CHAPTER 1

THE RULE OF LAW: A CRITICAL REAPPRAISAL

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1 THE RETURN OF THE RULE OF LAW

The "rule of law" has been one of the most popular formulas employed by Western political and legal thinkers in the last two decades of the twentieth century that followed the long post-war period.[1] Yet, as well as the expression "rule of law" which, though typical of Anglo-Saxon culture, is nonetheless used everywhere, the theoretical lexicon of the European social sciences also includes other, analogous expressions, such as the German *Rechtsstaat*, the French *État de droit*, the Italian *Stato di diritto*, and the Spanish *Estado de derecho*.[2] Although in Europe these expressions – rule of law, on the one hand, *Rechtsstaat* and the other continental expressions, on the other – are used promiscuously, their conceptual equivalence is far from being straightforward. Indeed, their terminological differences, and the ensuing well-known translation problems,[3] epitomize the diversity of cultural contexts and the relative independence of the theories advanced. In fact, the different expressions refer to two clearly distinct political and legal traditions. The "rule of law" is deeply rooted in Great Britain's political and constitutional history, from the Norman conquest to modern times, and has left significant traces upon the constitutional structures of the United States of America and of many other countries influenced by British institutions. The *Rechtsstaat* was first developed by German liberal culture in the second half of the nineteenth century and later spread throughout Europe, especially affecting the public law of both unified Italy and the French Third Republic.

For these reasons, the thesis of the conceptual equivalence of the "rule of law" with the *Rechtsstaat (État de droit, Stato di diritto, Estado de derecho)* – this is one of the main theses of the present essay – needs to be accurately argued for, both on a historical and a conceptual level. However, the renewed value of the "rule of law" formula and its analogous continental expressions corresponds to given political circumstances and cultural beliefs that seem to justify a theoretical approach

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uniting Anglo-Saxon and continental notions within the general category of the "rule of law". Following the downfall of "actually existing socialism" and the crisis of representative institutions, the rule of law has been brought back to life in Western culture in close connection with the doctrine of individual rights (or "human rights"): one need only think of authors such as Ronald Dworkin, Ralf Dahrendorf, Jürgen Habermas, Norberto Bobbio, and Luigi Ferrajoli.[4] Thus, the rule of law has been revived as a political and legal theory that gives pre-eminence to the protection of human rights, i.e. rights which have been defined by a great number of nineteenth- and twentieth-century national constitutions and international conventions, in particular the rights to life, personal security, freedom, private property, and contractual autonomy, as well as political rights.

Within such a historical setting, defined by Bobbio as "the age of rights",[5] to support the rule of law means to advocate the protection of individual rights as the primary aim of political institutions and legal bodies. Contrary to recurrent formalistic interpretations of the rule of law, it may be argued that its institutional characteristics are nowadays explicitly revived by Euro-continental and Anglo-Saxon theorists in the light of an "individualistic" political philosophy. Not only does such a philosophy relinquish social organicism, collectivist utilitarianism, and statism, but it also subordinates the public dimension and the general interest to the absolute primacy of individual values and expectations.[6] The current proponents of the rule of law, both in the Anglo-Saxon world and in continental Europe, view the attainment of such values and expectations as the primary source of legitimization of the political system. However, this view does not entail either underestimating the different normative and institutional particularities of the two traditions or overlooking the plurality of political and constitutional developments that have arisen within each of them.

2 A CONSTRUCTIVIST INTERPRETATION

The theoretical lemma "rule of law" is nowadays a prestigious formula of Western political and cultural language. In particular, political writers and journalists increasingly use this phrase and are inclined to present it as an institutional characteristic, which helps define Western civilization and its contrasts with other civilizations, especially Islamic and Chinese-Confucian cultures. Yet the conceptualization of the "rule of law" remains particularly uncertain and controversial.[7] It is widely recognized that specialist literature has so far devoted little attention either to analytically

defining the state characterized by the rule of law, from an institutional and normative perspective, or to differentiating it from contiguous notions, such as "legal state", "liberal state", "democratic state", "constitutional state", with which it is often erroneously or purposely identified. In continental Europe, theoretical–political handbooks and encyclopedic dictionaries mostly do not deal with the above matter, while the corresponding Anglo-Saxon texts exclusively refer to English constitutional history and to the specific Anglo-Saxon notion of the rule of law, thus ritually paying homage to Albert Venn Dicey's work.[8]

In this manner, a long tradition of blurred definitions is perpetuated: Carl Schmitt, in the early 1930s, had already argued that the expression *Rechtsstaat* "can stand for as many different things as the word *Recht* [law] itself and for as many different concepts as the many institutional arrangements implied by the word *Staat* [state]". He also sarcastically added that it was understandable "that propagandists and lawyers of all kinds gladly used the word to slander their adversaries for being enemies of the rule of law".[9] Even in Italy, 20 years later, authors such as Fernando Garzoni lamented the conceptual indeterminacy and ambiguity of the notion *Stato di diritto*.[10] Garzoni argued that the long-standing popularity of the notion, like that of "natural law", was due precisely to its pliability and ideological fungibility.[11] Revealingly, even theorists of German National Socialism and Italian Fascism, such as Otto Koellreutter, Heinrich Lange, and Sergio Panunzio, were able to claim the notion *Rechtsstaat* or *Stato di diritto* for their own political models.[12]

Quite obviously, it would be naive to seek a semantically univocal and ideologically neutral definition of the "rule of law". Given the many legal and institutional determinations, which have been – and may be – ascribed to the rule of law, such a "scientistic" approach would end up by *tout court* dismissing the concept and its related expressions.[13] However, it is obvious that, using similar criteria, the entire conceptual apparatus of political and legal theory – even of social sciences in general – could be expunged from scientific communication on the grounds of being deemed imprecise, unascertainable, and contaminated by evaluative judgements.

If, on the contrary, we ground our analysis on epistemological assumptions drawn from cognitive conventionalism and pragmatism, what matters is not the semantic definiteness and ideological neutrality of theories advanced in this respect; rather, it is their communicative clarity and usefulness within enunciative conventional ambits, aimed at understanding and solving problems.[14] By endorsing such a "weak epistemology", social theory is thus entrusted with the task of elaborating "coherent interpretations" – rather than explicative definitions – of the

concerned subjects and of providing persuasive grounds for their acceptance. This can be done and, in the writer's opinion, must still be done with respect to the rule of law.

It follows that a coherent theoretical understanding of the rule of law must not merely provide detailed historical and philological evidence of single experiences and their corresponding literature;[15] rather, it must detect the ethical assumptions, legal models, and institutional forms inherent in different experiences which all have – or have been – referred to the rule of law. Such a kind of interpretation is, by nature, "constructivist", i.e. selective and conjectural, and this inevitably leaves the interpreter ample room for discretion: he will be free to decide, at least, which historical experiences are to be included within a "coherent" general interpretation. In our case, for instance, we shall mainly focus on the "external history"[16] of the rule of law, rather than on the developments of its British or German "internal history". Its "external history" is a theoretical development that begins with the process leading to the rise of European modern states and can be properly reconstructed only by referring, in implicit though discriminating terms, to classical liberal thinking, from Locke to Montesquieu, from Kant to Beccaria, and from Humboldt to Constant. Such a historical scenario includes diverse experiences, such as the English eighteenth-century civil wars, the rebellion of Britain's American colonies against their homeland, French revolutionary constitutionalism, the process leading to the German Reich, and the institutions of the French Third Republic.

Such an interpretative approach will pay little attention to the German traditionalist thinking of the first half of the nineteenth century – whose main exponents are Friedrich Julius Stahl, Rudolf von Gneist, Robert von Mohl, and Otto Bähr – though it cannot forget that such philosophical currents did indeed prompt the creation of the continental notion of "rule of law" (*Rechtsstaat*).[17] It will also neglect the (embarrassing) circumstance that the rule of law was established in North America not only within the context of the well-known rebellion against the colonial motherland but also within that of the genocide of American natives, and also that it coexisted for a long time with the slavery of African Americans and, later on, with racial discrimination against them.[18] Moreover, such an approach will overlook the theses propounded by Nazi theorists who, unlike Carl Schmitt and sometimes in contrast with him, whilst not rejecting the rule of law, sought to render it compatible with the kind of totalitarian state they depicted as a *nationaler Rechtsstaat*: they argued that the totalitarian state represented a sort of *Rechtsstaat*, in that it was a 'legal state' (*Gesetzesstaat*), which

used law (*Gesetz*) as a "general and abstract" normative instrument, and guaranteed the political independence of the judiciary.[19] Finally, we shall not deal with constitutional doctrines and experiences that have referred to the rule of law without providing any particularly original theoretical contribution: this is the case, for example, for Vittorio Emanuele Orlando's work, which, within the monarchic-parliamentary context of Giolitti's Italy, referred to the state-centred model of the German *Rechtsstaat*.[20]

3 THE HISTORICAL EXPERIENCES OF THE RULE OF LAW

Within such an interpretative framework, four key experiences of the "external history" of the rule of law deserve our full theoretical appraisal: (1) the English rule of law; (2) the North American version of the rule of law; (3) the German *Rechtsstaat*; and (4) the French *État de droit*. We will argue that the theoretical elements drawn from these four historical experiences may be consistently united within a general model. This should provide a solid theoretical identity for the notion of the "rule of law", meant as the normative and institutional structure of a modern state within which the legal system – and not other functional subsystems – is entrusted with the task of guaranteeing individual rights, curbing the natural tendency of political power to expand and act arbitrarily.

3.1 The English rule of law

In 1867, William Edward Hearn wrote that wind and rain could enter the hut of the pauper, yet not the king. Each English citizen, whether a civil servant or a nobleman, was equally subject to law and to the common law courts.[21] Hearn introduced the expression "rule of law", as Albert Venn Dicey acknowledged in the introductory pages of his famous and authoritative treatise, *Introduction to the Study of the Law of the Constitution*.[22]

The constitutional "guiding principles" of the English rule of law include, first of all, individuals' legal equality, irrespective of their status and economic conditions. Notwithstanding individuals' deep social inequality – which is deemed to be obvious – all citizens are subject, with no exceptions, to the general rules of ordinary law, in particular to the ones regarding criminal punishment and patrimonial integrity. Such rules are enforced not by special courts, such as the Privy Council and the Star Chamber – which characterized English history – or as French administrative courts[23] (as claimed by Dicey), rather by ordinary courts.

Hence, individuals' equality before the law implies the rejection of both the granting of personal privileges and the arbitrary or excessively discretionary use of executive power.

The second "guiding principle" is the normative synergy between Parliament and judiciary, through which the settlement of single cases is in England the result of decisions stemming from two sources that are in fact, if not certainly in law, equally sovereign. On the one hand, there is the legislative sovereignty of Parliament, i.e. the Crown, the House of Lords, and the House of Commons, according to the famous "King in Parliament" formula. On the other hand, there is the common law, in the hands of ordinary courts. The former is a formal legal source; the latter is an actual legal source. Ordinary courts are not entitled to question Parliament's acts and cannot pretend to be "guardians of the constitution". Ordinary courts are obliged to apply the law rigorously; yet, they are to do so in a very complex manner, being also bound by legal "precedents", i.e. their own and autonomous jurisprudential tradition. Moreover, common lawyers have the power to interpret the law and such an instrument in their hands can – as they are perfectly aware – render the relationship between legislative acts and sentences quite flexible. In this respect, Dicey writes as follows:

> Parliament is the supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will become subject to the interpretation put upon it by the judges of the land, and the judges [...] are influenced by the feelings of magistrates no less than by the general spirit of the common law.[24]

The sovereignty of law, whether it stems directly from an act of Parliament (statute law) or from the jurisprudential tradition of common law courts, is thus conceived and essentially used against the discretionary prerogatives of executive power, within an institutional framework that has been emblematically called "the reign of law and judges".

The third and equally fundamental "guiding principle" is the protection of individual rights. Throughout the centuries-old history of English constitutionalism – from the feudal guarantees of the Magna Carta to the procedural rule of habeas corpus, to the list of human rights in the Petition of Rights and in the Bill of Rights – such a protection has more often been provided by common law courts than by Parliament. The extraordinary capacity of the courts to counteract the monarchy's absolutist demands has been crucial in favouring the development of "Englishmen's freedoms". Legislative acts themselves, such as the *Habeas Corpus* Acts of 1679 and 1816, have often been preceded by a long common law elaboration, which Parliament essentially ratified.[25]

Moreover, judicial decisions have safeguarded the rights of liberty and property against the potential arbitrariness of both administrative civil servants (employed by the Crown) and Parliament. Edward Coke – let us just mention the famous *Bonham's* case – already argued that ordinary judges would consider null, and thus would not apply, any act of Parliament deemed to be "against common right and reason".[26] Two centuries later, Dicey underlined that one of the functions actually performed by common law courts was to secure, even before Parliament where necessary, the supremacy of ordinary law as a general rule of the constitution.[27] Common law judges professionally engaged in respecting "precedents", i.e. in practice a number of rules and procedures aimed at safeguarding individual rights, could not but be uncompromising adversaries of any form of arbitrariness. They would inflexibly contrast, for instance, the application of excessive fines or unusual punishments, possibly introduced by Parliament, against the principles of certainty and non-retroactivity of criminal law.

On the whole, the originality of the English constitutional regime, as underlined by William Blackstone, lies in the fact that in England the widespread and differentiated nature of powers is not due to any imperative acts by the state or to the "general will" of a constituent assembly, expressing popular sovereignty. Neither is it due to a written, rigid, and normatively supreme constitutional Charter in line with the political experience of the United States, which had a significant impact on the continental Europe throughout the twentieth century. In England, Parliament can change the constitution at any time, and no political body is entrusted with controlling the constitutionality of legislative acts. The English constitutional structure depends on a long-standing civil tradition rooted in political conflicts, normative acts, customs, usages, and (not strictly legal) precepts, which in some cases date back to centuries before the development of the modern state and liberal philosophy.[28] This largely unwritten normative tradition even claims to be tied to a millenary and immemorial "ancient constitution", whose validity is allegedly derived from its own "antiquity" rather than from mythical or transcendent origins, or from the universal value of its contents. It hinges upon its quite particular quality of being "the law of the land", respected by and handed down from generation to generation, and of being the result of historical struggles.[29] In his essay on *Law and Public Opinion in England*, Dicey writes:

> The Revolution of 1689 was conducted under the guidance of Whig lawyers; they unwittingly laid the foundations of a modern constitutional monarchy, but their intention was to reaffirm in the Bill of Rights and in the Act of Settlement, not the innate rights of man but the inherited and immemorial liberties of Englishmen.[30]

The rule of law is only very indirectly a legal theory of the state; it is not its "juridicalization" or "constitutionalization". It is in striking contrast with the German (and in general continental) "legislative state", where judges are state's officials applying the state's law and where individual rights are "laid down" by Parliament.[31] In this respect, the rule of law, as argued by Dicey, is "a distinctive characteristic of the English constitution".[32]

3.2 The North American version of the rule of law

Dicey argued that the constitutional structure of the United States was a typical example of the rule of law on the mere ground that its founding fathers had drawn inspiration from English traditions. Indeed, the North American attribution to the judiciary, and not only to Parliament, of the task of protecting individual subjects against the executive power's arbitrary acts was undoubtedly influenced by the English model.[33] Similarly, the decision not to draft a Bill of Rights to be included in the text of the Constitution was influenced by the English precedent: the Bill of Rights as known today was introduced (as an open list) by the first ten constitutional amendments only at the end of 1791.

In the institutional development following the Declaration of Independence and the approval of the Constitution, the moderate and liberal approach of republican federalism, supported by Alexander Hamilton and James Madison, prevailed over the democratic philosophy of Thomas Jefferson and Thomas Paine; the latter being closer to French doctrines of popular sovereignty and the primacy of the constituent power. Within the context of a somewhat fundamentalist understanding of freedom and property rights as grounded in natural law, there arose a kind of religious approach to the rule of law, which was alien to the English ideology of the rule of law and would not be shared by the positive law doctrines that inspired the German *Rechtsstaat*.[34] The very idea of sovereignty seemed to crystallize, under a natural law perspective, within the principles of the constitution. The normative primacy of the constitution emerged in direct opposition to the sovereignty of the legislative function of the Federal Parliament, which was viewed as more dangerous for fundamental freedoms and property than administrative power itself.[35]

The constitutional regime of the United States soon displayed a clear penchant for solutions drawing from moderate liberalism, being poorly sensitive to democratic representation, and to the conflictual dynamics of social interests. It paid much more attention to the need, which would later be at the heart of Alexis de Tocqueville's aristocratic liberalism, formally to avoid the threat represented by parliamentary majorities to

individual liberties. Against this threat the suggested remedy, besides the tendential inflexibility of the written constitution, was the "judicial review of legislation" and, following Judge Marshall's sentence in *Marbury v. Madison* (1803), the possibility for the Supreme Court to determine the constitutional legality of legislative acts. Hence, the Federal Parliament's power, especially with respect to individual rights, was greatly weakened: this was a radical denial of any potential link between the acknowledgement of rights and normative claims in the name of popular sovereignty deriving from political conflicts.[36] In fact, it was believed that the professionalism and technical expertise of expert judges would ensure, much more effectively than Parliament, a correct interpretation of the constitution, and thus an impartial and meta-political protection of individual rights.[37]

Such institutional solutions, albeit falling within the paradigm of the rule of law, distinguished the American experience from the English one. In England, neither common law courts nor higher judicial bodies ever exercised judicial review on the grounds of the normative superiority and formally unchallengeable authority of the constitution.[38] The protection of "Englishmen's freedoms" relied on a long common law tradition, and not on institutional devices in the hands of high judicial bureaucracies. Moreover, in the continental Europe, throughout the nineteenth century and even later, constitutional charters remained flexible and were at the legislative power's disposal.

3.3 The Rechtsstaat

As far as we know, the expression *Rechtsstaat* was first used in the 1830s by Robert von Mohl, in his treatise *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, where individual freedom was, at the time, already viewed as a central aim of the state's action.[39] Yet, the *Rechtsstaat* was actually established in Germany during the Restoration, which followed the 1848 revolts, and epitomized a compromise between liberal doctrine, supported by the bourgeoisie, and the authoritarian ideology supported by conservative forces, above all the monarchy, the rural aristocracy and the high military bureaucracy. During the period including the first and second Empire, the institutional compromise was theoretically supported, through extremely rich and refined doctrinal instruments, by German public law jurists, represented especially by Georg Jellinek, Otto Mayer, and Rudolf von Jhering.[40]

By drawing inspiration from Kant and Humboldt, such a doctrine juxtaposed the *Rechtsstaat* with the absolute state and the police state, and re-elaborated in positive legal terms – in accordance with the "legal

method" – key elements of classical liberal thinking, in particular the public protection of human rights and the "separation of powers". The German re-evaluation of such liberal principles led to the formulation of the well-known theory of "subjective public rights" – propounded by Jellinek – and to the primacy of law as a system of impersonal, abstract, general, and non-retroactive rules.

The "subjective public rights" theory undoubtedly represents a statist conception of rights. It is the state's sovereign authority – this balancing between the monarchical principle and Parliament's representative function – that establishes individual rights by being "self-limiting". The source of individual rights is not popular sovereignty, as theorized by the French Revolutionaries: the only original and positive source of law is the law-making power of the nation state, through which the people's spiritual identity is expressed. It is not by chance, as critically underlined by Carl Schmitt, that German constitutional doctrines and practices, following Kant's lead, cancelled the "right of resistance" from the list of individual freedoms.[41] Failing a rigid constitution – which was quite common in nineteenth-century European constitutionalism[42] – it was the legislative power that decided and regulated the granting of individual rights. Rights were at the exclusive disposal of the legislative power by virtue of the "statutory reservation". Such an anticontractualist stance, far closer to English than French constitutionalism, undoubtedly appeased the concerns of moderates and, quite likely, also of conservatives.[43] However, it also expressed a rooted tendency of German constitutional thinking: the need, influenced by Savigny and Puchta's historicist and anti-natural-law thinking, for a rigorous secularization of both the legal system and individual rights. The pre-political origin and religious nature (transcendent, universalist, and natural law–based) of individual freedoms, supported by John Locke's contractualism, was not conceded.[44]

The *Rechtsstaat's* second axiom, i.e. the primacy of law, was reflected in the "principle of legality" (*Gesetzmässigkeit*), according to which the set of rules established by Parliament had to be rigorously respected by the executive and judicial powers in order for their acts to be legitimate. Such a double subordination to the primacy of law was emphatically deemed to be both the most effective defence against any political misuse of powers and the supreme guarantee for the protection of individual rights.

