CHAPTER 9

BEYOND THE RULE OF LAW: JUDGES' TYRANNY OR LAWYERS' ANARCHY?

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1. Like many categories of the modern political lexicon, the expression *Rechtsstaat* or "rule of law" seems to be doomed to implode because of historically stratified empirical referents and because of the complexity of contemporary legal systems. Anyone who has read the most recent legal literature on the matter will have seen over a hundred normative assumptions which, all together with no identifiable system or common canon, and selected with great variation from author to author, are taken as building blocks or obligatory premises for conceiving the *Rechtsstaat* (or the "rule of law").[1] Legal scholars, too, disagree on what constitutes the "dogmatic principle on which the *Rechtsstaat* (or the 'rule of law') stands", such as which other sub-principles are to be subsumed into it and what relationship it may have with other aspects of a constitutional legal system, e.g. fundamental rights and the principle of democracy. Indeed, it is no coincidence that this state of confusion and uncertainty had led some to suggest getting rid of the concept as an outdated and unusable ideological anachronism.[2]

In its narrowest and strictest sense, the concept of the *Rechtsstaat* is a product of the development of German state doctrine (which culminated in that peculiar weakening and legal dematerialization of its subject, which is the doctrine of the sovereignty of law).[3] In its broadest sense, however, as historians of political thought never fail to remind us, it relates back to the venerable philosophical tradition of the "government of laws" in the double meaning of government *per leges* and government *sub lege*,[4] and thus ends up getting confused with constitutionalism. On the common (to European legal systems) obeisance to the "principle of nomocracy", which states that laws and not men must reign supreme, the idea of the *Rechtsstaat* (or the "rule of law") crops up wherever progress is made towards setting a legal limit, either natural or accepted through usage, to the wielding of political power; it gains acceptance by acknowledging pluralism in legal systems and norms, drawing life from the polarity between positive law and rules of conduct that deal with *ethos* or *mos*.[5] Besides, many historians, when attempting to reconstruct the

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 353–369.

concept and practice of the rule of law, which is the Western world's laboratory for legally disciplining power, see an older constitutionalism behind its modern version.[6] Despite drawing vitality from this tradition, however, the concept of "rule of law" is a pure product of modern thought. Indeed, it is quite correct to argue that "the idea of 'rule of law' comes into being whenever the idea of 'government of laws' interacts with the concept of sovereignty of the modern nation state".[7]

However, this qualification, which denotes a further stage in the development of Western institutions, is also insufficient for grasping the peculiarity of the *Rechtsstaat* (or the "rule of law"). A state in which no alternative power can limit the sovereignty of legislative power, besides recourse to natural law or to some principle of transcendent law, cannot yet be called a *Rechtsstaat* acting according to the rule of law. This is arrived at by establishing a *potestas irritans actus contrarios* and attributing it to the judiciary. This *potestas*, however, can only come into effect when the independence of the judiciary is recognized (in the history of Great Britain, for instance, with the Act of Settlement of 1701), and especially when the power of the representatives of the people to politically control the government is established. It is only with the birth of modern representative institutions, which were spawned by the great political revolutions, that conditions were created for a substantive legalization of politics. And, no less, the *Rechtsstaat* plays a moderating role of political containment and neutralization *vis-à-vis* the revolutionary energies that brought about modern parliamentary democracies; it is the product of a transformation that leads "from the primacy of the legislator as a political agent personifying the general will to the primacy of law as a legal source, as a formal, neutral expression of the authority of the state".[8]

In the strict sense, therefore, the concept of *Rechtsstaat* only serves to identify a specific period of the history of the nineteenth century post-revolutionary state and to represent the specific legal expression of the liberal middle class, freed from the restrictions and hierarchies of the old regime but also weakened with respect to the revolutionary ideology of popular sovereignty. The idea of *Rechtsstaat* achieves that synthesis of statism and liberalism that was to emerge as the ideological key to an age of extraordinarily flourishing legal science.[9] It was especially the German theory of civil society and state that laid the foundations for what was to become the doctrine of the rule of law in the proper sense for generations of continental European jurists.[10] The special focus on the idea of sovereignty and legal personality of the state made it possible to overcome the *gubernaculum/jurisdictio* dualism that still weighed on early conceptions of modern constitutionalism,

including that of Montesquieu. However, the old-style polarization typical of the constitutionalist tradition lived on in the opposition described by the theorists of the *Rechtsstaat*: *richterliche Rechtsfindung* and *politische Rechtssetzung*.[11]

