CHAPTER 2

THE RULE OF LAW: A HISTORICAL INTRODUCTION

Pietro Costa

1 THE HISTORICAL DEVELOPMENT OF THE RULE OF LAW

The expression "rule of law" has become widely popular in the last few years, both in scholarly literature and political journals. The idea of rule of law is invoked for a number of purposes depending on the interests at stake, for example, to oppose individual freedom to totalitarianism, to claim the importance of individual rights, or to propound individual autonomy against bureaucratic intrusiveness.[1] The contemporary discontent towards centralized organizations of power, the crisis of the Welfare state, the extraordinary proliferation of rights, the exhaustion of alternatives to Western democracies have all, albeit in different ways, given new life to the notion of rule of law.

The contemporary value of the notion of rule of law, as well as its analytical, critical, and evaluative utilizations are matters that may be properly dealt with by jurists and philosophers of law and politics; the theoretical essays in this volume aim precisely at providing a contribution in this respect. To write an "historical introduction" – the task I am entrusted with – is indeed an easier and more modest charge: it suffices to go back in time and examine the history (and prehistory) of the concept in order to outline an inevitably schematic and selective map of its several meanings; my aim, quite simply, is to provide a framework or background to the essays in this volume, which focus analytically on some stages of the historical parable of the rule of law.

What is the history of the rule of law about? In order to answer such a question, we ought to examine the various meanings ascribed to the "formula" or compound expression that is known in German as *Rechtsstaat*, in French as *État de droit*, in Italian as *Stato di diritto*, and in English, at least hypothetically speaking, as the "rule of law" (such a translation will be examined and qualified below). Yet, before formulating the above question, a tentative pre-understanding of the concept might be useful to serve as a rudimentary compass guiding our research.

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 73–149.
© 2007 Springer.

At first sight, the cardinal points of the rule of law seem to be the following: political power (sovereignty, the state), law (objective law, norms), and individuals. More specifically, these three elements are the conditions for the existence and meaning of the rule of law, while the rule of law "as such" is a peculiar relationship between "state" and "law" which is, overall, beneficial to individuals. The rule of law, in other words, appears as a means to achieve a specific aim: it is expected to direct us about how to intervene (through "law") on "power" so as to strengthen individuals' positions. It follows that the problem of the rule of law can be included within the "discourse of citizenship": since the latter focuses on the relationship between the individual and a given political community and determines his or her political and legal identity, the rule of law is one of the potential strategies of such a discourse; for the *raison d'être* of the rule of law is to affect the state–individual relationship by introducing ("legal") curbs on sovereign power to the individual's benefit.[2]

Moreover, the circumstance that the rule of law aims at benefiting the individual suggests that the favourable treatment of the individual is implemented by means of a wide spectrum of rights granted to him. A thematic link between the rule of law and "individual rights" is therefore possible though not necessary, for the rule of law may guarantee beneficial conditions to individuals that may not necessarily stem from the granting of specific rights.[3]

What are the historical periods within which the evolution of the rule of law can be framed?

Viewing the modern state as one organized and limited by law, Blandine Barret-Kriegel believes that the origins of the rule of law are to be found in the early establishment of great national monarchies.[4] Such an understanding is indeed legitimate, but it is equally plausible to ascribe to our problem – which the formula "rule of law" purports to solve – a wider time span substantially coinciding with Western political and intellectual history, which has been constantly concerned with the inevitable tension (and necessary connection) between power and law.

It is nonetheless useful to draw a line between the general problem implicit in the phrase "rule of law" and its recent historically specific meaning, in order to determine the different phases of its evolution.

I suggest, therefore, a "three-stage" division, to be outlined in an order of decreasing proximity with respect to our subject matter. The first stage is the *history* (this being narrowly meant) of the rule of law: it begins with the emergence of the lexical expression in question, i.e. when the large and recurrent problem of the relationship between power, law,

and individuals was provided with a particular solution and given a name (the "rule of law", precisely). Yet, our formula also has a *prehistory* concerning contexts and times when, even though the problem did not yet have a name, there nonetheless existed the "thing", namely the specific traits of an approach which would subsequently be explicitly formulated by the "rule of law" theory. The prehistory of the rule of law, i.e. the number of conditions directly giving rise thereto, is therefore the second "stage" of our analysis. Further back in time is our third "stage", when attention given to the power/law relationship depended on a cultural background very different from the preconditions (the "prehistory") of our "formula". The significance of such remote "precedents" should not be reduced to the trivial (and false) "nihil sub sole novi", since the understanding and solutions of our problem radically changed over time; neither should it be grounded on the idea of a linear development, where each new phase draws from the previous one. Rather, these precedents are significant because they provide the history (and prehistory) of the rule of law with a *horizon of meaning*, which still includes its most recent developments.

2 THE HORIZON OF MEANING OF THE RULE OF LAW

Assuming the rule of law to be grounded on the need to curb the overwhelming and unbridled strength of power (a terrible and threatening power, though at the same time necessary for the creation and preservation of order) and that the rule of law expresses individuals' trust in law as a means to prevent or at least regulate the numinous and arcane strength of power, the horizon of meaning of the rule of law is to be found within an extremely wide time span, encompassing both ancient and medieval times.

The awareness of a "great dichotomy" between different kinds of regimes, grounded on the relationship between "government" and "law", is far from being a modern issue. Both Plato and Aristotle (albeit in different ways) examined different forms of government – a fundamental trait also of "Western" political thinking – by focusing on the central role of law.

Plato did not favour the idea of the government being shaped by law: if the government was in the hands of those who, possessing the "art", were capable of delivering justice, laws would not be needed; yet, "as the state is not like a beehive, and has no natural head who is at once recognized to be the superior both in body and in mind", law is inevitably important, so much so that Plato defined the "counterpart" of three

kinds of government (monarchy, the rule of the few, and the rule of the multitude), depending on whether the "sole ruler", few rulers, or many rulers govern "observing the laws or not".[5] Similarly, by criticizing democracies Aristotle introduced the sovereignty of law: "Such a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies and the government should judge of particulars".[6]

The role of law, the tension between its general character and the inexhaustible variety of individual cases, together with the difficult though necessary compromise between "despotic" decisions and the respect for a binding legal system, were common problems in ancient thinking and have been subsequently inherited and transformed by medieval culture. According to theologians and jurists discovering and creatively reinterpreting Aristotle's *Politics* and the *Corpus Iuris*, power was part of an order that both transcended it and provided its foundations. Power was emblematically expressed in the *iurisdictio*: in a *dicere ius* which embodied power precisely because power presupposed a given order and "declared" it, confirmed it, implemented it; power was inseparable from a legal system within which individual wills were subject to natural hierarchies, these being the supporting structures of cosmos and society. One of the great concerns of medieval culture (though already discussed in ancient times), i.e. tyranny, is explicable only by bearing in mind the constitutive link between government and law, power, and order.

For the sake of didactic comparison, though without straining things too much, it might be argued that the medieval relationship between power and order was a mirror image of the one we are nowadays led to envisage. While, under our perspective, the idea of a (spontaneously) excessive and "disordered" power is commonly perceived, in the medieval culture the idea of a given order within which power, or powers, fell and which controlled and governed them, thus containing them within a precise and ideal hierarchy, was taken for granted.

The rise of a new and "absolutist" idea of sovereignty coincides with the process of political entities (*civitates*, *regna*) slowly but steadily achieving autonomy. While medieval jurists placed them within their ideal hierarchy culminating in the imperial summit, according to Bodin's innovative doctrine, the sovereign, endowed with "absolute" power, was the king of France. A few words ought to be said to dispel an outdated misunderstanding that is, that sixteenth- and seventeenth-century "absolutism" was marked (in theory and practice) by unbridled and unlimited power. In fact, the establishment of a really "sovereign" power was a

slow and muddled process; it was opposed by local resistance, centrifugal forces, powers and rights claimed by estates, cities, classes that (in France) only the post-revolutionary state was able to vanquish (but one may wonder whether "particularistic" stances did not resurge from the ashes of the *ancien régime*). Not surprisingly, therefore, the "absolutist" theory of sovereignty itself, despite relevant discontinuities with medieval tradition – Bodin's doctrine is emblematic in this respect – did not heavily rely on power's "boundlessness": the "absolute" nature of power was claimed only to stress its original character; moreover, even though the legislative *potestas* was given prime importance, attention was also paid to the limits of power, which was obliged to abide by divine law and natural law, by the pacts with its subjects ("pacta sunt servanda") and by the reign's *leges fundamentales*.

Far from being endowed with absolute power, the "absolute" sovereign had limited power, since it was compelled to take into account normative systems, institutional structures, and *iura et privilegia* belonging to largely autonomous bodies and cities opposing and constraining it. To employ a provocative expression, it might be said that the "absolute" state was the most successful accomplishment of the rule of law: such a state, in fact, was limited by law (and by rights) and, far from using an unrestrained legislative power, it had to deal with the rules, the rights, and the privileges entailed by a prior social and legal order.

3 THE "PREHISTORY" OF THE RULE OF LAW: BETWEEN ENLIGHTENMENT AND REVOLUTION

The "absolute" state was "limited" by law, by rights, and by the *iura et privilegia* of individuals, ranks, and political bodies: the *ancien régime* was not the realm of arbitrariness which old "liberal" apologists used to oppose to the new "rational" nineteenth-century order. The opposition is not a "metaphysical", absolute one between non-reason and reason, disorder, and order. Simply, radically different approaches and values met and clashed throughout the seventeenth and eighteenth centuries. A new vision of sovereignty, of the individual and of his rights began to develop and a new "citizenship discourse" founded and provided the framework within which the idea of a *Rechtsstaat* came into existence. The solution provided by the rule of law to the relationship between power and law was closely related to the deep change in the political lexicon which took place in Europe during the Enlightenment.

The new idea of sovereignty and law presupposed a new philosophical anthropology: the individual was viewed in his essential and perennial

traits (in the "state of nature"); he was conceived independently of his belonging to social and political bodies and seen as a unitary subject with specific needs and rights, determined by freedom and equality. A free individual, however, was not an unbridled individual escaping all boundaries: on the one hand, individual freedom was an ambit protected from others' undue intrusion (as if the ancient *immunitas* had become a quality endemic to human beings "as such") and, on the other hand, it had to come to terms with law, i.e. there developed a space for personal action and personal expansion that was grounded on law, both limited and guaranteed by it.

Law was not in a (Hobbes-inspired) disjunctive relationship with freedom: freedom did not begin where coercion ended. Rather, according to Locke and Montesquieu, law (natural law, civil law) was the indispensable medium for freedom. According to Montesquieu, what prevents despotism – i.e. the degeneration of a politically sound regime – is a strong connection between freedom and law. The individual is free in so far as he acts within the law and law is, in turn, his only protection against arbitrariness. It is the nexus between freedom and law which restrains the sovereign's will and guarantees individual security. Freedom and security (of person and goods) are the key values guaranteed to individuals by law's protection against arbitrariness.

Law was not just an internal aspect of sovereignty. It had a specific functional destination and provided individuals with the framework and the protection of their actions. This led to the principles of lawfulness (*nullum crimen sine lege*) and of legal equality (all individuals are equally bound by law), which were taken for granted by nineteenth-century civilization (at least on an ideal level, since their effective implementation remained uncertain and problematic). In any event, in the age of Enlightenment, trust in law as a means for protecting and strengthening individuals' freedom, property, and rights went hand in hand with an optimistic vision of sovereignty. While at that time sovereignty had a dangerous tendency to become despotic, it could, or rather had to, express and realize a final rational order.

Sovereignty, law, and freedom (property, rights) were seen by eighteenth-century reformers as closely intertwined and such a connection was not overturned by the upheavals caused by the French Revolution, though the latter introduced a new language and practice going far beyond the *philosophes*' forecasts and expectations. Just like the enlightened reformers, revolutionaries believed that sovereignty must protect individual rights (above all freedom and property), which were the keystone and condition for the new order's legitimacy: according to

the 1789 Declaration of the Rights of Man and of the Citizen, sovereignty must realize (protect, coordinate) individuals' natural rights through the law. Natural rights were transformed (in a Rousseau-like fashion) into civil rights and, as such, they were strengthened and protected.

Yet, revolutionaries also brought significant innovations affecting both the sovereign and the individual. "Who is the sovereign?" asked Sieyès at the dawn of the Revolution: sovereignty belonged to "20 million French people" who, being equal and immune from the stigma of "privileges", *were* the nation. The nation was sovereign and the individuals were citizens: together with their natural civil rights, they enjoyed political rights and played an active role in the political body.

The optimistic eighteenth-century idea of sovereignty was confirmed by the Revolution's "philosophy": the commonplace of a merry-go-round between sovereignty, law, and freedom was strengthened by the new concept of sovereignty, which no longer belonged to the Enlightened monarch, but rather to the nation, the collective entity or "body". The "corporatist" pathos outlined by Rousseau in his *Social Contract* then became the key element of the relationship between the sovereign and the individual: since the sovereign was the "moi commun", i.e. the collective body, since sovereignty and community coincided, the vision of individuals' relationship with the sovereign was underpinned by the belief that, as Rousseau said, "the body cannot damage its own limbs".

It is on such grounds (the optimistic vision of sovereignty, strengthened by the "corporatist" image of a sovereign nation) that the revolutionary discourse paid little attention to "guarantees", i.e. to all normative and institutional devices capable of implementing solemnly declared freedoms and protecting them from the interference of power. Indeed, there was no need for guarantees since power's despotic temptations were blocked, at their very root, by the nature of the sovereign body.

Although, according to revolutionaries' most widespread thinking, the sovereign nation was the guardian of rights, and sovereignty (being embodied in the nation) was not a threat but rather a means to achieve individual rights, some of the Revolution's most brilliant leaders (Sieyès, Condorcet) did nonetheless envisage the possibility of a "tyrannical" degeneration of political institutions. According to Condorcet, the Declaration of Rights, deemed to be superior to ordinary legislation, may represent the real *rempart des citoyens*, i.e. the best shield against unjust laws possibly enacted by the nation's representatives.[7]

Far from being a harmless and academic issue, the potential "despotic" degeneration of republican institutions was at the centre of the political debates and conflicts that characterized the ensuing radicalization of the revolutionary process. It was within a besieged France and within the context of a threatened revolution that the relationship between sovereignty, law, constitution, government, and rights acquired a new and dramatic meaning. According to Robespierre and Saint-Just, to appeal to the constitution was useless when there was an urgent need to face the enemy and to save the nation: what was needed, instead, was terror and virtue; what was needed was a government ready to react and strike, a government free from legal obstacles and from laws' slowness and abstraction; what mattered was not law but rather the urgency of the situation; the "state of exception" was thus the principle demanding the terroristic defence of republican freedom: it was the "necessity", it was "the saintliest of all laws, the safety of the people" to legitimate a revolutionary government rendering it "terrible towards the bad" and "favourable towards the good".[8] Only Condorcet, once again, refused the "state of necessity" as a "pretext for tyranny",[9] and claimed the need to rigidly determine the boundaries and duration of exceptional measures, i.e. to preserve the essential parameters of common justice and lawfulness.

In the whirling "historical acceleration" caused by the Revolution, the spontaneous harmony that seemed to characterize the relationship between sovereignty, law, and rights – and the belief that law could act as an intermediary between citizens and power by implementing the natural rights of the individual – were overturned and replaced by dramatic alternative beliefs: on the one hand, the perception of power's dangerousness, of the potential discrepancy between the formal lawfulness and substantial despotism of legislative provisions (and the ensuing attempt to make the *Declaration of Rights* an unassailable safeguard); on the other hand, the theorization of a "state of necessity" capable of sweeping away formal lawfulness and individual rights in the name of the fight against darkness, of freedom against despotism, of virtues against corruption.

The expression "rule of law" is not yet to be found within the Revolution's debate and we are therefore still dealing with the "prehistory" of our formula. Yet, during this period numerous expectations and problems arose which are the conditions of the future rule of law. The Revolution's "philosophy" and practices decidedly break with a "regime" – the ancient society of hierarchies and "privileges" – that began to be referred to as *ancien*. A new subject came into play which claimed its

right to property, freedom, and political participation, and a new image and "experience" of power was conceived of. As never before, power had been able to manifest its extraordinary energy as well as its reforming and incisive capacity. While the ancient monarch's "absolute" power was bound to come to terms with "objective" realities, giving rise to differentiated and consolidated individual statuses, the sovereign nation's power, instead, was free from any predetermined constraint: the nation, according to Sieyès, is quite simply, whatever it needs to be. It was an absolute constituent power that, by means of its irresistible strength, swept away the ancient regime and created a new order based on freedom and property. Natural rights (freedom, property) existed "as such" and were simply declared by the nation; yet, the very act of declaring and then implementing and coordinating natural rights expressed the nation's capacity to bring a rights order into being. The order was grounded on rights but was founded by the nation. Legislating will and rights were thus closely intertwined and their relationship was mediated by a revolution that was conceived of and legitimated as an act aimed at demolishing the ancient regime and founding a new order.

The revolutionary break has been a specifically French phenomenon. Even though the "French model" had important effects on the rest of Europe, it was not the only possible solution advanced with respect to the relationship between power and law (and rights): even before the Revolution, a great European country, namely Britain, had precociously demonstrated how the sovereign's "absolute" vocation could be combined with restraints limiting arbitrariness and protecting individuals, so much so that the English experience was deemed by many Enlightenment French intellectuals to embody the freedom and tolerance still fiercely opposed in their own country.

Great Britain's political and social structures indeed appeared, to many "Enlightened" intellectuals, to be the best possible approximation to their recommended social model. The idea of society shared by different French and British (especially Scottish) social philosophies had a "dichotomic" character: the key to order lay in individuals' actions and interactions; society was organized spontaneously by some constitutive rules (freedom, property, and contract), whereas political power acted "from outside" as a protective and safeguarding means. Individual freedom (the free satisfaction of personal needs within the "rational" framework of property and contract) was the vital nourishment of an order existing independently of the sovereign's intervention and decisions, while the latter's legitimacy was to be found in his functional link with society. Whether one referred to Locke's ideas of natural law

and social contract or to different theories, there was a shared conviction that the law of the sovereign should simply protect and strengthen an autonomous and self-sustaining social order.

Such a scheme – whose essential traits were endorsed, even if differently founded, by Hume, Hutcheson, Smith, and Blackstone – was not a utopian outlook: it was the representation, in the abstract shape of a theory or "model", of a society resulting from a long historical process which had developed in England in the previous centuries.

Until the seventeenth century, the English monarchy – not very different from its continental counterparts (Spain and France) – more or less successfully strove to assume to itself strong, centralized power. It was during the seventeenth century that the histories of these European realms ceased to be similar and that the English "exception", though not rapidly and bloodlessly, came into being. It took a century or little less than that (a century marked by bloody battles, *coups de scène*, a regicide, revolutions, restorations, gallows, and conspiracies) for history to ultimately confirm Coke's stance and deny Hobbes' pessimism: finally a form of divided or shared sovereignty arose, without the collapsing of order and the breaking out of *bellum omnium*.

Coke's assumptions were confirmed, *post-mortem*, since after the "Glorious Revolution" the English political system was based not on the king's autocratic will but on the sharing of sovereignty and the primacy of the common law. The legal order was not determined by the sovereign; rather, it depended on an immemorial tradition, developed over time, autonomously growing and changing, and consisting of a coherent set of rules and principles which could not be disregarded by any political institution.

Common law was, according to the Roman tradition, *ratio scripta*: it was not abstract or natural reason but a reason historically implemented through a consolidated technique passed down from generation to generation of jurists and judges; thus, it was an artificial, technical, and objectified reason, embodied within the legal system: it was a collective reason, i.e. the expression of a community of *sapientes* ameliorating the system throughout generations, refining and suiting it to changing circumstances. Coke, Hale, and Blackstone thus described and legitimized the new English constitutional system as one which guaranteed benefits and individuals' freedoms and rights.

On the one hand, therefore, "a number of conflicts for the control and composition of the state's different bodies"[10] demolished sovereignty's "absolutist" vocation; on the other hand, individual rights and duties were linked to a normative system which was largely independent of one

centralized will. The "dichotomic" model (the idea of a legal and social order strengthened "from outside" by governmental intervention), too, was not an academic abstraction, but a plausible translation (into the idiom of social philosophy) of the deep logic of eighteenth-century British arrangements.

It follows that the difference between the English and French contexts was apparent even when the *philosophers* expressed their admiration for the "English model". The English model, evoked by French reformers in order to criticize the French political establishment, was not confined in England to the realm of what was "possible" and "alternative", but seemed to coincide with the existing regime; not surprisingly, Blackstone was able to combine natural law doctrine with common law precisely because he believed that the former (with its wealth of rights, freedoms, property, etc.) was accurately implemented by the existing constitutional system.

According to the French Revolutionaries, the order of rights could be implemented and the sovereign could become the guardian of freedom and property only if a new demiurge, the sovereign nation, crushed the *ancien régime* and implemented rights. In this light, Burke's heated criticism – made as early as at the beginning of the Revolution – of the revolutionary programme makes sense. Even if both countries were concerned with "liberty and property", Burke believed that fundamental rights could not be determined and imposed by an assembly's "instantaneous" act; rather, they were the country's "inheritance", the legacy of an immemorial tradition, the product of a constitution which autonomously grows and develops over time.

Individual rights in revolutionary France were indeed "natural"; yet, they did not affirm themselves on their own and required the sovereign nation's intervention. The law acquired a somewhat constitutive role inasmuch as it turned "natural" rights into "civil" rights. The "voluntaristic" component of the French model, which viewed law (and ultimately rights) as the expression of the sovereign will, was in striking contrast with the (emblematically Burkean) idea of an objective, impersonal, and "unintentional" legal system, on which individual statuses depended.

The framework of the American Federation[11] *in statu nascenti* is yet another model. For the sake of simplification, the American model could be seen as a "third option" that, whilst largely drawing from the English common law, was nonetheless centred around issues and concerns which would later be endemic in the French world. Revolutionary France and the American Federation shared the need to draft a constitution legally

acknowledging human and natural rights. Yet, the French and American contexts are very different and so are their "enemies": Great Britain's hostile and mortifying sovereign order, for the Americans; and an entire political and social organization, i.e. a burdensome "feudal" past, for the French people.