Such a theory of the rule of law failed to take into account the potential arbitrary use of legislative power, since it assumed a perfect correspondence between the state's will, legality, and moral legitimacy; moreover,

citizens' trust in such a correspondence was taken for granted. The German *Rechtsstaat* was thus regarded as legalistically vacuous, as a "tautological", procedural, and mere "legal state". The *Rechtsstaat* appeared to be nothing but the "law of the state" (*Staatsrecht*), characterized by a purely technical and formal concept of law (the generality and abstractness of norms). Detached from any reference to ethical values and political content, and not subject to jurisdictional controls on its constitutionality, such a state's law appeared to be paradoxically arbitrary: *sic volo, sic jubeo*. However, Carl Schmitt himself, a severe critic of the *Rechtsstaat*, acknowledged that legislative procedures, with their complicated mechanism of bonds and counterbalances, provided significant guarantees of moderation and protection of individual subjects against any possible misuse of the law.[45] Going beyond any legal formalism and any "religion of statute law", the protection of freedom and property was indeed the "material content" – both on a political and an ideological level – of the German *Rechtsstaat*.[46]

3.4 The État de droit

In France, an explicit theory of the *État de droit* was very belatedly formulated. It was first propounded by Raimond Carré de Malberg during the Third Republic, in the early decades of the twentieth century.[47] Unlike Dicey, who had conceived the idea of the rule of law independently of the notion of *Rechtsstaat*, Carré de Malberg was influenced by the German experience and, in part, by that of the United States. As a matter of fact, it could be argued that, while Dicey had reconstructed England's constitutional tradition claiming its autonomy and excellence, Carré de Malberg seemed concerned about acknowledging the superiority of German and US doctrines over French public law: in substance, he attempted a theoretical synthesis between these two experiences to be applied to French institutions. Moreover, while Dicey and German theorists of the *Rechtsstaat* had advanced their theories on the basis of effective historical experiences of the "rule of law", Carré de Malberg suggested his model of *État de droit* as an alternative to the reality of French constitutionalism, harshly criticizing the institutions of the Third Republic themselves.

Like the German liberal jurists, Carré de Malberg believed that the protection of individual rights against the state's potential arbitrariness was the main aim of the *Etat de droit* which, for this purpose, had to "self-limit" its sovereign power by binding it to respect general and *erga omnes* (towards everybody) valid rules. Yet, Carré de Malberg argued that the protection of rights required a profound reassessment of the

French constitutional tradition, including a critical examination of the Revolution itself. He claimed that French public institutions were dominated by Parliament's omnipotence, which seemed to have inherited a monopolistic entitlement to the state's sovereignty from monarchical absolutism, and this represented the greatest danger to French people's freedom.[48]

In France, the most dynamic expression of the revolutionary theory had been the idea of popular (or national) sovereignty, according to which Parliament was endowed with absolute primacy with respect to other powers of the state, since it was the sole body, which could claim direct popular investiture. "Law" had been conceived of, in line with Rousseau's thinking, as the expression of the nation's general will, whose prescriptions rigorously bound the executive power. As regards the judicial power, in the French Revolution's declarations of rights and constitutional texts judges had been the object of exclusively negative regulations: judges were not to meddle in the exercise of the legislative power and could not suspend the enforcement of laws.[49] Such a mistrust of judges, which was explicable in the light of the role played by the *ancien régime*'s magistrates, rendered the French constitutional system radically different from both British and US models.

Moreover, Rousseau's idea as to the indefeasibility and inalienability of popular sovereignty had led so a prestigious author as Emmanuel-Joseph Sieyès to draw his famous distinction between *pouvoir constituant* and *pouvoirs constitués*.[50] The constituent power was meant as a great collective legislator, defining values and principles, and laying down the rules upon which the political community was grounded. It was a pre-legal power, which was not nevertheless extinguished by the original act leading to the rise of the state and its "constituted powers". Unlike such powers, which were limited powers, the constituent power had an unlimited and inexhaustible strength, free from the normative restraints imposed by the constitution. Article 28 of the 1793 Declaration of Rights, for instance, very explicitly established that the people were always entitled to review, reform, and change their constitution and that no generation was bound by laws created by previous generations.

The normative voluntarism of such a radical-democratic doctrine brought about two significant consequences: firstly, Parliament simultaneously tended to act in the capacity of both constituent power and constituted power, thus assuming sovereign prerogatives. In particular, it claimed the permanent right to review the constitution, as well as an unlimited power of revision, equivalent to that of the constituent power.[51] Secondly, there was a clear constitutional tendency towards

sharply rejecting the *gouvernement des juges*, i.e. towards rejecting both constitutional rigidity and judicial control over the constitutional legitimacy of ordinary laws.

Carré de Malberg strongly attacked such a Jacobin tradition and upheld an understanding of the rule of law, which submitted all powers, including the legislative one, to law. Parliament had to be viewed as a merely constituted power – not by any means as a constituent power – whose functions had to be subjected to limits and controls, just as was the case of administrative power. To submit administrative acts to the principle of legality was indeed important, though not sufficient to guarantee the full protection of individual rights: the *Etat légal* was not yet a proper *Etat de droit*. An authentic *État de droit* had to provide individuals with legal means to allow them to oppose the legislator's will whenever its acts violated their fundamental rights.[52] For this purpose, if judicial review of legislation (in force in the United States) was regrettably not feasible in France, as argued by Carré de Malberg, then a clear distinction between the constitution and the ordinary laws was needed. It was necessary to place the former above the latter and compel Parliament to respect all legal limits laid down by the constitution, thus relinquishing any constituent claim.[53]

3.5 The English rule of law: a "founding exception"

The above four historical experiences of the rule of law display both normative and institutional differences. This may be illustrated by resorting to three comparative parameters: the attribution of sovereignty, the constitutional function, and the means for protecting individual rights.

Under the English rule of law sovereignty belongs to Parliament, which exerts its normative primacy almost exclusively with respect to the executive power. Not only is the English constitution unwritten but it is also not a legal act or a legal custom: rather, it is a set of legal traditions, normative acts, social conventions, and practices concurring in limiting and controlling the executive power. The legal determination of individual rights and their protection are, in practice, entrusted to common law ordinary courts.

The American variant of the rule of law further limits, distributes, and differentiates the state's sovereignty. Sovereignty ends up by symbolically coinciding with the normative supremacy of a written and substantially rigid constitution, which limits all of the state's powers, including the legislative power. The determination and protection of individual rights largely depend on the judicial power to construe constitutional principles.

As regards the German *Rechtsstaat*, sovereignty is ascribed to the legislative power, this having an absolute normative primacy over the other powers. The constitution is written, though it is flexible, it is not placed above ordinary laws and is not safeguarded by a constitutional jurisdiction. The protection of individual rights is exclusively entrusted to Parliament, which is their original source and guarantor.

According to Carré del Malberg's model of the *État de droit*, sovereignty coincides with the normative primacy of Parliament, which is meant as the expression of popular sovereignty. Yet, Parliament is not a constituent power: it is merely one of the "constituted powers". It follows that its functions must be subject to limits and controls. This implies a sharp distinction between the constitution and the ordinary laws, the constitution being superior with respect to such laws. In the *État de droit* citizens are provided with legal remedies against legislative acts – not only against administrative ones – whenever these violate their fundamental rights.

It is undeniable that the above political-cultural experiences and legal regimes are very different, both in terms of the sovereignty of their normative authorities and of the constitutional techniques they use to curb the state's powers and differentiate them one from another. Moreover, they adopt different approaches with respect to the foundation of individual rights and their actual protection. A "great divide" within the Western tradition of the rule of law that underpins the three perspectives can be clearly discerned: on the one hand, there is the "founding exception" of the English version of the rule of law and, on the other, albeit with significant internal differences, the North American version and the model of *Rechtsstaat*, together with similar Euro-continental experiences.[54]

As underlined by Carl Schmitt (following Friedrich von Savigny), what renders English constitutionalism both an exceptional and founding phenomenon is its being "a living customary law". Rather than being grounded on theoretical reasoning and conceptual systemization, the English "constitutional law" was nourished by a long tradition of practical adjustments of the law carried out by a juridical "private" and "autonomous" body. Such body was neither the state nor a public corporation or bureaucracy. In fact, English constitutionalism does not use or even know of the notion of "state". Rather, common lawyers tended to interpret political history, social conflicts, civil customs, and people's normative *ethos* by elaborating a socially widespread legal culture.[55]

The very formulation of individual rights does not depend on doctrinal inferences drawn from the principles of a written constitution or code

but rather is the result of normative induction and generalization, drawn from specific judicial decisions concerning individual freedom, property, and contracts. The split between "law in books" and "law in action", which American and Scandinavian legal realism would claim to be a constant trait of both legal positivism and normativism, seems to be completely extraneous to the common-law tradition. In England, the constitution is, by nature, pliable and flexible; yet, unlike what happens on the continent, it is rigorously applied by ordinary courts. In the continental Europe, as held by Dicey, solemn and redundant constitutional declarations include mostly abstract enunciations of principle, lacking suitable procedural means and doomed to be largely unenforced.[56] The English constitution is not a set of general principles and rules deriving, as Rousseau would have it, from the constituent will of a political *élite*. The constitution is not the "normative manual" of the new society used by the people's or nation's representatives as a guide in setting up an order perfectly rationalized by law. Quite coherently, the protection of individual rights is not founded on universal values and claimed in their name. Neither is it inferred from the moral or rational "nature" of mankind, deemed therefore to be the heritage of the entire human species. The particularistic and peculiar nature of "Englishmen's freedoms", being rooted in the "law of the land" and thus lacking universalistic ambitions, is, as we have seen, constantly upheld by the common law tradition, from Coke to Blackstone and Dicey.

Quite paradoxically, the particular and localistic English constitution was the generating nucleus of the entire Western experience of the rule of law, thus proving to be the exemplary paradigm of the protection of individual rights. After all, the historical primacy of "Englishmen's freedoms" – from the Magna Carta to the Bill of Rights – was always widely acknowledged both across the Atlantic and in the continental Europe, from American federalists to French revolutionaries and German theorists of "subjective public rights".[57]

At the same time, however, the English rule of law lacked any transitive capacity in terms of constitutional techniques and institutional mechanisms formally guaranteeing individual rights. This was, precisely, what led to the "great divide" in Western constitutionalism: in the United States, just like in Germany, France, Italy, and other liberal democracies, the model of an unwritten and flexible constitution did not gain ground. Neither did the idea that a normative list of rights was unnecessary or even counterproductive. The very idea that fundamental freedoms could be better protected by a body of pragmatic judges and jurists – these stabilizing and socially spreading the standards of a legal culture keen on

the rigorous settlement of single cases rather than on a generalizing, formalistic "legal science" – did not take root in continental Europe.

Both in the United States and in continental Europe, albeit with different modes and times, the model of a written constitution prevailed, together with that of an explicit formulation of tendentially "universal' rights". Constitutions and Bills of Rights were seen as sovereign expressions of a social group which organized itself in the form of a nation state, laying down, as foundations of its political life, some inviolable principles. The tendency to hierarchize the legal system, so as to subject ordinary laws to the normative primacy of the constitution and to make constitutional principles and rules inflexible, gained ground. Such a trend developed throughout the twentieth century and gave rise, especially through Hans Kelsen's contribution, to a real "judicial review" of legislation, controlling its constitutional legality, which went well beyond the United States judicial review practice. As from its introduction into the 1920 Austrian Constitution – the well-known *Verfassungsgerichtshof* – the institution of the Constitutional Court gradually spread out through Europe, and was particularly successful in the post–Second World War period in countries freed from authoritarian regimes, especially in Italy, Germany and, later on, Portugal and Spain. The tragic end of the Weimar Republic, which concluded the crisis of parliamentarism during the first German democracy (which had been unable to defend the 1919 Constitution), further supported the setting up of a specific court acting as the "keeper" of the constitution. Such a court was empowered not merely to render a law not applicable in a specific judicial case, as was the case in the United States, but also to declare the invalidity *erga omnes* of a law and thus deem it unconstitutional *tout court*. As we shall see, recent theory advocating a "constitutional democracy" is strictly connected with such important political and constitutional developments.[58]

4 A COHERENT AND UNITARY THEORETICAL FRAMEWORK

As we have seen, legal and institutional differences between the experiences and doctrines of the rule of law hinge upon the attribution of sovereignty, constitutional mechanisms, and the protection of individual rights. Such elements are particularly meaningful with respect to the "great divide" between the English version of the rule of law and other Western experiences. However, as we shall now argue, such diversities are strongly reduced and eventually disappear when their philosophical and political assumptions, as well as their grounding values, are taken into

account. This is also the case with respect to a great number of legal institutions and political structures, which in substantially similar ways, characterize all the above experiences. It is on the basis of such assumptions that the complexity of the "external history" of the rule of law may be rightfully reduced on a theoretical level. Our attempt to unify the diversity of historical experiences within a coherent and unitary theoretical framework thus becomes plausible and provides the "rule of law" with a precise conceptual identity.

Under such a perspective, the rule of law is a normative and institutional structure of the European modern state, within which, on the basis of specific philosophical and political assumptions, the legal system is entrusted with the task of protecting individual rights, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives. In more analytical terms, it may be argued that the rule of law is a legal and institutional figure resulting from a centuries-old evolutionary process, which leads to the establishment, within the structures of the European modern state, of two fundamental principles: the "distribution of power" and the "differentiation of power".[59]

The "principle of distribution" tends to limit the powers of the state by means of explicit restraints, with the aim of enlarging the scope of individual freedoms. Therefore, it entails a legal definition of public powers and their relationship with respect to the powers of each individual, these also being legally defined.

The "principle of differentiation" stands for the functional differentiation of the political-legal system from other social subsystems, in particular from ethical-religious and economic ones. It stands also for the delimitation, coordination, and legal regulation of the state's distinct functions, summarily corresponding to the enactment (*legis latio*) and enforcement (*legis executio*) of legislation.

4.1 The philosophical and political premises

Let us first examine the philosophical premises and the underlying ethical assumptions shared by the different experiences of the rule of law and their corresponding theories. Norberto Bobbio strongly argues that individualism is the general philosophical and political premise of the rule of law and the doctrine of fundamental rights.[60] Providing an inevitable historiographic simplification, Bobbio claims that the relationship between the state and citizens has been "overturned": in Europe, through the rise of the modern nation state, the priority of individuals' duties towards political (and religious) authorities has been

turned into the priority of citizens' rights and into the authorities' duty to acknowledge, protect, and finally promote such rights. In the European modern (sovereign, national, and secular) state, the original deontic figure, i.e. individual duty, gives way to another largely contrasting deontic figure, i.e. individual expectation or claim, which is collectively acknowledged and protected in the shape of "individual right".

On a historical level, the above "overturning of perspectives" clearly occurred during the religious wars, which ended in the middle of the seventeenth century with the Peace of Westphalia. During such wars, the right to resist oppression, i.e. individuals' rights to enjoy some fundamental freedoms, started to gain ground. Such freedoms were deemed to be fundamental because they were metaphysically taken as "natural". Therefore, it may be maintained that the political and legal model of the rule of law took root in Europe and, it is worth underlining, exclusively in Europe, in that, throughout a long political and anthropological evolution, a precise line of thought in contrast to the "Aristotelian" (and Aristotelian-Thomist) model arose and became prevalent.

Having relinquished the organicist conception of social life, according to which an individual's integration in the political group was the very condition for his humanity and rationality, there emerged the natural-law perspective or, as it has been suggested, the perspective of "modern natural law" in contrast with "old natural law".[61] Through very complex events dating back, at least, to the voluntarism of Franciscan theology of the thirteenth and fourteenth centuries and its further development by William of Ockham – without overlooking the conflictualist and democratic-radical traditions, from Machiavelli to Spinoza – the conceptualization of individual rights as "natural rights" became rooted.[62] Natural rights were *jura* in contrast with *leges*, i.e. in contrast with the sovereign's orders and with "objective law" expressed and guaranteed by the sovereign *potestas*. The harmonistic and nomologic conceptions of the natural order declined, together with its hierarchical structure, dating back to classical doctrines (the Greeks' *homonoia* and Cicero's *concordia*) and largely developed by Catholic scholars. In direct contrast with such philosophies, the metaphysical and social primacy of the human being was consolidated and his individual "conscience" emerged as a scope for his moral autonomy and political freedom, even though within a social context to be ordered by reason, ethics, and law.[63] "Old" natural law lost its normative compactness and was fragmented into a plurality of "natural rights" no longer depending on the group's will – not being granted by its political and religious authorities – rather, being acknowledged by the political community as its own foundation, as a condition

for its own legitimacy. The preservation of human natural and indefeasible rights became, according to the revolutionary emphasis of the 1789 *Declaration*, "the aim of any political association".[64]

In terms of political philosophy and legal theory, the following two principles are the corollaries of the ontological primacy of the individual subject and the axiological value of his freedom and autonomy: (1) political pessimism, namely the idea of the intrinsic dangerousness of political power; and (2) normative optimism, namely the belief that the dangerousness of political power can be constrained by law, that is by a set of constitutionally guaranteed individual rights and the "juridicalization" of the whole structure of the state.

Pessimism towards political power – which is a classical theory of European liberalism – is grounded on the assumption that power is both functionally necessary and socially dangerous. Although power, especially in its repressive manifestations, is necessary to guarantee political order, cohesion, and stability, it is also dangerous – and as such it is the most serious threat to individual rights – because, by nature, it tends to concentrate, to recursively reproduce itself, and to become arbitrary.

Political pessimism is profoundly extraneous to the Aristotelian-Thomist philosophy, since such philosophy grants political power a "ministerial" function to serve the "common good" and conceives of it as the vicarious projection of ethical and religious authorities, if not even of divine omnipotence. Pessimism towards political power is also extraneous to the political organicism endorsed by Islam and by most Eastern philosophies, especially Confucianism, which believe that the individual, at least in principle, ought loyally to obey political authorities, towards which he cannot oppose any legal claim.

The pessimistic theory is also extraneous both to the revolutionary optimism of Marxism and to the ethical conceptions of the state, which inspired twentieth-century totalitarian regimes, *in primis* German National Socialism. According to Carl Schmitt, the belief that political power can be subject to law, i.e. exerted according to general and neutral legal rules, is a normativistic (Kelsen-based) illusion, since power is "decision" by nature, namely discretion, partiality, particularism, and exception.[65] Political decisions have nothing to do with following rules; rather, they create them *ex novo*, and this is indeed the specific and positive function of political power.

In contrast with the many versions of political optimism – whether they be ethical-religious, revolutionary, or totalitarian – the pessimism inspiring the theorists of the rule of law requires the presence, within the state, of normative apparatuses and institutional bodies entrusted with

the task of identifying, contrasting, and repressing the political misuse of power and legal arbitrariness. Moreover, in order to curb power's arbitrariness, the theorists of the rule of law believe that the force of the legal system is a necessary, and somehow sufficient, means. Law – positive law, no longer just natural law – can and must act as an instrument for the ritualization of the exercise of power. In other words, the state's powers (above all executive and judicial powers) must be bound to respect general rules. Being a "general and abstract" normative instrument, "law" must replace the *commissio*, i.e. the monarch's personal orders and his arbitrary *lettres de cachet*. By imposing general forms and procedures – much more effectively than by prescribing specific contents or aims – legislative provisions can drastically reduce political discretion. If power is bound to act in accordance with general rules and preset forms, it is more transparent – or less opaque – and thus more "visible" and open to citizens' control.[66] Therefore, within the European contemporary state, the legal system is required to perform a threefold – problematic and somewhat ambiguous – function: to be an instrument for the social order and have political stability it expresses governmental power, to be a legislative mechanism to ritualize and limit political power and, strictly complementary to this function, to guarantee individual rights.

