be true, or to be the best theory. That a theory is self-effacing does not show that it is not the best theory. (...) Though S [self-interest theory] would not be failing in its own terms, it might be claimed that an acceptable theory cannot be self-effacing. I deny this claim. It may seem plausible for what, when examined, is a bad reason. It would be natural to *want* the best theory about rationality not to be self-effacing. If the best theory was self-effacing, telling us to believe some other theory, the truth about rationality would be depressingly convoluted. It is natural to hope that the truth is simpler: that the best theory would tell us to believe itself. But can this be more than a hope? Can we assume that the truth *must* be simpler? We cannot»⁶⁸.

⁶³ PARFIT 1984, 12-17. To be clear, acts by which one does not satisfy an immediate preference in order to be much better off in the future (such as undergoing a painful operation) are not irrationally rational acts, but rational acts in the most canonical sense. In fact, refraining from satisfying an immediate preference in order to gain a greater advantage in the future is not self-denying. An agent is self-denying when she does what she believes would be worse for her.

⁶⁴ PARFIT 1984, 14.

⁶⁵ PARFIT 1984, 11, 17 ss..

⁶⁶ PARFIT 1984, 23.

⁶⁷ Therefore, we cannot legitimize morality through self-interest, thereby reconciling moral and self-interest reasons and solving “the profoundest problem of Ethics”, in Sidgwick's words (PARFIT 1984, 19).

⁶⁸ PARFIT 1984, 23.

Similar considerations apply to consequentialism⁶⁹. The fundamental idea of consequentialism is that there is an ultimate moral aim that consists in the realization of the best possible outcome. Different versions of consequentialism offer different answers to the question about what makes an outcome good, better and best. According to hedonistic utilitarianism, for example, the best outcome is the one in which there is the greatest net sum of pleasure minus pain. But there are more sophisticated and less famous versions of consequentialism. Unlike hedonistic utilitarianism there may be versions of consequentialism which adopt a pluralist axiology; further, unlike simpler versions that rank states of affairs, there may be versions that evaluate histories of the world.

Although it may seem that consequentialism is so general as to be void, according to Parfit all forms of consequentialism share a peculiar common structure, which is condensed in the idea of *agent neutrality*⁷⁰. A moral theory is agent-neutral if it gives a common moral aim to all agents. Assume that the moral aim which has priority over all the others is the respect for human rights. A consequentialist approach to human rights would imply that each agent ought to minimize the occasions on which human rights are violated. This means that there may be cases in which an agent must actively violate human rights to prevent a bigger violation of human rights perpetrated by someone else. Agent neutrality is contrasted with *agent relativity*, which is then the hallmark of the non-consequentialist theories, also known as “deontological theories”. A theory is agent-relative if it gives different people different aims. Considering human rights once again, according to an agent-relative theory of rights the agent must refrain *herself* from violating rights, and she is not permitted to violate rights even in order to prevent greater violations committed by others. Nozick’s account of fundamental rights according to which rights are side constraints to actions is the typical example of this type of theory⁷¹.

Having clarified the notion of consequentialism, Parfit asks whether consequentialism is indirectly *collectively* self-defeating. A theory is indirectly collectively self-defeating «when it is true that, if several people try to achieve their T-given aims, these aims would be worse achieved»⁷². As in the case of self-interest theory, the concern is that if agents were motivated (disposed) to bring about the best outcome, the resulting outcome would not be the best achievable, even if they successfully performed the correct actions (even in the absence of performance errors). The failure might come not from the agents’ actions, but rather from their motivations. The difference with the case of self-interest theory is that the failure of the aim given by the theory would occur only if many people were motivated to bring about the best outcome.

Why should a collective motivation to bring about the best outcome make the outcome worse? The idea is that agent-neutral consistent and enduring motivations would result in the suppression of the agent’s desires. And if all or most of the agents suppress their desires and life-plans, this will result in a massive contraction of the aggregated sum of happiness⁷³.

Although this is the central case Parfit is going to discuss, it must be noted – symmetrically with what has been said regarding self-interest theory – that consequentialism may be self-defeating also because of the problem of performance errors. One example given by Parfit concerns the likelihood that a person may deceive herself about the outcomes of her actions. «If we want someone to be dead, it is easy to believe, falsely, that this would make the outcome better. It would therefore make the outcome better if we were strongly disposed not to kill, even when we believe that this would make the outcome better»⁷⁴. Once more, a case which very closely resembles the type of concerns which supported the adoption of the Exclusionary Model.

⁶⁹ PARFIT 1984, 24 ff.

⁷⁰ See for example PORTMORE 2001.

⁷¹ NOZICK 1975.

⁷² PARFIT 1984, 27.

⁷³ We found this critique in WILLIAMS 1973; for an analysis of the problem see ADAMS 1976.

⁷⁴ PARFIT 1984, 28.

As in the case of self-interest theory so in the case of consequentialism, the fact that consequentialism *may be* indirectly self-defeating does not prove that the theory fails in its own terms. Unlike in the case of self-interest theory, Parfit believes that in the real world consequentialism is not indirectly self-defeating. For, to be self-defeating most people should be disposed to realize the best possible outcomes; but the reality is that very few people are disposed to produce the best outcome in agent-neutral terms. But, more generally, like self-interest theory, consequentialism does not require that people are motivated by the aim that outcomes be as good as possible, but rather that people have the best set of motives in consequentialist terms, that is the set of motives which will make outcomes as good as possible⁷⁵. This means that consequentialism requires people to cultivate a set of motivations that, although they may occasionally lead to wrong actions, will, on the whole, result in the best possible outcome. The acquisition of these motivations is good overall and then the agents who acquire them are blameless when they do the wrong thing: blameless wrongdoing.

A useful example is that of a mother who can either benefit her child or a stranger, where the benefit that she could give to the stranger is bigger than that she could give to her child. When the mother benefits her child, she is acting wrongly in consequentialist terms. However, since it would have been wrong for her – again in consequentialist terms – to lose her love for her child, the wrongness of her action is the product of what is overall good. The action remains wrong, but the agent should not be considered immoral for having performed it⁷⁶. Once again, the situation described is very similar to the Motivational Account of the Exclusionary Model: what was a normative reason for a certain action remains a normative reason – since the ultimate criterion of rightness has not been changed –, but the agent ought not to be motivated by that reason, and, again, this is the price the agent must pay for the general conformity to reasons.

Because consequentialism may tell people not to be motivated to maximize the good, and it may be the case that people are unable to change their motivations in the requested way as long as they believe in consequentialism, consequentialism may tell people to believe in another theory. For example, may tell people to believe in an improved version of common-sense morality⁷⁷. In this case, consequentialism would be self-effacing. Still, Parfit believes that it is not the case that consequentialism is wholly self-effacing, rather it is more plausible that consequentialism is partially self-effacing and partially *esoteric*: it is morally good that consequentialism be adopted by an enlightened minority who do not disclose the theory to the vast, ignorant majority. While the image of this Government House Utilitarianism – to use Williams' caustic expression⁷⁸ – is disconcerting for many people, once again Parfit believes that depressing truths in ethics are still truths, and seems to side with Sidgwick, who regretted the esoteric character of consequentialism, «but he did not think regret a ground for doubt»⁷⁹.

To conclude, the charge according to which self-interest theory and consequentialism fail in their own terms has been rebutted by Parfit. In doing so, Parfit has shown that self-interest theory and consequentialism have a tiered structure, and this is why I think it is meaningful to speak of “indirect” theories of decision-making. They are indirect theories of decision-making because they do not tell people to apply their fundamental values in the decision-making processes, but they legitimize other decision-making models (some motivations) as the best way to reach the best outcome. Our reasoning must get worse to get better in the long run.

⁷⁵ PARFIT 1984, 28.

⁷⁶ PARFIT 1984, 31-40.

⁷⁷ PARFIT 1984, 40.

⁷⁸ WILLIAMS 1985, 108; see also SEN, WILLIAMS 1982, 16.

⁷⁹ PARFIT 1984, 41.

Using the distinction between theories of practical reason and theories of reasoning, self-interest theory and consequentialism must be understood as theories of practical reason – that is, as criteria for the rightness of action – which, in certain cases, instruct individuals not to adopt them as their own theory of reasoning. When it comes to self-interest theory and consequentialism Parfit has denied that there is an isomorphic relation between the criteria of correctness and the decision-making models.

6. *Authoritative Directives, Rules, and Indirect Models of Decision-making*

Although one of the biggest problems of the modern world is that obedience is all too easy⁸⁰, it may also be true that the authority of law and in particular the ideal of Rule of Law are cognitively burdensome. Parfit's thoughtful analysis of self-interest theory and consequentialism provides a framework to understand the cognitive difficulties related to obedience in general, and obedience to rules in particular. This conclusive section compares indirect consequentialism and the Service Conception which adopts the Exclusionary Model, dwelling on the problem of rules⁸¹.

Both in indirect consequentialism and in the Service Conception the decision-making process must in some sense get worse in order to get better. In both cases the decision-making process worsens from the agent's point of view because:

- (1) The agent has reasons not to be motivated by the criteria of correctness for action directly – in Raz's terms, the agent has reason not to be motivated by some reasons, denying the seemingly ubiquitous principle of practical reasoning according to which «one ought, all things considered, to do whatever one ought to do on the balance of reasons»⁸²; and this – as a claim about decision-making – means that the agent knows that she has reasons not to be motivated by her *personal moral assessment* of the background reasons.
- (2) The agent knows that, if she acts on the right motivations, there will be cases in which she will do the wrong thing, while she would have done the right thing had she acted directly on the criteria of correctness – that is, on the basis of her personal moral assessment of the background reasons.

In the case of consequentialism, (2) occurs when the agent, justified in following a refined version of common-sense morality, performs an action that is right by common-sense standards but not according to consequentialism. There are two different situations that make (2) true when the Service Conception tells us to adopt the Exclusionary Model of decision-making.

- (2.1) Although the command may come from a legitimate authority which is operating within the scope of its authority, the command may be wrong (even terribly wrong). In this case, though the balance of reasons points towards action x, the agent has a first-order reason to do non-x and an exclusionary reason not to be motivated by those reasons for x over which the authority has the power to pronounce.
- (2.2) In the second situation the authoritative directive is not generally and abstractly wrong, but is a *rule* that in the specific case misfires. The legal rule is not morally objectionable in itself. However, certain circumstances arise in the particular case such that the agent would be doing the wrong thing (even something terribly wrong) by obeying the rule⁸³.

⁸⁰ See for example SMEULERS 2019.

⁸¹ I will set aside self-interest theory.

⁸² RAZ 1999 [1975, 1990], 36.

⁸³ These two cases are adaptations of Gur's Situation 1 and Situation 2 (GUR 2018, 22 f.).

The problem of rules (2.2) within the theory of authority deserves attention.

Although not all authoritative directives are rules, as the concept also encompasses particular norms⁸⁴, many of them are. And while the law does not necessarily consist of rules imposing substantive constraints⁸⁵, these rules are crucial in many legal systems. A necessary condition for the Rule of Law – though by no means sufficient – is the rule *by law*, that is the use of orders that are general, clear, prospective, public, and relatively stable⁸⁶, imposing substantive constraints. In other words, the government of people through legal rules.

What is peculiar of rules is that they have the capacity to generate wrong results even if their creator never intended to produce them⁸⁷. This is so because of the way in which rules are (ideally) manufactured.

Following Schauer, a rule is created through a process of generalization from particular cases, where the resulting general factual predicate of the rule – the antecedent of the conditional statement, or *protasis* – is chosen according to the purpose, the rationale, the “justification” of the rule «the evil sought to be eradicated or the goal sought to be served»⁸⁸. A black dog enters the restaurant barking and disturbing customers. Generalizing from this particular case, if our purpose is that of satisfying customers protecting them from various annoyances, it is reasonable to abide with a rule according to which “dogs are not allowed”, instead of the rule “black things are not allowed”, since dogs, and not black things, are often cause of annoyance for the customers of restaurants.

But while the general factual predicate must be related to the production of the feared or desired consequence, it «is not a statement of the individually necessary and jointly sufficient conditions» for that, as it merely describes a set of facts that bear a relation of “probabilistic causation” to the justification⁸⁹. While “Dogness” is probabilistically related to annoyances, it is neither a necessary nor a sufficient condition for the occurrence of annoying events in the restaurant. Because rules are the result of probabilistic generalizations, they are over-inclusive with respect to their justification, in the sense that they encompass cases that should not be included according to the justification of the rule – for instance, well-behaved dogs, blind dogs or the Queen’s corgis. Moreover, the mere fact that rules are generalizations from specific cases – regardless, this time, whether they are probabilistic generalizations or not – makes it the case that they are also under-inclusive, failing to encompass cases which should be included according to the rationale – like a pet bear or a giant snake⁹⁰.

This means that rules sometimes do not serve their purpose and may well impede it actively. Rule-based decision-making is necessarily sub-optimal, because «although there will be occasions on which the rule-indicated result will be inferior to the justification-indicated result, there will be no occasions on which the rule-indicated result will be superior to the justification-indicated result»⁹¹. But this does not prove that the adoption of rule-based decision-making is irrational. We must distinguish between the justification or purpose behind the rule, i.e., the “substantive justification”, and the justification for *having a rule* as a strategy to serve the substantive justification – the “rule-generating justification”, the justification for specifying the (substantive) justification in the form of a rule⁹².

⁸⁴ RAZ 1999 [1975, 1990], 49.

⁸⁵ SCHAUER 1991, 10, 168 ff. Schauer contrasts rules imposing substantive constraints with *naked jurisdictional rules*, and argues that while a legal system can dispense with the former—as exemplified by the Weberian ideal of *qadi* justice—it cannot function without the latter.

⁸⁶ WALDRON 2016, parag.4

⁸⁷ SCHAUER 1991, 129.

⁸⁸ SCHAUER 1991, 26

⁸⁹ SCHAUER 1991, 29

⁹⁰ SCHAUER 1991, 31-37.

⁹¹ SCHAUER 1991, 100.

⁹² SCHAUER 1991, 94.

As we said, the use of rules to guide people's conduct is only one among possible strategies. Alternatively, the agent may be left – in a particularistic fashion – to contemplate the balance of background reasons which would do all the normative work without the interposition of the rule⁹³. Although intuitively superior, a decision-making procedure that aims to produce the best outcome for each case may be self-defeating, for instance because it wastes decision-making resources or is prone to error. The need to spare decisional resources and the distrust of a certain category of decision-makers – as well as other similar considerations – are the justification for the adoption of rules, which, in general, are tools for the allocation of decisional power⁹⁴. This is the justification for having rules and this is why, rule-based decision-making may overall be the best (the most rational) decision-making procedure available⁹⁵.

That said, since rules are crucial in our societies, it is appropriate to emphasize the role of rule-based decision-making within the Service Conception of Authority, talking of the Service Conception of Rules, even though the considerations that will follow are relevant for obedience to authoritative directives in general. Accordingly, the exclusionary reasons under analysis will be authoritative rules, which – following the Razian framework – are to be understood as second-order reasons for not being motivated by those first-order reasons that fall within the scope of the rule⁹⁶.

The distinction between, on the one hand, the strategies that agents should follow in their deliberation – the second, derived, level – and, on the other, the principles or theories that provide the ultimate criteria of correctness, and yet instruct people not to be motivated by them directly – the first level –, can be used to compare indirect consequentialism and the Service Conception of Rules. We arrive at the following scheme:

First level: Consequentialism / the substantive justification of the rules (in general, the theory about background reasons)

Second level: Improved version of common-sense morality / rule-based decision-making (in general, the Exclusionary Model of decision-making)

Indirect consequentialism is the conjunction of consequentialism as the ultimate criterion of correctness and, roughly, an improved version of common-sense morality as the model of decision-making. While the Service Conception of Rules is an indirect theory of decision-making which prescribes adopting a rule-based model of decision-making to serve better the balance of background reasons.

While both are indirect theories of decision-making, the Service Conception of Rules and indirect consequentialism differ in two important and intertwined aspects.

The first difference regards the relation with our intuitions. In the indirect consequentialist model, consequentialism operates at the first level – being the ultimate theory about the criteria of correctness –, while common-sense morality is adopted as the model of decision-making. Consequentialism is not an intuitive method of decision-making, while *common-sense* morality by definition respects people's pre-theoretical moral intuitions; therefore, the practical result of indirect consequentialism is, in many cases, the legitimation of people's common intuitions. Indeed, although Parfit's analysis reveals that moral truths are complex and counterintuitive (if

⁹³ SCHAUER 1991, 94.

⁹⁴ SCHAUER 1991, ch. 7, see 158 ff. in particular.

⁹⁵ SCHAUER 1991, 102. I am skipping here Schauer's important discussion about "rule-sensitive particularism" (SCHAUER 1991, 97).

⁹⁶ Schauer does not consider rules as exclusionary reasons in the same way as Raz does, but we can neglect this difference (see SCHAUER 1991, 88 ff.).

consequentialism is true, not only we have counterintuitive duties⁹⁷, but we also must accept that moral truths may be self-effacing and esoteric), it nevertheless reaffirms the value of common-sense intuitions as a potentially⁹⁸ legitimate method of decision-making. In a nutshell: a complex, disconcerting, counter-intuitive theory of practical reasons legitimizes a simpler and more intuitive decision-making model. This pattern is reversed in the case of the Service Conception of Rules (and generally in the case Service Conception of Authority which is applied to the broader category of authoritative directives). In a sense weighing all the practical reasons is more complex than weighing just the unexcluded reasons. However, it is also true that from the agent's perspective the substitution is not between balancing reasons and balancing non-excluded reasons, but between one's own sense of justice and obedience to the rule. Although from the normative standpoint the shift from the first level to the second is a simplification of the task, from the phenomenological and psychological standpoint the shift is rather a complication, at least until we rule out factors such as the interiorization of rules. In other words, while in the scheme of indirect consequentialism the complex is substituted with the simple, in the case of the Service Conception of Rules the simple – illusorily simple, but still psychologically simple – is substituted with the complex. Rule-based decision-making and in general self-conscious obedience to authoritative directives is rational because it is a safer procedure of decision-making, but is cognitively laborious, because the agent is required to neutralize her own moral intuitions, and to accept counter-intuitive conclusions.

Speaking about rules in particular (but the point can be applied to particular authoritative directives as well) Schauer says:

«the authority makes in advance the best all things considered decision (...) by creating a procedure in which the subject will be dissuaded by exercising that subject's *best* (but expected to be mistaken) judgment (...) then the rule-maker's task is often one of inducing a rule-applier or rule-subject to relinquish her best judgment»⁹⁹ (italics added).

As anticipated, there is also another important difference between indirect consequentialism and the Service Conception of Rules, which reinforces the first one. As we have seen, Parfit leaves open the possibility that consequentialism may instruct many people to believe in another moral theory: consequentialism may be partially self-effacing and partially esoteric. This solution can hardly be used in the context of legal rules and authoritative decisions, as far as liberal democracies are concerned.

First of all, it is significant that Parfit, in analysing how self-interest theory and consequentialism may be self-effacing and esoteric, resorts to thought experiments involving drug use or phenomena such as hypnosis¹⁰⁰. These solutions are clearly unavailable in the context of the Rule of Law. We may add that in order to conceal consequentialism there is no need, in the actual world, to resort to drugs and hypnosis, because the consequentialist way of reasoning is not common among people. Instead, reference to the substantive justification of authoritative rules is difficult to erase from people's minds, since it is grounded on their sense of justice. What is often neglected by people is not the substantive justification of the rule, but rather the justification for

⁹⁷ The same does not apply to self-interest theory, which may be regarded as an intuitive theory of rationality by many. This is why I am confining the analysis to consequentialism.

⁹⁸ The adoption of a revised version of common-sense morality would be justified if there were a risk that too many people might adopt consequentialism. A scenario far removed from present reality, according to Parfit, as we noted above.

⁹⁹ SCHAUER 1991, 133 f.

¹⁰⁰ PARFIT 1984, 12 f., 41.

having a rule. While consequentialism spontaneously tends to be self-effacing and esoteric, the untutored, naïve, sense of justice of people is by definition a common, public, mindset.

Therefore, unless *ad hoc* social techniques aimed at changing people's sense of justice intervene, the second level will not cognitively replace the first, but rather will be added to it. Not only must the agent change her intuitive method of decision-making, but she also *remembers* that the counter-intuitive method she must follow is a sub-optimal one. Authoritative rules may not only demand actions that are really wrong, but also do so in full view of the agent's moral *awareness*. The Service Conception of Rules has, in this sense, a "genealogical" nature. This intensifies the cognitive load on the obedient agent, whose sense of justice is in direct conflict with the content of the authoritative directive and cannot simply be set aside. The agent experiences that the truth about practical are "depressingly convoluted"¹⁰¹.

The Service Conception of Rules is an indirect theory which both (i) legitimizes a counter-intuitive method of decision-making and (ii) tends to be genealogical (rather than self-effacing and esoteric).

7. Conclusions

In the indirect theories of decision-making reasoning must worsen in order to improve. Indirect consequentialism and the Service Conception are both indirect theories of decision-making. Rule-based decision-making – which is at the core of the Rule of Law – is one of the most important decision-making procedures which are justified by the Service Conception. The comparison between indirect consequentialism and the Service Conception shows a deep structural difference. On the one hand, there are indirect theories that legitimize intuitive decision-making procedures and are self-effacing; on the other hand, there are indirect theories that legitimize counter-intuitive decision-making procedures and have a genealogical character. When indirect consequentialism tells people not to be motivated by consequentialism but by an improved version of common-sense morality the "worsening" of reasoning is not felt by the agent, whereas the worsening is felt when the Service Conception of Authority tells people not to be motivated by their assessment of the background reasons but by authoritative directives. The agent subjected to authoritative directives will find right things that are contrary to the directives and wrong things that are commanded by the directives; moreover, she will know that the criteria she is using are suboptimal, and then that some actions contrary to the directive that seem right are really right, and conversely that some actions prescribed by the directive that seem wrong are really wrong. This may occur either because the legitimate authority has issued a wrong directive, or because the directive is a rule which, although abstractly correct, commands a wrong action in the specific case. Acknowledging this requires control, control is effortful, and effortful things may look wrong. As Dennett noted when talking about the idea of competence without comprehension: «Our skepticism about competence without comprehension has causes, not reasons. It doesn't "stand to reason" that there cannot be competence without comprehension; it just feels right, and it feels right *because* our minds have been shaped to think that way»¹⁰². Rule-based decision-making is part of an unfortunate kind of indirect theories of reasoning.

¹⁰¹ PARFIT 1984, 23.

¹⁰² DENNETT 2017, 58.

