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ARTICLE

Militant Rule of Law and Not-so-Bad Law

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Abstract

The article provides intellectual arguments and tools from legal dogmatics that can help to counter the rule of law backlash. It argues that resilience can be boosted by a systemic militant rule of law approach. When it comes to restoring the rule of law, legal theory turns to the Radbruch formula (supra-statutory law). This approach remains contested by lawyers who are convinced – following the tradition of positivist legal theory – that invoking this formula is unacceptable because it violates a fundamental requirement of the rule of law, namely that of legality. Irrespective of the value of this concern, Radbruch's formula is not applicable to the current demise of the rule of law, as the law resulting from cheating and abuse in illiberal regimes does not result in evil law (though it may facilitate such developments). Instead of evil law, we face not-so-bad law. Legal imperfections exist in every legal system, and militant rule of law necessitates the systemic revision of these shortcomings in order to preempt the abuses of an anti-formalistic populist regime. In illiberal regimes, the self-corrective mechanisms of the rule of law are gradually eliminated, but the name of the game remains the rule of law. It means that judges still have (some) power to counter the backlash using extant interpretive techniques (for a while). This article will begin by introducing the concept of not-so-bad (NSB) law as an imperfection of the rule of law. In Part Two, the validity of NSB laws is discussed by relying on the source theory. It argues that even if validity is a matter of conformity to the source, the source can be understood to contain a legal merit component as determined by the rule of law, and falling short on this legal merit component can constitute a ground for declaring the norm's invalid. Part Three describes the abuses of the rule of law in illiberal democracies and describes how the NSB law of illiberal regimes does not satisfy the validity requirements of legal positivism. Part Four discusses the opportunities open to judges for resisting or undoing NSB law using existing techniques of legal interpretation and without violating rule of law principles.

Keywords Rule of law · Democratic backlash · Evil law · Militancy

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1 Introduction

Today, in Europe and elsewhere, democracies struggle with their deficiencies. The political answers to the various backlashes to democracy are deficient too. Political problems are neutralized by construing them as rule of law problems, but this is also wrong: law cannot solve socio-political problems on its own. Notwithstanding this misconstruction, there are indeed serious problems at the legal level. The demise of liberal democracy and its "natural" replacement with a populist/sovereigntist democracy goes hand-in-hand with an erosion of the rule of law. In such circumstances, there is an undeniable need to boost the resilience of the legal community in the face of adversity. This article places democracy's current malaise in a theoretical context and proposes a doctrinal response to the imperfections that the resultant theoretical model identifies. These doctrinal considerations fit into a program for the militant protection and restoration of the rule of law.

When the rule of law faces its demise, the populist ruler relies on a legal order that is superficially in compliance with the rule of law, or at least rule by law (legality). In order to counter the abuse of legality and to offer an encouraging perspective to lawyers who are professionally inclined towards legal formalism, any countermeasures must be justified in the language of the rule of law and accepted legal practices. A strategy of militant rule of law is advocated in this paper. In the closed legal world of positivism where only legal validity matters, only legal positivist arguments have a chance to be considered by the servants of the law.

Terminological explanations are needed at this point. Militant rule of law refers to the aggressive use of recognized rule of law principles and exceptions. Militant rule of law responds to the inherent weaknesses of the rule of law, which continue to enable the abuse of law. Without the 'militant' aspect, the rule of law is susceptible to being undermined by a simplistic concept of legal validity. This militancy can apply to both preventive and restorative situations. Preventive militant rule of law presupposes a systematic revision of the rule of law's existing institutional and doctrinal arrangements in order to make institutions resilient where the democratic legislative process and judicial inertia (or exceptionally, judicial activism) have undermined the rule of law. Restorative rule of law intends to overcome the paralysis created by the legality of inherited legal structures which bolster the survival of abusive legal and political structures. This article will deal primarily with restorative rule of law but the techniques discussed are relevant to other situations as well.

Militant rule of law is to some extent comparable to militant democracy. The difference is that militant democracy limits certain fundamental rights in order to preserve democracy against forces that intend to use democracy to take power only to then destroy it permanently, while militant rule of law merely stands for a vigorous application of extant rule of law precepts and standards. Ordinary precepts of the rule of law can only be suspended where there are already recognized exceptions in rule of law doctrine, and any limited and judicially-controlled departure from the rule of law's accepted precepts and standards must demonstrably serve a rule of law principle or value.

Militant rule of law does not need to go beyond a traditional understanding of the rule of law. Rule of law need not be some highbrow theory of extralegal values or some matter of "merit of the legal source" (see below) that brings abstract values and extralegal morality into the legal field. The rule of law is not a value because of the substantive content (merit) of the law. Rather, it has its merit because it serves "law's internal standards of justice."[1] The rule of law refers to those traditional practices of ordinary legal wisdom, prudential and structural standards, and the maxims that are accepted and shared in the legal community, which originate from the common ("natural") reason of the Romans' *iuris prudens*, whose maxims have stood the test of time over many centuries. These maxims, precepts, standards, and institutional arrangements represent a common tradition of the rule of law. These are not abstractions produced by some random scholar or international checklist manufacturer but are instead aspects of a long-established legal tradition that are constantly recognized and reaffirmed in the course of jurisprudential activities. Today, rule of law considerations are recognized by both the positive and the constitutional law of democracies – and of hypocritical non-democracies – and serve as the uncontested content of accepted legal culture.[2]

The rule of law cherishes legal certainty, but this is not a suicide pact for the rule of law's self-destruction, just as democracy is not a system which requires the passive acceptance of its own destruction enabled by its own rules. The rule of law is not inflexible, and it contains many exceptions. Some of these exceptions are very dangerous for the rule of law, for example, emergency powers and other situations where delegated legislation is permitted. But these are not the kinds of exceptions that I have in mind when suggesting a militant rule of law. Many exceptions to the maxims of the rule of law actually help to maintain justice and fairness in the legal system. Consider the sacrosanct principle of non-retroactivity in criminal law; in special situations, retrospective extensions of statutes of limitation are permitted, and even the sacred *nullum crimen* maxim may be circumvented.

Beyond the desire to offer an intellectual toolkit for legal resilience, the following remarks are intended as a criticism of the intellectual attitude of some self-styled formalist and/or positivist legal scholars who advocate a command theory which supports the total acceptance of anything the authorities command (the "law is law" attitude). These apostles of appeasement purport to preach from the high pedestals of scholarly objectivity and neutrality. According to their sermons, laws are to be accepted once properly adopted.

This article will deal first with the concept of not-so-bad (NSB) law as an imperfection of the rule of law. In Part Two, the validity of NSB laws is discussed by relying on the source theory. It argues that even if validity is a matter of conformity to the source, the source can be understood to contain a legal merit component as determined by the rule of law, and falling short on this legal merit component can constitute a ground for declaring the norm's invalid. Part Three describes the

[1] Dyzenhaus 2022, p. 20.

[2] Uncontested content does not here imply the absence of fundamental practical disagreements as regards the scope of a maxim's applicability, etc.

abuses of the rule of law in illiberal democracies and describes how the NSB law of illiberal regimes does not satisfy the validity requirements of legal positivism. Part Four discusses the opportunities open to judges for resisting or undoing NSB law using existing techniques of legal interpretation and without violating rule of law principles.

