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## **THE RULE OF LAW IN LEGAL PLURALISM**

The traditional formula of the rule of law is abundantly used today to test or accredit the doubtful legal nature of rules and practices that at first sight do not conform to the usual image of law. Since in its present shape the formula has been worked out in the light of modern law, the primacy of generality in law and the unity of the legal system, one may well wonder whether and to what extent it is correctly applicable to a situation of pluralism of legal orders like the one that contemporary law is developing before our eyes.

In facing this issue I will start from some presuppositions without discussing them.

### **What Is the Rule of Law?**

In my opinion the model of the rule of law has a strictly formal or procedural character and not a substantial one.<sup>1</sup> The purpose of this formula is not to establish the just law, but on what conditions a society is governed by law and not by the whims of men. It is true that it requires autonomy of human beings, but not as a central political value - otherwise the rule of law would only be valid for liberal societies.<sup>2</sup> We are talking simply - as Fuller rightly noticed - about

<sup>1</sup> P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", *Public Law* 1997, pp. 467-87.

<sup>2</sup> The definition of the rule of law as "a meta-legal doctrine or a political ideal" may indicate either the primacy of the law in political government or the political use of the formula, which, for example, serves to criticize the welfare state and administrative government. Often it is difficult to disambiguate the term, as can be observed in the thought of Hayek. Cf F.A. von

an anthropological condition: in order to obey a law properly speaking one has to be free and aware. The slave does not obey, but - as Aristotle stressed - is used as a tool. The rule of law first of all says that law is not proper to a society of slaves. This is banal, but it is always useful to make it explicit.

In addition to freedom of citizens, the rule of law also requires that law be understood as a cooperation of institutions, i.e. as a cooperative enterprise among legislator, officials and citizens, in which each one has a specific role: to dictate general and practicable rules, to interpret them and apply them in a suitable way, and take them as a guide for his or her own behaviour. This latter aspect has not generally been emphasized much by scholars dealing with the rule of law,<sup>3</sup> but it is as important as the former and is complementary to the principle of the separation of powers.

The rule of law does not concern law as such, but a legal order, that is to say an enterprise, in some way organic, for the regulation of classes of social actions. It is a set of formal principles and procedures that are deemed necessary though not sufficient conditions for a legal system to exist and to work properly.<sup>4</sup> Though we cannot fault Hart when he notes that the rule of law is "compatible with very great iniquity",<sup>5</sup> nevertheless it is also true that a just society is not compatible with systematic violation of the rule of law. That a legal system with its set of norms should respect given formal and procedural conditions, that it should work well and possibly be in good health are necessary though not sufficient component of the objective of a just society seen as an ideal goal.

The contribution that the rule of law makes to the problems of justice can be concentrated in the observation that it is not enough to do the correct

Hayek, *The Constitution of Liberty*, University of Chicago Press, Chicago 1960, p. 206. For internal variations in this conception of the rule of law, which I cannot dwell on here, cf. R. Westmoreland, "Hayek: the Rule of Law or the Law of Rules?", *Law and Philosophy* 1998, no. 17, pp. 77-109. The reader is reminded that for these reasons Kelsen opposed this formula, considering it a natural law prejudice.

<sup>3</sup> Fuller has considered law as the official language of social interaction. Cf. L.L. Fuller, "Human Interaction and the Law" [1969], in: *The Principles of Social Order*, K.I. Winston (ed.), N.C.: Duke UP, Durham 1981, p. 213 and, for the cooperative aspect, see also G.J. Postema, "Implicit Law", *Law and Philosophy* 1994, no. 13, pp. 361-387.

<sup>4</sup> One can also consider the rule of law as the result of the working of these principles, i.e. as "the state of affairs that obtains when a legal system exists and functions". M.H. Kramer, "On the Moral Status of the Rule of Law", *Cambridge Law Journal* 2004, vol. 63(1), p. 65.