4.2 The distribution of power

The principle of the "distribution of power" acts as a general legal criterion for the granting of opportunities and powers to individual subjects. Under the rule of law, individuals – together with the institutions and the associations they legitimately give rise to – are holders of a wide range of legitimate claims and micropowers. Such claims and powers, being legally defined, may be legitimately exerted even against governmental institutions, whose scope of action is limited accordingly. The legal system, through its behavioural rules and procedural restraints, concurs in rendering the exercise of political power more "visible" and in contrasting its intrinsic despotic penchant. At the same time, it limits the scope of political power by defining the ambits of political "non-interference" so as to protect individuals' fundamental rights, above all their freedom and property. The legal entitlement to opportunities, claims, and powers that monarchical absolutism had hierarchized and concentrated in the subjects and organs of the state, is therefore socially spread out. Outside the scope of official power, there are no longer mere submitted subjects but, rather, citizens endowed with legally acknowledged powers.

Throughout the different historical experiences of the rule of law, the principle of the distribution of power has been essentially expressed by the following normative or institutional modalities.

4.2.1 Unicity and individuality of the legal subject. Under the rule of law all individuals are subjects of the legal system. Therefore, all members of the political community are granted, in principle, an equal capacity of being holders of rights, and of performing acts bearing legal consequences.[67] By overcoming a millenary tradition, which was still in force in medieval legal systems – suffice it to mention the Edict of Theodoric or the Edict of Rotary, or the Magna Carta itself – the rule of law first applied the principle of the unicity and individuality of the legal subject. "Quite obviously", female inequality still remained within the rule of law, especially with respect to family law and political rights.[68] As for such rights, different criteria for census-based discrimination, theorized by both Sieyès and Kant, were long applied also to male citizens. Yet, apart from such well-known anomalies, under the rule of law any difference pertaining to individual legal status (e.g. among free men, freed men, servants, and slaves) were erased in Europe.[69] Furthermore, cities, corporations, baronies, or episcopates were no longer acknowledged as holders of feudal privileges guaranteed by charters or ad hoc statutes.

4.2.2 The legal equality of individual subjects. All individual subjects are equal before the law. Thanks to the general nature of any legislative act, subjective situations falling within a given abstract legal figure are treated alike, namely in the light of the same normative principles and according to the same rules. Hence, the legal consequences of legally equivalent actions are the same. This does not mean that the rule of law equalizes citizens on the basis of given factual or finalistic standards. Legal equality is not to be mistaken either for "substantial equality" (in Western countries, such a generic expression mostly stands for some kind of equalization of economic and social conditions), or for the effective and equal enjoyment of the rights individuals formally hold. In fact, each individual is able to enjoy the same rights (freedom of speech, teaching, press, association, economic initiative, etc.) in different ways and scopes, and it is only with respect to his actual entitlement to such rights that he is treated equally with respect to other holders of rights. In many legal (not only factual) respects, property-owners are indeed different from the property-less, employees are different from self-employed workers, minors are different from adults, citizens are different from foreigners, and previous offenders are different from citizens without

criminal records. Ergo, formal equality stands for the suppression of privileges, these being tantamount to normative discriminations among citizens in legally equivalent factual conditions. Hence, at the same time, formal equality implicitly acknowledges the vast range of factual inequalities – above all, economic and social inequalities, which the rule of law is not expected *qua talis* to reduce or cancel – assumed by the legal system as legitimate premises for different treatments.[70]

4.2.3 The certainty of law. Under the rule of law the state commits itself to guarantee all citizens the possibility to foresee, in principle, the legal consequences of both their behaviour and that of the other social subjects they necessarily interact with. In other words, all citizens – not only members of social elites – must be provided with cognitive means allowing them to foresee what kind of decisions affecting them may be taken in the future by the state's powers – especially by the executive and the judiciary. Under this perspective, the "certainty of law" is a widespread social good, which concurs in strengthening individual expectations and reducing social uncertainty. Employing Niklas Luhmann's systemic terminology, it may be held that, by guaranteeing the certainty of law, the state and its legal system perform a "reduction of complexity", which helps to mitigate citizens' uncertainty towards the risks of the social environment, and thus allows for a more stable, ordered, and functionally economical social interaction.[71] The specific contribution of the certainty of law – this reducing citizens' insecurity towards legal risks – is the possibility for all citizens to confidently take care of their own business and to claim their rights, with good chances of success, with respect to both their social partners and political authorities.

In order for the certainty of law to be implemented, citizens must above all be given the opportunity to know the law in force. They must not be doomed to *ignorantia legis* (ignorance of the law) as a result of the impossibility of knowing in advance and of interpreting with relative certainty the rules concerning them and applied by administrative authorities. Hence, laws must not be secret, and normative propositions must be clearly formulated and must not give rise to possible antinomies. Moreover, laws must not have a retroactive effect, especially in criminal matters, where the *nullum crimen sine lege* (no crime without law) principle must be upheld. Furthermore, since even the most absolute certainty of law may be frustrated by an arbitrary jurisdiction, the principle of the "natural judge" (a judge predetermined by law) must be upheld and, connected with such principle, ad hoc courts must be prohibited.[72] Lastly, as controversially underlined by Leoni and Hayek, the certainty

of law requires legislative power itself not to cause normative instability, which may occur if, by means of redundant legislation, parliaments, or governments – especially when not bound by rigid constitutional provisions – frequently and unforeseeably alter the regulation of cases.[73]

4.2.4 The constitutional acknowledgement of individual rights. The rule of law hinges upon the acknowledgement of rights as "original" normative prerogatives of individual subjects or the "positive" granting of such rights to all members of the political community. Going beyond notable differences in terms of philosophical reasoning and modes of legal protection – natural law doctrines versus legal positivism, universalism versus particularism, constitutional rigidity versus constitutional flexibility, and judicial review of legislation versus the absolute primacy of legislative power – different experiences of the rule of law are characterized by the constitutional commitment to guarantee individual rights, granting their holders the power to claim them on a judicial level, even against the state's organs.

If Thomas Marshall's historical and sociological taxonomy is endorsed, individual rights may be divided into three categories: civil rights, political rights, and social rights.[74] In addition to the right to life, civil rights include the "freedom rights": personal freedom, the procedural guarantees of *habeas corpus* against repressive powers, freedom of thought, speech and religion, the inviolability of personal domicile, the confidentiality of personal communications, and so on. Patrimonial rights – firstly the right of property and the freedom of economic initiative – contractual autonomy (i.e. the right to make binding contracts) and the right to apply to the courts are strictly connected with civil rights.

Political rights formally acknowledge citizens' interest in participating in the exercise of political power, either as members of bodies endowed with decisional authority or as electors of them. The general suffrage for the election of Parliament and of other public assemblies is the main expression of this acknowledgement. Lastly, social rights – affecting job, health, home, social assistance, social security, etc. – aim at giving a normative status to citizens' interest in education, well-being and social security, in line with the prevailing standards of a given (industrialized) country.

If the above threefold division of rights is upheld, the rule of law may be said to be essentially concerned with the protection of civil rights, in that these coincide with the range of "negative freedoms".[75] In the second half of the nineteenth century, such a protection was extended – albeit through social tensions, difficulties, and deficiencies – to political rights,

whereas "social rights", safeguarded only in part by the twentieth century European Welfare state, remained substantially outside the functional logic of the rule of law. According to such a logic, to be entitled to civil and political rights allows each individual to be freely involved, as an "independent unit", in social interaction. At the same time, this justifies the assumption that all individuals are provided with the legal tools necessary to be socially successful without resorting to the state's paternalistic protection.[76]

4.3 The differentiation of power

As mentioned above, the principle of the differentiation of power, being a characteristic element of the rule of law, entails two main aspects: (1) the self-differentiation of the political and legal subsystem from other functional subsystems; (2) the internal differentiation of the political subsystem within a process, which increases its complexity, specialization and efficiency, and gives rise to a plurality of different political structures and ways of waging power. As it is known, such a process has been interpreted and popularized by liberal political theories (from Montesquieu onwards) as a strategy for the "separation of powers" intentionally aimed at guaranteeing balance among the state's organs (the "moderate government") and, ultimately, the protection of individual rights.[77]

As regards the first aspect, the European rule of law is characteristic of a specific kind of political subsystem which stands out, when compared with political forms of the past, for its high functional autonomy with respect to ethical-religious and economic subsystems. It is through this functional autonomy that the individualistic political philosophy was successful within the experience of the rule of law, in contrast with the ancient organicist model. In fact, the conception of individual opportunities, claims, and powers as legal rights (not as mere ethical-religious expectations) refers to the general process of the 'positivization of law' as its necessary functional premise. In other words, the "positive" legal system grounds the normative value of its prescriptions on the "social contract", that is on the will of the members of the political community, thus no longer referring to transcendent deontologies.[78] It is through such an evolutionary conquest that, in Europe, the legal system, freed from its traditional ethical and theological envelopments, also broke with Aristotelian-Thomist organicism and with the monistic conception of what is true and good. As seen, this is particularly the case of the English tradition of the common law and the liberal philosophy that in Germany gave rise to the *Rechtsstaat*. Moreover, it is precisely the high functional autonomy of the legal subsystem that allows for the rule of law to establish

the principle of individuals' formal equality, namely an equality, which ignores the different positions that individual subjects hold within other functional subsystems grounded on property, political power, or family relationships. Not surprisingly, it is precisely such a "formalistic" and "atomistic" social structure that was later at the heart of Marx's early communist criticism of "equal law" and "bourgeois freedoms".[79] After all, both the unicity-individuality of legal subjects and their formal equality are, in turn, functional factors concurring in the development of a market economy that is itself freed from organicist premises and ethical-religious aims.[80]

As regards the second aspect – the internal functional differentiation – the rule of law is typical of a highly complex political system. Such complexity is due, first of all, to the division of the political system into two formally separate ambits: on the one hand, the conquest and management of political power through the organization of political parties and electoral rituals; on the other hand, administrative activity, unified by the task of issuing binding decisions through bureaucratic procedures.[81] Unlike in despotic or totalitarian regimes, under the rule of law political parties (just like trade unions) are not organs of the state's bureaucracy and cannot make *erga omnes* binding decisions. In turn, the administrative function is organized on the basis of two sub-functions which, in principle, are performed within distinct institutional settings and with different procedures: on the one hand, the legislative power, primarily conferred upon elective parliaments entitled to enact general and abstract laws; on the other hand, the enforcement of general and abstract laws or, more precisely, the issuing of binding decisions with respect to single actual cases,[82] which is essentially performed by organs that are administrative in strict terms. Lastly, within administration, a further functional autonomization process has been developed: the "judiciary power" has parted from the "executive power", thus freeing itself from being bureaucratically subject to the political government. The judiciary makes decisions on the basis of its members' (disputed) impartiality and political autonomy.

Very schematically, it can thus be asserted that throughout the different historical experiences of the rule of law, the principle of the differentiation of power has been expressed by the following institutional modalities.

4.3.1 The delimitation of the scope of political power and law enforcement. The self-differentiation of the political system, which is fully accomplished under the rule of law, has two symmetrical effects: on the

one hand, it tends to exclude the functional interference of ethical-religious and economic subsystems from the ambit of politics and law; on the other hand, it explicitly defines the functional scope of the legal-political subsystem by limiting (or self-limiting) the state's internal sovereignty. The clear-cut boundary line between "the public" and "the private", excludes what in Europe has been called – from Ferguson to Marx and Gramsci – "civil society" (*bürgerliche Gesellschaft, società civile*) from the scope of politics and law. Civil society includes the realm of privacy, i.e. religious beliefs and practices, sexual and family relationships, personal communications and information, the expression of literary and artistic creativity, and so on. It also includes the sphere of contractual autonomy, entrepreneurial initiatives, and patrimonial activities in general.

4.3.2 The separation between legislative institutions and administrative ones. As we have seen, under the rule of law a specialized organ (parliament) is entrusted with the task of enacting general and abstract norms (laws), whereas the executive and the judiciary are given the role of applying the laws, i.e. more precisely of issuing particular and concrete norms (administrative decisions or judgements), and seeing to their enforcement. Although the line between enacting general norms (*legis latio*) and applying them (*legis executio*) is very subtle, it is nonetheless unquestionable that the rule of law provides for a dual system which, at least in principle, separates legislative institutions from administrative ones.

4.3.3 The primacy of the legislative power, the principle of legality, the reserve of legislation. Under the rule of law, organs entitled to enact general norms (laws) are granted functional primacy with respect to organs deciding particular cases by issuing specific norms (executive acts and judgements). Such primacy may be more or less absolute according to the high or low degree of subordination of the legislative power to constitutional principles and according to the how intense is control on constitutional legality by the judiciary. However, the entire normative and institutional functioning of the rule of law is moulded by the "principle of legality", through which each administrative act – whether executive or judicial – must comply with a previous general norm.[83] The same functional logic underpins the principle of "statutory reservation", stating that only the legislative power is entitled to enact norms concerning individual rights, thus excluding executive and judicial powers from such a function.

4.3.4 The obligation of the legislative power to respect individual rights. The limitation of the legislative power is one of the most delicate and controversial problems of the rule of law's experience. However, it can be argued that, albeit in different ways, within all the historical experiences of the rule of law the legislative power appears to be limited by its political commitment or legal obligation to respect constitutionally acknowledged individual rights. Such restraints have an implicit, i.e. political, nature in Great Britain, Germany, and France, whereas they have a mainly legal (judicial) nature in the United States.

4.3.5 The autonomy of the judiciary. Leaving aside the question of public prosecutors – which would require a different and much more complex analysis – under the rule of law all judges are "subject only to law". Among the various administrative activities, the judicial function is notable for its ambition to occupy a "third" or neutral institutional ambit with respect to conflicting political and social interests. Therefore, in the exercise of their decisional powers, judges act independently of any hierarchical subordination, in particular towards the executive high ranks, which by their nature follow the ideological preferences of a given political majority.

5 THE EPISTEMOLOGICAL STATUS OF THE RULE OF LAW, ITS POLITICAL ASSUMPTIONS, AND LIMITS OF VALIDITY

The theoretical synopsis of the previous paragraph should satisfy the double need our essay sprang from, namely to elaborate a theory of the rule of law that could be both acceptable from a historical point of view and, at the same time, useful in cognitive terms, that is, helpful in understanding and solving practical problems.

The above theoretical reconstruction of the rule of law provides a unitary and coherent picture of the philosophical assumptions and the normative-institutional means, which have characterized its most important experiences. Although such a reconstruction is only one of the many possible interpretations of a highly complex phenomenon, it should be persuasive in a historical perspective. However, it endows the notion of rule of law with a rather precise meaning and differentiates it from other notions for which it has often been mistaken within the intricate bundle of concepts, formulas, and postulates in which it has long been submerged. In the light of our interpretation, the rule of law may be defined as *the normative and institutional framework of the European modern state which, on the basis of an individualistic philosophy (with the*

double corollary of political pessimism and normative optimism) and through processes of distribution and differentiation of power, entrusts the legal system with the primary task of protecting civil and political rights, thus contrasting, for this purpose, political authorities' inclination towards arbitrariness and misuse of their powers.

We shall now specify the epistemological status of this theory, its philosophical and political implications, as well as the limits of its validity. This will then allow us to assess the cognitive usefulness of the rule of law when set against the range of problems which, within the contemporary processes of increasing social complexity and global integration, must be tackled to protect individual rights and limit political arbitrariness. Quite obviously, such matters nowadays need to be examined by giving ample room to international and transnational experiences, thus going well beyond the political space of the rule of law, i.e. that of the sovereign nation state.[84]

5.1 The epistemological status

As far as the epistemological status of the suggested theory of rule of law is concerned, its evaluative and not formalistic character ought to be underlined. Despite not being a general theory of justice and not drawing from classic ethical and political metaphysics, the theory of the rule of law entails, as we have seen, some specific options as to the aims of politics and law. The hostility towards arbitrary power and the call for the certainty of law – which have been interpreted by some authors as axiologically adiaphorous[85] – themselves entail a clear ethical assumption, in that they favour a rational and foreseeable political order, where law primarily guarantees individuals' freedom and the security of their transactions (thus giving less importance to "communitarian" topics, such as social justice, solidarity, and equality). Though the rule of law is not an ethical and political project for the realization of the "best republic" – neither is it aimed at realizing a "state of justice"[86] – and though it relies on the functionally differentiated instrument of law, it is inconceivable outside the scope of a typically Western anthropology, namely individualistic, rationalistic, and secularized.

Neither can it be held that the theory of the rule of law merely recommends given procedures lacking prescriptive content, i.e. it is a merely procedural conceptualization of the state and the law, and as such is ideologically neutral. It is undeniable that, in many respects, the model of the rule of law is concerned with procedural techniques or institutional devices which, as such, may appear as axiologically indefinite and merely formal. The certainty of law may seem indifferent to the ethical

and political contents of law, so much so that it could be argued, for instance, that racist legislation might be compatible with the rule of law as long as its prescriptions were clear, non-contradictory and non-retroactive: *la légalité qui tue*, in other words. By resorting to similar considerations, also the "principle of legality" might be construed in a purely formal way, as claimed by Antonin Scalia, who views the rule of law as the "rule of rules".[87] In fact, the principle of legality does not imply any ethical and political assessment of the contents of a given law, either by the administrator bound to apply it or by the citizens, who are its ultimate recipients.

Yet, such interpretations seem to overlook the circumstances that, according to the theory of the rule of law, formal institutions and procedures are not self-referential and self-grounding. Rather, they pursue the aim of protecting individual rights, by which the legislator himself is bound. They are nothing but the linear means for such an aim, which is after all cogently declared by constitutional texts or traditions. By ignoring such a simple and enlightening axiom, formalistic interpretations of the rule of law – just like similar proceduralist theories of democracy – display the general flaw of all formalistic doctrines on politics and law, not to speak of the linguistic and cognitive formalism they implicitly refer to.[88]

5.2 The rule of law and the theory of individual rights

The doctrine of the rule of law is, quite probably, the most important heritage that, at the beginning of the third millennium, the European political tradition offers the world's political culture. Its exceptional theoretical relevance lies in its (successful) attempt to guarantee the individual's fundamental freedoms within, and by means of, a given organization of political power, i.e. the nation state. In comparison with any other civilization, the European rule of law uniquely combines the need for order and security, which is at the heart of political life, with the demand for civil and political freedoms, which is particularly felt within complex societies. The invention of "subjective rights" as the legal expression of individual freedom is, besides the undoubted effectiveness of the techniques used to differentiate and balance powers, the key to its originality and success. Within a few centuries, such an "invention" has taken hold as a general model both in Europe and in North America. The demise of fascist authoritarianism and Marxist collectivism only confirmed its success in the twentieth century. Nowadays, not only is the model of the rule of law not challenged by other alternatives in the Western world, but it also seems bound to be imposed at an international level as a condition for the rationality, modernity, and progress of the

cultures of all continents, including the farthest ones, such as Islamic cultures, American and African autochthonous cultures and, in the Far East, Hinduism, Buddhism, and Confucianism.[89]

However, in order to uphold the universality of the model or support its increasing international expansion, there are at least three theoretical issues concerning its conceptual instrumentation and its institutional implications that need to be assessed and possibly solved. The first issue concerns the relationship between the model of the rule of law and democratic theory; the second issue stems from the conflict between the (democratic) principle of popular sovereignty and the suggestion – advanced by a large number of theorists of the rule of law – to render constitutional Bills of Rights more rigid; the third issue concerns the philosophical foundations and thus the universal value of the theory of individual rights (or, in the international legal lexicon, "human rights").