I will argue that according to a mainstream understanding of the rule of law, most of the formally valid enactments of the NSB system can be interpreted in a way that limit arbitrariness intended by the legislator. To the extent that a constitutional order is based on the rule of law, laws of the NSB system which fall short of rule of law standards can be viewed as void. Such conclusions depend on the way in which the rule of law is defined. A conservative, traditional concept of the rule of law, if consistently applied, is sufficient for the invalidation of NSB law.

2 NSB Law and Evil Law

The abstractions of legal theory often imagine a dichotomy between an ideal legal order and evil law. Evil law is a concept with a long history in natural law, tyrannicide, and resistance literature. The concept reemerged in the legal mainstream in the aftermath of WWII in the debates concerning how the remnants of Nazi law ought to be dealt with. The concept was then directed against the positivist conception of the law attributed to the prevailing German legal ethos that was taken advantage of by the Nazi usurpers. Radically evil legal systems are often considered irrelevant for legal theory and for "normal" (actual) legal systems, a lack of interest perhaps best exemplified by Dworkin, who was of the view that "the puzzle of evil law" is of "almost no practical importance" because judges will disregard it.[3] To name a representative of the "opposite camp," Joseph Raz has no problem with the legal validity of NSB law (and, as far as law goes, not even with evil law); "[s]ince the claim [of laws having authority] is made by legal officials wherever a legal system is in force, the possibility that it is normally insincere or based on a conceptual mistake is ruled out.[4] (For Raz, resistance remains a possibility, even *the* appropriate action, but only on moral grounds.)

[3] Dworkin 2011, p. 410 deals with wicked law – which he understands as one species of evil law – suggesting that a moral judge adjudicating a dispute involving this type of law should either resign or lie about what the law is. As a practical matter, this is indeed a common strategy, though it is less often used to mitigate wicked law than it is to prop up wicked regimes, resulting in another violation of the rule of law and thereby further worsening the law's wickedness.

Hart was also quite concerned with evil law, and he thought that some laws are so evil that they can or must be disregarded, though he did not believe that the moral imperative to do so led to the evil law's invalidity (Hart 1983). Hart, in his criticism of Radbruch, advocated departure from the ordinary standards of the rule of law proposing retroactive legislation. Hart, 1958, p. 619.

[4] Raz 1995, p. 217 admits that the decision of an arbitrator even if final can be "challenged and justifiably disobeyed" if said arbitrator was bribed. In an illiberal democracy, it is the legislator who is 'self-bribing' by creating laws to benefit themselves for the sake of power aggrandizement, non-accountability, and financial advantage.

For a positivist treatment of evil and wicked law see, however, Kramer 2003; Dyzenhaus 2022

The empirical evidence of what NSB law regimes lead to does not support these flippant attitudes. Highbrow legal theory treats all legal orders as equal, though some as more equal than others due to their being closer to the ideal. This is so because this kind of theory tries to understand first and foremost what makes the legal order legal. At least according to Raz, who is quite interested in rule of law malfunctions,[5] evil law has no relation to the question of whether there is a presence or a lack of the rule of law. The rule of law is a virtue of the law, but it can serve bad purposes: the fact that "a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives." Fuller conceded (to Dworkin) that evil can be achieved through legality. Kelsen was of a similar view a few decades earlier.[6] Certainly, this scenario is plausible at the theoretical level, but for some reason, the evil legal regimes of modernity that have actually existed have always been persistent violators of the rule of law, and many of the evil things such regimes did were intimately connected with the deterioration of their legal orders. In other words, the legal problem is not only that the legal order and rule of law are abused, but rather, that evil regimes follow a kind of (il)legal logic that is fundamentally incompatible with the rule of law. Class justice in Stalin's regime was abhorrent as social justice, but it also required procedural lawlessness. The rule of law is violated when certain atrocities must be hidden (see the Final Solution in Hungary, which was executed without any clear rules for the deportations).[7] Congruence is also violated when the secret plans of a regime cannot be declared due to the fact they are too shocking; respect for non-retroactivity was not a declared hallmark of Stalin's regime of disappearing Commissars. The morality of a Fullerian (minimalist) rule of law is incompatible with the immorality of evil regimes.

Even if the rule of law is compatible with evil law at the level of theoretical speculation, this does not settle our practical problem with regards to the relationship between NSB law and the rule of law. NSB legal systems do not have to be rule of law perfectionists, and a degree of imperfection in the rule of law does not transform NSB legal orders into evil regimes. Different legal orders differ in their faithfulness to the rule of law,[8] or even in the definition of the rule of law accepted in their legal culture. The differences result from different pathways of historical development. Legal order enables the ruler to rule thanks to law's prospectivity and generality. These are features of the rule of law too. At this level the ruled will know with certainty what to expect: Not much good, but that they will know. They will know the reasons and conditions and modalities of the use of the knout. They are free to do what they are expected to do. Of course, this has a certain value, as this kind of legal certainty enables the citizen to plan and be free within the given shackles. This is certainly better than the lack of legal order with legal formalities, described in Kafka's *The Trial* and lived to an extent in the halcyon days of Stalin's rule. But

[5] Raz 1979, p. 222.

[6] Kelsen 1925, p. 335.

[7] The applicable circulars and decrees were merely orders to the administration directing them to assemble and upload Jews onto trains and nothing more.

[8] "Conformity to the rule of law is a matter of degree." Raz 1979, p. 222.

in a legal order where the rule of law is embedded, it will be the ruler whose abuse will be tempered. "The law inevitably creates a great danger of arbitrary power-the rule of law is designed to minimize the danger created by the law itself."[9] Depending of the substance of the law (to what extent it serves the public good) rule of law embedded legal order (the actual legal system) can be bad enough but that depends also on the rule of law quality of the law. The ruler's opportunities of abuse will be restricted where means rea is dictated as part of the rule of law precepts (stemming from a broader maxim of reasonableness of the law).The legal order of illiberal democracies, primarily in order to disregard the public interest of all, does not properly inculcate the rule of law precepts and it is for this reason that the law of illiberal regimes is not-so-bad as evil law, but it gets closer and closer to it.

The Manichean opposition of evil law versus normal, ideal, etc. law does not provide guidance when it comes to actual legal systems which are imperfect, but not evil. In real life, we have varying degrees of NSB law.[10] NSB law is the normal state of affairs, given that legal systems – to different degrees – operate in violation of rule of law principles, standards, etc. Contemporary rule of law practices also often fails to counter NSB legal systems, particularly those which rely on systemic cheating, which hide abuse behind formalities, or which use the law and isolated precepts of the rule of law in order to destroy it.

From the prevailing perspective in positivist legal theory, legal imperfections are irrelevant. While there is legitimate disagreement with regards to what kind of order and what kind of normativity qualifies as a legal order,[11] all properly created law is law. Once properly enacted, it is valid. The opposite theory is that validity depends on some kind of value correspondence or merit. The rule of law (in its thin form, which is limited to structurally relevant elements of the legal order, including procedures triggered by the structure) is a form with merit. The form that observes the rule of law provides merit. Certain rule of law and positive constitutional law theories and practices claim that without the merit of the rule of law, the law is void and/or can be voided.

Having eliminated the theoretical relevance of evil law by belittling it due to wishful thinking, Dworkin and legal theory in general goes on to describe an ideal liberal legal order of honest, public interest-driven legislators (or of the noble people, who act as sovereign in formulating the general will) and of judges who are at least professional, fair, and perhaps even rights-friendly. Consequently, their responses to actual imperfections in legal systems are underdeveloped, and their theoretical answers to the shortcomings and contradictions in the rule of law are uncertain. For these reasons, legal theorists instead find refuge in natural law, as happened with Radbruch.