<sup>5</sup> H.L.A. Hart, *The Concept of Law*, 2 ed., Oxford University Press, Oxford 1994, p. 207 and also J. Raz, "The Rule of Law and Its Virtue" [1977], in: *The Authority of Law*, Oxford University Press, Oxford 1979, pp. 210-29.

things, but it is also necessary to do them in a just or correct way. All of this can also be expressed in a negative way, by saying that "one of the most important functions of the rule of law is to set limits to what we may do, as a society, to reduce injustice",<sup>6</sup> or better, in a positive way, by saying that the way in which things are done influences the determination of their value in terms of justice. This is the reason why, for instance, we consider unjust a paternalistic political regime regardless of the content of its policies. Obviously this does not rule out the possibility that apparent respect for the rule of law, i.e. doing the wrong things in the right way, and its exploitation may help the bad ruler or deceitful official to make people accept an iniquitous and nefarious regime, that is to say to make people believe it is just. This, however, confirms that in the common sense of the term the rule of law as a state of affairs has something to do in its own way with issue of justice. In this sense even the most rigorously formalistic conception of the rule of law has to admit that its principles also have a moral meaning and a moral status<sup>7</sup> in the sense that *rebus sic stantibus* it is unreasonable to reject them, because they protect ethical-political values, though functional ones - first of all the value of legality.

The history of the rule of law began inside regimes that were not democratic and not liberal, but the relevant theory took on a definite shape with reference to the modern state<sup>8</sup>, that is with reference to a political formation that has taken over the monopoly of the laws, endowed with a high degree of centralized power and a major capacity for coercion. Being in possession of the laws does not mean being able to attribute to every command or act of volition the qualification of a "law" or even having mastery of the form of law. These are the limits that the rule of law sets to political will and discretion.

True, the legal practice of the state has not always corresponded to the principles of the rule of law. Nonetheless, the latter has always preserved the role of a regulatory ideal. Now, however, centralism of the state has waned; important spheres of associative life escape its exclusive control; legal norms produced elsewhere exert their action inside state law. In a word, the fragmentation of law seems to render unrealistic any aspiration to completeness both in personal plans in life and in the socio-political order as a whole.

p. 94.

<sup>7</sup> A. Marmor, "The Rule of Law and Its Limits", *Law and Philosophy* 2004, vol. 23, p. 39.

<sup>8</sup> B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge University Press, Cambridge 2004, p. 5.

If the rule of law is the regulatory ideal of the modern state, the crisis of this form of state would also seem to entail the exhaustion of that traditional formula.<sup>9</sup> Does this mean abandoning the ideal of a state of things in which law governs and not men?

In order to answer this question we shall consider a specific kind of legal pluralism: pluralism of legal orders closely related to the state. This is, we shall assume, the most favourable sphere for saving, somehow, the formula of the rule of law.

## What Is Legal Pluralism?

It would be banal and unproductive to label every situation of interrelation among multilevel legal orders as a form of legal pluralism. One must not confuse "plurality" with "pluralism". It is not enough to ascertain that the forms and places of law are manifold - which is certainly no new thing - or even that they interact both in a conflicting way and blending together and getting mixed up with one another. In order to speak of "legal pluralism" proper, it is necessary that each legal order (not only the state one) should not be set up as exclusive and that, from the internal point of view,<sup>10</sup> each should recognize as legitimate the legal claims of the other orders in competition with its own claims without incorporating them.<sup>11</sup> It is necessary that the legal sources involved should all be considered legitimate ones, that they should concern the same affair or the same social situation, that they should conflict in some respects and that no clear and consolidated normative hierarchies should be present.

Legal pluralism is a property of social contexts and not of legal systems. It refers to the fact that within a social space there may be legal norms of different origins, some produced inside it and others by external social spheres.<sup>12</sup>

<sup>9</sup> E. Denninger, „Vom Ende nationalstaatlicher Souveränität in Europa“, *Juristenzeitung* 2000, no. 55, pp. 1121 ff.

<sup>10</sup> This is why some prefer to speak of "legal polycentricity". Cf H. Petersen, H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Aldershot, Dartmouth 1995, p. 8.