Bibliographical references

- ADAMS R.M. 1976. *Motive Utilitarianism*, in «The Journal of Philosophy», 73, 14, 1977, 467 ff.
- ADAMS N.P. 2021. *In Defense of Exclusionary Reasons*, in «Philosophical Studies», 178, 1, 2021, 235 ff.
- RUTH C. 2016. *Comparativism: The Grounds of Rational Choice*, in LORD E., MAGUIRE B. (eds), *Weighing Reasons*, Oxford University Press, 213 ff.
- COCKING D., OAKLEY J. 1995. *Indirect Consequentialism, Friendship, and the Problem of Alienation*, in «Ethics», 106, No. 1, 1995, 86 ff.
- DENNETT D. C. 2017. *From Bacteria to Bach and Back. The Evolution of Minds*, Norton & Company.
- GRIFFIN J. 1986. *Well-being. Its Meaning, Measurement, and Moral Importance*, Oxford University Press.
- GUR N. 2018. *Legal Directives and Practical Reasons*, Oxford University Press.
- JORDAN A. 2018. *Exclusionary Reasons, Virtuous Motivation, and Legal Authority*, in «Canadian Journal of Law & Jurisprudence», XXXI, No. 2, 2018, 347 ff.
- MACKIE J. L. 1977 *Ethics: Inventing Right and Wrong*, Penguin books.
- MCNAUGHTON D., RAWLING P. 2025. *Consequentialism*, available at <https://www.rep.routledge.com/articles/thematic/consequentialism/v-1>.
- MOORE, M. S. (1989). *Authority, law, and razian reasons*, in «Southern California Law Review», 62, 4, 1989, 827 ff.
- MUFFATO N. 2022. *Ragioni esclusive, concezione gerarchica della razionalità e precetti autoritativi*, in «Ragion Pratica», 59, 2, 2022, 503 ff.
- NOZICK R. 1975. *Anarchy, State, and Utopia*, Blackwell Publishers.
- PORTMORE D.W. 2001. *Can an Act-Consequentialist Theory Be Agent Relative?*, in «American Philosophical Quarterly», 38, 4, 2001, 363 ff.
- PARFIT D. 1984. *Reasons and Persons*, Oxford University Press.
- RAILTON P. 1988. *Alienation, Consequentialism, and the Demands of Morality*, in SCHEFFLER S. (ed.), *Consequentialism and Its Critics*, Oxford University Press, 93 ff.
- RAZ J. 1986. *The Morality of Freedom*, Oxford University Press.
- RAZ J. 1989. *Facing Up: A Reply*, in «Southern California Law Review», 62, 1989, 1153 ff.
- RAZ J. 1999. *Practical Reasons and Norms*, Oxford University Press (ed. or. 1975; revised edition with postscript 1990).
- RAZ J. 2006. *The Problem of Authority: Revisiting the Service Conception*, in «Minnesota Law Review», 90, 2006, 1003 ff.
- RAZ J. 2009. *The Claims of Law*, in ID., *The Authority of Law* (second edition), Oxford University Press, 28 ff.
- SCHAUER F. 1991. *Playing by the Rules. A Philosophical Examination of Rule-based Decision-Making in Law and in Life*, Oxford University Press.
- SEN A.K., WILLIAMS B.A.O. 1982, *Utilitarianism and Beyond*, Cambridge University Press.
- SMEULERS A. 2019. *Why Serious International Crimes Might Not Seem ‘Manifestly Unlawful’ to Low-level Perpetrators: A Social-Psychological Approach to Superior Orders*, in «Journal of International Criminal Justice», 17, 1, 2019, 105 ff.
- SMITH M. 1994. *The Moral Problem*, Blackwell Publishing.

- VASSILIOU A. 2022. *The Normativity of Law: Has the Dispositional Model Solved our Problem?* in «Oxford Journal of Legal Studies», 42, 3, 2022, 943 ff.
- WALDRON J. 2016. The Rule of Law, in «Stanford Encyclopedia of Philosophy», available at <https://plato.stanford.edu/entries/rule-of-law/#:~:text=The%20Rule%20of%20Law%20comprises,norms%20that%20govern%20a%20society>.
- WHITING D. 2017. *Against Second-Order Reasons*, in «Noûs», 51, 2, 2017, 398 ff.
- WILAND E. 2007. How Indirect Can Indirect Consequentialism Be?, in «Philosophy and Phenomenological Research», 74, 2, 2007, 275 ff.
- WILLIAMS B.A.O. 1973. *A Critique of Utilitarianism*, in SMART J.J.C., WILLIAMS B.A.O. (eds.), *Utilitarianism For & Against*, Cambridge University Press, 77 ff.
- WILLIAMS B.A.O. 1981. *Persons, Character and Morality*, in Id., *Moral Luck. Philosophical Papers 1973-1980*, Cambridge University Press, 1 ff. (ed. or. 1975).
- WILLIAMS B.A.O. 2006. *Ethics and the Limits of Philosophy*, Routledge (ed. or. 1985).

PART IV.

Legal Design for the Rule of Law

Social Perceptions of Judges and the Rule of Law: A Protocol for Designing Judicial Vignettes

CLAUDIO AGÜERO SAN JUAN

University Alberto Hurtado, Chile.

E-mail: aguero.claudio@gmail.com

<https://orcid.org/0000-0002-7005-2979>

JUAN PABLO ZAMBRANO TIZNADO

University of La Frontera, Chile.

E-mail: juanpablo.zambrano@ufrontera.cl

<https://orcid.org/0000-0003-0939-5996>

PAULA MORGADO FERNÁNDEZ

University of Chile, Chile.

E-mail: paula.morgado.f@gmail.com

<https://orcid.org/0000-0003-1355-2317>

ABSTRACT

This article presents a tutorial-style protocol for designing and piloting vignette-based studies in experimental philosophy of law, with an application to lay evaluations of judicial decision-making under a minimal and strictly formal conception of the Rule of Law. The guiding hypothesis is that public assessments of judges are driven more by the moral valence of outcomes than by technical-legal virtues of justification, although explicit, publicly shareable reasons may mitigate the reputational costs of unpopular decisions. Part I systematizes the methodological steps for constructing “textoids” from judicial materials and controlling key threats to validity. Part II translates Raz- and Fuller-inspired requirements into operational cues of legality and anti-arbitrariness. The article concludes with a Decalogue of replicable criteria to support cumulative and comparative research on judicial legitimacy.

Questo articolo propone un protocollo di tipo tutoriale per progettare e testare studi basati su vignette nella filosofia sperimentale del diritto, applicato alle valutazioni dei non addetti ai lavori sul processo decisionale giudiziario secondo una concezione minimale e rigorosamente formale dello Stato di diritto. L'ipotesi guida è che le valutazioni pubbliche dei giudici dipendono più dalla valenza morale degli esiti che dalle virtù tecnico-giuridiche della giustificazione, sebbene ragioni esplicite e pubblicamente condivisibili possano attenuare i costi reputazionali delle decisioni impopolari. La Parte I sistematizza le fasi metodologiche per costruire “testoidi” da materiali giudiziari reali e controllare le principali minacce alla validità. La Parte II traduce i requisiti ispirati a Raz e Fuller in indizi operativi di legalità e non arbitrarietà. L'articolo si conclude con un Decalogo di criteri replicabili per la ricerca comparativa sulla legittimità giudiziaria.

KEYWORDS

Rule of law, judicial legitimacy, experimental philosophy, public perception, vignette methodology

Stato di diritto, legittimità giudiziaria, filosofia sperimentale, percezione pubblica, metodologia delle vignette

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo “Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)”, codice proposta 20225TJJSY – CUP J53D23005150006.



Social Perceptions of Judges and the Rule of Law: A Protocol for Designing Judicial Vignettes

CLAUDIO AGÜERO SAN JUAN, PAULA MORGADO FERNÁNDEZ, JUAN PABLO ZAMBRANO TIZNADO

0. Introduction – 1. Methodological tutorial: Initial challenges in vignette design – 1.1 Design and procedures – 1.2 Vignette construction – 1.3 Methodological issues – 2. Minimal background: the formal Rule of Law as a cue-set for vignette design – 3. By way of conclusion: a Decalogue of criteria for vignette design.

0. Introduction

In philosophy of law and legal theory, the contemporary debate on the judicial function has largely concentrated on the technical-legal properties of decisions: coherence, rationality, completeness, and reason-giving are the principal features examined in Italian and Hispano-American scholarship. In recent years, within the Spanish-language literature, the only sustained study explicitly linking the figure of the judge to the justification of judicial decisions remains the well-known article by Jorge Malem Seña. Other disciplines, for their part, have contributed mainly through research on plain language and on the judgment as a discourse genre. However, outside professional circles, the figure of the judge and the “quality” of judicial decisions are often assessed by different parameters. Citizens appear not to scrutinize the text as such, but to focus on the outcome of the decision (acquittal/conviction) and to treat that outcome as an indicator of the kind of judge who decides, integrating perceptions of the judge’s motivation with the perceived consequences of the ruling. Precisely because this lay evaluative logic diverges from specialized criteria, the gap between doctrinal analysis and social perception provides a clear methodological rationale for vignette-based research: by constructing short, controlled case narratives that systematically vary outcomes and salient cues of justification (e.g., legality, impartiality, and norm-guided intent), one can operationalize these competing dimensions and examine how each shapes public assessments of judicial performance.

The general hypothesis guiding the project is that public scrutiny of judicial decisions is oriented more by social morality than by technical justification. Two sub-hypotheses follow: (a) citizens’ perception of decision quality is modulated by the consequences attributed to the decision, and (b) signals of adherence to normative reasons and to the Rule of Law can attenuate the negative effects of that assessment. The methodological challenge lies in translating these theoretical hypotheses into a vignette-based experimental design that captures the complexity of lay judgment, without sacrificing clarity or control over the variables under study.

We take as a working assumption that lay evaluations of judicial decisions are shaped by more than logical-legal virtues. For the purposes of vignette construction, we treat the decision – especially its outcome and the way it is justified – as a set of cues from which participants may infer (a) adherence to formal legality and publicly shareable reasons, and (b) the perceived valence of the outcome’s consequences. This yields two core design dimensions to be manipulated: first, the presence or absence of explicit markers of formal legality and norm-guided intent (e.g., rule-following, impartiality, and reason-giving); and second, the perceived consequences of the outcome (e.g., socially costly vs. socially acceptable results). A further design implication is that, when outcomes are likely to be perceived as negative (for instance, the release of an individual regarded as dangerous), the vignette must specify the level of justificatory robustness – ranging from minimal reasoning to an explicit meta-justification invoking public normative reasons – so as to test

* Research conducted as part of the Fondecyt Regular n° 1250595, funded by ANID (Chile).

whether stronger justification offsets the reputational costs of the outcome. The purpose of this article is therefore methodological: to set out, justify, and refine a vignette-based research design capable of testing these relationships, and to invite scrutiny of its conceptual fidelity, manipulations, measures, and validity constraints before implementation on any specific population.

This manuscript serves two complementary purposes. First, it provides a tutorial-style protocol for translating doctrinal and legal-theoretical distinctions into controlled narrative stimuli (vignettes/textoids) and corresponding questionnaire-based measures, with explicit criteria for standardization, readability, and variable control. Second, it uses the Rule of Law debate as a worked example to show, in concrete terms, how a minimal and strictly formal conception can be operationalized as a set of textual cues plausibly detectable by non-expert participants. For this reason, the RoL discussion plays an instrumental role here: it is not meant to settle substantive controversies, but to guide design choices and make the protocol reusable across other philosophy-of-law questions.

In line with that aim, the paper does not report substantive findings about public attitudes toward judges, nor does it offer empirical conclusions about the main hypothesis. The broader research program is sequential: (i) a stimulus-construction and methodological validation phase (case selection, textoid conversion, cue manipulation, and comprehension/detection checks via expert review and iterative pilots), and (ii) a subsequent implementation phase on a lay sample to test the hypotheses concerning outcome valence and justificatory robustness/explicitness. This manuscript is confined to phase (i) and provides a transparent record of design choices, anticipated validity threats, and the minimal checks that must be met before fielding the study on the general population.

The core of the proposal is the use of experimental vignettes that simulate judicial decisions¹. This is a pioneering Spanish-language study in the Italo-Hispano-American context, where vignette-based research in legal domains has not developed. The difficulty lies in drafting vignettes that satisfy both the requirements of theories of the formal RoL (signals of formal legality, meta-justification, engagement with objections) and the methodological standards of experimental research (clarity, manipulation control, comprehensibility for lay participants, etc.). This tension requires careful alignment among three “languages”: that of legal theory, that of experimental philosophy, and that of lay discourse².

Our aim in this article is to review and systematize the methodological challenges of doing experimental philosophy within legal theory and to specify the conditions under which this kind of research is feasible. Rather than offering a mere experimental protocol, we argue that the central obstacle in the legal domain is the persistent gap between normative accounts of the Rule of Law and the empirical instruments needed to put them to the test. We propose to narrow that gap through systematic conceptual translation: key categories in legal-theoretical frameworks are reformulated as manipulable and observable variables in vignette-based experiments, assessed through lay perceptions of judges and judicial decisions. On this basis, we show how to operationalize features such as formal virtues, internal and external justification, impartiality, and normative motivation, thereby enabling empirical scrutiny of influential Rule-of-Law theories – especially those of Fuller and Raz – while treating experimental evidence as a complement, not a substitute, for theoretical argument. Designing such vignettes is thus a substantive contribution in itself, because it turns abstract doctrinal distinctions into empirically assessable and comparable stimuli that remain faithful to the underlying concepts while being intelligible to non-expert participants, and it provides a shared language for cumulative, comparative, and interdisciplinary work across legal theory, experimental philosophy, and the social sciences.

¹ For clarity, we distinguish the process of adjudication (“judicial decision-making”) from its product: the judgment (Spanish: *sentencia*), i.e., the court’s formal decision as expressed in the written instrument (often accompanied by the opinion stating the reasons).

² See, CABRÉ 2004; CUCATTO 2013.

The paper is structured into two parts. Part I provides a methodological tutorial: it sets out a general protocol for designing and validating judicial vignettes (source-case selection, textoid construction, linguistic standardization, variable manipulation, measures and checks, and key threats to validity). Part II serves as a worked application: it shows how a minimal and strictly formal conception of the Rule of Law can be operationalized as a set of textual cues, and how that cue-set can be used – via experiments on lay populations – to measure evaluations of decision quality and of the decision-maker. The final section distills the methodological lessons into a Decalogue of replicable criteria.

1. Methodological tutorial: Initial challenges in vignette design

PART I – Methodological tutorial: designing and validating judicial vignettes.

In Part I, the focus is general and reusable: we present a step-by-step protocol for building judicial vignettes that isolate relevant variables (e.g., outcome valence, justificatory robustness, cues of impartiality), ensure lay readability, and control common threats (outcome bias, demand characteristics, fatigue). The aim is to provide a procedure the reader can replicate across other philosophy-of-law questions, even when the legal system, case type, or target construct, changes.

This article sets out a protocol for designing experimental vignettes to study how laypersons evaluate judicial decisions. We use the standard experimental format – short, controlled narratives followed by questionnaires – because it allows researchers to present non-expert participants with the same decision scenario while manipulating a limited set of features in a transparent and replicable way. Our vignettes are *textoids*: researcher-crafted texts derived from real materials (judgments and media reports) and rewritten so as to preserve the core informational structure while making the stimulus readable, comparable, and ethically usable in an experimental setting. Methodologically, the protocol covers (i) how to select source cases, (ii) how to translate them into textoids through principled simplification and standardization, (iii) how to build experimental manipulations (e.g., outcome type and the explicitness or robustness of the stated reasons), and (iv) how to develop corresponding outcome measures in questionnaires (evaluations of the decision and of the judge, plus basic demographics). All instruments are researcher-built and subjected to iterative piloting with legally trained readers to check conceptual fidelity, readability, and the clarity of manipulations before any fielding with lay participants. Accordingly, the contribution of this article is confined to the first phase of a broader research plan: the construction and validation of vignette stimuli and survey instruments from source texts, prior to implementation on a target population.

We distinguish two families of studies in experimental philosophy: (i) those that ask participants to decide *as if* they were a judge, legislator, manager, physician, or other decision-maker, and (ii) those that ask participants to evaluate decisions made by third parties³. Our proposal belongs to the second type.

We contend that legal laypersons can judge a judge's intention in making a decision. Even if they cannot technically assess a judicial decision, they can judge whether it satisfies certain RoL criteria that may be regarded as part of the common knowledge of citizens in Western liberal democracies. Accordingly, regardless of the legal requirement to decide on “legal reasons”, what matters here are the criteria laypeople actually use to form a judgment about the judge and the decision⁴.

A standard device in experimental-philosophy research is the vignette: brief stories in which someone decides and morally relevant consequences follow; respondents are then asked about intention, the decision, and its consequences. Two strands of research on the attribution of intentionality are salient.

The first is the Knobe line of work: it revealed an asymmetry whereby people attribute inten-

³ See, KNOBE 2003; CUSHMAN et al. 2006.

⁴ See, CUSHMAN et al. 2006; SOSA 2007; DONELSON, HANNIKAINEN 2020, 4.

tion when the side effect is negative and deny it when the side effect is positive – the key being the moral valence of the result⁵. The second is Hindriks’s account, which complicates that explanation: the asymmetry reflects the agent’s adherence or indifference to normative reasons⁶. Praise or blame depends on whether observers perceive the agent as motivated by such reasons. We take this second line as our point of departure for analyzing judicial work. Citizens expect signs, indications, or cues of the judge’s commitment to normative reasons (due process, impartiality, equality, the prohibition of arbitrariness, etc.). Thus, even if citizens do not read the opinion that resolves a case, they understand the outcome of the decision as a public signal of that adherence, depending on whether it aligns with prevailing social morality⁷.

We hold that lay perceptions of the judge and of the judicial decision depend both on the decision’s effects and on the normative motivation attributed to the judge. This distinction allows us – for experimental purposes – to articulate “intention” (the desired mental state) and “intentionality” (the manner of acting made visible in the text) and to operationalize Hindriks’s three theses: (i) rejection of the simple view (an effect counts as intentional only if it was wanted); (ii) negative significance (an undesired but foreseen side effect may accompany the pursuit of a licit end); and (iii) deontic significance (an agent acts intentionally even when a foreseen effect constitutes a normative reason against the main action).

Accordingly, we adopt Hindriks’s framework. We assume that lay attributions of intentionality depend on three features: it is not sufficient that an effect be wanted for it to count as intentional; an agent can act intentionally even while foreseeing negative side effects that she does not desire; and, in a deontic register, an agent may act intentionally even in the face of a normative reason against doing so, if she acts out of duty. Consequently, our vignettes will make explicit that the court foresees an unintended adverse effect, recognizes it as a reason against, and nevertheless decides guided by public reasons; in this way, the attributed intention is anchored in adherence to normative reasons rather than in sympathy for the outcome. To make that adherence visible and assessable, the reasons are textualized through formal Rule-of-Law signals – publicity and clarity of reasons, generality, stability, and congruence between rule and decision – and through observable procedural conduct that permits judgments about impartiality and neutrality, such as equal treatment, a demand for sufficient proof, the absence of favoritism, and resistance to media pressure or to third-party intuitions. Complementarily, and only to control the context presented in the vignette, we introduce indirect cues of perceived traits of the judge – such as ideology or private life – carefully balanced so as not to contaminate the reading of the public reasons that the narrative brings to the foreground.

As noted, following Hindriks we assume that ordinary attributions of intention are guided by three theses: rejection of the “simple view” that identifies intention with a wanted effect; “negative significance”, according to which a foreseen and undesired side effect may accompany a licit action; and “deontic significance”, according to which agents act intentionally even when they foresee an effect that counts as a normative reason against the principal action⁸. In judicial terms, these theses imply that the public reads not only the result but also how the judge positions herself with respect to public normative reasons that justify the course of action. For this reason we treat *meta-justification* – the passage of the opinion in which the judge makes explicit her adherence to public RoL principles and acknowledges, weighs, and, where appropriate, overcomes adverse effects – as the textual marker that activates “deontic significance”: it makes visible that the decision responds to public reasons rather than private preferences and, in consequence, shapes lay attributions of intention, impartiality, and legitimacy.

Methodologically, this translates into systematically including a meta-justification statement

⁵ See, KNOBE 2003; KNOBE 2006; KNOBE 2010; KNOBE, NICHOLS 2008.

⁶ See, HINDRIKS 2008; HINDRIKS 2011; HINDRIKS 2014.

⁷ See, SCHAUER 2000; KNEER, BOURGEOIS-GIRONDE 2017.

⁸ See, HINDRIKS 2008; HINDRIKS 2011; HINDRIKS 2014.

in each vignette, immediately before the dispositive section, in which the judge acknowledges a foreseen negative effect and explains why, for public reasons associated with formal legality – publicity and clarity of the rule, generality, stability, and congruence between rule and decision – that effect does not determine the outcome of the case. The statement must explicitly formulate the conflict of reasons (“although foreseeing X counts against, I decide Y because A and B are public requirements of the law in force”), so that the reader can distinguish among intention, foresight, and public justification. The accompanying questionnaire will capture this distinction with items that test recognition of the meta-justification and the attribution of intention and impartiality, in addition to the checks already planned for RoL signals and outcome valence, thereby ensuring that the measurement of “good judge” and “good decision” rests on auditable textual signals rather than mere reactions to the result.

1.1 Design and procedures

At the time of publication, 70% of the construction-and-piloting phase has been completed (n=20 per pilot) to refine the wording of the vignettes and the manipulation of variables. Subsequently, a cross-sectional correlational study (Study 1) and three quasi-experimental studies (Studies 2-4) will be conducted, with manipulations of: (V1) assessments of the technical-legal quality of the judgment; (V2) the valence (positive/negative) of the case (dispositive) outcome; and (V3) the explicitness of the judge’s intentionality as adhering to the RoL.

1.2 Vignette construction

The writing of vignettes is the methodological core of the experimental design because it translates theoretical and doctrinal distinctions into narrative signals accessible to lay participants⁹. The challenge is to balance conceptual fidelity and comprehensibility, avoiding technicalities that hinder reading. To that end, we prepared a guide recommending brief narratives of up to two hundred seventy words, with simple, declarative syntax. When a legal term is indispensable, it is accompanied by a paraphrase or example, and the sequence is organized with explicit temporal and causal anchors to facilitate understanding¹⁰. These style rules aim to ensure that the text presents context, decision, and consequences without overloading the lay reader’s working memory. In addition, these discourse strategies are grounded in Ciapuscio’s notion of reformulation, understood as a global and local simplification of the information in a source text, which makes it possible to generate texts that are comprehensible to lay readers and to resolve both terminological obstacles and grammatical difficulties¹¹. The specific criteria for drafting the vignettes are developed in detail below.

Each vignette simultaneously integrates the image of the judge and the quality of the decision as manipulable dimensions. Literature shows that laypeople judge not only the technical correctness of decisions, but also the kind of judge who issues them; accordingly, the narrative construction includes traits that allow readers to form impressions regarding impartiality and neutrality, the absence of bias, and normative motivation expressed as adherence to public reasons rather than merely expedient solutions. Even perceived dimensions such as a virtuous private life or ideology are suggested by indirect allusions so that they function as part of the setting without becoming the focus of the stimulus¹².

Decision quality is operationalized through indicators accessible to laypersons that reflect, on the one hand, doctrinal distinctions associated with the Rule of Law and, on the other, the quality of justification. Signals of formal legality – publicity of reasons, generality, prospectivity, and stabili-

⁹ See, MONTOLÍO 2019.

¹⁰ In linguistics, the generic terms for these discourse strategies are expansion, reduction, and variation.

¹¹ See, CIAPUSCIO 2001.

¹² See, BÄUM 2006; BLACK, OWENS 2009; EPSTEIN, MARTIN 2010; CASILLAS et al. 2011; BRYAN 2020.

ty – are key to the perception of institutional legitimacy and must be encoded in the vignette text¹³. In turn, internal justification is understood as coherence among rules, facts, and conclusion, with no contradictions and with a minimal sufficiency; external justification is expressed in reference to sources and the appeal to public reasons. Observing these planes together allows one to evaluate empirically the degree of compliance – or non-compliance – with formal legality in each decision.

The vignette's narrative architecture is conceived in functionally differentiated layers. A first paragraph sets out the relevant facts and the parties' positions, in a sober register that provides the minimal normative background. A second paragraph presents the positions of the judge and of a judicial assistant, deliberately separating internal considerations from reasons supplied by institutional third parties; this separation distinguishes factual-legal evidence from justificatory frameworks, a practice recommended to isolate constructs and avoid cross-contamination among variables in vignettes and factorial surveys¹⁴. The judge's reasoning is framed as a focal normative reason, the decision is crystallized as an imperative act, and the consequences are described as a subsequent state of affairs without an explicit causal attribution. Taken together, this structure promotes a linear reading that proceeds from facts to reasons and from reasons to decision, consistent with best practices of clarity and economy of expression in vignette methodology¹⁵.

The experimental logic relies on a mirror design that holds the facts constant and alternates symmetrical justificatory frameworks for the decision-maker, reversing the assistant's recommendation as a controlled contextual cue. The aim is to observe variation in judgments of legal correctness, impartiality, legitimacy, or decision quality when the explicit grounding changes but the case facts do not. This form of manipulation is consistent with the experimental-philosophy tradition that explores micro-semantic variations in brief narratives to gauge the sensitivity of normative judgments to highlighted reasons, and it benefits from the logic of the factorial survey by treating motivation and recommendation as factors that can be counterbalanced and randomized to control for order effects and participant expectations¹⁶.