If we also turn our attention to the twentieth-century concept of constitutional democracy, we find three ideas underpinning the theory of the *Rechtsstaat* (or the "rule of law") incorporated within it: (1) the law gives shape to and in so doing limits state powers – the *pouvoirs constitués*; (2) legal sovereignty is exercised according to the model of the government by law, hence the principle of "statutory reservation" becomes the central tenet of the classical doctrine of the *Rechtsstaat* (or the "rule of law");[12] (3) judicial protection functions through the constitutional acknowledgement of the right to bring any abuse by private or public powers before a court. On this basis it is easy to understand how the two traditions, the German *Rechtsstaat* and the Anglo-American rule of law, have become closer, blending within the modern-day theory of constitutional democracy. The marriage of the continental European legal tradition with the Anglo-American common law–based one, in which the role of the *jurisdictio* has always been significant, seems to be functional to the recent expansion of judicial power, more of which will be discussed later. It is also true, however, that so many opinions have been formed around these fundamental assumptions that the idea of the rule of law almost seems to have imploded, as we have stated previously. Despite this, no other principle has emerged capable of representing and synthesizing the plurality of norms dealing with the leading ideas of modern-day constitutionalism within a coherent and unified construct.[13]

2. The polysemy of traditions, which go to make up the concept of "rule of law" has often been countered by the trend towards simplification, in particular in the legal debate of the early twentieth century. On the one hand, its origins were perceived as being within the medieval legal universe because that was the earliest form of what would be called the judicial state (as in the "state as guarantor of the law", according to Fritz Kern's however ambiguous definition, repeated by many authors) while, on the other, it was recognized as the specific legal foundation of the bourgeois society of today. Furthermore, if we examine classical theories, we are obliged to acknowledge that there have been many changes in the doctrine of the "rule of law" since the outset, which sometimes emphasized the legislative (Robert von Mohl), the administrative (Rudolf von Gneist), and the legal component (Otto Bähr),[14] thus paving the way not only for diversified assessments but also distortions

in argumentation. The doctrine of the liberal rule of law had successfully put an end to the "pernicious oscillation between the absolute power of a sovereign and the basic absolute rights of the individual introduced by natural law",[15] but had not been immune to other, albeit somewhat less dangerous oscillations.

As Carl Schmitt, for example, wrote in the early 1930s: "The judicial state has the semblance of a *Rechtsstaat* [or rule of law] insofar as judges pronounce the law directly and sustain it, even against the legislator who produces the norms, and against his laws".[16] On this basis, naturally, it was easy to criticize the rule of law as fundamentally conservative and substantially extraneous to the functions of government. On the other hand, however, its capacity for innovation in the interest of the middle class and economic modernizing interests was also underlined, almost to emphasize its constitutive ambiguity,. With the concept of sovereignty, the centrality of legislation entered the politics of great monarchies, and the modern state took on the characteristics of a legislative state. "What had been perceived in the states of continental Europe from the nineteenth century onwards as *Rechtsstaat* [or 'rule of law'] was in fact merely a legislative state, more precisely a parliamentary legislative state".[17] Here too, however, the emphasis on the legislative component ended up being polemically meant to confine the era of the rule of law within a period still dominated by a natural law belief in the universality and rationality of the law.

Simplifications of this kind, naturally, supported a critique of the rule of law as being substantially apolitical or anti-political in nature and hence weak and yielding to revolutionary political forces. The rule of law, thus, came into conflict with the *Machtstaat*, the state of officialdom (*Beamtenstaat*), and the ethical state of which it is merely an idealistic transformation.[18] Monarchies based on military and civilian bureaucracies on the one hand and plebiscitary democracies on the other were the traditional regimes that such historical simplifications and polemical arguments were made to serve. However, such arguments miss the underlying meaning of a concept that modern theory has introduced to explain a diverse legal-political system in which, as Niklas Luhmann has highlighted, the law is safeguarded from excessive political interference in terms of both constraints and limits of governmental decisions and the political neutrality of the judiciary. Constraints on political decisions and neutrality of judges entail each other in the framework of the rule of law. "Political neutrality of the judiciary only makes sense insofar as it is impossible, in technical-decisional terms, for the whole law to keep adapting to the swings in political consensus. And this in turn is partly impossible since a judiciary independent from politics guards the need to

keep a highly complex law coherent, and rejects the grand simplifications of politics".[19]

Except for these qualifications, it must be said that definitions like "legislative state" or "judicial state" have not lost all their heuristic potential, if for no other reason than for being counter-ideal types for highlighting the specificity of present-day institutional changes. Still today, the nineteenth century political subject tends to be defined using the phrase "legal state" as opposed to the "constitutional state", which appeared in the twentieth-century, especially after the tragedies caused by totalitarianism: the basic difference was that the former relied on legislative policies only for the guarantee of basic rights, while the latter depended on a constitution, and one garrisoned by an agency reviewing legislation.[20] Many interpreters thus see again the prevailing present-day tendency in western political systems, and the peculiarity of some of them in particular (e.g. Germany), as an evolution from a parliamentary legislative state into a democratic judicial state.[21] It was on this very change that twentieth-century debate on the future of the rule of law was centred.

