CHAPTER 8

THE PAST AND THE FUTURE OF THE RULE OF LAW

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1 RULE OF LAW, LEGAL STATE, AND CONSTITUTIONAL STATE

The phrase "rule of law" is commonly given two different meanings that should be kept rigorously distinct. In the broadest, or weak or formal sense, it means any legal system in which public powers are conferred by law and wielded in the forms and by means of the procedures the law prescribes. In this sense, which corresponds to the German *Rechtsstaat*, all modern legal systems in which public powers have a legal source and form are "legal states" in a merely formal meaning of the "rule of law".[1] In the second, strong and substantive sense, "rule of law", instead, stands only for those systems in which public powers are also subject to (and hence limited or constrained by) law not only in their form, but also in the content of their decisions. In this meaning, prevalent in continental Europe, the phrase "rule of law" denotes legal and political systems in which all powers, including legislative power, are constrained by substantive principles normally provided for by the constitution, such as the separation of powers and fundamental rights.

I shall argue that these two distinct meanings correspond to two distinct normative models relating to two different histories. Both of them developed in Europe and each was the outcome of a paradigm shift in the conditions of existence and validity of legal norms. These two models are: (1) the ancient positivist model of the legal state that emerged together with the modern state and the principle of legality as a criterion for recognizing the existence of law; and (2) the new positivist model of the constitutional state which resulted, in the wake of the Second World War, from the spread throughout Europe of constitutional charters stating criteria for the recognition of the validity of law, and of the review of ordinary legislation by a Constitutional Court.

The significance of the former shift is obvious. It was generated by the state monopoly over legal production and hence by the purely positivist justification of law. No less radical was, however, the latter shift which,

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 323–352.

as we shall see, affected the same structural aspects as the former. I shall illustrate three modifications produced by each of the two paradigm shifts from which the two different models derive: (a) in the nature of the law (b) in the nature of legal science, and (c) in the nature of judicial decision. Consequently, I shall identify three paradigms – pre-modern law, the legal state, and the constitutional state – and analyse the changes that took place in these three aspects of each of them during the shift from one paradigm to the other. By contrast, I shall not go into the specific tradition of English rule of law; although the rule of law in the strong, substantive meaning was first exhibited in England, the English tradition has always been linked to the tradition of common law and thus cannot be identified either with the legal state or the constitutional one.[2] In conclusion, I shall deal with the present crisis of these two models of the rule of law, a crisis now faced with a new paradigm shift of still uncertain form and outline.

2 LEGAL STATE AND LEGAL POSITIVISM

The distinctive feature of pre-modern law was its form, not so much legislative as judge-made and doctrinal, being the product of judicial tradition and knowledge that had accumulated through the centuries. In the Middle Ages common law had no unitary and formalized system of positive legal sources. There were certainly statutory sources: acts, ordinances, decrees, statutes, and the like, but these derived from diverse, concurrent institutions – Empire, Church, princes, free cities, or corporations – none of which had the monopoly of legal production. The conflicts among them – the struggles between Church and Empire or between Empire and free cities – were conflicts for sovereignty, namely the monopoly or at least supremacy in legal production. But, they were never resolved univocally until the birth of the modern state and the supremacy of this institution and its legal system over all the others. In the absence of unitary sources and in the presence of a plurality of concurrent legal systems, the unity of law was assured by doctrine and judicial decisions, by way of an evolution and updating of the old Roman law tradition within which the various statutory sources were arranged and coordinated as materials of the same kind as legal precedents and the opinions of learned doctors. Clearly, such a paradigm – inherited from Roman law but in this way similar to extra-European consuetudinary law – had enormous institutional and epistemological implications.

The first of these implications concerned the theory of validity, namely the identification of what we can call the norm of recognition of

existing law. Within a doctrinal and judge-made legal system a norm exists and is valid not because of its formal source, but for its intrinsic rationality or substantive justice. *Veritas, non auctoritas facit legem* is the formula that can express the validity of pre-modern law and is opposite to that championed by Hobbes in his renowned polemic *A Dialogue between a Philosopher and a Student of the Common Law of England*.[3] By then the student of law was right. Whenever an exhaustive and exclusive legal system is bereft of positive sources, a legal norm is not valid by the authority but the authoritativeness of who establishes it; hence, its value is identified with its "truth", in the broad sense, obviously, of rationality or conformity with precedent and tradition, in other words, with the common sense of justice.

The second implication regards the nature of legal science and its relationship with law. Within a system of doctrinal and judge-made law, legal science becomes immediately normative and identifies with the law itself. There is no "positive" law which is the "object" of legal science and of which legal science is the interpretation or descriptive and explicative analysis. There is only law handed down by tradition and constantly reworked by scholars. From this there follows a third implication that judicial decision does not consist in the application of a body of law "given" or presupposed as something that exists on its own, in harmony with the modern principle of the judge's subjection to the law, but in the doctrinal and judicial production of that body of law. This brings with it all the consequences of a flawed legality, especially in criminal matters: the lack of certainty, the enormous discretion of judges, inequality, and the lack of guarantees against arbitrariness.

This shows how extraordinary was the revolution which took place with the establishment of the principle of legality through state monopoly of legal production. It was a paradigm shift involving the form much more than the content of legal experience. If the Napoleonic Code or the Italian Civil Code is compared with Gaio's *Institutiones*, the substantive differences would seem relatively few. What changes is the kind of legitimization: no longer the authoritativeness of the scholars but the authority of the source of production; no longer truth but legality; not the substance (or intrinsic justice) but the form of the normative acts. *Auctoritas, non veritas facit legem*: this is the conventionalist principle of legal positivism as expressed by Hobbes in the *Dialogue* mentioned earlier; the opposite of the ethical-cognitivist principle of natural law.

Legal naturalism and legal positivism, natural law and positive law can well be seen as the two cultures and legal expressions underlying these two opposing paradigms. The millenarian predominance of natural

law as a "strand of thought according to which for a law to be a law it must conform to justice"[4] cannot be understood without taking the outlines illustrated here of pre-modern legal experience into account. In the latter, when there were no positive sources, natural law was resorted to as a system of norms that were intrinsically "true" or "just" as "common law"; in other words, as the legitimating ground of legal doctrine and judicial practice.[5] This is why the pre-modern theory of law could be but natural law; whereas the legal positivism of Hobbes's formula corresponded then, in a seeming paradox, to an axiological or philosophical-political claim of thought, i.e. of rationality and justice – the demand for re-establishing law upon the principle of legality as both a meta-norm for recognizing existing law and a first and irreplaceable boundary to arbitrariness, legitimizing power through its subordination to law and protecting equality, liberty, and certainty.

The modern rule of law was established in the form of the legal state when this claim was realized historically with the establishment of the principle of legality as the sole source of valid, and indeed existing, law. By virtue of this principle and the codifications implementing it all legal norms exist and are valid, in that they are "posited" by authorities invested with normative competence. Their language is no longer spontaneous and, so to speak, itself "natural", as in pre-modern law shaped by natural law, but an artificial language whose rules of use are themselves established by the laws, both regarding the forms of the normative linguistic acts – statutes, judicial decisions, administrative provisions, and contracts – and the meanings they express and produce. This turned the paradigm of law, legal science, and judicial decision upside down.

In the first place, with the principle of legality the very notion of "validity" of the norms changes and is dissociated from those of "justice" and "truth". Therefore, the criterion for identifying existing law changes, too: a norm exists and is valid not because it is intrinsically just, let alone "true", but because it has been enacted by a body authorized by law. This shift, expressed in what we usually call the "separation of law and morals", came about through a long process of secularization of law promoted in the early modern era by the doctrines of Hobbes, Pufendorf, and Thomasius, and reached maturity with the French and Italian legal Enlightenment and the openly legal positivist doctrines of Jeremy Bentham and John Austin. This separation is the ground of the formal conception of validity as logically independent from justice – the distinctive feature of legal positivism. It also grounds the unity of the legal system. From whatever starting point, even the most marginal, whether it be a legal deed (e.g. the purchase of a newspaper) or a legal

situation (e.g. a parking prohibition), there is a law behind it, either because it immediately regulates the former and constitutes the latter or because it regulates the normative acts which in turn regulate or constitute that deed or situation.