The scheme described yields clear analytical advantages. Separating levels – facts, reasons, decision, outcomes – increases construct validity and facilitates testing hypotheses about the relative weight of deontic and “autonomic” rationalities in the evaluation of decisions. The consequences section, drafted without causal attribution, provides situational anchoring and makes it possible to examine whether *ex post* biases such as outcome bias emerge, without inducing a utilitarian reading. Stylistic restraint, the use of the third person, and lexical symmetry across versions reduce linguistic noise and “demand characteristics”, in line with recommendations for concise, balanced writing in EVM¹⁷. The manipulation is transparent and auditable, so that comprehension, detectability of the reasoning, and perceptions of impartiality can be pre-tested with independent checks¹⁸.

There are also limitations that point toward improvements. In several appended versions, the decision aligns with the dominant reason, which introduces collinearity between motivation and outcome and makes it difficult to isolate the effect of each. A natural next step is to move toward a full factorial design in which, for external legal reasons, the judge occasionally rules against her own motivation; this would allow estimation of main effects and interactions and would decouple result and grounding. One must also consider the affective load of certain topics, which may activate moral identities and social-desirability bias; the literature recommends pretests of affect and readability, control of length and reading, and counterbalancing the order of presentation to mitigate these risks.

¹³ See, FULLER 1960; RAZ 1985; TAMANAHA 2004; BENNETT 2007; KLATT 2016.

¹⁴ See, ATZMÜLLER, STEINER 2010.

¹⁵ See, AGUINIS, BRADLEY 2014.

¹⁶ See, KNOBE 2003.

¹⁷ The term “linguistic noise” denotes a set of phenomena that hinder the measurement of participants' responses when one text is turned into another – whether through interlingual or intralingual operations.

¹⁸ See, AGUINIS, BRADLEY 2014.

External validity, as in any vignette study, depends on samples and contexts; it is therefore advisable to report the population frame clearly, to preregister hypotheses and analyses, and to include relevant covariates such as religiosity, ideology, and clinical familiarity, in order to strengthen inference¹⁹.

1.3 Methodological issues

The prototypes in the appendix present versions of four vignettes intended to illustrate how small narrative variations make it possible to operationalize core dimensions of the Rule of Law²⁰. The underlying structure remains unchanged – facts, the parties' positions, the judge's reasoning, the assistant's recommendation, the decision, and the consequences – and the manipulation concentrates on the relation between reasoning and decision and on rotating the counselor's voice. That intention to control, however, is not always achieved.

Version 1A frames motivation in private terms, anchored in religious convictions oriented toward protecting life “to the very last consequences”, and the decision aligns with that motivation by ordering chemotherapy. The counselor suggests respecting the autonomy of the mother and child. The case exhibits a lack of public meta-justification, since the reason invoked rests on a personal conviction. The Rule of Law appears weakened not by a lack of internal coherence but by the absence of adherence to general normative reasons. The consequence of the decision – the child's remaining in the hospital – introduces a negative valence that may interfere with assessments of impartiality and bias the judgment toward sympathy or antipathy regarding the outcome.

Version 1B reverses the orientation. The judge is motivated by public reasons linking life, autonomy, and freedom of choice, while the counselor adopts a pro-life position. The decision allows the mother and child to decide. The design here introduces a clear signal of formal legality because the motivation appeals to a recognizable public principle. The subsequent consequence – the child remains at home – generates a different valence and allows a contrast to see whether perceptions of impartiality and legitimacy are anchored in the formal correctness of the motivation or in the attractiveness of the result.

Versions 1C and 1D introduce the more demanding case in which the judge rules against her own motivation. In 1C she declares convictions favoring the protection of life at all times, but decides according to the law in force that recognizes personal autonomy. The meta-justification is explicit; the decision is presented as submission to the rule rather than to private preference, thereby offering a test of impartiality. In 1D the symmetry is inverted: the judge expresses a pro-autonomy inclination but decides under a rule that privileges the absolute protection of life. In both cases, the negative situational anchor – the child remains hospitalized – again puts the recognition of impartiality in tension with the affective reaction to the outcome.

Taken together, these versions show the promise of the approach but also its limits. Judicial independence and the objectivity of reasoning are not insulated within motivation; they are contaminated by consequences that trigger emotional responses. In that context, it is not always clear whether the quality of the decision is being evaluated by the justification offered or by sympathy for the result, a difficulty well documented by the literature on outcome bias in legal decision-making and by retrospective biases that distort perceptions of adjudicative correctness when *ex post* elements are introduced.

Order and fatigue effects add further challenges. When the same person evaluates several versions, sequence can carry over responses or encourage implicit comparisons, and repetition fosters

¹⁹ See, ATZMÜLLER, STEINER 2010.

²⁰ Two caveats: (1) The vignette prototypes in Appendix 1 are English translations of the originals in Appendix 2 (Spanish). These translations have not been reviewed by specialists; accordingly, we cannot ensure that their conceptual implications fully match those of the Spanish versions. (2) The vignettes in Appendix 2 are not the final versions but an advanced prototype; future publications will present the final vignettes together with the linguistic decisions that underpin their structure and wording.

attentional shortcuts that lower data quality. To mitigate this, the study uses short blocks and rotates the order in which vignettes are displayed so that each participant faces a limited number of vignettes. The order is counterbalanced to vary sequences systematically and neutralize order as an uncontrolled variable. Length is calibrated to a maximum of two hundred seventy words per vignette, following evidence from philosophy and moral psychology suggesting that brief yet complete narratives improve engagement without overloading working memory, thereby preventing length from becoming an unwanted source of variance²¹.

Ensuring manipulation is another critical axis. It is not enough to assume that readers interpret the stimuli as intended. Accordingly, explicit recognition questions are included immediately after each vignette to verify detection of signals associated with the Rule of Law – publicity of reasons, general application of the rule, and congruence between norm and decision – and to distinguish among the absence of justification, merely technical justification, and meta-justification anchored in public reasons. Short open-ended questions are added so that participants can state in their own words the main reason for the decision or the case outcome²². This dual mechanism, combining recognition and free recall, monitors attention and comprehension and reduces the likelihood that responses reflect idiosyncratic interpretations rather than the manipulation actually introduced. Pilot tests showed that, in the absence of these supports, some participants left items blank or failed to identify the point of the stimulus.

Linguistic ambiguity poses an additional challenge. Techniques of legal discourse and causal connectives such as “therefore”, “consequently”, or “given that” may be interpreted heterogeneously by readers without legal training, affecting internal validity. The methodological plan therefore contemplates, after piloting, a redrafting stage based on post-vignette comprehension assessments to identify problematic terms and connectives and correct them before final deployment. The goal is to ensure that effects stem from manipulation and not from accidental semantic ambiguities.

A particularly delicate risk is the confusion between evaluating the quality of the decision and evaluating the direction of the decision. Perceived valence – whether the result seems positive or negative – tends to dominate judgments about technical-legal correctness or about the judge’s profile, even in the presence of clear signals of formal legality. The literature warns that people assess correctness retrospectively from results, which may lead to overestimating the influence of valence and underestimating the weight of arguments. To prevent this, the study combines counterbalancing of versions, joint and separate evaluation of dimensions, and manipulation of the level of construal, alternating abstract and concrete scenarios to examine how psychological distance modulates the preference for consequences as against formal principles²³.

Operationalizing impartiality and neutrality requires anchoring them in observable procedural conduct. Simply labeling that “the judge was impartial” invites the projection of vague intuitions or cultural biases. By contrast, describing that the judge listened attentively to both parties, demanded sufficient evidence from the prosecution before deciding, or dismissed arguments that were based solely on external pressures makes it possible to measure perceptions from verifiable signals. Meta-justification is formulated in a public register to show that the decision rests on general legal reasons and, when an individual preference is made explicit, it is done in a controlled manner. This strategy strengthens construct validity by turning normative ideals into concrete textual behaviors.

The design also attends to the influence of demand characteristics and social desirability. To reduce them, control items capable of detecting suspicious response patterns are incorporated, and block order is randomized, reducing both the transparency of the study’s aim and the implicit normative pressure. The intention is to elicit more spontaneous responses that are less guided by external expectations²⁴.

²¹ See, AGUINIS, BRADLEY 2014.

²² See, IBÁÑEZ 2012.

²³ See, HSEE et al. 1999; TROPE, LIBERMAN 2010.

²⁴ See, PODSAKOFF et al. 2003; AGUINIS, BRADLEY 2014.

Cultural equivalence is critical for external validity. The same stimulus may be read differently depending on cultural background; for that reason, content is carefully adapted to the local context while preserving the experimental structure. This entails using Chilean Spanish, referring to procedures widely known through media coverage, and avoiding the names of institutions specific to legal practice that only specialists would recognize. These decisions aim to ensure that responses reflect the theoretical variables rather than cultural peculiarities extraneous to the design²⁵.

Finally, ethical considerations are addressed. Some vignettes present decisions with negative direction that may cause distress. Exposure to narratives of loss, injustice, or harm may trigger intense affective responses, affect the willingness to continue, and compromise subjective well-being. To mitigate these effects, cases were selected whose harm can be considered of medium magnitude in the dominant social morality in Chile, excluding especially shocking scenarios such as sexual offenses. Advance warnings about sensitive content are provided; withdrawal at any time without penalty is guaranteed; and a final debriefing contextualizes the aim of the research, explains the hypothetical nature of the vignettes, and provides contact information for comments or follow-up support. These measures seek to balance scientific validity with ethical responsibility toward participants, so that the production of knowledge does not come at the expense of their psychological well-being²⁶.

2. *Minimal background: the formal Rule of Law as a cue-set for vignette design*

PART II – Worked application: operationalizing the Rule of Law and measuring decisional quality.

Part II applies the preceding protocol to the Rule of Law case: we translate a minimal and strictly formal conception into a set of implementable cues for textoids (e.g., explicit reference to the applicable rule, rule-fact-decision congruence, publicly shareable reasons, and procedural signals of impartiality). On that basis, we clarify how these controlled variations support experiments on lay populations aimed at measuring perceived decision quality, legitimacy, and the judge's attributed norm-guided intent.

The expression “Rule of Law” (RoL) is used in different ways across legal and political theory. For the purposes of this article, we adopt a strictly formal and minimal understanding: the RoL refers to constraints on decision-making that make the exercise of legal authority rule-guided, publicly reasoned, and non-arbitrary. This minimal framing is sufficient for a methodological protocol, because it points to features that can be made visible in short texts and therefore implemented as controlled variations in experimental vignettes.

Methodologically, the role of the formal RoL in our design is limited to identifying a set of textual cues that can be embedded in (or withheld from) a vignette so that lay participants can plausibly detect them. In practice, these cues fall into two families. The first concerns legality and rule-guidance, such as whether the vignette signals that the decision relies on a publicly applicable rule, stated with clarity and applied consistently to the facts. The second concerns procedural and institutional constraints, such as signals of impartiality, independence from external pressure, and the provision of reasons that can be understood as publicly shareable rather than ad hoc or personal.

Accordingly, this section does not defend a theory of the RoL. It specifies design-relevant cues that can be operationalized in textoids derived from judgments and public reports. Examples of such cues include explicit reference to the applicable rule; a brief explanation of why the rule applies to the stated facts (congruence); acknowledgment of counterarguments and evidentiary limits; explicit mention of procedural safeguards; and a short, plain-language statement of reasons.

²⁵ See, HARKNESS et al. 2010; BEHR 2017.

²⁶ See, SLOAN, QUAN-HAASE 2017.

These elements can be translated into experimental manipulations – e.g., high vs low justificatory explicitness, rule-congruent vs outcome-driven reasoning, or procedurally careful vs procedurally thin decision-making – while keeping the scenario constant.

In this project, Raz and Fuller are not introduced to settle a theoretical controversy about the Rule of Law, but as systematic sources of operationalizable criteria. Methodologically, we treat them as cue-generators: their role is to identify which features of a judicial decision can be rendered, in a short text, as indicators of formal legality, rule-guided governance, and non-arbitrariness. Fuller primarily contributes a set of legality requirements (e.g., publicity, clarity, prospectivity, consistency, stability, and congruence between rule and application) that can be translated into narrative cues about how a rule is applied to facts. Raz, by contrast, emphasizes law's guidance function and the institutional conditions that constrain decision-making (e.g., limits on discretion, judicial independence and impartiality), which translate into cues about the mode of reasoning and the judge's procedural conduct. In this sense, the theoretical framework functions as an instrumental bridge between doctrinal categories and concrete editing decisions in vignette construction.

At the design level, this translation yields two families of manipulations. (1) Rule-and-application legality cues (Fuller): the text can make the applicable rule, its clarity, its general applicability, and the rule-fact-decision congruence more or less explicit (e.g., by stating the normative premise and explaining its fit with the facts, or by leaving that relation implicit). (2) Institutional and anti-arbitrariness cues (Raz): the text can include or omit signals of impartiality, independence from external pressure, equal procedural treatment, and publicly shareable reasons (e.g., a meta-justification that acknowledges foreseeable costs of the outcome yet decides on legal duty). These two cue-families support “high vs low RoL” versions and help disentangle – so far as the method allows – evaluations driven by outcomes (valence) from evaluations driven by justification (robustness/explicitness), which is the instrument's core methodological aim.

The table below synthesizes the key concepts from Raz and Fuller regarding the Rule of Law, and how these are translated into observable cues within the vignettes. Each row shows a key theoretical category and its corresponding manipulation in the experimental stimulus design.

<i>Theoretical source</i>	<i>RoL element (abstract)</i>	<i>Vignette cue (text-level)</i>	<i>Example manipulation</i>
Fuller	Publicity / clarity	Rule stated in plain language	Rule explicit vs absent/implicit
Fuller	Congruence	“Because the facts satisfy X, the rule applies”	Fit explained vs merely asserted
Fuller	Stability / consistency	Avoid ad hoc exceptions; same standard used	Stable standard vs ad hoc exception
Raz	Limits on discretion	Reasons framed as rule-guided, not preference	Duty-based vs preference-based framing
Raz	Impartiality / independence	Equal hearing; resisting external pressure	Procedurally careful vs thin
Raz	Public reasons	Meta-justification addressing objections/costs	Meta-justification present vs absent

The table should not be read as an abstract summary, but as the operational map that structures the vignettes included in the article. At the level of writing, each cue-family is implemented through

small yet controlled variations across versions: (i) “Fullerian” cues of formal legality (plain-language statement of the applicable rule, rule-fact-decision congruence, consistency, and the avoidance of ad hoc exceptions), and (ii) “Razian” cues of anti-arbitrariness control (independence from external pressure, procedurally grounded signals of impartiality, and justification in publicly shareable reasons). This is why the textoid architecture is kept constant (facts → reasons → decision → consequences), while the manipulation is concentrated on how visible the rule-to-decision link is and on how the judge’s motivation is framed: as private preference or as publicly defensible legal duty. Making this bridge explicit shows that the vignettes are not standalone “cases”, but controlled instantiations of a single theoretical scheme translated into textual cues.

This anchoring is especially clear in the vignette series discussed in the article (e.g., 1A-1D). Across these versions, the goal is not to “change the case” but to switch on/off components of the cue-set. When the judge’s motivation is framed in private terms (e.g., religious conviction) and no meta-justification is provided, the Raz/Fuller package is weakened: the decision may remain internally coherent, yet it lacks the core RoL marker of public reason-giving and auditable rule-decision congruence. By contrast, when a version makes an applicable rule identifiable, explains its fit with the facts, and adds a meta-justification that acknowledges foreseeable outcome costs yet decides on legal duty, it strengthens both Fullerian indicators (publicity, clarity, congruence) and Razian indicators (constraint of discretion and impartiality). The “crossed” versions – where the judge rules against her own inclination – make the point most sharply: they render the Rule of Law as an observable textual signal of institutional self-constraint and allow researchers to test whether participants distinguish between (i) outcome preference, and (ii) quality assessments grounded in publicly shareable reasons. In this way, the table operates as the translation rule connecting theory, stimulus writing, and experimental measurement.

The remainder of the article develops a protocol for building these vignette stimuli (textoid construction, standardization, and manipulation checks) and for aligning them with questionnaire measures that capture participants’ evaluations of the decision and the decision-maker. The aim is methodological: to provide a replicable template for vignette construction and validation, rather than adjudicate broader theoretical controversies about the RoL²⁷.

3. *By way of conclusion: a Decalogue of criteria for vignette design*

This section synthesizes the methodological lessons in the form of a Decalogue. The Decalogue combines, on the one hand, four general criteria applicable to any experiment that examines the figure of the judge and the quality of judicial decisions, and, on the other, six specific criteria for designing judicial vignettes as an experimental instrument. The structure aims to provide an integrated framework that both guides empirical research in legal contexts and sets out best practices for the use of controlled narratives in experimental-philosophy studies.

First, any experiment that addresses the figure of the judge and the quality of judicial decisions must recognize the tension between technical-legal analysis and social perception. Whereas legal theory privileges the internal virtues of reasoning – consistency, coherence, and completeness – citizens tend to evaluate decisions on the basis of their consequences and the intentionality attributed to the judge. Designing an experiment therefore requires articulating these two dimensions so that neither is rendered invisible. The methodological challenge is to ensure that the central conceptual variables are translated into stimuli recognizable by laypersons without losing theoretical precision.

Second, a cross-cutting criterion is the need to secure both internal and external validity in a context of high complexity. Internal validity demands isolating the effect of manipulated variables – for

²⁷ See, KNOBE 2003; KNOBE, NICHOLS 2008; HINDRIKS 2008; HINDRIKS 2011; HINDRIKS 2014.

example, impartiality or meta-justification – from collateral factors such as order of presentation or fatigue. External validity, by contrast, requires adapting the instruments to the cultural context without altering the experimental design. Only a careful balance between these two planes allows one to draw conclusions that are both methodologically rigorous and socially relevant.

Third, every experiment involving judges and judicial decisions must address the problem of operationalization. Concepts such as impartiality, normative motivation, or formal legality are dense notions in doctrinal scholarship, but they must be transformed into observable conduct. This entails designing clear narrative descriptors that allow participants to recognize, for example, that a judge demands evidence from both parties or makes explicit her adherence to public reasons. Conceptual translation is delicate, because the success of the study – and whether responses track the constructs to be assessed rather than arbitrary interpretations – depends on it.

Fourth, a general criterion concerns research ethics. When one experiments on citizens' perceptions of justice, it is inevitable that some vignettes will involve negative consequences or situations of injustice. The design must therefore provide advance warnings, the option of voluntary withdrawal, and debriefing procedures at the end of the study. These practices not only protect participants but also reinforce the scientific legitimacy of a project that investigates the very terrain of judicial legitimacy.

Fifth, when vignettes are the central instrument, narrative clarity becomes essential. Vignettes must be brief enough to avoid fatigue yet complete enough to situate the case, present the decision, and show its consequences. Prior English-language work in experimental philosophy suggests a maximum of about 200 words, which helps maintain attention without sacrificing contextual richness. Simple syntax and the use of examples or paraphrases for legal terms are crucial strategies for ensuring lay comprehension. We use a maximum of 270 words because Spanish typically requires more words than English to express the same content.

Sixth, a specific criterion is the explicit integration of the figure of the judge into the narrative. A vignette cannot be reduced to an abstract ruling: it must present cues that allow participants to attribute impartiality, neutrality, or bias to the deciding judge. In this way, perceptions of the judicial decision are intertwined with perceptions of the person who issues it, mirroring how the public interprets judicial work. This integration is crucial if results are to capture not only judgments about texts but also judgments about institutional actors.

Seventh, vignette construction should include signals of judicial-decision quality that are accessible to laypersons. This includes both internal justification – coherence among facts, rules, and conclusion – and external justification – reference to sources and public reasons. It also requires ensuring linguistic clarity and marking Rule-of-Law signals such as publicity, prospectivity, and stability. By manipulating the presence or absence of these signals, vignettes make it possible to test whether citizens recognize and value doctrinal dimensions that usually remain within the professional sphere.

Eighth, manipulation checks must follow each vignette. Research cannot assume that participants have interpreted the stimulus as intended; it must corroborate this empirically. Closed recognition questions and short open-ended recall items ensure identification of Rule-of-Law signals, the decision's valence, and the judge's normative motivation. Without these controls, responses might reflect idiosyncratic understandings rather than reactions to the experimental design.

Ninth, it is essential to prevent biases typical of experiments with repeated narratives. Order of presentation can produce carryover effects, and prolonged exposure can induce fatigue. The solution is to rotate versions, counterbalance order, and limit the number of vignettes each participant faces. With these precautions, one reduces the risk that results are driven by design features rather than substantive variables.

Tenth, a final criterion concerns cross-cultural comparability. In studies seeking to replicate or contrast findings across contexts, linguistic and cultural adaptation is inevitable. Preserving the experimental structure and, where appropriate, employing back-translation techniques helps ensure that meaning is maintained despite institutional or linguistic differences. In this way,

judicial-vignette experiments can become a valuable tool not only for experimental philosophy of law but also for comparative dialogue across legal systems.

Beyond its instrumental value, this Decalogue aims to open a still-incipient field of research in legal philosophy. The possibility of translating complex normative categories into empirical stimuli enables the exploration – through experimental methods – of classic questions concerning legitimacy, impartiality, and judicial justification. Thus, the design is not limited to offering a set of techniques; it inaugurates a space for dialogue between legal theory and experimental social psychology.

One obvious application of this model lies in studies of judicial legitimacy. Vignettes make it possible to examine how different forms of reason-giving, or different degrees of adherence to the Rule of Law, affect public confidence in judges. This opens the door to incorporating empirical evidence into debates about institutional trust, perceived bias, and expectations of impartiality within the judiciary.

The model can also be extended to comparative analysis across legal systems. Cultural adaptation of vignettes, together with back-translation, offers the opportunity to contrast how citizens from different legal traditions perceive the same judicial dilemmas. Such studies could enrich not only experimental philosophy of law, but also the comparative theory of institutional legitimacy.

Another projection concerns the study of regulatory and legislative quality. Although the present work focuses on judicial opinions, the vignette logic could be adapted to explore how laws themselves – and their justifications and social consequences – are perceived. This would extend the methodological framework to a domain in which the relationship between legal theory and public perception is equally decisive.

Finally, this model can help bridge doctrinal scholarship, normative theory, and empirical research. The value of the Decalogue lies not only in organizing methodological issues but in showing that it is possible to test experimental designs that engage with the conceptual density of legal theory. It thus invites future studies not only to test specific hypotheses, but also to use experimental philosophy as a tool to renew how legal theory formulates and tests its claims.

Appendix 1. Vignette Prototypes

Vignette № 1, Version A

A family-court judge hears a petition filed by Valdivia Hospital for the mother to decide whether her son, who has terminal cancer, should undergo chemotherapy sessions. The mother's attorney argues that the cancer is incurable and that chemotherapy would prevent the child from enjoying the time he has left. She adds that the right to life also encompasses the possibility of living with dignity.

The judge holds that the right to life requires maintaining treatment, even when there is no possibility of cure. She states that her religious convictions lead her to protect life to its ultimate consequences. The judge acknowledges that maintaining treatment will likely reduce the child's daily well-being and time with his family; she does not seek that result, though she foresees it may occur as a side effect of complying with what she understands the law requires.

By contrast, the court's advisor maintains that the mother and the child should decide, because the law should not impose how people face the final stage of life.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment ordering that the child receive chemotherapy, holding that life must be protected even in cases of incurable illness. The opinion acknowledges that the foreseen adverse effect constitutes a normative reason against doing so, but the court intentionally decides in accordance with public reasons of life-protection provided for by the legal order.

In the months that follow, the child remains hospitalized and under medical treatment, without returning home to his family until the end of the clinical course.

Vignette № 1, Version B

A family-court judge hears a petition filed by Valdivia Hospital for the mother to decide whether her son, who has terminal cancer, should undergo chemotherapy sessions. The mother's attorney argues that the cancer is incurable and that chemotherapy would prevent the child from enjoying the time he has left. She adds that the right to life also encompasses the possibility of living with dignity.