Being a legislative state, or an administrative state subject to the principle of "statutory reservation", the classic *Rechtsstaat* kept its state substance solidly by being a sovereign subject. The sovereignty of contemporary *Rechtsstaat* (or rule of law), by contrast, seems increasingly constrained and doubtful.[22] In such a changed situation, therefore, the classical diagnoses, which have become more and more popular in recent years point towards a "judicialization" of politics that would inevitably bring about an undue politicization of the magistracy and judicial agencies.[23]A crucial factor of this development would be a judicial body (a constitutional court as outlined by Hans Kelsen just after the First World War[24]) playing the role of "guarantor of the constitution" and entrusted not only with the review of legislation but also with promoting the actualization of the constitution and the achievement of basic rights. Critics of this constitutional innovation have repeatedly seen this very desire or need to curtail the scope of legislation and devolve it to the judiciary as the clearest manifestation of the crisis of the classical *Rechtsstaat* (or rule of law).[25] On the other hand, advocates of the review of legislation have focused on the ideological characteristics of the classical doctrine of the division of powers, pointing out how the body enabled to nullify unconstitutional laws, was indeed set up as a tribunal but, by virtue of its function, was to be considered an "organ of legislative power".[26]

On the other hand, at international level too, growing and exaggerated hopes have increasingly been pinned on the judiciary for it to be a tool in

the struggle against state-committed crimes (war crimes and crimes against humanity) in the wake of a proceduralist trend of which, again, Kelsen was the most authoritative theorist, and which triggered a major theoretical/political diatribe.[27] What is called into question here seems not so much judicial bodies expropriating politics as their subservience to ideals of power and hegemonic interests with strong political connotations. In this arena, too, however, there have been an erosion of the powers of the executive (in particular on two traditional norms of international law, namely the immunity of states from judicial review and the "immunity of the organs") and a growing discretionary power and unprecedented activism of the judiciary, as well as a broader scope for criminal prosecution.[28]

3. The twentieth century, as many tendencies of its early years had suggested, drew to a close with a shifting of the balance of power towards the judiciary, a greater presence of justice in society as a whole and a widespread, growing preoccupation about a degeneration which, in the eyes of many, was producing a sea change in the "rule of law".[29] As at the beginning of the century, and especially just after the First World War, there had developed a debate on the "judicial state" and "government by judiciary",[30] so now one speaks increasingly of "judicial democracy" and "judicial guardianship", or even, in extreme terms with populist nonchalance, of judicial "despotism" and "totalitarianism", and "tyranny" or "dictatorship of the judges".[31] Today, in particular, there is a significant semantic shift. Whether it is invoked in the name of governability and the majority principle, or exorcized as the spectre of authoritarianism, plebiscitary democracy no longer has its counterpoint in representative democracy, but in judicial democracy. In particular, government by judges is again being talked about in terms of a greater politicization of the judiciary which, in the eyes of many critics, is working as a Jacobin weapon for rooting the corrupt out from the social body, or even as a conservationist force for the constitutional settings of the welfare state. On the opposite side, but again within the context of what is now a transversal anti-political party diatribe,[32] and in response to populist calls for politics to make its voice heard again by appealing directly to the people, the issue again emerges of constitutional guarantees and neutral bodies for safeguarding rights and the constitution.

It is a fact that the range of decisions that the political systems of complex societies have delegated to law courts or quasi-judicial institutions has grown in recent years: given that these societies can no longer be rationally governed in a bureaucratic and hierarchical way, nor can they be entirely entrusted to spontaneous, self-regulating mechanisms,

judicial bodies find themselves playing a crucial role in a social landscape full of contrasting (and simultaneous) tendencies towards legalization and deregulation, regulation and de-institutionalization. The judge is increasingly becoming an institutional *factotum* with tasks not confined to ruling on controversies but also to settling issues that other public bodies and social institutions do not consider important enough or are unable to tackle satisfactorily. On the other hand, recourse to a judge does offer comparative advantages to citizens using the institutions over addressing over powers: the judicial power is less invasive, more open, more widespread, and less discretionary than political power proper.[33]

Various individual factors may be seen at the basis of this expansion of judicial power; the usual pre-requisites for it include the dynamics of a democratic legal system, an invigorated independence of the magistracy, a widespread culture of rights, a "revolution of growing expectations"; the equally influential pathological factors include corruption of the political classes, government inefficiency, weakness of the parliamentary opposition, which all force the magistracy to a supplementary role.[34] This can explain why intervention by the magistracy has begun to take on the semblance of legislative stopgaps and has often been interpreted as a frontal attack by the judges on the legislator and one which is not limited to ruling on single cases. At the same time, western political systems – and none so markedly as Italy – have witnessed a heightening of the role of other forces, which are (or seem) "neutral", such as the presidency of the republic or of the parliamentary houses, which inevitably leads to their becoming overexposed.[35]