In the second place, the nature of legal science changes: it ceases to be an immediately normative discipline and tends to become cognitive, i.e. explicative of an object – positive law – separate and autonomous from it. Over and above the similarities of content, our manuals of private law are as different from the civil treatises of the pre-modern era as they are from the works of Roman jurists because they are no longer immediately normative systems of theses and concepts but interpretations, comments, or explications of the civil code, and only on this basis can they be argued and upheld.

Finally, the nature of judicial decision changes – it becomes subjected to the law and is legitimized exclusively by such subjection and thus by the principle of legality. This confers a somewhat cognitive characteristic to judgment, too, which is called upon to ascertain, on the basis of the rules of use that the law itself lays down, the facts foreseen and stated by the law, e.g. offences. It is precisely the conventional character of law expressed by the Hobbesian formula which transforms judgment into cognition or ascertainment of what the law prescribes in accordance with the symmetrical and opposing principle of *veritas non auctoritas facit iudicium*. It also grounds the whole combination of guarantees – from legal certainty to equality before the law and freedom against arbitrariness, from the independence and impartiality of judges to the burden of proof being on the prosecutor, and to the rights of the defendant.

3 CONSTITUTIONAL STATE AND RIGID CONSTITUTIONALISM

While this first shift of legal paradigm was expressed in the establishment of the principle of legality, because of the legislator's omnipotence, the second shift occurred over the last half century with the subordination, guaranteed by a specific judicial check of legitimacy, of legislation itself to a superior law, namely the constitution, which is of a higher order than ordinary legislation.

There follow three changes in the model of the legal state, parallel to the latter's changing of pre-modern case law: (a) in the nature of law, whose positive character extends from legislation to the norms regulating its content and thus causes a dissociation between validity and being in force, as well as a new relationship between the form and substance of

decisions; (b) in the interpretation and application of the law, where this dissociation involves a change in the judge's role as well as in the forms and conditions of his subjection to the law; and (c) in a legal science that is no longer simply descriptive, but plays a critical and propositional role regarding its very subject matter.

The first change concerns the theory of validity. In the constitutional state, statutes are not only subject to formal norms about their production, but also to substantive ones about their meaning. Thus, statutes whose meaning clashes with constitutional norms are inadmissible. The existence or being in force of norms that in the older legal positivist paradigm had been dissociated from justice now is dissociated from validity too, for a norm may well be formally valid and thus in force but substantively invalid because its meaning clashes with substantive constitutional norms, such as the principle of equality or fundamental rights. More precisely, while the rule for recognizing a norm as in force remains the old principle of legality concerning the form of law-making exclusively, which we can thus call the principle of formal legality or mere legality, the rule for recognizing validity is much more complex for it contains what we can call the principle of substantive legality or strict legality. This principle also compels the substance that is the contents or meaning of the norms produced, to be coherent with the principles and rights laid down in the constitution.

The second alteration, consequent to the first, concerns the role of case law. The incorporation of principles and fundamental rights into the constitution and thus the possibility of norms becoming invalid by being in contrast with them, changes the relationship between judge and statute law. No longer is it an a-critical unconditional subjection to whatever it is the content or substance of statute law but a subjection, first and foremost, to the constitution and thus to the law only insofar as its is constitutionally valid. Therefore, interpretation and application of the law is also and always a ruling on the law itself that the judge, whenever he is unable to implement it constitutionally, has the obligation to censure as invalid by denouncing its unconstitutionality.

The third alteration, regards the epistemological paradigm of legal science. As much as it changes the conditions of validity, this alteration requires that legal science be no longer merely explicative and value-free but also critical and project-oriented. Under the old paradigm of the legal state, the critique and design of the law was only possible from the outside – at the level of ethics or politics, or simply opportunity or rationality – there being no room for substantive internal flaws in positive law: neither inconsistencies among norms (for it was the later law

that remained in force), nor incompleteness (for the lack of constitutional constraints made legislative non-compliance impossible), were possible. On the other hand, within a complex normative system such as that of the constitutional state, which not only regulates the forms of production, but also the meaning of norms, incoherence and incompleteness, antinomies, and lacunae are flaws that stem from the different normative levels of its formal structure. It is obvious that these flaws, which are not only possible, but also to a certain extent inevitable, act retrospectively on legal science, giving it the political and scientific role of ascertaining what the flaws are from the inside and suggesting the necessary corrections. More precisely: legal science has to ascertain the antinomies caused by norms that violate the rights of liberty as well as the lacunae caused by the lack of norms supporting social rights, and call for the annulment of the former because they are invalid and the enactment of the latter because they are due.

Constitutionalism taken seriously, as the drafting of law using law itself, confers to legal science and case law a pragmatic function and dimension unknown to the legal reasoning of the old dogmatic and formalistic legal positivism: ascertaining antinomies and lacunae, promoting their overcoming by means of existing guarantees, and drafting the guarantees that are needed but absent. This confers legal culture a civil and political responsibility to its object, giving it the task of pursuing the overall coherence and completeness – i.e. the effectiveness of constitutional principles – by judicial or legislative means, though without any prospect of this being wholly achieved.

It is clear that the subjection of legislation to the constitution introduces an element of permanent uncertainty concerning the validity of the former, depending on the judicial assessment of its coherence with the latter. At the same time, however, and contrarily to popular belief, this restricts the uncertainty of its meaning by reducing the power of interpretative discretion of both courts and legal science. Indeed, under the same conditions, and depending on whether or not there are principles laid down by a rigid constitution, the same legal text involves a narrower (in the former) and wider (in the latter) range of legitimate interpretations. Take, for example, a norm like the one in the Italian criminal code which punishes the imprecisely defined offence of *vilipendio* (defamation, often of an institution): "Whomsoever commits defamation ... etc." Without a constitution, the meaning of a norm like this is totally indeterminate since "defamation" could mean any manifestation of thought that asserts as "vile" the institutions the norm protects. With the constitution, and in particular the constitutional principle of free speech, even granting that a norm against

"defamation" could still be valid, it cannot be construed so as to apply to all expressions of thought, even if these are offensive to these institutions, instead of simple insults.

Finally, there is a fourth change – perhaps the most important but which I shall merely hint at here – produced by the paradigm of rigid constitutionalism.[6] While in the theory of law this paradigm involves revising the concept of validity because of the dissociation between the formal force and the substantive validity of decisions, in political theory it involves a correlative revision of the purely procedural concept of democracy. The transformation of principles and fundamental rights into a constitution, constraining legislation, and conditioning the legitimacy of the political system to their protection and implementation has grafted a substantive dimension on to democracy in addition to the traditional political, formal, or merely procedural one. I mean to say that the substantive dimension of validity in the constitutional state translates into a substantive dimension of democracy itself, of which it is both a limit and a complement: a limit because the fundamental principles and rights are prohibitions and obligations imposed on the power of the majority which would otherwise be absolute, and a complement because these very prohibitions and obligations are as many guarantees that go to protect the vital interests of all against the abuse of such powers, which, as the last century has shown, could otherwise overturn democracy itself, along with rights.

I wish to add that while rigid constitutionalism brings about an internal change to the ancient positivist model, it is also a supplement to the rule of law as well as to legal positivism itself: it is the rule of law and legal positivism in their most extreme and developed state, as it were. Indeed, as we have seen, the change it brings about has given legality a twofold artificial and positive character; no longer only of the "is" of law, in the sense of its state of "existence", but also of its "ought", namely its conditions of "validity", they, too, being made positive constitutional law on the law in the shape of legal limits and constraints to law-making. This has been the most important achievement of contemporary law: regulation not only of the forms of legal production, but also of the contents of the norms produced, and therefore a broadening and completion of the very principle of the rule of law through the subordination of the formerly absolute legislative power to law.