In any event, in both cases there arose a constituent process which, both in its dynamics and outcome, was radically different from the English model: it was the constituent power that transformed natural rights (which, otherwise, would remain weak and precarious) in legal rights. The constituent will thus acquired a relevance that was not to be found in Great Britain – and which accounts for the American "success" of Locke's contractualism – though it did not lead to such concepts as the Nation's omnipotence, the law's centrality or, above all, the strong link between law and rights, which would be endorsed by the French assembly.

The American colonies did not fight against feudalism: they fought against the English parliament's sovereignty and against the tyrannical use of sovereignty allegedly exerted thereby.[12] Thus, the potential danger of popular sovereignty was soon and strongly perceived in the American debate: while Jefferson and Paine strove to subject the constitutional structure to the people's "absolute" will, which was always free to "start anew" and redefine the rules of the game, other writers (among whom Adams), although endorsing popular sovereignty as the ultimate foundation, reduced its impact by calling for federalism and power-balancing.

It is undeniable that some French thinkers, such as Condorcet, were concerned with the risks of despotism and perceived the need to curb legislators' omnipotence. Nevertheless, French concerns about the necessity for constitutional "guarantees" led only to dead ends, whereas in the United States they achieved full expression, starting with Judge Marshall's famous judgment, in a legal doctrine and practice that, although grounding the political order on popular sovereignty, deemed constitutional principles to be indestructible and to be protected by judges' control on legislative power.

It follows that freedom and property were the pivotal elements of a social order that both law and the sovereign must respect and protect. In the United States, just like in contemporary France and Great Britain, a widespread social theory conceived of individual freedom and property as the supporting pillars of order and required the sovereign to respect and protect them. If the organization of power was always legitimated by its functional link with individuals and rights, the relationship

between power and law, and between law and sovereignty, took different shapes in different countries. In France and the United States it was the sovereign people's will which, at least as an ultimate instance, guaranteed the implementation of individual rights; yet, in the United States and not in France, the people's will was split into two clearly differentiated legal structures – the constitution and legislation – so much so that the former's "voluntaristic" foundation was overlooked; conversely, Great Britain brought rights back within an objective order that did not require a specific founding act of the people's will.

Regardless of the diversities of contexts and outcomes, the relationship between sovereignty, law, and freedom was at the heart of the eighteenth-century representation of the political order. According to Kant, the ultimate conundrum was how to combine sovereign power with individual freedom. Under an ethical perspective, freedom coincided with the subject's inner autonomy; under a legal perspective, focused on "those relationships between one person and another which are both external and practical",[13] freedom was inseparable from human interaction. Law became the legal framework within which individual actions took place and was the condition for their coexistence: the law reconciled an individual being's freedom with that of others; "right is therefore the sum total of these conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom".[14] The legal system thus coordinated individual wills and, being "extracted from a priori principles", was not contingent, nor subject to variations in time and place or to the sovereign's decisions: it was a "natural" law in that its fundamental characteristics were independent of any given political organization.[15]

However, the coordination of individual freedoms was not guaranteed by the mere existence of a normative system: given that conflicts and prevarications could always arise, law could not simply advocate the coordination of freedoms, but must guarantee its effective implementation. Since law was not grounded on ethical reasons but "depends on the principle of the possibility of an external coercion"[16] allowing for the coexistence of individual "wills", coercion became an integral part of the law.

Coercion, in turn, called for the presence of a sovereign: law implies a force capable of settling conflicts and repressing violations; for such a reason, Kant believed that the shift from the "natural state" to the "civil state" (from a legal system lacking coercive force to a regime where rules are guaranteed by force) was the "postulate of public law" and grounded the political community on the "original contract".

The original contract was not "a fact" but rather an "idea of reason":[17] the old idea of a social contract, that Sieyès had transformed into the reality (and symbol) of the nation's constituent will has been turned by Kant into the regulating idea of the political order, the latter being the "coalition of the wills of all private individuals in a nation to form a common public will".[18]

According to Kant, law was not an expression of the sovereign's will, neither was the sovereign dependent on the creative will of a constitutional process. Nonetheless, law did need a sovereign with coercive power to perform its ordering role; it required the intervention of a "master" controlling each individual's will and forcing him "to obey a universally valid will under which everyone can be free". At this stage of his reasoning, Kant was faced with what he called the most difficult problem humanity needs to tackle: law needed the sovereign's coercive intervention, yet the latter is "an animal who needs a master"; a process of regression ad infinitum begins, which could only be resolved by way of approximation: "Nothing straight can be constructed from such warped wood as that which man is made of".[19]

Kant's solution lay in the implementation of "a perfectly just civil constitution".[20] Individual happiness did not pertain to the latter, since it was left to each individual's free determination. If the government regarded its subjects' happiness as its final goal, not only did it saddle itself with an impossible task (given the variety of ends that individuals may identify happiness with), but it also took the place of individuals' choices, thus severely encroaching upon their freedom: if a constitution "suspends the entire freedom of its subjects", the "paternal government" becomes the "greatest conceivable despotism".[21]

Therefore, far from being engaged in attaining individual happiness, the state was bound to respect the principles of the "just constitution", i.e. freedom, equality before the law, independence, and must coercively ensure their effective realization: the state's *raison d'être* and its constitutional arrangement were legitimated by a specific aim, which had nothing to do with individual well-being or happiness, promised (or even attained) by a despotic regime; rather, the state's aim was to protect "that condition in which the constitution most closely approximates to the principles of right".[22] The sovereign's role was both essential (given the necessary relationship between law and sanctions) and bound by its goal: the sovereign must act to respect and defend the principles of freedom, equality, and independence, which are not laws enacted by the already-constituted state, are not principles of positive law (even of a

"higher" level), but are principles of pure reason that guarantee the just constitution of civil society.[23]

Kant's rigorous model thus deemed the sovereign and law to be perfectly distinct though necessarily intertwined. According to Kant, law is a normative scheme that freedom hinges upon, though only the state's coercive intervention can render the latter effective. The sovereign's tasks are thus clearly predetermined: not being entrusted with the "positive" realization of its subjects' happiness, the sovereign aimed at ensuring the "just constitution" of freedom (and thus deserved the ready and absolute obedience of its subjects). The sovereign or the people's will played no role in the foundation of law (and rights). The rational organization of the state, together with the link between its coercive force and the law, provided a solution (by way of approximation) to what Kant lucidly presents as a decisive dilemma: how to combine the "master's" – "absolutely" dominant position with the inflexibility of a rule of which he ought simply to be the guardian.

4 THE RULE OF LAW BETWEEN THE FRENCH REVOLUTION AND 1848

Kant did not use the word *Rechtsstaat* or "rule of law"; yet, as early as 1798, whilst referring to Kant and his followers, J. W. Placidus spoke about the "Schule der Rechts-Staats-Lehre",[24] thus creating an "original" link between Kant and the rule of law which would subsequently be taken for granted; and it was in Germany that, throughout the nineteenth century, the expression "rule of law" abandoned the realm of "prehistory" and officially entered that of "history". It was in Germany that a doctrine developed which would strongly (even though belatedly) affect both Italian and French legal cultures.

Even where the expression "rule of law" made a belated appearance, as in France, the problems highlighted by Kant's dilemma needed nonetheless to be resolved, especially when they were worsened by the French Revolution's decisive but cumbersome legacy. A number of intellectuals who are now depicted as "liberals" – such as Constant, De Staël, Guizot, and Tocqueville – had thus to come to terms with the Revolution; and indeed it was by examining this momentous historical experience that they came to the conclusion that sovereignty, law, and rights needed to be reassessed. Constant's criticism of Rousseau (and, through him, of Jacobinism) focused on the guarantees which had been sidestepped, during the revolutionary debates, by corporatist pathos and by trust in the sovereign nation. Trust in the sovereign and in its natural

alliance with the individual collapsed because of the traumatic experience of the Terror and gave way to a "strategy of suspicion" vis-à-vis political power.[25]

Even though the sovereign, according to Constant, was necessary to guarantee order, its presence constitutively entailed the risk of despotism. Therefore, the problem of controlling and restraining the terrible energy of power – which had already marked the "prehistory" of the rule of law – acquired a new impetus and centrality for Constant and other French liberal thinkers of early nineteenth century. The protection of individual rights (freedom and property) was deemed to be an "absolute" need, not open to exceptions or weakening; it required a suitable constitutional organization and a fierce fight against what Constant deemed to be the most serious degeneration of power, i.e. arbitrariness, namely the avoidance of rules in the name of efficiency or necessity. The "state of necessity" relied upon by Jacobins to legitimate the constitution's inapplicability was deemed to be the expedient whereby the unbridled and dreadful strength of power had been exerted. The dramatic epitome of the pathology of power was the Jacobin Terror, which, by postulating unlimited and uncontrolled power of the sovereign over the individual suggested that such tyranny could only be prevented in future by respect for rules, i.e. the observance of formal bonds.

The certainty of rights hinges upon the certainty of legal rules. Constant's critique of Mably's and Filangieri's "Enlightened" interventionism[26] arose from the belief that "speculative laws", i.e. laws affecting social dynamics and pursuing constantly new and unexpected goals, surreptitiously reintroduce (as a result of their being "forward-looking") unpredictability, uncertainty, and arbitrariness, which are precisely what procedures and rules seek to avoid.

The certainty of rights thus presupposes the certainty of legal rules and procedures which, in turn, require the external support of the political system's "closing valve", i.e. public opinion, as propounded by Constant and the entirety of nineteenth-century liberal thinking.[27]

Hence, the system's necessary aims and means, i.e. its "allies" and "enemies", were clearly defined. The aim was to safeguard freedom and property; the means were the network of formal rules and bonds conditioning the sovereign and requiring him (through public opinion's "external" intervention) to perform the indispensable task of safeguarding public order. The difficulty endemic to such a framework – the dilemmatic shift from Kant's "warped piece of wood" to a "straight piece of wood" – is that the (coercive) protection of rights was inevitably in the

hands of precisely the same power which most dreadfully threatened rights.

Constant was writing not long after the perturbing period of Terror but nonetheless shows evidence of the expectations and fears endorsed by the French liberalism in the following period, when the fundamental traits of this kind of power, already traced in the brief "Great Revolution", seemed to be conclusively confirmed in the aspirations and convulsions of 1848. Politicians not advocating a "political and social republic", looking at the events of 1789 rather than of 1793 for reference, at the *Declaration of the Rights of Man and of the Citizen* rather than at the Jacobins' Republic, believed that power was a threat historically brought about by the "tyrannical majority": it was the blind and brutal triumph of quantity over quality, the despicable advent of a "no-quality democracy" that, by appealing to some of the most influential symbols of the Revolution – equality, popular sovereignty, and universal suffrage – was dangerously capable of removing all restraints and guarantees. The omnipotent majority reintroduces the primacy of the "popular will", which the theory grounded on "absolute" rights had tried to exorcize by calling for the respect of rules and the strength of public opinion.

Pre-1848 liberalism was perfectly conscious of both the importance of what was at stake and of the fragility of the "remedies" available: what was at stake was freedom and property (the pillars of a legitimate order) and the remedies against tyranny were frail since they were ultimately dependent on the sovereign who, in the name of the primacy of the will of the assembly, of the majority, of the people, could freely get rid of them. Having to deal with such a commonly perceived danger, Antonio Rosmini advanced one of the most accurate and complete suggestions in this respect: on the one hand, rights ought to be provided with a "strong" and metaphysically unobjectionable foundation; on the other hand, a rigidly census-based representative method should be introduced, so that the sovereign could be the faithful image of the proprietary apparatus; lastly – and mostly importantly – a "Supreme Court", a "political tribunal", should be set up in order to realize an effective control of the legislative assembly. The Court would "preserve and safeguard the national constitution", ensuring that rules conformed to "the fundamental law, which stands above them all, and is their touchstone". Rather than enacting a constitution and then leaving it "alone", without envisaging any power "entrusted to safeguard it", a body should be created to protect the constitution from any potential infringement thereof: in this way, the constitution is "no longer a written piece of paper with no voice", and it is "given both a life and a voice".[28]

Besides "constitutional engineering" interventions aimed at curbing the threats of power,[29] the conflict between power and law could not be resolved by simple expedients and formal mechanisms. This was true even where a higher and untouchable constitutional provision was envisaged or where the guaranteeing role of legal provisions and procedures was relied on: such expedients and mechanisms were deemed, on the one hand, to be instruments needed for a specific "absolute" goal (the preservation of individual rights); on the other hand, they were not a self-sufficient remedy: albeit indispensable, they required public opinion's intervention to be properly effective.

While pre-1848 liberalism reintroduced the constitutive elements of Kant's dilemma and attempted to resolve the latter by relying on a double connection (between power and law, and between the legally bound power and individual rights) strengthened by the control of public opinion, in Germany the same thematic tangle was examined by introducing (even before 1848) a specific expression (*Rechtsstaat*) that would become very popular.

Independently of the number of meanings ascribed to such a lemma in nineteenth century Germany, these belonged to a legal doctrine which differed from the "French model" in all respects, i.e. in the state's foundation and role, as well as in the representation of individuals and their rights. German culture was permeated by a "historicist paradigm" which, though interpreted in different manners and employed by conflicting (conservative or liberal) perspectives, was nonetheless anchored to some recurrent assumptions: firstly, the political order was not a "voluntaristic" or built-up system but linked to tradition, to a historically continuous development; secondly, the "subject" of such a development was a collective entity, i.e. the people, that, being historically moulded and endowed with a specific ethical and spiritual identity of its own, was fully realized and expressed within the state;[30] thirdly, an individual's political and legal identity was determined by his belonging to the people-state, so that his rights could be referred not to an abstract natural personality, but rather stem from the vital link between the individual himself and the people-state.

The two main theories on the *Rechtsstaat* propounded in Germany in the first half of the nineteenth century were developed within such a framework: their authors are Friedrich Julius Stahl and Robert von Mohl.[31]

According to Stahl,[32] "the legal subject is the people in its entirety ..., not the individual being as such". Human personality is concretely and historically realized by the individual's belonging to the people.

The relationship between the individual being and the legal order is mediated by this belonging: the individual is subject to law "not as an individual being, as a *homo*", rather as a member of his people, a "component of the whole", a "*civis*".[33] The people, in turn, is transfused and realized within the state, viewed as the "personification of the human community", the union of people under a sovereign authority,[34] an original totality, the objective and necessary expression of the national community, rather than an arrangement dependent on individual beings' will.

Stahl ascribed the expression *Rechtsstaat* to such a state and thoroughly explained its meaning. According to Stahl, a state characterized by the rule of law is not an indifferent ethical reality (a circumstance which, in any event, would be excluded by its historical and spiritual bondage with the people); neither is it the expression of Kant's (or Humboldt's) idea of a sovereign merely engaged in protecting individual rights. The state is not prevented from pursuing its aims and neither is the law's control extended so as to encompass "the aim and content of the state". "Rule of law", *Rechtsstaat*, simply refers to a state acting in a legal form and purporting to "exactly determine and unquestionably establish the lines and boundaries of its actions as well as the free ambits of its citizens in accordance with law (*in der Weise des Rechts*)". Law is the state's formal way of action, its legal format: the state characterized by the rule of law is opposed to the "police state" and to Rousseau's and Robespierre's *Volksstaat* and matches the modern evolutionary trend not so much because it endorses this or that content but because it removes extemporaneousness and arbitrariness from the state's action and makes it regular, legal. The modern state, being grounded on the rule of law, cannot but act (no matter what its actions are) in a legal form.[35]

The rule of law does not consist in a state's being ultimately aimed at protecting individual rights and, for this purpose, constraining power and neutralizing its dangerousness. Stahl did focus on fundamental rights, freedoms, and, equality, with the aim of providing a doctrine free from the French model's "individualistic" abstractions and aware of the need to mediate individual rights with a necessarily unequal and hierarchical order. Yet, what really matters, according to Stahl, is that the *Rechtsstaat* is reflected not in a number of content-based limits respected by the state, but in the formal, legal manners whereby the state's actions are taken.

The circumstance that the *Rechtsstaat* prescribes a given mode of action for the state rather than a law-created connection between the sovereign and its subjects was a coherent consequence not so much (and not only) of Stahl's politically conservative choices but rather of his

overall theoretical assumptions, dominated by the centrality of the people-state and by the belief that individual rights were closely connected with the individual's belonging to the political community.

Robert von Mohl's doctrine radically differed from Stahl's. By including the expression *Rechtsstaat* in the title of his extensive work on *Polizeiwissenschaft*,[36] Mohl officially christened, as it were, such an expression.[37] This was certainly not a "Kantian" title; besides, Mohl was dissatisfied with Kant's perspective, which excessively mortified and contracted the state's administrative and "governing" task. It was the sovereign's interventionism (a *topos* of German cameralistic tradition) which, according to Mohl, had to be reassessed in the light of the rule of law's fundamental enunciations, giving primacy to individual freedom whilst, at the same time, overcoming Kant's rigorous "non-interventionism".

Mohl believed that the rule of law was typical of a specific kind of state, namely that which suits itself to a society developing through its members' energies and initiatives. The value of individual and collective resources was enhanced by strengthening individual freedom; this was not a mere "empty domain" free from external intrusions but was substantiated in the individual's positive and expanding actions. Under the rule of law, the state was able to determine the measure and limits of its intervention: it strove not to compromise the autonomy of individual choices and initiatives and was also ready to back the individual by removing hindrances he may not be able to overcome on his own.

Unlike Stahl, Mohl believed that the state's intervention must take in account some content-based restraints: in order for the state to be a *Rechtsstaat*, law must intervene by binding its action to the attainment of a specific goal – individual freedom – which did not coincide with an area protected from interferences of power but rather implied the individual personality's complete development. Thus, even if individual freedom must be guaranteed by law and implemented by a judge, the state's intervention should not be limited to the performance of its jurisdictional role, since a state providing no services other than the administration of justice was not feasible.[38]

The guiding light of Mohl's reasoning was not the state's centrality, but rather individual freedom: freedom (conceived of as *immunitas* and as positive and expanding action) was the goal, the limit, and the criterion for the state's action, which, even when upholding individual action, must respect all laws and customs, must take into account a given people's dispositions and particular inclinations[39] and must, above all, respect property, this being the unavoidable condition for individual development.[40]

Although criticizing a Kant-modelled state concerned merely with safeguarding rights, Mohl underlined the functional link between the state and an individual freely and creatively using his own resources: Stahl's criticism of Mohl's excessive tilt towards "atomism" (the deadly sin, according to the historicist paradigm) is thus not surprising. In fact, even if Mohl thought he escaped Stahl's criticism because he himself believed in the state's active and irreplaceable role and in its vital link with society, the roots of dissent lay in two profoundly different ideas of the state and of the rule of law. Stahl did indeed refer to *Rechtsstaat* and advocated the state's legally "regulated" action: yet, while Stahl believed that the gravitational centre was the people-state and the individual's belonging to the political community (which the implementation of individual rights depended upon), Mohl argued that the legitimacy and boundaries of the state's action were dictated by individual freedom.

Stahl equally believed that the intimate connection between the state and the law, i.e. the legal shape which the state's action (*qua Rechtsstaat*) could not avoid adopting, benefited individuals, in that they could rely on the foreseeable, regular, and regulated character of the state's intervention. However, what was forsaken by Stahl and was central to Mohl's view was the functional destination of the state and its connection with the individual's fundamental rights.

5 THE RULE OF LAW IN GERMAN LEGAL DOCTRINE IN THE SECOND HALF OF THE NINETEENTH CENTURY

While the expression *Rechtsstaat* could be used in the pre-1848 period as a key word underpinning constitutional reforms, in the second half of the century it underwent a depoliticization and technicalization process[41] and stimulated theoretical investigations legitimating institutional innovations in the field of administrative law.

In this respect, we must take into account the changes which affected German jurisprudence and its historicist assumptions in the second half of the nineteenth century. Even if the historicist and organicistic background was still alive, diverging theories started emerging in the 1850s and 1860s: some authors took organicistic suggestions seriously, so that they assumed the association, the *Genossenschaft*, as the matrix of the entire public law and located the state within a network of groups and associations with which it was ontologically connected; others, despite sharing the idea of a genetic link between "people" and "state" (between the nation's historical identity and its institutional realization), deemed

the state's sovereignty to be the social order's hinge as well as the specific and exclusive object of legal knowledge.

The "rule of law" formula cannot but be involved in such a complex cultural change.

In the early 1860s, Otto Bähr employed the formula *Rechtsstaat* in the title of a work which would become an important landmark for both German and Italian legal doctrine. Bähr's perspective, shared by others such as Beseler and Gierke, was grounded on the central role of the social group, the *Genossenschaft*. Bähr believed that it was only within such a perspective that Stahl's deficient stance could be overcome. While Stahl had praised the rule of law's virtues, by failing to effectively limit the sovereign's discretion, he had reduced the rule of law to a merely formal bound.[42]

According to Bähr, when the structure of any given social group is examined, the general traits of the legal phenomenon stand out: each association is a microcosm characterized by constitutive rules, control roles, and by a specific distribution of rights and burdens. In other words, the existence of each association hinges upon the combination of governors' decisional supremacy with the protection of its associates' rights.[43] What is true for any association is true also for the state, this merely representing the apex of many groups with different dimensions and levels of complexity.[44] Even the state implies the existence of a "fundamental law", which is not the output of a sudden and voluntaristic "decision", but springs from the actual legal order and determines both each organ's jurisdiction and individuals' rights and duties.

Under Bähr's perspective, the delicate problem faced by the state and not by any other smaller association was the difficulty clearly illustrated by Kant and doomed to become the crucial dilemma of nineteenth-century doctrines on the rule of law: how can an impartial arbitrator of disputes be envisaged when the opposing parties are the subject, on the one hand, and the sovereign, on the other? How can a controller of the controller be plausible when the *sub iudice* action is imputable to the sovereign, i.e. to the same person upon whom the overall order depends?