5.2.1 Rule of law and democracy. The doctrine of the rule of law is clearly different from the idea of democracy (and of a "democratic state"), even in its weakest versions drawing inspiration from Schumpeter's criticism of classical participatory and representative models of democracy.[90]Although authoritative liberal-democratic thinkers, starting with Norberto Bobbio, Ralf Dahrendorf and Jürgen Habermas, deem the protection of individual rights to be a *conditio sine qua non* (an absolute condition) of any possible democratic regime, the institutions of the rule of law are, as such, indifferent to given key points of the – classic and post-classic – democratic conception of the political system. With the exception of a very weak and implicit hint at the representative nature of the legislative power, the theory of the rule of law is not committed to issues, such as popular sovereignty, citizens' actual participation in collective decisions, the procedures and values of political representation, the pluralism of political contenders or governments' accountability, and responsiveness.[91]

In a nutshell, the legal and political framework of the rule of law may be juxtaposed to the classical absolute state, the modern totalitarian state and, in general, the police state. However, it is not in conflict with oligarchic and technocratic regimes, characterized by a mass political apathy and by great economic and social differences. The rule of law seems to be more in line with the liberal political tradition than with a political philosophy grounded on citizens' civil responsibility, on the transparency and diffusion of political communication, and on the vitality of the public sphere. Under the rule of law, the threat to individual freedoms seems to derive exclusively from the arbitrary acts of the state's

organs, and not also from the misuse of their powers by subjects belonging to the social and economic world.

It follows that the internationalization of the model of the rule of law may oppose principles and values which are – or, rather, have been – important components of the European democratic experience. In practical terms, this is nowadays true for the process of European integration, as underlined by the undergoing debate on the "democratic deficit" of European institutions, despite their commitment to protecting individual rights (confirmed by the Charter of Fundamental Rights approved at the Nice summit[92]). The risk of dismissing crucial democratic values is also dramatically present on a global scale, as proven by the sharp contrast between, on the one hand, great Western powers and, on the other, many non-Western countries and a great number of non-governmental associations and transnational political movements. Western powers favour the international expansion of the model of the rule of law, together with an uncompromising defence of the universality, interdependence, and indivisibility of "human rights". Other countries, however, are much more sensitive to what they call "collective rights", extended so as to comprise the reduction of economic and social inequalities, the protection of peoples' cultural identity and political autonomy, the fight against poverty and epidemic illnesses, and the freedom of economically backward countries from foreign indebtedness.[93]

5.2.2 Constitution, individual rights, popular sovereignty. As we have seen above when specifically examining US and French constitutionalism – the English "exception" has been separately analysed – two different approaches, here conventionally called "liberal" and "democratic", may be adopted with respect to the constitutional guarantee of individual rights.

5.2.2.1 *The liberal approach.* The liberal approach, which is typical of the United States experience, tends to conceive the Bill of Rights as the source of all principles and rules protecting fundamental freedoms. The normative validity of the rule of law stems from the assumption of rationality and ethical universality of its principles, so that no parliamentary majority – not even the unanimous consent of the members of elective assemblies – can abrogate constitutional provisions regarding, for example, the right to life, the rights of freedom, and the right of property and economic initiative. Any parliamentary decision to abrogate such provisions, even when it complies with the procedures established for constitutional amendments, should be deemed to be constitutionally subversive and thus null and inapplicable.

Such a theoretical stance entails procedurally and institutionally notable corollaries: firstly, the foundations of the rule of law need to be firmly grounded by rendering the constitutional provisions that protect individuals' rights as rigid as possible, that is, by requiring qualified majorities and other procedural hindrances for the parliamentary review of the constitution. Secondly, and most importantly, the legislative power must also be institutionally limited, thus entrusting the judiciary with the task of evaluating (with *erga omnes* efficacy) the constitutionality of laws.

In the second half of the twentieth century, with the persistent exception of Great Britain, the "liberal" approach, initially developed in the United States, prevailed also within the experience of European constitutionalism, especially in Germany and Italy, and thus ended up by being identified *tout court* with the continental doctrine of the rule of law. According to such an approach, the guarantee of fundamental rights depended on mutual checks and balances between "constituted powers", including the legislative power, under the watchful eye of the Constitutional Court, as authoritatively suggested by Hans Kelsen. At the same time, the "democratic" idea, according to which the constituent power is the source of any possible constitutional legitimacy, lost its strength.[94] Accordingly, the idea of the almightiness of the democratic legislator was rejected: democracy could not but be a "constitutional democracy", limited by a liberal constitution within which fundamental rights, as written by Luigi Ferrajoli, were deemed to be inalienable and inviolable and therefore "not susceptible of decision"[95] by any political majority or power, since they were beyond popular sovereignty.

5.2.2.2 *The democratic approach.* According to the "democratic" approach, the protection of individual rights and, more generally, the establishment of the state's organs and the definition of their functions depend on the constituent power and on the permanent initiative of the political community. Such a voluntaristic approach does not identify the constitution with the guarantee of rights and the separation of powers, as advocated by the famous Article 16 of the 1789 Declaration of the Rights of Man and the Citizen.[96] Provided the constitution has been freely desired and democratically established by most members of the political community, it is fully valid, even if it is not inferred from liberal principles. In this case, the model to draw inspiration from is the French revolutionary experience, which preceded the formulation of the theory of the *État de droit* and which Carré de Malberg directly criticized. In the French experience, the establishment of rights was the result of political struggles, which were successful thanks, *inter alia*, to the support of the

elective assemblies; it was not the result of a sophisticated and bureaucratic balance between the powers of a "mixed" or "moderate" government. According to this approach, it is believed that the rigid nature of the constitution or the review of legislation by a Constitutional Court is not a crucial means to protect individual rights. What is more important is a watchful public opinion, an open and competent political debate and a permanent popular initiative, leading, if necessary, to the prompt legislative (or referendum-based) updating of constitutions and declarations of rights. Just like any other normative act, the Bill of Rights is doomed to be overcome by social changes, especially because such changes are quickened by the evolutionary rapidity of complex societies. Excessive constitutional inflexibility may lead to social backwardness and may hinder democracy. It may also poorly protect rights since it relies on legal institutions that pretend to neutralize politics.[97]

5.2.2.3 *An ideological-political alternative.* Although the above two approaches are equally concerned with the protection and promotion of individual rights, a theoretical solution that reconciles them in a compromise between normativistic rationalism – typical of the Euro-continental doctrine of the rule of law – and democratic voluntarism is not feasible. Quite obviously, the "democratic" approach may be criticized because the lack (or weakness) of procedural and institutional restraints safeguarding the Bill of Rights may be dangerous, since it leaves both the fate of individual rights and of democracy itself in the hands of temporary parliamentary majorities. In fact, a formal democratic regime is inconceivable without respect for the main freedom rights. Hence, the "liberal" approach is, in truth, a vital guarantee of democracy itself, since it reduces the risk – not a mere scholastic risk, as shown by the downfall of the Weimar Republic – that a democratic regime may be removed and replaced by an authoritarian regime without this requiring any breach of parliamentary procedures.[98] Democracy is thus strengthened, not weakened, by liberal restraints preventing its self-destruction.

However, the "liberal" approach can also be criticized. In rigorous theoretical terms, it is irrelevant whether a constitution is approved or modified by a qualified majority rather than by a simple majority or by an absolute majority. The point is that a constitution – as a single constitutional norm – always expresses the will of a given portion of the "people" (or of the "nation"), no matter how wide it may be, against the will of another portion, just as it happens with ordinary laws, which are usually approved by simple majority. This is particularly the case of complex societies, characterized by the "polytheism" of cultures and moral values. Hence, also constitutional norms concerning

individual rights are not the expression of a Rousseau-inspired "general will" but rather of the preferences of a given political majority. Little does it matter whether this majority deems the principles it endorses to be beyond political dispute; on the contrary, such a belief renders its "liberal" stance dogmatic and potentially intolerant.

Its historical and partisan genesis should thus discourage any attribution of rationality, unchangeability, or even sacredness to any constitution, even to one committed to civil liberties and politically inclusion. Contrary to Kelsen's claim that a constitution has no political author, it must be acknowledged that constitutional principles express political ideologies and ethical values that were shared (and or are still shared) only by a greater or smaller majority of citizens and rejected (and/or are still rejected) by a minority. It follows that even a liberal-democratic constitution may be oppressive towards the interests and expectations of minorities that dissent from the constituent majority. In fact, the majority might even be favourable to the death penalty and to war, and/or might be opposed to homosexual family rights, abortion, euthanasia, or to respect for animals and the prohibition against killing them. Therefore, the tendency to fix the range of liberal values at a given moment of their historical development, and to entrust judicial bureaucracies with the task of ensuring that elective assemblies do not introduce illiberal legislative innovations, runs the risk of being paradoxically dogmatic, and despotic. The relevance and originality of the Euro-continental versions of the rule of law within its "external" history in the twentieth century cannot be denied. However, the risk they currently run is a kind of constitutional conservatism, fossilizing the will of their "founding fathers". Such a risk may be worsened by granting high judicial courts the power to interpret the constitution – which is in fact a constituent and legislative power – such as to allow them to mould the constitution, which is nonetheless regarded as "rigid", i.e. untouchable by Parliament.[99] Besides, one might ask advocates of the "liberal" approach which bodies, if not supreme courts, should be entitled to decide which political issues cannot be subject to free public debate and decision – e.g. referendum-based – on the grounds that they are constitutionally not susceptible to political decision.[100]

Therefore, it seems that the "liberal" approach is open to criticism no less than the "democratic" one. In order to remedy such criticism, US and Euro-continental theorists of the rule of law should rigorously isolate the (few or even very few) constitutional principles – regarding, for instance, freedom of thought and its public expression – whose breach prevents free expression of political will, this being an essential condition

of the political legitimacy of governments according to both the "liberal" and the "democratic" approach. Only such constitutional principles should be protected by specific procedures – not by metaphysical biases – rendering their abrogation extremely difficult. It should also be recalled that, within politically fragmented societies – this is often the case of differentiated and complex societies – a simple majority in parliamentary decisions is already a threshold beyond which decisional paralysis is likely to occur.

Thus, the choice between the "liberal" and the "democratic" approach appears to be connected with largely questionable empirical considerations and ideological-political preferences. Such a dilemma may be clarified by a theoretical analysis, though it cannot be resolved.[101]

5.2.3 Foundation and universality of individual rights. A third set of unsolved theoretical questions concerns the philosophical foundation and the universality of human rights. Such questions touch upon the issue as to their general coercive applicability, which was dramatically highlighted by the 1999 "humanitarian war" for Kosovo.[102] According to Norberto Bobbio, a philosophical – and thus rational and universal – foundation of the doctrine of human rights is not conceivable. The reason is, in his opinion, that human rights are burdened by deontic antinomies, especially by that opposing freedom and patrimonial rights to social equality, the latter being a value that the establishment of "social rights" should promote and protect.[103]

Other authors (among them Jack Barbalet) juxtapose, within the normative list of freedom rights, "non-acquisitive" to "acquisitive" rights. The former include first of all the protection of "negative freedom", i.e. the limits imposed on the state's (and third parties') intervention within the private domain, as is the case of personal freedom, freedom of thought, and inviolability of personal domicile and private property; non-acquisitive rights also include the "social rights", which attribute simple powers of consumption or enjoyment. Acquisitive rights, including contractual autonomy, freedom of association of press, and economic initiative, have a marked acquisitive capacity since, under given conditions, their exercise brings about political, economic, and communicative power to the benefit of their holders. Since only a minority of individuals is usually provided with the political, economic, and organizational means necessary to take advantage of the acquisitive capacities of such rights, it follows that their exercise leads to a notable restriction of other individuals' freedoms and an increase in social inequalities. Therefore, the widespread idea that human rights provide individuals

with legitimate claims spontaneously converging in a peaceful and progressive social interaction should be abandoned and replaced by the agonistic and selective approach of the "struggle for rights".[104]

Along with Bobbio and Barbalet's theories, it must be added that the doctrine of human rights lacks the necessary criteria (as the systemic lexicon would put it) for cognitive self-regulation, in that it lacks theoretical categories rigorously determining and defining individual rights (the taxonomy suggested by Thomas Marshall, albeit very useful, has a historical and sociological imprint, and is moreover directly moulded on the last three centuries of English history). Hence, the "catalogue of rights" is constantly open to inflation by means of anomic accumulation through successive "generations" of rights or normative interpolations arising out of mere factual circumstances.[105] Some Western philosophers and jurists have even suggested that the theory of individual rights should also cover living beings not belonging to the human species, embryos, and even inanimate objects. In other words, despite the 1948 Universal Declaration and apart from a widespread pragmatic consensus on a number of "fundamental" rights, substantially corresponding to Marshall's "civil rights", nowadays there is no theoretically defined and generally shared "catalogue" of individual rights, even in Western countries. This holds true also for the normative implications and practical applications of single rights.

Let us provide some illustrative examples (among the many available) in this respect. If it is true that the right to life is one of the most normatively "certain" individual rights, it is equally true that there is no theoretical consensus as to its incompatibility with the death penalty, which is widely practised in the United States, although the United States is widely recognized as, and considers itself to be, the homeland of individual rights and of the rule of law. Another example is provided by life imprisonment which, even in the brutal, close-to-torture forms often practised in Western countries, is usually believed to be compatible both with the right of freedom and with prisoners' right to physical and psychic integrity; only a few express dissenting opinions on this subject.[106] A further example: the mutilation of female genitals (known as 'infibulation') – a very common practice in many North-Eastern and Central African countries – has coherently been declared by some European countries to infringe women's right to physical and psychical integrity. As regards the mutilation of male genitals ("circumcision"), it is known that this is practised on millions of minors not only in the Islamic and Jewish world but also in the Western world, especially in the United States, –without explicit religious reasons. Such mutilations are not usually

considered a violation of minors' personal integrity. Although the ensuing lesion normally bears less serious consequences than female "infibulation", a minority of Western doctors and jurists stress that it nonetheless entails the irreversible mutilation of a healthy organ, carried out without the consent of the concerned individual and for no valid hygienic reason.[107]

In the light of the above considerations, it may be concluded that the elaboration of a rigorous theory of individual (or "human") rights is not very useful and that a practical commitment to the actual application of rights is sufficient. Bobbio himself seems to agree with this pragmatic stance.[108] It is unquestionable that the legitimization of individual rights cannot but be historical and contingent. After all, it is well known that civil and political rights took root in Europe, at a particular time in its history, as a result of long and bloody social struggles. Hence, it would seem that there is no alternative than to admit that any doctrine of individual rights is philosophically unfounded and deontically imperfect. It is a Western historical output, indeed important for Western countries, yet unable to justify either any universalistic claim or any "civilizing" proselytism.

However, it might also be argued that a rigorous theory of the rule of law requires a rigorous elaboration of the doctrine of individual rights. It might also be added that it is precisely the lack of theoretical rigour that nowadays concurs in rendering uncertain the effectiveness of many aspects of the rule of law, as we shall see below. Moreover, what is even worse, such a deficiency favours the propagandistic distortion of the doctrine of "human rights" and its transformation into a kind of aggressive humanitarian universalism – as indeed was the case of the war for Kosovo, led by Western powers against the Federal Republic of Yugoslavia. Although lacking a philosophical foundation and normative universality, and perhaps precisely for this reason – in that it is freed from the hindrance of universal concepts – the doctrine of individual rights may be "universalized" in communicative terms. In order to do so, two conditions should be met: firstly, the doctrine of individual rights should take on a more rigorous physiognomy – in terms of legal and political theory, not of metaphysical justification; secondly, its communicative universalization should be grounded on an intercultural "translation" of the entire deontical lexicon and syntax of the rule of law model.[109] The topicality and relevance of such problems of intercultural communication are confirmed by the debate, mainly involving Singapore, Malaysia, and China, as to the necessity of opposing "Asian values" to the tendency of Western countries to impose their ethical and political

values – above all the rule of law, individual rights, and democracy – together with Western technology, industry, and bureaucracy on Eastern cultures.[110]

5.3 The rule of law and international relations

The most serious constraint on the validity of the doctrine of the rule of law is due to its narrow normative scope, which does not extend beyond the political space of the nation state. Such a limit, which contrasts strangely with the universalistic claim of most of its contemporary advocates, is double-faceted.

5.3.1 Interstate relationships. Firstly, the doctrine of the rule of law is not concerned with the relationship between any single state and other states. Rather, it exclusively deals with the "internal sovereignty" of the state and does not cover its international political and legal relations – its "foreign policy" –, these being entirely left to the agreement-based regulation of conventions and treaties. In other words, while significantly restraining the "internal sovereignty" of the nation state, the rule of law leaves its "external sovereignty" intact, including the *jus ad bellum*, which, since the mid seventeenth-century Peace of Westphalia, has been considered a sovereign prerogative of the state.[111] A rigorous internal application of the provisions of the rule of law may sometimes coexist – Great Britain and France are emblematic examples in this respect – with a warlike and imperialist foreign policy, and the enactment of "colonial law".[112]

It is not by chance that, according to Dicey, the greatest theorist of the English rule of law, the international order was not even a real legal order. Following John Austin's lead, Dicey claimed that international rules could be considered, at most, a sort of (legally not binding) "public ethics".[113] According to Georg Jellinek, an equally authoritative theorist of the *Rechtsstaat*, international law was a set of rules not different and separate from the state's legal system. International obligations were, just like constitutional law and administrative law, the output of the "self-limitation" of the sovereignty of the nation state.[114]

The reason why the doctrine of the rule of law lacks a theory of international law and relations is thus clear. Its principles, in particular the principles of the distribution and differentiation of power, have been conceived so as to be applied only to the state's citizens and institutions. Citizens and institutions of foreign countries are given legal relevance only upon explicitly coming in touch with the domestic legal system and, even in such a case, under given conditions – e.g. the reciprocity clause – and

with remarkable exceptions (especially for subjects and institutions not belonging to the Western "civilized world"). What is more, since the time of its founding fathers such as Hugo Grotius, Richard Zouche and Emeric de Vattel modern international law – the Westphalian *jus publicum europaeum* – has acknowledged only nation states as the subjects of its system, excluding individuals, whose rights have been deemed to be automatically represented and protected by the states they belong to.

It ought to be added that the principle of non-interference in domestic jurisdiction, namely into the "internal affairs" of sovereign states, which was the pillar of the Westphalian order until at least the 1980s, excluded the relationship between single governments and their citizens from the competence of international law and institutions, thus not allowing the protection of individual rights to have an international relevance. A remarkable exception was represented by the ad hoc international criminal courts, set up in the twentieth century with the formal aim of trying individuals responsible for serious violations of human rights. Yet, the establishment of such courts – from Nuremberg to Tokyo, and from The Hague to Arusha – has so far been disappointing in many respects. In fact, their experience has proven that an international criminal jurisdiction, failing an international order somehow modelled on the rule of law, cannot have a sufficient degree of impartiality and autonomy with respect to the great powers.[115]

5.3.2 The world order. Secondly, the principles of the rule of law, with the partial exception of Kant's pacifism, have never been theoretically connected with world order and peace,[116] even when, in the first half of the twentieth century, the "Westphalian system" – the "anarchical" system of sovereign states – was modified by the rise of centralized supernational institutions, such as the League of Nations and the United Nations. Despite widespread rhetoric about the international rule of law, the doctrine of the rule of law has had no influence on the organization of institutions – in particular the United Nations – aimed at limiting states' sovereignty for the unlikely attainment of a "stable and universal peace". In fact, international peace was dependent on the hegemonic great powers from time to time successfully ending world conflicts. The establishment of international institutions was inspired more by the hierarchical and authoritarian model of the Holy Alliance than by Kantian cosmopolitan pacifism and the connected ideology of universal citizenship and "cosmopolitan law" (*Weltbürgerrecht*).[117] As Hans Morgenthau held, the United Nations structure, in particular, is based

on such a model, in that it is centred around the Security Council, which is dominated by the veto power of five great powers and thus contravenes one of the key principles of the rule of law: the formal equality of all legal subjects.[118]

The thesis that the experience of the rule of law has not inspired any theory on international law and institutions might seem overstated. It might be objected that a great number of contemporary Western thinkers – the "Western globalists", as they were ironically called by Hedley Bull – who, following Kant's and Kelsen's lead, advocate the application of the principles and values of the rule of law to the realization of a political and legal "global system". However, globalist thinkers such as Richard Falk and David Held are, above all, interested in divulging some impressive key words – "global civil society", "global constitutionalism", "global democracy", and "cosmopolitan order" – and in globally "pantographing" their liberal-democratic beliefs. At the same time, they seem scantily interested in either normatively or institutionally specifying the project of a possible "global rule of law" or in interacting with non-Western political and legal cultures, which should be involved in their cosmopolitan projects.[119] As for the most authoritative globalist author, Jürgen Habermas, he does not seem to have any doubts as to the evolutionary causal nexus, so to speak, which closely connects "cosmopolitan law" to the rule of law and universal citizenship to democratic citizenship. "Cosmopolitan law – as he sententiously writes – is a consequence of the idea of the rule of law".[120] Habermas maintains that the cosmopolitan expansion of the Western rule of law obeys both the internal logic of democratic institutions and the semantic content – to the intrinsic universalism – of human rights.