4 INSTITUTIONAL AND CULTURAL SHIFTS

At this point, we can identify these two paradigm shifts that we have described with a structural change in the principle of legality and, consequently, in the rules of formation of legal language. The distinctive

trait of legal positivism that distinguishes modern from pre-modern law is, as we have seen, precisely the positive character that comes from what has been called the principle of formal legality or mere legality, by means of which a norm exists and is valid exclusively for the legal form of its production. The distinctive trait of legal constitutionalism with respect to merely legislative legal systems is, in turn, no less structural a feature; the subordination of legislation itself to law through what I have called the principle of substantive legality or strict legality, by means of which a norm is only valid and in force insofar as its contents do not clash with the fundamental principles and rights laid down by the constitution.

I expressed the first of these two structural differences – between pre-modern law and the positive law of the legal state (or rule of law in the weak sense) – by saying that, whereas the legal language of uncodified legal systems is a "natural" language, that of positive law is an "artificial" one; all its rules of use are stipulated and agreed on positively. It is the criminal laws, for example, that tell us what is "theft" and what is "murder"; they are substantive norms about the production of judicial decisions and condition their validity, together with the "truth" of their assumptions. Similarly, it is the norms of the civil code that tell us what a contract – a mortgage or a sale – is, and thus, all together, form the substantive norms for the production of civil judgements that ascertain the validity of contracts. This collection of norms about production is the basis of formalism and legal positivism, expressed by the principle of mere legality: law can in no sense be derived from morality or nature or other normative systems but is wholly an artificial object "posited" or "produced" by human beings and thus depending on their responsibility, on how they consider, draft, produce, interpret, and apply it.

The second structural difference (between the positive law of the legal state and the positive law of the constitutional state, or the rule of law in the strong sense) can also be expressed in relation to legal language. It is that now not only does legal language codify and discipline through norms of higher order the procedural norms on the production of linguistic normative acts, but also the substantive norms on the meaning or content they are able to express; not only the syntactic rules on the formation of the symbols – laws, rulings, and other binding legal acts – but also the semantic rules that constrain the meaning, precluding that which cannot be validly decided and obliging that which must be decided. In short, not only the rules on "how" law is pronounced, but also on "what" it can and cannot say. The substantive conditions of validity of laws, that the pre-modern paradigm found in the principles of natural law and the earlier positivist paradigm had replaced with the purely formal principle

that valid law is enacted law, come into the legal system again as positive principles of justice enshrined in norms of a higher order than legislation. Indeed, if the rule of law is based on the principle of strict legality, the laws are themselves regulated by norms on their production. Therefore, not only do they condition by their language the validity of the decisions expressed in legal language but, as expressions in legal language, in turn have their own validity conditioned by norms of a higher order that regulate their meaning as well as their form. It is in these substantive norms on meaning that the foundations of the constitutional state lie, whether they impose limits, as in the rights of freedom, or obligations, as in social rights. It is in them that the legal paradigm of constitutional democracy shows up through the democratic convention: besides the rules of the democratic game, the game itself, besides the method and form of democracy, the democratic project itself.

However, these two shifts were not only produced by political revolution and legal and institutional innovation – the rise of the modern state and then the introduction of rigid constitutions and specialized agencies of constitutional justice – but also by cultural developments, i.e. theoretical revolutions that changed the conception of law in the imagination of jurists and in common sense. This is what took place in the first major modern legal revolution, the rise of legal positivism as both a model and a conception of law in opposition to the old, pre-modern case law. Although anticipated by contract theories of law as a "device" or "contrivance"[7] in political philosophy and by the legal positivist theories of Bentham and Austin, its success in legal culture was difficult and anything but taken for granted. Suffice it to consider the stiff opposition to codification raised by the most important legal school of the nineteenth century – the Pandectist School, who were schooled on the idea of the *System of Modern Roman Law* according to the meaningful title of the work by its leader Friedrich Savigny – who strongly argued for the law to be separate from legislation and the immediately constructive and normative role of legal science.

The same holds true about constitutionalism. Its institutional and even theoretical premises were largely present well before today's European constitutions provided for and guaranteed their own rigidity by special procedures for constitutional amendment and the review of legislation. There was the example of the Constitution of the United States which, from the outset – as far back as the renowned 1803 ruling of *Marbury v. Madison* on an unconstitutional law – was a rigid constitution guaranteed by the judicial control of the Supreme Court. It obtained this guarantee, however, not so much from its conception as a

law of a higher order than legislation as from being the outcome of a federal treatise that neither Congress nor individual states could deviate from. Furthermore, most European countries had constitutions that were formally rigid since their amendment required aggravated procedures With the exception of the 1920 Austrian constitution, none of these, however,[8] provided for any special judicial review of the constitutionality of laws. One can even postulate "the natural rigidity of constitutions" as has happened recently,[9] even when they, like the Italian Albertine Statute, are devoid of norms on how to amend them. This idea seems perfectly obvious to us today since a flexible constitution, namely one that can be validly amended by ordinary procedures, is in fact not a constitution but an ordinary law, whatever name it goes by, and even if it is written in stone. It is, however, a fact that this theory was upheld in 1995, and not in 1925 (when Mussolini rode roughshod over the Statute with his liberticidal laws without any jurist raising his voice in warning against a *coup d'état*), nor in the 1950s (when the Italian court of cassation held that constitutional principles and rights were only programmatic). Even at a theoretical level, all the premises of democratic constitutionalism were in the doctrine of the greatest theoretician of legal positivism, Hans Kelsen, who not only theorized the step structure of the legal system, but also elaborated the guarantee of the judicial review of legislation, in his plan for the Austrian constitution of 1920.[10] It is, however, again a fact that Kelsen himself was the most fervid believer in not only the "pure" and value-free nature of legal theory, but also the archaic legal positivist theory – which, as we have seen, is untenable in systems with a rigid constitution – of the equivalence of the validity and the existence of norms, which prevents substantively unconstitutional norms from being declared invalid.[11]

In sum, in the legal culture of the nineteenth and early twentieth centuries, legislation, whatever its content, was considered the supreme unlimited and illimitable source of law. Constitutions, whatever we may think today of their "natural" rigidity, were not perceived as rigid constraints on the legislator but solemn political documents or, at most, ordinary laws. Just consider the devaluation and incomprehension by Jeremy Bentham, one of the greatest exponents of legal liberalism, on the Declaration of 1789. In a pamphlet titled *Anarchical Fallacies*,[12] Bentham asked himself whatever could such a document be that begins with the proclamation "all men are born free and equal" and then goes on to list a whole series of principles of justice and natural rights, if not a minor philosophical treatise set forth in articles and the upshot of a "confusion" of words that "can scarcely be said to have a meaning."[13]

For he claimed that "there are no such things as natural rights", "rights anterior to the establishment of government" that "existed before laws, and will exist in spite of all that laws can do".[14] Bentham did not realize that, through that Declaration, positive law was changing its nature before his eyes. The Declaration itself was positive law and those principles of justice it proclaimed, once stipulated, were no longer principles of natural but of positive law, which obliged the political system to respect and protect them.

Even so, after their legal nature was recognized, constitutions were long held to be simple laws subject to amendment and thus, as was the case in Italy, violation by the legislator. Indeed, it was not until 50 years ago that the idea of a statute about statutes and a law about law began to enter the common sense of jurists. It was beyond the bounds of imagination that a statute could constrain statutes, since the latter were the only, hence omnipotent, source of the law – the more so since they had been democratically legitimized as the expression of the parliamentary majority and thus popular sovereignty. This meant that the legislator in turn, as well as the policy of which legislation was both the product and the tool, was considered omnipotent. A merely formal and procedural conception of democracy ensued, which was identified solely with the power of the people, namely, the representative procedures and mechanisms meant to achieve majority will.