In this respect, Bähr's solution resulted from the distinction between the state's different functions: before the legislating state and the judging state, citizens' rights were only moral; when, however, the state acted as an administrative power, the control could be entrusted to a judge committed to protecting the individual's legal sphere.[45] This was the conceptual core that would be continuously referred to and further elaborated in the following decades,[46] given the importance of a theory that paved the way for a judicial control of the state's administration and

favoured the setting up of the administrative justice bodies that were actually created in the last decades of the nineteenth century, not only in Germany, but also in Italy and France.[47]

However, no matter how popular and brilliant Bähr's solution to Kant's problem of the "warped piece of wood" was, no matter how much it was linked with the relevant implications of administrative justice, it was only a partial solution: it was not the state as such, but rather only one specific expression of it (its administrative action) that was deemed to be legally controllable. Under such a perspective, the rule of law doctrine partly reduced its claims and partly rendered them more specific and attainable: it did not aim at a "global" limit which, in the name of law, could be opposed to the sovereign's free will, but at the same time it went beyond Stahl's "formal" solution (the *Rechtsstaat* as a state acting in the form of law) and highlighted a domain where rules and controls could be clearly founded and embodied in a specific institutional arrangement.

Bähr takes for granted the idea of *Genossenschaft* and the pivotal homogeneity between the social organization and the state and conceptualizes the rule of law on such grounds. The jurist Carl Friedrich Gerber also underlined the importance of the rule of law. However, he distanced himself from the organicist and historicist tradition by making the state–person the exclusive object of legal knowledge.[48]

According to Gerber, the "organic" life of the *Volk* and its ethical and spiritual identity were legally relevant and conceivable only when realized within the state. The state, as a "legal personality", was the "guardian and discloser of the people's forces", "the supreme personality of law",[49] embodying the "ethical power of a self-aware people", the "social expression of humanity": no rival power could limit or encroach upon its sovereignty. Gerber's representation of individuals and their rights stemmed from his uncompromising state-centred idea. Individual rights are the indirect consequence of the state's autonomous decision, this acting unilaterally in pursuing its aims: individual rights are conceived of as "a series of public law effects", as reflections of a legal system centred around the state's will.[50]

It follows that a functional link between the state, law, and individuals was hardly conceivable: when referring to the state as ruled by law, as *Rechtsstaat*, Gerber simply purported to stress the need for the state to implement "its greatest force" acting "within its sphere of legal existence".[51] However, the importance of Gerber's theory in the history of the rule of law is to be found elsewhere, namely in his suggestions about the formula's critical point: how to envisage and realize a state which can be both master and servant of the law.

Gerber's solution is clear-cut: the state is the master and determines, together with the normative system, the individual's rights, which are the former's "reflections". From an exclusively legal viewpoint, no formal limits are placed on the state's sovereignty and the state is the jurist's unitary and exclusive object of investigation. However, Gerber himself believed that the state historically exists in relationship with its people, of which it is the legal realization and embodiment. The state is thus concerned with "interests", "life manifestations and conditions", which belong to the same historical and spiritual process that the state itself stems from: to ignore such interests would be tantamount to "insulting the ethical dignity of a Nation or hindering its free development".[52] The salient features of modern civilization that Gerber examines (freedom of conscience, press, association, expatriation, and judicial independence) were thus deemed to be the historically necessary contents of the state's will, which unilaterally determined the legal system and the individual's rights.

Even though Gerber's reasoning was centred on the state and the rigorous inference of individual rights from the state-determined legal system, it did not escape the postulation of a "double route": the route of history, moulding the "modern state" and endowing it with rights that the collective conscience could not relinquish, and the route of law, granting rights no foundation other than their dependence on the state's objective order.

The idea that rights were a mere indirect effect of the state's will was decisively rejected by Otto von Gierke,[53] the fiercest defendant of the organicistic tradition. With respect to Gerber's "turning point", and in particular to the dogmatic inflexibility of his disciple Paul Laband in adopting and developing Gerber's reasoning, Gierke expressed his strong dissent, both in terms of its methods and contents. As for the method, Gierke claimed that Laband broke the link between history and law, overestimating logics and ignoring that the state's historical and spiritual substratum is an integral part of its "positive" reality; as for the content, Laband applied private law schemes to public law and thus reduced the state to its "dominating will", neglecting the *Gemeinwesen*, i.e. the "communitarian" substratum the state depends on.

According to Gierke, neither the relation of citizenship nor the foundations and scope of individual rights could be understood without considering the state's "organic" and communitarian dimension. On the contrary, the relationship between the individual and the political community can be accounted for only by recognizing the individual's belonging to the social whole (to the state as a political association) and

the protection of the individual's legal sphere as complementary. Gierke rejected Gerber's contention that rights were grounded on the state's unilateral will: rights did not mirror the legal system chosen by the state but were rooted in community life. Together with the individual's belonging to the community and his duties of obedience, a number of limits forbidding other entities (including the state) to impinge upon the individual's legal sphere arose within the social organism itself.

According to Gierke, individual rights were not natural, pre-social, pre-state rights, which absolutely and "externally" limited the positive legal order. Rights had no origin other than that of the *Mitgliedschaft*, i.e. the common belonging of "rights-holders" to the organic political community: individuals' duties and rights (both "negative" and "positive") derived from their belonging to the community. The state, the legal order, and the individual's rights must be conceived of as "limbs" of the social-political organism. Far from being the "reflection" of the state's legal system, individual rights were rooted in the community's social framework and, as such, they limited, channelled, and bound the state's action. The difference from Laband and Gerber's rigorous state-centred approach could not be more evident.[54]

However, two aspects need to be stressed. Firstly, Gierke did not believe that rights have an "absolute" value: not only because he submerged them in history and represented them without giving in to natural law nostalgia, but also because he believed that rights were open to being erased by the state, holder of the supreme *potestas*, if it so decided.[55] It is true that such a possibility was abstract, because rights were rooted in the people's historical and spiritual development and as such were imposed on the state. Nonetheless – and this is the second aspect to focus on – Gierke believed that the state's sovereignty was ultimately decisive and that the "final" guarantor of the limits imposed thereon was history, i.e. the strength of a society "dictating" to the state given choices, coherent with the civilization it expresses. Gierke's distance from "formalists" remains undoubtedly significant (with respect to the representation of laws and rights), but Gierke's theory has some common traits (if not with Laband) with Gerber, who similarly tried to detect within history those content-based limits that law "as such" could not oppose to the state.

In other words, a particular *concordia discors* arose around the formula *Rechtsstaat*: on the one hand, formalists and organicists differed on the link between state, law, and rights and suggested conflicting theories; on the other hand, both positions regarded the sovereign (at least ultimately) as an uncontrollable arbitrator and found their last resort in

history, i.e. in the substantive bonds which a given civilization imposes on the state.

It was in this context that one of the most brilliant outcomes of German jurisprudence took place: the theory of the state's "self-limitation", first hinted at by Jhering and then thoroughly developed by Jellinek.

Jhering dealt with the main dilemma (how to ensure the coexistence of the state's supreme force with law, limitation, and check) by arguing that force was not to be given up in the name of law. While no coexistence was possible without hierarchy and coercion, even an "unbridled" force could have – at least for short and exceptional periods – an ordering role:[56] the state was "the organization of social coercion", the "regulated and guaranteed" exercise of "social coercive power",[57] whereas "anarchy, namely the impotence of the state's power" was the denial of order and the "decomposition and disintegration of society".[58]

Order being dependent on the sovereign's strength, the problem faced by Jhering was to understand if, up to what extent and by means of which guarantees, it was possible to direct power along legal routes, to unite the sovereign's free will and "absolute" decisional capacity with the supremacy of norms. According to Jhering, legislative power cannot be limited, because law was the expression *par excellence* of sovereignty; a legislative act could be arbitrary only with respect to "law's general principles", though in this case it is deemed "unfair",[59] rather than illegal.

Things are different concerning the relationship between the state and the law: law could be seen as a limit to the state's action, provided that the famous dilemma was resolved or sidestepped: "how can the state's power be subdued to a given entity since there is no power above it?"[60]

According to Jhering, the answer was provided by the "self-limitation" theory: the sovereign was not conditioned by an "external" limit, since no higher power could be the holder of sovereignty beyond the state; on the contrary, the state was restrained by its free decisions. Hence, there arises the problem of guarantees: if free will is restrained by self-limitation, there is nothing preventing the state from getting rid of a restraint created thereby. Jhering's solution centred around the genetic and functional link uniting the state with society: it is in the state's interest to cultivate its own "self-control" and to guarantee the "certainty" of the system which "the spiritual and moral strength of a people"[61] depended on; yet, the real decisive factor was society's pressure on the state, "the sense of law" that modern society deems to be the essence of civilization and imposes on both individuals and the sovereign.

The conceptual components of the state–law link are now clear. Jhering believed that "self-limitation" could reconcile the state's absolute sovereignty with a system of restraints limiting and directing its action. The protection of individuals' legal sphere from undue administrative intrusions was thus grounded. The legislative power instead, which was deemed to be the essence of sovereignty, remained free from restraints and controls.

Although a sovereign state bound by law could be envisaged, the connection between the state and the law was preserved only as long as "external" forces intervened to support the legal mechanism. According to Jhering, the certainty of law "is not grounded on the constitution, which can be interpreted as desired; neither is it possible to conceive of a constitution removing from the state the possibility to encroach upon law". What matters is "the real strength behind law, i.e. people for whom law is a condition of its own existence and for whom an offence against law is like an offence against itself".[62] Consequently, while state and law can coexist within a calm and self-confident world, a "state of necessity" could cause their pathological though inevitable divorce, since the respect of formal rules had to give way in this case to the absolute surplus of sovereign power for the sake of preserving order and the supreme "salus populi".[63]

By abandoning the rigorous legal formalism which had characterized the first stage of his thinking, Jhering entrusted the historical and social development with the task of regulating "from outside" the link between the state and the law. Unlike Jhering, Jellinek's starting point was the "state-centred paradigm" launched by Gerber and his aim was what might appear as "squaring the circle": he tried to preserve the dogma of the state's absolute sovereignty and make rights dependent on the individuals' belonging to the political community, but at the same time he conceived of such rights as true individual prerogatives rather than mere reflections of the state's normative system. The cornerstones of Jellinek's reasoning coincided, in some respects, with the theory of the state's self-limitation,[64] and, in other respects, with the demonstration that the state, albeit pursuing the general interest, often attained it by multiplying rights and thus establishing true legal relationships between the individual and the state. *Rechtsstaat* was therefore a sovereign state which, by limiting itself, appeared as a legal person, a holder of rights and obligations, and was bound to respect both objective law and the rights of the individuals which it entered into a relationship with.[65]

The rule of law thus appeared to be formally complete in that the state established legal relationships with the individuals who have been made

holders of rights (in a somewhat paradoxically circular way[66]) by the state itself, i.e. by its sovereign decision to self-limit its power. The rule of law did also coincide with a number of legal relationships in which the state and the individuals, the administration and the subjects, were holders of rights and obligations that were legally established and open to judicial control. Jellinek's difficulty arose, as for every nineteenth-century jurist, when attention was shifted from administration to legislation; once again, the difficulty of limiting the legislative power was resolved or sidestepped by going "beyond" the formal shape of the legal system and by appealing to the maturity and civilization of a people capable of counteracting "the state's formally unassailable acts of will" by relying on slowly modifiable or even constant and untouchable principles.[67]

When synthetically examining the nineteenth-century German debate on the rule of law, it is possible to detect recurrent themes and problems underlying the many different approaches.

Both "formalists" and "organicists" denied the natural law foundation of rights and shared the idea of the individual's dependence on the political community and the dogma of the state's absolute sovereignty. The impossibility of opposing to it *aliunde*-founded elements was the ground of the central dilemma: how to combine an unlimited sovereign power with a legal order regulating it and making its intervention foreseeable. The central features of the theory that was gradually refined throughout the second half of the century and was thoroughly elaborated by Jellinek were the idea of the state's self-limitation (which made sovereign absolutism compatible with the existence of fetters on its power), the existence of legal relationships between the state and individuals, the distinction between the state (as a whole) and its several institutional components, so that this or that organ could be limited whilst the state "as such" could be deemed as the holder of an absolute power.[68]

Thanks to this theory, relationships between the state and individuals could be regulated and the administration could be submitted to judicial control, in order to protect the individual's legal domain; however, the difficulty inherent in imposing precise formal restraints on legislation (assumed as the emblematic embodiment of the state's sovereignty) still remained unresolved.

The nineteenth-century *Rechtsstaat* was realized as a "*sub lege* administration", leading to the setting up of an administrative jurisdiction, in order to compensate a seemingly opposing though in fact complementary phenomenon, namely the growing impact of administration on social dynamics. While, on the one hand, administration was more and

more employed as a means for social integration and the settlement of conflicts, as a means for reforms capable of diminishing inequalities without challenging the distribution of power and wealth, on the other hand there was an increasing dread of threats to freedom and property and there was an attempt to devise measures subjecting the state's interventionism to checks and restraints.

The importance attached to the idea of an administration *sub lege* was therefore intelligible in the light of a number of factors: the concern for the state's increasing interventionism, the depoliticization undergone by the rule of law after the 1848 failure (when attention shifted from political rights to individuals' private interests) and the feeling that administration could be subjected to restraints without this amounting to an "offence to sovereignty". Such reasons, which placed administration in the spotlight, also tended to keep the rule of law on the threshold of legislation: legislation appeared (though not for long) as a force which was less aggressive towards freedom and property, these being more closely threatened by administration; moreover, legislation seemed to be the most direct outcome of sovereignty, which by definition could not meet restraints and resistances.

Yet, the theory of the legislating state's almightiness did not imply, even for German "state-centred" jurisprudence, indifference, or silence towards freedom, property, and individual rights. In this respect, nineteenth-century jurisprudence shared a basic conviction: according to Jellinek and Jhering, Gerber and Gierke, and Mohl and Constant, the essential tension between the state and law, the sovereign and norms, found its solution "beyond" itself, in the dynamics of historical forces: in public opinion, which Constant (and the entire liberal tradition) viewed as the "external" safety valve of a system centred on the respect of rules and legal forms; or in the people, whom German jurists deemed to be realized in the state and capable of imposing on it choices mirroring its degree of civilization. The conflict between "formalists" and "organicists" was certainly momentous within German jurisprudence but should not conceal their common heritage, which, on the one hand, included the maximum acknowledgement of the state's sovereignty and, on the other, regarded the people and its history as a "safety valve". According to nineteenth-century legal culture, the circumstance that legislation was not subject to formally cogent constraints was not decisive, not because the problem was deemed irrelevant or nonexistent, but because its solution was offered by history, which dictated the inescapable contents of civilization to the state. The common thread running through all these theories was an optimistic "philosophy" of social progress including the

"state", "law", and "freedom and property" within a single network and viewing them as expressions of a "modern" civilization conceived of as the culmination of universal history.

6 *RECHTSSTAAT* AND RULE OF LAW: DICEY'S CONTRIBUTION

The theory of the *Rechtsstaat* advanced by German nineteenth-century legal doctrines led to a peculiar understanding of the power–law link: on the one hand, administrative action was scrutinized with the aim of imposing precise legal bonds and corresponding judicial checks on it; on the other hand, constraints on legislative action were hardly envisaged since the latter was taken to emblematically embody the state's absolute sovereignty.

In any event, the *Rechtsstaat* formula rotated around a specific legal conceptualization of the state which represented one of the most significant outputs of nineteenth-century German culture. We must now ask up to what extent it is possible to extend the idea of *Rechtsstaat* to contexts which, albeit sensitive to the power–law relationship, had not developed a legal theory of the state which was somewhat analogous to that expressed by German culture.

Although both Italy and France developed – partly furthering native traditions, partly assimilating the suggestions of the "German model" – a theory of the state allowing for the similar resurgence of dilemmas and suggestions endemic to the German *Rechtsstaat*, in contexts with radically different constitutional histories and cultures the power/law interplay did not entail the same dilemmas or suggest analogous solutions.

This was the case of Great Britain, where an original theory of sovereignty was fully elaborated by Austin in the nineteenth century without referring to the "continental" idea of state. The key figure was not the "state" seen as the global synthesis of powers and the embodiment of the nation's ethos; rather, it was a polycentric apparatus characterized, on the one hand, by a precocious division of sovereignty and, on the other hand, by a legal system which, throughout its alluvial development, was the main bulwark of "Englishmen's rights".[69]

It was within such a composite political and legal structure that the expression "rule of law" gained ground in Great Britain and soon became not less popular than the German *Rechtsstaat*. Inasmuch as the expression "rule of law" was used to denote a particular way of setting and resolving the power–law–individuals relationship, such a formula was semantically akin to the expression *Rechtsstaat* (*Stato di diritto, État*

de droit) and can be used as a translation thereof (or vice versa). Nonetheless, the translation process ought to be taken seriously and not be naively limited to a mechanical tracing any given word to another one, e.g. the fact that the Greek *iatrós* and the English *doctor* have the same meaning depends on "our decision": among all the activities respectively ascribable to the *doctor* and the *iatrós*, we draw a line between those that are "culture-bound" and must be expunged from the "translating" process, and those that are referable to a functional "culture-invariant" core and make equivalence and translation possible.[70]

The circumstance that the "rule of law" is tantamount to (and translatable as) *Rechtsstaat* (*Stato di diritto*, *État de droit*) does not mean that the former can be exactly equivalent to any of the latter; rather, it simply means that different "culture-bound" features nonetheless allow for the (obviously "chosen" and not "objectively indisputable") determination of a shared "culture-invariant" function. We shall not underline the macroscopic differences among the different contexts involved (English and German, and in general European–continental). It is interesting, instead, in order to compare different "national cultures", to focus on a major English work, characterized by a purportedly systematic and "scientific" method: Albert Venn Dicey's[71] *An Introduction to the Study of the Law of the Constitution*, published in 1885 and destined to become very popular for many years to come.[72]

It is not by chance that, precisely at a time when German public law doctrines developed a thorough "theory of the state", Dicey, by purporting to write an authentically legal work – breaking off with the "antiquarianism" of tradition, which simply and "externally" examined constitutional history, and thus aiming at demonstrating the legitimacy and usefulness of theory[73] – drafted an "introduction to the constitution": the reference to the constitution was the "culture-bound" trait, just like the idea of the people-state was for German public law theories; and the point is whether Dicey's "rule of law" and German (and continental) *Rechtsstaat* shared "invariant" traits, both in the conceptualization of and the solution provided to the relationship between power and law (and rights), and whether such traits allow for the two formulae to be (relatively) equivalent.

Dicey did not elaborate an exhaustive "theory of the state", but his "theory of the constitution" was largely a theory of sovereignty: sovereignty was the object of the entire first section of his work, and the main issues he dealt with hinged upon such a concept. Sovereignty was not abstractly examined and was not viewed as the essence of the "state as such", but was referred to the political institutions holding such power:

the Queen, the "House of Lords", the "House of Commons", in other words parliament ("Queen in parliament"). However, rather than describing constitutional institutions and mechanisms, Dicey aimed at accurately demonstrating the absolute nature of sovereign power: since the holder of sovereignty was parliament, sovereignty's absolutism coincided with the non-coercible, irresistible power of parliament's assembly. Being a law-making assembly, parliament was entitled to enact and abrogate all laws, which individuals and bodies were required to abide by.

According to Dicey, De Lolme's popular expression (whereby the English parliament can do everything but make a woman a man, and a man a woman) illustrated a particular tradition which, from Coke to Blackstone, has always celebrated parliament's omnipotence.[74] The "judge-made law" character of the English legal system did not affect the above assumption, not only because Austin himself had already provided an "imperativistic" foundation of the common law, but also because no judge has ever thought of himself as entitled not to apply an act of parliament; acts of parliament, on the contrary, could confidently overrule any consolidated judge-made law.[75]

Parliament's supremacy was thus the "very keystone of the law of the constitution";[76] no legal constraints on parliament's omnipotence could be conceived. The "absolute" sovereignty, that German "state-centred" theory attributed to the state "as such", was transferred by Dicey to parliament, but kept its original feature and was conceived of as a power free from all restraints. However, as promptly specified by Dicey, parliament's omnipotence had to be viewed in its specifically legal meaning: if it had been understood as "effective" omnipotence, it would have been, quite simply, absurd. The sovereign's power (parliament's power) was effectively and politically restrained by internal and external limits: the electoral mechanism itself allowed citizens to exert their influence upon parliament and, whenever such influence was insufficient, disobedience and resistance were always feasible; after all, parliament itself was the expression and interpreter of a specific political and social equilibrium and, precisely for this reason, parliament's will was usually not very different from what it could actually achieve.

It follows that a line must be drawn between two "levels of reality", the legal and the political: when referring to the legal level, sovereign omnipotence stood for the impossibility of imposing legal constraints to the sovereign's law. Once again, given the contextual diversity, Dicey's doctrine, even if not identical, was nonetheless equivalent to the reasoning of many German jurists, who celebrated the state's omnipotence, but postulated at

the same time a (historically spontaneous) harmony between the state's will and the people's civilization.

The first assumption was therefore conceived of in a manner which we have already encountered and was centred around the sovereign's omnipotence and the ensuing impossibility of imposing legal limits on the sovereign's actions. Differences arose when the problem of the relationship between sovereignty and law (as a system of limits) was dealt with: while German jurists advanced the state's self-limitation theory as a feasible solution, together with the distinction between the state and its organs and the foundation of an administrative judicial system, Dicey took a different stand, whose fundamental traits were grounded on the role of the constitution and on the nature of the common law.

As for the theory of the constitution, Dicey heavily relied (throughout the several editions of his work) on a famous contribution by James Bryce who, first in his *The American Commonwealth* of 1888 and later in a long essay,[77] drew a distinction between rigid and flexible constitutions, destined to become very popular. Assuming that the constitution, as such, is the bone structure of a political society organized through and according to law, a line must be drawn between two different kinds of constitution: a constitution that develops over time, grows on itself as a result of differently originated inputs, and can be defined as *flexible* because it is open to continuous adjustments and changes introduced without following specific procedures; and a *rigid* constitution which, being enacted uniquely by a given body, determines the state's shape "once and for all" and does not favour changes thereto, by claiming to be unchangeable or by establishing cogent provisions for its own alteration.