The judge considers that the right to life includes respect for personal autonomy, which allows the mother and the child to decide whether to accept the treatment. The judge foresees that discontinuing chemotherapy may reduce life expectancy; she does not intend that effect and accepts it as secondary while safeguarding autonomy as a public reason.

By contrast, the court's advisor argues that the child should receive chemotherapy because, in her view, the law imposes a duty to preserve life in all cases.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment ordering that the child not receive chemotherapy, holding that autonomy at the end of life is also part of the right to life. The judge recognizes that this risk constitutes a normative reason against that outcome, but she intentionally resolves on public reasons of autonomy and dignity in the final stage of life.

In the months that follow, the child remains at home with his family and does not undergo medical treatment until the end of the clinical course.

Vignette № 1, Version C

A family-court judge hears a petition filed by Valdivia Hospital for the mother to decide whether her son, who has terminal cancer, should undergo chemotherapy sessions. The mother's attorney argues that the cancer is incurable and that chemotherapy would prevent the child from enjoying the time he has left. She adds that the right to life also encompasses the possibility of living with dignity.

The judge states that her ethical convictions lead her to protect life at all times. However, she considers that the law in force recognizes personal autonomy and that it is for the mother and the child to decide about treatment. She declares that foreseeing discontinuation of treatment and the possible shortening of life expectancy constitutes a normative reason against which she does not desire, but she acts intentionally in accordance with the law and with public reasons of autonomy and dignity.

By contrast, the court's advisor takes the view that the law imposes a duty to preserve life in all cases.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment ordering that the child not receive chemotherapy, holding that autonomy at the end of life is also part of the right to life. The judge makes explicit that the foreseen adverse effect is secondary and unintended, and that her decision rests on public reasons rather than personal convictions.

In the months that follow, the child remains at home with his family and does not undergo medical treatment until the end of the clinical course.

Vignette № 1, Version D

A family-court judge hears a petition filed by Valdivia Hospital for the mother to decide whether her son, who has terminal cancer, should undergo chemotherapy sessions. The mother's attorney argues that the cancer is incurable and that chemotherapy would prevent the child from enjoying the time he has left. She adds that the right to life also encompasses the possibility of living with dignity.

The judge states that her ethical convictions lead her to value personal autonomy and freedom of choice. However, she considers that the law in force requires protecting life even in cases of incurable disease. She recognizes that prolonged hospitalization may affect the child's daily well-being and time with his family; she does not intend that result and foresees it as a side effect

that counts against, but she intentionally decides in accordance with the legal duty to protect life as a public reason.

In contrast, the court's advisor maintains that the mother and the child should decide, because the law should not impose how people face the final stage of life.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment ordering that the child receive chemotherapy, holding that life must be protected even in the face of terminal illness. The judge acknowledges that the foreseen adverse effect constitutes a normative reason against doing so, but maintains that her decision responds to public reasons of the legal order.

In the months that follow, the child remains hospitalized and under medical treatment, without returning home to his family until the end of the clinical course.

Vignette № 2, Version A

A family-court judge hears a petition filed by the mother's attorney to change the three-year-old girl's paternal surname. Counsel argues that the father was convicted of domestic violence against the mother and the child herself. She also contends that the child's best interests and well-being support the request to change the surname.

The judge considers that current law allows only a single change of name. She believes the child is too young to make that decision and that the mother cannot make it on her behalf, because doing so would prevent the child from changing it again in the future. She recognizes that keeping the paternal surname may cause symbolic and practical harm to the minor; she does not intend that result and identifies it as a normative reason against. All the same, she decides intentionally on public reasons of formal legality – generality, stability of the civil-registry system, and the rule's prospectivity – and on the idea that the definitive choice should be future and autonomous.

By contrast, the court's advisor argues that granting the request would allow the child to detach from the violent context that marked her early years.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment denying the petition and orders that the child retain her paternal surname. The judge makes explicit that the foreseen adverse effect is secondary and unintended, and that her decision rests on public reasons of the legal order.

Years later, upon reaching the age of majority, the young woman exercised her right to change her surname, just as the judge had indicated was compatible with the general and prospective application of the rule.

Vignette № 2, Version B (mirror)

A family-court judge hears a petition filed by the mother's attorney to change the three-year-old girl's paternal surname. Counsel argues that the father was convicted of domestic violence against the mother and the child herself. She also contends that the child's best interests and well-being support the request to change the surname.

The judge considers that, although the general name regime allows only one change, current law recognizes as public reasons the child's best interests and the protection of identity in contexts of violence. She foresees that authorizing the change at this age could restrict a future autonomous decision and affect the stability of the registry system; she does not seek that effect and recognizes it as a normative reason against. Nevertheless, she decides intentionally on public reasons of protection and the child's dignity, and on the congruence between the established facts and the exceptional remedy that the legal order permits.

By contrast, the court's advisor believes the general rule should be maintained and that one should wait until the age of majority so as not to compromise later decisions.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues a judgment granting the petition and orders the surname change, finding that, in the context described, the concrete measure better realizes the child's best interests. The judge notes that the foreseen adverse effect is secondary and unintended, and that the decision is taken for public reasons rather than personal preferences.

Years later, the registry entry remained unchanged, with no record of any additional application by the young woman to modify it.

Vignette No 3, Version A

A panel of the Santiago Court of Appeals hears a constitutional action filed by a candidate for the Chamber of Deputies. He asks the court to order the removal from the Internet of a news report accusing him of corruption. He argues that the report harms his reputation and affects the conduct of his re-election campaign. The media outlet's defense argues that freedom of expression should prevail and that politicians must be subject to press scrutiny.

The panel's presiding judge considers that current law allows removing content only when it insults, contains manifest falsehoods, or attributes events that did not occur. He foresees that keeping the report online may affect the candidate's campaign; he does not intend that result and recognizes it as a normative reason against. Nevertheless, he intentionally decides on public reasons associated with formal legality – publicity and generality of the rule, stability, and congruence between norm and decision – and on the prohibition of prior restraint.

By contrast, the court's rapporteur takes the view that, during an election period, the report may seriously prejudice the candidate's re-election prospects.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues judgment denying the candidate's request, holding that candidates for public office must bear heightened scrutiny and that journalistic work is protected by freedom of expression. The court makes explicit that reputational risk is a foreseen, unintended side effect, and that the decision rests on public reasons within the legal order.

In the months that follow, the candidate's campaign reports reputational impact, though it is not possible to establish the report's specific influence on the electoral results.

Vignette No 3, Version B (mirror)

A panel of the Santiago Court of Appeals hears a constitutional action filed by a candidate for the Chamber of Deputies. He asks the court to order the removal from the Internet of a news report accusing him of corruption. He argues that the report harms his reputation and affects the conduct of his re-election campaign. The media outlet's defense argues that freedom of expression should prevail and that politicians must be subject to press scrutiny.

The panel's presiding judge considers that, although the general rule forbids prior restraint, current law contemplates strict exceptions where manifest falsehoods or attributions of events that did not occur injure reputation. He foresees that taking down the content may limit public debate and journalistic criticism; he does not seek that effect and recognizes it as a normative reason against. All the same, he intentionally decides on public reasons of protecting reputation and informational veracity in electoral contexts, and on the congruence between the established facts and the exceptional response permitted by the legal order.

By contrast, the court's rapporteur believes the report should remain online because judicial control of content could disproportionately affect freedom of expression.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues judgment granting the petition and orders the report removed, finding that, in the circumstances, its continued publication seriously and verifiably harms the plaintiff's reputation. The court records that the restriction on public debate is a foreseen, unintended side effect, and that the decision is taken for public reasons rather than personal preferences.

Following the decision, the outlet adds an editorial note indicating that a review of the challenged material is underway, and the electoral process continues without further statements from the court.

Vignette № 4, Version A

A panel of the Santiago Court of Appeals hears a constitutional action filed by a senator. The plaintiff asks the court to order the removal from the Internet of a photograph in which he appears engaging in sexual relations with a model on the terrace of his apartment. He alleges that dissemination of the image violates his privacy and seriously harms his reputation. The media outlet's defense argues that freedom of expression should prevail, that the photo was taken from a public street from which the location was clearly visible, and that politicians are subject to heightened public scrutiny.

The panel's presiding judge considers that the applicable law authorizes content removal only in exceptional cases and that, as a rule, compelled takedowns may constitute prior restraint. He foresees that keeping the image available will harm the plaintiff's privacy; he does not intend that result and recognizes it as a normative reason against. Nevertheless, he intentionally decides on public reasons of freedom of expression and citizen oversight of public officials, and on formal legality in its dimensions of generality, stability, and congruence between norm and decision.

By contrast, the court's rapporteur takes the view that publishing intimate images lacks public-interest value and directly affects the plaintiff's private life.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues judgment denying the petition, holding that, in the circumstances, measures tantamount to prior restraint should be avoided and heightened public scrutiny of authorities should be protected. The court records that the harm to privacy is a foreseen, unintended side effect, and that the decision rests on public reasons rather than personal preferences.

In the days that follow, the controversy continues in the public sphere for a short period and then subsides, with no further statement from the court.

Vignette № 4, Version B (mirror)

A panel of the Santiago Court of Appeals hears a constitutional action filed by a senator. The plaintiff asks the court to order the removal from the Internet of a photograph in which he appears engaging in sexual relations with a model on the terrace of his apartment. He alleges that dissemination of the image violates his privacy and seriously harms his reputation. The media outlet's defense argues that freedom of expression should prevail, that the photo was taken from a public street from which the location was clearly visible, and that politicians are subject to heightened public scrutiny.

The panel's presiding judge considers that, although the general rule forbids prior restraint, the legal order contemplates strict exceptions when disseminating a person's intimate images – even of a public official – gravely violates private life without contributing information of public interest. He foresees that ordering removal of the photograph may limit public debate and political criticism; he does not intend that effect and recognizes it as a normative reason against. All the same, he intentionally decides on public reasons of protecting privacy and reputation, and on formal legality in its dimensions of generality, stability, and congruence between the established facts and the exceptional response permitted by the norm.

By contrast, the court's rapporteur believes the content should remain online to safeguard freedom of expression and avoid an expansive precedent for judicial control of publications.

Before ruling, the judge heard both parties and reviewed the evidence each submitted.

The court issues judgment granting the petition and orders the photograph removed, finding that it constitutes an unlawful intrusion into the plaintiff's private life. The court records that the

restriction on public debate is a foreseen, unintended side effect, and that the decision is taken for public reasons rather than personal preferences.

In the days that follow, the outlet publishes an editorial note stating that it will comply with the ruling and review its protocols; public debate continues for a few days and then subsides, without further pronouncements from the court.

Appendix 2. Vignette Prototypes in Spanish

Viñeta Nº 1, versión A

Una jueza de familia conoce una petición presentada por el Hospital de Valdivia para que una madre decida si su hijo, enfermo con cáncer terminal, haga sesiones de quimioterapia. La abogada de la madre sostiene que el cáncer no tiene cura y que la quimioterapia impediría al niño disfrutar el tiempo que le resta de vida. Argumenta que el derecho a la vida también comprende la posibilidad de vivir con dignidad.

La jueza considera que el derecho a la vida exige mantener el tratamiento, incluso cuando no hay posibilidad de curación. Señala que sus convicciones religiosas la llevan a proteger la vida hasta sus últimas consecuencias. La jueza reconoce que mantener el tratamiento probablemente reducirá el bienestar cotidiano y el tiempo en familia del niño; no busca ese resultado, aunque prevé que puede ocurrir como efecto secundario al cumplir lo que entiende exige el derecho.

En cambio, la consejera del tribunal expone que la madre y el niño deberían decidir, pues estima que la legislación no debe imponer la forma en que las personas enfrentan la etapa final de la vida.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó. La sentencia ordenó que el niño reciba la quimioterapia, estableciendo que la vida debe ser protegida incluso ante enfermedades incurables.

El texto admite que el efecto adverso previsto constituye una razón normativa en contra, pero decide intencionalmente conforme a razones públicas de protección de la vida previstas por el ordenamiento. En los meses posteriores, el niño permanece hospitalizado y bajo tratamiento médico, sin regresar a su hogar con su familia hasta el final del proceso clínico.

Viñeta Nº 1, versión B

Una jueza de familia conoce una petición presentada por el Hospital de Valdivia para que una madre decida si su hijo, enfermo con cáncer terminal, haga sesiones de quimioterapia. La abogada de la madre sostiene que el cáncer no tiene cura y que la quimioterapia impediría al niño disfrutar el tiempo que le resta de vida. Argumenta que el derecho a la vida también comprende la posibilidad de vivir con dignidad.

La jueza considera que el derecho a la vida incluye el respeto a la autonomía personal, lo que permite que la madre y el niño decidan si aceptar o no el tratamiento. La jueza prevé que suspender la quimioterapia puede disminuir la expectativa de vida; no pretende ese efecto y lo acepta como secundario al resguardar la autonomía como razón pública.

En cambio, la consejera del tribunal expone que el niño debiera recibir quimioterapia, pues estima que la legislación impone el deber de preservar la vida en todo caso.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó. El tribunal dicta sentencia y ordena que el niño no reciba la quimioterapia, estableciendo que la autonomía en la etapa final de la vida también forma parte del derecho a la vida.

La jueza reconoce que ese riesgo constituye una razón normativa en contra, pero resuelve intencionalmente por razones públicas de autonomía y dignidad en la etapa final de la vida. En los meses posteriores, el niño permanece en su hogar junto a su familia, sin someterse a tratamiento médico hasta el final del proceso clínico.

Viñeta Nº 1, versión C

Una jueza de familia conoce una petición presentada por el Hospital de Valdivia para que una madre decida si su hijo, enfermo con cáncer terminal, haga sesiones de quimioterapia. La abogada de la madre sostiene que el cáncer no tiene cura y que la quimioterapia impediría al niño disfrutar el tiempo que le resta de vida. Argumenta que el derecho a la vida también comprende la posibilidad de vivir con dignidad.

La jueza manifiesta que sus convicciones éticas la llevan a proteger la vida en todo momento. Sin embargo, considera que el derecho vigente reconoce la autonomía personal y que corresponde a la madre y al niño decidir sobre el tratamiento. Declara que prever la suspensión del tratamiento y el eventual acortamiento de la expectativa de vida constituye una razón normativa en contra que no desea, pero actúa intencionalmente conforme al derecho y a razones públicas de autonomía y dignidad.

En cambio, la consejera del tribunal estima que la legislación impone el deber de preservar la vida en todo caso.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó. El tribunal dicta sentencia y ordena que el niño no reciba la quimioterapia, estableciendo que la autonomía en la etapa final de la vida también forma parte del derecho a la vida.

La jueza explicita que el efecto adverso previsto es secundario y no buscado, y que su decisión se funda en razones públicas y no en convicciones personales. En los meses posteriores, el niño permanece en su hogar junto a su familia, sin someterse a tratamiento médico hasta el final del proceso clínico.

Viñeta Nº 1, versión D

Una jueza de familia conoce una petición presentada por el Hospital de Valdivia para que una madre decida si su hijo, enfermo con cáncer terminal, haga sesiones de quimioterapia. La abogada de la madre sostiene que el cáncer no tiene cura y que la quimioterapia impediría al niño disfrutar el tiempo que le resta de vida. Argumenta que el derecho a la vida también comprende la posibilidad de vivir con dignidad. La jueza manifiesta que sus convicciones éticas la llevan a valorar la autonomía personal y la libertad de decisión. Sin embargo, considera que el derecho vigente exige proteger la vida incluso en casos de enfermedades incurables. Reconoce que una hospitalización prolongada puede afectar el bienestar cotidiano y el tiempo en familia del niño; no pretende ese resultado y lo prevé como un efecto secundario que cuenta en contra, pero decide intencionalmente conforme al deber jurídico de protección de la vida como razón pública.

En contraste, la consejera del tribunal expone que la madre y el niño deberían decidir, pues estima que la legislación no impone debe imponer la forma en que las personas enfrentan la etapa final de la vida.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó.

El tribunal dicta sentencia y ordena que el niño reciba la quimioterapia, estableciendo que la vida debe ser protegida incluso ante enfermedades terminales. La jueza admite que el efecto adverso previsto constituye una razón normativa en contra, pero sostiene que su decisión responde a razones públicas del ordenamiento jurídico. En los meses posteriores, el niño permanece hospitalizado y bajo tratamiento médico, sin regresar a su hogar con su familia hasta el final del proceso clínico.

Viñeta Nº 2, versión A

Una jueza de familia conoce una petición presentada por la abogada de la madre de una niña de tres años. Ella solicita el cambio del apellido paterno de la niña. La abogada sostiene que el padre fue condenado por violencia intrafamiliar en contra de la madre y de la propia hija. También argumenta que el interés superior de la niña y su bienestar amparan la solicitud de cambiar el apellido.

La jueza considera que el derecho vigente solo permite cambiar de nombre una vez. Estima que la niña es demasiado pequeña para tomar esa decisión y que la madre no puede hacerlo en su nom-

bre, porque ello impediría que la niña, en el futuro, volviera a modificarlo. Reconoce que mantener el apellido paterno puede generar un daño simbólico y práctico para la menor; no pretende ese resultado y lo identifica como una razón normativa en contra. Con todo, decide intencionalmente conforme a razones públicas de legalidad formal – generalidad, estabilidad del régimen registral y prospectividad de la regla – y a la idea de que la elección definitiva debe ser futura y autónoma. En contraste, la consejera del tribunal expone que acoger la solicitud permitiría a la niña desvincularse del contexto de violencia en el que transcurrieron sus primeros años de vida.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó.

El tribunal dicta sentencia y rechaza la solicitud, ordenando que la niña conserve su apellido paterno.

La jueza explicita que el efecto adverso previsto es secundario y no buscado, y que su decisión se funda en razones públicas del ordenamiento jurídico. Años después, al alcanzar la mayoría de edad, la joven ejerció su derecho a cambiar de apellido, tal como la jueza había indicado que era compatible con la aplicación general y prospectiva de la regla.

Viñeta N° 2, versión B (espejo)

Una jueza de familia conoce una petición presentada por la abogada de la madre de una niña de tres años. Ella solicita el cambio del apellido paterno de la niña. La abogada sostiene que el padre fue condenado por violencia intrafamiliar en contra de la madre y de la propia hija. También argumenta que el interés superior de la niña y su bienestar amparan la solicitud de cambiar el apellido.

La jueza considera que, aun cuando el régimen general de nombres permite un solo cambio, el derecho vigente reconoce como razones públicas el interés superior del niño y la protección de su identidad en contextos de violencia. Prevé que autorizar el cambio a esta edad podría restringir una futura decisión autónoma y afectar la estabilidad del sistema registral; no busca ese efecto y lo reconoce como una razón normativa en contra. Pese a ello, decide intencionalmente con base en razones públicas de protección y dignidad de la niña, y en la congruencia entre los hechos acreditados y la solución excepcional que el ordenamiento permite. En contraste, la consejera del tribunal estima que debe mantenerse la regla general y esperar a la mayoría de edad para no comprometer decisiones posteriores.

Antes de resolver, la jueza escuchó a ambas partes y analizó la prueba que cada una aportó.

El tribunal dicta sentencia y acoge la solicitud, ordenando el cambio de apellido por estimar que, en el contexto descrito, la medida concreta realiza de mejor modo el interés superior de la niña.

La jueza deja constancia de que el efecto adverso previsto es secundario y no buscado, y que la decisión se adopta por razones públicas y no por preferencias personales. Años después, la inscripción se mantuvo sin nuevas gestiones, sin que conste una solicitud adicional de modificación por parte de la joven.

Viñeta N° 3, versión A

Una sala de la Corte de Apelaciones de Santiago conoce una acción constitucional presentada por un candidato a diputado. Él solicita que la corte ordene retirar de Internet un reportaje en el que se le acusa de corrupción. Sostiene que dicho reportaje daña su reputación y afecta el desarrollo de su campaña de reelección. La defensa del medio de comunicación argumenta que debería prevalecer la libertad de expresión y que los políticos deben estar sujetos al escrutinio de la prensa.

El juez presidente de la sala considera que el derecho vigente solo permite retirar contenidos que insulten, contengan falsedades manifiestas o atribuyan hechos que no hayan ocurrido. Prevé que mantener en línea el reportaje puede afectar la campaña del actor; no pretende ese resultado y lo reconoce como una razón normativa en contra. Pese a ello, decide intencionalmente conforme a razones públicas asociadas a la legalidad formal – publicidad y generalidad de la regla, estabilidad y congruencia entre norma y decisión – y a la prohibición de censura previa. En contraste, el relator del tribunal estima que, en época electoral, el reportaje puede perjudicar gravemente las opciones de reelección del actor.

Antes de resolver, el juez escuchó a ambas partes y analizó la prueba que cada una aportó. El tribunal dicta sentencia y rechaza la petición del candidato, señalando que los candidatos a cargos públicos deben soportar un nivel reforzado de escrutinio y que el trabajo periodístico se encuentra amparado por la libertad de expresión.

El tribunal explicita que el riesgo reputacional es un efecto secundario previsto y no buscado, y que la decisión se funda en razones públicas del ordenamiento.

En los meses posteriores, la campaña del actor acusa impacto reputacional, sin que sea posible establecer la influencia específica del reportaje en los resultados electorales.

Viñeta N° 3, versión B (espejo)

Una sala de la Corte de Apelaciones de Santiago conoce una acción constitucional presentada por un candidato a diputado. Él solicita que la corte ordene retirar de Internet un reportaje en el que se le acusa de corrupción. Sostiene que dicho reportaje daña su reputación y afecta el desarrollo de su campaña de reelección. La defensa del medio de comunicación argumenta que debería prevalecer la libertad de expresión y que los políticos deben estar sujetos al escrutinio de la prensa.

El juez presidente de la sala considera que, aun cuando la regla general proscribe la censura previa, el derecho vigente contempla excepciones estrictas cuando se trata de falsedades manifiestas o atribuciones de hechos no ocurridos que lesionan la honra. Prevé que retirar el contenido puede limitar el debate público y la crítica periodística; no busca ese efecto y lo reconoce como una razón normativa en contra.

Con todo, decide intencionalmente conforme a razones públicas de protección de la reputación y de la veracidad informativa en contextos electorales, y a la congruencia entre los hechos acreditados y la respuesta excepcional que el ordenamiento permite. En contraste, el relator del tribunal estima que debe mantenerse el reportaje en línea, pues el control judicial de contenidos podría afectar la libertad de expresión de manera desproporcionada.

Antes de resolver, el juez escuchó a ambas partes y analizó la prueba que cada una aportó.

El tribunal dicta sentencia y acoge la petición, ordenando el retiro del reportaje por estimar que, en las circunstancias del caso, su permanencia vulnera de modo grave y verificable la honra del actor.

El tribunal deja constancia de que la restricción al debate público es un efecto secundario previsto y no buscado, y que la decisión se adopta por razones públicas y no por preferencias personales. Tras la decisión, el medio incorpora una nota editorial indicando revisión en curso del material cuestionado, y el proceso electoral continúa sin pronunciamientos adicionales del tribunal.

Viñeta N° 4, versión A

Una sala de la Corte de Apelaciones de Santiago conoce una acción constitucional presentada por un Senador. El demandante solicita que la corte ordene retirar de Internet una fotografía en la que aparece teniendo sexo con una modelo en la terraza de su departamento. Alega que la difusión de esa imagen vulnera su vida privada y afecta de manera grave su honra. La defensa del medio de comunicación sostiene que debe prevalecer la libertad de expresión, que la foto fue tomada desde la vía pública, desde donde se veía claramente el lugar, y que los políticos están sujetos a un escrutinio más intenso por parte de la ciudadanía.

El juez presidente de la sala considera que la normativa vigente solo autoriza la eliminación de contenidos en casos excepcionales y que, como regla, el retiro forzoso de publicaciones puede constituir censura previa. Prevé que mantener disponible la imagen afectará la privacidad del actor; no busca ese resultado y lo reconoce como una razón normativa en contra. Pese a ello, decide intencionalmente conforme a razones públicas de libertad de expresión y de control ciudadano de las autoridades, y a la legalidad formal en su dimensión de generalidad, estabilidad y congruencia entre norma y decisión.