It was only after Second World War and the defeat of Nazi-fascism that, with the introduction of judicial guarantees of the repeal of unconstitutional laws by ad hoc courts and not their simple non-application in individual cases as in the United States,[15] the meaning and normative scope of the rigidity of constitutions as norms of a higher order than ordinary legislation was recognized and sanctioned. It was no coincidence that this guarantee was first introduced in Italy and Germany, followed by Spain and Portugal, where, after the Fascist dictatorships and the massive popularity they enjoyed, the role of the constitution as a limit and constraint on the power of the majority was being rediscovered in accordance with the notions embodied two centuries earlier in Article 16 of the Declaration of 1789: there is no constitution in which "the guarantee of fundamental rights is not assured or the separation of powers provided for"; the two principles and values that Fascism denied and which are, in turn, the denial of Fascism.

This is the reason why we can talk about having "discovered" the constitution only over recent decades; in Italy, for example, in the sixties, after the constitutional court awoke the constitution from the hibernation the Court of Cassation had placed it in. Constitutionalism was not

part of the scientific terrain of jurists in the nineteenth century, nor in the early half of the twentieth century, and has only recently penetrated legal culture and been grafted on to the old legal positivist paradigm. Indeed it is on this terrain that we have the clearest confirmation of the pragmatic dimension of legal science: norms and principles are nothing more than meanings and do not exist merely by virtue of their legal enunciation but also, and more so, as meanings shared by legal culture and common sense. I would add that our legal culture is still largely old positivistic and non-constitutional, and the paradigm of the constitutional state is still very much to be developed both in theory and institutionally.

There is an interaction between institutional and cultural shifts. Legal and political philosophies are always a reflection, a constitutive and, so to speak, a performative factor of the actual legal experiences of their times natural law, despite all its variations, was the dominant legal philosophy of the pre-modern era for as long as there was no formalized system of sources based on the state monopoly of legal production; legal positivism took over after codification and the birth of the modern state; constitutionalism is, or at least is becoming, dominant today, after the introduction of judicial guarantees of constitutional rigidity. Each of these stages corresponded to a change in the legitimization of law and its criteria of validity; from the immediately substantive basis of pre-modern case law, when the validity of a legal case depended on the (subjective) assessment of the (objective) justice of its contents, through the purely formalistic basis of the legal state, in which the validity of a norm only depended on the legal form of its production, up to the both formal *and* substantive formula of the constitutional state, in which the validity of laws depends not only on their sources and forms conforming to the norms for their production, but also on their content complying with the principles laid down by constitutions, which are of a higher order.

Three cultures, models of law and notions of validity, therefore, each corresponding to a different political system: the *ancien régime*, the legal state, and the constitutional state. But also three different epistemological paradigms of judicial decision and legal science, and three different increasingly complex models of political legitimization. With the first institutional revolution, the existence and validity of law were dissociated from its justice since the a priori assumption that it was immediately just, based on the wisdom of its doctrinal and judicial development, had ceased. For the first article of the social contract founding the positive legal order was that a law formally pre-establish, against judicial arbitrariness, what is forbidden and punishable, so that the judge was

constrained in applying by the need to accept the premises the law itself laid down. But the second article, produced by the second institutional revolution, was that the same law be constrained to substantive principles of justice, that it must allow, or must forbid, something that is permitted or forbidden by fundamental constitutional rights. With this second revolution, the existence of law, too, is dissociated from its validity, for the a priori assumption that a norm is valid merely by virtue of how it is said and not also of what it says no longer holds. The substantive and nomostatic dimension of law that had been expunged by early positivism began to penetrate the legal system again, in the broader legal positivism of the constitutional state: under the guise not of an arbitrary sense of right but of limits and constraints placed on the legislator as positive constitutional norms.

5 THE CURRENT CRISIS OF BOTH MODELS OF THE RULE OF LAW

Both models of the rule of law illustrated here are today in crisis. I shall identify two aspects and two sets of factors of this crisis, one affecting the legal state and the other the constitutional state: in other words, the rule of law in both the weak and strong sense, or the law itself in its positive form both legal and constitutional. In both cases, the crisis manifests itself in as many forms of regression towards a pre-modern type of case law.

Firstly, the crisis affects the principle of mere legality which, as we have said, is the norm of recognition of the legal state. It derives, in turn, from two factors: legislative inflation and dysfunctional legal language, both expressions of the crisis of the regulative and conditioning capability of the law and therefore of the "artificial reason" that Thomas Hobbes set against the *iuris prudentia* or wisdom of the "subordinate judges" of his time.[16] In Italy, for example, there are now many tens of thousands of state and regional laws in force, and thousands of laws and decrees passed every year. The result of this exponential growth – the outcome of a politics that has degraded legislation to administration and has by now no vision of the difference between the two functions as to sources and content – is the twilight of codifications and a growing uncertainty in and ungovernability of the entire legal system. Criminal law, especially, has grown at such a pace that its very effectiveness and guarantee mechanisms, its capability for regulating and preventing offences, and repressive abuses have been upset. The Rocco Code, dating from 1930, is still in force in Italy; to this the Republic, in half a century,

has added an infinity of special, emergency, and occasional laws, produced by a political and unplanned use of criminal laws good only for exorcizing problems: from anti-drug legislation to the countless laws prompted by the unending state of emergency, firstly terrorism then mafia, up to the latest "security acts" passed only for their symbolic value. On the other hand, in the general ineffectiveness of non-criminal control, no important law has been left without its own criminal clause, to the point that the constitutional court saw fit to issue a declaration of criminal law bankruptcy in the form of Ruling N 364 of 1988, by which it dismissed the classic principle of the inexcusability of *ignorantia legis* in criminal matters as unrealistic.

The other factor of crisis in the principle of legality has been the disorganized language of the laws expressed in increasing vagueness, obscurity, and long-windedness. Here, again, Italian criminal law is emblematic. The Rocco Code had undermined the principle of determinacy through ambiguous, imprecise, and value-based expressions, in particular when referring to crimes against the person of the state, with meanings that could be extended ad infinitum in judgment. Semantic indeterminacy, however, reached heights of real inconsistency in the special legislation of the republican era that brought about a further dissolution of criminal language with single articles of law many pages long, intricate normative labyrinths, uncoordinated contradictory references, obscure formulas interpretable in more than one way, normally resulting from compromise or, worse still, the decision to rely on judicial application for normative choice.

The result of this disaster is a maximal criminal law – maximal extension, maximal inefficiency, and maximal arbitrariness – of which all the political functions that are classically associated with the principle of legality are withering away: predetermination of offences by the legislator and hence legal certainty and the judge's subjection to law; protection of citizens against judicial and police arbitrariness and their equality before the law; mandatory prosecution, the centrality of trial, and its role as a means for verifying or confuting acts committed instead of preventive penalization; and, lastly, the efficiency of the judicial machinery, choked up with an infinite number of fruitless, costly paper cases whose outcome only serves to blur the distinction of lawful v. unlawful in common sense and to take time and resources away from more important inquiries that are increasingly bound to end in that form of surreptitious amnesty that is the expiry of limitation period. In short, it is the conditioning role of the principle of mere legality that in today's "age of decodification"[17] is undermining the primacy of legislation, hence of

politics and representative democracy, to the advantage of administration, the judiciary and negotiation, i.e. sources of neo-absolutist power which are no longer subordinated to the law. The rationality of the law, which Hobbes countered with the "*juris prudentia*, or wisdom of subordinate judges" typical of the old common law, has been done away with by the legislation of even more subordinate legislators; the growth of discretion in legal practice had precisely the effect of reproducing a law of prevalently judicial, administrative, or private making, along the lines of the old model of pre-modern law.