Both Bryce and Dicey believed that, while past constitutions were flexible, modern ones were usually rigid, the main exception being the English constitution. By deeming the English constitution to be flexible, Dicey's theory was strengthened: parliament's absolute sovereignty was proven, *inter alia*, by the circumstance that parliament could introduce the most upsetting constitutional changes by simply enacting an ordinary act; there was no constitutionality review: whereas in the United States the presence of a rigid constitution and the distinction between ordinary and constitutional law made the judge a guarantor of the constitution and a controller of the legislator, in Great Britain judicial courts must refrain from interfering with the "machinery of government".[78]

Curbs on parliament's absolute sovereignty were thus not to be found in the constitution: the relationship between law and power heavily tilted in the latter's favour. According to Dicey, the tension between power and law arose when parliament's sovereignty and the "law of the land" were jointly

taken into account; and it was precisely in the combination of such two principles "which pervade the whole of the English constitution"[79] that Dicey found the solution to the power–law link, together with the authentic value of the "rule of law".

Dicey detected three key features of the "rule of law". Firstly, the "rule of law" entailed respect for the *nullum crimen sine lege* principle: as acknowledged by Dicey himself, the principle, ever since Enlightenment reformism, had been endorsed by the continental political systems, though Dicey was sceptical of Europe's integral application of the principle.[80]

Secondly, the "rule of law" stood for the individuals' equal subjection to law; as for the above principle, this idea was (theoretically) endorsed also by the entire nineteenth-century legal world, though Dicey believed it was sharply disproved by the presence (in France and in general throughout the continent) of a specific administrative judicial system.[81] Dicey launched a severe attack on the "droit administratif", which needs to be "historicized" by briefly mentioning two aspects: first of all, it should be recalled that Dicey's misunderstanding of the French *droit administratif* "was legendary"[82] and that Dicey himself later softened his criticism throughout the *Introduction*'s various editions; secondly, it ought to be recalled that Dicey was politically and ideologically biased[83] against administrative intervention which, however, was actually developing also in Great Britain, being it prompted (as in Europe) by the need to "govern" society and by the aim of integrating the *classes dangereuses*; under this perspective, Dicey's defence of the "rule of law" as an area free from administrative intrusions was analogous to the continental attempt to strengthen administrative courts to tackle the increasing pressures exerted by the "interventionist state".

Thirdly – and most decisively – Dicey believed that the "rule of law" stood for a peculiar process of founding and attaining freedoms and rights, which was connected with Great Britain's specific kind of constitution and legal system. As illustrated by Bryce, the English constitution was flexible and developed as a result of continuous successive adjustments: its general principles (such as the rights of freedom) "are the result of judicial decisions". Individuals' legal sphere was not abstractly determined once and for all; rather, it has developed "from below", adapting itself to many and various situations, through the intervention of judges, who, being called upon to resolve specific problems, over time have determined its contours.

Hence, Dicey's "rule of law" was an inseparable feature of "judge-made law" and was thus a peculiarly English way of casting and resolving the

problem of the relationship between power and law, which was indeed different from the continent (especially the "French model"), this relying on the provisions of a ("rigid") constitution. Dicey conceded that the difference between Great Britain and the continent might appear to be exclusively extrinsic and, as such, irrelevant: if in England or, for example, in Belgium, freedom was guaranteed and arbitrariness was avoided, it did not matter whether this happened as a result of a written constitution imposing such a *status quo* in general terms or as a result of the "law of the land" ensuring such a condition on a case-by-case basis. However, as Dicey sharply underlined, there was a substantial difference as to the decisive problem of guarantees. Dicey argued that solemn constitutional declarations were weak enunciations whose infringement was always feasible, whereas the strength of the English flexible constitution was due to the circumstance that the protection of individuals' legal sphere was not simply theorized but implemented. English legal culture could not conceive of an abstract declaration of rights that neglected their procedural "remedy"; hence, freedoms were developed through the judicial interventions protecting them "in action".[84]

It is at this stage that Dicey was compelled to provide a solution to the most delicate problem: the relationship between power and law, sovereignty and rules and, in his case, between parliamentary sovereignty and the "law of the land", which determined and protected individuals' legal sphere. Just like the continental *Rechtsstaat*, the English rule of law was placed within a specific field of tension marked by the relationship between the sovereign and the law (and the individual's rights). How did Dicey settle the tension without cancelling it?

Dicey's solution lied essentially in the following two considerations. Firstly, parliamentary sovereignty and judge-made law were complementary rather than antagonistic elements within the system's overall logics: parliament could indeed enact law without meeting any opposition, but the law, once enacted, was entirely left to the judge's interpretation, and the judge understood it in the light of his particular sensitivity and of the "general spirit of the common law".[85] Parliament's will was, indeed, formally absolute; yet, when placed within the system's overall functioning, it was also substantially conditioned by judicial interpretation and application.

Secondly, parliament was entitled to change the constitution as it thought proper, it could affect freedoms and suspend the *Habeas Corpus* Act; however, "the suspension of the constitution", being "based on the rule of law", i.e. depending on the "law of the land" which was a judge-made law, "would mean with us nothing less than a revolution".[86]

Even though it would have been a "revolution", it would have nonetheless been a "legal" revolution, since parliament's sovereignty was ultimately absolute and uncontrollable: under such a perspective, the tension within which the "rule of law" theorized by Dicey was placed seemed to dissolve "upwardly", i.e. it was resolved by confirming the role of sovereignty which, in order to exist, could not find insuperable legal hurdles on its way. Under such a perspective, Dicey's "rule of law" and the German formula *Rechtsstaat* seem analogous, not only because they both focused on the tension between power and law, but also because they shared the same dilemma, i.e. the difficult combination between the sovereign's absolute power and a system of restraints functionally linked with the protection of individuals' legal sphere.

However, such an "invariant" coexisted with differences pertaining to the strategies adopted to overcome the usual *impasse*. Whereas Jellinek believed that the dilemma must be solved within the legal realm of the state (relying on the state's self-limitation, the state-person theory, and the legal relationship) and that the safety valve was people, civilization, and history, in other words elements "external" to the legal world (albeit affecting its effective configuration), Dicey believed that parliamentary sovereignty was bound to confront a specific legal structure (which freedom and property primarily depended on), i.e. the "law of the land" or judge-made law, endowed with a genesis and substance of its own: the sovereign could change it, but had nonetheless to confront a legal system which was not (at least directly) referable to his will.

Rather, Gierke's theory could be evoked by Dicey's "rule of law", inasmuch as individual rights, according to the German jurist, were framed within the community and its historical development (even if they can be cancelled ad libitum by the state's ultimate power[87]).

In any event, even if their argumentative strategy differed, both Dicey's "rule of law" and the German formula *Rechtsstaat* shared two basic assumptions: on the one hand, they aimed at protecting individuals' legal sphere; on the other hand, they believed that the system's necessary safety valve must be found in history and society.

Besides the analogies between British and German jurists, Dicey's *Introduction* focused on two specific aspects that were not so clear in continental jurisprudence: firstly, the necessary link between "law" and its "interpretation" and the shortcomings of a theory which concentrated on the creation and not on the effective application of the law; secondly, and consequently, the importance of guarantees and controls and the discovery of the Achilles' heel of continental (and especially French) constitutionalism, which lacked a suitable mechanism for the

"enforcement" of constitutional provisions, whereas the United States, despite their distance from the British model's "flexibility", had wisely entrusted judges with the task of safeguarding their constitution.

7 THE RULE OF LAW AND THE CONSTITUTION: KELSEN'S CONTRIBUTION

Being backed on the one hand by the development of the British "rule of law" and on the other by their familiarity with the American constitutional model, in different ways Dicey and Bryce underlined the unresolved problem of continental theories: law's persistent weakness before power's absolutism. While Dicey's attack on the *droit administratif* could be easily rejected (or sent back to the sender, who overlooked an analogous process in his own country), it was more difficult to ignore Dicey's considerations on constitutional law, inasmuch as the problem of legal restraints binding the state–legislator rather than the state–administrator had been left unsolved by continental jurisprudence.

In fact, not even Dicey had completely eradicated the problem, since his idea of sovereignty was analogous to that adopted by continental theories. Yet, Dicey was able to appeal to a constitution which, albeit flexible and modifiable ad libitum by parliament, nonetheless belonged to a legal system which, all in all, offered freedom and property strong (though not insuperable) protection against possible (though historically and politically unlikely) *coups de main* carried out by the sovereign.

Not surprisingly, several continental jurists, both in German-speaking countries and in France, were becoming aware that a mere "administrativistic" application of the "rule of law" theory could not finally solve the problem of the "power–law" link.

In the French legal culture,[88] a rigorous contribution (perhaps the closest to the German tradition of *Rechtsstaat* and unsatisfied with the exclusively "administrativistic" idea of the rule of law) came from the work of an Alsatian jurist, Raymond Carré de Malberg.[89]

Just like Jellinek (or Vittorio Emanuele Orlando), Carré de Malberg believed that the state was a legal being, the personification of a nation: the state presupposed the nation but the nation, far from being provided with an autonomous, albeit embryonic, apparatus, existed only in that it was personified by the state; the state as a legal person was the pivotal figure of public law theory[90] and allowed for the creation (and the very conceivability) of a unitary order.[91]

The state's essence was the sovereign absolute power[92] and such a belief urgently raised the recurrent problem: how could power be compatible

with law? How could the sovereign's irresistible force be combined with a system of constraints imposed thereon? The problem was particularly serious given the French parliament's dominant position within the country's constitutional system: as Carré de Malberg bluntly said, "nowadays the French parliament is almighty, just as the English parliament".[93] Parliament was sovereign both in England and France and the problem of the limits of power involved not only administration, but also the activities of legislators.

Carré de Malberg adopted an already proven remedy: he endorsed the self-limitation theory and insisted on the "guaranteeing" importance of the "formal" link between the state and law, i.e. on the fact that the state, being the nation's legal organization, had no choice but to act through law; he consequently believed that the state, as a legal entity, was submitted to its own norms and could, as any other subject, be a holder of obligations as well as rights.

The most insidious objection (advanced also by Duguit)[94] and the theory's main weakness were the merely *octroyée* nature of legal boundaries: given that the state's limitation depended upon the sovereign's self-control (to use Jhering's expression), which could be modified or even cancelled ad libitum, the protection of the individual sphere appeared uncertain, to say the least. Being aware of this weakness, Carré de Malberg deeply investigated the idea of national sovereignty. By originally examining French constitutional history, starting with the Revolution's founding act, Carré de Malberg opposed (what he deemed to be) Rousseau's idea of sovereignty, i.e. "democratic" sovereignty, identified with the totality of individuals constituting the nation,[95] to the sovereignty that was cultivated and realized by the 1789 Revolution; by attributing sovereignty to the nation, the revolution meant to detach it from the monarch and from each single component of the political system so as to attribute it to the state "as such", which personified the nation.

Hence, if "national sovereignty" implied that no sole body, including parliament, could be the holder of sovereignty (this belonging to the state-nation), then parliament's power was scaled down. A "hyperdemocratic" approach, according to which political representation could be conceived of as a mere means of transmission of the electors' wills, was rejected and the old though always troubling threat of a "despotic majority" was kept under control. On such groundings, Carré de Malberg attempted to express the real meaning and develop the full potential of the rule of law.

Although the rule of law had led jurists to urge the development of a *sub lege* administration, Carré de Malberg believed that it was also

important to draw a line between *État de droit* and *État légal*. The latter aims at rigidly and generally subduing administration to law, even where no individual rights are involved, and takes the shape of a "special form of government", whereas the distinctive feature of the *État de droit* is its instrumental and functional character: it purports to impose legal constraints on administration in order to strengthen the individual's legal sphere.[96] An *État légal*, therefore, did not perfectly tally with an *État de droit*. On the one hand, *État légal* imposed restraints upon administrative action that were more rigid and generalized than the *État de droit* form of state, which could intervene only to protect individual interests; however, on the other hand, while the *État légal*'s effectiveness was exhausted within the relationship between the administration and the law, the *État de droit* was not so circumscribed: given that its immanent aim and *raison d'être* were the protection of individuals from the abuses of power, the *État de droit*, by following its "natural course", must affect both administration and legislation; its "natural" achievement was the enactment of a "constitution" which could guarantee specific "individual rights to citizens" which no law could impinge on. According to Carré de Malberg, "the rule of law is a system of limitations, not only affecting administrative authorities, but also the Legislative Body". In order to attain a real and complete *État de droit*, the French parliament's "good will" was not enough; rather, citizens' freedoms needed judicial protection against both administrative and legislative actions.[97]

In his *Théorie générale*, Carré de Malberg argued that the *État de droit* ought to control also the *sancta sanctorum* of sovereignty, which tradition identified with legislative power; for such a purpose, not only did he suggest to draw a clear line between the constitution and the law – a distinction which Bryce had already regarded as typical of "rigid" constitutions – but also advocated some form of control guaranteeing the constitution's actual supremacy (and thus avoiding the risk, which Dicey deemed to be very high in "continental" systems, of disregarding high-sounding principles).

Carré de Malberg was not alone in dealing with similar issues and remedies. In the years immediately preceding the First World War (when Carré de Malberg was writing his *Théorie générale*[98]) and in the following decade, Hans Kelsen began to outline his original theory and apply it to the construction and technical instrumentation of the rule of law.[99]

The radical break introduced by Kelsen in the *Rechtsstaat* tradition was grounded on a specific epistemological foundation (which we shall only briefly deal with). Ever since his significant 1911 work (*Hauptprobleme der Staatsrechtslehre*), Kelsen had believed that the distinction between

Sein and *Sollen*,[100] and thus between sciences explicating phenomena on a causal basis and forms of knowledge concerned with the analysis of norms, could guide us in critically reviewing traditional public law theories.[101] The idea of the state as a "real" entity, which was the source of the recurring dilemmas of nineteenth-century jurisprudence, resulted from overlooking of the *Sein/Sollen* distinction.

According to Kelsen, the state was not a "real" entity but a theoretical object created by jurists: to conceive of the state "cannot but mean to conceive of the state as law".[102] The state and the law are thus reciprocally identified: to think of the state as a set of norms – an idea which would be most rigorously formulated in Kelsen's great works of the 1920s (in *Allgemeine Staatslehre* and in *Das Problem der Souveränität und die Theorie des Völkerrechts*) though it had been already substantially outlined in *Hauptprobleme* – allowed Kelsen to get rid of the idea (propounded by Jellinek and tradition in general) of the state's "duplicity" and to dismantle the latter's most consolidated features: the idea of the state as a "really" exceeding and irresistible power, as a subject with a will, with given purposes using all its forces to achieve them.

According to Kelsen, the state is not a real entity, it is a set of norms:[103] to think of the state as "real" perpetuates an archaic and "religious" approach, offering a "substantialistic" and anthropomorphic image of the state which modern epistemology (from Vaihinger to Cassirer,[104] from Mach to Avenarius[105]) has rejected. On the contrary, when the state is deemed to coincide with the legal system and to be its simple "personification", there follows the demise of the aporia that the rule of law has unsuccessfully tried to overcome by combining (through the "self-limitation" theory) the state's "absolute" power with law's binding (and guaranteeing) role. Indeed, the aporia arose from the archaic and mythical image of the state as an exceeding and "really" existing power; it was an aporia capable of outliving the self-limitation *escamotage*, which also Kelsen saw as inefficacious, since it relied on the Leviathan's (ultimate) decision. On the contrary, if the state coincides with the legal system, the key element of the aporia loses ground: the state is not power, it is law, it is a system of norms (and the "personification" of its unity).

Since state and law coincide, it follows that physical and legal subjects, as well as the state's organs, are all subject to obligations imposed thereon by the legal system: "the state's legal obligation is not different from that of other legal subjects"[106] and both the state and any single individual represent "the personification of legal norms", the only difference being

that the state personifies the entire legal system, whereas individuals are personifications of partial legal systems.[107]

The famous aporia ceases because its ground – the essential tension between the sovereign, the law and the individual's rights – collapses once the heterogeneity of such elements is dissolved in the unity of the legal system, which is the only legitimate research field of the jurist. The tension between the state's irresistible power and the individual's self-defence ceases to exist: the state coincides with a legal system and individuals are defined with respect to an objective system of norms; the obligation is precisely "the subjectivization of the legal proposition", i.e. the applicability of norms to "a specific individual".[108] Being "internal" components of the legal order, individuals are not holders of "rights" which the legal system has to deal with: human beings are "persons" in that the legal system "establishes their rights and obligations" and lose such a quality once the state decides to "take it from them".[109] To assume the existence of "natural" restraints on the legal system would be tantamount to recalling that natural law theory which, according to Kelsen, is definitely no longer tenable.

By encompassing the traditional *dramatis personae* of the *Rechtsstaat* within the homogeneous dimension of the legal system and by amputating "power" and "subjectivity" as "really" existing elements, Kelsen thus defined his approach to the rule of law. If absolutism is the renounce to a legal theory of the state, the rule of law coincides with the possibility of submitting all the state's activities to the law: the *Rechtsstaat* is "determined in all its activities by the legal system, which is legally intelligible in all its key components".[110]

The rule of law thus stands, first of all, for law's centrality, and for the ensuing opposition to the trend – which was very strong in public law theory of the time – for claiming a wider role for administration than that of mere "executor" of legal norms.[111] Ever since his *Hauptprobleme*, Kelsen had deemed administrative "discretionary power" not to stand for free deviation from norms but rather for a process which, shifting from abstraction to concreteness, determining the content of norms, presupposes them and becomes unintelligible without them.[112] Being an executive activity ("discretional" in that it implements a rule), administration could not be an autonomous source of obligations and rights; on the contrary, it presupposed the legal system, exclusively based on the "legislative process": the system's unity would have been jeopardized if, along with legislation, a "second source of the state's will, autonomous and independent of the first" would have been conceived of.[113]

While in his earlier thinking Kelsen viewed the rule of law as the emblem of both law's centrality and the opposition to the "administrative state" – an opposition combining theoretical suggestions with a strong attack against the *monarchisches Prinzip* in the name of parliament's relevance[114] – he later associated his rule of law theory with his "dynamic" analysis of the normative system,[115] which he elaborated under the influence of Alfred Verdross and Adolf Merkl.[116]

In this perspective, the unity of the legal system did no longer coincide with a set of general norms, but was located within the "dynamic" relationship between "general norms" and "individual norms", being both components of a unitary law-making process.[117] Law-making and law-enforcing are not simply opposed: the judgement depends on the law, "from which it is legally determined"; but the judgement creates law, is an act of law-making, inasmuch as it is referred to those legal acts, e.g. executive acts, which are to be taken *on the basis* of it".[118]

It follows that to conceive of the legal system in a "dynamic" manner, to fully understand its legal characteristics, and thus to understand the rule of law in all its implications, prevents us from focusing on legislation "as such". Legislation is merely a component of the "multi-step" structure outlined by Kelsen; when you look at "the bottom" of the system, you find "individual" norms "applying" legislation, when you look at "the top" of the system, you realize legislation is not the system's apex, rather it is itself the application of a higher norm, i.e. the constitution. And it is precisely the constitution which, albeit briefly mentioned in the *Hauptprobleme*, but not yet dissected in all its potential,[119] became in the 1920s an essential topic of Kelsen's theory.

This dynamic, "stepped" vision of the legal system[120] allowed Kelsen to introduce relevant changes both in constitutional theory (and legislation[121]) and in the foundation of the rule of law. If legislation lost its "absolute" position within the system and became an intermediate step in the law-making and law-applying processes, if it was reinterpreted as the enforcement of a higher norm, then legislative acts were open to control: the "regularity" of any "enforcement" procedure, as well as its "conformity" to the "higher level of the legal system"[122] could then be rightly ascertained. Consequently, according to Kelsen, the implementation of the rule of law lead to the setting up of a judicial body committed to controlling laws" constitutionality. In fact, given the "system's hierarchical structure", "the postulate of statutes' constitutionality was theoretically and technically identical to the postulate of the judgements' and administration's legitimacy" and consequently warranted its assessment by an appropriate institution.[123]

Being a superior norm within a hierarchically structured system, the constitution theoretically and technically allows for constitutional control; the latter, in turn, makes constitutional provisions compulsory.[124] The constitution is the safety valve of the rule of law, whereas statutes represent the application of constitutional provisions.

On these premises, the nineteenth-century traditional rule of law was radically revised and gave way to a new figure – the constitutional *Rechtsstaat* – which, while having some of the former's characteristics, transformed and replaced it.

The dilemma between "power" and "law" (and "rights"), which permeates the lengthy development of the rule of law, was removed (more than solved) by Kelsen using a Gordian technique: demolishing a tradition which had become entangled in the famous aporia by virtue of the "myth" of the "really" active state (we shall not question in this essay whether and how the exorcized "dilemma" troubled Kelsen's reasoning when dealing with the original constitution and the fundamental norm).

Having founded the rule of law on the hierarchical relationship between the constitution and legislation, the link with any prior definition of individual rights (endemic to the former development of the "rule of law") has been severed and the rule of law has acquired a purely formal dimension. It is true that, according to Kelsen, the constitutional *Rechtsstaat* (where the constitution can be modified only by a "qualified majority") is a useful means to protect minorities and to favour the development of democracy,[125] but it is also true that the rule of law fosters democracy by means of its legal and formal structure and not because it is intrinsically connected with pre-existing ("natural") rights finding therein an effective protection against power.

Through the *Stufenbautheorie* and constitutional primacy, the privileged relationship between sovereignty and parliament was interrupted: statute law was no longer the quintessence of sovereignty and both legislative and administrative powers could be controlled by a judicial body. According to Kelsen, the limit to legislative power that traditional doctrine had detected in history, politics, and society, could be legally grounded on the same reasoning justifying the subjection of all the state's organs to control.

Through the constitutional review of legislation, Dicey's objection to continental constitutionalism (redundant in its principles and defenceless in terms of guarantees) loses its sharpness. Guarantees were now provided by control mechanisms that the legal system itself, without appealing to external "safety valves", was able to devise. While Dicey's reasoning endorsed the common nineteenth-century conception of

sovereignty and resolved the problem of "guarantees" by resorting to the British judge-made law, Kelsen broke off with traditional German doctrines: he subjected statute law to the constitution and resolved the problem of "guarantees" by introducing control mechanisms within a rigorously unitary legal order.