All these are typical instances of a strongly ethnocentric usage of the "domestic analogy", this taking for granted the analogy between, on the one hand, the "civil society" that supported the development of the modern European state in the seventeenth and eighteenth centuries and, on the other hand, the current supposed "global civil society". The analogical argument would allow for all principles of democratic representation, separation of powers, and protection of "human rights" to be applied to all world populations – and to the world as a whole.[121] On the basis of such anthropologically dogmatic premises, Habermas stands out, as is well known, for having advanced universalistic claims favouring both the Gulf War of 1991 and North Atlantic Treaty Organization's (NATO) "humanitarian war" against the Federal Republic of Yugoslavia of 1999.[122]

6 THE CRISIS OF THE RULE OF LAW

The theory of the rule of law should help us in understanding new problems, which today, at the beginning of the third millennium, must be tackled in order to promote individual rights and restrain arbitrary power in the context of increasing social complexity and globalization processes. Such problems can be categorized as adding up to a "crisis of the rule of law". The crisis affects both the functioning of the democratic structures of Western states, especially in their post–Second World War versions, and the international protection of human rights. According to reports by the United Nations and non-governmental organizations (NGOs), such as Amnesty International and Human Rights Watch, millions of people are nowadays victims in all continents of unprecedented violations of their fundamental rights.

The extent of this phenomenon is due not only to the despotic or totalitarian nature of many political regimes but also to arbitrary decisions taken by international bodies endowed with great political, economic, or military power, which globalization processes have rendered uncontrollable and that increase the threat of "global terrorism".[123] Wars, the death penalty, torture, the ill-treatment of prisoners, genocides, poverty, epidemics, international trade rules, foreign indebtedness squeezing the poorest countries, the slavery-like exploitation of minors and women, and the racist oppression of marginalized peoples – from Palestinians to Kurds, Tibetans to Indo-Americans, Roma to African and Australian aboriginals – the destruction of the environment, all contribute to this crisis.

The reasons for the crisis of the rule of law may be grouped in two distinct lists: one concerns the increasing social complexity within advanced industrial societies involved in technological and information revolutions; the other regards integration processes both on a regional – the European Union, first of all – and a global scale. Within the first group, the crisis of the governing capacity of the legal system and the decreasing effectiveness of the protection of individual rights are particularly important. Within the second list, the main issue is the erosion of states' sovereignty and the prevalence of transnational powers and organs not subject to the institutional mechanisms for the distribution and differentiation of power.

6.1 The crisis of the governing capacity of law

It certainly cannot be said that the philosophical premises of the rule of law are nowadays undergoing a crisis within complex Western societies. On the contrary, since the collapse of the Soviet empire and the exhaustion

of Marxist ideology, individualism seems to have permeated all aspects of social life, from consumer habits to lifestyles, from family to professional experiences and to the meticulous protection of individual privacy by ad hoc bureaucratic institutions. What seems to be undergoing a serious crisis, instead, is the "governing capacity" of the legal system, i.e. the actual enforcement and regulatory efficiency of the legal prescriptions enacted by different organs performing legislative functions. The reasons behind such a functional *impasse*, particularly affecting Euro-continental democracies, have been assessed by the systemic sociology on law in terms of "law inflation" within differentiated and complex societies.[124]

The process of differentiation of social subsystems compels the legal system to react to their rapid development by increasingly producing more specialized and particular provisions. Yet, law is a rigid and slow structure compared with the evolutionary flexibility of subsystems such as, in particular, the scientific-technologic and economic ones, which are endowed with a notable capacity of rapidly self-programming and self-correcting. This brings about "law inflation", which entails normative devaluation, redundancy and instability and, ultimately, law's regulative inability. Not only is the number of legislative acts multiplied but their texts are also increasingly muddy and far too long, more and more loaded with technological expressions and cross references to other normative texts. The fragmentary nature of norms, the reference to "emergency situations", the inclination to "programme" rather than regulate, worsen the tendency of a state's legislation to lose the requirement of generality and abstractness, and to become more and more similar to administrative acts.[125] Quite obviously, the "Code" model, with its rationalistic claim to be clear, systematic, universal, and unchangeable over time, now appears to be a real historical wreck, overwhelmed by the muddled flood of microlegislation.

Along with such phenomena, and especially in European countries directly involved in the political integration process, there is the multiplication of not only domestic normative sources but also of supranational sources. The tendency towards anomie due to normative overload is thus worsened by the difficulty in identifying the "general principles" of the legal system whose definition is given also by many jurisdictional organs – let us just mention the European Court of Justice – which claim to be entitled to construe national, European Community, and international law. This gives rise to a mainly judge-made European law which, by definition, falls outside the schemes of the rule of law.[126]

The weakened governing capacity of law affects both the principle of distribution of power and that of differentiation of power. In particular, the certainty of law and, as a direct consequence, the principle of legality are seriously jeopardized. The hypertrophy of criminal and civil law increases the power of interpreters and judges, so much so that courts hold real normative power, being in fact authorized to selectively redraft legislative texts. Not only is *ignorantia legis* widespread, since citizens are increasingly unable to know which laws are valid and what their normative impact is, but the deliberate ignorance of law is an inevitable judicial practice, even within the highest courts. To tacitly ignore the law, either totally or partially, seems to be a condition required not only to deliver a judgement, but also to carry out ordinary administrative activities. Therefore, within the structures of the rule of law, the areas for autonomous decision-making *ultra legem* and, often, *contra legem*, are multiplied.

It is around such "legislative despotism" of Euro-continental democratic states that the harsh controversy led by authors such as Bruno Leoni and Friedrich von Hayek is centred. Such authors contrast the normative orgies of the democratic *pouvoir législatif* with the very liberal tradition of the Anglo-Saxon rule of law, founded on the common law tradition and relying upon the judiciary – not parliaments – for protecting individual liberties.[127] "Englishmen's freedoms" are incompatible, as argued by Leoni and Hayek, with the authoritarian and illiberal tradition of the continental democratic rule of law. The authors advocate the replacement of parliamentary legislation with a legal order based on customs and general principles, entrusted essentially to the discretionary power of the judiciary. A "law of judges" should be able to guarantee both the certainty of law and the protection of individual rights much more efficiently than the chaotic enactment of specific commands, which are nowadays typical of the legislation of democratic parliaments. Although such a liberal-conservative criticism of the Euro-continental democratic rule of law is very lucid in many respects, it seems to overlook the fact that precisely the inflation and disability of legislative acts and the collapse of the certainty of law are bringing about the decline of Euro-continental parliaments and are strengthening the normative function of the judiciary, i.e. one of the most primitive and sub-differentiated ways of law-making.

6.2 The decreasing effectiveness of the protection of rights

In his essays on citizenship in Europe, Thomas Marshall claimed that the acknowledgement of civil rights – among which, in particular, private property and contractual autonomy – proved to be entirely functional to

the early expanding stage of the market economy. Political rights, instead, arising from nineteenth-century class struggles, favoured the entrance of working classes into the elitist institutions of the "liberal state". As regards "social rights", Marshall underlined their radical paradox. Unlike civil rights and most political rights, social rights were in contrast with the market's acquisitive logic, in that social rights were essentially oriented towards equality, whereas the market produced inequality. Despite this circumstance, Marshall believed that British institutions, moulded on the principles of the rule of law, would succeed in subordinating market mechanisms to social justice, thus permanently contaminating the logic of free exchange with the protection of "social rights". Ultimately, economic inequalities and social competition would be greatly reduced.[128]

Although Marshall's analytical scheme has been rightly criticized for its evolutionary reductionism,[129] it nonetheless suggests a useful approach to the relationship between the development of the market economy, the progress of political institutions, and the establishment of individual rights in modern Europe. On the basis of such a scheme, though keeping at a distance from the social-democratic optimism underpinning it, it may be held that the gradual acknowledgement in continental Europe of civil rights, political rights and, finally, the "social rights" has been matched by a gradually more selective, legally imperfect, and politically reversible guarantee of rights. A sort of "law of decreasing effectiveness" as to the protection of individual rights may thus be argued. Such "law" is due to the different relationship, which has gradually been established in Europe between the acknowledgement of rights, on the one hand, and the functional requirements of a political system correlated with the market economy, on the other. Starting with the industrial revolution, the "rule of law" has progressively opened up to the formal acknowledgement of a number of successive "generations" of rights, ultimately taking the shape of the constitutional state[130] and then of the welfare state.

The European Union Charter of Fundamental Rights (December 2000), drafted by the delegations of 15 member states, has further enlarged the list of rights by including "new rights" on privacy, environmental protection, consumer protection, respect for physical integrity, and the prohibition of reproductive cloning.[131] Yet, throughout the history of Euro-continental constitutionalism – and this is precisely the paradox lucidly pointed out by Dicey as early as at the end of the nineteenth century – the formal acknowledgement of citizens' "entitlement" to new categories of rights has not been matched by the

parallel effectiveness of their "endowment". If this is the case, we might then expect European "new rights" to be equally doomed.

When compared with civil rights, political rights have always been less rooted in modern Europe's political tradition. As mentioned above, until more than a century after the great bourgeois revolutions, the right to vote was subject to census-based criteria connected with the market. Furthermore, large sections of economically marginalized individuals were excluded from the exercise of political rights until the early decades of the last century. This was in particular the case of workers and farmers, let alone women, whose political exclusion was cancelled only in the mid twentieth century. It was Hans Kelsen who argued that, in the twentieth century "state of political parties", citizens' political rights were nothing more than a "totemic mask", namely the mask of popular sovereignty and representation, these being political institutions no longer entailing any actual participation in the exercise of power.[132] Nowadays, authoritative political scientists such as Giovanni Sartori hold that citizens' political rights have been frustrated by "videocracy", that is the overwhelming power of mass media dominating both the economic market and the political world through substantially equivalent advertising devices.[133]

Even more evidently than political rights, "social rights", ever since their first appearance in the Weimar Constitution, have been weakly effective, being more directly exposed to market contingencies. In order for "social rights" to be effective, they need public services – social security, financial allocations, minimum standards of education, health, well-being, etc. – which consume a large amount of resources. It follows that, given the considerable impact of social rights on the accumulation of wealth and taxation, such rights are particularly precarious. Nowadays, since the global success of the market economy has imposed on Europe the necessity for the "reform" of the welfare state, "social rights" have mostly lost the legal requirements of universality and actionability – suffice it to think of the right to work and, partly, the right to health – and tend to become national assistance services discretionally provided by political power. Leaving aside the question of its economic feasibility and effectiveness, the proposed distribution of a "basic income" or "citizenship income" to all citizens, in line with the above reformist logic, would be subject to the same fragile dependence on discretionary political decision-making.[134] This illustrates the limitations of the idea hopefully advocated by last century's European social-democracy – that the "rule of law" naturally progresses towards not only

the protection of "negative freedoms" but also the promotion of "substantial equality". As Bobbio has written:

> [M]ost social rights have not been implemented. Till today it can merely be said that they express ideal aspirations and that calling them 'rights' can only serve the purpose of granting them a noble title. [...] It can only be generically and rhetorically said that we are all equal with respect to the three fundamental social rights – to work, health, education – whilst it can be realistically said that we are all indeed equal in the enjoyment of negative freedoms.[135]

A number of authors, such as Pierre Bourdieu and Loïc Wacquant, argue that globalization processes, by depriving nation states of an important part of their traditional prerogatives, tend to reduce their functions essentially to guaranteeing domestic political order. In this respect, also the European welfare state would be expected to replace its social services with mainly repressive functions. The welfare state is supposedly ceasing to be a guarantor of collective well-being and turning into the policeman of its citizens' individual safety, in line with the US model, which is essentially of a "penally repressing state".[136]

6.3 The erosion of nation states' sovereignty

The downfall of nation states' sovereignty seems by now to be irreversible. Globalization processes have definitively caused the crisis of the Westphalian model of sovereign states, these no longer being able to tackle global issues, such as the reduction of environmental degradation, demographic equilibrium, economic development, peace, the repression of international crime, and the fight against "global terrorism". Alongside nation states, new powerful subjects arise within the international arena, namely multinational corporations, regional unions, political and military alliances, such as the NATO, NGOs, etc. Alongside international treaties and conventions, there arise new international law "sources", such as transnational "law firms", namely large lawyers' offices moulding new forms of *lex mercatoria*, and arbitral courts. At the same time, the judicial function and power tend to expand also on an international level, further eroding states' jurisdictional sovereignty, as proven by the setting up of ad hoc international criminal tribunals and the International Criminal Court (ICC) of The Hague, as polemically pointed out by theorists of the "global expansion of judicial power".[137]

Within a system of international relations largely conditional on the conveniences of economic and financial corporations, the weak governing capacity of states' legal systems is overwhelmed by the dynamic and innovative decisional power of market forces, especially with regard to industrial, fiscal, and social policies. In such fields, international law tends no longer to operate (in a Weberian manner) as a "rational"

structure strengthening the expectations of international subjects; rather, it works as a composite and pragmatic means for the management of risks peculiar to highly uncertain interactions.[138]

Such changes in international law are accompanied by a serious crisis of the international legality and the traditional functions of international institutions, in particular the United Nations, which is unable to control the international use of force and to protect, in this respect, "human rights", above all the right to life. Within a general context of erosion of nation states' sovereignty and of international "anarchy", great Western powers deem it necessary to cancel the Westphalian principle imposing the respect of territorial integrity and the political independence of nation states. They claim the right to resort to force on humanitarian grounds against political regimes seriously violating "human rights". In NATO's "humanitarian interventions" in the Balkans in the twentieth century's last decade, force was used in open violation of the United Nations Charter, of general international law and of the constitutions of many European members of the NATO. It was believed that the use of mass destruction weapons (missiles, cluster bombs, depleted uranium projectiles) and the killing of thousands of civilians are in line with the aim of protecting "human rights".[139]

In the light of such exogenous processes, the schemes of the distribution and differentiation of power, which are typical of the rule of law, seem, so to speak, to be functionally and "spatially" out of phase, while the theory of individual rights is compelled to face problems going well beyond the horizon of nation states, and to attempt to "internationalize" itself. However, some authors believe it would be unrealistic both to try to revive the sovereignty of nation states and to devise cosmopolitan projects of political and legal unification of the world. Rather, a general deregulation would be necessary, gradually attributing sovereignty only to global market forces.[140] Other authors believe that, in the light of a possible future "global constitutionalism", a key role can be played by an international criminal jurisdiction acting on the basis of a universal criminal code and supported by an international police force. In this respect, the new ICC is viewed as the main instrument for the future development of a "legal globalism" aimed at protecting individual rights and at repressing power's arbitrary acts on an international level.[141]

7 OPEN QUESTIONS

The above analysis poses such deep-rooted questions as to call the whole experience of rule of law into question. In fact, today there is uncertainty about both the function and fate of all the Western political institutions

that, for some centuries, have guaranteed – at least to a certain extent – the protection of individual freedoms and the limitation of the state's power.

The open questions are serious and numerous. For instance, given the crisis of the legal category itself, how can the certainty of law be restored within contemporary complex societies? By the way, it ought not to be forgotten that the concept of "legal certainty" had already been subject to criticism by American and Scandinavian legal realists in the first half of the twentieth century for being tantamount to pure normative idealism. Nowadays it is severely criticized by the exponents of "critical legal studies" and of the economic analysis of law.[142] What can be done to restore the "general and abstract" character of law and stop its current inflationary trend? By what means can the principle of legality regain its effectiveness, given that the scheme of the differentiation of powers is overwhelmed by phenomena, such as the degenerative metamorphosis of political representation, the technical decline of legislation, and the administrative – executive and judicial – nature of the settlement of actual single cases? Furthermore, how is it possible to protect political rights and, above all, the "social rights", given the increasing privatization of social functions, the decay of the "public sphere" and the decline of collective structures of social solidarity? What fate will "new rights" have, in particular the rights of foreigners, especially when tried or detained? What will happen to the protection of the environment and to the "cognitive autonomy" of audiences increasingly subject to the subliminal pressure of mass media?

Analogously, with respect to international law, we may wonder whether it is possible to use legal means to contrast the arbitrariness of large world economic and military powers and their communicative ramifications, and whether it is possible to prevent "global terrorism" from successfully establishing its bloody alternative to law and politics. It is doubtful whether Kelsen's strategy – "peace through law" – can be seen as the most suitable means to promote international peace and to reduce world political and economic imbalances, these being themselves the main hindrance to peace. Moreover, it is equally controversial whether new vigour can be given to states' legal systems, thus enabling them to subject global market forces to legal rules, especially in industrial, financial, and fiscal fields. Furthermore, it is not clear how the European Union can somehow draw inspiration from the model of the rule of law, freeing itself from the hegemony of great economic and financial interests, and from the encroachment of administrative bureaucracies which, in practice,

keep the European constitution in their "custody". Equally uncertain is the possibility (and desirability) of creating a planetary rule of law, resulting from the reform of current international institutions and affecting not only the United Nations but also the very controversial Bretton Woods economic institutions. Neither are there being currently envisaged reformist solutions directing international criminal justice to the effective protection of "human rights", and not towards what is strategically convenient for great Western powers. Lastly, it may be wondered how the international protection of human rights can be rescued through legal and non-violent means from its judicial and military neocolonial degeneration.

These are all crucial questions with reference to the concept of rule of law has allowed us to pose with sufficient clarity and realism. However, no relevant answers will be provided in this essay other than the ones implicit in the above analysis. Such questions are thus left "open" to, above all, the further theoretical and historical contributions of the essays in this volume.[143] After all, an analytical elaboration touching all these issues would require an entire volume. This essay can thus be concluded with a simple (and anyway incautious) suggestion of a few general "starting points", which sum up the above theoretical discussion and may hopefully be useful for further and more detailed research. In some respects, however, they correspond to the writer's very explicit political and ethical preferences and thus deserve, at the most, to be recorded and discussed.

7.1 The rule of law as a "minimum political order"

Claiming a rigorous protection of human rights, the rule of law is nowadays brought back to life within an unfavourable global scenario. Such a scenario is marked by rapid social changes taking place in the most industrialized countries and by the increasing polarization of power and wealth on a global scale; both factors lead to social instability and political turbulence. Yet, the present return of the rule of law, so long as it is carried out in a theoretically rigorous and politically responsible manner, may be welcomed as an attempt by Western political culture to recover its most severely tested and precious heritage.

Despite its imperfections, serious limitations, internal tensions, and, most importantly, its current crisis, there does not seem to be any sound alternative in the Western world to the rule of law, either on a theoretical or political level. It is precisely the downfall of last century's main ideologies – together with the crisis of "actually existing socialism" and the videocratic degradation of representative institutions – that seems to

recommend the rule of law as a "minimum political order", namely a sufficiently stable political order, characterized by an acceptable level of protection of civil rights. Indeed, the protection of civil rights – the right to life, fundamental freedoms, and private property – appears nowadays to be the primary political aim within complex societies, in which citizens' feelings of insecurity and loneliness are increasing. Even in the most developed countries, a large number of people are afraid for their own physical safety and for the security of their own belongings; they feel threatened by urban criminality and are anxiously looking for a job or are afraid of losing it. Within such a context, which Ulrich Beck has called *Risikogesellschaft* (risk society), the rule of law may be seen as a non-despotic, non-plebiscitary, and non-totalitarian political system, capable of governing collective risks and guaranteeing at the same time ample room for individual freedom and social autonomy. This general issue may be seen as a subject of great topical interest if it is acknowledged that the development of a "world risk society" is very likely, being fostered by globalization processes.[144]

This does not imply – needless to say – that the minimum political order of the rule of law can be taken as a universal minimum, as if it could correspond to a sort of Rawls-inspired "overlapping consensus". The minimum political order of the rule of law may not, in fact, be compatible with non-Western cultures not sharing its individualistic premises, and thus it may be intolerant and oppressive.