Alessandro Pizzorno, a sociologist aware of the institutional dimension and the way politics works, has recently summed this up referring to a plurality of tendencies: (1) "the increased participation of judges in drafting laws"; (2) "the increased tendency of legislative and administrative bodies to delegate delicate issues to the judiciary"; (3) "broader public access to justice for resolving controversies which were traditionally dealt with by social and administrative authorities"; (4) "establishment, largely by European parliamentary democracies, ... of a review of legislation carried out by an ad hoc judicial body"; (5) the emergence and spread of a practice definable as "check for political rectitude" or "check for virtue" by the judiciary.[36] To these we must add the proliferation of "conflicts of responsibility" within a social scenario, which has been aptly defined as "organised irresponsibility".[37] Indeed, the expansion of judicial power in contemporary societies also stems from a shift in the economics of human suffering, in the sense that the latter increasingly seems to be a result of civilization, and especially of industrialization and the impact of

major technologies. Overall, there is an increase in collective damages caused by an indeterminate number of actions by an indeterminate number of actors, against which ever more strong is the demand to identify the culprits and ever more problematical the attribution of individual and collective responsibility.[38] Furthermore, the scientific uncertainty in judicial rulings about responsibility in complex social processes does nothing but increase disputes, which call for a judicial settlement.[39]

In some cases, including paradigmatically Italy, the phenomenon of the rise in the power of the judiciary is largely a matter of its overexposure rather than an increase in its strength. This, on the one hand, stems from the never-ending "crime emergency" and on the other from the collapse of a political class discredited by a corruption that had become part and parcel of the system.[40] We should not be speaking here of the risk for the rule of law to be toppled by a judicial attack but rather of the attempt to reinstate normality in a situation, which has been characterized historically by what, albeit with various interpretations, has been called the "double state".[41]

4. It would be easy and somewhat misleading to concentrate on the anomalies of the Italian situation to illustrate the changes which, over recent decades, have affected how law and politics have interacted in constitutional democracies. Rather, it would be more appropriate to consider the development of the German constitutional democracy, about which doctrine has pointed to two complementary tendencies. On the one hand there is the "politicization of constitutional adjudication" by virtue of recognizing to the court "competences which are not only for reviewing legislation but also for actively promoting the 'actualization of the constitution' in the sense of 'an objective legal system of values'".[42] The passage from the idea of the constitution as guarantee to one of the constitution as indication or "directive" (Böckenförde spoke of *dirigierende Verfassung*) is at the basis of this evolution. One the other hand, however, there is an evident "judicialization of politics",[43] since legislative proposals and political decisions are affected by considerations of what positions the court could reach and what its reactions would be. Where conflict on norms exists, the court's word is final and thus it holds the ultimate sovereign power, while politics ends up merely as an excrescence of constitutional law, coinciding with "the increasingly extensive interpretation of the constitution".[44]

We can take the position of Ernst-Wolfgang Böckenförde as paradigmatic here. Böckenförde, a constitutional scholar of the Schmittian school and a judge at the court of Karlsruhe from 1983 to 1996, claimed

that the passage from the classic legislative state to one watched over by constitutional case law jeopardizes the separation of judicial and legislative power, and thus both the liberal core and the democratic substance of the rule of law. There emerges a tendency towards a "judicial state of constitutional judges", which broadens the discretion of the judiciary and places the institutional equilibrium of the rule of law at risk in terms of citizens' autonomy. He points out that the court has become a "strong political (non-party) body, an Areopagus of the constitution; what sovereignty it holds by virtue of its competence for a final binding decision is increased".[45] This development comes into conflict with the democratic moment: the ever delicate balance between democracy and rule of law, which had been broken in the first half of the last century in favour of plebiscitary democracy, seems now to be skewed in favour of what could be best described as a "rule of rights". Constitutional justice is charged with being more preoccupied with guaranteeing human rights and the principle of the welfare state than with the principle of democracy. However, basic rights themselves are now being construed by constitutional case law in terms of "norms of principle", which inevitably come into conflict with the classical synthesis of democracy and rule of law. "Whoever wishes to hold firm on the determining function of a popularly elected parliament for making law – instead of rebuilding the constitutionalist framework to favour a state based on the *jurisdictio* of the constitutional court – has also to hold firm that fundamental rights (enforceable by courts) are 'merely' individual rights of freedom *vis-à-vis* state power and not also objective (and binding) norms of principle in all areas of law".[46]