Under Kelsen's perspective, the preservation of the constitutional *Rechtsstaat* could not depend on formal mechanisms: the protection of the constitution was the task of a judicial body which guaranteed statutes' conformity to the (formal and substantial) restraints established by the constitution itself; the constitution's stability was protected by the requirement of a qualified majority for any modification of it. Beyond the formal sphere, which Kelsen regarded as the only legally relevant ambit, there was the area of social interaction. The future of democracy and of the constitutional *Rechtsstaat* – which purported to be a technically refined and efficient instrument of democracy – depended on the complex interplay of competing interests and motivations and on the rationality and tolerance with which individuals were endowed.

8 THE RULE OF LAW BETWEEN "OBJECTIVE LEGAL INSTITUTES" AND THE "WELFARE STATE"

Kelsen paved the way for a new approach to the rule of law: one that eradicated nineteenth-century dilemmas; demolished the meta-legal vision of power and individuals; focused on the legal system; and established its differentiated, hierarchical normative levels. This enabled the new approach to overcome the dogma of the untouchable majesty of statute law, hallowed the constitution's pivotal role, introduced restraints on legislators' activity and made judicial review feasible.

Kelsen's brilliant contribution was grounded on a sharp distinction between *Sein* and *Sollen* (is and ought) and operated within the boundaries of the system's "formal" dimension: "content-based" constraints binding the system fell outside the scope of the legal discourse, whereas democracy (which Kelsen constantly took into account) was a means for social coexistence which, excluding absolute political beliefs, found its most suitable instrument in the "formal" mechanisms of the rule of law.

Not surprisingly, therefore the widespread anti-formalist (and anti-Kelsen) reaction of the 1920s focused on the problems inherent in a merely "formal" understanding of the rule of law. In fact, it was true that the constitution made the legislator's activities open to control; however, the constitution had no protection other than in the purely numerical and extrinsic "qualified majority" required for its modification. The problem

of limits, which the *Stufenbautheorie* had resolved for the legislative power, i.e. at the system's "intermediate" level, affected the system's summit, the level of the constituent power.

The thesis that a merely formal restraint on power's arbitrariness was insufficient permeated the German debate in the Weimar age, and was neatly pointed out by Erich Kaufmann.[126]

After his early neo-Kantian years, Kaufmann decidedly broke away from Rudolf Stammler and Kelsen[127] arguing the deficiencies of a merely "formal" understanding of law: that neo-Kantian "forms and norms" were empty and that there was no path towards their ontological foundation; Kaufmann believed it essential to move away from an "abstract system of forms" towards a "material order of contents" and to relinquish "formal apriorism" which "makes us go astray in the sea of effective reality".[128] His approach was in striking contrast with Kelsen's method and his aim was to understand the real relationships (*Dingbegriffe*) underpinning conceptual relations (*Relationsbegriffe*).[129] According to Kaufmann, it was necessary to go beyond the system's formal and procedural levels to detect its "objective" traits directing both judges' and legislators' choices: constraints on public power ought not to be "merely formal", rather they need to be grounded on a "material order" which can determine the latter's conditions "in a content-based manner".[130]

The concept of "institute"[131] was outlined to overcome a purely normative analysis: the institute was something more than a set of norms; it was enlivened by its own principles, it was the expression of an objective order, of a "logic of things" which judges, ordinary legislators, and the constituent assembly were bound to respect. Under a "formalistic" approach, limits and cross-checks were doomed to give way to the inevitable arbitrariness of a given "will" (if not the ordinary legislator's, at least the constituent super-legislator's). However, if the narrow limits of normativism were overcome, there arose principles, values, and forms of collective life ("institutes") that offered individuals the ultimate and indefeasible "guarantee" against the despotism of power, which formalism was unable to offer.

The "institute" as a "substantial" limit to power's arbitrariness was not the creation of Kaufmann's alone; it was the final outcome of German historicist and organicistic tradition, and also connected (as Kaufmann himself specified) with that idea of *institution* which Maurice Hauriou had innovatively outlined in the late nineteenth century.

According to Hauriou, the legal order must be set against a background of social interaction where the most miscellaneous groups and associations

developed. The word "institution" thus stands for any organized social group: a group both demanding and protective towards its members, characterized by a given internal distribution of power and capable of lasting over time. It is within the institution's social and legal microcosm that the rules determining individual members' duties and prerogatives are established.[132]

The institution, rather than the state, is the "original" legal phenomenon: the state presupposes a rich and diverse network of institutions that affects its historical development and is still alive at the height of its splendour.[133] Hauriou's reasoning is "dualistic" and is explicitly in contrast with Léon Duguit's "sociologistic" monism as well as with the "formalistic" monism of Carré de Malberg or Kelsen. The legal order is grounded on the duality between "state" and "nation"; the nation does not exist simply because it is embodied in the state (as propounded by Carré de Malberg), but it is itself a historical reality, visible and operating, "an organized social body",[134] "a set of established situations ..., capable of solidarizing in order to counterpoise the government and constitute a coalition ...",[135] endowed with an autonomous and legal substance of its own.

According to Hauriou, such coordinates defined the rule of law: rather than being grounded on the self-limitation idea, which was internal to the dogma of the state's omnipotence and an expression of a kind of "monism" unable to view anything beyond the state's ambit, the state ought to be founded on an "equilibrium theory", according to which order was the result of interaction between the state and the institutional framework, which the state could not but refer to.[136]

Hauriou did not underestimate the "internal", "endo-state" aspects of the rule of law; as a matter of fact, by relying on the plurality of bodies and powers, nineteenth-century jurisprudence was able to subject administration to law and to provide for the setting up of an administrative judicial system. Within such a perspective, however, it was indeed difficult to impose limits on legislation, even though Hauriou viewed the American model as an interesting example in this respect.[137] The point, however, was that a final and satisfying solution could not be reached without going beyond the state's monad and referring to the dynamics of "social institutions".

According to Hauriou, we must refer to the individuals, interests, groups, social hierarchies, and the gradual setting-up, within social relationships, of "established situations", i.e. institutions that the state's power can govern, coordinate, protect, but not arbitrarily create or cancel.[138] Ergo, freedom does not derive from the state's self-limitation:

Hauriou believed that law and rights were created by society's institutional framework which was both the matrix of the state and the necessary reference point for the latter's action.[139]

The "political constitution" drew its meaning and strength from its relationship with the "social constitution". Individual rights themselves ought to be seen neither as unilateral concessions by the state nor as attributes of an absolute and unrelated subjectivity but rather as protrusions of society: social and normative structures, forms of social relationships, "institutions" precisely. It was the whole set of such statutes, of such "objective legal institutions", that determined individuals' conditions, the *statute* of each French citizen.[140]

The combined interaction between the state's initiative and the spontaneous germination of institutions led to the dynamic equilibrium upon which the success of the rule of law hinged. Consequently, socially consolidated rights might not even be confirmed by a written constitution, as demonstrated (according to Hauriou) by Great Britain's eloquent example; and vice versa: the legal order was not "illiberal" simply because the written constitution lacked a precise enunciation of freedoms, as in the 1875 French constitution. The rule of law was founded not so much on formal apparatuses as on the equilibrium between social institutions and the state's intervention. Hauriou, however, did acknowledge the relevance of a written constitution: in France, the Declaration of Rights was important not for its "individualistic" content, product of its time,[141] but because it greatly reinforced the respect for "objective legal institutions", inasmuch as it was a set of rules superior to ordinary laws and hopefully strengthened by the review of statutes' constitutionality.[142]

If Hauriou and Kaufmann's contexts, outlooks, and concerns were different, though, they shared a two-faceted "antiformalistic" thesis: to demonstrate the flaws of a merely formal definition of the rule of law and to find a way for law to avoid the political arbitrariness that, while kept under control in its "ordinary" legislative manifestation, might show up in the "state of exception" of the constituent's activities. However, useful institutional mechanisms could be – established devices such as administrative courts and more recent ones such as review of statutes' constitutionality – seemed incapable of hindering, by themselves, the sovereign's "despotic drift": there arose again the risk of an "unfounded" legal order, of an order separated from the "logic of things", from a structure embedded in the reality of social relationships, this being the sole bulwark against power's recurrent "excesses".

Not surprisingly, this was a constant concern of jurists debating the constitution of Weimar. We must take into account the 1919 constituent's inconsistent (though innovative and bold) attempt to "constitutionalize" "social rights". This attempt (which was taken over and further by the post–Second World War constitution) had been differently valued by contemporary jurists. Some thought the constitution of Weimar ran aground on a barren compromise between incompatible principles; others thought it displayed a dangerous "interventionist" penchant, threatening traditional freedom and property by means of a long list of "social rights".

Therefore, while anti-formalism and the anti-Kelsen critique of the 1920s searched for restraints on the constituent power, it also, under a somewhat opposed perspective, disapproved of Kelsen's lack of attention towards the creative and dynamic role of power.

Hermann Heller's critique falls within the latter perspective. Heller criticized Kelsen for his attempt to create a theory of the state without a state,[143] leaving sovereignty, power, and decisions at the margins of his discourse. Heller (a supporter of social democracy) wished to keep at a distance from both Marxist orthodox economicism and from Kelsen's formalism, and strove to elaborate a theory accounting for both rules and the authority creating and making them effective, without erroneously making power and obedience legally "invisible".[144] Heller contrasted Carl Schmitt with Kelsen, to claim the existence of a supreme command capable "of definitively and effectively deciding on all matters relating to collective social action within the territory, possibly going also against positive law, and of imposing such decisions on all individuals".[145]

Heller argued that the holder of sovereignty in contemporary constitutional systems was undoubtedly the people, the centre from which radiated Rousseau's "General Will" which supported and legitimized the entire system.[146] Democracy, which was centred on the people's strong and determined will, must be conceptualized by relinquishing both Schmitt's celebration of the people's homogeneity and absolute unity and Kelsen's neutral proceduralism, which brought democracy within the formalism of the constitutional *Rechtsstaat*. Democracy meant sharing a number of fundamental values and principles without, at the same time, excluding different perspectives and strategies; there could be value pluralism and even conflict, as long as they were governed by the acceptance of common rules. Consequently, parliamentarism was neither the institutional projection of ethically "neutral" compromises (as propounded by Kelsen) nor the frail covering (as argued by Schmitt) of conflicts and agreements among "total" parties: its "historical and spiritual foundation"

"is not the belief in public debates as such, rather in the existence of a common ground for debates".[147]

Heller argued that the possibility of overcoming the Weimar crisis whilst retaining and furthering its democratic potential depended on the individual's capacity to identify himself with a common set of values; it was within such a context that the rule of law acquired its historical and political impetus.

Heller also claimed that the historical parable of the rule of law was animated by the need to constrain power's arbitrariness and to make the legal consequences of individual actions foreseeable. By appealing to the primacy of law and to the separation of powers, it was possible to introduce check devices – above all, administrative courts – which would secure protection of the individual freedom and property. According to Heller, the most recent attempts to go even further and subject both administration and the legislative power or even the constituent power to a system of restraints were due to the fears of the bourgeoisie, which was aware that the real threat to freedom and property came from the parliamentary assembly, more and more concerned with the interests of the working classes (owing to the introduction of the universal suffrage and the advent of mass parties).

According to Heller, modern society was facing a dramatic dilemma. The first alternative was that the bourgeoisie, frightened by the possibility of a radical and interventionist democracy and unsatisfied with the feeble protection which the formal procedures of the *Rechtsstaat* could offer, threw itself into the arms of an "irrational neo-feudalism",[148] took refuge in the cult of the "strong man" and relinquished democracy and "nomocracy", parliamentarism and the rule of law. The second alternative – the only way, according to Heller, to save the rule of law – required a deep reassessment of the traditional nineteenth-century theory of the *Rechtsstaat* and the acknowledgement that the aim it pursued – the protection of the individual's legal sphere from power's arbitrary intrusions – was a necessary but not sufficient condition for order. To update the rule of law and to suit it to contemporary needs meant to free rights from their original individualistic bias[149] and thus turn the traditional rule of law, focused on the protection of property and freedom, into a social-democratic *Wohlfahrtsstaat*, a social rule of law.[150] It was only by opening up the rule of law to the new realities of "social democracy", by functionally connecting it with rights, that did not coincide with the "classical" rights of liberty and property, that the rule of law could raise from its ashes and become the means for a new legitimacy.

These (mostly German and French) theories of the 1920s virtually conclude the course of the rule of law that began with a "prehistory" in eighteenth-century reformism and was fully realized by mid–late nineteenth-century European theories of public law.

The key points of the "new direction" taken by the rule of law can be summarized as follows.

Firstly, by determining the hierarchical relationship between statute law and the constitution, Kelsen's *Stufenbautheorie* dismantled the dogma of parliament's "absolute" sovereignty (a dogma shared by the main nineteenth-century European legal traditions); moreover, it allowed legal restraints to be imposed on legislative activities and made them open to review, thus reducing the notable differences between the European continental tradition and American constitutionalism. Thanks to Kelsen's pioneering and long overlooked contribution, a radical discontinuity was created in the history of the rule of law, by introducing a new and determining "constitutional moment" and fully realizing the integral "legalization" of the system that had only been imperfectly achieved by nineteenth-century theories.

The theoretical device deployed by Kelsen was the denial of the state's "reality" and its identification with the normative legal system: rather than offering a solution internal to the well-known oxymoron of an absolutely sovereign and legally bound state, he eliminated one of its terms. It was at this stage, however, that there arose the second key point of the debate on the rule of law: Kelsen's uncompromising normativism became the Achilles' heel of the rule of law, inasmuch as this purported to "finally" limit the sovereign's power. The mere formal "hierarchy of norms" thus seemed an ineffective weapon against a form of power which, albeit kept under control in a given area of the system, demonstrated once again its "excessive" nature at a higher level, and could not actually be curbed until attention was shifted from form to content, from norms to social structures, to "institutes", "institutions", and grounding principles.

Thirdly, some aspects of the relationship between rule of law and individual rights changed. According to Heller and Neumann, the state characterized by the rule of law had a privileged relationship with a new class of rights (which began to be called "social"), which gave legal basis to individuals' claim to the state's "positive" intervention. In any case, a salient feature of the rule of law remained unaltered throughout its story, i.e. its functional role, the protection it offered to individuals, often through a precise range of rights. Yet, while the nineteenth-century traditional rule of law was essentially concerned with the protection of

freedom and property, under Heller's perspective the *Rechtsstaat*, as *Wohlfahrtsstaat*, was functionally connected with a class of rights which widened and further complicated its original purpose.

Fourthly, in an unusually clear manner (again in Heller's lucid work), there appeared the likelihood – neither remote nor hypothetical, but rather actual and decisive – that the rule of law might be fully exhausted and defenceless against a crisis that allegedly required a radical overstepping of all normative and formalistic hurdles.

9 "RULE OF LAW", "STATE OF JUSTICE", AND "ETHICAL STATE"

The "dictatorship" feared by Heller was soon experienced in Germany, in a much more complex and powerful way than that envisaged by the jurist – whereas Italy precociously provided Heller with an example of an "anti-parliamentary" solution to the crisis of the liberal-democratic state. Undoubtedly, Fascism and National Socialism were not homogeneous and interchangeable phenomena: a historical and comparative analysis of the Italian and German regimes of the 1920s and 1930s would outline a complex picture of both the analogies and differences between them. In any event, an undeniable (albeit unrefined and basic) common trait to such experiences was their hostility towards liberal and democratic traditions. This does not mean, however, that the German and Italian regimes were similar in their summary execution (or ritual sacrifice) of the rule of law.

In Germany, in the years immediately following 1933, the rule of law was at the centre of a harsh debate among jurists;[151] however, it ought to be borne in mind that in all power conflicts that deeply affected the life of the Nazi regime the debate was marked by a tendency to overstate (or make up) ideological differentiations – which were in fact modest or inexistent – in order to use them as weapons again political antagonists.

A number of circumstances led early National Socialism to resort to the idea of the rule of law. On the one hand, examination of the famous formula allowed the protagonists of the debate to come to terms with liberal constitutionalism and to specify their own political beliefs; on the other hand, the same protagonists of the National Socialist "revolution" employed the expression *Rechtsstaat* to reassure groups and intellectuals attached to tradition during the particularly delicate transition towards the new political arrangement.

According to jurists with an old or recent National Socialist penchant, the rule of law was a useful target when attacking "liberalism", upon

which it is deemed to be historically dependent: however, not all jurists believed that the downfall of liberalism caused the *Rechtsstaat* to disappear automatically. On the contrary, the possibility of using the notion (and "symbol") of the rule of law in the new German National Socialist world sparked off a multi-voiced debate, dominated by two jurists, Otto Koellreutter and Carl Schmitt, both striving for a pre-eminent position in the new regime.

Although Koellreutter had been a long-time supporter of National Socialism whereas Schmitt had a more complex and troubled past, they both interpreted and valued the "Gesetz zur Behebung der Not von Volk und Reich" of 24 March 1933,[152] which conferred upon the government the power to enact laws and introduce constitutional changes, in the same way. According to both, from this moment, even without a formal abrogation of the constitution of Weimar, the ancient regime was replaced by a new regime grounded on the *Führertum* and the *Volk*.

In 1933, Koellreutter attempted to demonstrate that National Socialism, unlike Fascism (this being founded above all on the state), appealed to the *Volk* (to the people conceived of as a blood and racial unity, a homogeneous reality with a given ideological and territorial identity) and to the *Führer*, who interpreted the *Volk*'s profound needs: hinging upon the link between *Führer* and *Volk*, the National Socialist regime was most pertinently called *Führerstaat*.[153] In the same year, Schmitt began his career as the "Reich's jurist"[154] by publishing *Staat, Bewegung, Volk*,[155] in which his previous liking or longing for the strong, independent, and detached-from-society state (the "total state" in qualitative terms[156]) were replaced by a "triad" view of the state as a mere component of a process grounded on "movement" and on the *Führer* as its interpreter and guarantor. According to both jurists, the new state was a *Führerstaat* which expressed the strength of people whose fundamental trait was the *Artgleichheit*, i.e. qualitative equality or homogeneity stemming from common blood and racial bonds.[157]

Although there seems to be no decisive difference between the two jurists on the new regime's grounding principles, the *casus belli* between them was precisely the rule of law. Koellreutter believed that the transition from what the jurist Gustav Adolf Walz called the *Zwischenverfassung*[158] (the unwarlike, powerless constitution of Weimar) to the new National Socialist order epitomized the transformation of the old liberal rule of law into a new (allegedly "national") *Rechtsstaat*. The new state broke with liberal individualism: while the traditional *Rechtsstaat* was functionally linked with individuals and their rights, the "national" *Rechtsstaat* found its main reference point in the people's life. The circumstance that the

National Socialist order was still a *Rechtsstaat* was proven by the fact that, in the new regime, according to Koellreutter, general laws and the judiciary's independence were still important.[159] Yet, such elements were functionally linked with the people rather than with the individual and could be suspended when necessary, i.e. for the same *salus populi* which legitimized the 1933 act.[160]

Although Schmitt did not deny that general laws and independent judges were still in action in the National Socialist order, he emphasized that all aspects of the new regime had to be interpreted by bearing in mind that equality was no longer merely formal and that laws (including pre-1933 laws that had not yet been abrogated had to be interpreted in the light of National Socialist principles.[161] From this perspective, the notion of the *Rechtsstaat* seemed to Schmitt a misleading characterization of the new regime.

According to Schmitt, the *Rechtsstaat* was a recent expression dating back to the nineteenth century. It arose as the expression of a neatly liberal anthropology, metaphysics, and politics. The "state characterized by the rule of law" was opposed, on the one hand, to the "Christian state", so as to value a purely secular and generally "human" legitimization of the political order, and, on the other hand, to Hegel's state, so as to underline the functional link between the sovereign and the individual. In opposition to such an ideological dimension of the rule of law, a new formulation of the concept, oriented towards its "neutralization and technicalization", took shape, starting with Stahl. Under such a perspective, the state must simply be "subject to law", no matter what aims it pursued, whereas law was a mere form which could be easily suited to any specific content.[162]

According to Schmitt, the colourless, ethically and teleologically indifferent image of the state provided by normativistic formalism was incompatible with the National Socialist belief in a "concrete" order, grounded on the *Blut und Boden* hendiadys.[163] The *Rechtsstaat*, construed according to its proper meaning, seemed to be inseparable from the relativism and agnosticism that had turned the state into a *Gesetzesstaat*, a "legislative state", a state formalistically identified with the barren "creation" and "application" of norms.[164] As a "legislative state", the *Rechtsstaat* was incompatible with the National Socialist state,[165] for which Gustav Adolf Walz had coined the popular formula *völkischer Führerstaat*; Walz himself acknowledged the existence of general laws and of judges enforcing them but insisted on their instrumental value – since the heart of the new order was the people, which was not a heterogeneous and "plural" mass but an *artgleicher deutscher Volk* naturally expressed by the *Führerstaat*.[166]

Given its congenitally "formalistic" nature, the *Rechtsstaat* could not properly be used to denote the new *Führerstaat*. Being historically and conceptually viewed as a "legislative state", the *Rechtsstaat* was in contrast with another kind of state which could have been more suited to the National Socialist regime, i.e. the "state of justice". The liberals' trap ought to be avoided: these would have us believe that the alternative between *Recht* and *Unrecht*, righteousness and wrongfulness, and justice and injustice rotated around the notion of *Rechtsstaat*. On the contrary, the rule of law, assumed to be synonymous with a "legislative state", dismissed "justice" by turning it into a problem of regularity or conformity to law. Suffice it to mention the example of criminal law: although "justice" would call for the punishment of the guilty (*nullum crimen sine poena*), formalism rested upon the empty maxim *nulla poena sine lege*. Therefore, while the "legislative state" was suited to liberals' empty scepticism, the "state of justice" was properly referable to the people's "concrete order".[167]

By relying on such an assumption, Schmitt legitimized the "Night of the Long Knives", when the SA's leaders had been eliminated: the *Führer* acted as a supreme judge before supreme danger. Whereas the rule of law's formalism had ruined the German nation – liberalism had used constitutional guarantees to protect people guilty of high treason – the *Führer*'s concrete justice could save the nation. Undoubtedly, the liberal legal tradition admitted the possibility of suspending guarantees in the name of an "exceptional" need. However, in the new regime, the "state of necessity", far from suspending law, revealed it: Hitler did not act like a Republican dictator "in a legally empty space", confronting an exceptional contingency that, once overcome, would allow the formalism of the rule of law to be restored. On the contrary, his actions were an authentic act of justice: his jurisdiction was rooted in law's primary source, i.e. the people. In cases of extreme need, the *Führer* was the supreme judge and the ultimate means for the realization of law.[168]

The debate on the rule of law would soon be abandoned, since it proved to be useless to a regime which was no longer interested in maintaining a connection, albeit weak, with the past. In any event, the meaning of the National Socialist debate on the rule of law was clear and notable. While the rule of law doctrine had, until then, expressed the possibility of using law (through its refined technical instrumentation) as a means to restrain and control power by making its actions foreseeable and "regular", in the new regime the concept of the *Rechtsstaat*, to be compatible with Nazi ideology, needed to overturn the relationship between power and law. It was power (the *Führer*'s "exceptional" power)

that used law to guarantee the *salus populi*. This led to the importance of the "state of necessity". "Necessity" was indeed an old weapon: the Jacobins appealed to it legitimate the suspension of the constitution[169] and it had also permeated liberal legal theories.[170] Yet, under the new regime, it was the "rule" that was internal to the "exception" and not the contrary. Power reigned supreme within this scenario and power's decisions would prevail ("structurally" and not exceptionally) over rules: norms could still have a useful purpose as long as they had a "subordinate" function and merely regulated politically "secondary" relationships. Koellreutter's conservative solution involuntarily ended up by being similar to Fraenkel's idea of the "double state":[171] a state – typical of the National Socialist regime – where the "high" level of unbridled and uncontrollable politics was superimposed (in a useful synergy) on the "low" level of "normal" private and economic relationships.