[9] Raz 1979 p. 224.

[10] A special category is a wicked legal system, see Dyzenhaus 2010

[11] According to a minimalist approach, the fact that something is both 'legal' and an 'order' (i.e. a legal order) implies that laws are general norms and therefore that like cases are treated alike (Hart 1983, 49 at 81).

Modern legal systems differ in their rule of law performance. At the level of abstraction, one can say that the law and the rule of law are different, but modern legal systems incorporatefundamental elements of the rule of law and as such, the two are often indistinguishable in practice.[12] In constitutional states, it is prescribed that the legal order must be a rule of law-based order, at least insofar as the legal quality of the laws and their application is concerned. At the level of abstraction, it is legitimate to argue that a legal order remains a legal order even if the authorities enact retroactive criminal law applicable to a specific person or persons, although at a certain point the legitimate *social* question arises: is it still appropriate to classify such commands as part of a *legal* order? But in modern legal systems, and in constitutional states in particular, some structural elements of the law (generality, non-retroactivity, etc.) are considered socially as well as legally inherent features of the legal order, and this consideration is itself considered part of the legal order which leads to practical consequences as regards the applicability of norms.

The theory deals with ideal situations and perfect legal actors. If perfection is assumed, abstraction results in a neutrality without direction for action when imperfection rears its ugly head. Remedial action – the appropriate response to imperfection – is theoretically paralyzed though legal doctrine, responding to practical needs, has techniques to respond to illegality.[13]

Most known legal systems are neither evil nor nearly as perfect as legal philosophies would have us believe. Many extant systems are so imperfect that they lack the self-correcting capabilities offered by the rule of law and its institutions.[14] These legal systems, while claiming to operate within the expectations of an ordinary rule of law system, are bad enough in the sense that I shall go on to explain, but are not evil.[15] Given the ideal-oriented nature of legal theory – exemplified by the likes of Dworkin – there is little interest in a theory of NSB law, and therefore little interest in a rule of law and legal dogmatics-based strategy to counter NSB law. This perspective does not allow for structurally-imperfect legal orders that actually exist – which are, of course, far from this ideal – to be properly addressed. Legal orders in the real world are approximations of what is justified in legal philosophies which grant equal validity to all systems that guarantee the observance of the legal source

[12] This is not to say that the abstractions of legal theory are not legitimate. A lack of theoretical academic interest is not to be blamed for the lack of comprehensive, theory-based studies of different legal orders' rule of law quality. The practical problem with NSB law is that its crucial players rely on a distorted version of the abstract legal positivist theory in order to explain away that which is wrong (bad) with the system they operate as inevitably legal (valid).

[13] On the necessary imperfection of the rule of law see Endicott 2000.

[14] Legal imperfection as understood here refers to structural shortcomings and not to the negative consequences of law, which may indeed be negative regardless of whether the rule of law is observed. The latter concern is expressed in Raz 1995, p. 373: "Reliance on common or judicial practices in [pluralistic] societies is likely to lead to evil and oppression." The present article specifically concerns imperfections in the rule of law itself. These imperfections not only undermine the legal system and the efficiency and legitimacy of the legal order, but per se have negative consequences and facilitate evil and oppression.

[15] Order provided by law versus anarchy or a lack of order is a different dichotomy. The latter may result from the absence of law (as a set of imposed rules) or from legally-enhanced disorder; it could result from legal imperfection, or from a deliberate and legalized state-imposed state of anarchy.

requirement. This results in a theory which gives equal respect to all legal norms (i.e. both valid rules and commands), including those which undermine the rule of law and those which lack law's internal morality. While legal systems differ in the degree to which they enshrine the rule of law requirement, the law of robust democratic countries – even if imperfect – is capable of sustaining law's self-corrective capacity. In other systems, however, although most of the rule of law's formal requirements are maintained, these corrective mechanisms have been replaced with mechanisms that continually and systematically reproduce legal imperfections.

Evil law is not simply the opposite of a theoretical ideal of the law (the ideal law). It denies law not in terms of its legal quality (the capacity to establish a normative order). Evil legal orders are evil not for lack of legal quality but because of their deliberately evil, inhuman consequences.[16] () At the same time some of the assumptions of the evil order (e.g. the radical denial of the human capacity of certain legal subjects) are incompatible with the generality requirement of the rule of law. Some forms of evil law cannot operate within the rule of law framework. The Führer's capricious orders, which were quite often speculative formulations by his subordinates based on his offhand comments – including even many of the so-called orders pertaining to the atrocities of the Final Solution – hardly amounted to a coherent legal order and thus generally lacked any legal quality. The evil law versus law opposition is theoretically problematic because evil law is not only the opposite of a fair legal system where the rule of law is observed in its ideal form, but also a denial of a fundamental value element of modern law (i.e. the foreseeability of general commands by and amongst equal legal subjects), and thus it is arguable that evil law is only law in form (a set of commands). Social steering and coordination based exclusively on commands hardly ever amounts to an actual legal system. Notwithstanding doubts about the legal qualities of evil law, Radbruch considered it law, albeit invalid law. After all, the instances of criminal law being formulated or applied in a manner that Radbruch could not stomach were the result of a well-established (cruel) tradition of criminal law applied in a pedantic and rather stupid (but legally correct) way. The problem was that the applicable (valid) positive law served an evil regime *in the sense that it served its inhuman goals directly.* This is not the problem with ordinary law, despite its varying degrees of imperfection; badness (structural and consequential) does not intend to perpetuate cruelty-based arbitrary despotism (though, as Kelsen noted, it can serve despotism). While the assumption in rule-governed legal systems is that their legal quality is to be determined by legal criteria, extralegal considerations cannot be left out of the equation when it comes to determining how (not too) bad a legal system is.

Once we move out of the dichotomy of evil law versus an abstract ideal legal system, we are confronted with the various levels of imperfection that exist in actual legal orders. In the classification (evaluation) of their "badness", both the

[16] Stalinist 'law' is a borderline case: it is questionable to what extent the fig-leaf of published norms amounted to a normative order. Most aspects of life from being arrested, tortured, and executed to receiving a room in a flat or losing a job or even food were arbitrary, and the secret decrees which served as the basis for such decisions were simply authorizations to act arbitrarily.

quality of the rule of law expectations and their observance ought to be considered. Once again, NSB law here refers to the practical relationship of the actual legal orderwith the rule of law, admitting that the demands of the rule of law vary and can be more or less stringent and imperfect, and additionally they may vary according to divergent historical developments and legal traditions. Rule of law is used here as the standard for determining how bad a legal system is. Socialist legality did not have serious rule of law expectations, and even the legality aspect was itself conditional due to the enormous discretionary power of the authorities. On the other hand, in the wicked legal system of apartheid South Africa, the rule of law was observed at the level of the judiciary, while legislation – despite observing the legal formalities of law-making – introduced a system that did not respect one of the fundamentals of the rule of law,[17] namely that all shall be equal before the law. Furthermore, apartheid South African legislation created large holes in the common law by granting the authorities unchecked powers for detentions without trial which eventually resulted in abuses such as torture. Rule of law-based expectations are fundamentally compromised where (a) legality is the only or decisive concern and law's inner morality is not, (b) judicial review is available only exceptionally, or (c) non-legal considerations prevail over the rule of law. When it comes to the observance of accepted rule of law standards and principles, a certain level of discrepancy is unavoidable. Imperfection is inherent in legal regulation, and consequently in the rule of law itself. While one reason for this is legal vagueness, infidelity is also part of the story. Both result in unforeseeable – and at least in some sense arbitrary – legal consequences. Of course, the less the rule of law is observed and the more law offers discretionary powers which allow despotism, the less acceptable it is regardless of whether formalities are observed. One extreme but common form a bad legal system may take is the dual legal system.[18] Dual systems are hardly rule of law regimes, notwithstanding partial legality; while such systems maintain the rule of law in certain spheres, it is absent or of very limited use in certain enclaves, wherein unchecked discretion prevails. Such enclaves are legally accepted in matters of national security and immigration law, international relations, and may also be created in response to various emergencies.[19] Further, it is a matter of tradition and culture to what extent certain autonomous areas of social life (e.g. churches)