Underlying Habermas's idea of the constitutional court as "custodian of deliberative democracy"[47] and Rawls's as "paradigm of public reason"[48] there is a similar mistrust of possible paternalistic involutions in constitutional justice, the belief that legal discourse can develop interpretative strategies that favour argument within the decision-making process but "cannot *replace* political discourse, which serves to lay the basis for norms and programmes and always requires the inclusion of all interested parties".[49] It is a fact that the existence of constitutional courts has had a deep impact on the conception of law in western democracies[50] and has favoured a sort of widespread review, even in countries with a centralized system of reviewing legislation, and encouraged judges to wield their interpretative powers (what is called "adjusting interpretation" of the provisions of law).[51] But, notes Rawls, the constitution "is not what the court says it is; it is what those who act constitutionally in the other branches of government allow the court to say about it".[52]

Against these risks, authors like Ottfried Höffe, call for judicial self-restraint and an ethos of judicial self-control.[53] In so doing, however, he obviously underestimates what Luhmann had pointed out many years before (although he, too, erred on the side of unilateralism), namely that "law has become too complex and the organisation of the professions too differentiated for there to be any practical significance in unity of training and professional orientation".[54] Whichever way the question is viewed, it is the moralization of the constitution through a certain conception of fundamental rights and of the role of institutions in actualizing them that enables the judge, as custodian of the constitution, to play a strategic role in contemporary power frameworks. The judge becomes custodian of a constitution in which the *potestas coercitiva* of law fades and gives way to its *potestas directiva*: and this is the major shift in the development today of the rule of law.[55]

The republican communitarian basis on which constitutional discourse is increasingly set in contemporary democracies is an indication of this moralizing tendency of which the wielders of judicial power seem to be the last custodians as the other legal professions become ever more technical. For example, the undeniable resurgence of the issue of the common good in contemporary political theory is fostered by the idea that constitutions deal extensively with issues of human values and commitments towards solidarity, responsibility, and mutual respect (from which judges draw extensively in motivating their rulings). Thus, it is the task of politics to reconcile interests of the custodians of the judicial state to give a higher definition of common good.[56] It is equally undeniable that for many the new frontier of the rule of law seems to be the legal ascertainment of truth in so-called truth commissions. "In the constitutional state", wrote, for example, Peter Häberle, "the principle of the *rule of law* in all its forms builds what is perhaps the sturdiest bridge towards the unending process of seeking the truth".[57] One does wonder, however, if this moral casting of public discourse implies a real risk of judicial hegemony for contemporary democracies or whether the most serious threats to the survival of the rule of law are to be sought elsewhere.

5. Does progress, then, proceed in the light of these developments and with the emergence of new agencies of international justice towards a planetary judicial state or at least, in Kelsen's terms, toward a supranational centralization of the judicial function? Little (indeed nothing for the former) leads us to such a conclusion. At most, what appears is a dissociation between these dynamics of expansion of judicial power and the localization of real powers in the material constitution of societies

and the international community. The globalization process seems to proceed more towards the supremacy of lawyers' partisan and mercenary "expertocracies" that take strategic advantage of the opportunities and resources of a litigation society than towards a government or an international "regime" of judges. Western state institutions have proven and still prove difficult to export. This has led to the establishment of the *Machtstaat* (military and repressive apparatuses, coercive organization, and disciplining techniques) and not of the rule of law; the military state is not hard to export but it is difficult to transplant a judicial democracy that does not degenerate into serving the aims of a politicized justice. More than the figure of the (constitutional) judge with scales for balancing different values and ethical/legal principles, it is the "merchant of law" who now dominates the field, expanding his/her power quantitatively and qualitatively.[58]

Alongside jurists specialized in adjudication, in the practice of worldwide civil society, we now find specialists in political lobbying working at major federal or national centres of executive power and litigators specialized in business cases. These are indeed the categories of lawyers who are acquiring an increasingly high profile in the arena of globalization.[59] Against the *ethos* of impartiality serving truth-seeking and the general interest, the legal Machiavellianism of these legal strategists takes them step by step far from the cultural foundations of the western Christian constitutional state (setting them at irreversible loggerheads with the jurist custodians of the constitutions). But above all, they place their skills at the service of transnational corporations of power against which the de-legitimized national state institutions seem ever less able to erect barriers of guarantee to defend the fundamental rights of individuals who have unfortunately found themselves caught up in the wheels of globalization.