The interplay between rules and exceptions, law and necessity, was not a prerogative of the German debate on the *Rechtsstaat*; rather, it had already taken place (in both similar and different ways) in Fascist Italy.[172] Schmitt himself emphasizes that, during the German and Italian crisis and the "rejection" of liberalism, attention had been focused on the rule of law; yet, according to Schmitt,[173] the quality of the debate had been higher in Italy, as demonstrated by a book by Sergio Panunzio, published in 1921 and dedicated precisely to the *Stato di diritto*.

Panunzio was the first to clearly express a theory that was to be developed with many variations in the 20-year period of Fascism. He did not wish to overthrow the rule of law, only to limit its relevance and to demonstrate its inadequacy in exhausting, by itself, the entire state phenomenon. According to Panunzio, the system of norms, constraints, and checks was indeed important, but the limits of its application needed to be crystal clear: the rule of law was essentially valid for the "contractual" coexistence of individuals and presumed an ordinary and peaceful everyday life. Yet, history was much more "demanding": exceptional states often arose, such as wars, and in this case the "ordinary logic" of the rule of law was no longer useful. "Each legal criterion is overcome" and the hero takes charge of the situation, the hero whose exceptional personality interprets the nation's "deep" needs "beyond any legal limit and criterion". The state characterized by the rule of law gave way to the "ethical state": "a historical entity and a self-autonomous person, which is the Spirit itself".[174]

The rule of law, the *Stato di diritto*, was not quashed but placed at a lower level in the hierarchy of fundamental legal concepts. It was contrasted with another different and determining kind of state, the

"ethical state", the state that was action, dynamism, embodiment of the national community, and, as such, not referable to Kant's idea of a mere coexistence of (private) freedoms.[175] Under such a perspective, the link that the liberal doctrine of the rule of law had established with individuals, deemed to be the beneficiaries of the state's actions and of the system of restraints imposed thereon, changed. The individual (according to Giovanni Gentile, Felice Battaglia, and Arnaldo Volpicelli) was indeed the protagonist of the political process: yet, he was not the selfish individual, the "empirical" individual, or the abstract holder of unchangeable rights and duties, but the subjectivity underlying any different and superficial individuality, the subject who discovers himself as "self-conscience", "overcomes his immediacy", and "discovers his essence".[176] According to Battaglia, the state was the organization of human life as concrete *ethos* and, as such, it cannot be divided (as suggested by Panunzio) into "state characterized by the rule of law" and "ethical state": the state is wholly ethical, inasmuch as it "is founded on the subject becoming a citizen", detecting the state's roots in himself, *in interiore homine*.[177]

Coexistence between the "rule of law" and the "ethical state" was not always easy and painless; indeed, the adoption of an intrinsically "individualistic" formula was harshly criticized by a number of Fascist jurists: suffice it to mention Giuseppe Maggiore who, being receptive to Nazi ideology, criticized the principle of lawfulness in criminal law, regarded the *Duce* as both the embodiment of popular conscience and the source of all laws[178] and fully developed the criticism of individual rights (and of the underlying "individualistic" anthropology) that he had begun before the Fascist era. According to Maggiore, the state was the original act, the realization within history of the Subject's conscience, "the universal subject, the One dialectising itself in the opposition between subject and sovereign".[179] The individual had no autonomous reality and was inconceivable as such, since it was "the whole as universal subjectivity" which conferred upon him his value and meaningfulness.[180] Individuals and their rights did not matter: what counted was the totality and strength of the state, which was "the same immanent energy of the legal process: the act of law *par excellence*".[181]

As we have seen, the period in question was marked by a number of theories sharply rejecting the continuation of the rule of law doctrine within the regime's legal culture. The most widespread approach was different: a clear-cut break with traditional jurisprudence was not claimed and focus was placed on a *topos* of nineteenth-century tradition, i.e. the state's "absolute" sovereignty. In this perspective, the state freely

determined itself through law and individual rights stemmed from the state's self-organization. Law was not "a unilateral order imposed on the subject" but an order that the state addressed to itself in its "continuous and unbreakable organizational process and legal development". The state existed in that it organized itself by laying down law: "by virtue of the *legislative act* which the state *really* consists of, the state ... organizes and constitutes itself as a *legal entity*".[182] No pre-state rights and "immortal principles" could be opposed to the state: an "external legal limitation to sovereignty"[183] was not conceivable, the latter being exclusively restrained (and founded in a legally unquestionable manner) by history and by its creative and uninterrupted process.

The link with nineteenth-century doctrines is apparent: the *Rechtsstaat* simply referred to a state which existed and realized itself through law. Such a perspective derived from Stahl's legal philosophy and was often found also in pre-Fascist Italian legal culture.[184] It led to the belief that, while the new regime must reject "all atomistic conceptions of the individual" and of his rights, it must provide a legal definition of the relationship between the individual and the state.[185] Thus, the most widespread trend was to "de-ideologize" the rule of law, freeing it from any liberal-constitutional relic and to identify it (*à la* Stahl) with the "norm-based" or legal nature of the state's activities. The state was empowered to get rid of any single rule but could not live without a legal system, without a normative arrangement rendering its will "regular" and ordered; the state did not encounter any limits to its will and could change the system as its pleased, but it had to deal with history, with "the needs of popular conscience".[186] When the state was obliged to limit freedom to safeguard public interests, this did not depend on an arbitrary decision of the governors, but on "a general, i.e. law's, order".[187]

In other words, the redefinition of the rule of law according to Fascist legal culture relied on three key points. Firstly, the *Stato di diritto* was a state whose will was expressed through law, this not prejudicing the contents of the state's decisions and the scope of its interventions; the functional link between the state and individuals was thus abandoned since it was deemed to be an unacceptable "individualistic" relic of nineteenth-century traditions. Secondly, rather than being concerned with the constitution, the *Stato di diritto* dealt with administration and advocated "justice within administration", which the regime could live with. Thirdly, the rule of law relied upon a clear distinction between "private" relationships and the public domain; such a distinction, though not perfectly coinciding with the National Socialist "double state" – given the

different importance attached by Fascism to law and to the "norm-based" state's will – assumed in any event the idea of an "absolute politics" mainly embodied in the state.

10 THE SOCIAL RECHTSSTAAT AND ITS CRITICS: THE POST–SECOND WORLD WAR PERIOD

Even though National Socialism rapidly got rid of the rule of law while Fascism tended to preserve it as an internal and "lower" feature of its absolute and ethical state, both needed to eliminate the rule of law's genetic and conceptual links with nineteenth-century liberal tradition. It is therefore not surprising that it seemed necessary to resort to the principles of lawfulness, legal certainty (and rule of law) even during the last period of Fascism and much more urgently after its collapse, when an urgent need to prepare and "plan" an alternative regime arose.

A book by a young Italian philosopher, Flavio Lopez de Oñate, dedicated to the "legal certainty" was an important premonition of such a need and the indicator of a growing "crisis".[188] Lopez de Oñate's work hinged upon law's relevance. According to Lopez, law allowed for the legal consequences of individual actions to be foreseeable: only if it was consistent and unalterable, not arbitrarily adjusted by external contingencies, could law be seen as the "objective coordination of action"[189] providing individuals with the certainty they need.

The principle of lawfulness used by Lopez de Oñate to criticize a declining though still existing Fascist regime, was akin to that which Piero Calamandrei – who had enthusiastically reviewed Lopez de Oñate's work[190] – appealed to during the period of "power vacuum" which followed the end of Fascism. Calamandrei argued that lawfulness was the most precious legacy of the French Revolution and had been destroyed by both National Socialism and Fascism, the former openly attacking it, the latter "officially and superficially" endorsing it though in fact introducing "a semi-official practice of effective unlawfulness".[191]

Thus, in both Lopez de Oñate and Calamandrei's different though convergent works can be seen a "revival" of the liberal-constitutional tradition that had been fully expressed by the rule of law and by its underpinning principles, i.e. the centrality of law, the independence of the judiciary, and the possibility of foreseeing the legal consequences of individual actions. The circumstance that law was able again to control power was viewed as the most relevant evidence of the end of the recent "totalitarian" nightmare.

Yet, planning an alternative order to a "totalitarian" state soon appeared to be a more complex and demanding task, since "lawfulness" seemed to be hardly separable from the overall arrangement of a new regime: not surprisingly, throughout the historical development of the rule of law, recurrent attempts to technicalize, neutralize, or depoliticize the formula failed and the functional link between the state and the individual's expectations and claims survived.

Therefore, when a new constitutional order entirely incompatible with the defeated "totalitarianism" was sought for, a mere revival of the pre-Fascist tradition and the simple restoration of the "principle of lawfulness" appeared to be reductive proposals. In this context, on the one hand, "lawfulness" required the introduction of new constitutional devices (the hierarchy of norms, the judicial review on constitutionality), which Kelsen had originally theorized in the 1920s; on the other hand, the functional scope of the rule of law, namely the connection between the state and the individual's rights, was once again confirmed, but it took on new meanings, inasmuch as rights were now seen as the pillars of the constitutional order and could no longer coincide with the nineteenth-century "freedom-property" hendiadys.

The rights attributed to the individual were different because the anthropology underpinning post–Second World War constitutions was itself different. In the Italian constitution[192] as well as in the French[193] and the German "Fundamental Law",[194] can be found the imprint of a number of theories (Jacques Maritain's neo-Thomism, Emmanuel Mounier's personalism, Catholic and Protestant neo-natural law doctrines, liberal-socialism) that, in spite of their different philosophical foundations, all firmly believed in the centrality of the "person".[195] The "person" represented the substantial principle which, by being coordinated with the rule of law's "formal" structures, radically differentiated the new constitutional democracy from the "totalitarian state"; it was the "person" which suggested a vision of the subject very different from liberal "individualism" and opposed "solidarity" to "selfishness", and "social" rights to mere "negative" freedom.

Undoubtedly, post-war constitutions had their own specific development and characteristics, according to different contexts. Yet, there were also some common and innovative traits: firstly, the rule of law was inseparable from the judicial review of statutes' constitutionality; secondly, the "original" link between the rule of law and individual rights took on a new meaning, since "new" rights (especially social rights) were added to the "old" rights of "freedom and property".

Such an understanding, which was substantially shared by many European countries, was emphasized in the German *Grundgesetz*, which explicitly focused on a "social" *Rechtsstaat*; and it was by no mere chance that precisely in Germany the debate on the meaning and scope of such an expression was particularly rich and intense.

The connection between the rule of law and a democracy capable of extending the subject's legal sphere beyond the classical boundaries of freedom and property was not new: Heller had already subscribed to such a perspective by adding the adjective "social" to the *Rechtsstaat*. What was innovative was giving the new model a constitutional relevance, and considering it as one of the pillars of the new order. Yet, while it was commonly accepted that the rule of law had now become a constitutional *Rechtsstaat*, it was not taken for granted that the latter was also a social *Rechtsstaat*. While some jurists argued (by appealing to the phrasing and overall logic of the *Grundgesetz*) that the social *Rechtsstaat* was an essential component of the new constitutional democracy,[196] other jurists, such as Ernst Forsthoff, were sceptical towards such an interpretation of the "Fundamental Law".

According to Forsthoff, the underpinning principle of the *Grundgesetz* was the rule of law as such, with its traditional set of principles (the separation of powers, law's centrality, and the judiciary's independence), whereas the "social state" was a politically and socially relevant phenomenon, though not an institution of constitutional rank: administration, not the constitution, allowed for the realization of the "welfare state". According to Forsthoff, "the structure of the Federal Republic's constitution ... is determined ... by the rule of law", whose relationship with the "welfare state" is realized only "through the interplay between the constitution, the legislation and administration".[197] Administration, not the constitution, took care of "the primary needs of life".[198] Forsthoff was influenced by Schmitt, who had "weakened" the constitutional relevance of "social rights" by holding that the constitution of Weimar had chosen the bourgeois *Rechtsstaat* and had deemed only the rights of freedom to be "absolute", whereas "socialistic rights" were conditioned by a number of factual and institutional presuppositions;[199] similarly, Forsthoff believed that the relevance of the adjective "social" ascribed by the *Grundgesetz* to the *Rechtsstaat* should not be "taken seriously" when interpreting the constitution.

In the post–Second World War period, therefore, two different conceptions of the rule of law stood out: while, on the one hand, the new constitutions were appealed to in order to demonstrate the functional link between the rule of law and "social rights", on the other hand a different understanding of such constitutions denied the organic link

between "rule of law", "welfare state", and "social rights" and drew a line between the constitutional *Rechtsstaat* and the (administrative and legislative) "welfare state".

A third interpretation was advanced with respect to the relationship between the rule of law and the "welfare state"; rather than simply viewing them "in a disjunctive manner" (ascribing a constitutional relevance to the former and referring the latter to the ambits of administration and legislation), it deemed such forms of state to be directly opposed one to the other. It followed, according to Friedrich von Hayek and Bruno Leoni,[200] that the rule of law was necessarily incompatible with the artificial and despotic intervention of both legislative and administrative powers.

The idea of a crisis of the rule of law caused by legislative inflation now started gaining ground:[201] if the rule of law entailed a system of limits making power's actions foreseeable and subject to control, then it also included, as an essential feature, law's stability and steadiness; however, if law were to become an instrument used to govern society, if it were adapted to individuals' ever-changing needs, then it would cease to represent certainty and would epitomize insecurity. The rule of law would lose its conceptual purity and mingle with the ideals of its "ideal-typical" antagonist, i.e. the "state of justice",[202] precisely the "state of justice" which Schmitt had identified with National Socialism, though it could have been equally identified with the Soviet's model of "socialist lawfulness". Ergo, a review of administrative or legislative action was not enough; rather, the root of the problem ought to be tackled, thus dispelling (despite Dicey's theory) the myth of parliamentary omnipotence and resorting to a rule of law which relied on the technical knowledge of judges and jurists and was sheltered from legislators' unilateral and "arbitrary" decisions.[203]

In the "anti-totalitarian" mood permeating the legal culture of the post–Second World War period, the rule of law's success was proportional to the multiplicity of political models it was associated with: it could appear as the means to combine the enhancement of individual rights with the control of sovereign's arbitrariness, or as the guarantor of freedom and property against an inevitable but dangerous "welfare state", or as a kind of social and legal order radically different from the "artificial" and arbitrary "legislative state".

11 CONCLUDING REMARKS

Many issues concerning the rule of law during the post–Second World War period retain their vitality and relevance today, transformed but still recognizable. The theory of a radical incompatibility between the rule of

law and the "welfare state", or (under an opposite perspective) the need to develop and fully accomplish Heller's idea of a social *Rechtsstaat*; the new role of the law, the loss of its Enlightenment "majesty" and its ever-increasing use as a pliable and changeable instrument of government; the judge's role and his relationship with (statute and constitutional) law: all these are issues which have come down to present debates through the filter of 1950s culture, which referred to ideas and suggestions going back even further in time.

In fact, certain themes and topics recurrently feature in the historical development of the rule of law.

(a) In general terms, the rule of law finds its "horizon of meaning" within the power–law link, in the need to constrain and regulate the sovereign's unforeseeable will. More precisely, however, it has expressed the strong and widespread nineteenth-century conviction that law can control power,[204] through the refined legal devices offered by the advances of modern public law science. Given the extraordinary nineteenth-century development of German public law theories, it is not by chance that the concept of the rule of law has been first theorized in that country.

(b) The legalization of power, of which the rule of law purports to be both the means and expression has been carried out by rules and procedures that varied according to national legal cultures and the restraints imposed by different legal systems. Three main areas appear to be particularly distinctive in this respect: the United States, Great Britain, and continental Europe (which, however, had different characteristics depending on whether the revolutionary and post-revolutionary "French model" or the German model were taken into account). Despite the diversity of the political and legal systems involved, the lemma "rule of law" seems in any event to be translatable in various national idioms without losing its semantic field as it shifts from one historical and cultural experience to another.

(c) The strategies used to achieve the rule of law's aim, i.e. to control power through law, have been numerous: there seem to be two distinct conceptions of the "state subject to law", according to whether law imposes merely formal and procedural constraints on the state or whether it compels the state's action to respect specific contents. The difference has had capital importance in the development of the rule of law, for it has affected its meaning and purpose: while, in both cases, power's subjection to law brought benefits to individuals, in the former case the state's action was free to assume

any kind of content whatsoever, whereas in the latter a compulsory link between "state" and "rights" was established.

Such a distinction can be useful, in general terms, for guiding and classifying purposes. Two further considerations must nonetheless be borne in mind in employing it. Firstly, the historical development of the rule of law has drawn inspiration more frequently from the "content-based" model rather than from the "formal" model which, in pure and rigorous terms, has been associated with Stahl (for its "original" enunciation) and with Kelsen (for its full elaboration). Secondly, even where the rule of law has been independent of an (explicit or implicit) functional link with individual rights, it could nonetheless have a "content-based" effect: Kelsen's constitutional *Rechtsstaat* was, in itself, a device grounded on the formal hierarchy of norms, but it was also the main instrument for the realization of democracy, as Kelsen himself argued.

(d) Among the many traits ascribed to the rule of law throughout its historical development, there did not seem to emerge a necessary relationship between the rule of law and a specific political and constitutional system: although there was a prevailing historical link between the rule of law and liberal constitutionalism, the twentieth-century development of the *Rechtsstaat* paved the way for different usages of the formula, for it has been referred also to the "Fascist state" or to the "welfare state" of the post–Second World War period.

(e) Although the rule of law is referable to different kinds of state and to different political and constitutional regimes, it nonetheless always expresses a hardly appeaseble tension towards power, which it perceives as the expression of a supreme will and decision. The rule of law appears not so much as an alternative but rather as an antidote to power's voluntarism, i.e. as an instrument which may soften and "tame" the sovereign's will, which nonetheless maintains a pivotal role. Although the rule of law has always expressed, across different countries – such as Dicey's Great Britain, Jellinek's Germany, or Orlando's Italy – a precise "anti-voluntaristic" stance, this has taken different shapes: resort could be made to judge-made law, as in Great Britain; or, as throughout the continent, to advanced institutional engineering (thus first setting up an administrative judicial system and then reviewing statutes' constitutionality).

The rule of law is also an attempt to curb power by correcting its mechanisms "from within". Through it, the nineteenth-century political and legal culture believed two important aims could be attained.

Firstly, the rule of law could help in contrasting Rousseau's and the Jacobin idea of popular sovereignty:[205] that "primacy of the will" which was specified as "tyranny of the majority", primacy of the number, and "democracy without quality". The rule of law strives to combine sovereign power's absolutism with the protection of individuals' legal domain against the will's despotism. Secondly, the rule of law could overcome an ambivalent approach towards administration: in some respects, this appeared as an irreplaceable instrument for social integration and for the settlement of conflicts; in other respects, it was suspected of being too "interventionist" towards freedom and property. Consequently, the rule of law allowed for power to be moderated from within by making its actions controllable and revisable.

(f) It was the idea of the sovereign's absolute will which led to the aporia underpinning the nineteenth-century development of the rule of law, i.e. the irresolvable conflict between the state's absolute sovereignty and the legal constraints which the rule of law identified itself with. While such an aporia remained unsolved throughout nineteenth-century public law theories, the parable of the rule of law was given a new direction by Kelsen's theory, which allowed for the old taboo of the uncontrollable legislative power to be overcome and provided the grounding for the review of statutes' constitutionality. The post–Second World War period brought about a new era for the rule of law's development. On the one hand, fundamental rights were now provided with a safe shield against the legislator's now "controllable" free will; on the other hand, the rights to which the rule of law was now functionally linked went well beyond nineteenth-century traditional freedom and property. This entails a paradox: on the one hand, the rule of law was an antidote to legislators' absolutism but, on the other, it stimulated (being a "social" *Rechtsstaat*, connected with "social rights") state interventionism, thus leading to the "legislative inflation" promptly criticized by the "antivoluntaristic" theorists of the "rule of law" (such as Hayek or Leoni) as jeopardizing legal certainty.

(g) Both the "antivoluntaristic" stance (the need to curb the "decisionism" of power) and the remedy thereof (to resort to judges' control) were recurrent in the nineteenth-century development of the rule of law and in its twentieth-century mutations. Whether it be the American Supreme Court or the common law judge, or the Constitutional Court, or the administrative judge, it is up to the curb power. It is reasonable to assert that such a reiterated belief in the "antivoluntaristic" role of the judge was grounded on an obstinate "Montesquieu-based" image of the judiciary as a "void power", as well as on a typically positivistic

theory of interpretation, conceived of as a mere cognitive and deductive operation.