<sup>11</sup> This is the minimum essential meaning of "legal pluralism". Cf F. Ost, M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, Bruxelles 2002, pp. 185-187.

<sup>12</sup> J. Griffith, "What is Legal Pluralism?", *Legal Pluralism & Unofficial Law* 1986, no. 24, p. 38, and S.F. Moore, "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study", in: S.F. Moore, *Law as Processes: An Anthropological Approach*, Routledge & Kegan Paul, London 1978, pp. 54-81.

Hence it is not "legal pluralism" to recognize the existence within the same legal system of different normative mechanisms applicable to the same situation,<sup>13</sup> because this is plurality *in the* order and not *of the* orders. Not even the "existential" criterion is sufficient, which appeals to people subject in the same situation to legal orders independent of one another,<sup>14</sup> because the challenge of pluralism consists precisely in conceiving these legal orders as connected and competing. And finally, it is not even satisfactory to resort to the geographical criterion,<sup>15</sup> because - as we have seen - not all the legal orders involved have a territorial dimension, unless this is taken to mean a "vital space" or a sphere of extension of the social relationships within which different normative spheres meet and clash. This space necessarily materializes in places in which the law is ascertained, applied and executed, but the sphere of normative validity is the legal space and not the material places, and besides this is how Kelsen interpreted the territorial validity of the state legal system.

Hence legal pluralism designates a normative situation in which different legal orders concur and compete in the regulation of a course of action or sets of actions concerning social relations of the same kind. The respective competences are in principles not exclusive and give rise to normative overlaps without distinguishable hierarchies of the sources of law.

### **A Sketch of Official Legal Pluralism**

As I have already said, I will circumscribe my inquiry to the relations between normative orders that have a significant bond with state law and that therefore surely are entitled to claim to be officially legal. This means that I will not deal with the subject from the point of view of legal sociology and anthropology, which are interested in the interrelations between norms of varying origin inside the same social context. Otherwise, it would be necessary to deal with the

<sup>13</sup> This thesis, criticized in other respects by Griffith, has been upheld by J. Vanderlinden, "Le pluralisme juridique: essai de synthèse", in: J. Gilissen (ed.), *Lepluralisme juridique*, Université de Bruxelles, Brussels 1971, p. 19.

<sup>14</sup> This is the new definition by Vanderlinden, "Return to Legal Pluralism", *Journal of Legal Pluralism & Unofficial Law* 1989, no. 28, p. 151. However, the criterion of the "actor's perspective" is very important for dealing with legal pluralism. Cf M. Chiba, "Other Phases of Legal Pluralism in the Contemporary World", *Ratio Juris* 1998, no. 11(3), pp. 238-240.

<sup>15</sup> Referring to legal systems, networks and orders "co-existing in the same geographical space". W. Twining, *Globalisation and Legal Theory*, Butterworth, London 2000, p. 83.

problematic concept of "legality", the distinction between *official law* and *unofficial law*, as well as the further distinction between these and no law at all.

In this narrower perspective, I shall refer more directly to three categories of relations between different legal orders, which I simply expound here in a very simplified form without examining the differences in detail, though they are deep ones.

First of all, there are two big areas of international law that correspond to important sectors of domestic law and overlap with them. The first aims at protecting the private property of state or non-state actors at an international level. The most indicative example for our purpose is that of the World Trade Organization (WTO), but it is also advisable not to neglect the importance of the World Bank. The second major area is concerned with protecting public goods, which are also extremely important for domestic law, like security (for example, the UN Security Council), the protection of the environment (numerous international environmental regimes, for example the International Whaling Commission or the international regime for the protection of the Ozone Layer), the defence of workers' rights (International Labour Organization) and the numerous regimes of international and regional protection of human rights, among which one should also mention the recent International Penal Court.

This classification leaves out all the processes of institutionalization of *lex mercatoria*, giving rise to forms of *private government* and to the transnational legal system of the world markets (transnational commercial law), because they do not depend on the intervention of states and indeed tend to escape their influence. Multinational corporations draw up contracts with one another that they no longer submit to any national jurisdiction or to any national or international substantive law.<sup>16</sup> But it is obvious that in this way ample sectors of law escape state sovereignty, traditionally competent about contract law.