The problem for the rule of law at the dawning of the 21st century is not, therefore, the risk of abuse of power by public bodies, but the threats from major concentrations of private power (starting from data protection and the discipline of information flows).[60] Privatisation processes have radically redrawn the map of economic constitutions, first and foremost in the countries in which a rapid dismantling of collectivist economics has occurred.[61] Furthermore, however, they are posing a serious threat to the social and cultural foundations of those constitutional democracies which, in the course of the twentieth century, conserved and creatively innovated the heritage of the classic rule of law that gave legal shape to western liberal civilisation. The real guardians of the new order are now monetary agencies and financial institutions

above and beyond democratic control and imbued with a somewhat selective perception of the principles of the rule of law.[62]

It is undeniable that those who care about the rule of law are in the first instance sensitive to the private dimension. Such, for example, is the conception of Friedrich August von Hayek that belongs to the common law tradition and has become paradigmatic for the neo-liberalism (or libertarianism) of globalization according to which the function of the judge is limited to issues of spontaneous order so that the judge is but an aid to the natural process of selection of norms in a market society.[63] What the legal philosophy of Hayek (and his many and repetitive epigones) seems to ignore is the concentration of powers in a market society that is very far from the harmonious idealizations of the moral philosophers of the good Scottish school. It is not *super partes* tribunals or magistrates whose professional duty is to seek out truth and impartiality that today settle legal controversies, but large organized law firms capable of mobilizing appropriate political support, and real multinationals of commercial law.

The "spontaneous" evolution of open societies seems oriented towards a "dual system of justice", in which a "tailored" justice for the wielders of economic power is set alongside a "mass justice for 'ordinary' consumers".[64] It is precisely this new dualism that threatens the survival (and credibility) of the rule of law in the political systems of the age of globalization. Momentous rulings that can cause hardship to large multinational corporations are more the exception than the rule. There is therefore a danger of passing from a democracy supervised by constitutional judges[65] to a civil society of legal corporations that is in fact a litigation society, in which the interests of the most powerful, and the most reckless strategies always come out on top. Such a society would be bereft of the counterweight which, to safeguard the coherence of a highly complex legal system, erects protective barriers against "the grand simplifications of politics", and it would also lack counterweights against the new, transnationally organized forms of large-scale crime.

In the light of these developments, the critique of judicial expertocracy runs the risk of being aimed against the wrong target. If anything, it is obvious why judges are facing the offensive firepower of converging forces: they are seen as the custodians not only of a commutative justice that aims to abate the inequalities of globalization[66] and a distributive justice that aims to ease the straining of a society characterized by competition and conflicts of private interests, but also of a retributive justice and, as such, they are malevolently seen as an oligarchy of avengers. In particular, they appear on the one hand as the guarantors of the

liberal-social-democratic compromise that underlies the contemporary rule of law – as well as civil, political, and social rights – while on the other the champions of a check for legality (and public morality) that clashes with the tendency, held by many to be physiological, towards the corruption inherent in the dynamics of globalized markets, working under extremely heterogeneous cultural, social, and political conditions. And yet the worldwide civil society that is emerging with great difficulty and conflict, has need for, not so much of the national civil societies Hegel looked to in his classical synthesis, but of an administration of justice and a class of competent, determined, and impartial jurists.

NOTES

1. K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte*, Tübingen: Mohr Siebeck, 1997, p. 527. In this work, the author performs a useful exercise in analysing and classifying legal rulings (from the principle of proportionality to the principle of publicity and so on for a total of no fewer than 142 items), which have been set (in some way) in relation to the concept of rule of law. Cf. E. Schmidt-Assmann, "Der Rechtsstaat", in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts*, Heidelberg: Müller, 1995, vol. I, pp. 987–1043.
2. See Ph. Kunig, *Das Rechtsstaatsprinzip*, Tübingen: Mohr Siebeck, 1986. In the literature of the second half of the twentieth century interest in the rule of law has been replaced by the doctrine of human rights, see again K. Sobota, op. cit., pp. 8–9. This is well documented in Italian literature: the latest example is the debate on fundamental rights initiated by Luigi Ferrajoli in the journal *Teoria politica* (1998–2000). On fundamental rights, see also P. Häberle, *Le libertà fondamentali nello Stato costituzionale*, Roma: Nis, 1993 (part tr. of *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, Heidelberg: Müller, 1983).
3. Cf. E.-W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", in id. *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt a. M: Suhrkamp, 1976, pp. 65–92; M. Tohidipur (ed.), *Der bürgerliche Rechtsstaat*, Frankfurt a.M,: Suhrkamp, 1976; M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. II, *Staatsrechtslehre und Verwaltungswissenschaft 1800–1914*, München: Beck, 1992. For French literature see M.J. Redor, *De l'Etat legal à l'Etat de droit. L'evolution des conceptions de la doctrine publiciste française 1879–1914*, Paris: Economica, 1991.
4. Cf. N. Bobbio, "Governo delle leggi e governo degli uomini", in *Il futuro della democrazia*, Torino: Einaudi, 1991, pp. 175 ff.; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari: Laterza, 1989, pp. 895 ff. For two classic analyses see F. Neumann, *Die Herrschaft des Gesetzes*, Frankfurt a. M.: Suhrkamp, 1980; M. Villey, *La formation de la pensée juridique moderne*, Paris: Montchrestien 1975.
5. Cf. P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna: il Mulino, 2000, p. 12.
6. See C.H. McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca (NY): Cornell University Press, 1947; N. Matteucci, *Lo Stato moderno. Lessico e percorsi*, Bologna:

il Mulino, 1993. For a recent synthesis M. Fioravanti, *Costituzione*, Bologna: il Mulino, 1999; see also id. "Costituzione e Stato di diritto", in *La scienza del diritto pubblico. Dottrine dello Stato e della costituzione tra Otto e Novecento*, Milano: Giuffrè, 2001, p. 577.