En contraste, el relator del tribunal estima que la publicación de imágenes íntimas carece de

interés público y afecta directamente la vida privada del actor. Antes de resolver, el juez escuchó a ambas partes y analizó la prueba que cada una aportó. El tribunal dicta sentencia y rechaza la petición, declarando que, en las circunstancias del caso, corresponde evitar medidas equivalentes a censura previa y resguardar el escrutinio público reforzado sobre autoridades.

El tribunal deja constancia de que el perjuicio a la privacidad es un efecto secundario previsto y no buscado, y que la decisión se funda en razones públicas y no en preferencias personales. En los días siguientes, la controversia continúa algunos días en la esfera pública y luego disminuye, sin que exista un pronunciamiento adicional del tribunal.

Viñeta N° 4, versión B (espejo)

Una sala de la Corte de Apelaciones de Santiago conoce una acción constitucional presentada por un Senador. El demandante solicita que la corte ordene retirar de Internet una fotografía en la que aparece teniendo sexo con una modelo en la terraza de su departamento. Alega que la difusión de esa imagen vulnera su vida privada y afecta de manera grave su honra. La defensa del medio de comunicación sostiene que debe prevalecer la libertad de expresión, que la foto fue tomada desde la vía pública, desde donde se veía claramente el lugar, y que los políticos están sujetos a un escrutinio más intenso por parte de la ciudadanía.

El juez presidente de la sala considera que, aun cuando la regla general proscribe la censura previa, el ordenamiento contempla excepciones estrictas cuando la difusión de imágenes íntimas de una persona, incluso autoridad, vulnera gravemente su vida privada sin aportar información de interés público. Prevé que ordenar el retiro de la fotografía puede limitar el debate público y la crítica política; no pretende ese efecto y lo reconoce como una razón normativa en contra. Con todo, decide intencionalmente conforme a razones públicas de protección de la vida privada y de la honra, y a la legalidad formal en su dimensión de generalidad, estabilidad y congruencia entre los hechos acreditados y la respuesta excepcional permitida por la norma.

En contraste, el relator del tribunal estima que debe mantenerse el contenido en línea para resguardar la libertad de expresión y evitar un precedente expansivo de control judicial de publicaciones. Antes de resolver, el juez escuchó a ambas partes y analizó la prueba que cada una aportó. El tribunal dicta sentencia y acoge la petición, ordenando que la fotografía sea retirada por constituir una intromisión ilegítima en la vida privada del actor.

El tribunal deja constancia de que la restricción al debate público es un efecto secundario previsto y no buscado, y que la decisión se adopta por razones públicas y no por preferencias personales. En los días siguientes, el medio publica una nota editorial señalando que cumplirá la resolución y revisará sus protocolos; el debate público continúa algunos días y luego disminuye, sin nuevos pronunciamientos del tribunal.

References

- ACCATINO SCAGLIOTTI D. 2003. *La fundamentación de las sentencias: ¿Un rasgo distintivo de las judicaturas modernas?*, in «Revista de Derecho (Valdivia)», 15, 9-35.
- AGÜERO SAN JUAN C., SILVA BERRÍOS V., SEPÚLVEDA ARELLANO E., SOLOGUREN INSÚA E., RAJEVIC MOSLER E. 2022. *La estructura de las sentencias judiciales como un problema de lenguaje claro*, in «Ius et Praxis», 28, 3, 228-247.
- AGÜERO SAN JUAN C.A., SOLOGUREN INSÚA E., ZAMBRANO TIZNADO J.P., CALZETTA A.D. 2024. *Organización retórica de sentencias judiciales chilenas: análisis del caso de Robynson Gómez Noa*, in «Revista de Lengua i Dret», 82, 204-228.
- AGUINIS H., BRADLEY K.J. 2014. *Best Practice Recommendations for Designing and Implementing Experimental Vignette Methodology Studies*, in «Organizational Research Methods», 17, 4, 2014, 351-371.
- ALEXY R. 1998. *Law and Correctness*, in FREEMAN M. (ed.), *Current Legal Problems*, Oxford University Press.
- ALLAN T.R.S. 2011. *Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism*, in «International Journal of Constitutional Law», 9, 1, 155-162.
- ALLAN T.R.S. 2001. *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press.
- AMAYA A. 2017. *Virtudes y razonamiento probatorio*, in «Revista Anuario: Diálogos Jurídicos», 2, 2017, 19-36.
- ATIENZA M. 2006. *El derecho como argumentación*, Ariel.
- ATZMÜLLER C., STEINER P.M. 2010. *Experimental Vignette Studies in Survey Research*, in «Methodology: European Journal of Research Methods for the Behavioral and Social Sciences», 6, 3, 2010, 128-138.
- BÄUM L. 2006. *Judges and Their Audiences: A Perspective on Judicial Behavior*, Princeton University Press.
- BEHR D. 2017. *Assessing the Use Back Translation: The Shortcomings of the Back Translation as a Quality Testing Method*, in «International Journal of Social Research Methodology», 20, 6, 2017, 573-584.
- BENNETT M. 2007. *“The Rule of Law” Means Literally What It Says: the Rule of the Law”: Fuller and Raz on Formal Legality and the Concept of Law*, in «Australasian Journal of Legal Philosophy», 32, 2007, 90-113.
- BLACK R., OWENS R. 2009. *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, in «Journal of Politics», 71, 3, 2009, 1062-1075.
- BREST P., LEVINSON S., BALKIN J.M., AMAR A.R., SIEGEL R.M. 2019. *Processes of Constitutional Decision Making: Cases and Materials*, Wolters Kluwer.
- BRYAN A.C. 2020. *Public Opinion and Setting the Agenda on the U.S. Supreme Court*, in «American Politics Research», 48, 3, 2020, 377-390.
- BRYAN A.C., KROMPHARDT C.D. 2016. *Public Opinion, Public Support, and Counter-attitudinal Voting on the U.S. Supreme Court*, in «Justice System Journal», 37, 2016, 298-317.
- CABRÉ M.T. 2004. *¿Lenguajes especializados o lenguajes para propósitos específicos?*, in VAN HOOFT A. (ed.), *Textos y discursos de especialidad: el español de los negocios*, Brill, 19-33.
- CARBONELL F. 2022. *Un modelo de decisión judicial justificada para el proceso penal chileno*, in «Política Criminal», 17, 33, 2022, 58-84.
- CALZETTA D., AGÜERO SAN JUAN C., ZAMBRANO TIZNADO J.P., SEPÚLVEDA ARELLANO E. 2025. *Puesta a punto de un modelo inferencial para analizar la operación de especificación en sentencias judiciales*, in «Isonomía - Revista de teoría y filosofía del Derecho», 62, 83-115.
- CASILLAS C.J., ENNS P.K., WOHLFARTH P.C. 2011. *How Public Opinion Constrains the U.S. Supreme Court*, in «American Journal of Political Science», 55, 2011, 74-88.
- CHRISTENSEN J., GOMILA A. 2012. *Moral Dilemmas in Cognitive Neuroscience of Moral Decision-making: A Principled Review*, in «Neuroscience & Biobehavioral Reviews», 36, 4, 2012, 1249-1264.
- CIAPUSCIO G. 2001. *Procesos y recursos de producción textual en la divulgación de ciencia*, in BRUMME J. (ed.), *La historia de los lenguajes iberorománicos de especialidad. La divulgación de ciencia*, Iberoamericana Vervuert.

- COLOMA R. 2025. *Decidir hechos y argumentar con pruebas: Materiales para una teoría de la prueba en los procesos judiciales*, Marcial Pons.
- COLOMA CORREA R., AGÜERO SAN JUAN C., LIRA RODRÍGUEZ R. 2021. *Tecnología para decidir hechos en procesos judiciales*, in «Revista Chilena de Derecho y Tecnología», 10, 1, 2021, 111-143.
- COMANDUCCI P. 1999. *Razonamiento jurídico: Elementos para un modelo*, Fontamara.
- CUCATTO M. 2013. *El lenguaje jurídico y su “desconexión” con el lector especialista. El caso de “a mayor abundamiento”*, in «Letras de Hoje», 48, 1, 2013, 127-138.
- CUSHMAN F., YOUNG L., HAUSER M. 2006. *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, in «Psychological Science», 17, 12, 2006, 1082-1089.
- DICEY A.V. 1915. *Introduction to the Study of the Law of the Constitution*, Macmillan.
- DONELSON R., HANNIKAINEN I. 2020. *Fuller and the Folk: The Inner Morality of Law Revisited*, in LOMBROZO T., KNOBE J., NICHOLS S. (eds.), *Oxford Studies in Experimental Philosophy: Volume 3*, Oxford University Press, 6-28.
- DWORKIN R. 1985. *A Matter of Principle*, Harvard University Press.
- DWORKIN R. 1977. *Taking Rights Seriously*, Harvard University Press.
- DWORKIN R. 2011. *Justice for Hedgehogs*, Harvard University Press.
- EISENBERG M. 1978. *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, in «Harvard Law Review», 92, 2, 1978, 410-432.
- EPSTEIN L., MARTIN A.D. 2010. *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, in «University of Pennsylvania Journal of Constitutional Law», 13, 2010, 263-281.
- FINNIS J. 1980. *Natural Law and Natural Rights*, Oxford University Press.
- FISCHER E., ALLEN K., ENGELHARDT P.E. 2023. *Fragmented and Conflicted: Folk Beliefs About Vision*, in «Synthese», 201, 2023, 1-33.
- FISCHER E., CURTIS M. 2019. *Methodological Advances in Experimental Philosophy*, Bloomsbury.
- FISCHER E., ENGELHARDT P.E. 2020. *Lingering Stereotypes: Salience Bias in Philosophical Argument*, in «Mind & Language», 35, 4, 2020, 415-439.
- FISCHER E., ENGELHARDT P.E., HERBELOT A. 2015. *Intuitions and Illusions: From Explanation and Experiment to Assessment*, in FISCHER E., COLLINS J. (eds.), *Experimental Philosophy, Rationalism and Naturalism*, Routledge, 259-292.
- FISCHER E., ENGELHARDT P.E., HORVATH J., OHTANI H. 2021. *Experimental Ordinary Language Philosophy: a Cross-linguistic Study of Defeasible Default Inferences*, in «Synthese», 198, 2, 2021, 1029-1070.
- FISCHER E., ENGELHARDT P., SYTSMA J. 2021. *Inappropriate Stereotypical Inferences? An Adversarial Collaboration in Experimental Ordinary Language Philosophy*, in «Synthese», 198, 11, 2021, 10127-10168.
- FISCHER E., SYTSMA J. 2021. *Zombie Intuitions*, in «Cognition», 215, 2021, 104871.
- FINKELSTEIN C. 2018. *The Significance of Reasons in Judicial Decision-making*, Oxford University Press.
- FLANAGAN B., HANNIKAINEN I. 2022. *The Folk Concept of Law: Law is Intrinsically Moral*, in «Australasian Journal of Philosophy», 100, 1, 2022, 165-179.
- FULLER L.L. 1958a. *Human Purpose and Natural Law*, in «Natural Law Forum», 28, 1958, 68-76.
- FULLER L.L. 1958b. *Positivism and Fidelity to Law: A Reply to Professor Hart*, in «Harvard Law Review», 71, 4, 1958, 630-672.
- FULLER L.L. 1960. *Adjudication and the Rule of Law*, in «Proceedings of the American Society of International Law at its annual meeting (1921-1969)», 54, 1960, 1-8.
- GIBSON J.L., CALDEIRA G.A., BAIRD V.A. 2013. *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, in «Comparative Political Studies», 46, 12, 2013, 1463-1490.
- GLYNN A., SEN M. 2015. *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women’s Issues?*, in «American Journal of Political Science», 59, 1, 2015, 37-54.
- GREEN L. 2005. *Three Themes from Raz*, in «Oxford Journal of Legal Studies», 25, 3, 2005, 503-525.
- GREEN L. 1999. *Who Believes in Political Obligation?*, in EDMUNDSON W. (ed.), *The Duty to Obey the Law*, Rowman & Littlefield.

- GREEN L. 1989. *Law, Legitimacy, and Consent*, in «California Law Review», 62, 1989, 795-825.
- GREEN L. 1988. *The Authority of the State*, Clarendon Press.
- GUASTINI R. 2016. *La sintaxis del derecho*, Marcial Pons.
- HART H.L.A. 1962. *The Concept of Law*, Oxford University Press.
- HENRICH J., HEINE S.J., NORENZAYAN A. 2010. *The Weirdest People in the World?*, in «Behavioral and Brain Sciences», 33, 2-3, 2010, 61-83.
- HINDRIKS F. 2025. *The Moral Failures of Collective Agents: Responsibility Voids and Control Gaps*, in «Synthese», 205, 2025, 145.
- HINDRIKS F. 2014. *Normativity in Action: How to Explain the Knobe Effect and Its Relatives*, in «Mind & Language», 29, 1, 2014, 51-72.
- HINDRIKS F. 2011. *Control, Intentional Action, and Moral Responsibility*, in «Philosophical Psychology», 24, 6, 2011, 787-801.
- HINDRIKS F. 2008. *Intentional Action and the Praise-blame Asymmetry*, in «The Philosophical Quarterly», 58, 233, 2008, 630-641.
- HOCEVAR M. 2005. *Deber jurídico y deber moral en el pensamiento de John Finni*, in «Frónesis», 12, 3, 2005, 38-63.
- HOCEVAR M., BELANDRIA M. 2008. *Justificación de la autoridad*, in «Dikaioσύne: revista semestral de filosofía práctica», 20, 2008, 1-80.
- HSEE C., LOEWENSTEIN G., BLOUNT S., BAZERMAN M. 1999. *Preference reversals between joint and separate evaluations*, in «Psychological Bulletin», 125, 5, 1999, 576-590.
- IBÁÑEZ R. 2012. *La comprensión del discurso escrito: Una propuesta teórico-metodológica para su evaluación*, in «Revista signos», 45, 78, 2012, 20-43.
- JOST J.T., HUNYADY O. 2002. *The psychology of system justification*, in «European Review of Social Psychology», 13, 1, 111-153.
- KELSEN H. 1960. *Teoría pura del derecho*, Porrúa.
- KLATT M. 2016. *The Rule of Dual-Natured Law*, in FETERIS E., KLOOSTERHUIS H., PLUG J., SMITH C. (eds.), *Legal Argumentation and the Rule of Law*, Eleven International Publishing, 27-46.
- KNEER M., BOURGEOIS-GIRONDE S. 2017. *Mens Rea Ascription, Expertise and Outcome Effects*, in «Cognition», 169, 2017, 139-146.
- KNOBE J. 2010. *Person as Scientist, Person as Moralist*, in «Behavioral and Brain Sciences», 33, 4, 2010, 315-329.
- KNOBE J. 2006. *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, in «Philosophical Studies», 130, 2, 2006, 203-231.
- KNOBE J. 2003. *Intentional Action and Side Effects in Ordinary Language*, in «Analysis», 63, 3, 2003, 190-194.
- KNOBE J., NICHOLS S. 2008. *An Experimental Philosophy Manifesto*, in KNOBE J., NICHOLS S. (eds.), *Experimental Philosophy*, Oxford University Press, 3-14.
- KNOBE J., SHAPIRO S. 2021. *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, in «University of Chicago Law Review», 88, 1, 2021, 165-236.
- LARROUCAU J. 2017. *Razonamiento hermenéutico y “hechos sustanciales controvertidos”*, in «Revista Chilena de Derecho», 44, 1, 2017, 159-183.
- LEV O. 1994-1995. *Personal Morality and Judicial Decision-making in the Death Penalty Context*, in «Journal of Law and Religion», 11, 2, 1994-1995, 637-695.
- LUBET S. 1985. *Judicial Ethics and Private Lives*, in «Northwestern University Law Review», 97, 5-6, 1985, 993-1008.
- MALEM J. 2001. *¿Pueden las malas personas ser buenos jueces?*, in «Doxa», 24, 2001, 379-403.
- MARTINEAU R. 1981. *Disciplining Judges for Nonofficial Conduct*, in «University of Baltimore Law Review», 10, 2, 1981, 225-256.
- MONTOLÍO E. 2019. *Lingüística, comunicación y transferencia de conocimiento a la sociedad: Un reto para el siglo XXI*, in «Palimpsesto», 9, 15, 2019, 54-67.

- MORGADO FERNÁNDEZ P., FERNÁNDEZ-SILVA S. 2021. *Incidencia de las metáforas en la comprensión de textos divulgativos del área de Biología*, in «Logos (La Serena)», 31, 1, 2021, 61-83.
- NEWMAN G., BLOOM P., KNOBE J. 2014. *Value Judgments and the True Self*, in «Personality and Social Psychology Review», 18, 2, 2014, 133-151.
- NICHOLSON P. 1974. *The Internal Morality of Law: Fuller and His Critics*, in «Ethics», 84, 4, 1974, 307-326.
- POBLETE C.A. 2024. *Comunicació clara a Latinoamèrica*, in «Revista de Llengua i Dret», 82, 2024, 143-161.
- PODSAKOFF P.M., MACKENZIE S.B., LEE J.Y., PODSAKOFF N.P. 2003. *Common Method Biases in Behavioral Research: a Critical Review of the Literature and Recommended Remedies*, in «Journal of applied psychology», 88, 5, 2003, 879-903.
- POSNER R.A. 2008. *How Judges Think*, Harvard University Press.
- PRIEL D. 2013. *Is There One Right Answer to the Question of the Nature of Law?*, in WALUCHOW W., SCIARAFFA S. (eds.), *Philosophical Foundations of the Nature of Law*, Oxford University Press.
- RAWLS J. 1999. *A Theory of Justice*, Harvard University Press.
- RAZ J. 1979. *The Authority of Law*, Oxford University Press.
- RUNDLE K. 2013. *Form and Agency in Raz's Legal Positivism*, in «Law and Philosophy», 32, 6, 2013, 767-791.
- SCALIA A. 1989. *Judicial Deference to Administrative Interpretations of Law*, in «Duke Law Journal», 3, 1989, 511-521.
- SCALIA A., GARNER B.A. 2012. *Reading Law: The Interpretation of Legal Texts*, Thomson/West.
- SCHAUER F. 2000. *Can Public Figures Have Private Lives?*, in «Social Philosophy and Policy», 17, 2, 2000, 293-309.
- SHAPIRO S.J. 2013. *Legality*, Harvard University Press.
- SHKLAR J. 1987. *Political Theory and the Rule of Law*, in HUTCHINSON A., MONAHAN P. (eds.), *The Rule of Law: Ideal or Ideology*, Carswell.
- SIMMONDS N. 1989. *Central Issues in Jurisprudence: Justice, Law and Rights*, Sweet & Maxwell.
- SLOAN L., QUAN-HAASE A. (eds.) 2017. *The SAGE Handbook of Social Media Research Methods*, SAGE.
- SOSA E. 2007. *Experimental Philosophy and Philosophical Intuition*, in «Philosophical Studies», 132, 1, 2007, 99-107.
- SOBOTA K. 1997. *Das Prinzip Rechtsstaat: Verfassungs- und Verwaltungsrechtliche Aspekte*, Mohr Siebeck.
- TAMANAH B. 2004. *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.
- TAPP J., HESS K. 2016. *Using Procedural Justice to Promote Acceptance of Legal Decisions*, in «Legal and Criminological Psychology», 21, 1, 2016, 70-87.
- TROPE Y., LIBERMAN N. 2010. *Construal-level Theory of Psychological Distance*, in «Psychological Review», 117, 2010, 440-463.
- WALDRON J. 2004. *The Rule of Law as a Theatre of Debate*, in BURLEY J. (ed.), *Dworkin and His Critics*, Blackwell.
- WALDRON J. 2008. *The Concept of Law and the Rule of Law*, in «Georgia Law Review», 43, 2008, 1-61.
- WALDRON J. 2009. *Judges as Moral Reasoners*, in «Oxford Journal of Legal Studies», 29, 2, 2009, 177-203.
- WALDRON J. 2016. *The Rule of Law*, in *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/entries/rule-of-law/>.
- ZAMBRANO J.P., AGÜERO C. 2009. *El cultural Point of View en una sentencia penal*, in «Frónesis», 16, 2, 2009, 385-392.
- ZAMBRANO P. 2010. *El derecho como razón excluyente para la acción*, in «Problema. Anuario de Filosofía y Teoría del Derecho», 4, 2010, 323-366.
- ZAMBRANO-TIZNADO J.P., LIRA-RODRÍGUEZ R. 2023. *The Ideological Role of Chilean Judges in the Definition of Mapuche Domestic Violence*, in «International Journal of Law in Context», 19, 3, 2023, 386-406.

Governing by Nudging: A Critical Inquiry into Liberty and Equality

PIER FRANCESCO **BRESCIANI**

Università di Bologna, Italy.

E-mail: pierfrancesco.bresciani@unibo.it

SILVIA **ZULLO**

Università di Bologna, Italy.

E-mail: silvia.zullo@unibo.it

ABSTRACT

This paper aims to bridge the ethical and constitutional perspectives on nudging to shape a framework for assessing the legality of behavioral interventions in contemporary constitutional states. The first part outlines the broad ethical debate surrounding nudging, clarifying the terms in which ethical and political philosophers have traditionally criticized it. Particular attention is given to competing conceptions of autonomy in the literature and to the distinct normative status of informative nudges. The second part explores which ethical critiques can be translated into a constitutional argument. The authors argue that nudges operating within rights-protected areas – where strong conceptions of autonomy have been codified – should be treated as interferences requiring compelling constitutional justification. They further propose that well-established legal tools, such as the proportionality test, must be reinterpreted to account for the specific nature of nudging. Finally, drawing on constitutional traditions, the paper advances the idea that a broader critique of nudging can be grounded in the principle of equality, given the structurally unequal effects of nudges depending on the individual characteristics of those targeted – an issue largely undertheorized in both ethical and legal debates.

L'articolo combina la prospettiva etico-giusfilosofica a quella costituzionalistica per offrire un contributo alla definizione di un *framework* di valutazione della legalità dei *nudge* negli Stati costituzionali contemporanei. A tal fine, la prima parte ricostruisce l'ampio dibattito etico sul *nudging*, chiarendo i termini in cui la riflessione morale e filosofico-giuridica lo ha generalmente criticato. Particolare attenzione è dedicata alle diverse concezioni di autonomia presenti nella letteratura e allo specifico statuto normativo dei *nudge* informativi. La seconda parte esplora quali problemi etici possano essere riconfigurati come questioni costituzionali. Gli autori sostengono anzitutto che i *nudge* operanti in aree protette da diritti – in cui sono state positivizzate concezioni forti di autonomia – dovrebbero essere trattati come interferenze che richiedono una giustificazione costituzionale. In questo contesto, inoltre, anche dottrine consolidate, come il test di proporzionalità, dovrebbero essere ristrutturare per tenere conto della specifica natura del *nudging*. Infine, dato che i *nudge* tendono ad avere una efficacia in concreto disuguale a seconda delle condizioni personali dei destinatari, è avanzata l'idea, finora poco esplorata in letteratura, che alcuni limiti costituzionali più generali al *nudging* possano essere derivati dal principio di eguaglianza.

KEYWORDS

nudge, autonomy, fundamental rights, liberty, equality, vulnerability

nudge, autonomia, diritti fondamentali, libertà, eguaglianza, vulnerabilità

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, Diritto e questioni pubbliche, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista Diritto & Questioni Pubbliche è stata finanziata dall'Unione Europea – NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 Istruzione e ricerca – Componente 2 Dalla ricerca all'impresa – Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY – CUP J53D23005150006.



Governing by Nudging: A Critical Inquiry into Liberty and Equality

PIER FRANCESCO BRESCIANI, SILVIA ZULLO

1. *Introduction* – 2. *The Notion of Autonomy in Nudge Ethics: An Overview* – 2.1 *The “Nudge agenda”* – 2.2 *In Defence of Autonomy* – 3. *Constitutionalizing a Critique to Nudging* – 3.1 *The Liberty Argument: Nudges as Interferences with the Freedom to Exercise Rights* – 3.2 *The Equality Argument: Nudges as Interventions with Inherently Unequal Impact* – 4. *Conclusion*.