The second category of legal orders is that of supranational law.<sup>17</sup> This category - unlike the preceding one - is still linked to the territory, although it

<sup>16</sup> Cf G. Teubner, "Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts", *Soziale Systeme* 1996, no. 2, pp. 229-55.

<sup>17</sup> A supranational organization is distinguished from an international one by the following characteristics: the existence of independent organs with an autonomous decision-making power; the power to take decisions binding the constituent member states by majority vote and the power to take decisions that directly affect the legal position of individuals within the constituent member states without the intervention of the national governments. Cf M.L. Jones, "The Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart's Model of Law and a Legal System", *Cornell International Law Journal* 1984, no. 17, p. 15,

goes beyond state borders. Obviously, the best known example is that of the European Union. We mention it not because it is the only case of supranational law, but because it has some original characteristics and involves some of the most highly evolved legal systems in the Western world. European supranationality is not to be confused with federalism, which distributes sovereign power. It proceeds through pooling and sharing rather than through division and distribution.<sup>18</sup> European law is not even to be confused with the traditional *ius commune* (which nevertheless to some extent is a historical antecedent of it), because it is constructed by states that participate in it.

In order to understand the nature of European law we need to look at the decisions of the *European Court of Justice* rather than at the texts of the institutive treaties in which the governments of states renounce a part of their sovereignty. Beginning from the *Van Gend & Loos* case of 1963, the Court of Justice has constantly maintained that a new legal system had been founded that was different from that of the member states and from international law. Further, it has defined the treaties as the "constitutional charter of a legal community (*Rechtsgemeinschaft*)", i.e. one founded upon the unity of law rather than on political unity.<sup>19</sup> Consequently, the Court of Justice has established three important principles: Community law<sup>20</sup> has priority over national law, even if produced later; European legislation has a direct effect without the mediation of a national law and, very important, Community law creates rights and obligations not only for states, but also for citizens. These principles, partially and not effectively contested by some Constitutional Courts<sup>21</sup> (rather than by the governments) of member states, are substantially accepted and applied by the national jurisdictions.<sup>22</sup> The relations between the European legal system and those of member states are still being debated by legal theory. It is not clear whether we are look-

n. 64 and also K.-H. Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept", *European Law Journal* 1997, no. 3(1), pp. 33-54.

<sup>18</sup> M.R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Laterza, Roma-Bari 2006, p. 55.

<sup>19</sup> Cf. M. Zuleeg, "Die Europäische Gemeinschaft als Rechtsgemeinschaft", *Neue Juristische Wochenschrift* 1994, no. 9, pp. 545 ff.

<sup>20</sup> I will use the term "Community law" in a broad sense to describe either European Community law or European Union law.

<sup>21</sup> Whilst the German Constitutional Court regards itself as under a duty to have the final say about the content of all the laws in force in Germany, the Court of Justice claims to have the final say about those laws with a European element that are in force in Germany.

<sup>22</sup> In the prominent decision of *Costa v. Enel* (1964) the Court affirmed drastically: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which,

ing at separate but coexistent and communicating legal systems, or a single legal system with a correspondingly more complex Rule of Recognition which the Community legal system is part of,<sup>23</sup> or yet again a single system with conflicting Rules of Recognition inside it, and hence with manifold and unranked sources of law.<sup>24</sup> But in any case the practical implications do not change, since in fact a considerable part of the law applied inside the member states is produced elsewhere and has the characteristics of autonomy and supremacy.

The third category to be considered does not concern legal orders in the strictly institutional sense, but processes of fragmentation inside the legal structure of a political community that change the way of interpreting the state legal system.