[17] Dyzenhaus 2010

[18] The duality of law originates in the Nazi state's modus operandi (see Fraenkel 2017); it is fair to designate the whole Nazi legal system as evil or at least corrupted, even if only a limited part of it was geared towards the regime's genocidal or evil activities. In Nazi Germany, repressive criminal law was to some extent formalized, although the formal system was intertwined with anti-formalistic elements (i.e. *gesundes Volksempfinden*). While this concept of a "healthy national sentiment" played a central role in SS justice, it originates in Savigny and was applied throughout the Weimar period in the criminalization of homosexuality.

[19] Historically the legal control over emergency powers – which in much of Europe originate in powers that correspond with inherited monarchical privilege – changes over time. For example, wiretapping was unregulated in the UK (or France) before *Malone*, but on the other hand, increasing secret surveillance of citizens and their communications by foreign intelligence agencies has once again rendered wiretapping a de facto no-go zone for legal supervision.

and professional activities (e.g. health care, social media) are subject to rule of law-based legal regulation. Absence of legal control is the price to be paid for constitutionally granted autonomy.

What qualitative differences are there between the various levels of legal imperfection? One relevant difference is the cause of the imperfection. Secondly, the degree to which the imperfection is structural makes a fundamental difference. Imperfection should not be called structural just because it is widespread and repeated, but rather because the absence of any serious corrective mechanism to correct incidental imperfections makes such imperfections the modus operandi of the legal system. In more vicious regimes, structural imperfections are a consequence of deliberate design. A second consideration in the determination of structural imperfection is to what extent the rule of law is officially accepted, and to what extent it is instrumentalized or disregarded by cheating. Hypocrisy makes imperfect law less bad, while an anti-elitist disdain of the law – liberated of hypocritical restraint – makes things even worse.

The evil law versus law dichotomy is not unknown in the history of legal ideas; as a theoretical matter, it was discussed in medieval political theory. According to some theories, secular law can be evil when it contradicts divine law, and in such cases there is a duty to resist the monarch's invalid command and rule, including by going as far as performing a justified tyrannicide. But in most circumstances, natural law was ready to accept the imperfections of the secular law, although a betrayal of the English Crown's perceived duties was considered sufficient grounds for resistance and revolution by the American colonists. In the age of enlightenment, while reason was thought superior to feudal arbitrariness, the unreasonableness of the law was generally not thought to automatically result in its voidness.

In modern times, the problem of evil law emerged in the context of Nazi (and later communist and other forms of totalitarian) law. After the collapse of the Nazi regime, its legal order seemed to survive its creator, and the following question arose: what is to be done with the legal leftovers of this evil, tyrannical regime? To complicate matters, the Nazi regime continued to apply law that was enacted earlier – even if the application of such laws were somewhat distorted by the logic of the Nazi regime – though these parts of the law were generally considered legitimate. Post-war Germany needed a legal order, and it was unthinkable to set aside the legal system applied by the Nazis in its entirety, just as it was unthinkable to dismiss all the servants of the law for having served in the Nazi system. It was at this point that Germany's legal positivists – i.e. the German legal and political class – had to find a solution which accorded with their shared belief that Nazi law could not be allowed to survive. It was then that Gustav Radbruch, who represented the German legal positivist tradition in his academic writing, came to the fore with a series of short newspaper articles which discussed in practical terms four rather peculiar criminal cases concerning the application of Nazi criminal law (i.e. law which was enacted and interpreted by the Nazi regime). Reflecting upon the atrocities of Nazi Germany, he concluded that some Nazi laws were so unjust (i. e. evil) that they must be disregarded entirely. They can and must be disregarded because they are void for being contrary to the superior law of justice (*ius*). According to the "Radbruch's formula" (*Radbruch'sche Formel*), positive law must be considered contrary to justice, and

therefore void, where the contradiction between statute law and justice is so intolerable that the former must give way to the latter.[20]

While Radbruch did not refer to natural law, the opposition he sets up between statute and law is comparable to the traditional *ius-lex* dichotomy. A residual supreme law that exists outside positive law rules supreme where evil law would otherwise apply. Radbruch's position was accepted in positive German constitutional law; nebulous provision of the Basic Law requires the authorities to apply both *Gesetz und Recht*, and the Federal Constitutional Court found that the Radbruch formula was applicable both within and without the criminal law.[21] Needless to say, the German approach is not universally accepted, and in some constitutional systems, not even wicked law can be deprived of validity. The Hungarian Constitutional Court, in a seminal case on the statute punishing communist crimes, rejected the Radbruch line of reasoning even with regards to the statute of limitation. It stated that a restoration of – or revolution in – the rule of law cannot be achieved by disregarding the rule of law, i.e. legality. Communist law that was properly enacted remains valid law and must be applied where it does not violate the new constitution. This was the same logic that precluded that Court from invoking the unconstitutional constitutional amendment doctrine, a matter of militant constitutionalism[22] at a moment when the constituent majority was radically limiting the possibilities of constitutional review. Other respected courts which uphold the rule of law have not found legality to be a principle without exceptions, and have therefore had less difficulties in their quest to hold the wrongdoers of former totalitarian regimes to account.

Be that as it may, Radbruch dealt with the evil law of an evil regime. A disregard of legal certainty is permissible for Radbruch only when the content of the law is unjust to an intolerable degree. In the Manichean division of legal systems into evil and not so bad law, legality guarantees validity irrespective of the actual violation of the rule of law.

3 Legal Validity

Different imperfections of the rule of law require different legal strategies for its correction. The demise of the rule of law can be resisted only where there is social-political readiness to stand for the democratic constitutional order, but this

[20] BVerfGE 95, 96 (1996) – Mauerschützen, para 141.

[21] After German unification, the German courts convicted some of the leaders of the former GDR for their participation in the formulation of the infamous order to shoot at people crossing the East German border without authorization, a measure which resulted in many killings. Former border guards (who were conscripts) were convicted too. The shooting of border crossers was required by East German criminal law, but the German Constitutional Court found this law to be inapplicable in light of the Radbruch formula. The case came before the ECtHR which declined to endorse this approach, instead invoking a more traditional approach and ruling that those who applied the law in force at the time of the shootings were in violation of conflicting superior (positive) norms of GDR law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 70, 74 ECHR 2001-II).

[22] Sajó 2019, pp. 187–206.

social-political willingness must be underpinned by legal techniques. Where the self-corrective mechanisms of the rule of law are still functioning, preventive repair work is appropriate. This article deals with a different situation, namely the rule of law's restoration. What should be done about the rather bad and increasingly wicked law that is emerging in populist regimes, in particular in illiberal democracies if or when the illiberal regime is eventually defeated? The legal systems of contemporary illiberal regimes combine formal (hypocritical) respect for the rule of law (where law is used to reinforce an abusive rule that drifts towards despotism) with systematic cheating with the law. In some instances, this is supplemented with emergency-based states of exception. This combination destroys law's morality.