The second and no less important aspect of the crisis concerns the principle of strict legality – the regulated and conditioned character of legislation itself – with which I have here identified the norm of recognition of the constitutional state. Again, in Italy, in recent years the constitution has been subjected to concentrated attack and repeated transgression – from the damage wrought to Article 138 on its revision by the various attempts at institutional reform, up to the violation of Article 11 with the participation in the Kosovo war – which have impaired its authoritativeness and constraining strength. Furthermore, this is not a slight dip in the effectiveness of the 1948 constitution but a crisis of the very idea of constitution as a system of limits and constraints and, more generally, of the value of rules as such; these are increasingly resented and disparaged by political and economic powers as inappropriate shackles on popular sovereignty and the free market.

There is also another, even more evident, crisis factor, which concerns the constitutional state. This is the end of the national state as the exclusive monopoly of legal production: the source of law has shifted beyond national borders and this has brought about a crisis in the unity and coherence of the system of legal sources and the guarantor role of state constitutions. The old pyramid structure of the sources – headed by the constitution, followed immediately by ordinary laws and then regulations and other administrative and contractual sources – has been replaced with a conglomeration of legal sources from various different systems, from the European Union to the United Nations, but nonetheless directly or indirectly in force.

Emblematic – by being advanced in the substance of the rule of law although not so in form, either weak or strong – is the process of European integration. In one sense, the European Union is still an amorphous legal and political system, whose traits contradict both principles of democratic constitutionalism: adequate political representativeness of the organs of the Union endowed with greater normative powers and the rigid subordination of their decisions to a check of validity which is

clearly anchored to the protection of fundamental rights. In another sense, the process of European integration has shifted the decision-making places traditionally reserved to national sovereignty outwith state boundaries; not only on economic and monetary issues, but also in commercial relationships, immigration, consumer protection, environmental protection, and social policies. It is estimated that almost 80% of legislative production is now directly or indirectly of community origin.[18]

I shall speak later of the perspectives that this process opens which, in the long term, are certainly progressive, thanks also to the European Charter of Basic Rights approved in Nice in December 2000. In the meantime, until a constitutional re-establishment of the Union comes about, this incomplete integration is putting the traditional hierarchies of sources of law under strain and is weakening national constitutions, owing to the EU's lack of political responsibility and constitutional review. On its basis, norms produced outwith the state – treaties, regulations, directives, and rulings – come into force in state legal systems, prevailing over national parliamentary laws and even claiming prevalence over their constitutions. This deforms the constitutional structure of national democracies, in terms both of the political representativeness of the new legal sources, as well as their constitutional constraints: in short, the whole paradigm of the constitutional state.

The democratic deficit of the Union is seen first and foremost in the community legal system. The new sources refer back to agencies that are not directly representative, such as the Council and the Commission, which make decisions through mechanisms that are not transparent and which are deeply affected by lobbies that are all the more powerful the richer and better organized. However, the absence of representativeness and political responsibility has a retroactive effect on the national legal systems that the new sources become part of: through the greater distance between the public and the normative agencies of the Union; through the low level of influence national parliaments can exert on the choices their governments make in participating in complex decision processes that often culminate in decisions made by majority vote and not unanimous agreement; through disinformation and lack of interest in European issues among both political classes and public opinion.

The constitutional review of community sources is as much weakened.[19] Not only do these sources come into force in national systems directly – the regulations as directly applicable norms and the directives as the frame for them but also with immediate effectiveness[20] – but, according to the decisions of the Court of Justice, they are of a higher order than all the norms of national[21] law, including constitutional ones.

The Italian constitutional court ruled against this at the beginning but later substantially accepted it, with the provision that community norms be subordinated to the supreme principles of the Italian republican constitution.[22] It thus comes about that non-legislative norms are not subordinated to legislation but of a higher order than legislation and even able, at least according to the Court of Justice, to deviate from the constitution. This generates more normative inflation and, most importantly, the opening of new areas of neo-absolutist power in contrast with every principle of the rule of law. There is, therefore, a danger that the blurring of roles between national and European legal sources will produce a twofold form of dissolution of legal modernity: the formation of an uncertain community case law by concurrent conflicting courts and regression into the pluralism and overlapping of legal systems and sources that was characteristic of pre-modern law. Expressions such as "principle of legality" and "statutory reservation" are becoming progressively meaningless.

Finally, there is the crisis of the embryonic international constitution formed by the UN Charter and the many conventions on human rights. The principle of peace, which is the fundamental norm and the rationale of the United Nations, has been destroyed by the two wars western powers unleashed during the last decade – the Second Gulf War and the Kosovo War – and by overriding the United Nations in favour of North Atlantic Treaty Organisation (NATO) as the guarantor of a world "order" increasingly marked by the growth of inequality, concentration of wealth, and the expansion of poverty, hunger, and exploitation in the rest of the world.[23]

After all, the whole process of worldwide economic integration that goes under the name of "globalization" can be easily read as a vacuum of public law produced by the absence of limitations, rules, and checks over the strength of major state, military, and private economic powers. Without institutions capable of dealing with these new relationships, the law of globalization is increasingly shaped after the private, contractual forms of law instead of the general, abstract public ones,[24] which shows how much economics dominates politics, and how much the market dominates the public sphere. Thus, the neo-absolutist regression in external sovereignty of the major powers (only) is accompanied by a parallel neo-absolutist regression of the major transnational economic powers; this is the return of a regressive neo-absolutism that shows up in the vacuum of rules that is openly accepted by present-day globalized anarchic capitalism as its fundamental rule – a sort of new *Grundnorm* for economic and industrial relations.

6 THE FUTURE OF THE LEGAL STATE: PROSPECTS FOR REFORM

The decline of national states, the loss of the normative role of law, the multiplication and confusion of legal sources, the thwarting of the principles of formal and substantive legality, and the demise of politics and its capability for forward planning are undermining both paradigms of the rule of law: legal state and constitutional state. It is impossible to foresee what the outcome of this crisis will be, whether destructive, leading to the law of the jungle and survival of the fittest, or whether this will prove to be a transitory crisis that will lead to the emergence of a third, broader model of the rule of law. The only thing we know is that, whatever the outcome is, it will depend on the role that legal and political reason will be able to play. Evolution towards a strengthening rather than a dissolution of the rule of law pivots on re-establishing legality – ordinary and constitutional, and state and supra-state – in order that it be able to meet the challenges it faces on the two fronts described above.

The first challenge, that the crisis of the principle of mere legality is undermining the legal state, calls upon the critical, propositional, and constructive role of legal reason to re-establish ordinary legality. I shall identify two possible lines for reform, one pertaining to the liberal area of the rule of law and the other to its social dimension.

The former concerns criminal law, a terrain on which, and not by chance, the liberal rule of law was born. An effective way of stemming the flood of legislation that has put such a strain on the guaranteeing role of criminal law would be to strengthen the principle of mere legality, by replacing the simple statutory reservation – the principle that a criminal law may only be created through a parliamentary statute – with a code reservation, the idea being to enact a constitutional principle that no norm can be introduced for offences, punishments, and trials unless through an aggravated procedure, in the form of amendments or supplements to the text of the criminal, or criminal procedure, code.[25] This would not simply be a reform of the code but a recodification of the whole body of criminal law. It would be based on a meta-legal guarantee against abuse by special legislation, which could put an end to the present chaos and protect the codes – which Enlightenment culture saw as a relatively simple and clear system of norms for protecting citizens' rights against the arbitrariness of "subordinate judges" – from the arbitrariness of today's "subordinate" legislators. The criminal and criminal procedure codes would become the exhaustive and exclusive normative texts of the whole criminal matter; and, each time, legislators would have to take

on the responsibility for their being coherent and systematic. This would enhance legislators' regulatory power over both citizens and judges. The ensuing drastic depenalization – starting with the paper-laden, bureaucratic criminal law made up of a conglomeration of misdemeanours and petty offences often punished with fines – would be compensated by the overall increased certainty, effectiveness, and guarantees.