We know that inside the same state there can be more than one legal system, as happens in some non-Western, colonial or post-colonial states, in the regime of apartheid and in all particular juridical regimes for ethnic and racial groups (customary law, tribal law, religious law, social law, and the like). But this does not compromise the unity of the legal system if we can identify a single rule of recognition legitimating such a plurality of internal legal regimes for different groups of citizens. National and multinational states and federations still concern individuals and more or less culturally homogeneous groups of individuals, linked to a given territory subject to a uniform administrative power. In more developed legal systems the ideal model has been that of a unitary legal system, uniform and exclusive for all citizens, proper to a nation-state.

The nation, far from being identified with the ethnic group, has to be seen as a construct of politics through the use of law and slow but inexorable processes of homologation and assimilation. In this way the legal rules are strengthened by a common form of life and acquire stability and uniformity of interpretation and application. Consequently, constitutionalism has developed in a state-centred sense and still today it is dominated by the image of political institutions holding the centre of political and economic life and governed by fundamental values and principles shared and practised by the political community. The current concepts of people, popular sovereignty, citizenship, unity, equality, recognition and democracy tend to imply the uniformity of a nation-state with a unitary and centralized legal and political system.

on the entry into force of the Treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply".

<sup>23</sup> This is the thesis of M.L. Jones, "The Legal Nature of the European Community", p. 36 and also substantially that of MacCormick.

<sup>24</sup> This is the thesis of N.W Barber, "Legal Pluralism and the European Union", *European Law Journal* 2006, no. 12(3), pp. 306-329.



This form of constitutionalism has proved unsuited to facing the challenges of pluralism coming from outside and from inside. It is no longer a matter of taking into account the ever-rising number of immigrants, exiles and refugees, but also the increasing disagreement among citizens on the way of interpreting and practising constitutional values. The constitutional state has to distance itself from the nation in order to face three types of conflict: conflicts of interests concerning control and distribution of resources, conflicts of cultural identities and conflicts relating to values.<sup>25</sup>

Once the state is no longer identified with the nation, the way of considering the constitution changes: it is no longer seen as a common programme of life informing government institutions, but as the language of disagreement,<sup>26</sup> that is to say it legitimates dissent, corroborating conflicting positions, and at the same time it tries to administer it in the forms of practical reasoning. The constitution (now also in countries with a rooted state tradition) takes on supremacy over the state itself, which is reduced to an institutional and procedural apparatus that gives legal form to constitutional discourse. Constitutional law governs over and above the exercise of government powers. "Constitutional law and discourse is no mere reflection of a prior political order or process, but is recursively implicated in the elaboration of that order".<sup>27</sup>

The effects of this transformation on the univocality and exclusiveness of the legal system are remarkable. On the outside, while the nation-state presented itself as a separate and incommunicable entity, the primacy of the constitution over the state now allows commonalty and dialogue between constitutional values also present to some extent in other constitutions (especially in relation to human rights) and hence tending to universality. On the inside, constitutional discourse has to reshape to intra-state claims and sub-state movements regarding the relations between different groups (national, ethnic, territorial, religious, gender, linguistic or other cleavage) in a way not tending to ghettoize them, separating them from the common discourse, but to include and legitimize a plurality of visions and interpretations of the same constitution through mutual recognition and an "agonistic" process of negotiation. This means that we have to abandon the assumption that cultures worthy of recognition must already have a "national" dimension or be accomplished and autonomous forms

<sup>25</sup> C. Offe, "'Homogeneity' and Constitutional Democracy: Coping With Identity Conflicts Through Group Rights", *Journal of Political Philosophy* 1998, no. 6, pp. 119-124.

<sup>26</sup> Cf J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford 1999.

<sup>27</sup> N. Walker, *The Idea of Constitutional Pluralism*, European University Institute, San Domenico (Fi) 2002, p. 33.

of life, and also that we have to challenge the idea, accredited by an ideological use of the principle of self-determination of peoples, that nations must for this very reason be recognized as states.<sup>28</sup>

In a plural order the legal system no longer presents itself as a uniform legislative flow from a single centre of authority, but as the result of the unstable relationship between different types of authority or claims to authority situated at different sites or in different processes outside and inside the state itself.<sup>29</sup>

In other words, constitutionalism does not limit itself to animating the law-state on the plane of values, but forces this state to be flexible towards a plurality of solutions or orders that render disagreement legal and transfer it from rules to legal practice. The law has to administer and to domesticate disagreement, although the latter has been made legitimate by the law itself.