To counter these self-destructive tendencies, a militant understanding of the rule of law is needed.

Militant rule of law, when confronted with a system of NSB law, challenges the validity of such law on positive law grounds as understood by many legal positivists: while it does not per se deny the authority of NSB law, it does not take the validity of such laws for granted. As David Dyzenhaus has convincingly argued, enacted laws that cannot be interpreted in light of fundamental principles of legality "have a dubious claim to authority. If enough dubious laws are enacted, the order begins to shift from one of legal right to one of unmediated coercive power."[23]

At this point militancy runs into positivist objections. The objections generally follow the following line of argument:

Lawyers are trained to work with positivist legal assumptions. A law that is in conformity with legality satisfies the rule of law. This attitude prevails even among lawyers and judges who oppose the illiberal regime and would like to act professionally, because all legal professionals assume that they must follow the law as printed in the official gazette. Before outlining the shortcomings and actual violations of the rule of law in illiberal democracies, it is essential to show that this practical assumption is based on a common misunderstanding of legal validity. Even if one accepts the precepts that laws cannot be disregarded for being unjust – except perhaps when it comes to evil law – and that legal validity is determined by the law itself, the determination of this validity is not limited to simple procedural compliance with the requirements of law-making. These assumptions rely on some version of the Hartian separation thesis, which states that moral considerations cannot overrule what is enacted in positive law or what has become established authoritative legal practice.[24]

The possibly strongest formulation of Hart's separation thesisreads as follows: "(LP*), In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)."[25] This

[23] Dyzenhaus 2022, p. 2–3 defines legality in a broad sense that goes beyond the observance of the letter of the law.

[24] "[T]he law ought to be such that legal decisions can be made without the exercise of moral judgment" (Waldron 1999, p. 166).

[25] Gardner 2012, p. 21. LP stands for legal positivist tradition.

position is often called the source theory. "'Source' is to be read broadly, such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based."[26] It seems to be the case that according to the *source theory*, all properly adopted law is valid and must be followed. For the servants of the law, the source theory operates as a normative theory. They claim to be bound to apply all valid law, i.e., all laws which are properly enacted.[27]

However, only a narrow and distorted understanding of Hart's thesis dictates this conclusion.

According to the separation thesis, laws are a matter of social fact (i.e., what is accepted as law) and not of moral fact (i.e., what is right or wrong). Law itself determines what is *legally* right or wrong. Whether law accepts what is deemed moral in society is irrelevant.

To a considerable extent, the source theory operates as *the* normative theory for the servants of law. They claim to be bound to apply all valid law (valid here means "properly enacted"). However, the absoluteness and rigidity of this position is mitigated by the considerable liberty these servants retain because law being a social fact means that it matters what is socially accepted as law, which is ultimately a matter of ever-changing social understandings. If the requirements of the rule of law are considered an inherent part of the law itself, this could undermine a given norm's claim to validity. This is not a matter of the merit of the source. As Gardner admits, merit of the source includes reasonableness. This is crucial, as the extreme end of NSB law – i.e. those persisting where there is legal cheating or under autocracy – often lacks reasonableness, and thus, its legal quality is open to doubt.[28]

Reason-based considerations may become accepted as a precondition for validity, though only until a designated legal authority finds that unreasonable law is nonetheless valid, at least according to "hard" positivists like Gardner. As Marmor, another positivist theoretician claims: "Legal powers are invariably constrained and there is nothing special about them being constrained by all sorts of merit based considerations. In any case, and this is why incorporation is not a problem for proponents of (LP*), when a legal power is granted, law is modified only by the actual exercise of the power."[29] Marmor (who is, like Hart, a self-proclaimed soft positivist[30]) points out that moral considerations may have a role "in determining the legal validity of norms", as long as it is the case in social fact "that people, particularly judges and other legal officials, believe them to be true and treat them as constraints on legal validity,"[31] unless this shifts to beliefs in moral truth. The quality of the source (i.e. rule of law conformity, like generality, etc.) does not amount to a belief in moral truth as considerations of legality are not external to law. As Hart has stated: "[I]

[26] Ibid. p. 20.

[27] In the Dworkinian alternative is that unjust valid law must not to be enforced, and in general, the judge will arrive at the most morally attractive interpretation.

[28] See the necessity of reasonableness review beyond fundamental rights, below.

[29] Marmor 2021, p. 485.

[30] Hart 1994, pp. 252 and 253.

[31] Marmor 2021, p. 486.

n the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles."[32] Generality and legality as "proceeding according to a [pre-existing, properly enacted] rule" also imply equal treatment and from equal treatment a legal sense of equality and justice derives.[33] Generality and equal legal treatment are requirements of the rule of law and together with other precepts, traditions of the rule of law these requirements 'penetrate' and form the legal system in NSB law. Where non-moral "merit" to be considered means the precepts and practices of the rule of law and rule of law is a social fact, the determination of the validity of the law goes beyond the observance of the rules of law-making. This satisfies the soft source theory *even where there is no specific constitutional authority requiring such constraints on legal validity.* It is sufficient for legal officials to accept the constraints of the "morality of the law" as legal sources.[34] The legitimacy of this position is hardly debatable where the legal system itself declares that it must observe the rule of law, e. g. in the constitution – and this is the case in many illiberal democracies. Where the officials authorized to declare the validity of the law according to the source theory lose their credibility, as in the case of extreme NSB law, the declaration of invalidity might be transferred to another body or different process. Here, in the absence of "some relevant agent" who would have "classified (declared, treated, invoked)"[35] the norms reasonable, a "soft legal positivist" view is appropriate. In the soft version of positivism, a lack of source-based merit (e.g. reasonableness) is enough for a norm to not qualify as law. As mentioned above, for practical purposes, it is the lack of reasonableness – an element of the rule of law – that deprives an enactment of its validity (legal character). To quote Gardner once again, the source theory "is itself normatively inert." It is only "the minor (or informational) premise in a practical syllogism", whose normative power comes from the fact that it is *accepted* as part of the rule of law. The duty to apply reasonableness originates from the requirements of the rule of law that has prescriptive power because the officials who believe that the rule of law is part of the system accept it as a relevant consideration in the determination of a norm's legal validity. The rule of law, being

[32] Hart 1958, p. 623.

[33] Cf. Hart 1961, p. 161. See also Hart 1961 p. 206 ("the germ of justice").

[34] Gardner is of the view that the rule of law is a merit issue that cannot be a matter of source. He admits that Hart was of two minds in this respect. Given that the source depends on the lawyers who apply it, and given that in contemporary NSB systems the rule of law is accepted as a requirement as regards sources, Gardner does not share this soft positivism. In his view, "a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid qua legal, than one that is prospective, admirably certain, and perfectly general." Gardner 2012, p 31. On the other hand, "Agreeing that a norm is legally valid is not incompatible with holding that it is entirely worthless and should be universally attacked, shunned, ignored, or derided." Gardner 2012, p. 32. Even if one accepts Gardner's legal positivism, there are legitimate legal considerations about the circumstances under which a valid norm can be voided, especially where the rule of law is a recognized component of the legal system. A norm can be valid with regards to its enactment, and that makes it a legal norm that ought to be treated as such, but a norm's validity does not make it immune to invalidation (voidness).