Throughout the history of the rule of law the solution of the enigma of the "subjection of power to law" has been found in the judge's role. It is also not surprising that, in contemporary debate, the problem of the rule of law hinges upon the capital question of legal hermeneutics, i.e. the role of judges and the techniques of interpretation and application of law.[206]

(h) If the recurrent solution in the history of the rule of law has been resorting to the judge in order to control power, there was also a widespread feeling that a "final" solution to the power–law link was hard to find. In the nineteenth century, when the rule of law strove to ensure the judicial review of administration, whereas legislation seemed, by nature, to escape any legal constraint, a "closing valve" to the system was needed. Although the judicial review of administrative action appeared as a notable progress in the long path to subjecting power to law, it did not seem to exhaust the problem of power and its control. Rather, a widespread "philosophy of history" (more exactly a common "sense" of history) fostered, through its faith in "magnificent and progressive futures", the idea of a spontaneous harmony between power, law, and rights, and offered by such means the "closing valve" to the legal system.

Yet, the optimistic historicism of the nineteenth century was doomed to be harshly defeated by the dramatic events of the twentieth century. It was precisely the tremendous impact of totalitarian regimes that urged a rethinking of the limits on sovereignty and pushed "upwards" the process of subjecting power to law, which had began in the previous century, thus stimulating the widespread realization of that constitutional *Rechtsstaat* which made legislators' action open to judicial review and seemed capable of protecting fundamental rights.

However, this did prevent the needs and tensions expressed in the debate of the first 20 years of the twentieth century from reappearing. On the one hand, the characteristic aim of the rule of law (the restraint on the sovereign's uncontrollable will) was pursued by extending the control to the system's higher levels (from administrative control to legislation, and from legislation to the constitution); on the other hand, in a tension with the other trend, merely formal restraints on power were feared to be frail and "unfounded"; the need was felt to interrupt the "process ad infinitum" to which any *Stufenbautheorie* seemed doomed and to find out "ultimate" constraints which could be imposed on power, "absolutely" preserved areas ontologically removed from the despotism of will.

Within the ever-renewed tension between power and law, between formal controls and substantial restraints, between the sovereign's interventionism and order's spontaneity, it might thus be possible to see a "surplus of meaning" from which the rule of law draws its symbolic suggestiveness, and which cannot be encompassed within formal constitutional devices and the boundaries of "pure reason".

"But once more – said the European – what state would you choose?" –The Brahmin answered, "That in which the laws alone are obeyed". "Where is this country?" said the counsellor. The Brahmin: "We must seek it".[207]

NOTES

1. See L. Cohen-Tanugi, *Le droit sans l'État: sur la démocratie en France et en Amérique*, Paris: PUF, 1985.
2. For the many historical similarities between the rule of law and the "citizenship discourse", see P. Costa, *Civitas. Storia della cittadinanza in Europa*, vols. 1–4, Roma-Bari: Laterza, 1999–2001.
3. On the historical and theoretical notion of the rule of law, see A.L. Goodhart, "The Rule of Law and Absolute Sovereignty", *University of Pennsylvania Law Review*, 106 (1958), 7, pp. 943–63; E.-W. Bockenförde, "Entstehungswandel des Rechtsstaatsbegriffs", in *Festschrift für Adolf Arndt zum 65. Geburtstag*, Frankfurt a. M.: Europäische Verlagsanstalt, 1969, pp. 53–76; M. Tohidipur (ed.), *Der bürgerliche Rechtsstaat*, Frankfurt a. M.: Suhrkamp, 1978; B. Barret-Kriegel, *L'état et les esclaves*, Paris: Calmann-Lévy, 1979; J. Raz, *The Rule of Law and its virtue* [1977], in id., *The Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press, 1979, pp. 210–29; J. Finnis, *Natural law and Natural Rights*, Oxford: Clarendon Press, 1980, pp. 270 ff.; N. MacCormick, "Der Rechtsstaat und die rule of law", *Juristische Zeitung*, 39 (1984), pp. 65–70; F. Neumann, *The Rule of Law. Political Theory and the Legal System in Modern Society* [1935], Leamington: Berg, 1986; A.C. Hutchinson and P. Monahan (eds), *The Rule of Law. Ideal or Ideology*, Toronto/Calgary/Vancouver: Carswell, 1987; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari: Laterza, 1989, pp. 889 ff.; M. Stolleis, "Rechtsstaat", in A. Erler and E. Kaufmann (eds), *Handwörterbuch zur deutscher Rechtsgeschichte*, Berlin: Schmidt Verlag, 1990, vol. 4, pp. 367–75; S. Amato, "Lo Stato di diritto: l'immagine e l'allegoria", *Rivista Internazionale di Filosofia del diritto*, 68 (1991), pp. 621–66; M. Fioravanti, "Costituzione e Stato di diritto", *Filosofia politica*, 5 (1991), 2, pp. 325–50; J. Chevallier, *L'État de droit*, Paris: Montchrestien, 1992; B. Montanari (ed.), *Stato di diritto e trasformazione della politica*, Torino: Giappichelli, 1992; M. Troper, "Le concept d'État de droit", *Droits. Revue française de théorie juridique*, 15 (1992), pp. 51–63; I. v. Münch, "Rechtsstaat versus Gerechtigkeit?", *Der Staat*, 33 (1994), 2, pp. 165–84; M. Fioravanti, "Lo Stato di diritto come forma di Stato. Notazioni preliminari sulla tradizione europeo-continentale", in G. Gozzi and R. Gherardi (eds), *Saperi della borghesia e storia dei concetti fra Otto e Novecento*, Bologna: il Mulino, 1995, pp. 161–77; P.P. Craig, "Formal and substantive conceptions

of the rule of law", *Diritto pubblico*, 1 (1995), pp. 35–55; H. Noske (ed.), *Der Rechtsstaat am Ende? Analyse, Standpunkte, Perspektiven*, München/Landsberg: Olzog, 1995; A. Catania, *Lo Stato moderno: sovranità e giuridicità*, Torino: Giappichelli, 1996; H. Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats", *Archiv für Rechts- und Sozialphilosophie*, Beiheft 65, Stuttgart: Steiner, 1996, pp. 9–31.

4. B. Barret-Kriegel, *L'état et les esclaves*, pp. 27 ff.
5. Plato, *The Statesman*, pp. 494, 505, in *The Dialogues of Plato*, Eng. tr. (with analyses and introductions) by B. Jowett, Oxford: Oxford University Press, 1892.
6. Aristotle, *Politics*, Book IV, pp. 117–18 (Aristotle, *The Politics of Aristotle*, Eng. tr. (with introduction, marginal analysis, essays, notes, and indices) by B. Jowett, Oxford: Clarendon Press, 1885.
7. J.A.N. Caritat de Condorcet, "Réflexions sur ce qui a été fait et sur ce qui reste à faire, lues dans une société d'amis de la paix" [1789], in J.A.N. Caritat de Condorcet, *Oeuvres*, IX, ed. by A. Condorcet O'Connor and M.F. Arago, 1847, anast. reprint, Stuttgart-Bad Cannstatt: Frommann, 1968, p. 447.
8. M. Robespierre, "Rapport du 5 nivôse an II sur les principes du Gouvernement révolutionnaire", in M. Robespierre, *Œuvres complètes*, 10, *Discours. 5. partie*, Paris: Presses Universitaires de France, 1967, It. tr. "Sui princìpi del governo rivoluzionario" (25 December 1793), in M. Robespierre, *La rivoluzione giacobina*, ed. by U. Cerroni, Pordenone: Studio Tesi, 1992, pp. 145–46.
9. J.A.N. Caritat de Condorcet, "Sur le sens du mot révolutionnaire" [1793], in Condorcet, *Oeuvres*, vol. XII, p. 623.
10. N. MacCormick, "Der Rechtsstaat und die rule of law", p. 66.
11. The American rule of law is examined by B. Casalini's essay, *infra*.
12. G. Stourzh, "The Declarations of Rights, Popular Sovereignty and the Supremacy of the Constitution: Divergences between the American and the French Revolutions", in *La Révolution américaine et l'Europe*, Paris: Editions du Centre National de la Recherche Scientifique, 1979, p. 361.
13. I. Kant, "The metaphysics of morals", in I. Kant, *Political Writings*, ed. by H. Reiss, translated by H.B. Nisbet, Cambridge/New York: Cambridge University Press, 1991, pp. 132–3.
14. Ibid., p. 133.
15. Ibid., p. 132.
16. Ibid., p. 135.
17. I. Kant, "On the common saying: This may be true in theory, but it does not apply in practice", in I. Kant, *Political Writings*, p. 79.
18. Ibid., p. 79.
19. I. Kant, "Idea for a universal history with a cosmopolitan purpose", in I. Kant, *Political Writings*, p. 46.
20. Ibid., p. 46.
21. I. Kant, "On the common saying", p. 74.
22. I. Kant, "The metaphysics of morals", p. 143.
23. I. Kant, "On the common saying", p. 79.
24. M. Stolleis, "Rechtsstaat", p. 368; E.-W. Böckenförde ("Entstehungswandel des Rechtsstaatsbegriffs", pp. 53–4) recalls that Carl Theodor Welcker, in 1813, and Johann Christoph Freiherr von Aretin, in 1824, had already used the expression *Rechtsstaat*.

25. B. Constant, *Principes de politique applicables à tous les gouvernements*, ed. by E. Hofman, Genève: Droz, 1980, vol. 1, pp. 22 ff. See also B. Constant, "Principes de politique" (1815), in B. Constant, *Oeuvres*, ed. by A. Roulin, Paris: Gallimard, 1957.
26. See B. Constant, *Commentaire sur l'ouvrage de Filangieri*, Paris: Belles Lettres, 2004.
27. See B. Constant, *De la force du gouvernement actuel de la France et de la necessité de s'y rallier. Des réactions politiques. Des effets de la Terreur*, ed. by Ph. Raynaud, Paris: Flammarion, 1988, It. tr. *Le reazioni politiche*, in B. Constant, *Le reazioni politiche. Gli effetti del terrore*, ed. by F. Calandra, Napoli: E.S.I., 1950, pp. 91, 97.
28. A. Rosmini, *La costituzione secondo la giustizia sociale*, in A. Rosmini, *Progetti di costituzione. Saggi editi ed inediti sullo Stato*, ed. by C. Gray [Edizione nazionale delle opere edite e inedite di A. Rosmini-Serbati, vol. 24], Milano: Bocca, 1952, p. 231.
29. See J. Luther, *Idee e storie di giustizia costituzionale nell'Ottocento*, Torino: Giappichelli, 1990.
30. See M. Ricciardi, "Linee storiche sul concetto di popolo", *Annali dell'istituto italo-germanico in Trento*, 16 (1990), pp. 303–69.
31. The essay by G. Gozzi examines the rule of law in German culture, *infra*; see also I. Maus, "Entwicklung und Funktionswandel der Theorie des bürgerlichen Rechtsstaats", in M. Tohidipur (ed.), *Der bürgerliche Rechtsstaat*, vol. I, pp. 13–81; G. Gozzi, *Democrazia e diritti. Germania: dallo Stato di diritto alla democrazia costituzionale*, Roma-Bari: Laterza, 1999, pp. 35 ff.
32. See M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, II, *Staatsrechtslehre und Verwaltungswissenschaft 1800–1914*, München: Beck, 1992, pp. 152 ff.
33. F.J. Stahl, *Die Philosophie des Rechts*, II, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, Erste Abteilung, *Die allgemeinen Lehren und das Privatrecht* [Tübingen, 1878[5]], Hildesheim: Olms, 1963, pp. 195–6.
34. Ibid., p. 131.
35. Ibid., pp. 137–8.
36. *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*.
37. See M. Fioravanti, *Giuristi e costituzione politica nell'ottocento tedesco*, Milano: Giuffrè, 1979, pp. 95 ff.; M. Stolleis, *Geschichte des öffentlichen Rechts*, p. 258.
38. R. von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates* [1832], vol. 1, Tübingen: Laupp, 1844[2], p. 10, n. 1.
39. Ibid., pp. 30–2.
40. Ibid., pp. 21–2.
41. M. Stolleis, "Rechtsstaat", p. 372.
42. O. Bähr, *Der Rechtsstaat* [1864], Aalen: Scientia Verlag, 1961, pp. 1–3.
43. Ibid., pp. 32–9.
44. Ibid., pp. 18–21.
45. Ibid., pp. 45–52.
46. Especially by Otto Mayer. On Mayer see M. Fioravanti, "Otto Mayer e la scienza del diritto amministrativo", *Rivista trimestrale di diritto pubblico*, 33 (1983), pp. 600–59.
47. See, for Italy, B. Sordi, *Giustizia e amministrazione nell'Italia liberale. La formazione della nozione di interesse legittimo*, Milano: Giuffrè, 1985; for Germany: W. Rüfner, "Die Entwicklung der Verwaltungsgerichtsbarkeit", in K.G.A. Jeserich, H. Pohl, and G.-C. von Unruh (eds), *Deutsche Verwaltungsgeschichte*, vol. III, *Das deutsche Reich bis zum Ende der Monarchie*, Stuttgart: Deutsche Verlags-Anstalt, 1984, pp. 909 ff.;

for France: F. Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)*, Paris: PUF, 1995.

48. See M. Fioravanti, *Giuristi e costituzione*, pp. 243 ff.
49. C.F. von Gerber, *Grundzüge des deutschen Staatsrechts*, Aalen: Scientia Verlag, 1969, It. tr. *Lineamenti di diritto pubblico tedesco*, in C.F. von Gerber, *Diritto pubblico*, ed. by P.L. Lucchini, Milano: Giuffrè, 1971, p. 95.
50. Ibid., pp. 65–8.
51. Ibid., p. 118, n. 18.
52. Ibid., p. 120.
53. See S. Mezzadra, "Il corpo dello Stato. Aspetti giuspubblicistici della *Genossenschaftslehre* di Otto von Gierke", *Filosofia politica*, 7 (1993), 3, pp. 445–76.
54. O. von Gierke, *Labands Staatsrecht und die deutsche Rechtswissenschaft* [1883], Darmstadt: Wissenschaftliche Buchgesellschaft, 1961.
55. Ibid., pp. 37–8.
56. R. von Jhering, *Der Zweck im Recht*, Goldbach: Keip, 1997, It. tr. *Lo scopo nel diritto*, ed. by M.G. Losano, Torino: Einaudi, 1972, pp. 186–7.
57. Ibid., p. 224.
58. Ibid., pp. 226–7.
59. Ibid., pp. 261–2.
60. Ibid., p. 269.
61. Ibid., pp. 270–1.
62. Ibid., pp. 271–4.
63. Ibid., p. 304.
64. See M. Fioravanti, *Giuristi e costituzione*, pp. 391 ff.; M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, II, pp. 375 ff., 450 ff.; G. Valera, "Coercizione e potere: storia, diritti pubblici soggettivi e poteri dello Stato nel pensiero di G. Jellinek", in G. Gozzi and R. Gherardi (eds), *Saperi della borghesia*, pp. 53–118.
65. See G. Jellinek, *System der subjektiven öffentlichen Rechte*, Aalen: Scientia Verlag, 1979.
66. See M. La Torre, "Dei diritti pubblici soggettivi: il paradosso dei diritti di libertà", *Materiali per una storia della cultura giuridica*, 12 (1982), pp. 79–116.
67. G. Jellinek, *Allgemeine Staatslehre*, Berlin: Springer Verlag, 1919, It. tr. *Dottrina generale dello stato*, ed. by M. Petrozziello, Milano: Società Editrice Libraria, 1921, vol. I, pp. 665–7.
68. S. Romano provides an excellent contribution in this respect: "La teoria dei diritti pubblici subbiettivi", in V.E. Orlando (ed.), *Primo trattato completo di diritto amministrativo*, Milano: Società Editrice Libraria, 1900, pp. 160 ff.
69. See *supra*, § 3.
70. J. Lyons, *Introduction to Theoretical Linguistics*, Cambridge: Cambridge University Press, 1969, p. 457.
71. See R.A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, London: Macmillan, 1980; S. Cassese, "Albert Venn Dicey e il diritto amministrativo", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 19 (1990), pp. 5–82; S. Cassese, "La recezione di Dicey in Italia e in Francia. Contributo allo studio del mito dell'amministrazione senza diritto amministrativo", *Materiali per una storia della cultura giuridica*, 21 (1995), 1, pp. 107–31.
72. The essay by E. Santoro is devoted to Dicey and the rule of law, *infra*.

73. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1959[10], pp. 16 ff.
74. A.V. Dicey, *An Introduction*, pp. 39–43.
75. Ibid., pp. 60–3.
76. Ibid., p. 70.
77. J. Bryce, *Flexible and rigid constitutions* [1901], in J. Bryce, *Constitutions*, New York: Oxford University Press, 1905.
78. A.V. Dicey, *An Introduction*, p. 137.
79. Ibid., p. 407.
80. Ibid., pp. 188 ff.
81. Ibid., pp. 193, 328 ff.
82. P.P. Craig, "Formal and substantive conceptions", p. 40.
83. See in this respect I. Jennings, *The Law and the Constitution*, London: University of London Press, 1959[5], pp. 54 ff.
84. A.V. Dicey, *An Introduction*, pp. 198 ff.
85. Ibid., p. 413.
86. Ibid., p. 202.
87. See *supra*, § 5.
88. The essay by A. Laquièze, *infra*, is devoted to the French model of the rule of law. See also Ph. Raynaud, "Des droits de l'homme a l'état de droit. Les droits de l'homme et leurs garanties chez les théoriciens français classiques du droit public", *Droits. Revue française de théorie juridique*, 2 (1985), *Les droits de l'homme*, pp. 61–73; 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.
89. See M. Galizia, "Il 'Positivisme juridique' di Raymond Carré de Malberg", *Quaderni fiorentini*, 2 (1973), pp. 335–509; G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, Paris: Ed. du CNRS, 1985.
90. R. Carré de Malberg, *Théorie générale de l'État, spécialement d'après les données fournies par le Droit constitutionnel français*, Paris: Sirey, 1920, vol. I, pp. 2–7.
91. Ibid., pp. 48–50.
92. Ibid., p. 194.
93. R. Carré de Malberg, *Théorie générale de l'État*, vol. II, p. 140.
94. Duguit criticizes the self-limitation theory by relying on the primacy of both society and the *règle de droit*; see L. Duguit, *Traité de droit constitutionnel*, I, *La règle de droit - Le problème de l'État*, Paris: Ancienne Librairie Fontemoing, 1927[3], pp. 633 ff., 665 ff. See E. Pisier-Kouchner, *Le service public dans la théorie de l'État de Léon Duguit*, Paris: Pichon et Durand-Auzias, 1972, pp. 62 ff.
95. R. Carré de Malberg, *Théorie générale de l'État*, vol. II, pp. 154 ff.
96. R. Carré de Malberg, *Théorie générale de l'État*, vol. I, pp. 488 ff.
97. Ibid., pp. 492–3.
98. See G. Bacot, *Carré de Malberg*, pp. 10–11.
99. G. Bongiovanni's essay, *The rule of law and constitutional justice in Austria. Hans Kelsen's contribution*, *infra*, is devoted to Kelsen.
100. H. Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssätze*, Aalen: Scientia Verlag, 1984, It. tr. *Problemi fondamentali della dottrina del diritto pubblico*, ed. by A. Carrino, Napoli: E.S.I., 1997, pp. 41 ff. On Kelsen and neo-Kantianism see G. Calabrò, "Kelsen e il neokantismo", in C. Roehrssen (ed.),

Hans Kelsen nella cultura filosofico-giuridica del Novecento, Roma: Istituto dell'Enciclopedia italiana, 1983, pp. 87–92; S.L. Paulson, "Kelsen and the Neo-kantian Problematic", in A. Catania and M. Fimiani (eds), *Neokantismo e sociologia*, Napoli: E.S.I., 1995, pp. 81–98; R. Racinaro, "Cassirer e Kelsen", ibid., pp. 99–110.

101. See M. Fioravanti, "Kelsen, Schmitt e la tradizione giuridica dell'Ottocento", in G. Gozzi and P. Schiera (eds), *Crisi istituzionale e teoria dello Stato in Germania dopo la Prima guerra mondiale*, Bologna: il Mulino, 1987, pp. 51–103; Fioravanti appropriately focuses on the anti-traditional stance of Kelsen's legal theory.
102. H. Kelsen, *Das Problem der Souveränität und die Theorie des Volkerrechts. Beitrag zu einer reinen Rechtslehre*, Tübingen: Mohr, 1920, It. tr. *Il problema della sovranità e la teoria del diritto internazionale. Contributo per una dottrina pura del diritto*, ed. by A. Carrino, Milano: Giuffrè, 1989, p. 20.
103. H. Kelsen, "Staat und Recht. Zum Problem der soziologischen oder juristischen Erkenntnis des Staates", *Soziologische Hefte*, 2 (1922), pp. 18–37, It. tr. "Stato e diritto. Il problema della conoscenza sociologica o giuridica dello Stato", in H. Kelsen, *Sociologia della democrazia*, ed. by A. Carrino, Napoli: E.S.I., 1991, p. 69.
104. See in particular E. Cassirer, *Substanzbegriff und Funktionsbegriff. Untersuchungen über die Grundfragen der Erkenntniskritik* [1910], Hamburg: Meiner, 2000.
105. H. Kelsen, "Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik", *Zeitschrift für öffentliches Recht*, 2 (1921), pp. 453–510, It. tr. "Il rapporto tra Stato e diritto dal punto di vista epistemologico", in H. Kelsen, *L'anima e il diritto. Figure arcaiche della giustizia e concezione scientifica del mondo*, Roma: Edizioni Lavoro, 1989, pp. 5 ff.
106. H. Kelsen, *Problemi fondamentali*, p. 484.
107. H. Kelsen, *Il problema della sovranità*, pp. 31–2.
108. H. Kelsen, *Problemi fondamentali*, p. 395.
109. H. Kelsen, *Il problema della sovranità*, pp. 67–8.
110. H. Kelsen, "Rechtsstaat und Staatsrecht", *Österreichische Rundschau*, 36 (1913), pp. 88–94, It. tr. "Stato di diritto e diritto pubblico", in A. Kelsen, *Dio e Stato. La giurisprudenza come scienza dello spirito*, ed. by A. Carrino, Napoli: E.S.I., 1988, pp. 214–15.
111. See B. Sordi, *Tra Weimar e Vienna. Amministrazione pubblica e teoria giuridica nel primo dopoguerra*, Milano: Giuffrè, 1987, pp. 88 ff.; B. Sordi, "Un diritto amministrativo per le democrazie degli anni Venti. La 'Verwaltung' nella riflessione della Wiener Rechtstheoretische Schule", in G. Gozzi and P. Schiera (eds), *Crisi istituzionale e teoria dello Stato in Germania dopo la Prima guerra mondiale*, pp. 105–30.
112. H. Kelsen, *Problemi fondamentali*, pp. 560–1. See also H. Kelsen, "Zur Lehre vom Gesetz im formellen und materiellen Sinn, mit besonderer Berücksichtigung der österreichischen Verfassung", *Juristische Blätter*, 42 (1913), pp. 229–32, It. tr. "Sulla dottrina della legge in senso formale e materiale", in H. Kelsen, *Dio e Stato*, p. 233.
113. H. Kelsen, *Problemi fondamentali*, pp. 612–13.
114. See B. Sordi, *Tra Weimar e Vienna*, pp. 157 ff.
115. S.M. Barberis, "Kelsen, Paulson and the Dynamic Legal Order", in L. Gianformaggio (ed.), *Hans Kelsen's Legal Theory. A Diachronic Point of View*, Torino: Giappichelli, 1990, pp. 49–61 and the essays collected in L. Gianformaggio

(ed.), *Sistemi normativi statici e dinamici: analisi di una tipologia kelseniana*, Torino: Giappichelli, 1991.