The idea of a constitutional pluralism, external and internal, tries to capture in a single but generic formula these three forms of relationship among contemporary legal orders created by international law, by transnational law, by supranational law and by domestic law.

## **Juridical Space vs Legal System**

This is not the place to investigate the reasons for this ungovernable multiplication of legal orders, largely produced by a process of *self-deconstruction* of the state. The history of the relationships between sovereign states from Westphalia to our own day can be schematized in the progressive stages of mutual independence, of cooperation, which is a sign of the loss of self-sufficiency, of interdependence, which is a sign of vulnerability, and finally interpenetration, which is a sign of the loss of exclusiveness. Today we find ourselves at the stage of passage from interdependence to interpenetration, since the former still implies a residue of separation and autonomy and therefore is still linked to some extent to the interstate system. The latter, by contrast, not only indicates new forms of relationship among states following the creation of a myriad of organ-

<sup>28</sup> *Contra* see C. Taylor, "Why Do Nations Have to Become States?", in: G. Laforest (ed.), *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, McGill-Queen's University Press, Montreal-Kingston 1994. More in general cf. J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge University Press, Cambridge 1995, p. 9 ff. which contains other illuminating critical considerations on state-centred constitutionalism and on the need to transform it.

<sup>29</sup> N. Walker, *The Idea of Constitutional Pluralism*, p. 30.

izations and new institutions, but also decrees the end of the autonomy of their economic and political life. Paradoxically, the new sovereignty now has to be seen as the capacity to enter into a relationship with the rest of the world and as the political capacity to be an actor in world disorder.<sup>30</sup>

We now have to examine two critical objections to this way of presenting legal pluralism.

One objection, which originates from the Kelsen strain of theories of law, maintains that a plurality of sources does not automatically mean a plurality of legal orders when it is possible in some degree to link these sources to a single *Grundnorm* and derive them from it.<sup>31</sup> Hence a set of legal orders having a state origin strictly speaking would not lead to legal pluralism, but to pluralism of the sources of state law. International law, supranational law and domestic law are actually parts of the same system, if in the constitution one can identify legislative provision for the corresponding sources. The fact that the hierarchy of the sources is uncertain and not clearly defined would not rule out the system being a single one.

This objection can be countered by showing the consequences of the previously noticed primacy of the constitution with regard to state legal system. The plurality of the sources of law contemplated by the constitution is substantially an official recognition of legal orders which the state system has to some extent to take into account if some conditions of a conventional type contemplated by the constitution itself have been satisfied. Hence it is necessary to go not only well beyond the monistic thesis of the singleness of the legal system, but also beyond the dualistic thesis. We also have to recognize that the primacy of the constitution over the state opens up the way to the pluralist thesis of the official legal orders and the problem of their mutual recognition and their unstable and complex interconnection with reference to particular cases.

In order to solve these problems, that is to say in order to identify and determine the legal rule to be applied to the particular case, it is necessary to take into account a double level of "internal point of view": one proper to the "juridical space", that is to the delimitation of the plurality of legal orders involved, and one proper to the particular legal order, that is to the "place" in which the law is concretized and is applied to the particular case. The juridical space is not

<sup>30</sup> A. Chayes, A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, Mass. 1995, p. 26.

<sup>31</sup> Gurvitch had already noted that plurality of sources is fully compatible with a monistic conception of law. Cf G. Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit*, A. Pedone, Paris 1935.

delimited once and for all,<sup>32</sup> but it depends on the nature of the issues at stake, on the subjects involved, and on the effects of the behaviours and the decisions (*quod omnes tangit ab omnibus comprobetur*). The institutions inside the legal orders belonging to a common juridical space, and first of all judicial ones, are at the same time competent to administer the interrelations between the legal orders involved or the importance that the rules produced elsewhere (*lex alius loci*) have for the internal legal order. The notion of a "juridical space" becomes more important and decisive than the usual one of a "legal system".