1. *Introduction*

Nudge theory has increasingly attracted attention as a framework for shaping behavior and designing large-scale public policies. Richard Thaler and Cass R. Sunstein advocate for nudging as a form of liberal paternalism, enabling institutions to guide individuals toward outcomes that enhance their well-being – drawing on insights from behavioral science – while preserving their freedom of choice¹.

Despite its wide diffusion, nudge theory has been subject to persistent criticism for its alleged incompatibility with the principle of individual autonomy, which lies at the core of constitutional theory. Nudges operate by exploiting non-reflective cognitive processes – automatic, intuitive, and often unconscious mechanisms – thereby steering individuals’ behavior without engaging their deliberative faculties. From a constitutional perspective, such interventions risk reducing citizens from autonomous rights-bearers to mere objects of policy design, insofar as they diminish the individual’s capacity for conscious self-determination. If autonomy is understood, in line with much of ethical and constitutional doctrine, as the ability of persons to exercise control over their choices through reflective endorsement of preferences, nudges appear to compromise this very capacity. The risk is that individuals may be induced to adopt courses of action they would not otherwise have taken, absent the external influence, thereby raising serious concerns about the preservation of agency and the authenticity of consent within a constitutional democracy.

Our central argument is that, in much of the prevailing discourse on nudging, legal analysis tends to accord insufficient attention to the ethical objections raised within philosophical scholarship. We argue that a specific risk associated with nudges is their heightened likelihood of going unnoticed and remaining beyond the critical scrutiny of citizens, more so than traditional policy instruments. Unlike conventional measures such as fines or regulations, nudges are frequently embedded in subtle ways within complex decision-making environments, rendering it unreasonable to assume that citizens possess the requisite knowledge or expertise to identify them. More significantly, even when individuals are able to discern “particular features” of their environment, they may nevertheless be unable to ascertain whether these constitute deliberate nudges or merely incidental characteristics. Moreover, the article underscores that mere awareness of a policy’s existence constitutes a fundamental precondition for the realization of an informed public debate. Nevertheless, even in circumstances where nudges are transparently disclosed, the problem of citizens’ unawareness of morally salient information endures. The claim that such information ought to be made available does not imply that every citizen must, in all circumstances, acquire comprehensive knowledge of it; rather, it requires that individuals be granted the opportunity to

* Sections 1 and 4 represent a collective effort by the Authors. Sections 2, 2.1, 2.2 were authored by S. Zullo, while Sections 3, 3.1, 3.2 by P.F. Bresciani. Overall, this work is the product of a close collaboration, combining the authors’ complementary expertise.

¹ THALER, SUNSTEIN 2021; SUNSTEIN 2014.

access and examine it if they so choose. When applied in practice, these difficulties are further compounded by social inequalities, as individuals differ in their capacities for awareness, understanding, and critical evaluation.

We argue that these issues take on particular importance within contemporary constitutional theory, inviting reflection on how existing constitutional frameworks may be mobilized to confront them.

The argument unfolds as follows. Section 2 examines the principal claims advanced by proponents of nudging and engages with the core ethical issues concerning the conditions necessary to safeguard individual autonomy. This discussion proceeds on the assumption that autonomy is not equally distributed across individuals. Section 3 then turns to the implications of nudging for the legal domain within contemporary constitutional theory, exploring how – and to what extent – moral critiques of nudging can be framed in the constitutional discourse, particularly in light of the fundamental values of liberty and equality.

2. *The Notion of Autonomy in Nudge Ethics: An Overview*

Nudges are regarded as effective forms of influence that maintain individuals' autonomy while bypassing their deliberative reasoning processes². Nevertheless, ongoing debates about what it truly means in a nudge world³ to preserve autonomy raise a critical ethical and normative question: can interventions that engage automatic cognitive mechanisms genuinely uphold autonomy in a morally meaningful way for evaluating actions and policies?

This issue is especially significant because one of the most frequently debated ethical concerns in the literature is that nudges may infringe upon individual autonomy.

The concept of autonomy adopted in this analysis aligns with that commonly used in discussions on the ethics of nudging – namely, autonomy understood as freedom of choice, personal agency, and self-determination⁴. Autonomy, understood as freedom of choice, entails having access to meaningful alternatives without being compelled to choose a specific option, adopting a negative conception of liberty – defined as the absence of control, pressure, or coercion⁵. Au-

² According to Sunstein and Thaler, the ability to influence behavior in these ways is based on a division of mental processes, inspired primarily by the work of Kahneman and others on the dual nature of psychological processes and the structure of the mind. Sunstein and Thaler have categorized nudges into two groups, corresponding to the division of psychological processes into fast, parallel, automatic, associative processes that require little effort – what is known as “System 1” – and slow, controlled processes that require effort, which make up “System 2”. Based on this distinction, we can differentiate between nudges that exploit the unintentional processes of System 1 and those that instead enhance individuals' reflective and self-control capacities. For example, nudges of the first type include interventions that take advantage of decision inertia and status quo bias – people's tendency to stick with familiar choices or avoid changing a given situation, even when doing so might be beneficial. Choice architects can act by setting the more rational or beneficial option as the default, anticipating that the individual is unlikely to change it. Other examples involve leveraging the framing effect – that is, the tendency of individuals to react differently to the same information depending on how it is presented – or the use of explicit imagery to make certain information more salient (e.g., the design of cigarette packages intended to raise smokers' awareness of the harms of smoking). Nudges of the second type help individuals translate their plans into concrete decisions and actions, avoid falling into traps associated with weakness of will, or better understand information about certain products or situations, thereby enabling them to make more rational choices. See THALER, SUNSTEIN 2011, 19–22; SUNSTEIN 2016, 26–27. For more on Systems 1 and 2, see KAHNEMAN 2011.

³ See WALDRON 2014.

⁴ VUGTS, VAN DEN HOVEN, DE VET, VERWEIJ 2020. Sunstein argues that autonomy is more effectively protected when the range of available choices is thoughtfully limited. In this view, autonomy and freedom of choice are not the same. Gerald Dworkin, before Sunstein, drew this distinction: he defined freedom as the capacity to act on one's desires, provided that meaningful options are accessible and not restricted – even in part – by other individuals or social institutions. Autonomy, by contrast, refers to the capacity for self-determination. See DWORKIN 1988.

⁵ BERLIN 2017.

tonomy is also understood in terms of agency, which involves the capacity to reason, engage in critical reflection, and make deliberate choices. Being autonomous, in this sense, means not only having access to options and being free from external interference, but also having the ability to evaluate those options and act upon them in pursuit of one's personal goals⁶. Unlike the first conception, which focuses on external conditions and freedom from coercion, this view highlights the internal psychological processes of individuals, stressing the importance of mental capacities such as deliberation, critical reflection, and the ability to reason about one's own preferences. Critics argue that by doing so, nudges bypass individuals' capacity for reasoning, thereby treating people not as reflective agents but as manipulable subjects, ultimately diminishing their sense of control and agency⁷. Luc Bovens argues: «there is something less than fully autonomous about the patterns of decision-making that Nudge taps into. [...] we are not fully in control of our actions»⁸. An example of this argument is given by a specific category of nudges: *default options*⁹. When presented with a choice, defaults are the alternative that the chooser ends up with if they take no action or make no active decision, so it is the option that «will obtain if the chooser does nothing»¹⁰. For example, in some countries, individuals are considered organ donors by default, while in others, they are not. The establishment of a default qualifies as a nudge insofar as it preserves individuals' capacity for choice while nonetheless exerting a substantial influence on the option most are likely to adopt. This influence may be explained either by cognitive inertia or by the perception that the default embodies an implicit normative recommendation. Consider, for instance, Frank Furedi, who contends that autonomy must be defended from a growing force of nudgers, asserting that their aim is to deprive individuals of the ability to make wrong choices, thereby reducing them to something less than genuine agents of choice¹¹. In Furedi's perspective, a society increasingly shaped by nudging erodes individual responsibility, weakens the ability to make moral judgments, and endangers people's moral autonomy.

Scholars, such as Bart Engelen, refer to the idea that an agent is rational when they are able to think and reflect clearly as “process-rationality”¹², so that a person can be considered rational when they successfully achieve their intended goals. And while some of these interventions clearly maintain freedom of choice, certain scholars argue that others fall short¹³. From their perspective, protecting freedom of choice involves more than merely avoiding overt coercion; it also requires respecting individuals' ability to exercise control over their own judgments and decisions.

This raises an important question: in what sense do nudges truly preserve autonomy and liberty as freedom of choice?

Thaler and Sunstein defend nudging as a form of “libertarian paternalism” – a public policy tool that allows institutions to guide individuals toward welfare-enhancing outcomes without restricting their freedom of choice. On one hand, they argue that nudges preserve freedom of choice because they leave all existing options intact. On the other hand, they also point to a more substantive view, suggesting that nudges can actively protect and support individuals' autonomy in the decision-making process. If they adopt the first view, a broad range of influences could be classified as nudges, giving policymakers strong justification for using them as regulatory tools. Conversely, if Thaler and Sunstein endorse the second, more substantive interpretation, nudges gain stronger moral credibility – but at the cost of narrowing their applicability, as fewer interventions would meet the more rigorous standards needed to qualify as genuine nudges. In relation

⁶ HANSEN, JESPERSEN 2013; GLOD 2015.

⁷ SAGHAI 2013, 488; see also NOGGLE 1996.

⁸ BOVENS 2009; CONGIU, MOSCATI 2022.

⁹ MACKAY, ROBINSON 2016.

¹⁰ THALER, SUNSTEIN 2021, 83.

¹¹ FUREDI 2011.

¹² ENGELEN 2019.

¹³ HAUSMAN, WELCH 2010; VUGTS et al. 2020; NOGGLE 2018.

to these two interpretations and the question of autonomy, it is not feasible in this context to examine all forms of nudges. Accordingly, our analysis will be limited to two specific types: the framing effect and the use of default rules. The exploitation of the framing effect consists in presenting information using the formulation most likely to induce a specific behavior, whereas an alternative formulation – though conveying the same informational content – would not produce the same effect. Default rules operate in a similar way but exploit the human tendency toward inertia. A well-known example is the use of default rules in structuring retirement plans in the United States. From the perspective of choice architects, the most “rational” approach to pension fund enrollment consists of the automatic inclusion of individuals in a plan with predetermined contribution rates and investment allocations. At the same time, individuals retain the freedom to withdraw from the plan at any moment by exercising their right to opt out. In this light, it becomes evident that both framing effects and default rules operate as instruments that shape individual decision-making while formally preserving freedom of choice. However, precisely because they exploit predictable cognitive mechanisms, such as inertia or sensitivity to wording, they raise important ethical and legal questions: to what extent is it legitimate to steer individual decisions by leveraging cognitive vulnerabilities? How can default rules and the use of framing effects be considered admissible in terms of their impact on individual autonomy? Choice architects aim to create what can be called a “psychological salience” – that is, a salient feature of a particular perceptual state that has the power both to direct the agent’s attention toward a specific element and to motivate the agent to act in a certain way¹⁴.

2.1 The “Nudge Agenda”

Thaler and Sunstein contend that nudges respect autonomy – understood as freedom of choice and agency – because they do not alter the available set of options. A nudged individual retains full access to all available options and is still therefore free to choose as they wish. Nudges influence individuals’ decisions by modifying elements of the context in which choices are made – commonly referred to as the choice architecture. The nudges that typically draw autonomy-based criticism from opponents of government intervention are known as “System 1” nudges. These rely on or activate cognitive heuristics – (quasi-)automatic mental shortcuts – that individuals use to conserve their limited cognitive resources instead of engaging in deliberate, reflective thinking. Critics contend that nudges steer individuals toward particular choices and outcomes, which can render them unacceptably paternalistic and, in some cases, even manipulative¹⁵. In many instances, the individual being influenced cannot easily opt out of the structure created by the “choice architect”, as nudges frequently reshape the perception of available options – making some appear more attractive or others less so – without engaging the person in active or conscious deliberation. As a result, one way to refine our understanding of nudges is to explicitly introduce a condition for preserving freedom of choice, as *substantial noncontrol*¹⁶. This condition ensures that the individual preserves the capacity to resist the influence with relative ease, should they wish to do so. Nevertheless, this gives rise to a further question: what is the precise meaning of the claim that nudges may undermine individual autonomy? Could they, under certain conditions, be construed as a form of manipulation?

Addressing whether nudges are genuinely designed to influence behavior while still safeguarding individual freedom of choice is a question that holds significance not only from an ethical standpoint but also within the legal framework of fundamental rights and constitutional guarantees. Sunstein explores more deeply the ways in which governments use nudges to influence

¹⁴ NOGGLE 2018.

¹⁵ HANSEN, JESPERSEN 2013.

¹⁶ FADEN, BEAUCHAMP 1986.

citizens. He observes that «although nudges are commonly employed by businesses, charities, and self-help figures to shape behavior, their use by the State raises distinct ethical concerns»¹⁷. Thus, the core question guiding our analysis mirrors the one examined by Sunstein: how can we determine whether a government's attempts to influence its citizens are ethically justified?¹⁸

Nudges can take many forms – such as default options, information disclosures, and warning messages – and can be applied across a broad range of areas, including healthcare and retirement planning¹⁹, and they are «choice-preserving and low-cost tools»²⁰. Depending on the context, the “right direction” may refer to choices that promote individual well-being, support public health, encourage financial security, or serve other socially beneficial outcomes. Depending on the context, the “right direction” might involve avoiding harm to an individual, providing a personal benefit, or enhancing overall social welfare. A notable example is the GPS system, which not only serves as a practical instance of a nudge – guiding individuals toward a desired destination – but also functions as a broader metaphor for the concept of nudging itself²¹: «A GPS – like many other kinds of nudges – does not tell people their desired destination but instead suggests a route, which they are free to reject, that can get them to where they want to go»²². The GPS metaphor is fundamentally grounded in a core principle of nudging: people are prone to error and often act against their own long-term interests. Human beings can be impulsive and shortsighted²³, which, as Sunstein explains, leads to «behavioral market failures, that occur when people make decisions that reduce their own welfare. Research shows that people make self-defeating decisions under predictable sets of circumstances – when decisions test our self-control, when decisions are complex or difficult, when decisions do not provide the opportunity for us to learn from our previous choices, or when decisions are infrequent or unfamiliar»²⁴.

Sunstein explains that some nudges work because they *inform* people, others work because they *make certain choices easier*. He explains that default options take advantage of the human tendency toward inertia – they become the choice people make when they do nothing: «Some nudges, such as *default rules*, work because of the power of inertia and procrastination»²⁵. And given the seemingly limitless opportunities to implement nudges and the wide array of strategies available to policymakers, Sunstein provides several examples illustrating how nudges can be employed in public policy²⁶. Using this distinction, it becomes clear that default rules are among the few – but widely used and hotly debated – examples of nudging policies that are embedded within legal

¹⁷ See SUNSTEIN 2016, 13-15.

¹⁸ SUNSTEIN 2016, 13-15.

¹⁹ See THALER, SUNSTEIN 2021, 44-45.

²⁰ See THALER, SUNSTEIN 2021, 20-21.

²¹ See SUNSTEIN 2016, 27-28.

²² See SUNSTEIN 2016, 55-56.

²³ SUNSTEIN 2014.

²⁴ Behavioral market failures may occur under these conditions because of normal human cognitive functioning. Sunstein refers to those choice architectures that do not rely on cognitive or decisional limitations as “educative nudges”, thereby introducing a distinction that is not merely descriptive. Influences that enhance deliberative and executive capacities are generally viewed as morally unproblematic, since they engage rational faculties. In contrast, non-educative nudges exploit non-intentional processes which, in many situations, lead to suboptimal responses to environmental challenges and, because they bypass rational scrutiny, are considered problematic: «Other nudges are meant to help people without increasing their knowledge or understanding; default rules have this characteristic» (SUNSTEIN 2016, 32-34).

²⁵ See THALER, SUNSTEIN 2021, 26-27.

²⁶ Well-known nudges include requiring chain restaurants to post calorie labels, placing graphic warnings on packs of cigarettes, and automatically enrolling people in savings plans but giving them the ability to opt out. Nudges that engage System 2 deliberation, like the calorie labels or financial information, and nudges that exploit System 1 automatic thinking, like the graphic cigarette warning or the automatic savings-plan enrollment. Sunstein calls nudges that trigger System 2 “educative nudges” or “boosts”.

systems. Examples include so-called “opt-out” options, such as automatic enrollment in employee retirement savings plans or default rules for organ donation. These defaults are designed to influence behavior effectively by leveraging status quo bias, the tendency to place greater value on options perceived as the default²⁷. In contrast, other nudging strategies – such as simplification, appeals to social norms, increasing ease and convenience, providing disclosures or warnings, and reminders – do not fall within the scope of the legal system. This means they are not codified by law, and the behavioral change they produce occurs outside formal legal mechanisms. Since a large number of individuals tend not to take action, defaults can carry significant influence and produce powerful outcomes²⁸:

«A default nudge works by designating one course of action as the default; it establishes what will happen unless the decision-maker actively makes a change. For example, the choice architect (the person designing the choice) might change from an “opt-in” regime to an “opt-out regime”. That is, if choosers do not desire the preselected course of action, they will need to opt-out of it for it not to happen. To stick with the purchase example theme, think of what the checkout page of an online shop looks like. Often when you select a shipping method, there will be a choice between “environmentally friendly” or “standard” shipping. If sellers want to encourage the green choice, they can make this option the default course of action by preselecting it (subject to opt-out) on the screen. If customers do not make the switch to standard shipping, green shipping will be chosen. This is a default nudge»²⁹.

Nudges are considered non-normative primarily because most of them do not form part of a legal system and, therefore, do not generate obligations through legally binding requirements to act in a specific way. Even in cases where nudges are embedded within legal frameworks – such as the aforementioned examples of default (opt-out) rules – they do not impose a duty to act, but rather influence individuals’ circumstances without mandating a particular response. Additionally, nudges shape behavior in a non-cognitive manner, as their effectiveness relies on automatic, non-reflective reactions to elements of the choice architecture, rather than on deliberate reasoning or conscious decision-making³⁰. The core focus of this implication is that nudges steer individuals toward particular choices and outcomes, making them objectionably paternalistic, and that such methods distort or undermine genuine decision-making, what Martin Wilkinson describes as a “perversion of the decision-making process”, or in other words, that nudging is manipulative³¹. In both cases, critics claim the choice architect is not sufficiently respecting the chooser’s agency and may make the chooser worse off and they contend that nudging fails to respect individual agency adequately and may ultimately harm those being nudged. Concerning paternalism, Sunstein recognizes that whenever one person influences or decides for another, we might be concerned about unacceptable paternalism³²:

«Even if the influence results in an outcome that is, in fact, beneficial to Person B, some anti-paternalists argue that Person A’s behavior is problematic by virtue of their deciding for the other, since that simply is none of their business. The idea of interfering with the liberty or autonomy of Person B raises

²⁷ TVERSKY, KAHNEMAN 1991.

²⁸ See SUNSTEIN 2016, 140-147.

²⁹ See MICHAELSEN, SUNSTEIN 2023, 5.

³⁰ See LEPENIES, MAŁECKA 2015, 432.

³¹ WILKINSON 2013, 345.

³² In this case we have a narrow account of paternalism, that occurs whenever person A interferes with the liberty or autonomy of Person B without B’s consent, to influence or require B to make a choice or end up in a situation deemed by A to be in the interest of B, and a broader account, that occurs whenever Person A influences Person B, so as to steer Person B away from a choice that Person B would otherwise make because Person A believes that another choice is in the interest of Person B. See DWORKIN 2005, 305-331.

questions and puzzles, as does the idea of influences: Is it paternalistic to provide truthful information? Many people do not think so. Is it paternalistic to forbid people from making a decision that affects only themselves? Many people think so. Is a warning paternalistic? A GPS nudges; is it paternalistic? We think so, but many people would not agree; What about a reminder? Automatic enrollment in savings programs? Placement of healthy foods in highly visible, accessible places in a grocery store? With these questions in mind, some people would limit paternalism to cases of mandates and bans. Others would emphasize the state of mind of Person A; is Person A deeming herself superior or being disrespectful to Person B, and if so, in what way? And even if some action is paternalistic, it does not necessarily follow that it is wrong. If Person A is acting paternalistically toward Person B, there might be no ethical problem if, for example, Person B's life is being saved. Even if we bracket the hardest issues, it should not be hard to see how some nudges might be questioned as unacceptably paternalistic. In a typical nudge scenario, a choice architect will have decided what course of action is to be encouraged by a nudge, and the intervention will attempt to influence the object of the nudge in the choice architect's preferred direction. Our own view is that most nudges do not, in fact, run into such objections»³³.

For instance, one suggestion is the creation of a kind of Bill of Rights for nudging, which would include requirements such as full transparency. Additionally, it could be required that nudges be employed only in ways that leave individuals "better off, as judged by themselves", ensuring that personal well-being and self-assessed interests remain central to the design and application of such interventions. If a nudge meets this criterion, it may be considered a legitimate form of "means paternalism" – one that fully respects individuals' own goals and values. In this view, the decision-maker's personal objectives hold ultimate authority in assessing the appropriateness of a nudge. The emerging field of behavioral welfare economics is increasingly engaging with these foundational questions, seeking to understand how policy interventions can support individuals' well-being without overriding their autonomy.

Manipulation, by contrast, principally has to do with improper or undue influence on the process by which a decision is made, and involves some underhand interference with the ways in which people see their options. In other words, manipulation is a threat to autonomy because it leads people to choose differently from how they otherwise would have, and for reasons of which they may be unaware. Here, Sunstein says:

«For instance, people are often highly susceptible to what other people do or approve of (that is, of social norms) but may fail to realize the extent to which such social information affects their behavior. On one view, the use of social norms to nudge people might therefore be thought to be unacceptably manipulative and the same might be said about a default rule of which people are unaware. There is also a distinctly welfarist objection to manipulation, rooted in Mill's work on liberty. Manipulators do not allow people to choose for themselves; they displace people's own choices by inclining them, without consent or understanding, in directions favored by the manipulators. If choosers know what is in their best interests (for epistemic reasons, emphasized by Mill), then manipulators will lead choosers in directions that will reduce rather than increase their welfare»³⁴.

Full transparency might weaken the objection that nudges are manipulative, since decision-makers will be equipped to counter the attempted influence. How openly and "directly" transparent information about the intervention ought to be in order to avoid manipulation has been largely debated. Some have viewed the expectation that individuals should be able to identify every single nudge as excessive; nonetheless, this assumption has largely guided empirical research on transparency and nudging. A final response to concerns about manipulation is that nudges should be

³³ See MICHAELSEN, SUNSTEIN 2023, 19.

³⁴ See MICHAELSEN, SUNSTEIN 2023, 20– 22.

evaluated on a case-by-case basis. For example, risk information, taken on its own, is rarely considered manipulative. A truthful warning is not manipulative in principle, as it does not undermine people's ability to reason and make choices. However, some nudges present more nuanced ethical challenges. Consider, for example, the deliberate placement of certain food items in highly visible spots within a grocery store to increase the likelihood of their selection. While this strategy may not amount to overt manipulation, it could still be seen by some as ethically questionable or as subtly crossing the line into manipulative influence³⁵.

Ultimately, Sunstein, in responding to such objections, emphasizes that not all concerns about manipulation are equally compelling and that a balanced, context-sensitive approach is necessary when evaluating the ethics of nudging: «Choice architecture is inevitable, and so it is in a way pointless to complain about it»³⁶.

Sunstein's framework – like much of the literature on nudging – rests on a crucial, often implicit assumption: that people are “nudgeable”. In other words, they are open to influence.