116. H. Kelsen, *Problemi fondamentali*, foreword to the second edition (1923), pp. 27–8. See A. Abignente, *La dottrina del diritto tra dinamicità e purezza: studio su Adolf Julius Merkl*, Napoli: E.S.I., 1990.
117. H. Kelsen, *Problemi fondamentali*, pp. 25–7.
118. H. Kelsen, "Die Lehre von den drei Gewalten oder Funktionen des Staates", *Archiv für Rechts- und Wirtschaftsphilosophie*, 17 (1924), pp. 374–408, It. tr. "La dottrina dei tre poteri o funzioni dello stato", in H. Kelsen, *Il primato del parlamento*, Milano: Giuffrè, 1982, pp. 88–9.
119. See G. Bongiovanni, *Reine Rechtslehre e dottrina giuridica dello Stato. H. Kelsen e la costituzione austriaca del 1920*, Milano: Giuffrè, 1998, pp. 64 ff.
120. See A. Giovannelli, *Dottrina pura e teoria della Costituzione in Kelsen*, Milano: Giuffrè, 1979; M. Barberis, "Kelsen e la giustizia costituzionale", *Materiali per una storia della cultura giuridica*, 12 (1982), pp. 225–42, M. Troper, "Kelsen e il controllo di costituzionalità", *Diritto e cultura*, 4 (1994), pp. 219–41.
121. Kelsen plays a significant role in the process leading to the 1920 Austrian constitution. See G. Bongiovanni, *Reine Rechtslehre*, pp. 143 ff.
122. H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionelle)", Paris: Les Presses Universitaires de France, 1929, pp. 52–143, It. tr. "La garanzia giurisdizionale della costituzione (la giustizia costituzionale)", in H. Kelsen, *La giustizia costituzionale*, ed. by G. Geraci, Milano: Giuffrè, 1981, p. 148.
123. Ibid., pp. 171–2.
124. Ibid., p. 199.
125. Ibid., p. 202.
126. See E. Castrucci, *Tra organicismo e Rechtsidee. Il pensiero giuridico di Erich Kaufmann*, Milano: Giuffrè, 1984.
127. E. Kaufmann, *Critica della filosofia neokantiana del diritto*, ed. by A. Carrino, Napoli: E.S.I., 1992.
128. Ibid., pp. 12–13.
129. E. Kaufmann, "Juristische Relationsbegriffe und Dingbegriffe", in E. Kaufmann, *Gesammelte Schriften*, III, *Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahnrhunderten*, Göttingen: Schwartz, 1960, p. 267.
130. E. Kaufmann, "Die Gleichheit vor dem Gesetz im Sinne des art. 109 der Reichsverfassung" [1927], in E. Kaufmann, *Gesammelte Schriften*, III, pp. 246–65, It. tr. *L'uguaglianza dinanzi alla legge ai sensi dell'art. 109 della Costituzione del Reich*, in E. Kaufmann, *Critica*, p. 85. See R. Miccù, "La controversia metodologica nella dottrina weimariana dello Stato", in R. Miccù (ed.), *Neokantismo e diritto nella lotta per Weimar*, Napoli: E.S.I., 1992, pp. 155 ff.
131. E. Kaufmann, *L'uguaglianza*, pp. 88–9. See E. Castrucci, *Tra organicismo e Rechtsidee*, pp. 128–9.
132. M. Hauriou, *Principes de droit public*, Paris: Sirey, 1910, pp. 128 ff.
133. Ibid., pp. 228 ff.
134. Ibid., p. 254.
135. Ibid., p. 461.
136. Ibid., pp. 72–3.
137. Ibid., pp. 75–7.

138. Ibid., pp. 78–80.
139. M. Hauriou, *Précis de droit constitutionnel* [1923], Paris: Sirey, 1929[2], pp. 101–3.
140. Ibid., p. 613.
141. M. Hauriou, *Principes de droit public*, p. 558.
142. M. Hauriou, *Précis de droit constitutionnel*, pp. 611 ff.
143. H. Heller, "Die Krisis der Staatslehre" [1926], *Gesammelte Schriften*, II, *Recht, Staat, Macht*, Leiden: Sijthoff, 1971, pp. 3–30, It. tr. "La crisi della dottrina dello Stato", in H. Heller, *La sovranità ed altri scritti sulla dottrina del diritto e dello Stato*, ed. by P. Pasquino, Milano: Giuffrè, 1987, pp. 31 ff. See also H. Heller, *Dottrina dello Stato*, ed. by U. Pomarici, Napoli: E.S.I., 1988, pp. 97 ff.
144. Ibid., pp. 95 ff. See the remarks by P.P. Portinaro, "Staatslehre und sozialistischer Dezisionismus. Randbemerkungen zu Hellers Rechts- und Staatstheorie", in Ch. Müller and I. Staff (eds), *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller 1891–1933*, Baden-Baden: Nomos, 1984, pp. 573–84.
145. H. Heller, *La sovranità*, p. 174.
146. Ibid., pp. 165–7.
147. H. Heller, "Politische Demokratie und soziale Homogenität" [1928], *Gesammelte Schriften*, II, pp. 421–33, It. tr. "Democrazia politica e omogeneità sociale", in H. Heller, *Stato di diritto o dittatura? e altri scritti*, Napoli: Editoriale Scientifica, 1998, pp. 17–18.
148. H. Heller, "Rechtsstaat oder Diktatur?" [1929], in H. Heller, *Gesammelte Schriften*, II, pp. 443–62, It. tr. *Stato di diritto o dittatura?*, in H. Heller, *Stato di diritto*, p. 51.
149. H. Heller, "Grundrechte und Grundpflichten" [1924], in H. Heller, *Gesammelte Schriften*, II, pp. 284 ff.
150. Ibid., p. 291. See W. Schluchter, *Entscheidung für den sozialen Rechtsstaat. Hermann Heller und die staatstheoretische Diskussion in der weimarer Republik*, Baden-Baden: Nomos, 1983[2]; I. Staff, "Forme di integrazione sociale nella Costituzione di Weimar", in G. Gozzi and P. Schiera (eds), *Crisi istituzionale e teoria dello Stato*, pp. 11–50. Neumann, too, deals with the "creation of the social rule of law" (F.L. Neumann, "Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung" [1930], in F.L. Neumann, *Wirtschaft, Staat, Demokratie. Gesammelte Aufsätze 1930–1954*, Frankfurt a. M: Suhrkamp, 1978, It. tr. "Il significato sociale dei diritti fondamentali nella costituzione di Weimar", in F.L. Neumann, *Il diritto del lavoro fra democrazia e dittatura*, Bologna: il Mulino, 1983, p. 134).
151. See P. Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter and the Debate over the Nature of the Nazi state 1933–1937", *Cardozo Law Review*, 16 (1994), pp. 399–427; M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, III, *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945*, München: Beck, 1999, pp. 316 ff.
152. See C. Schmitt, "Das Gesetz zur Behebung der Not von Volk und Reich", *Deutsche Juristen-Zeitung*, 38 (1933), pp. 455–8.
153. O. Koellreutter, *Grundriss der allgemeinen Staatslehre*, Tübingen: Mohr (Paul Siebeck), 1933, pp. 163–4.
154. See C. Galli, *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*, Bologna: il Mulino, 1996, pp. 840 ff.
155. C. Schmitt, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Anseatische Verlagsanstalt, 1933.

156. See C. Schmitt, “Weiterentwicklung des totalen Staats in Deutschland” [1931], in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot, 1985, p. 360; see also G. Preterossi, *Carl Schmitt e la tradizione moderna*, Roma-Bari: Laterza, 1996, pp. 107 ff.
157. C. Schmitt, *Staat, Bewegung, Volk*, p. 42; O. Koellreutter, *Grundriss*, p. 54.
158. G.A. Walz, *Das Ende der Zwischenverfassung*, Stuttgart: Kohlhammer, 1933.
159. O. Koellreutter, *Grundriss*, pp. 108–9, 255–6.
160. See O. Koellreutter, “Der nationale Rechtsstaat”, *Deutsche Juristen-Zeitung*, 38 (1933), pp. 517–24.
161. C. Schmitt, “Nationalsozialismus und Rechtsstaat”, *Juristische Wochenschrift*, 63 (1934), pp. 716–18.
162. C. Schmitt, “Was bedeutet der Streit um den ‘Rechtsstaat’?”, in C. Schmitt, *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916–1969*, ed. by G. Maschke, Berlin: Duncker & Humblot, 1995, pp. 123–5.
163. Ibid., p. 126.
164. Also Schmitt’s disciple, Forsthoff, claims the impossibility of separating the rule of law from its liberal grounding, thus criticizing Koellreutter, “Der deutsche Führerstaat”, *Juristische Wochenschrift*, 62 (1934), p. 538. Koellreutter’s answer is contained in his “Das Verwaltungsrecht im nationalsozialistischen Staat”, *Deutsche Juristen-Zeitung*, 39 (1934), pp. 626–8; see also the remarks by H. Helfritz, “Rechtsstaat und nationalsozialistischer Staat”, *Deutsche Juristen-Zeitung*, 39 (1934), pp. 425–33.
165. C. Schmitt, “Nationalsozialismus und Rechtsstaat”, pp. 714–15; C. Schmitt, “Der Rechtsstaat”, in H. Frank (ed.), *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, München: NSDAP, 1935, pp. 5–6.
166. G.A. Walz, “Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?”, *Deutsche Juristen-Zeitung*, 38 (1933), pp. 1338–40.
167. C. Schmitt, “Nationalsozialismus und Rechtsstaat”, pp. 713–14.
168. C. Schmitt, “Der Führer schützt das Recht” [1934], in C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar, Genf, Versailles 1923–1939*, Berlin: Duncker & Humblot, 1988, pp. 200–1.
169. See *supra*, § 3.
170. See *supra*, § 5, Jhering’s example.
171. See E. Fraenkel, *Der Doppelstaat*, Frankfurt a. M.: Europäische Verlagsanstalt, 1974, It. tr. *Il doppio Stato. Contributo alla teoria della dittatura*, Torino: Einaudi, 1983. Bobbio’s observations are to be found in *Introduzione* to the Italian edition, pp. ix–xxix.
172. For greater documentation in this respect, see P. Costa, “Lo ‘Stato totalitario’: un campo semantico nella giuspubblicistica del fascismo”, *Quaderni fiorentini*, (28) 1999, pp. 61–174.
173. C. Schmitt, “Was bedeutet der Streit”, p. 121.
174. S. Panunzio, *Lo Stato di diritto*, Città di Castello: Il Solco, 1921, pp. 156–9.
175. See U. Redanò, *Lo Stato etico*, Firenze: Vallecchi, 1927. See also the critique by C. Curcio, *Rivista internazionale di filosofia del diritto*, 7 (1928), pp. 102–4.
176. F. Battaglia, “Dall’individuo allo Stato” [1932], in F. Battaglia, *Scritti di teoria dello Stato*, Milano: Giuffrè, 1939, pp. 48–51.

177. F. Battaglia, "La concezione speculativa dello Stato" [1935], in F. Battaglia, *Scritti*, pp. 164–5. See for similar considerations A. Volpicelli, "Lo Stato e l'etica. Nuove osservazioni polemiche", *Nuovi studi di diritto, economia e politica*, 4 (1931), pp. 163–75; G. Gentile, "Il concetto dello Stato in Hegel", *Nuovi studi di diritto, economia e politica*, 4 (1931), pp. 321–32.
178. G. Maggiore, *Diritto penale totalitario nello Stato totalitario*, Padova: Cedam, 1939, pp. 20 ff.
179. G. Maggiore, *Il diritto e il suo processo ideale*, Palermo: Fiorenza, 1916, pp. 107–10.
180. Ibid., pp. 101–2.
181. Ibid., p. 113.
182. A. Volpicelli, "Vittorio Emanuele Orlando", *Nuovi studi di diritto, economia e politica*, 1 (1927–1928), p. 194.
183. Ibid., p. 202.
184. See e.g. A. Falchi, "I fini dello Stato e la funzione del potere" (1914), in A. Falchi, *Lo Stato collettività. Saggi*, Milano: Giuffrè, 1963, p. 97.
185. C.A. Biggini, *La legislazione costituzionale nel nuovo diritto pubblico italiano*, Ravenna: Arti Grafiche, 1931, pp. 156–7.
186. O. Ranelletti, *Istituzioni di diritto pubblico. Il nuovo diritto pubblico italiano*, Padova: Cedam, 1929, p. 30. See also B. Brugi, "I così detti limiti dei diritti subiettivi e lo Stato", *Lo Stato*, 2 (1931), pp. 699–707.
187. F. Ercole, *Lo Stato fascista corporativo*, Palermo: Ed. del G.U.F., 1930, p. 17. Under such a perspective, the Fascist state may be seen as the highest and most exclusive stage of the parable of the rule of law since Fascism has extended the scope of law to fields, such as labour relationships, which had been left legally "undefended" by liberalism. See F. Battaglia, "Le carte dei diritti", *Archivio di studi corporativi*, 5 (1934), pp. 154 ff. Renato Treves (in an essay published during his exile in Argentina) denounces the verbalistic nature of the Fascist understanding of the rule of law. A response can be found in F. Battaglia, "Ancora sullo Stato di diritto", *Rivista internazionale di filosofia del diritto*, 25 (1948), pp. 164–71. See also R. Treves, "Stato di diritto e Stato totalitario", in *Studi in onore di G.M. De Francesco*, Milano: Giuffrè, 1957, vol. 2, pp. 51–69; C. Treves, "Considerazioni sullo Stato di diritto", in *Studi in onore di E. Crosa*, Milano: Giuffrè, 1960, vol. 1, pp. 1594–5.
188. F. Lopez de Oñate, *La certezza del diritto* [1942], Milano: Giuffrè, 1968, pp. 25 ff. On the "crisis" of intellectuals between Fascism and post-Fascism, see L. Mangoni, "Civiltà della crisi. Gli intellettuali tra fascismo e antifascismo", in *Storia dell'Italia repubblicana*, I, *La costruzione della democrazia: dalla caduta del fascismo agli anni Cinquanta*, Torino: Einaudi, 1994, pp. 615–718.
189. F. Lopez de Oñate, *La certezza del diritto*, p. 48.
190. P. Calamandrei, "La certezza del diritto e le responsabilità della dottrina" [1942], in F. Lopez de Oñate, *La certezza del diritto*, pp. 167–90. See P. Grossi, *Stile fiorentino*, Milano: Giuffrè, 1986, pp. 142 ff.; F. Sbarberi, *L'utopia della libertà eguale. Il liberalismo sociale da Rosselli a Bobbio*, Torino: Bollati Boringhieri, 1999, pp. 115 ff.
191. P. Calamandrei, "Costruire la democrazia (Premesse alla Costituente)" [1945], in P. Calamandrei, *Opere giuridiche*, ed. by M. Cappelletti, Napoli: Morano, 1968, vol. III, pp. 132–3.
192. See U. De Siervo (ed.), *Scelte della costituente e cultura giuridica*, I, *Costituzione italiana e modelli stranieri*, Bologna: il Mulino, 1980; U. De Siervo (ed.), *Scelte della*

costituente e cultura giuridica, II, *Protagonisti e momenti del dibattito costituzionale*, Bologna: il Mulino, 1980; P. Pombeni, *La Costituente. Un problema storico-politico*, Bologna: il Mulino, 1995; M. Fioravanti and S. Guerrieri (eds), *La costituzione italiana*, Roma: Carocci, 1998.

193. S. Guerrieri, *Due costituenti e tre referendum. La nascita della Quarta Repubblica francese*, Milano: Angeli, 1998 (esp. pp. 101 ff.).
194. G. Gozzi, *Democrazia e diritti*, pp. 117 ff. See also F. Lanchester and I. Staff (eds), *Lo Stato di diritto democratico dopo il fascismo ed il nazionalsocialismo (Demokratische Rechtsstaatlichkeit nach Ende von Faschismus und Nationalsozialismus)*, Milano/Baden-Baden: Giuffrè/Nomos Verlag, 1999.
195. See P. Pombeni, "Individuo/persona nella Costituzione italiana. Il contributo del dossettismo", *Parolechiave*, 10–11 (1996), pp. 197–218; F. Pizzolato, *Finalismo dello Stato e sistema dei diritti nella Costituzione italiana*, Milano: Vita e Pensiero, 1999.
196. See W. Abendroth, "Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland" [1954], in E. Forsthoff (ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit. Aufsätze und Essays*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968, pp. 114–44; W. Abendroth, "Der demokratische und soziale Rechtsstaat als politischer Auftrag" [1975], in M. Tohidipur (ed.), *Der bürgerliche Rechtsstaat*, vol. I, pp. 265–89. On the continuity between Heller and Abendroth, see G. Gozzi, *Democrazia e diritti*, p. 169.
197. E. Forsthoff, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1950–1964*, Stuttgart: W. Kohlhammer, 1964, It. tr. *Stato di diritto in trasformazione*, ed. by C. Amirante, Milano: Giuffrè, 1973, p. 60. See C. Amirante, *Presentazione*, ibid., pp. v–xxxiv. On the complexity of Forsthoff's work, see B. Sordi, "Il primo e l'ultimo Forsthoff", *Quaderni fiorentini*, 25 (1996), pp. 667–82.
198. E. Forsthoff, *Stato di diritto*, pp. 151–2.
199. C. Schmitt, *Verfassungslehre* [1928], Berlin: Duncker & Humblot, 1970, It. tr. *Dottrina della costituzione*, ed. by A. Caracciolo, Milano: Giuffrè, 1984, p. 227.
200. See B. Leoni, *La libertà e la legge* [1961], Macerata: Liberilibri, 1994 (esp. pp. 67 ff.). See R. Cubeddu, *Introduzione*, ibid., pp. ix–xxxv. See also the review by D. Zolo, *Quaderni fiorentini*, 24 (1995), pp. 394–6. The essay by M.C. Pievatolo, "Leoni's and Hayek's Critique of the Rule of Law in Continental Europe", *infra*, is devoted to Leoni (and to Hayek).
201. Giovanni Sartori (in an illustratively entitled paragraph "From Rule of Law to Rule of Legislators") argues that *ius* ought not to be mistaken with *iussum* and claims the insufficiency of a merely formalistic construction of the rule of law; he also ascribes "legislative inflation" to (what we today would call) a "legislation-centred" conception, deeming this to represent a threat to the rule of law (G. Sartori, *Democratic Theory*, Detroit: Wayne State University Press, 1962, pp. 306–14).
202. G. Fassò, "Stato di diritto e Stato di giustizia", in R. Orecchia (ed.), *Atti del VI Congresso nazionale di filosofia del diritto*, I, *Relazioni generali*, Milano: Giuffrè, 1963, pp. 83–119.
203. Ibid., pp. 115 ff. A separate examination would be needed for Gustav Radbruch's thinking: it is nonetheless worth recalling that he also believes the "secret" of the English rule of law to lie in a class of jurists and judges used to interpreting positive laws in the light of the system's historically rooted values. See G. Radbruch, *Der Geist des englischen Rechts*, Heidelberg: Rausch, 1947, It. tr. *Lo spirito del diritto inglese*, Milano: Giuffrè, 1962, pp. 39 ff.; see also A. Baratta, *Introduzione*, pp. xi ff.; G. Alpa, *L'arte di giudicare*, Roma-Bari: Laterza, 1996, pp. 32–3.

204. See P.P. Portinaro, "Il grande legislatore e il futuro della costituzione", in G. Zagrebelsky, P.P. Portinaro, and J. Luther (eds), *Il futuro della costituzione*, Torino: Einaudi, 1991, pp. 5–6.
205. See M. Fioravanti, "Lo Stato di diritto come forma di Stato", in G. Gozzi and R. Gherardi (eds), *Saperi della borghesia*, pp. 173–4.
206. See in this respect R.M. Dworkin, *A Matter of Principle*, Cambridge (MA): Harvard University Press, 1985, pp. 9 ff.; P.P. Craig, "Formal and substantive conceptions", pp. 54–5. See also G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia*, Torino: Einaudi, 1992, pp. 147 ff.; G. Alpa, *L'arte di giudicare*, passim; E. Scoditti, *Il contropotere giudiziario. Saggio di riforma costituzionale*, Napoli: E.S.I., 1999. An excellent critique of the recurrent aporias of the rule of law is to be found in M. Troper, "Le concept d'État de droit", pp. 51 ff.
207. Voltaire, *A Philosophical Dictionary*, in *The Works of Voltaire*, ed. by John Morley, notes by Tobias Smollett, tr. by W.F. Fleming, New York: E.R. Du Mont, 1901, p. 332.