[35] Gardner 2012, p. 22.

a constitutionally recognized component of the legal system enables the review of the source's merit (within the source) in practical legal work, allowing officials to find norms that undermine the rule of law to be void. Formal legality in itself cannot thereby undo unreasonableness and therefore cannot save the enactment.

4 The Problem with Legal Cheating

The fraudulent, cheating-based NSB law of illiberal democracies cherishes legality and not only for reasons of legitimacy. "Even if a regime is wicked, it will normally have to abide by the Fullerian precepts quite perseveringly if it is to give effect to its wicked designs over the long term. It will have to induce citizens to facilitate (grudgingly or willingly) the accomplishment of its aims, and thus it will have to steer and constrain their conduct in ways that are very likely to involve compliance with Fuller's requirements."[36] There are good prudential reasons for prospective despots to respect the rule of law. Therefore it is not surprising that legal enactments are carried out through procedures determined by the constitution and law, and statutes authorizing the servants of the regime are duly enacted in parliament. Authorities cannot act without legal authorization and observe the law, *grosso modo*. Courts ensure the constitutionality of these authorizations and supervise the actions of the authorized. These courts are composed in most cases of judges who are selected by members of their profession. They act without external influence. So far, so good. Elections are held to compose the powers that be, and the government is very keen to act in accordance with public sentiment, although it tries to influence this sentiment in accordance with what it purports to be the common good. Another promising news. But the laws are written according to the material interests of a single power group and/or to serve the perpetuation of this group's power. As a system of disguised privileges, this results in a de facto violation of equality before and under the law. Those who are called to apply the law are carefully selected to be faithful to that power. The system follows the Giolitti-Putin concept of legality: to my friends everything, and the law to my enemies. Moreover, the legal systems of plebiscitarian leader democracy and most other hybrids, though governed by the principles and standards of the rule of law, tend to have a dual legal system. Parallel to the constitutional system, there is also a state of exception regime created in the name of some kind of emergency, of course in conformity with the (rather soft) formal requirements for declaring such emergencies. Even in the absence of such formal emergencies, the statutes allow government intervention in the name of protecting the national interest. All this indicates that the enactments of such illiberal regimes do not satisfy a fundamental requirement of the rule of law, namely *congruence*. According to Fuller, congruence is a special form of fidelity to law, and serves as the basis of the law's morality. The congruence requirement dictates that congruence shall exist between official action and a declared rule. In the *Rechtsstaat* tradition,

[36] Kramer 2003, p. 67.

authorities must observe the law faithfully.[37] The congruence principle is also applicable to legislation: there must be congruence between enacted legal rules and the principles of the constitution. Moreover, declared legislative purposes and real legislative intent must be congruent, and the same applies to legislative intent and the law's intended consequences.[38]

In illiberal democracies, official law observance is exemplary, and laws are followed to the letter. But the law that is followed is full of discretionary authorization, as the letter of the law gives the authorities a very wide and discretionary margin of appreciation. Of course, there is nothing abnormal here to the legalist's mind; the legalist rightly points out that discretion results from an indispensable need for flexibility. After all, the world is full of risks that are hard to evaluate and contingencies that are hard to foresee. In other instances, NSB law is very strict and predetermines specific outcomes for the benefit of certain actors, though ostensibly for the greater glory of legal certainty. This is how fraudulent law operates.

The closer one gets to the actual workings of fraudulent law, the more obvious it is that the outcomes of such laws are not intended to be impartial, and that the legal system, the laws, and their application smack of unreasonableness. Laws are formulated as neutral general rules, but they are clearly intended to help or hinder predetermined people in a manner that almost constitutes *ad hominem* legislation. There is reference to the national interest or national economic interest, but there is no evidence that the measures contained therein could possibly serve the common good, all while it is rather easy to identify the legislation's actual beneficiaries.

Wherever you look in this legal system you will notice that the ruler dutifully plays according to the rules of the poker game, but he always wins. Looking closer still, you will notice that the ruler always has an extra card up his sleeve.[39]

The demise of the rule of law in illiberal democracies originates in the political self-perception of the regime, and the regime's abuses cannot be understood without understanding the regime's underlying worldview. Ruling by cheating is enabled by – and in turn propagates – the conviction that there is no genuine place for political minorities, even if those 'minorities' constitute a numerical majority of the population. Any political opposition is not only seen as futile, but if they are not bribable (which they unfortunately often are), they are considered to be enemies. In principle, illiberal democracy satisfies Schumpeter's idea of democracy, because theoretically people maintain the right to replace inadequate leaders with others. But the disrespect of the opposition and its treatment as the enemy disregards a fundamental trait of democracy, a trait which those engaged in a totalitarian use of majority rule do not wish to grasp or recognize. The Kelsenian idea of democracy as the respect of minority views is absent:

> "It is precisely in the face of such dictatorship that democracy reveals its deepest essence, shows its highest value. Because it values everyone's political

[37] Fuller 1969

[38] For the rule of law undoing incongruence, see intent analysis below.

[39] See Sajó 2021

> equal, it must also equally respect any political belief, any political opinion, which is after all expressed by the political will. … The relativism is therefore the worldview that the democratic thought presupposes. That's why it gives every political practice the same opportunity to express itself and to compete freely for people's mind. The rule of the majority that is so characteristic of democracy differs from every other rule is not only that – according to its innermost nature – it conceptually requires its opposition - the minority -, but also politically recognizes and protects it in the basic and freedom rights, in the principles of proportionality."[40]

5 Militant Considerations to Correct NSB Law

In Radbruch's aforementioned short article advocating supra-statutory justice, there is a less quoted line where he explains that the Nazi legal system was flawed law not only because of its fundamental violations of equality etc., but because, like its puppet-master Hitler, it was a system of lies. Like the Nazis, our NSB regimes have institutionalized cheating the law and cheating with the law. But the differences between evil law and NSB laws are still fundamental: Hitler created a system based on the lie of racial inequality, while plebiscitarian leader democracies create a political and legal system based on cheating through public procurement rules. Consequently, the radical denial of the legal system as presented in the theory of evil law is of no help.

Where the legal system is based on cheating, it comes into conflict not only with elementary morals (which is not a legal consideration), but with reason too, and reasonableness *is* part of the rule of law. A decision based on lies is unreasonable. Reasonableness is a central concern of the common law, but it is seldom mentioned as a fundamental characteristic of the rule of law.

Reason and reasonableness are subject to relativist criticisms which claim that reason is an arbitrary concept and that reasons would dictate different things to different people etc. According to another criticism, universalizing discourses of reason are only an imperialistic imposition serving white privilege.[41] Reasonableness is, however, a firm requirement of the law, and of the rule of law in particular, even if it is seldom mentioned in rule of law catalogues. It has a clear minimal content rooted in legal tradition. In the common law, it is clearly articulated in the *Wednesbury* test; unreasonable means excluding from consideration matters which are relevant and considering matters which are irrelevant to the decision at hand. The standard example is the red-haired teacher, dismissed because she has red hair.[42] Furthermore, logical fallacies in the interpretation of the law, or false deductions are also legally unreasonable. In continental systems, there are equivalent doctrines,

[40] Kelsen 1920, p. 36.
[41] Scott 1996
[42] Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 at 229.

especially in proportionality analysis, and in Canadian law there is a requirement for a rational connection between a law's means and ends.