However, the concept of being nudgeable assumes that individuals have access to meaningful choices and the ability to act upon them. This raises a key question: which forms of choice architecture interfere with an individual's self-determination or autonomy? The core concern with nudging is not merely the preservation of freedom of choice, but the potential limitations and intrusions on personal autonomy. Can transparency through disclosure alone effectively protect liberty as freedom of choice from manipulation? And if so, how is autonomy truly preserved?

As we will explore in Section 3, nudges do not affect everyone equally. In some contexts, they may disadvantage the most vulnerable individuals – either by excluding them from the intended benefits or by causing them direct harm.

2.2 *In Defence of Autonomy*

Given this context, we focus primarily on the conceptions of autonomy used in the nudge literature itself in order to clean up the conceptual confusion that pervades it.

In the current ethical debate, we have two strands of criticism that challenge the idea that nudges respect autonomy. The first line of criticism claims that nudging conflicts with the republican concept of freedom. At the heart of this notion is the idea of arbitrary power, which Philip Pettit defines as the capacity to intrude upon, or exert control over, the range of choices that another agent is otherwise in a position to exercise³⁷. Till Grüne-Yanoff applies this framework to government nudges and libertarian paternalism, arguing that such policies enable the state to exercise arbitrary power over citizens, thereby infringing upon their autonomy³⁸. The ethical concern he raises is that, through the deployment of nudges, governments may shape citizens' choices at their discretion, thereby placing individuals in a subordinate position and, in doing so, infringing upon their autonomy³⁹. Of course, we recognize the risk of idealizing autonomy as an unattainable ideal – a flawless form of decision-making grounded entirely in deliberate reflection. Expecting complete independence and fully reflective choices is clearly unrealistic, given that we are always influenced to some extent. Holding autonomy to such an elevated standard would

³⁵ In this context, Robert Baldwin identifies three distinct “degrees” of nudging. First degree nudges aim to support individuals' reflective decision-making by offering tools such as information. Second degree nudges aim to steer individuals toward desirable outcomes, while formally leaving the available options unchanged. A common example of this type is default rules with opt-out mechanisms, which rely on behavioral inertia. Third degree nudges are like those that shape decisions and preferences in a certain way and are “resistant to unpacking”. This is ethically problematic because individuals may not even realize they are being nudged – or how. See BALDWIN 2014, 831-857.

³⁶ See MICHAELSEN, SUNSTEIN 2023.

³⁷ PETTIT 1996.

³⁸ GRÜNE-YANOFF 2012.

³⁹ See HAMILTON 2018.

render it incompatible with the way we acknowledge autonomy in everyday life. It would also overlook the needs of those who struggle with full autonomy – such as individuals with weak will or heightened vulnerability – leaving them unsupported. Moreover, Harry Frankfurt’s example of the “unwilling addict” illustrates that an individual may possess autonomy – in the sense of being capable of setting their own ends and desiring not to smoke – yet, in the absence of self-mastery, fail to realize those ends⁴⁰. On the other hand, people can lack autonomy, for example, when they are completely ambivalent and unable to make up their mind and determine what their wholehearted goals are. We know that supermarkets are heavily nudged choice environments, with companies using all sorts of marketing techniques to sell specific products. However, most of us manage to stay within the perimeters of our self-determination and avoid alienation. Bart Engelen and Thomas Nys have introduced the concept of “perimeters of autonomy” to refer to the set of identifications, concerns, and commitments that make us who we are. According to the authors, if the nudge changes behavior within this spectrum of possible decisions, it does not violate the agent’s perimeters of autonomy. As if to say that one remains within the bounds of one’s concerns and identifications, the choice is not manipulated by the architecture but genuinely belongs to the agent⁴¹. This claim gives us a realistic idea of what it means to be a self-determining agent. On this account, we position and sometimes reposition the perimeters of our autonomy. Although nudges may at times alter behavior – given that individuals might have acted differently in their absence – this does not necessarily negate autonomy, since one may continue to act autonomously across a spectrum of options provided that such options remain situated within one’s broader parameters of self-determination. This conception of autonomy alleviates many of the concerns that nudging techniques inherently compromise personal freedom. From this perspective, nudges cannot be regarded as an unequivocal violation of individual autonomy. However, defending autonomy alone does not fully address the issue of manipulation. Some nudges may still be manipulative – and such manipulation can be morally troubling. In our perspective, manipulation in these cases occurs through, and at the cost of, individual’s autonomy. That is, manipulation exploits the leeway granted by the boundaries of one’s autonomy – someone may intentionally use what you value or care about to influence your behavior⁴².

In connection with this point, the second major challenge to the claim that nudges respect autonomy centers on the idea that nudges are problematic when they are not “easily resistible”⁴³. According to Yashar Saghai, «an influence does not sufficiently preserve freedom of choice if we are unable to easily resist it»⁴⁴. The easy resistibility criterion thus demands not only that nudges maintain the full range of available options, but also that individuals have a real opportunity to resist the influence being exerted. The easy resistibility criterion holds that nudges must not only preserve the full range of available choices but also provide individuals with a real and accessible opportunity to resist their influence. If a nudge is so forceful that it significantly compromises a person’s ability to make an independent decision, it infringes upon autonomy understood as free-

⁴⁰ See FRANKFURT 1998.

⁴¹ ENGELN, NYS 2020, 137-156.

⁴² See GALLETTI, VIDA 2018, 65-153.

⁴³ In this regard, Christman’s theory of autonomy proves especially insightful. While there are many competing views on personal autonomy, a common thread among several is the emphasis on an individual’s control over the formation of their preferences. From this standpoint, autonomy is less about the specific choices made and more about the process by which those choices are developed – specifically, whether the individual maintains meaningful control over that process. To bring clarity to this idea of control, Christman outlines two essential conditions for personal autonomy: (i) A person A is considered autonomous in acting on a preference P if A did not, or would not have, resisted the development of P when consciously attending to its formation; and (ii) this lack of resistance must not have taken place (or would not have taken place) under circumstances that compromised the individual’s capacity for self-reflection. See CHRISTMAN 1991, 11 ff.

⁴⁴ SAGHAI 2013, 488.

dom of choice – even if the choice set remains formally unchanged. This critique can be reframed as the claim that nudges are either effective or easily resistible, but not at the same time. From this perspective, a line of reasoning presented by Chris Mills questions whether nudges can achieve behavioral influence without compromising individual autonomy⁴⁵. He argues that choice architects, who define the distinctiveness of nudging in terms of its reliance on unreflective, intuitive reasoning, face a trilemma: a nudge is likely to be either ineffective, effective through ethically questionable means, or effective in a way that is conceptually indistinguishable from other evidence-based policy tools⁴⁶. A nudge will be either willfully unavoidable, indistinct from other policies, or ineffective at securing policy outcomes. If nudges are to be treated as a distinct form of policy intervention, they either fall short of their promise as inexpensive and effective tools – because they are less impactful than often suggested – or they depend on mechanisms that blur the boundaries between nudging and more traditional, and potentially more ethically troubling, forms of influence. Furthermore, nudges may be more restrictive than commonly assumed, as they are often harder to consciously resist than proponents claim.

Mill's perspective is closely connected to the concern that nudging may erode democratic institutions, which must therefore be subjected to the full range of safeguards provided by the rule of law. Governmental nudges – along with their justification through libertarian paternalism and the broader use of behaviorally informed policies – have been criticized for weakening essential pillars of democracy, such as public deliberation and political legitimacy⁴⁷. Nudges have been criticized as undemocratic due to their implementation without adequate public deliberation or open discussion. Critics argue that nudges lack political legitimacy, as there is often no transparent or participatory process in place for their evaluation or approval⁴⁸. Policy makers can independently decide to implement nudges «without putting effort into cumbersome legislative and deliberative processes as they do not require political support, parliamentary procedure and debate»⁴⁹. They argue that for social norms to be legitimately imposed on everyone, transparency and public deliberation are essential prerequisites. An additional benefit of deliberation is that it addresses concerns related to limited epistemic access, allowing diverse perspectives and knowledge to inform the development and justification of such norms⁵⁰.

Robert Lepenies and Magdalena Malecka address this concern by arguing that the legal system – a structured body of codified, publicly accessible, and openly debated legal norms – can serve as a social institution that enhances the visibility and accessibility of nudges⁵¹. By embedding nudges within the legal framework, their non-normative and non-cognitive effects on citizens' behavior can be reduced. This integration encourages individuals to reflect on the influences they are exposed to and enables public debate about the (legal) foundations and legitimacy of such influences. In response to this line of critique, Sunstein argues that nudges are often highly salient and, as a result, tend to be transparent and subject to public debate. He acknowledges, however, that nudges can be particularly concerning when they rely on unconscious cognitive processes, emotions, or both – what is referred to as System 1 thinking. Nonetheless, Sunstein maintains that because System 1 processes are an inescapable part of human decision-making, nudges should not be dismissed solely on the basis that they operate through these mechanisms. If such interventions are publicly disclosed and justified on their merits, he contends, they should remain within the bounds of legitimate policy tools.

⁴⁵ MILLS 2018, 395-414.

⁴⁶ MILLS 2018, 410.

⁴⁷ EWERT 2020.

⁴⁸ IVANKOVIC, ENGELEN 2019, 43 ff.

⁴⁹ LEPENIES, MALECKA 2015, 430.

⁵⁰ SCHIAVONE et al. 2014, 103-113.

⁵¹ LEPENIES, MALECKA 2015, 432 ff.

This reference to nudges being public should however be discussed more critically. In *Nudge*, Thaler and Sunstein refer to John Rawls's publicity principle as one of their guiding principles, arguing that this principle is a good guideline for constraining and implementing nudges⁵². As Lepenies and Malecka argue, Rawls did not intend that publicity criterion to apply to all policies, but mainly to the first principles of justice⁵³. In a democratic society, citizens must be informed about the moral foundations of coercive laws and the true reasons underlying their social and political arrangements:

«We propose that nudging in the case of default rules should be complemented by a mechanism of the following kind: every time citizens are nudged towards a choice, via default rules which policy makers regard as leading to socially desirable outcomes, rules should stipulate that citizens ought to be required to make an active choice between default or opt-out option. Our second proposal states that in order to address possible abuse of default rules, lawmakers should be held liable for the introduction of default rules that infringe rights or are in other regards violations of the constitutional order. These default rules could be recommended as being valid or invalid by nudging oversight bodies. For example, a quasi-public, quasi-independent nudging ombudsman could be appointed by parliaments. The task of this body would be to represent a broad variety of societal and legal concerns, as well as diverse academic and scientific perspectives, and to oversee the conformity of nudges generally (not just default rules) to constitutional and basic legal principles»⁵⁴.

Such an approach necessitates considering the broader legal and institutional framework within which nudges are deployed. It encourages a more robust discussion about the constitutional boundaries and the normative appropriateness of using nudges in different areas of law, potentially paving the way for a more coherent and principled model of behaviorally informed governance⁵⁵.

In the next section, we will explore why these concerns take on particular significance within the framework of contemporary constitutional theory, and how current constitutional legal systems might be leveraged to address them.

3. *Constitutionalizing a Critique to Nudging*

While the philosophical debate on the ethics of nudging has developed considerably over the last decade, the legal discourse on the subject remains relatively limited⁵⁶.

This is likely due to the widespread view, mentioned earlier, that nudging is, by definition, legally insignificant – at least in most cases. In fact, this holds true for both the broadest and the narrowest conceptions of nudges. The broadest interpretations regard even constitutional provisions as “nudges”, due to their expressive function. For example, by granting individuals the right to express their thoughts, constitutions not only impose legal constraints on public authorities but also help shape the choice architecture of a given society⁵⁷. At this level, however, nudges raise no particular concern for the legal domain, as the idea that law also serves a symbolic function is neither contested nor problematic within contemporary constitutional theory. In contrast, the narrowest conceptions typically refer to nudges that are purely factual in nature and do not in-

⁵² THALER, SUNSTEIN 2021, 244-245.

⁵³ RAWLS 1999.

⁵⁴ LEPENIES, MALECKA 2015, 434.

⁵⁵ See GALLETTI, VIDA 2018, 362-382.

⁵⁶ ALEMANNO, SPINA 2014; ALEMANNO, SIBONY 2015; KEMMERER ET AL. 2016; CITINO, CAMERLENGO 2023; ZELISTRA 2024; ZELISTRA 2025.

⁵⁷ SUNSTEIN 2018, 10.

volve law-making at all. Think of the well-known example of a fly placed in a urinal to improve aim, or the strategic arrangement of healthy and junk food in cafeterias⁵⁸. Nudges of this kind tend to make constitutional arguments appear somewhat disproportionate. Furthermore, even when nudges in the narrow sense are enshrined in law (such as through default rules), the opt-out option makes it difficult to imagine legal claims or trigger litigation, since individuals might lack standing to challenge provisions they can simply opt out of.

Against this backdrop, the few legal scholars who have taken nudges seriously have generally sought to adapt constitutional guarantees – particularly those linked to the rule of law – to this new form of public intervention. Notably, Alemanno and Spina have discussed the difficulties of applying the principles of legality, impartiality, and judicial review, given the informal nature of nudges⁵⁹. More recently, Zelistra has argued for the development of a legal doctrine capable of distinguishing between different types of nudges, in order to identify those policies that ought to be subject to rule-of-law safeguards due to their significant impact on individual autonomy and their close connection to personal identity⁶⁰. According to Zelistra, the very meaning of rule-of-law safeguards should be revised to resolve tensions with nudging – for example, by acknowledging that the principle of formal legality need not necessarily serve the purpose of enabling individuals to respond autonomously to regulation⁶¹.

By redesigning legal frameworks to accommodate nudges within democratic government, this body of literature tends to imply that nudging constitutes a form of governance whose admissibility in constitutional states is generally indisputable. The idea we want to put forward is that, in this common way of discussing nudging, legal discourse tends to minimize the ethical objections raised by philosophers. In fact, the moral critiques developed in Section 2 are highly relevant within the constitutional dimension as well.

In the legal literature, building on arguments from the moral debate, Morag Goodwin has already advanced the idea that a critique of nudging can be grounded in the principle of human dignity, which lies at the core of constitutionalism. In particular, according to Goodwin, governing through nudges may alter our relationship to the institutions that govern us, disrupting our fundamental status as moral agents and political beings⁶².

Here, we aim to develop a similar status-based argument against certain forms of nudging, grounded in the constitutional values of liberty and equality. Our argument does not outlaw nudges outright but instead calls for a strict scrutiny of their justifiability and empirical effects in certain contexts.

On the one hand, nudging calls into question a basic tenet of constitutional rights theory: that individuals must remain free to determine whether and how to exercise or enjoy their rights. Section 3.1 examines this theoretical tension and argues that, in rights-protected areas, nudges should not be regarded as legally insignificant, but rather as interferences that require constitutional justification. To this end, it may be necessary to develop a legal doctrine aimed at protecting individuals from undue pressure to exercise or enjoy their rights – just as they are protected from actions that discourage them from doing so – and to rethink how the proportionality test operates, since it cannot function in the same way as it does for more traditional forms of regulation, given the distinctive manner in which nudges interfere with rights.

On the other hand, even when nudging does not interfere with the exercise or enjoyment of rights, it nonetheless raises a fundamental question of equality before the law. As people are not all equally nudgeable, nudges might disproportionately benefit better-off individuals in society or,

⁵⁸ THALER, SUNSTEIN 2021.

⁵⁹ ALEMANNI, SPINA 2014; a similar approach is also adopted by CASSESE 2016.

⁶⁰ ZELISTRA 2024.

⁶¹ ZELISTRA 2025.

⁶² GOODWIN 2016, 306–307.

even worse, directly harm vulnerable categories⁶³. More radically, the very fact that people are not all equally nudgeable seems to indicate that nudges inherently discriminate against individuals based on their capacity to resist them, which ultimately depends on their personal conditions. Section 3.2 develops the argument that this leads to an unequal distribution of compliant behaviors, disproportionately affecting the most nudge-vulnerable members of society, which is constitutionally problematic.

Both the constitutional critique grounded in freedom in the enjoyment of rights and the one based on the principle of equality rest on the idea that nudges exploit individuals' (variable) automatic responses to push them towards what is presumed to be their good – or, for that matter, society's. As explained earlier, this is generally the case when System 1 processes are involved. Where nudging does not involve this kind of manipulation, but instead merely provides individuals with information to support a free and informed choice, no specific constitutional objection can be raised against its use⁶⁴. In the end, this appears to be the most relevant distinction from a legal perspective: that between nudges and mere informational interventions⁶⁵.

3.1 *The Liberty Argument: Nudges as Interferences with the Freedom to Exercise Rights*

Constitutions guarantee varying degrees of liberty to individuals. In our time, most of this is done through the recognition of fundamental rights, which protect against hindrances to individuals' freedom to make choices about their lives⁶⁶. While different constitutional orders may protect different choices – and the qualification of a choice as a right is often a matter of political conflict (e.g., recognizing or not the right to a self-determined death) – a common feature of constitutional discourse is that, once a right is recognized as such, the law acknowledges a protected space for free decision-making in its exercise or enjoyment⁶⁷.

The point we aim to argue is that nudging endangers this space for free decision-making and does so in a way that traditional forms of regulation typically do not.

Consider nudges in the health sector, where individuals generally enjoy a constitutional right to decide freely whether to undergo medical treatments. Traditional public interventions in this field include both mandatory treatments and public information campaigns. The former, like other coercive measures, eliminates any space for free decision-making in exercising the right to refuse treatment. The latter, by contrast, empowers individuals by providing relevant information to support autonomous decision-making. Offering substantial incentives or imposing significant costs on individuals' choices, though not common in this area, would also be regarded as an interference with constitutional rights and, like mandatory treatments, would require adequate justification. This is because such measures ultimately alter the choice architecture established by the very existence of a constitutional right.

As we described in Section 2, nudges can either act like public information campaigns, empowering individual autonomy by providing information, or like incentive- or cost-based interventions, if they aim to push people toward the choice the nudger thinks is best. According to pro-nudging theorists, what distinguishes nudges is the nature of the push involved, which is said to preserve substantial freedom of choice by avoiding significant incentives or costs. From a fundamental rights perspective, however, what seems really decisive is the fact that – just like

⁶³ ROBERTS 2018, 1047 ff.

⁶⁴ For a similar conclusion in relation to the human-dignity-based critique, see GOODWIN 2016.

⁶⁵ Cf. MICHAELSEN, SUNSTEIN 2023, 2-3.

⁶⁶ WENAR, CRUFT 2025.

⁶⁷ This seems to be a tenet shared by both will and interest theories of rights. Even interest theorists – despite allowing for inalienable rights – generally oppose the forced enjoyment of those rights, and reject the idea that grounding rights in individuals' interests provides a backdoor justification for wholesale paternalism (see, e.g., RAZ 1988, 199).

incentive- or cost-based interventions – nudges tamper with the protected space for free decision-making, even if the interference is quantitatively minor.

Most constitutional orders do not recognize a general freedom of self-determination, making a broad autonomy-based objection to nudging constitutionally untenable⁶⁸. However, all constitutions recognize fundamental rights, which entail a protected space for free decision-making. It is precisely here that the moral critique of nudging gains relevance in the legal domain. And, just as in the moral domain, the decisive question is: what do we mean by “free”? Should we consider any interference in the protected space for free decision-making incompatible with the right holder’s freedom? Or should admissible interferences be limited to those above a certain threshold of significance? Moreover, should that threshold vary depending on personal circumstances, or be based on a general standard?

Within contemporary constitutional theory, not all conceptions of free choice are considered analytically acceptable⁶⁹.

Recently, for example, Pettit has argued that non-frustration theory should not be accepted. According to the non-frustration paradigm – dating back to Thomas Hobbes – a choice is considered free if a person is not hindered from doing what they prefer. In Hobbes’s account, freedom is consistent with both fear and necessity⁷⁰. On the one hand, even a person who pays their debt out of fear of imprisonment should be considered to have made a free choice, since nothing prevented them from not paying. On the other hand, all voluntary actions are free, even if they proceed from some cause (echoing the compatibilist position in contemporary debates on free will).

A similar conception of free choice could permit any pushes on right holders, as long as no coercion is exercised. Even nudges that purposely exploit human cognitive biases would not appear problematic, since freedom as non-frustration concerns itself only with whether behavior aligns with the subject’s perceived will, and not with the causes of personal preferences.

However, not only is such a conception analytically refutable, as Petit has argued, but it also does not align with contemporary constitutional practices.

When assessing violations of fundamental rights, courts generally consider how personal preferences regarding the exercise of those rights have developed. A particularly striking example in this regard is the well-established doctrine of the “chilling effect”. Starting from *Cumpănă and Mazăre v. Romania*⁷¹, the European Court of Human Rights has held that conventional rights can be violated by acts that dissuade individuals from exercising them (e.g., the abstract provision of prison sentences for defamation may itself violate journalists’ freedom of expression because of their deterring effect)⁷². In these cases, individuals remain non-frustrationally free – they could even be acquitted eventually – but the mere fact that fear of legal proceedings and sanctions interferes with their protected space for decision-making in exercising their rights is legally significant and might constitute a violation of such rights.

Overall, the actual functioning of constitutional guarantees aligns more closely with alternative conceptions of free choice, namely non-interference and non-domination⁷³. Non-interference con-

⁶⁸ Cf., for the German case, where Article 2 of the Basic Law guarantees a general right to self-determination LÜBBE-WOLFF 2016.

⁶⁹ PETIT 2025, 71 ff.

⁷⁰ HOBBS 1651, xxi.

⁷¹ ECHR, *Cumpănă and Mazăre v. Romania*, GC, 17 December 2004, §114 ff. More recently see, e.g., ECHR, *Baka v. Hungary*, GC, 23 June 2016, §§160, 167, 173. Within ECJ’s jurisprudence see *Real Madrid Club de Fútbol*, GC, 4 October 2024, §60 ff. («the proportionality of a sanction, any undue restriction on freedom of expression entails a risk of obstructing or paralyzing future media coverage of similar questions. What matters is the very fact of judgment being given against the person concerned, even where such a ruling is solely civil in nature and the sanction imposed is a minor one»).

⁷² A similar doctrine is established in the jurisprudence of the U.S. Supreme Court. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

⁷³ PETIT 2025, 75 ff.

ceptions require that all options be equally available to individuals, excluding any choice from being considered free if it is subject to interference that alters its architecture (through penalties, costs, or misrepresentation of the options). Non-domination conceptions, as mentioned above, go even further: the mere absence of actual interference is not sufficient. For a choice to be truly free, individuals must be protected from even hypothetical interferences through an adequate legal framework.

Insofar as nudges interfere with spaces of decision-making protected by the recognition of rights, a solid constitutional critique grounded in liberty can be raised. If one accepts that fundamental rights always entail the freedom to exercise or enjoy them, and that the idea of freedom must be construed at least in non-interference terms, then nudges – just like other incentive- or cost-based interventions that alter choice architecture within rights-protected areas – appear constitutionally problematic.

This means that nudges in rights-protected areas (apart from those that merely provide individuals with information) should always be considered interferences, regardless of the significance of the pushes they entail, and should therefore require constitutional justification. This form of interference can be legally conceptualized through doctrines such as the chilling effect, though it may also require developing a reversed version of that doctrine to address cases where individuals are pushed to exercise their rights. Positive pushes, in fact, should be considered equally problematic, unless one is willing to functionalize rights for the benefit of society rather than for the individual who holds them⁷⁴. Such a doctrine should protect the negative dimension of rights, including, for example, the right not to undergo medical treatment, not to express oneself, not to join an association, not to vote, and so forth.

Of course, especially in cases where a mandate could be constitutionally justified, nudging might be as well. A constitutional critique grounded in liberty does not rule out nudges as a policy option outright. It simply requires that they be taken as seriously as any other interference with the exercise or enjoyment of fundamental rights, and that courts be allowed to assess their justifiability accordingly.