Restoring and strengthening the principle of mere criminal legality and hence the regulatory and conditioning capacity of the law refers back to the reform and reinforcement of the principle of strict legality; a principle by means of which, as we have seen, the law itself must be regulated and conditioned by meta-legal guarantees: not only by the classical substantive principles of determinacy, materiality and offensiveness as semantic rules for the formation of legal language but also, in this case, a formal principle of legislative production for constraining it to unity, coherence and to the greatest possible simplicity and intelligibility. It is, moreover, only by re-establishing legality through these principles – determinacy in content and code reservation in the form of production – that the proper relationship between legislation and judicial decision can be restored on the basis of a rigid *actio finium regundorum*. In an apparent paradox, legislation and hence also politics can assure the separation of powers and the judge's subjection to the law, and thus meet the constitutional requirement of the absolute statutory reservation, if and only if legislation itself is in turn subordinated to the law, namely, guarantees (first and foremost, determinacy) that can limit and constrain the decision. This is tantamount to saying that the law can be effectively conditioning if and only if it is itself conditioned legally. This is the old Enlightenment formula detracts nothing from its value. That all this held true two centuries ago, when codification made the shift possible from the judicial arbitrariness characteristic of the old case law to the rule of law, makes it no less valid today when legislative inflation has practically pushed the criminal system back into the uncertainty of pre-modern law.

Re-establishing the legality of the welfare state is more difficult and complex. The welfare state did not develop, in Italy and elsewhere, through the subjection to law characteristic of the rule of law, so much as through the steady expansion of governmental institutions, the growth of their political discretion and the unsystematic accumulation of special laws, specific measures, administrative practices and acts of patronage that have been grafted on to the old structure of the liberal state, deforming it. The upshot was a heavy complex bureaucratic intermediation of welfare provisions that is responsible for their inefficiency and, as shown by not only Italian experience, illegal degeneration. There

is no denying that the public provision of social services involves the development of costly bureaucratic apparatuses but these can be appropriately pruned and simplified by building a social rule of law which, no differently from the liberal rule of law, is based on the maximum subordination of its provisions to law not only in their form, but also in their content. This could be made possible by making provisions as universal as social rights, rather than dependent on discretionary and selective bureaucratic intervention.

In this prospect, the most fruitful indication put forward by the most interesting studies on the reform of the social state, in my view, is a general principle that combines well with a strengthening of mere legality and its conditioning role through the contents, which are in turn conditioned, imposed on legislation itself. According to this principle, a social right can be guaranteed all the more completely, simply, and effectively in legal terms, at the least cost, and given maximum protection from political and administrative discretion and the arbitrariness and corruption they feed, the less bureaucratic mediation that is needed for its satisfaction; this reduction is achieved by the social right being recognized to apply equally to all through laws as general and abstract as possible. The paradigmatic example in this sense is the statutory satisfaction, in universal generalized terms, of the social rights to subsistence and welfare by a minimum guaranteed wage to all those of majority age upwards.[26] But a similar framework is also found in generalzsed, free, and mandatory forms of social welfare, such as health care and education for all, which now are variously paid for by the public sphere in accordance with the paradigm of equal rights to health and education. In these cases automatic provisions, together with subjection to law, guarantee to the highest degree the certainty of law and rights, the equality of citizens and their immunity from arbitrariness. Naturally, these social guarantees have a high cost; the cost of actually satisfying the corresponding rights is compensated for, besides the minimum living standards and substantive equality it secures, by fewer resources wasted on enormous parasitic bureaucracies that today manage social welfare, sometimes corruptly, on the basis of discrimination and power.

Unfortunately, little hope can be held out for these prospects of reform. Today, changing the welfare state according to the universalistic model of the statutory guarantee of social rights runs against the prospective privatization of the public sphere and the free-market options that prevail in political culture and the ruling classes. Similarly improbable would be a re-establishment of criminal legality based on the guarantee of the code reservation. While criminal legislation is sliding

back towards pre-modern law, criminal doctrine looks on in silence as havoc is wreaked with its subject matter and takes comfort in the "realist" fallacy that criminal law cannot be any different from what it is. Improbable, however, does not necessarily mean impossible. We should not mix up inactivity and realism unless we wish to hide the responsibility of both politics and legal culture, reducing to "unrealistic" or "utopian" what we will not or cannot do. We should admit, instead, that the cause behind the crisis is the unwillingness of politics and the propositional inactivity of culture, one following the other as each other's alibi, putting at risk not only the future of the rule of law, but also of democracy itself.

7 THE FUTURE OF THE CONSTITUTIONAL STATE: CONSTITUTIONALISM WITH NO STATE

The second challenge faced by the rule of law regards its constitutional dimension. It is the crisis of the principle of strict legality produced by states losing their sovereignty, with the dislocation of legal sources outside borders and the ensuing weakening of the guarantees provided by national constitutions. It calls for a rethinking of constitutionalism and legal guarantees, i.e. of the places, forms, and degree of rigidity with which constitutions can condition legislation by constraining it to guarantee the fundamental rights and the principles of equality and justice they lay down. We have seen how these places are no longer only state but supra-state and are today occupied at European and world level by agencies that actually make decisions with no political responsibility and under uncertain constitutional constraints. This weakens both dimensions of constitutional democracy: the formal dimension of political democracy, because non-representative agencies are being endowed with growing powers of decision-making, and the substantive dimension of the constitutional state, because those agencies are not subordinated to law and there are no secure checks on the constitutionality of their decisions.

Faced with these processes, first and foremost that of European unification, a nostalgic attitude of sterile opposition leads nowhere. What is certain is that markets will not withdraw behind national boundaries and phenomena of supra-state, international integration and interdependence will increase, not decline. The only possible answer to this challenge, therefore, is to promote legal and institutional integration in addition to the economic and political integration that, whether we like it or not, is not only happening, but is also irreversible. Faced with the crises of the

national state and constitutionalism, we are forced to the realization that the only alternative to the decline of the rule of law and new forms of market and political absolutism is a stateless constitution that can deal with the new localizations of power and decisions. While it is true that today's state constitutions are no longer capable of fulfilling their role of guarantor, it is useless to fight a tardy rearguard action in defence of the state and the autonomy of its now outdated legal system. Attention should rather be focused on developing European constitutionalism on the one hand and, on the other, an international model of constitutionalism that can restrain the absolutism of the new powers.

International constitutionalism is the more difficult and improbable long-term prospect. The demise of opposing political blocs, which could have been an excellent prelude for a new world order based on the primacy of the United Nations and the guarantee of human rights enshrined in many international charters, heralded instead the decline of the United Nations, the conversion of NATO to the armed wing of rich western countries against the increasingly impoverished countries of the rest of the world and the reinstatement of war as a means for resolving international conflict and defending our democratic fortresses against the pressure of the growing "huddled masses" kept outside their borders. The only step forward towards an international rule of law was the Treaty of Rome of 17 July 1998 setting up an international criminal court empowered to deal with crimes against humanity. The fact remains that the only alternatives to a future world of war, violence, and exponential growth of poverty and crime, in which our very democracies would be put at risk and deprived of their legitimacy, are a legal project of world constitutionalism, which is already outlined in the UN Charter, and the resolution by major powers to take it seriously.

The prospects of extending the constitutional paradigm to the European Union are somewhat more realistic. Despite many limitations and difficulties, there is an ongoing constituent process in the Union which has sped up considerably over the last 10 years. The latest and most significant step was the approval in Nice on 7 December 2000 of a European Charter of basic rights; besides traditional liberties and civil rights, this provides a long list of social rights a well as last-generation rights on privacy, the protection of the human body, and the preservation of the environment. This document has been merely proclaimed and not yet formally incorporated in the treaties. However, its political value and de facto compulsory nature, consequent to its unanimous approval by the European Council, Commission and Parliament, are unquestioned. Moreover, in legal terms, too, it is probable that its norms already

be incorporated into Article 6 of the Treaty of Union which for "general principles of Community law" refers to basic rights "resulting", besides from the European Convention on Human Rights of 1950, "from common constitutional traditions of Member States": these are precisely those very "common constitutional traditions" that the Convention, which was set up by the European Council of Cologne on 3–4 June 1999, had to identify within the charter it would develop. It can therefore be argued that not only is this charter a first, highly important step towards the development of a true European constitution, but it is now also law in force, legally binding on the Union and its member states, as well as for the Luxemburg Court of Justice, more and more clearly bound to become a European constitutional court.