The problem is that outside the sphere of fundamental rights, these considerations are usually not applied to statutes due to self-imposed judicial deference. At this point, an ally of the myopic legalist comes up with an argument developed by a school of self-styled political constitutionalists which considers judicial constitutional review to be an abuse inflicted by an elitist judicial class which aims to establish some form of juristocracy. The republican populist assumes that legislators build a decent society through the democratic process. This assumption lacks empirical evidence. The democratic process, which relies on legality, tends towards the erosion of the rule of law, especially in illiberal democracies. In a system of legalized cheating, the assumptions of good faith and the idea that democracy can only produce legitimate law are unsustainable. It is for this reason that a more militant understanding of the rule of law is appropriate and indeed necessary.

Modern law as a more-or-less closed system (i.e., one which primarily operates under the assumption that it is closed and self-referential) lives within its own confines, i.e., within rules that are set by and within the legal system. In the prevailing positivist understanding of law, law is self-referential: the law regulates its own creation and application[43] (though imperfectly). It is only law that can determine what the law is. Nevertheless, even this modern law is full of openings. The norms of the external non-legal world – including morals – *do* shape law and may even replace the supposedly self-referential law; consider all the references to unconscionable clauses *contra bonos mores*, for example. And while these extra-legal references receive specific legal meaning in the service of legal certainty and the openings are of course guarded by lawyers, they are nonetheless openings into a purportedly closed system. However, they ought not be confused with back entries for natural law.

The cheating version of NSB law is protected by the absoluteness of legal self-creation. The cheating government is in the position to legalize whatever ill-deeds they intend to commit, and a narrow conception of legality – shared by lawyers trained in, or perhaps forced into, this tradition – is the foundation of this kind of government. But the illiberal regime and its legal servants cannot rely on the legitimating theory of positivism, as such theories reflect ideal conditions and abstract, theoretical presuppositions which the practices of illiberal regimes are a world away from. It is legitimate to neutralize and – if unavoidable – invalidate the statutes, decrees, decisions, and legal relations of the world's more extreme NSB legal systems, even if they cannot be said to be evil legal orders.

5.1 Judicial Resistance to NSB Law

Contrary to the narrowest positivist understandings of legal validity, even the source theory grants opportunities to resist perverted law: even if we assume that all properly adopted law is valid, the law-applying authorities still retain considerable

[43] Kelsen 1991, pp. 124–125.

wiggle-room. The administrator and the judge retain considerable liberty in determining what kind of meaning is to be attributed to the valid law, and this itself serve is a source of resistance to attacks on the rule of law. If this liberty is understood in accordance with a militant understanding of the rule of law, it can be used in service of the rule of law's restoration (especially if the judiciary has maintained its integrity). Those who are called to apply the law are not simply there to apply whatever the political power dictates through valid statute, but also to serve the normative system in its operation as *law*, in the sense of satisfying inherent qualitative expectations that make a command into law, i.e., that make it worthy of being part of the legal order. The judge, the administrator, and even the legislator produces a legal (normative) order whose legal quality stems from the observance of the rule of law. Legal positivism accepts that the judge can be a source of law (create law), though in a way that is fundamentally different from the legislator. The legislator has enormous power to depart from what exists (though this vast power is increasingly constrained by constitutional limitations in most jurisdictions), while the judge has to rely on existing legal sources, including precedents. But this remains a matter of choice controlled by the legal profession (judges in particular) enabling the protection of constitutional values and fairness, limiting the arbitrariness of power. This is in line with the judiciary's commitment to the rule of law, which is also supported by the hypocrisy of the cheaters' law, which pretends to respect the rule of law (often as a constitutional principle), in part because rule by law serves the ruler's interests. The servants of the law are called to respect the internal "content independent"[44] values of the legal order, like legality, generality, clarity, reasonableness, equality, fairness, and maxims like *nullum crimen*, *audiatur et altera pars*, *nemo in suam*…, etc., i.e., the moral call of the rule of law. These are the requirements of legal morality that Fuller called the morality of the law. They are moral in the sense of diminishing arbitrariness, which enhances legal subjects' freedom. The morality or moral quality of the law is not to be confused with the merit of the law's content; law's morality does not require law to generate social justice, efficiency, or the like. The vagueness of the law or the discretionary powers afforded to officials of the law (e.g. in evaluating evidence) leaves considerable freedom for officials to be moral people, or at least to take a human and empathetic position while applying the law. Dyzenhaus described the judges of the common law in apartheid South Africa as following the common law in a way which provided them opportunities to be faithful to the rule of law, even while they could not escape the service of the apartheid regime for whom they had to apply statutory laws which served as the instrument of choice for the oppressive regime there.[45] The possibility of morally

[44] Collins 1986, 67 at 68.

[45] For Dyzenhaus, a law is wicked if it is morally wrong. In accordance with a kind of legal positivist approach and a "thin" (i. e. non-substantive) concept of the rule of law, it is not immorality per se that makes the law wicked, but it is the total disregard for the rule of law which results in the undermining of the moral order created and supported by the rule of law. Where legality results in a total disregard of fundamental principles of the rule of law, the resulting social arrangements will be immoral. For example, when a judge applies a law that stipulates that state interests defined by law must be protected in all cases – such as by not admitting evidence provided by a private party – the result cannot be morally acceptable (see Dyzenhaus 2010).

justified interpretative choice also exists in illiberal democracies, and even more so when it comes to a restoration of the rule of law. It is true that the continental legal culture differs from that of the common law, but it is not true that the bureaucratic legal tradition amongst continental judges precludes more creative "Fullerian" interpretations of laws and precedents in the NSB law context.

Legality forces authorities to be law-observant, and thereby limits their arbitrariness. Likewise, foreseeability allows legal subjects to avoid negative experiences or at least to take better-calculated risks. Procedural fairness and equality before the law protect the legal subject from arbitrariness and thereby lead to a more rational and therefore slightly better world. On the other hand, the arbitrariness of the law undermines its legitimacy, and even if this does not necessarily result in the collapse of a (fraudulent) legal order, it increases the costs of its application and undermines its efficiency. Without the rule of law, the social value of law is diminished.

This rule of law-supportive interpretative duty of the judge has been present at least since Hobbes developed the first 'source theory' of law. His correction of the source theory is based on a duty he assigns to the judge to consider the precepts of the laws of nature. According to Hobbes, the judge is required to attribute a reasonable meaning to the law, i.e., one that is in conformity with natural law. The precepts of natural law are constitutive elements (maxims) of the legal order that are considered today to be the building blocks of the rule of law:

> "4. The Law of Nature, and the Civill Law, contain the Law each other, and are of equall extent. For the Lawes of Nature, which consist in Equity, Justice, Gratitude, and other morall Vertues on these depending, in the condition of meer Nature (as I have said before in the end of the 15th Chapter,) are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before; as being then the commands of the Common-wealth; and therefore also Civill Lawes : For it is the Soveraign Power that obliges men to obey them."[46]

In legal states, the rule of law requirements of law-making – i. e. the requirements of reasonableness, fairness, and a democratic process – are often part of the written law.[47]

To sum up, the acceptance of the separation thesis and a disregard for the merit of a law's content should not lead to the conclusion that validity review is a matter of simple correspondence with the formal rules of enactment. In a rule of law system, the enactment rules themselves must satisfy the requirements of the rule of law.

Judges – including apex court judges – are not Dworkinian heroes of the Herculean sort, and are not trained to be moral warriors. Many judges do not intend to apply the morally-best solution to hard cases, if indeed they ever encounter hard cases. They are not socialized to be heroes confronting evil nor do they have a duty

[46] Hobbes 1980 (reprint), p. 316. It is true, however, according to Hobbes, that when it comes to the content and meaning of law, ultimately it is the sovereign's reason that matters, and he can thereby disregard natural law.