In this regard, the way nudges interfere with rights is not irrelevant. The fact that nudges formally leave individuals with the possibility to exercise their rights tends to make them appear less intrusive than mandates. This could suggest that, in cases where imposing a mandate would be difficult to justify, a nudge might be more easily accepted. However, scrutiny over their justification should consider that nudges function differently from mandates: they do not directly restrict the exercise of fundamental rights but rather affect the effectiveness of the freedom of choice entailed by those rights. The proportionality test should therefore be framed at this level, and not by comparing nudges with different types of interferences. For example, when it comes to the requirement of necessity, one should ask whether less manipulative measures – such as more

⁷⁴ For rights-theory consequences of this view, see nt. 67. Within the preparatory works of the Italian Constitution, the distinction between the conceptions of liberty traditionally adopted by constitutional theory and alternative conceptions – whereby liberty is framed not as an individual entitlement but as a means to advance collective or societal interests – emerges clearly in the debates on Article 2, where communist, socialist, and (some) catholic framers argued for the latter, explicitly distinguishing it from the idea codified in the 1789 Declaration (see *Prima Sottocommissione della Commissione per la Costituzione*, 1 October 1946: «La Pira dichiara che la sua preoccupazione è stata di dare della libertà un concetto diverso da quello che è alla base della dichiarazione del 1789 [...] È, questo, un concetto negativo della libertà; invece nella Costituzione italiana si vuole introdurre un concetto positivo di questa libertà, il concetto di una libertà finalizzata. Mentre la Costituzione del 1789, e in genere le costituzioni a tipo liberale, parlano allo Stato per limitarne la libertà nei confronti dei diritti imprescrittibili dell'uomo, la nostra Costituzione vuole parlare non soltanto allo Stato, per limitare la sua autonomia circa i diritti della persona, ma anche alla persona, per orientare la sua libertà e limitarla rispetto ai diritti della persona. Quindi la nostra Costituzione dovrebbe parlare contemporaneamente allo Stato, per limitare la sua libertà o meglio per finalizzarla, e alla persona pure per finalizzarne la libertà. [...] Togliatti: Le libertà sono garantite dalla Costituzione, ma debbono essere esercitate in un determinato modo»). In the end, although rights were counterbalanced by duties of political, economic, and social solidarity, the proposal to functionalize liberty did not make it into the final text of the Constitution. See also PALADIN 2008 [1997], 161.

transparent or informational nudges, or nudges that operate more within individuals' "perimeters of autonomy" –⁷⁵ could achieve the same objective. Similarly, with respect to the essential core of the right as a limit to permissible interference, courts should verify whether the nudge preserves a sufficiently substantial space for free decision-making (maybe in terms of effective resistibility), and not whether the minimum substantive content of the right is guaranteed⁷⁶. Only a proportionality test constructed at this level – drawing on the debate outlined in Section 2 – would allow for the constitutionalization of autonomy-based critiques, creating space for legal challenges aimed at assessing how far such behavioral interventions can be said necessary in a democratic society, which is ultimately a matter of constitutional politics.

3.2 *The Equality Argument: Nudges as Interventions with Inherently Unequal Impact*

Even if it has received far less theoretical attention than autonomy-based critiques, a stronger, principled constitutional objection to the admissibility of nudging can be grounded in the principle of equality.

Indeed, nudges are interventions with a structurally unequal impact, because their effectiveness depends on personal characteristics of the nudgees. In particular, factors such as wealth, education⁷⁷, and intellectual capacity or disposition⁷⁸ influence how individuals respond to a given nudge. On the contrary, traditional forms of regulation, such as mandates, generally apply equally to everyone (e.g., a criminal prohibition), which makes hard-paternalistic measures⁷⁹ comparatively preferable from a strictly egalitarian standpoint.

Our argument here does not concern the variability in compliance *per se*, which exists for every form of regulation, but rather the variability in the substantive burden imposed on the nudgees. In this respect, a distinction can be drawn between traditional forms of regulation and nudges, much like the distinction between sanctions affecting personal liberty and those that are pecuniary. A prison sentence tends to affect individuals in broadly similar ways, whereas a monetary sanction – if imposed without regard to a person's economic condition – can be disproportionately burdensome for poorer individuals. This unequal afflictive potential raises constitutional concerns⁸⁰, prompting many legal systems to adopt models for determining economic sanctions that reflect their adverse impact on equality before the law⁸¹. However, despite nudges being entirely analogous in this respect, no effective solutions have yet been explored to mitigate this inherent threat.

Since at least the 1970s, a strand of constitutional theory and practice has emphasized the inadequacy of formal ideals of equality. These approaches have been challenged for failing to account for how individuals are socially differentiated, for overlooking the role of political and economic structures in creating and reinforcing such differentiations, and for failing to ensure that individuals can participate equally in making the laws they live under⁸². Within European constitutional legal orders, more substantive conceptions of equality have been codified in post-WWII constitutions. For example, the Italian Constitution, at Article 3, explicitly recognizes it as «the duty of the Republic to remove those obstacles of an economic or social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country».

⁷⁵ See § 2.3.

⁷⁶ See also CITINO, CAMERLENGO 2023, V, who advanced a comparable line of reasoning.

⁷⁷ ROBERTS 2018.

⁷⁸ VIALE 2018, 29.

⁷⁹ For cases in which hard-paternalistic measures are usually justified within contemporary constitutional systems – such as to protect vulnerable individuals or to uphold moral values – see BRESCIANI 2021.

⁸⁰ FERRAJOLI 2000 [1989], 386, 415; WHITMAN 2009.

⁸¹ FARALDO-CABANA 2018.

⁸² LEVER 2025.

In one of the few studies on the relationship between nudging and distributive justice, Jessica Roberts highlights empirical data suggesting that individuals with lower income, sophistication, or education may not respond to nudges as intended⁸³. In the cases Roberts discusses, more vulnerable individuals appear “nudge-proof”, i.e., unable to benefit from the interventions. For example, studies have shown that employer-sponsored wellness programs – incentivized by the government in the US context – tend to achieve greater engagement and success among advantaged populations, such as individuals who are already healthy, work in white-collar jobs, hold management positions, or have some higher education. In contrast, lower-income individuals are more likely to experience poor health and are less likely to participate in such programs⁸⁴. If this is the case, where those most in need of the intervention are less responsive, and those who are more responsive are already better off, nudging risks exacerbating existing inequalities⁸⁵. That is precisely the opposite of what a constitutional government bound to the value of equality should pursue.

More troubling still is the possibility that disadvantaged groups, precisely because of their conditions, may be less able to resist nudges. Sunstein himself notes that empirical studies have shown that poor people are less likely to opt out of a default rule⁸⁶, suggesting that this «could depend on the fact that low-income workers have a great deal to worry about and so are less likely to take the trouble to think through and alter the default rule»⁸⁷ or «because they are not confident that opting out makes best sense»⁸⁸. For Sunstein, the regressive impact of nudges “weakens” the case for their use and calls for balancing measures, provided such measures do not undermine the original objectives of the nudgers⁸⁹.

From a constitutional perspective, however, the unequal impact of nudges raises serious concerns about the legitimacy of this kind of intervention, requiring strict scrutiny of their effects and a design that is sensitive to this underlying tension.

At the particular level, where empirical data can demonstrate a regressive effect, the constitutional legitimacy of a given policy appears highly questionable, especially in legal contexts that have codified the principle of equality in both its formal and substantive dimensions. Moreover, an equality-based critique might undermine nudging even at the general level. A state measure that structurally discriminates against individuals on the basis of their personal conditions, such as wealth, education, or cognitive capacity, seems hardly justifiable under the standards commonly accepted in contemporary constitutional discourse⁹⁰. If nudges benefit only the better-off or, worse yet, disproportionately shift compliant behavior (and thus the burdens of public policy) onto already disadvantaged groups, they violate the very core meaning of equality before the law. When this occurs, the case for nudges is not merely weakened, as Sunstein suggests, but fails altogether.

⁸³ ROBERTS 2018, 1060.

⁸⁴ ROBERTS 2018, 1055.

⁸⁵ ROBERTS 2018, 1062.

⁸⁶ SUNSTEIN 2016, 174-175.

⁸⁷ SUNSTEIN 2016, 174-175.

⁸⁸ ROBERTS 2018, 179.

⁸⁹ ROBERTS 2018, 179.

⁹⁰ E.g., within US constitutional jurisprudence, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), declared unconstitutional a one-dollar poll tax, affirming that classifications based on wealth or property, like those based on race, are traditionally disfavored. Similarly, in the European context see, for instance, ECHR, *Chassagnou and Others v. France*, GC, 29 April 1999, where the Court found a violation of Article 14 in a case regarding hunting rights, as within the category of landowners opposed to hunting for ethical reasons, only small landowners were required to tolerate the use of their property against their conscience, creating a difference in treatment between large and small landowners that was disproportionate to the aim pursued by the Government. In the Italian context, where a substantive conception of equality is codified, the Constitutional Court recently struck down a provision setting the amount of fines replacing short custodial sentences, holding that they were far beyond what most people can currently afford, thereby transforming the fine in lieu of prison into a privilege for the wealthy, thus violating Article 3.2 (see ItCC, judgment no. 28/2022).

For these reasons, constitutional provisions codifying the value of equality – such as the US Equal Protection Clause, the EU principle of equality, and similar norms – could constitute a basis for legal challenges against nudges, even in areas which are not rights-protected. Although legal protections vary depending on how different systems currently approach anti-discrimination, the broader scope of an equality-based approach to the constitutionality of nudging policies may ultimately prove more effective than autonomy-based critiques, just as it has in many other areas of particular social importance.

4. Conclusion

This paper has sought to show how ethical issues of nudging can be translated into constitutional arguments. We do not claim that current constitutional frameworks categorically forbid nudging, but rather that they may require nudges to be justified, and that such justifications may themselves be constitutionally contestable. This, of course, does not mean that no reforms are needed if behavioral regulation is to become the norm. It simply suggests that we are not entirely without constitutional defenses as things stand.

To this aim, we first outlined the autonomy-based critiques of nudging. From this perspective, a key distinction is between System 1 nudges, which rely on or activate cognitive heuristics, and nudges that merely provide information. Although distinguishing between the two may sometimes require a case-by-case assessment, especially given that epistemic nudges can also carry manipulative potential similar to System 1 interventions, the distinction remains important, as informative nudges are generally not constitutionally problematic. Informative nudges do not appear to raise constitutional concerns different from those posed by other informational interventions by public authorities, which generally require the information to be accurate and the knowledge-production process to meet the standards of a democratic society.

Nudges pose a distinct risk when used as a regulatory tool that affects and limits individual autonomy. In this regard, the analysis of the ethical debate reveals that the critiques are grounded in different conceptions of autonomy, each offering varying degrees of support for the objection to nudging. Within contemporary constitutional theory, a strong conception of autonomy is commonly accepted in rights-protected areas. Since the recognition of fundamental rights implies the existence of a protected space for free decision-making in their exercise and enjoyment, nudging within these areas should be regarded as an interference that requires adequate justification. Even nudges that push individuals to exercise or enjoy their rights constitute interferences at this level, as individuals are generally considered free not to exercise their rights. Well-established legal doctrines, such as the chilling effect doctrine, may help conceptualize this type of interference, which is distinct in nature from that posed by more traditional legal measures. Moreover, arguments developed in the ethical debate can help inform a suitable proportionality test for such interferences – for example, the *substantial noncontrol* criterion could serve as a limit to the admissibility of a nudge, just as the essential core of a right functions in cases of substantive interference.

According to these principles, for instance, a green nudge aimed at informing individuals about their energy consumption and ways to reduce it would raise no significant concerns, provided that the information is accurate and presented in a non-manipulative way. In contrast, a nudge consisting of a notice that most taxpayers have already paid their taxes – since it operates by encouraging conformity to a social norm, exploiting a well-studied System 1 mechanism – should be regarded as an interference with the right to property. The proportionality of such a behavioral intervention should therefore be assessed accordingly, evaluating whether it is suitable and necessary to achieve a legitimate aim in a democratic society. In most cases and contexts, such an intervention is likely to be considered justified; nonetheless, this legal framing creates a space for constitutional contestability of behavioral regulation. In this respect, our point is not that nudges

are always bad, but rather that the burden of proving their legitimacy lies with the nudger, who can no longer avoid the complex conceptual and empirical questions involved in measuring liberty and autonomy.

Finally, drawing on the idea, already present in the ethical debate, that individuals possess different degrees of autonomy, we proposed a potential equality-based objection to nudging, which remains undertheorized in both the ethical debate and legal scholarship. If the ability to resist or benefit from nudges depends on personal conditions such as wealth, education, or cognitive capacity, behavioral regulation risks having a structurally unequal impact. This can exacerbate existing inequalities by disproportionately placing the burden of nudge-compliant behavior on already disadvantaged groups, which is problematic in terms of both formal equality before the law and the principle of substantive equality.

Just like the liberty-based objection, an equality-based one does not rule out nudging altogether. Nonetheless, it requires a strict scrutiny of the empirical effects of nudging policies and, if they do in fact produce discriminatory outcomes, provides a basis for their legal contestability. More broadly, developing an argument grounded in equality appears particularly important in a debate – such as the one on the ethics of nudging – that often focuses too narrowly on the preservation of individual liberty. By contrast, constitutional tradition cannot accept to defend liberty at the expense of equality, particularly when new forms of regulation threaten to reinforce the very structural social hierarchies that constitutions were designed to progressively break down.

References

- ALEMANNI A., SIBONY A. (eds.) 2015. *Nudge and the Law. A European Perspective*, Hart Publishing.
- ALEMANNI A., SPINA A. 2014. *Nudging Legally: On the Checks and Balances of Behavioral Regulation*, in «International Journal of Constitutional Law», 12(2), 2014, 429-456.
- BALDWIN R. 2014. *From Regulation to Behaviour Change: Giving Nudge the Third Degree*, in «Modern Law Review», 6, 2014, 831-857.
- BELLAMY R., KING J. (eds.) 2025. *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press.
- BERLIN I. 2017. *Two Concepts of Liberty*, in D. MILLER (ed.), *The Liberty Reader*, Routledge, 33-58.
- BOVENS L. 2009. *The Ethics of Nudge*, in T. GRÜNE-YANOFF S., OVE HANSSON S. (eds.), *Preference Change. Approaches from Philosophy, Economics and Psychology*, Springer, 207-219.
- BRESCIANI P.F. 2021. *Prospettive sulla legge paternalista come categoria giuridica*, in «Giurisprudenza Costituzionale», 1, 2021, 223-251.
- CASSESE S. 2016. *Exploring the Legitimacy of Nudging*, in KEMMERER A., MÖLLERS C., STEINBEIS M., WAGNER G. (eds.), *Choice Architecture in Democracies. Exploring the Legitimacy of Nudging*, Hart, 241-246.
- CHRISTMAN J. 1991. *Autonomy and Personal History*, in «Canadian Journal of Philosophy», 21, 1991, 1-24.
- CITINO Y., CAMERLENGO Q. 2023. *Les “nudges” et le droit constitutionnel: une alliance prometteuse ou risquée?*, 1, 2023.
- CONGIU L., MOSCATI I. 2022. *A Review of Nudges: Definitions, Justifications, Effectiveness*, in «Journal of Economic Surveys», 36, 2022, 188-213.
- DWORKIN G. 2005. *Moral Paternalism*, in «Law and Philosophy», 3, 2005, 305-319.
- DWORKIN G. 1988. *The Theory and Practice of Autonomy*, Cambridge University Press.
- ENGELN B. 2019. *Nudging and Rationality: What is there to Worry?*, in «Rationality and Society», 2, 2019, 204-232.
- ENGELN B., NYS T. 2020. *Nudging and Autonomy: Analyzing and Alleviating the Worries*, in «Review of Philosophy and Psychology», 1, 2020, 137-156.
- EWERT B. 2020. *Moving Beyond the Obsession with Nudging Individual Behaviour: Towards a Broader Understanding of Behavioural Public Policy*, in «Public Policy and Administration», 3, 2020, 337-360.
- FADEN R.R., BEAUCHAMP T.L. 1986. *A History and Theory of Informed Consent*, Oxford University Press.
- FARALDO-CABANA P. 2018. *Pecuniary Punishments*, in «Oxford Research Encyclopedia of Criminology».
- FERRAJOLI L. 2000. *Diritto e ragione. Teoria del garantismo penale*, Laterza (1989).
- FRANKFURT H. 1998. *The Importance of What We Care About*, Cambridge University Press.
- FUREDI F. 2011. *Defending Moral Autonomy Against an Army of Nudgers*, Available online: <https://www.spiked-online.com/2011/01/20/defending-moral-autonomy-against-an-army-of-nudgers/>.
- GALLETTI M., VIDA S. 2018. *Libertà vigilata. Una critica del paternalismo libertario*, IF Press.
- GLOD W. 2015. *How Nudges Often Fail to Treat People According to Their Own Preferences*, in «Social Theory and Practice», 4, 2015, 599-617.
- GOODWIN M. 2016. *Architecture, Choice Architecture and Dignity*, in KEMMERER A., MÖLLERS C., STEINBEIS M., WAGNER G. (eds.), *Choice Architecture in Democracies. Exploring the Legitimacy of Nudging*, Hart, 285-308.
- GRÜNE-YANOFF T. 2012. *Old Wine in New Casks: Libertarian Paternalism Still Violates Liberal Principles*, in «Social Choice and Welfare», 4, 2012, 635-645.
- HANSEN P.G., JESPERSEN A.M. 2013. *Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy*, in «European Journal of Risk Regulation», 1, 2013, 3-28.
- HAUSMAN D.M., WELCH B. 2010. *Debate: To Nudge or Not to Nudge**, in «Journal of Political Philosophy», 1, 2010, 123-136.

- HAMILTON P. 2018. *A Republican Argument Against Nudging and Informed Consent*, in «HEC Forum», 3, 2018, 267-282.
- HOBBS T. 1651. *The Leviathan*.
- IVANKOVIĆ V., ENGELEN B. 2019. *Nudging, Transparency, and Watchfulness*, in «Social Theory and Practice», 1, 2019, 43-73.
- LEPENIES R., MAŁECKA M. 2015. *The Institutional Consequences of Nudging – Nudges, Politics, and the Law*, in «Review of Philosophy and Psychology», 6, 2015, 427-437.
- LEVER A. 2025. *Equality*, in BELLAMY R., KING J. (eds.), *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press.
- LÜBBE-WOLFF G. 2016. *Constitutional Limits to Health Related Nudging – a Matter of Balancing*, in KEMMERER A., MÖLLERS C., STEINBEIS M., WAGNER G. (eds.), *Choice Architecture in Democracies. Exploring the Legitimacy of Nudging*, Hart, 247-254.
- KAHNEMAN D. 2011. *Thinking, Fast and Slow*, Allen Lane and Penguin Books.
- KEMMERER A., MÖLLERS C., STEINBEIS M., WAGNER G. (eds.) 2016. *Choice Architecture in Democracies. Exploring the Legitimacy of Nudging*, Hart.
- MACKAY D., ROBINSON A. 2016. *The Ethics of Organ Donor Registration Policies: Nudges and Respect for Autonomy*, in «The American Journal of Bioethics», 11, 2016, 3-12.
- MICHAELSEN P., SUNSTEIN C.R. 2023. *Default Nudges. From People's Experiences to Policymaking Implications*, Palgrave Macmillan.
- MILLS C. 2018. *The Choice Architect's Trilemma*, in «Res Publica», 3, 2018, 395-414.
- NOGGLE R. 2018. *Manipulation, Salience, and Nudges*, in «Bioethics», 3, 2018, 164-170.
- NOGGLE R. 1996. *Manipulative Actions: A Conceptual and Moral Analysis*, in «American Philosophical Quarterly», 1, 1996, 43-55.
- PALADIN L. 2008. *Saggi di storia costituzionale*, Il Mulino (1997).
- PETTIT P. 2025. *Liberty*, in BELLAMY R., KING J. (eds.) 2025, *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press.
- PETTIT P. 1996. *Freedom as Antipower*, in «Ethics», 3, 1996, 576-604.
- RAWLS J. 1999. *A Theory of Justice*, Belknap Press of Harvard University Press.
- RAZ J. 1988. *The Morality of Freedom*, Oxford University Press.
- ROBERTS J.L. 2018. *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, in «Michigan Law Review», 116(6), 2018, 1045-1066.
- SAGHAI Y. 2013. *Salvaging the Concept of Nudge*, in «Journal of Medical Ethics», 8, 2013, 487-493.
- SCHIAVONE G., DE ANNA G., MAMELI M., REBBA V., BONIOLO G. 2014. *Libertarian Paternalism and Health Care Policy: A Deliberative Proposal*, in «Medicine, Health Care and Philosophy», 1, 2014, 103-113.
- SUNSTEIN C.R. 2016. *The Ethics of Influence*, Cambridge University Press.
- SUNSTEIN C.R. 2018. *Prefazione*, in VIALE R., *Oltre il nudge. Libertà di scelta, felicità e comportamento*, Il Mulino, 9-12.
- SUNSTEIN C.R. 2014. *Why nudge: The Politics of Libertarian Paternalism*, Yale University Press.
- THALER R.H., SUNSTEIN C.R. 2021. *Nudge: The final edition*, Yale University Press.
- TVERSKY A., KAHNEMAN D. 1991. *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, in «The Quarterly Journal of Economics», 4, 1991, 1039-1061.
- VIALE R. 2018. *Oltre il nudge. Libertà di scelta, felicità e comportamento*, Il Mulino.
- VUGTS A., VAN DEN HOVEN M., DE VET E., VERWEIJ M. 2020. *How Autonomy is Understood in Discussions on the Ethics of Nudging*, in «Behavioural Public Policy», 4, 2020, 108-123.
- WALDRON J. 2014. *It's All for Your Own Good*, The New York Review of Books. from <http://www.nybooks.com/articles/archives/2014/oct/09/cass-sunstein-its-all-your-own-good/>.
- WENAR L., CRUFT R. 2025. *Rights*, in «The Stanford Encyclopedia of Philosophy».

- WHITMAN J.Q. 2009. *Equality in Criminal Law: Two Divergent Western Roads*, in «*Journal of Legal Analysis*», 1, 2009, 119-165.
- WILKINSON T.M. 2013. *Nudging and Manipulation*, in «*Political Studies*», 2, 2013, 341-355.
- ZELISTRA R. 2024. *Nudging and the Safeguards of the Rule of Law*, in «*German Law Journal*», 25, 2024, 750-771.
- ZELISTRA R. 2025. *Formal Legality for Nudges*, in «*Ratio Juris*», 38(1), 2025, 45-62.

contributors

CLAUDIO AGÜERO SAN JUAN
University Alberto Hurtado

JORDI FERRER BELTRÁN
University of Girona

GIOVANNI BISOGNI
University of Salerno

CAROLINA FERNÁNDEZ BLANCO
University of Girona

GIORGIO BONGIOVANNI
University of Bologna

PIER FRANCESCO BRESCIANI
University of Bologna

MARCO BRIGAGLIA
University of Palermo

PAOLO CAPRIATI
University of Palermo

PIERLUIGI CHIASSONI
University of Genova

GLENN DE MUYNCK
University of Bologna

RICCARDO GUASTINI
University of Genoa

ANDREJ KRISTAN
University of Bologna

M. VICTORIA KRISTAN
University of Bologna

LUISA LUGLI
University of Bologna

MARCO MAZZONE
University of Catania

PAULA MORGADO FERNÁNDEZ
University of Chile

LEONARDO PIERDOMINICI
University of Bologna

ALBERTO PUPPO
Instituto Tecnológico Autónomo de México

MARIA CRISTINA REDONDO
University of Genoa

FRANCESCO RIZZI BRIGNOLI
University of Bologna

GIUSEPPE ROCCHÈ
University of Palermo

ARIANNA ROSSI
University of Bologna

CORRADO ROVERSI
University of Bologna

FABIO RUWETT
Visual designer

NATALIA SCAVUZZO
Autonomous University of Madrid

ALDO SCHIAVELLO
University of Palermo

MARCO SEGATTI
University of Genoa

CHIARA VALENTINI
University of Bologna

VÍCTOR GARCÍA YZAGUIRRE
University of Tarapaca

JUAN PABLO ZAMBRANO TIZNADO
University of La Frontera

SILVIA ZULLO
University of Bologna

composed by Fabio Ruwett
published by Diritto & Questioni pubbliche
February 2026