Of course, the new Charter of Rights will be insufficient to redraft European law along the lines of a constitutional state. For that, a rational re-establishment of the entire power organization of the Union will be necessary, based on the one hand on the classic principle of the division of power and, on the other, on a more exact distribution of competence along federal lines between European and state agencies. To build a European rule of law, therefore, it is necessary to proceed in the opposite direction from a national rule of law: constitutionalism not as a complement of the legal state but, instead, as its premise. Only when the constitutional integration of Europe has taken place – only when its jurisdiction is extended well beyond the basic economic issues and is made to include a legislative function of the European parliament – will it become possible to promote increasingly advanced forms of legislative integration.

Today, legal integration proceeds with community sources being superimposed on state ones, thus aggravating the tangle of norms and the crisis of the principle of legality in its formal no less than in its substantive dimension. The main factor in this integration is the role played by the Court of Justice which, helped by the involvement of state courts brought about by the direct introduction of community norms into state systems,[27] is forming a prospectively judge-made European law. It is clear, however, that there is no substantive reason why integration should not take place legislatively: why, in particular should the Union have as many basically similar codes or systems of civil and criminal law as member states, without arriving at a European civil[28] and criminal[29] codification, at least within the scope of its jurisdiction. This would enhance not only the protection of rights and the process of political unification, but also free exchange itself, the security of commerce, and the protection of community interests and goods, which is part of the treaty's aims

and falls under the Union's jurisdiction. The main obstacle standing in the way of unification of codes, or at least of the formation of federal codes and judicial systems with a clearly distinct scope from that of state codes, is, obviously, criminal law. In systems like Italy's it is reserved to legislation by representative agencies, but this requirement could be met at community level if the European parliament were empowered with legislative functions. In short, it would be possible for a European rule of legislative law to develop as an alternative to the present trend towards a community-wide case law confusedly mixed up with national legal systems. The European Charter can certainly contribute to reaching this goal since the rights it guarantees outline a public space that goes well beyond the limited scope of the treaties.

This would obviously be a third paradigmatic shift. After case law, the legal state and the constitutional state, a fourth model: the rule of law raised to supranational level, with nothing of the old form of the state but retaining the form and substance of its articulated constitutional structure in the principles illustrated above of mere and strict legality. Of course, it would make no sense to talk of the forms that the system and hierarchy of the sources of a hypothetical supranational, specifically European rule of law would take on. Within the perspective of a constitution and a public sphere that are no longer national but supranational, we can only imagine that a constitutional space of an order higher than any other source could serve as the basis for re-establishing strict legality, similarly to the model of the constitutional state that is the limit and necessary dimension of, and intrinsic constraint to, all legitimate power. For it is precisely this space that hosts the public sphere, identifiable with the interests of all – either because they are general or because they correspond to fundamental and hence universal rights – whose guarantee the legitimacy of all public powers depends on. Re-establishing mere legality on the model of the legal state, through a reorganization of the underlying system of sources and corresponding powers on the basis of a clear redefinition and division of their competences and relationships of hierarchy and subsidiarity, depends on the articulation of the public sphere at its various levels and dimensions.

On the prospect of this third, broader model of the rule of law outlined by supranational charters of rights, however, political studies have raised theoretical doubts concerning and identified obstacles to both its viability and desirability. The necessary premise for a European or even global legal and constitutional state would be one single people, civil society, or public sphere, that does not exist;[30] therefore, a supranational legal integration, even though only limited to protecting basic rights,

would amount to an imposition (which at best would remain on paper) of a single normative model, undermining pluralism of cultures, traditions, and legal experiences.

Apart from the idea of a basic political and cultural homogeneity underlying our national states, which in my opinion is false, this objection implies a conception of constitution as an organic expression of a *demos*, or at least of pre-political links and a shared sense of belonging among its recipients. I think that this communitarian belief should be overturned. A constitution is not for representing the common will of a people but for guaranteeing the rights of all, even when this runs counter to popular will. Its function is not to express the existence of a *demos* or its presumed cultural homogeneity, collective identity, or social cohesion but, quite the opposite, to guarantee by those rights the peaceful coexistence of different and potentially conflicting individuals and interests. Its basis of legitimacy, as opposed to that of ordinary laws and governmental decisions, does not come from majority consensus but from an even more important and fundamental value: the equality of everyone in basic liberties and social rights, i.e. in vital rights conferred to all, as limits and constraints precisely against the laws and governmental acts of contingent majorities.

Shared sense of belonging and constitution, political unification, and legal enforcement of equality are, furthermore, closely bound together as the experience of our own democracies has shown. It is true that the effectiveness of any constitution requires a minimum of cultural and pre-political homogeneity that, as regards the European Convention on Human Rights, is perceptible precisely, and perhaps especially, in the common constitutional traditions of the member states of the Union. But the opposite is also even truer: it is in an understanding of equality of rights as a guarantee of protecting differences of personal identity and curtailing material inequalities that a perception of others as one's equal can take root, and with it the shared sense of belonging and the collective identity of a political community. It can even be said that the equal protection of rights is not only necessary, but also sufficient for forming the only "collective identity" worth pursuing, namely one based on mutual respect instead of the mutual exclusion and intolerance generated by ethnic, national, religious, or linguistic identities. The main ingredient of political unification is legal rather than economic or monetary unification.

In short, if by "public sphere" we mean that which is in the interests of all as opposed to the private sphere that concerns individuals' interests,[31] it must be acknowledged that it mainly requires the protection of

equality and those rights of all that are fundamental rights. The public sphere and civil society are thus not the premise but the effect of the constitution. It is with the constitution, i.e. the social contract, whereby it is agreed upon to protect the basic rights of everyone, that society emerges from the state of nature and a public sphere emerges as the locus of politics and a sphere of equality, distinct from the private sphere that is, by contrast, the place of economics and the sphere of inequality and difference. This is why we can say that a European public sphere will not exist for as long as Europe remains a mere common market – an area of free exchange – but will come into being precisely when equality in those rights for all that are basic rights is established and protected. Even less so will a worldwide public sphere exist as long as human rights laid down in the many conventions and declarations stay on paper, unprotected, and the law of the jungle continue to prevail in international political and economic relations.

The reasons that keep us from being optimistic about the prospects of extending constitutionalism to the international level are not, therefore, theoretical. They are all exclusively political. There is nothing to stop us believing that the idea of an international rule of law is in theory attainable. Its attainability only depends on politics, and precisely on the will of the economically and militarily strongest countries. This is what the real problem boils down to: the crisis of the project of peace and equal rights that politics itself had laid down at the end of the Second World War. The paradox lies in the crisis of political planning taking place in an age of transition in which it is certain that, in the course of just a few decades, the integration processes presently developing will lead in any case to a new world order. Politics and law hold the key to the quality of this new order: whether the West shuts itself up as in a besieged fortress, inequality, and poverty grow and new fundamentalism, wars, and violence develop, or the will prevails within the international community to give renewed momentum to that rational project of a constitutional order that the peace and the very security of our democracies depend on.