7.2 The international inflation of Bills of Rights

According to Norberto Bobbio, the moral progress of mankind may be measured by the succession of international declarations, which define human rights in an increasingly wide manner and specify them in distinct subcategories. At the same time, however, Bobbio does acknowledge the increasing difficulties encountered by the international protection of rights and consequently has even ended up by suggesting we abandon theoretical discussions and adopt a purely pragmatic approach.[145] In fact, it can be said that, along with legislative inflation, the second half of the twentieth century has witnessed the emergence of the same inflationary problem also with respect to Bills of Rights. No matter what their symbolic or moral value might be, they have resulted in a mass of international documents, treaties, and conventions, which are nothing but verbose, repetitive, and ineffective normative compilations. Many governments of the West (or politically connected with the West, such as for instance the last governments of Brazil[146]) have without hesitation subscribed to such documents with the intention of sedating domestic

political opposition, and relying on the indulgence of allied (or protective) great powers towards their own systematic violations of human rights. As Bobbio writes, the discourse on rights may have a great practical role, though it "becomes misleading when it overshadows or conceals the difference between claimed rights on the one hand and acknowledged and protected rights on the other".[147]

The inflation of Bills of Rights, together with the widespread international violation of human rights, brings about general problems, which need to be examined at least along the following three theoretical lines.

7.2.1 "Law in books" and "law in action". The international hypertrophy of Bills of Rights should lead to a deep realist mistrust – in terms of political and legal realism – of the "paper-based" tradition that developed in the second half of the last century, and which was especially due to the rhetorical vocation of great international assemblies, above all of the General Assembly of the United Nations. Such a declamatory habit might be contrasted with the sobriety of British tradition. In the homeland of individual rights and the rule of law, the unwritten character of the constitution goes hand in hand with a social widespread consensus as to the protection of "Englishmen's freedoms" and with a largely coherent administrative practice. This takes place in the absence of a rigid constitution, of the judicial control of constitutional legitimacy and of any (Kelsen-inspired) hierarchization of the legal system. It might be argued that, in Great Britain, the entire rule of law is "a living customary law", and thus it is much closer to being "law in action" than "law in books". Within the international context, such an argument could be used against the fervent propounders of global constitutionalism, and also against whoever believes that a rigid constitution is the *conditio sine qua non* for the protection of rights within a unified Europe. It seems more plausible to argue that European citizens suffer, on the contrary, from excessive constitutional rules stemming from both national constitutions and constitutional courts of different countries.[148]

7.2.2 "Rule of men" and "rule of laws". The plethoric expansion of normative texts might be contrasted, as mentioned above, not only with an attempt to rigorously and selectively define the doctrine of the rule of law and of individual rights but also with the setting up of political and legal structures controlling the implementation and effectiveness of legal provisions. It would be a mere rationalistic illusion to think that a given society – especially a contemporary complex and transnational society – meekly accepts legislation and may be easily shaped according to the

intrinsic rationality of legal principles. Besides, it would be a normative blunder to believe that the considerable power of legal interpreters – above all judges – is only due to the technical and structural reasons, which have led to the crisis of the certainty of law, namely, that it is only attributable to the inflation of law, to the poor technical quality of legal texts, to their particularistic contents and to the confused plurality of national and international legal sources.

The founding fathers of the American constitution firmly believed in the contraposition between the "rule of men" and the "rule of law": they argued that, thanks to a written constitution, there would only be in the United States a rule of law, not of men. Yet, as warned by legal realism, a "rule of men" always exists within a "rule of law", and it cannot be meant, in a rationalistic way, as the latter's denial. Even in the most perfect "republic of laws", as argued by Carl Schmitt, men – not laws – govern, and interpreters – not legislators – are sovereign.[149] Contrary to Portalis and Bentham's thinking, the discretion of interpreters, especially judges, may be simply checked and reduced, not suppressed, by normative restraints and institutional devices. To suppress the power of interpreters would mean, *tout court*, to suppress public administration and politics. It is emblematic, and paradoxical, that in the practice of the English rule of law, it was precisely the power of interpreters, namely the power of common law judges, to ultimately guarantee the protection of individual rights, even against the letter of Parliament's acts. Therefore, in the English common law tradition, the "principle of legality" has as its main premise not only parliamentary law but, together with it and if necessary against it, the principles of freedom of an unwritten constitution, which mirrors the immemorial traditions and civil culture of a whole people. Hence, also under this perspective, the normativistic emphasis of "legal globalism" and political cosmopolitanism should be replaced by a cautious historicist and pluralist understanding of the development of legal systems.

7.2.3 Legal culture and judges' training. It may be useful to develop a theory on the "rule of men" within the rule of law. This means, by assuming the English "founding exception" as an ideal reference point, that the legal culture of judges and administrators plays a crucial role in the functioning of the rule of law and in the protection of individual rights. Such a role is performed, in a specific manner, by the "normative ideology" of ordinary judges (as Alf Ross puts it).[150] Hence, the effectiveness of the protection of individual rights largely depends not only on the normative and institutional structures of the rule of law, but

also, so to speak, on the "prejudices" of ordinary magistrates as to the support of civil liberties. It follows that a "politics of law" committed to the protection of individual rights should be centred around issues, such as the cultural training and recruitment of judges, their social sensitivity, their professional identity and integrity, and their orientation towards the general principles and aims of law, namely the strengthening of social expectations and the protection of individual rights; thus going beyond the formalism of an evanescent "legal method", which is erroneously thought of as "pure" and morally neutral. This is all the more the case of international criminal jurisdictions, whose magistrates are usually uprooted from any local normative tradition and are unaware of the political and social problems underlying the "deviant" behaviour to which they pretend to apply international justice.

7.3 The "struggle for law"

The rule of law may be considered as a "minimum political order", essentially limited to protecting civil rights. This might have two distinct meanings: on the one hand, that the rule of law is a normative and institutional structure *rebus sic stantibus* with no alternatives in the Western world. Trying to demolish or simply to contrast it in the name of anarchic, authoritarian, or totalitarian ideologies would be very risky. On the other hand, it may mean that while the protection of civil rights belongs, so to speak, to the physiological normality of the rule of law, the minimum level might be exceeded only by a conflictual pressure. In other words, only social conflict can restore the effectiveness of political rights, redeeming them from their condition of pure electoral ritual, and satisfy further expectations and claims on a national or international level, starting from the "social rights".

Two possible interpretations of the rule of law thus emerge, these mirroring the above mentioned opposition between the "liberal approach" and the "democratic approach", though in part going beyond it. The first interpretation – which is essentially taken from United States constitutionalism – identifies the protection of individual rights with what has been called "constitutional democracy".[151] The necessary and somewhat sufficient protection of individual rights is guaranteed by the balance and interaction among "all" of the state's powers, assisted by a written and rigid constitution, by a constitutional court (or a court with similar functions) and by a thorough control of the constitutionality of legislative acts. What counts, above all, is to remove "constitutional principles" from the decisional competence of parliamentary majorities and to entrust them to the "impartial" care of the judiciary. Within such

a framework of immunity, the judicial practice of the US Supreme Court may be even considered as a "moral reading" of the constitution (as suggested by Ronald Dworkin) or as the "exercise of a sort of self-government" surrogating citizens' self-management (as suggested by Frank Michelman).[152] It follows that such interpretations of the rule of law and democracy are "non-political", paternalistic and non-conflictual, and entrust the future of all political institutions to the "care" of high judicial bureaucracies.

Alternatively to such an interpretation, an activistic and conflictualistic conception of both the protection of individual rights and the functioning of the rule of law might be advanced: rights "exist" and political institutions enforce them in so far as they are activated by the social conflict.[153] Such a realist – Machiavellian – alternative might be called a "struggle for law", to use Rudolph von Jhering's words.[154] Without minimally neglecting the importance of institutions and procedures, Jhering's formula might stand, firstly, for a political commitment to ensure that the legal ritualization submits national and international powers to general rules, thus rendering them somehow controllable. The active forces of "civil society" – among which, in particular, the exponents of the legal world – should avoid delegating to the political organs even the protection of civil rights. In fact, even the right to life is constantly threatened today. Suffice it to mention the series of military interventions in the Balkans and in central Asia, which were decided by European governments and parliaments in open violation of their respective constitutions.[155] Analogously, fundamental freedoms – above all, freedom of thought – are threatened within contemporary societies dominated by mass media corporations.

Secondly, a civil battle would be necessary to ensure the actual enjoyment of political rights and the effective satisfaction – whatever this may mean in formally constitutional terms – of expectations underpinning the "social rights" and "new rights". The rule of law, as such, is not functionally equipped and politically inclined to acknowledge such interests and expectations, apart from the welfare state's services which are, anyway, largely ineffective. If reference may be ideally made to the British common law's courts, only a new "living legal custom" might render the protection of such interests and expectations effective, quite obviously at given general political and economic conditions.

In Western countries, individual rights can be defended and promoted not only within the system of the rule of law but also outside its formalized realm by political, communicative, cultural, educational, and economic means. Quite certainly, nowadays it would be improper to

appeal to Rousseau's idea of "popular sovereignty", which is, *inter alia*, not in line with the global dimension of problems, conflicts, and antagonistic forces. It would be equally useless to generically refer to the constituent power as the original and legitimate source of political and legal power. It might rather prove to be more useful to adopt a realist sociological theory on the new "law-making" subjects and on the potential forms of a new "political jurisgenesis", to use Michelman's words.[156] Anyway, it ought not to be forgotten that individual rights, even when they are proclaimed in the most solemn and morally laden way, are mere "opportunities" rewarding the winners of the political struggle, which is often conducted, as underlined by Bobbio, through the use of force.[157] Rights are (extremely precious) social prostheses, which allow citizens to claim, with greater chances of success and without having to resort again to the use of force, the satisfaction of socially shared interests and expectations. Even the reduction of arbitrary power and the institutional protection of individual rights – the two specific functions of the rule of law – are the historical output of a number of "struggles for the defence of new freedoms against old powers":[158] they are the other side of social struggles; they lie in and fall with them.

NOTES

1. Evidence of the widespread usage of this notion, even beyond a strictly scientific ambit, is given by the fact that the European Union's Charter of Fundamental Rights, approved in Nice in December 2000, refers in the first lines of its preamble to the "principles of the rule of law" as a foundation of the Union. Also the "Cairo Declaration" of 3–4 April 2000, drafted upon the conclusion of the summit between Africa and Europe, includes a norm endorsing the "principles of the rule of law" (chap. 4, art. 53).
2. Neil MacCormick translates *Rechtsstaat* with the formula of "state-under-law"; cf. N. MacCormick, "Constitutionalism and Democracy", in R. Bellamy (ed.), *Theories and Concepts of Politics*, Manchester (NY): Manchester University Press, 1993, pp. 125, 128–30; N. MacCormick, "Der Rechtsstaat und die 'rule of law'", *Juristenzeitung*, 39 (1984), pp. 56–70.
3. See M. Barberis, "Presentazione", in A.V. Dicey, *Diritto e opinione pubblica nell'Inghilterra dell'Ottocento*, Bologna: il Mulino, 1997, p. xv.
4. See R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977; R. Dworkin, *Law's Empire*, Cambridge (MA): Harvard University Press, 1986; R. Dahrendorf, *Quadrare il cerchio*, Roma-Bari: Laterza, 1995; J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a.M.: Suhrkamp Verlag, 1992; N. Bobbio, *L'età dei diritti*, Torino: Einaudi, 1990, Eng. tr. *The Age of Rights*, Cambridge: Polity Press, 1996; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari: Laterza, 1989; L. Ferrajoli, "Diritti fondamentali", *Teoria politica* (1998), 2, pp. 3–33. On the theses

maintained by Ferrajoli in the latter essay, see D. Zolo, "Libertà, proprietà ed eguaglianza nella teoria dei 'diritti fondamentali'", *Teoria politica*, 15 (1999), 1, now also in L. Ferrajoli, *Diritti fondamentali*, Roma-Bari: Laterza, 2001. See also Luigi Ferrajoli's essay in this volume.

5. See N. Bobbio, *L'età dei diritti*, passim.
6. Among the supporters of the formalistic conception of the rule of law, see J. Raz, "The Rule of Law and its Virtue", *The Law Quarterly Review* (1977), 93; J. Raz, "The Rule of Law", in J. Raz, *The Authority of Law*, Oxford: Clarendon Press, 1979; A. Scalia, "The Rule of Law as a Law of Rules: Oliver Wendell Holmes Bicentennial Lecture", *Harvard Law School*, 56 (1989), 4; for the alternative option between formalistic and antiformalistic (or ethical) conceptions of the rule of law, cf. P.P. Craig, "Formal and Substantive Conceptions of the Rule of Law", *Diritto pubblico*, 1 (1995), 1, pp. 35–54. See also L.L. Fuller, *The Morality of Law*, New Haven (CT): Yale University Press, 1969; D. Lyons, *Ethics and the Rule of Law*, Cambridge: Cambridge University Press, 1984; J. Waldron, "The Rule of Law", in J. Waldron, *The Law*, London/New York: Routledge, 1990; I. Shapiro (ed.), *The Rule of Law*, New York: New York University Press, 1994.
7. Cf. J.N. Shklar, "Political Theory and the Rule of Law", in A.C. Hutchinson and P. Monaham (eds), *The Rule of Law: Ideal or Ideology*, Toronto/Calgary/Vancouver: Carswell, 1987, p. 1.
8. See N. Bobbio, N. Matteucci, and G. Pasquino (eds), *Dizionario di politica*, Torino: Utet, 1983, in which the lemma "rule of law" does not appear. For Great Britain, see, *inter alia*, R. Scruton, *A Dictionary of Political Thought*, London: Pan Books, 1982; D. Miller (ed.), *The Blackwell Encyclopedia of Political Thought*, Oxford: Basil Blackwell, 1987. For German literature, see for instance, M. Stolleis, "Rechtsstaat", in A. Erler and E. Kaufmann, *Handwerterbuch zur deutschen Rechtsgeschichte*, Berlin: Erich Schmidt, 1990.
9. Cf. C. Schmitt, *Legalität und Legitimität* [1932], now in C. Schmitt, *Verfassungsrechtliche Aufsätze aus dem Jahren 1924–1954*, Berlin: Dunker und Humblot, 1932, p. 274; for Schmitt's criticism of the rule of law, cf. C. Galli, *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*, Bologna: il Mulino, 1996, pp. 513–36; P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 4, *L'età dei totalitarismi e della democrazia*, Roma-Bari: Laterza, 2001, pp. 328–38.
10. See F. Garzoni, *Die Rechtsstaatsidee im schweizerischen Staatsdenken des 19. Jahrhunderts*, Zürich: Polygraphischer Verlag, 1953.
11. See A. Baratta, "Stato di diritto", in A. Negri (ed.), *Scienze politiche*, Enciclopedia Feltrinelli Fisher, Milano: Feltrinelli, 1970.
12. See O. Koellreutter, *Grundriss der allgemeinen Staatslehre*, Tübingen: Mohr, 1933; H. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, Tübingen: Mohr, 1933; S. Panunzio, *Lo Stato di diritto*, Città di Castello: Il solco, 1922.
13. Ph. Kunig has actually advanced such a suggestion (as recalled by P.P. Portinaro in his essay in this volume) in *Das Rechtsstaatsprinzip*, Tübingen: Mohr Siebeck, 1986; for a careful analysis of the theoretical polysemy of the notion of *Rechtsstaat*, see K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte*, Tübingen: Mohr Siebeck, 1997; C. Margiotta, "Quale Stato di diritto?", *Teoria politica*, 17 (2001), 2, pp. 17–41.

14. For a criticism of the neopositivistic myth claiming the precision of scientific language and, in general, for an epistemological "post-empiricist" approach to social sciences, see D. Zolo, *Reflexive Epistemology*, Boston (MA): Kluwer, 1989.
15. A large historical and theoretical account is provided by Pietro Costa's essay in this volume.
16. Cf. A. Baratta, "Stato di diritto", p. 513.
17. On these authors and in general on the "state-centred" paradigm typical of early nineteenth century German doctrines of public law, cf. P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 3, *La civiltà liberale*, Roma-Bari: Laterza, 2001, pp. 137–93.
18. Mario Dogliani underlines such a commonly overlooked issue in *Introduzione al diritto costituzionale*, Bologna: il Mulino, 1994, pp. 191–3. On this matter, see the essay by Bartolomé Clavero in this volume.
19. On this theme, see E.-W. Böckenförde (ed.), *Staatsrecht und Staatsrechtslehre im Dritten Reich*, Heidelberg: Müller, 1985.
20. See V.E. Orlando, *Diritto pubblico generale. Scritti vari coordinati in sistema* (*1881–1940*), Milano: Giuffrè, 1940. According to Orlando, the state characterized by the rule of law "imposes upon itself legal norms capable of limiting the activities of public authorities with the aim of acknowledging and respecting its subjects' legitimate interests" (V.E. Orlando, *Primo trattato completo di diritto amministrativo italiano*, vol. 1, Milano: Società Editrice Libraria, 1900, p. 32 ff.). On Orlando's political theory, cf. P. Costa, *Lo Stato immaginario. Metafore e paradigmi nella cultura giuridica italiana fra Ottocento e Novecento*, Milano: Giuffrè, 1986, pp. 124–35 and passim.
21. Cf. W.E. Hearn, *The Government of England: Its Structure and its Development*, London: Longmans, 1867, pp. 89–91; S. Cassese, "Albert Venn Dicey e il diritto amministrativo", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 19 (1990), pp. 37–8.
22. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), London: Macmillan, 1982, pp. cxxxvii–cxxxviii. Dicey sums up the rule of law in the following manner: "In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by the law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which our constitution is founded" (ibid., p. lv). For the exceptional success of Dicey's work, which was reprinted eight times in 30 years, and is considered a classic of English constitutional law by both juridica legal doctrine and jurisprudence, cf. E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, Torino: Giappichelli, 1999, pp. 5–15. On Dicey's thought see R.A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, London: Macmillan, 1980; T. Ford, *Albert Venn Dicey*, Chicester: Barry Rose, 1985; D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science", *Modern Law Review*, 46 (1983).
23. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 213–67. For Dicey's famous and controversial criticism of (French) administrative law, cf. S. Cassese, "Albert Venn Dicey e il diritto amministrativo", pp. 6–17; S. Cassese, "La recezione di Dicey in Italia e in Francia", *Materiali per una storia della cultura giuridica*, 25 (1995), 1, pp. 107–31; B. Leoni, *Freedom and the Law*, Princeton (NJ): Van Nostrand, 1961, pp. 59–77.

24. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, p. 273.
25. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 117–130 ff.
26. Cf. C.K. Allen, *Law in the Making*, Oxford: Clarendon Press, 1964, pp. 456–7. On Coke and his understanding of common law, cf. J. Beauté, *Un grand juriste anglais: Sir Edward Coke 1552–1634. Ses idées politiques et constitutionnels*, Paris: Presses Universitaires de France, 1975, pp. 72–6; P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 1, *Dalla civiltà comunale al Settecento*, Roma-Bari: Laterza, 1999, pp. 188–97.
27. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, p. cxlviii. The English constitution, writes Dicey, is "the fruit of contests carried on in the Courts on behalf of the rights of individuals...., is a judge-made constitution, and it bears on its face all the features of judge-made law" (ibid., p. 116).
28. See H. Bracton, *De legibus et consuetudinibus Angliae*, ed. by T. Twiss, Buffalo (NY): Hein, 1990.
29. On the myth of the "ancient constitution" as foundation of the common law, and on the "rationalizing" contributions by William Blackstone (with his famous *Commentaries*) and, later on, by Dicey, cf. E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, pp. 45–56, 109–46; see also J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, Cambridge: Cambridge University Press, 1987.
30. Cf. A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, London: Macmillan, 1914, p. 82. Similar theses had been maintained, as it is known, by Edmund Burke, in his *Reflections on the Revolution in France*, in E. Burke, *Works*, vol. 2, London: George Bell, 1790.
31. According to MacCormick, in the UK individual rights are a kind of 'customary rights' (they are neither Bentham-inspired "constitutionally derivative rights", nor Locke-drawn "fundamental rights"); cf. N. MacCormick, "Constitutionalism and Democracy", pp. 124–5, 135.
32. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, p. lv.
33. Cf. B. Leoni, *Freedom and the Law*, p. 63.
34. Both Georg Jellinek and Ernst Troeltsch have underlined the religious origins of American democracy (cf. G. Gozzi, *Democrazia e diritti. Germania: dallo Stato di diritto alla democrazia costituzionale*, Roma-Bari: Laterza, 1999, pp. 6–10).
35. Cf. M. Fioravanti, *Costituzione*, Bologna: il Mulino, 1999, pp. 102–9.
36. On this issue, in addition to Brunella Casalini's essay in this volume, see J. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge (MA): Harvard University Press, 1980; J. Agresto, *The Supreme Court and Constitutional Democracy*, Ithaca (NY): Cornell University Press, 1984; P. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America*, New Haven (CT): Yale University Press, 1997; E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis*, Paris: Giard & Cie, 1921. More generally, see B. Ackerman, *We The People. Foundations*, Cambridge (MA): Harvard University Press, 1991; C.R. Sunstein, *The Partial Constitution*, Cambridge (MA): Harvard University Press, 1993; J. Waldron, "A Right-Based Critique of Constitutional Rights", *Oxford Journal of Legal Studies*, 13 (1993), 1; S.M. Griffin, *American Constitutionalism*, Princeton (NJ): Princeton University Press, 1996. For a criticism of US constitutional moralism under the perspective of an economic analysis of law, see the classic R.A. Posner, *Economic Analysis of Law*, Boston (MA): Little, Brown, 1992.

37. See M.V. Tushnet, *Red, White and Blue. A Critical Analysis of Constitutional Law*, Cambridge (MA): Harvard University Press, 1988; R.M. Unger, *Law in Modern Society*, New York: The Free Press, 1976; A. Carrino, "Roberto M. Unger e i 'Critical Legal Studies': scetticismo e diritto", in G. Zanetti (ed.), *Filosofi del diritto contemporanei*, Milano: Cortina, 1999, pp. 171–7; G. Minda, *Postmodern Legal Movements*, New York: New York University Press, 1995.
38. On this issue, see P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States*, Oxford: Clarendon Press, 1990; A.L. Goodhart, "The Rule of Law and Absolute Sovereignty", *University of Pennsylvania Law Review*, 106 (1958) 7, pp. 950–5.
39. See Robert von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, Vol. 3, Tübingen: Laupp, 1832–4.
40. See R. von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Leipzig: Breitkopf und Härtel, 1878–88; G. Jellinek, *System der subjektiven öffentlichen Rechte*, Tübingen: Mohr, 1905; O. Mayer, *Deutsches Verwaltungsrecht*, Leipzig: Dunker und Humblot, 1895. See also Gustavo Gozzi's essay in this volume.
41. Cf. C. Schmitt, *Legalität und Legitimität*, pp. 264, 276–7, 279. As it has been suggested, Kant's contribution to the theory of the rule of law is the ethical and metaphysical idea that the "rule of law" is an obligation in the light of the principles of a general moral theory.
42. For the German situation, cf. G. Gozzi, *Democrazia e diritti*, pp. 59–63.
43. Jellinek carefully studies English and German constitutional traditions, which he contrasts with the French Revolutionary contractualistic philosophy; cf. M. Dogliani, *Introduzione al diritto costituzionale*, pp. 162 ff.; M. Fioravanti, "Costituzione e Stato di diritto", *Filosofia politica*, 5 (1991), 2, pp. 336–7.
44. Therefore, it may be held that the rule of law does not necessarily rely on a contractualistic conception, although the fundamental civil rights it protects are the ones that Locke believes are grounded on the *pactum societatis*: life, safety, freedom, and property; cf. N. Luhmann, "Gesellschaftliche und politische Bedingungen des Rechtsstaates", in N. Luhmann, *Politische Planung*, Opladen: Westdeutscher Verlag, 1971, pp. 57–9; G. Gozzi, *Democrazia e diritti*, pp. 31–3.
45. Cf. C. Schmitt, *Legalität und Legitimität*, pp. 274–83.
46. In this respect, cf. P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 3, *La civiltà liberale*, pp. 192–3; see also E. Forsthoff, *Rechtsstaat im Wandel*, München: Beck, 1976.
47. See R. Carré de Malberg, *Contribution a la théorie général de l'État*, vol. 2, Paris: Sirey, 1920–2. On the notion of the "rule of law" according to Carré de Malberg, cf. P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 4, *L'età dei totalitarismi e della democrazia*, pp. 106–15. More generally, on French doctrines of public law, see M.-J. Redor, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste française 1879–1914*, Paris: Economica, 1992; M. Troper, "Le concept d'État de droit", *Droits*, 5 (1992); on the impact of the German model in France, see J. Chevallier, *L'État de droit*, Paris: Montchrestien, 1999; see also the essay by Alain Laquièze in this volume.
48. Cf. R. Carré de Malberg, *Contribution a la théorie général de l'État*, vol. 1, pp. 140 ff.
49. See art. 3 (chap. 5, title 3) of the 1791 Constitution.

50. Cf. P.P. Portinaro, "Il grande legislatore e il custode della costituzione", in G. Zagrebelsky, P.P. Portinaro, and J. Luther (eds), *Il futuro della costituzione*, Torino: Einaudi, 1996, pp. 18–22.
51. On the relationship between the constituent power and the revision of the constitution in European history, cf. M. Dogliani, "Potere costituente e revisione costituzionale", in G. Zagrebelsky, P.P. Portinaro, and J. Luther (eds), *Il futuro della costituzione*, pp. 253–89; E.-W. Böckenförde, "Il potere costituente del popolo. Un concetto limite del diritto costituzionale", ibid., pp. 231–52.
52. Cf. R. Carré de Malberg, *Contribution a la théorie général de l'État*, vol. 1, pp. 488–92.
53. On the relationship between the US institutions and French constitutional tradition, cf. R. Carré de Malberg, *La Loi, expression de la volonté générale*, Paris: Librairie du Recueil Sirey, 1931, pp. 104–10; on the relationship between written constitutions and constituent power, cf. R. Carré de Malberg, *Contribution a la théorie général de l'État*, vol. 2, pp. 493–500.
54. Cf. N. MacCormick, "Constitutionalism and Democracy", pp. 124–30, 144–5.
55. Cf. C. Schmitt, *Die Lage der europäischen Rechtswissenschaft* (1943–1944), now in C. Schmitt, *Verfassungsrechtliche Aufsätze aus dem Jahren 1924–1954*, Berlin: Duncker und Humblot, 1958, pp. 413–4.
56. Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 198 ff.; we shall deal with the issue of the lack of effectiveness of Euro-continental constitutional declarations in sects. 6 and 7.
57. On the relationships between the French and American Revolutions and on the famous debate raised by Georg Jellinek in this respect, cf. N. Bobbio, "La Rivoluzione francese e i diritti dell'uomo", in N. Bobbio, *L'età dei diritti*, pp. 89–120; on the primacy given by Jellinek to the common law in the history of the "legislation of freedom". cf. G. Gozzi, *Democrazia e diritti*, pp. 16–22.
58. "Constitutional democracy" is at the heart of the essay in this volume by G. Gozzi, *Democrazia e diritti*, especially in its second section; cf. also L. Ferrajoli, *Diritti fondamentali*, passim; M. Fioravanti, *Costituzione*, pp. 157–62.
59. For a reinterpretation of the *Rechtsstaat* underlining the aspects of its functional differentiation, cf. N. Luhmann, "Gesellschaftliche und politische Bedingungen des Rechtsstaates", pp. 53–65. In this respect, cf. also: C. Schmitt, *Verfassungslehre* (1928), Berlin: Duncker und Humblot, 1957, pp. 123 ff.; C. Schmitt, "Der bürgerliche Rechtsstaat", *Die Schildgenossen* (1928), 2, pp. 128–33; C. Schmitt, "Nazionalsozialismus und Rechtsstaat", *Juristische Wochenschrift*, 63 (1934), pp. 714–5; C. Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?" (1935), in C. Schmitt, *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916–1969*, Berlin: Duncker und Humblot, 1995, pp. 124–5.
60. Cf. N. Bobbio, *L'età dei diritti*, pp. ix, 58 ff.
61. See N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Milano: Comunità, 1965; P. Piovani, *Linee di una filosofia del diritto*, Padova: Cedam, 1968; N. Bobbio, "Il modello giusnaturalistico", in N. Bobbio and M. Bovero, *Società e Stato nella filosofia politica moderna*, Milano: Il Saggiatore, 1979; P. Piovani, *Giusnaturalismo ed etica moderna*, Roma-Bari: Laterza, 1961.
62. On the issue, see M. Villey, *La formation de la pensée juridique moderne*, Paris: Montchrestien, 1975; G. Tarello, "Profili giuridici della questione della povertà nel francescanesimo prima di Ockham", in *Scritti in memoria di Antonio Falchi*, Milano:

Giuffrè, 1964; E. Santoro, *Autonomia individuale, libertà e diritti*, Pisa: ETS, 1999, pp. 148–65. For the conflictualistic approach, see for instance J.I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750*, Oxford: Oxford University Press, 2001; E. Esposito, *Ordine e conflitto. Machiavelli e la letteratura politica del Rinascimento italiano*, Napoli: Liguori, 1984; G. Borrelli, *Ragion di Stato e Leviatano. Conservazione e scambio alle origini della modernità politica*, Bologna: il Mulino 1993.

63. See E. Santoro, *Autonomia individuale, libertà e diritti*, passim.
64. See H. Blumenberg, *Die Legitimität der Neuzeit*, Frankfurt a.M.: Suhrkamp Verlag, 1974.
65. For Schmitt's criticism of Kelsen's normativism, see C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre der Souveränität*, München/Leipzig: Duncker & Humblot, 1922; C. Galli, *Genealogia della politica*, passim; G. Preterossi, *Carl Schmitt e la tradizione moderna*, Roma-Bari: Laterza, 1996; for Nietzsche's assonant (and inspiring) criticism of the rule of law, cf. P. Costa, *Civitas. Storia della cittadinanza in Europa*, vol. 3, *La civiltà liberale*, in particular pp. 536 ff.
66. Norberto Bobbio's writings on the "visibility/invisibility" of power are a classic: see, above all, *Il futuro della democrazia*, Torino: Einaudi, 1984, Eng. tr. Cambridge: Polity Press, 1987. On the legitimization of power that procedural ritualization is able to promote, see the realistic comments by N. Luhmann, *Legitimation durch Verfahren*, Neuwied, Berlin: Luchterhand, 1969.
67. The explicit declaration of equality before the law is to be found in many documents, from the 1789 "Declaration of the Rights of Man and of the Citizen" to the French Republican Constitution of 1991, and the 1849 *Verfassung des Deutschen Reiches*.
68. On the relationship between the rule of law and the female status, see Anna Loretoni's essay in this volume. In general: A. Phillips, "Citizenship and Feminist Theory", in G. Andrews (ed.), *Citizenship*, London: Lawrence & Wishart, 1991, pp. 76–88; M. Dietz, "Context Is All: Feminism and Theories of Citizenship", in C. Mouffe (ed.), *Dimensions of Radical Democracy*, London: Verso, 1992, pp. 63–85. On the relationship between gender differences and law, see F. Olsen, "Feminism and Critical Legal Theory: An American Perspective", *The American Journal of the Sociology of Law*, 18 (1990), 2; C. Smart, "The Woman of Legal Discourse", *Social and Legal Studies*, 1 (1992), 1; T. Pitch, "Diritto e diritti. Un percorso nel dibattito femminista", *Democrazia e diritto*, 33 (1993), 2, pp. 3–47; L. Ferrajoli, "La differenza sessuale e le garanzie dell'eguaglianza", ibid., pp. 49–73; M. Graziosi, "Infirmitas sexus. La donna nell'immaginario penalistico", ibid., pp. 99–143; A. Facchi, "Il pensiero femminista sul diritto", in G. Zanetti (ed.), *Filosofi del diritto contemporanei*, pp. 129–53; G. Minda, *Postmodern Legal Movements*, passim.
69. This does not mean, as we have mentioned and as emerges from some essays in this volume – in particular the ones by Bartolomé Clavero and Carlos Petit – that, in America, the rule of law has not legitimated the slavery of African Americans and that, throughout the nineteenth century, European institutions have not been imposed on non-European countries in a colonial manner, i.e. in illiberal and discriminatory ways.
70. It is not by chance that in the latter decades of the nineteenth century, it was precisely Albert Venn Dicey who launched an attack at the rising welfare state, accusing it of breaching the fundamental principles of the rule of law as a result of its collectivistic and egalitarian stances: cf. A.V. Dicey, *Lectures on the Relation between Law and*

Public Opinion in England during the Nineteenth Century, pp. 211–302. On the relationship between formal legal equality and substantial equality, see the enlightening work by Alf Ross, *On Law and Justice*, London: Steven & Sons, 1958.

71. On these issues, see N. Luhmann, *Rechtssoziologie*, Reinbek bei Hamburg: Rowohlt, 1972; N. Luhmann, *Macht*, Stuttgart: Enke Verlag, 1975; see also D. Zolo, "Function, Meaning, Complexity. The Epistemological Premisses of Niklas Luhmann's 'Sociological Enlightenment'", *Philosophy of the Social Sciences*, 16 (1986), 2.
72. For a criticism of *ad hoc* courts, cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 213–67.
73. Cf. B. Leoni, *Freedom and the Law*, pp. 63–77; see also F.A. von Hayek, *Law, Legislation and Liberty*, London: Routledge and Kegan Paul, 1982.
74. See T.H. Marshall, "Citizenship and Social Class", in T.H. Marshall, *Class, Citizenship, and Social Development*, Chicago: The University of Chicago Press, 1964. For a criticism of Marshall's tripartition, cf. L. Ferrajoli, "Dai diritti del cittadino ai diritti della persona", in D. Zolo (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari: Laterza, 1994, pp. 277–83.
75. On the distinction between "negative freedom" and "positive freedom", see the classic essay by Isaiah Berlin, *Two Concepts of Liberty*, now also in I. Berlin, *Four Essays on Liberty*, Oxford: Oxford University Press, 1969; see also G. De Ruggiero, *Storia del liberalismo europeo*, Roma-Bari: Laterza, 1925. On the ensuing debate: R. Young, *Personal Autonomy: Beyond Negative and Positive Liberty*, London: Croom Helm, 1986; D. Parfit, *Reasons and Persons*, Oxford: Clarendon Press, 1984; E. Santoro, *Autonomia individuale, libertà e diritti*, passim.
76. Cf. T.H. Marshall, "Citizenship and Social Class", pp. 95–6.
77. For an analytical discussion of the different functional meanings of the "separation of powers", cf. R. Guastini, *Il diritto come linguaggio*, Torino: Giappichelli, 2001, pp. 73–80.
78. On the "positivization of law" as a precondition for the modern state and, in particular, for the rule of law, cf. N. Luhmann, *Grundrechte als Institution*, Berlin: Duncker und Humblot, 1965, pp. 16 ff., 186–200.
79. Cf. K. Marx, *Zur Judenfrage*, in *Marx-Engels Werke (MEW)*, vol. 1, Berlin: Institut für Marxismus-Leninismus, 1956–69, p. 364. On the issue, cf. G. Lohmann, "La critica fatale di Marx ai diritti umani", *Studi perugini* (1998), 5, pp. 187–99.
80. Cf. N. Luhmann, *Politische Planung*, pp. 35–45, 53–89; on the issue, cf. D. Zolo, *Complessità, potere, democrazia*, now also in D. Zolo, *Complessità e democrazia*, Torino: Giappichelli, 1986, pp. 69–90.
81. Cf. N. Luhmann, *Politische Planung*, pp. 42, 62.
82. According to legal realism, the executive's activity, and in particular the judiciary's, consists in the enactment of ad hoc rules for the settlement of single cases.
83. The meaning of the "conformity" of a single administrative act – either executive or judicial – to a previous general norm is, as it is known, a highly controversial subject; cf. for instance R. Guastini, *Il giudice e la legge*, Torino: Giappichelli, 1995, pp. 35–66.
84. The expression "political space" is used here in the meaning, which has been ascribed to it by Carlo Galli in his collection of essays, *Spazi politici. L'età moderna e l'età globale*, Bologna: il Mulino, 2001.

85. Cf. P.P. Craig, "Formal and Substantive Conceptions of the Rule of Law", pp. 42–5; J. Raz, "The Rule of Law and its Virtue", pp. 195 ff.; J. Raz, "The Rule of Law", passim.
86. On the contraposition between rule of law and 'state of justice' see G. Fassò, "Stato di diritto e Stato di giustizia", in R. Orecchia (ed.), *Atti del VI Congresso nazionale di filosofia del diritto. Pisa, 30 maggio-2 giugno 1963*, Milano: Giuffrè, 1963.
87. See A. Scalia, "The Rule of Law as a Law of Rules: Oliver Wendell Holmes Bicentennial Lecture"; see also Brunella Casalini's essay in this volume.
88. Cf. D. Zolo, *Reflexive Epistemology*, pp. 167–77; D. Zolo, *Democracy and Complexity*, pp. 19–53.
89. On the relationship between the Western tradition of the rule of law and the Islamic legal and political culture, see the essays in this volume by Raja Bahlul, Baudouin Dupret, and Tariq al-Bishri. In general: A. Abu-Sahlieh and A. Sami, *Les Musulmans face aux droits de l'homme: religion, droit, politique*, Bochum: Winkler, 1994; G. Gozzi (ed.), *Islam e democrazia*, Bologna: il Mulino, 1998; further bibliographic notes in M.G. Losano, *I grandi sistemi giuridici*, Roma-Bari: Laterza, 2000, pp. 325–80. On the relationship between the Western doctrine of human rights and the Chinese-Confucian tradition (and on the *vexata quaestio* of the violation of individual rights in China), see the essays in this volume by Alice Ehr-Soon Tay, Wu Shu-chen, Lin Feng, and Wang Zhenmin-Li Zhenghui. In general: J.A. Cohen, *Contemporarey Chinese Law: Research Problems and Perspectives*, Cambridge (MA): Harvard University Press, 1970; E. Dell'Aquila, *Il diritto cinese*, Padova: Cedam, 1981; W. Chenguang and Z. Xianchu (eds), *Introduction to Chinese Law*, Hong Kong/Singapore: Sweet & Maxwell Asia, 1997; J. Tao, "The Chinese Moral Ethos and the Concept of Individual Rights", *Journal of Applied Philosophy*, 7 (1990), 2; A.H.Y. Chen, *Chinese Cultural Tradition and Modern Human Rights*, Amnesty International Annual General Meeting, Hong Kong, 2 December 1997; M.G. Losano, *I grandi sistemi giuridici*, pp. 405–33. More generally: W. Schmale (ed.), *Human Rights and Cultural Diversity: Europe, Islamic World, Africa, China*, Goldbach: Keip, 1993; M. Yasutomo (ed.), *Law in a Changing World: Asian Alternatives*, Archiv für Rechts- und Sozialphilosophie, Beiheft 72, 1998.
90. On this issue, cf. D. Zolo, *Democracy and Complexity*, pp. 54–98.
91. For a "minimal definition" of democracy's rules and values, see N. Bobbio, *Il futuro della democrazia*, pp. 4–7, 10–1, 33–7, 59–62.
92. On the issue in general, there is ample literature: D. Grimm, "Una Costituzione per l'Europa?", in G. Zagrebelsky, P.P. Portinaro, and J. Luther (eds), *Il futuro della Costituzione*, pp. 339–67; J. Habermas, "Una Costituzione per l'Europa? Osservazioni su Dieter Grimm", ibid., pp. 369–75; R. Bellamy, V. Bufacchi, and D. Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995; R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Avebury: Aldershot, 1996.
93. See for instance the "Banjul Charter on Human and People's Rights", ratified in 1981 by the Organization of African Unity, where economic and social rights, viewed as collective rights of all peoples, prevail over individuals' civil and political rights; this is the case also of the "Arab Charter of Human Rights", ratified in El Cairo in September 1994; cf. in general R.J. Vincent, *Human Rights and International Relations*, Cambridge: Cambridge University Press, 1986, pp. 39–44.