Another objection comes from legal sociologists and anthropologists, who first worked out the theory of legal pluralism.<sup>33</sup> Although their conceptions are varied, they all agree in rejecting a state-oriented prejudice and in maintaining that the distinction between official and unofficial law is not to be taken to mean that the latter is not real law. In this outlook my restriction on the multiplicity of the forms of official law would not qualify a form of "legal pluralism" in the strict sense; it would, rather, appear as yet another disguise of the state-oriented bias.

However, if we wonder about the reasons why these interstate, super-state and sub-state legal orders have developed, we have to recognize that we are talking about vast and profound social, cultural, economic and political demands that states and their law do not succeed in satisfying and that require to be made legal through processes of a different kind. From this point of view I do not see any difference between the traditional pluralism, from below, of social groups and their internal organization, and this multiplication, from above, of interstate organisms. All belong to the traditional themes of the relationship between law and society that now, more and more clearly, have been taking on a world dimension.

One must not be deceived by the fact that in these new spheres a legal language is apparently used which in itself is to some extent technicized, since in reality inside them there are rules and forms of rationality of an economic, scientific and moral kind that are often mistaken for legal norms. In substance these new legal or quasi-legal frameworks are constituted by inextricable inter-lacements of legal and non-legal discourses and confer on law a role that is more operational than imperative, more functional than parametric.

If we want to recognize a difference from the social groups which the sociology of law has traditionally been interested in, thus speaking of a "new legal

<sup>32</sup> This does not rule out the possibility of consolidation of the juridical space and institutionalization of it through international treaties, as is characteristic of the European Union.

<sup>33</sup> Cf N. Rouland, *Anthropologie juridique*, PUF, Paris 1988.

pluralism", we can say with Teubner that "the legal discourse no longer »incorporates« results by misreading social norms as legal norms; today it »incorporates« processes misreading economic or technical production as law production."<sup>34</sup> The fact that in this new situation we find ourselves more and more urgently facing the issue of the concept of law and the principle of legality is - in my opinion - proof of the definitive abandonment of the state-oriented prejudice.

## The Rule of Law and the Political Community

At this juncture the following questions arise: does the model of the rule of law proper to state or national legal systems also apply to non-state legal orders? Do not the close interrelations and interpenetrations among these official legal orders perhaps also suggest reformulating the general model of the rule of law in relation to state law? We will endeavour to address these two issues together.

Anyone can ascertain that - exactly as happens with the concept of democracy - an amply rhetorical use is made of the rule of law as if it were a label guaranteeing the genuineness and at the same time the justness of the legal output.<sup>35</sup> Conformity to the principles of the rule of law is borne in mind in international law treaties and is particularly emphasised in the European treaties and by the European Court of Justice.<sup>36</sup> The demand for respect of these principles is often a condition for opening economic and commercial relationships, especially with non-Western states, since it is thought that this also favours the introduction of political and social reforms.<sup>37</sup>

If we observe more closely the canonical formulation of the rule of law, in it we have to distinguish three fundamental aspects: its presuppositions, demands in terms of values and legal practices.

Presuppositions concern the political context to which the formula is applied. We know that the rule of law has been consolidated with reference to

<sup>34</sup> G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", *Cardozo Law Review* 1991-2, vol. 13, p. 1459.

<sup>35</sup> The apex of this rhetoric came with the Declaration of New Delhi in 1959. Cf *The Rule of Law in A Free Society: A Report of the International Commission of Jurists*, Geneva 1959.

<sup>36</sup> In particular, paragraph four of the Preamble of the Treaty on European Union and article 220 (ex 164) of the European Community Treaty. Cf M.L. Fernandez Esteban, *The Rule of Law in the European Constitution*, Kluwer, London 1999, pp. 102 ff.