NOTES

1. See H. Kelsen, *Pure Theory of Law*, Berkeley (CA): University of California Press, 1967.
2. "Constitutional state" and "rule of law in the strong sense" are not synonyms. The rule of law in the strong sense implies that the law is in fact – even though not by right – subjected to normative principles such as fundamental liberties and the separation of powers. This can take place, as the example of England shows, because these principles have taken social and cultural root notwithstanding the absence of

a written constitution. The bi-univocal tie, today accepted virtually everywhere, between rule of law in the strong sense and constitutionalism stems from the fact that written and rigid constitutions have made these principles "positive" in nature. In doing so they have given legal guarantee to the subordination of public powers to these principle, not only in terms of spontaneous alignment by judges and legislators, but also in their formulation in positive constitutional norms and the control by a constitutional court on their possible violation. Despite the absence of a constitution, in England the experience of the rule of law realized a model of rule of law in the strong sense, to the extent of having been the inspiration for the whole evolution of the rule of law in continental Europe and the United States. However, that model has remained outside the continental development of the *Rechtsstaat* (state-under-law) and of the paradigmatic shifts that marked it.

3. The formula *auctoritas, non veritas facit legem* appears in the 1670 Latin translation of the *Leviathan* [1651]: T. Hobbes, *Leviathan, sive de Materia, Forma et Potestate Civitatis Ecclesiasticae et Civilis*, in *Opera Philosophica quae Latine Scripsit Omnia*, ed. by W. Molesworth (1839–1845), reprint Aalen: Scientia Verlag, 1965, vol. 3, chap. 26, p. 202. But Hobbes states very much the same maxim in *A Dialogue between a Philospher and a Student of the Common Law of England* [1681], in *The English Works*, ed. by W. Molesworth (1839–1845), reprint by Aalen: Scientia Verlag, 1965, vol. 6, p. 5: "It is not wisdom, but authority that makes a law".
4. This definition of natural law doctrine has been suggested by N. Bobbio, *Teoria della norma giuridica*, Torino: Giappichelli, 1958, §12, pp. 49–54.
5. "Natural law", wrote Bobbio, "was conceived of as "common law" (Aristotle called it *koinòs nomos*), and positive law as a special, or particular law in a certain civitas; therefore, on the principle that particular law prevails over general law (*lex specialis derogat generali*), positive law prevailed over natural law every time the two came into conflict"; cf. N. Bobbio, *Il positivismo giuridico* [1961], Torino: Giappichelli, 1996, pp. 13–14.
6. Cf. my *Diritto e ragione. Teoria del garantismo penale* [1989], Roma-Bari: Laterza, 2000, pp. 898–900, 904–7, 926.
7. One recalls the first page of the *Leviathan* in which the state is called "an Artificial Man" and the laws "an artificial *Reason* and *Will*" (T. Hobbes, *Leviathan* [1651], Harmondsworth: Penguin, 1985, Introduction, p. 81). "Commonwealths, or civil societies and governments", writes Locke, are "the contrivance and institution of man" (*A Second Letter Concerning Toleration* [1690], in *The Works of John Locke in Nine Volumes*, London: Rivington, 1824, vol. V.
8. As is known, the introduction of the constitutional court into the Austrian Constitution of 1.10.1920 (arts. 137–48) was the work of Hans Kelsen, who was asked by the government to develop the whole project. He himself was a member of the court for many years and a permanent referee. See in particular H. Kelsen, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", *Revue du droit public et de la science politique*, 35 (1928).
9. See A. Pace, *La causa della rigidità costituzionale*, Padova: Cedam, 1996.
10. On Kelsen's theoretical and institutional contribution to the affirmation of the constitutional paradigm see G. Bongiovanni, Reine Rechtslehre *e dottrina giuridica dello Stato. Hans Kelsen e la costituzione austriaca del 1920*, Milano: Giuffrè, 1998.
11. H. Kelsen, *General Theory of Law and State* [1945], New York: Russell & Russell, 1961.

12. J. Bentham, *Anarchical Fallacies*, in *The Works of Jeremy Bentham*, J. Bowring (ed.), Edinburgh: William Tait, 1838–43, vol. 2.
13. Ibid.
14. Ibid.
15. On the difference between a centralized control of the constitutionality of laws through the power of the constitutional court to cancel unconstitutional laws in general (which was a feature of the Austrian constitutional model), and the American model, which empowers all judges to refuse the application of unconstitutional norms only in single, specific cases, while they stay valid and can be applied elsewhere, cf. H. Kelsen, "Judicial review of legislation: a comparative study of the Austrian and the American constitution", *Journal of Politics*, 4 (1942), 1.
16. T. Hobbes, *Leviathan*, cit., XXVI, p. 317: "it is not that *Juris prudentia*, or wisedome of subordinate Judges; but the Reason of this our Artificiall Man the Commonwealth, and his Command, that maketh Law". See also the ending of n. 3.
17. See N. Irti, *L'età della decodificazione*, Milano: Giuffrè, 1979.
18. Cf. M. Cartabia and J.H.H. Weiler, *L'Italia in Europa. Profili istituzionali e costituzionali*, Bologna: il Mulino, 2000, p. 50.
19. On the check of legitimacy by the European Court of Justice and the Italian constitutional court cf. M. Cartabia and J.H.H. Weiler, op. cit., pp. 73–98. 163–90.
20. The system of Community sources is traced by art. 249 of the Treaty.
21. This principle was established by the Court of Justice in its decision of 15.7.1964, case 6/64 *Costa/Enel*.
22. The Italian Constitutional Court has progressively aligned itself with the decisions of the European Court of Justice through a series of admissions of increasing weightiness regarding the prevalence of Community norms on Italian ordinary law, by virtue of the "limitations of sovereignty" that Italy consented to in accordance with art. 11 of the Constitution.
23. On the legitimization of war as a tool for protecting human rights see D. Zolo, *Invoking Humanity: War, Law and Global Order*, London/New York: Continuum International, 2002. See also my "Guerra 'etica' e diritto", *Ragion pratica*, 13 (1999), pp. 117–28.
24. See M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna: il Mulino, 2000.
25. I upheld the principle of "code reservation" in penal issues in "La pena in una società democratica", *Questione giustizia*, (1996), 3–4, pp. 537–8. According to this principle, any parliamentary decision concerning penal issues should assume the form of a Penal Code or an organic reform of it.
26. As is known, this proposal has been widely debated in sociological and political literature; cf.: J. Meade, "Full Employment, New Technologies and the Distribution of Income", *Journal of Social Policy*, 13 (1984), pp. 142–3; R. Dahrendorf, *Per un nuovo liberalismo*, Roma-Bari: Laterza, 1990, pp. 135–47, 156; M. Paci, *Pubblico e privato nei moderni sistemi di Welfare*, Napoli: Liguori, 1990, pp. 100–5.
27. Cf. M. Cartabia and J.H.H. Weiler, op. cit., pp. 60–76.
28. This is the direction legal research is moving in today, prompted by two resolutions by the European Parliament, of May 1989 and May 1994. They suggested, as an essential component to the common market, the harmonization of certain areas of private law in member states with the prospect of a common European code of private law. A commission of legal experts, convened to draft a project of European

Civil Code, coordinated by Christian von Bar, presented a new version of the *Principles of European Contract Law* at the end of 1999, published in Italy with an introduction by G. Alpa, "I principi del diritto contrattuale europeo", *Rivista critica del diritto privato*, 18 (2000), 3.

29. On the initiative of the European Commission a group of legal experts, headed by Mireille Delmas-Marty, developed a project of a *corpus juris* for the penal protection of financial interests within the European Union. See G. Grasso, *Verso uno spazio giudiziario europeo*, Milano: Giuffrè 1998; L. Picotti (ed.), *Possibilità e limiti di un diritto penale dell'Unione europea*, Milano: Giuffrè 1999.
30. In this sense, cf. D. Grimm, "Una costituzione per l'Europa?", in G. Zagrebelsky, P.P. Portinaro, J. Luther (eds), *Il futuro della costituzione*, Torino: Einaudi, 1996, pp. 339–67; D. Zolo, *Cosmopolis: Prospects for World Government*, Cambridge: Polity Press, 1997, pp. 129–34.
31. Ulpiano: *Publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem* (D 1.1.1.2.).