7. E. Santoro, Common law *e costituzione nell'Inghilterra moderna. Introduzione al pensiero di Albert Venn Dicey*, Torino: Giappichelli, 1999, p. 2, and the contribution by the same author in this book.
8. Cf. M. Fioravanti, "Lo Stato di diritto come forma di Stato. Notazioni preliminari sulla tradizione europeo-occidentale", in id., *La scienza del diritto pubblico*, p. 863.
9. Ibid., p. 867.
10. Cf. H. Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats", *Der Staat*, 34 (1995), pp. 132. On the polarity of natural/positive law in the theory of the rule of law see D. Klippel (ed.), *Naturrecht im 19. Jahrhundert. Kontinuität-Inhalt-Funktion-Wirkung*, Goldbach: Keip, 1997.
11. H. Hofmann, *Das Recht des Rechts, das Recht der Herrschaft und die Einheit der Verfassung*, Berlin: Duncker & Humblot, 1998, p. 40.
12. I here refer to the literature discussed in my "Legalità (principio di)", in *Enciclopedia delle scienze sociali*, Roma: Istituto dell'Enciclopedia Italiana, 1996, vol. V, pp. 216–25 and to R. Guastini, "Legalità (principio di)", e "Legge (riserva di)", in *Digesto delle discipline pubblicistiche*, vol. IX, Torino: Utet, 1994, pp. 84–97 and 163–73.
13. K. Sobota, op. cit., p. 527.
14. See: K. Sobota, op. cit. (particularly the whole second part of the volume); R. Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*, Frankfurt a.M.: Klostermann, 1986.
15. Cf. M. Fioravanti, "Costituzione e Stato di diritto", p. 590.
16. Cf. C. Schmitt, *Legalität und Legitimität*, München-Leipzig: Duncker & Humblot, 1932, It. tr. "Legalità e legittimità", in *Le categorie del 'politico'*, Bologna: il Mulino, 1972, pp. 213, 215 ff.
17. Ibid., pp. 211–12. Along these lines E. Forsthoff, *Rechtsstaat im Wandel*, München: Beck, 1976; E.-W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", passim.
18. For a critical reconstruction see L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, Milano: Anabasi, 1995.
19. Cf. N. Luhmann, *Politische Planung*, Opladen: Westdeutscher Verlag, 1971, p. 49.
20. See L. Ferrajoli, "Garanzia", *Parolechiave*, 19 (1999), p. 20.
21. Cf. E.-W. Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt a.M: Suhrkamp, 1991, p. 190.
22. Cf. N. Matteucci, *Lo Stato moderno*, p. 79: "the post-modern state can be described and synthesized as the decline of sovereignty or, more appropriately, sovereign power".
23. The most radical diagnostics and criticism of the expansion of the political power of the judiciary was produced by Carl Schmitt; see C. Schmitt, *Der Hüter der Verfassung* [1929], Berlin: Dunker & Humblot, 1969; id., *Verfassungslehre*, München/Leipzig: Duncker & Humblot, 1928.
24. See G. Bongiovanni, *Reine Rechtslehre e dottrina giuridica dello Stato. Hans Kelsen e la costituzione austriaca del 1920*, Milano: Giuffrè, 1998.