94. See Giorgio Bongiovanni's essay in this volume.
95. Cf. L. Ferrajoli, "Democrazia e Costituzione", in G. Zagrebelsky, P.P. Portinaro, and J. Luther (eds), *Il futuro della costituzione*, pp. 323–4; on the issue, see also S. Holmes, "Precommitment and the Paradox of Democracy", in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988; in general UK Preuss, *Zum Begriff der Verfassung. Die Ordnung des Politischen*, Frankfurt: Fischer Verlag, 1994; J.L. Jowell, *The Changing Constitution*, Oxford: Clarendon Press, 1994.
96. "Toute societé dans la quelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution".
97. Cf. P.P. Portinaro, *Stato*, Bologna: il Mulino, 1999, pp. 110–12.
98. In this respect, besides the Weimar Republic, reference is made to the "suicide" of the French Second Republic.
99. Cf. P.P. Portinaro, "Il grande legislatore e il custode della Costituzione", pp 22–31; with respect to the "Critical Legal Studies" and Mark Tushnet's criticism of American constitutionalism, cf. A. Carrino, "Roberto M. Unger e i 'Critical Legal Studies': scetticismo e diritto", pp. 171–7.
100. For a criticism in this respect of American constitutional practice, see C.R. Sunstein, *The Partial Constitution*, passim; C.R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford: Oxford University Press, 1996; see also Brunella Casalini's essay in this volume. For Germany, see in particular E.-W. Böckenförde, *Staat, Verfassung, Demokratie*, Frankfurt a.M.: Suhrkamp, 1991.
101. This fully legitimates, for instance, the important "liberal" arguments maintained by Luigi Ferrajoli in his essay in this volume.
102. See D. Zolo, *Invoking Humanity. War, Law and Global Order*, London/New York: Continuum International, 2002.
103. Cf. N. Bobbio, *L'età dei diritti*, pp. 40–44; D. Zolo, "Libertà, proprietà ed eguaglianza nella teoria dei 'diritti fondamentali'", pp. 3–24.
104. See J.M. Barbalet, *Citizenship*, Milton Keynes: Open University Press, 1988; L. Ferrajoli, *Diritti fondamentali*, passim; D. Zolo, "La strategia della cittadinanza", in D. Zolo (ed.), *La cittadinanza*, pp. 33 ff.
105. The expression "generations" has been used by Bobbio, without any specific theoretical claim. P. Barile, in *Diritti dell'uomo e libertà fondamentali*, Bologna: il Mulino, 1984, equally provides a (useful) account of positive constitutional law. Attempts to a theoretical elaboration are to be found in R. Alexy, *Theorie der Grundrechte*, Baden-Baden: Nomos Verlagsgesellschaft, 1985; J. Rawls, "The Basic Liberties and Their Priorities", in S.M. McMurrin (ed.), *The Tanner Lectures on Human Values*, vol. 3, Salt Lake City (UT): University of Utah Press, 1982, pp. 1–87; G. Peces-Barba Martínez, *Curso de derechos fundamentales*, Madrid: Eudema, 1991.
106. Cf. D. Zolo, "Filosofia della pena e istituzioni penitenziarie", *Iride*, 14 (2001), 32, pp. 47–58; A. Cassese, *Umano-disumano. Carceri e commissariati nell'Europa di oggi*, Roma-Bari: Laterza, 1994; T. Mathiesen, *Prison on Trial: A Critical Assessment*, London: Sage Publicatons, 1990; E. Santoro, *Carcere e società liberale*, Torino: Giappichelli, 1997; L. Wacquant, *Les prisons de la misère*, Paris: Raisons d'agir, 1999.
107. Clinical evidence concerns serious pathologies: haemorrhages, infections, urethral fistulas, urine retention, prepuce cysts, and glands necrosis. For such reasons, many

organizations, such as Nocir, Noharm, and Norm, have been set up in the United States to oppose male circumcision. See W.J. Prescott, "Genital Pain versus Genital Pleasure", *The Truth Seeker*, 1 (1989), 3; A. Abu-Sahlieh, "To Mutilate in the Name of Jeowa or Allah: Legitimation of Male and Female Circumcision", *Medical Law*, 13 (1994); A.J. Chessler, "Justifying the Injustifiable", *Buffalo Law Review*, 45 (1997).

108. Cf. N. Bobbio, *L'età dei diritti*, pp. 40–44.
109. See L. Baccelli, *Il particolarismo dei diritti*, Roma: Carocci, 1999, passim.
110. See Alice Ehr-Soon Tay's essay in this volume, where a sharp distinction is drawn between "authentic" Confucian values and their instrumental political usage by the Singapore model's supporters; see also: M.C. Davis (ed.), *Human Rights and Chinese Values. Legal, Philosophical and Political Perspectives*, New York: Columbia University Press, 1995; W.T. de Bary and T. Weiming (eds), *Confucianism and Human Rights*, New York: Columbia University Press, 1998; D.A. Bell, "A Communitarian Critique of Authoritarianism. The case of Singapore", *Political Theory*, 25 (1997), 1; see also the section dedicated to this issue by B. Casalini on the site *Jura Gentium*, at http://www.juragentium.unifi.it.
111. See L. Ferrajoli, *La sovranità nel mondo moderno*, Milano: Anabasi, 1995.
112. With respect to British colonialism in the Indies, see Ananta Kumar Giri's essay in this volume. For Spanish "colonial law" see Carlos Petit's essay in this volume. More generally, with respect to "colonial law", see S. Romano, *Corso di diritto coloniale*, Roma: Athenaeum, 1918; J.M. Cordero Torres, *Tratado elemental de derecho colonial español*, Madrid: Editora Nacional, 1941. On imperialism see, above all, M. Nicholson, *International Relations*, London: Macmillan, 1998; for an updated reinterpretation, see M. Hardt and A. Negri, *Empire*, Cambridge (MA): Harvard University Press, 2000. See also the classic H. Bull and A. Watson, *The Expansion of International Society*, Oxford: Clarendon Press, 1984.
113. Cf. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, p. 22; C. Schmitt, *Die Lage der europäischen Rechtswissenschaft*, p. 387.
114. Cf. G. Jellinek, *Die rechtliche Natur der Staatenverträge*, Wien: Hoelder, 1880, p. 27.
115. Cf. D. Zolo, *Invoking Humanity*, pp. 99–132.
116. For a realist critique of Kantian pacifism – from Kelsen to Bobbio and Habermas – see D. Zolo, *I signori della pace. Una critica del globalismo giuridico*, Roma: Carocci, 1998.
117. Cf. P.P. Portinaro, *Il realismo politico*, Roma-Bari: Laterza, 1999, pp. 119–25; P.P. Portinaro, *Stato*, pp. 128–32.
118. See H.J. Morgenthau, *Politics among Nations*, New York: Knopf, 1960; D. Zolo, *Cosmopolis: Prospects for World Order*, Cambridge: Polity Press, 1996.
119. See R. Falk, *Human Rights and State Sovereignty*, New York: Holmes & Meier, 1981; D. Held, *Democracy and the Global Order*, Cambridge: Polity Press, 1995. See also the essays in the volume *Global Democracy: Key Debates*, ed. by B. Holden, London/New York: Routledge, 2000; see in particular, besides the editor's contribution, the essays by D. Held, "The changing contours of political community: rethinking democracy in the context of globalization", pp. 17–31; D. Zolo, "The lords of peace: from the Holy Alliance to the new international criminal tribunals", pp. 73–86; R. Falk, "Global civil society and the democratic prospect", pp. 162–78.
120. "Das Weltbürgerrecht ist eine Konsequenz der Rechtsstaatsidee" (J. Habermas, "Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren",

Kritische Justiz, 28, 1995, p. 317, now also in J. Habermas, *Die Einbeziehung des Anderen*, Frankfurt a.M.: Suhrkamp, 1996); see also J. Habermas, *Faktizität und Geltung*. For a realist criticism of Habermas's cosmopolitanism, cf. D. Zolo, "A Cosmopolitan Philosophy of International Law? A Realist Approach", *Ratio Juris*, 12 (1999) 4, pp. 429–44; cf. also Habermas's reply, ibid., pp. 450–3.

121. For a criticism of such approaches, see P. Hirst and G. Thompson, *Globalization in Question*, Cambridge: Polity Press, 1996; P. Hirst and G. Thompson, "Global Myths and National Policies", in B. Holden (ed.), *Global Democracy*, pp. 47–59; on domestic analogy, see the classic monograph: H. Suganami, *The Domestic Analogy and World Order Proposals*, Cambridge: Cambridge University Press, 1989.
122. See J. Habermas, "Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral", *Die Zeit* (1999), 18.
123. There is boundless literature on globalization. See for instance: I. Clark, *Globalization and Fragmentation*, Oxford: Oxford University Press, 1997; U. Beck, *Was ist Globalisierung?*, Frankfurt a.M.: Suhrkamp Verlag, 1997; Z. Bauman, *Globalization. The Human Consequences*, Cambridge: Polity Press; Oxford: Blackwell, 1998; P. de Senarclens, *Maîtriser la mondialisation*, Paris: Presses de Sciences Po, 2000; L. Boltanski and E. Chiapello, *Le nouvel esprit du capitalisme*, Paris: Gallimard, 1999; L. Gallino, *Globalizzazione e disuguaglianze*, Roma-Bari: Laterza, 2000; K. Bales, *Disposable People. New Slavery in the Global Economy*, Berkeley (CA): California University Press, 1999. On the global threat of terrorism, cf. D. Zolo, *Invoking Humanity*, pp. 135–6, 171–2.
124. See N. Luhmann, "The Self-Reproduction of the Law and Its Limits", Conference Materials on *Autopoiesis in Law and Society*, Firenze: European University Institute, 1984; N. Luhmann, "The Unity of the Legal System", ibid.; N. Luhmann, "The Sociological Observation of the Theory and Practice of Law", ibid.; G. Teubner and H. Willke, "Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht", *Zeitschrift für Rechtssoziologie*, 6 (1984), 1, pp. 4–35.
125. There is an extensive literature in this respect: see for instance, in this volume, the reference made to the issue by Luigi Ferrajoli's essay. As early as 1958, Carl Schmitt, in his essay *Die Lage der europäischen Rechtswissenschaft*, pp. 407–8, criticized the "motorization" of law turning it into an administrative measure (*Verordnung*).
126. See, in this volume, the references made to the issue by Alain Laquièze and Luigi Ferrajoli.
127. See F.A. von Hayek, *The Constitution of Liberty*, London: Routledge & Kegan Paul, 1960; F.A. von Hayek, *The Rule of Law*, Menlo Park (CA): Institute for Human Studies, 1975; B. Leoni, *Freedom and the Law*, pp. 59–96. Similar theses are upheld by Nicola Matteucci (*Positivismo giuridico e costituzionalismo*, Bologna: il Mulino, 1996, pp. 108 ff., 113), who supports the idea of a liberal state founded on the judicial power, not on the legislative one. See in this respect the critical commentary to the Italian version of Leoni's book: D. Zolo, "La libertà e la legge", *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1995), 14; and D. Zolo, "A proposito di 'Legge, legislazione e libertà' di Friedrich A. von Hayek", *Diritto privato*, 1 (1996), 2, pp. 767–81. See also Maria Chiara Pievatolo's essay in this volume.
128. Cf. T.H. Marshall, "Citizenship and Social Class", pp. 127–32.

129. Cf. A. Giddens, "Class Division, Class Conflict and Citizenship Rights", in A. Giddens, *Profiles and Critiques in Social Theory*, London: Macmillan, 1982, pp. 171–3, 176; J.M. Barbalet, *Citizenship*, passim; D. Held, "Citizenship and Autonomy", in D. Held, *Political Theory and the Modern State*, Stanford (CA): Stanford University Press, 1989, pp. 189–213; L. Ferrajoli, "Dai diritti del cittadino ai diritti della persona", pp. 272–6.
130. See M. Fioravanti, *Appunti di storia delle Costituzioni moderne*, Torino: Giappichelli, 1990.
131. See the Charter of Fundamental Rights of the European Union, especially arts. 3, 8, 37, 38.
132. Cf. H. Kelsen, *General Theory of Law and State*, Cambridge (MA): Harvard University Press, 1945, pp. 288–9; see also H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen: J.C.B. Mohr, 1929.
133. See G. Sartori, *Homo videns*, Roma-Bari: Laterza, 1997.
134. Even where they are not suppressed, "social rights" are granted in discretionary forms and measures, primarily for reasons of public order and managing critical situations. Not erroneously, therefore, Jacques Barbalet has argued that, rather than "social rights", nowadays we should speak of "social services" (cf. J.M. Barbalet, *Citizenship*, pp. 60–72). On the "basic income" cf. L. Ferrajoli, "Dai diritti del cittadino ai diritti della persona", pp. 277–83 and Ferrajoli's essay in this volume; cf. also Z. Bauman, *In Search of Politics*, Cambridge: Polity Press, 1999, pp. 180–90.
135. Cf. N. Bobbio, *L'età dei diritti*, pp. xx, 72.
136. See P. Bourdieu (ed.), *La misère du monde*, Paris: Seuil, 1993; L.J.D. Wacquant, "La tentation pénale en Europe", *Actes de la recherche en sciences sociales*, 124 (1998); L.J.D. Wacquant, "L'ascension de l'Etat pénal en Amérique", ibid.; L.J.D. Wacquant, *Les prisons de la misère*.
137. See N. Tate and T. Vallinder (eds), *The Global Expansion of Judicial Power*, New York: New York University Press, 1995; G. Zagrebelsky, *Il diritto mite*, Torino: Einaudi, 1992, pp. 213 ff.; A. Pizzorno, *Il potere dei giudici*, Roma-Bari: Laterza, 1998; cf. also D. Zolo, "A proposito dell'espansione globale del potere dei giudici", *Iride*, 11 (1998), 25, pp. 445–53. On the debate concerning the power of German Constitutional Courts, cf. G. Gozzi, *Democrazia e diritti*, pp. 256–60. See also Pier Paolo Portinaro's essay in this volume.
138. See the useful work by M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna: il Mulino, 2000.
139. Cf. D. Zolo, *Invoking Humanity*, pp. 66–98; see also P. de Senarclens, *L'humanitaire en catastrophe*, Paris: Presses de Sciences Po, 1999.
140. See, *inter alia*, K. Ohmae, *The End of the Nation State. The Rise of Regional Economies*, New York: The Free Press, 1995; J.-J. Roche, *Théories des relations internationales*, Paris: Editions Montchrestien, 1999.
141. See "Statuto di Roma della Corte penale internazionale", *Rivista di studi politici internazionali*, 66 (1999), 1, pp. 25–95; see also G. Vassalli, "Statuto di Roma. Note sull'istituzione di una Corte Penale Internazionale", ibid., pp. 9–24. For a large number of documents in this respect, visit the United Nations' website at http://www.un.org/law/icc. An example of "legal globalism" applied to criminal law is given by O. Höffe, *Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch*, Frankfurt a.M.: Suhrkamp Verlag, 1999.

142. See J. Frank, *Law and the Modern Mind*, New York: Coward-McCann, 1949; A. Ross, *On Law and Justice*; R.M. Unger, *Law in Modern Society*; R.A. Posner. *Economic Analysis of Law*; G. Tarello, *Il realismo giuridico americano*, Milano: Giuffrè, 1962.
143. Luigi Ferrajoli's essay in this volume deserves specific reference for its critical and project-oriented approach.
144. See U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt a.M.: Suhrkamp, 1986; Z. Bauman, *In Search of Politics*; A. Dal Lago, "Esistenza e incolumità", *Rassegna italiana di sociologia*, 41 (2000), 1, pp. 131–42; see also U. Beck and D. Zolo, "Dialogo sulla globalizzazione", *Reset* (1999), 55.
145. Cf. N. Bobbio, *L'età dei diritti*, pp. 5–44.
146. See M. Reale, *Crise do capitalismo e crise do estado*, Sao Paulo: Editora Senac, 2000. Apart from having a "long" and advanced constitution, Brazil has signed nearly all international treaties and conventions protecting human rights. Yet, it remains one of the countries in which individual rights are seriously violated; see for instance L. Mariz Maia, *Tortura no Brasil: a banalidade do mal*, on the website *L'altro diritto* at http://www.altrodiritto.unifi.it.
147. Cf. N. Bobbio, *L'età dei diritti*, p. xx.
148. Cf. J.H.H. Weiler, "I rischi dell'integrazione", in A. Loretoni (ed.), *Interviste sull'Europa*, Roma: Carocci, 2000, pp. 72–3; J.H.H. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor?*, Cambridge: Cambridge University Press, 1999.
149. Cf. C. Schmitt, *Über die drei Arten des Rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt, 1934, pp. 11–24, 33–4; cf. N. Bobbio, "Governo degli uomini o governo delle leggi?", now also in N. Bobbio, *Il futuro della democrazia*, pp. 169–94.
150. See A. Ross, *On Law and Justice*, passim.
151. Cf. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge (MA): Oxford University Press, 1996, pp. 37 ff.; F.I. Michelman, "The Supreme Court 1985 Term", *Harvard Law Review*, 100 (1986–1987); F.I. Michelman, "Law's Republic", *The Yale Law Journal*, 97 (1988), 8; cf. also M. Fioravanti, *Appunti di storia delle Costituzioni moderne*, pp. 73 ff.; M. Fioravanti, "Costituzione e Stato di diritto", now also in M. Fioravanti, *La scienza del diritto pubblico*, Milano: Giuffrè, 2001, pp. 575–604; G. Gozzi, *Democrazia e diritti*, pp. 256–93; G. Bongiovanni, *Teorie 'costituzionalistiche' del diritto*, Bologna: Clueb, 2000, pp. 209–31.
152. Cf. G. Gozzi, *Democrazia e diritti*, pp. 287–90. Gozzi claims that constitutional courts (for instance, the German Constitutional Court) run the risk of losing prestige by supporting innovative theories (ibid., pp. 254–5).
153. See Luca Baccelli's essay in this volume, linking an activistic understanding of rights with Machiavellian realism; cf. also L. Baccelli, "Diritti senza fondamento", in L. Ferrajoli, *Diritti fondamentali*, pp. 201–16; L. Baccelli, *Il particolarismo dei diritti*, pp. 145–85.
154. See R. von Jhering, *Der Kampf um's Recht*, Wien: Manz, 1874; R. von Jhering, *Der Zweck im Recht*, Leipzig: Breitkopf und Härtel, 1923.
155. Cf. L. Ferrajoli, "Una disfatta del diritto, della morale, della politica", *Critica marxista* (1999), 3, pp. 18–20; U. Villani, "La guerra del Kosovo: una guerra umanitaria o un crimine internazionale?", *Volontari e terzo mondo* (1999), 1–2, pp. 35–7.

156. Cf. F.I. Michelman, "Law's Republic", p. 1514; M.R. Ferrarese, *Le istituzioni della globalizzazione*, pp. 101–58; see Luca Baccelli's essay in this volume.
157. Cf. J.M. Barbalet, *Citizenship*, pp. 44, 97 ff.; N. Bobbio, *L'età dei diritti*, pp. xiii–xiv: "[R]eligious freedom was the result of religious wars, civil liberties were the result of parliaments' struggles against absolute monarchs, political freedom and social freedoms were the result of the birth, growth and maturity of workers' movements, of farmers with little or no land, of poor people asking public powers not only to acknowledge personal freedom and the other 'negative freedoms', but also to protect them against unemployment, and to provide them with the basic means against illiteracy."
158. Cf. N. Bobbio, *L'età dei diritti*, p. xiii.