[47] See e.g. Hungary which has a remarkably good statute that requires the application of most rule of law precepts, though this statute has not yet been applied.

to be heroic resistance fighters. I propose not that the judge confronts evil, nor even the banality of evil. I am merely suggesting that they confront a routine and banal system of lies, brainwashing, and of both grand and petty theft. But this is not to undersell the positive impact they could make; judges have a professional freedom that can achieve quite a lot, including making quite bad but not so bad law better. Not even a rigid source theory would preclude the judge from applying a merit-based interpretation.[48]

The existing professional rules enable the judge and all those who apply positive law to make proper choices in order to resist legal cheating and other forms of rule of law abuse by applying existing techniques of interpretation, although this requires rather radical interpretations in the sense that it requires a militant attitude to rule of law protection. Interpretation does allow for moral choices, often without any heroic risk-taking and without directly challenging the validity of morally-repugnant laws. In the 1940s, the judges of the Hungarian Kuria (Supreme Court) could have avoided the extensive application of contemporary Hungarian racial laws, but instead they extended – in a doctrinally correct way – the meaning of "honorable women" in the miscegenation context with the result that more Jews were held criminally liable.[49] Without much tinkering with precedents, these decisions could have easily veered in the opposite direction. A rule of law-bound and decent judge should apply the narrowest possible meaning to mitigate damage in such cases, and there is nothing in the profession prohibiting this. I accept that this is not in in line with Hart' positivism,[50] and indeed, it is more reminiscent of Dworkin's coherence thesis, but contrary to Dworkin, it is a technique based exclusively on the internal morality of the law as opposed to external conceptions of merit or non-legal public morality. As mentioned above, this satisfies the coherence thesis of legal positivism. According to the coherence thesis, the law consists of source-based law combined with the most morally-sound justification of said source-based law.

5.2 Militant Legal Dogmatics

When confronting NSB law, all that the lawyer and judge are required to do is to follow the dictates of the rule of law. The practice of defending the rule of law applies to the constitutional review of laws, to the interpretation of norms and administrative decisions, and even to private law legal relations. As to interpretation, even assuming that a law is valid, the presumption of its fraudulent application is compatible with the idea of a legal order. Given that extreme versions of NSB law should not be assumed to be impartial nor enacted in good faith, the judge should go the extra mile when applying the recognized techniques of interpretation in order to reach the most impartial[51] meaning possible, for example where the law allows discretion intended to favor government cronies. Likewise, where the law revokes a license without due

[48] Legal positivism has simply no position on this matter. Gardner 2012, p. 47.
[49] Lehotay 2020, p. 205.

[50] As stated by Raz 1995, p. 211.
[51] Lucy 2005, pp. 3–31.

cause, the judge can always say that there was insufficient *vacatio legis* because adequate preparatory time shall include sufficient time to relocate a business without loss, etc., rather than just the time needed to understand the law (as some captive constitutional courts have suggested).

Where an administrative decision is not based on relevant facts, or is based on conclusions which though purporting to base themselves upon relevant facts are *non sequitur*, this should also constitute a ground for voidness.

There are a number of militant rule of law-conforming interpretative techniques that help safeguard or restore the rule of law. With regards to constitutional review, as mentioned above, the extension of reasonableness review to laws that do not touch upon fundamental rights should not be seen as contrary to the rule of law. A robust *reasonableness review* in such cases (as well as in matters of fundamental rights) would require the government to demonstrate a strong logical and factual basis for their belief that the enacted law could achieve its purported goal, e.g. that a measure would actually serve national economic interests, that it is feasible, and that the resulting burdens are indeed necessary. Other less orthodox but still accepted possibilities of review include *intent analysis*, which is necessitated by systemic cheating in legislation.[52] As Joseph Landau has demonstrated in his 'broken records review,' where the values referred to in the presented ends of legislation are "not grounded in some objective measure of basic truth or rationality" this suffices for making a finding of unconstitutionality.[53]

Lying about the legislative intent can be a per se ground for voiding the relevant legislation. After decades of hesitation, the ECtHR performed a rather serious intent analysis in *Merabishvili v Georgia*,[54] which relied on an express prohibition in Article 18 of the European Convention on Human Rights which provides that restrictions of rights if applied for any purpose other than those for which they have been prescribed are impermissible. The Article has been applied to Moldova, Russia, Ukraine, Azerbaijan and Georgia, though NSB law is not limited to these countries.

Arguments for intent analysis have appeared in the literature at least since Ely wrote some 53 years ago that "[In an] ordinary case, where the trigger is simply a disadvantageous distinction, the government's burden will be to justify the choice under attack by relating it to a permissible governmental goal – a demonstration to which motivation is irrelevant. Absent such a showing, however, the proof of motivation which triggered the burden of justification will perforce invalidate the governmental action."[55] "Sometimes proof that the law or action under attack is having, or is likely to have, a certain pattern of impact will constitute the appropriate trigger" of judicial review.[56] In a system of legal cheating, the simple fact that means

[52] In some areas, such as racial discrimination as well as some other grounds of discrimination, it is accepted that a discriminatory animus is sufficient to void the law regardless of the law's effect, see for the US: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[53] Landau 2020, p. 452.

[54] *Merabishvili v Georgia* Application No. 72508/13, judgement of 14 June 2016.

[55] Ely 1970, pp. 1207, and 1208.

[56] Ely, ibid., p,1205.

and ends have a *prima facie* plausible relationship to one another should be considered insufficient given that the ends are often simple screen smokes, and indeed, a bad motive ought to be presumed.

Some more radical measures taken to defend the rule of law and constitutionalism challenge traditional positivist doctrines of legality. The doctrine of unconstitutional constitutional amendment stands out in this respect; it was first successfully adopted in India in the doctrine of the unamendable basic structure of the constitution. In the case of India, contrary to the German Basic Law, this idea was developed without any textual constitutional basis.

Of course, where brute force in the form of disciplinary action against judges pervades the judicial system, no interpretation can save us from NSB law, but in those sorts of cases we are veering dangerously close to evil law, or at least enabling it. Where the judiciary destroys its own independence, there can be no more rule of law nor constitutionalism. Even without serving evil law, the legal order will be very bad. It will remain a legal order and it may even preserve the vestiges of the rule of law but having even fully legal character does not exclude despotism.[57]

6 Conclusion

The rule of law, if reduced to naked legality, will turn against the rule of law as it enables and reinforces rule by law. This means that instead of preventing and reducing the arbitrariness of power, legality becomes the transmission belt of power aggrandizement. But the rule of law and law in general are not intended to undo their very essence. Like living organisms, law contains mechanisms of self-defense against being poisoned by its own internal operations. It is said that the rule of law is to be preferred over the rule of man, but the rule of the law still requires men, primarily lawyers, to accept and uphold a rule of law that is broader than formal legality.

A traditional but not simplistic positivist understanding of the rule of law enables the lawyer to reinterpret fraudulent statutes in a rule of law-reinforcing way, or even to declare them void. A militant understanding of the rule of law is not contrary to the positivist theory of legal validity, and it liberates legal reasoning from the straitjacket of a simplistic but widespread misunderstanding of the source theory that is used by regime collaborators in the name of scientific neutrality.

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[57] Kelsen 1925. 335.

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