25. See L. Lombardi, *Saggio sul diritto giurisprudenziale*, Milano: Giuffrè, 1967; M. Cappelletti, *Giudici legislatori?*, Milano: Giuffrè, 1984; id., *Les pouvoirs des juges*, Paris-Aix: Economica, 1990; R. Wassermann, *Die richterliche Gewalt. Macht und Verantwortung des Richters in der modernen Gesellschaft*, Heidelberg: Schneider, 1985; G. Orrù, "Giudici sovrani?" in M. Basciu (ed.), *Crisi e metamorfosi della sovranità*, Milano: Giuffrè, 1996.
26. This, as is known, is the thesis of H. Kelsen, propounded in the course of his controversy with Carl Schmitt and the traditional *Staatslehre*.
27. Cf. D. Zolo, "Il globalismo giudiziario di Hans Kelsen", in id., *I signori della pace. Una critica del globalismo giuridico*, Roma: Carocci, 1988, pp. 21–48; id., *Invoking Humanity. War, Law and Global Order*, London/New York: Continuum International, 2002, pp. 99 ff. For an overall account see M.L. Volcansek (ed.), *Law Above Nations. Supranational Courts and the Legalization of Politics*, Graimesville: University Press of Florida, 1997.
28. For significant precedents cf. A. Cassese, *Violenza e diritto nell'era nucleare*, Roma-Bari: Laterza, 1986, pp. 151 ff. On the issues of international criminal justice see G. Vassalli, *La giustizia internazionale penale. Studi*, Milano: Giuffrè, 1995; F. Lattanzi and E. Sciso (eds), *Dai Tribunali penali internazionali "ad hoc" ad una Corte permanente*, Napoli: Editoriale Scientifica, 1995; S. Clark and M. Sann (eds), *The Prosecutions of International Crimes*, New Brunswick: Transaction Publishers, 1996; O. Höffe, *Gibt es ein interkulturelle Strafrecht? Ein philosophischer Versuch*, Frankfurt a.M: Suhrkamp, 1999.
29. See C.N. Tate and E.T. Vallinder (eds), *The Global Expansion of Judicial Power*, New York: New York University Press, 1995; see also "The judicialisation of politics: a world-wide phenomenon", *International Political Science Review*, 15 (1994), 2; A. O'Neill, *The Government of Judges: The Impact of the European Court of Justice on the Constitutional Order of the United Kingdom*, Firenze: European University Institute Press, 1993; J. Weiler, "The quiet revolution: the European Court of Justice and its interlocutors", *Comparative Political Studies*, 26 (1994), pp. 510–53.
30. Cf. L.B. Boudin, "Government by judiciary", *Political Science Quarterly*, 26 (1911), pp. 238–70 and the literature on oligarchy and bureaucracy of the judiciary including books such as G.E. Roe, *Our Judicial Oligarchy* (1912); E. Fuchs, *Schreibjustiz und Richterkönigtum* (1907); E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (1921). For a history of the "social litigation system" see E.A. Purcell, jr., *Litigation and Inequality. Federal Diversity Jurisdiction in Industrial America, 1870–1958*, New York/Oxford: Oxford University Press, 1992.
31. For bibliographical information see: E. Bruti Liberati, "Potere e giustizia", in E. Bruti Liberati, A. Ceretti and A. Giasanti (eds), *Governo dei giudici. La magistratura tra diritto e politica*, Milano: Feltrinelli, 1996, pp. 190 ff.; see also L.M. Friedman, *Total Justice*, New York: Russel Sage, 1994; A. Garapon, *Le gardien des promesses. Justice et démocratie*, Paris: Jacob, 1996.
32. See K. von Beyme, *Die politische Klasse im Parteienstaat*, Frankfurt a.M.: Suhrkamp, 1993.
33. Cf. C. Guarnieri and P. Pederzoli, *La democrazia giudiziaria*, Bologna: il Mulino, 1997, p. 9, with reference to R.C. Cramton, "Judicial lawmaking and administration in the Leviathan state", *Public Administration Review*, 36 (1976), pp. 551–5. On the discretionary power of the judiciary see A. Barak, *Judicial Discretion*, New Haven: Yale University Press, 1989.

34. Cf. C.N. Tate, "Why the expansion of judicial power", in C.N. Tate and E.T. Vallinder (eds), *The Global Expansion of Judicial Power*, pp. 28 ff. On Italy cf. S. Righettini, "La politicizzazione di un potere neutrale. Magistratura e crisi italiana", *Rivista italiana di scienza politica*, 25 (1995), pp. 227–65; S. Rodotà, "Magistratura e politica in Italia", in E. Bruti Liberati, A. Ceretti and A. Giasanti (eds), *Governo dei giudici*, pp. 17–30; G. Gargani and C. Panella, *In nome dei pubblici ministeri. Dalla Costituente a Tangentopoli: storia di leggi sbagliate*, Milano: Mondadori, 1998. For the German debate see Ch. Koller, *Die Staatsanwaltschaft. Organ der Judikative oder Exekutivbehörde? Die Stellung der Anklagebehörde und die Gewaltenteilung des Grundgesetzes*, Frankfurt a.M.: Lang, 1997.
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62. See S. Strange, *Mad Money: When Markets Outgrow Governments*, Ann Arbor: University of Michigan Press, 1998.
63. See F.A. von Hayek, *Law, Legislation and Liberty*, London: Routledge, pp. 1973–9. Francesco Viola underlines that according to Hayek the function of the judge is not to recognize rights but to protect expectations; cf. F. Viola, *Autorità e ordine del diritto*, Torino: Giappichelli, 1987, p. 173.
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65. "Supervised" in the sense the concept is used by H. Willke in his *Supervision des Staates*, Frankfurt a.M.: Suhrkamp, 1997. By the same author see *Atopia. Studien zur atopischen Gesellschaft*, Frankfurt a.M.: Suhrkamp, 2001.
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