<sup>37</sup> Cf G. Silverstein, "Globalization and the Rule of Law: A Machine that Runs of Itself?", *International Journal of Constitutional Law* 2003, no. 1(3), pp. 427-45.

the law of a national state, that is a political community founded on common values and endowed with completeness<sup>38</sup> in relation to all the essential needs of social life (*law community*).

For this reason legal rules have to be general and impersonal. Pluralism of identities and particular situations is considered as legally irrelevant in that it is dangerous for equality, which in turn is a necessary limit to arbitrary exercise of power. Legislative power must not deal with what people are and what they are doing here and now, but only with the type of action that they have to perform.<sup>39</sup>

If the community is complete, then the law must be complete too, in order to control political power in all its extension. The idea of a closed legal system made up of general norms, logically connected to one another, not contradictory, practicable and - as far as possible - devoid of gaps satisfies this requisite (and, moreover, also the rationalistic aspirations of legal science).

In this global and unitary legal environment individuals work out and pursue their personal plans for life and obtain the resources required to fulfil them. Therefore we are not dealing with occasional and episodic directives, but a general regulation addressing citizens that - as Rawls says - enter the political society when they are born and leave it when they die.<sup>40</sup>

Hence a closed legal system, a state viewed as a "political body", a nation viewed as a coherent set of common values are conceived as a package which is substantially consistent in that it is suited to a complete political community. It is believed that there is a close connection between the idea that the person fulfils himself or herself according to a plan of life and the conviction that a unitary social order is required that is able to provide all the resources essential to this goal.

These presuppositions have all been lost. Constitutionalism has brought to the foreground respect for people's identities, their rights and their concrete life situations. The case rather than the rule, the case in the place of the rule is once again at the centre of the law and its very *raison d'être*. Hence the central

<sup>38</sup> Cf J.M. Finnis, *Natural Law and Natural Rights*, Clarendon, Oxford 1980, pp. 147 ff

<sup>39</sup> "The rule of law is seen to express a preference for *what* you are over *who* you are - for what type of thing you did rather than what precisely you did here". F. Schauer, "Rules, The Rule of Law, and the Constitution", *Constitutional Commentary* 1989, no. 6, p. 69.

<sup>40</sup> "(...) a democratic society, like any political society, is to be viewed as a complete and closed social system. It is complete in that is self-sufficient and has a place for all the main purposes of human life. It is also closed (...) in that entry into it is only by birth and exit from it is only by death". J. Rawls, *Political Liberalism*, Columbia University Press, New York 1996, pp. 40-1.

problem of present-day law is that of the formation of the rule and not that of applying a rule that is already formed. To this goal the laws, the principles and the particular case itself are seen as "legal materials" from which to derive the rule. This certainly means that they exist before the work of the interpreter and are binding for this work, but also that he or she has to identify and circumscribe the object of his or her own interpretative activity and has to give clearly argued reasons for his or her own interpretative choices. In short it now appears even more incorrect to describe interpretative activity as a reiteration of a well-formed existing norm when it is, in fact, a process of formation of a latent rule.

The interdependence among states and the fragmentation and interpenetration of legal orders have dissolved the claims to completeness of the national community and, consequently, the idea of a unitary legal system. It would seem that in this context the rule of law can only be reduced to a bureaucratic model of justice, attentive to the correct working of institutions, addressing isolated individuals and linked only to the requisite of fairness.<sup>41</sup> So understood, however, it would lose its "political" character, which is essential.

Actually, since the demand of individuals and social groups to govern their own existence according to a plan of life remains valid anyway, we cannot do without the political dimension. It is therefore necessary to put order in the pluralism of legal orders through processes of integration that, though never being definitive, guarantee a certain stability on which to base the predictability of the consequences of one's own actions. In performing this task, the law takes on an essential role (*integration through law*). Hence the political community from being a presupposition of the law now becomes a goal to be reached through the law. This is no minor change. Politics returns to its most original meaning, that of being the place of the recognition of strangers, that is to say of people that have different conceptions of the good. True recognition originates from what is different, not from what is similar.

### **The New Challenges That the Rule of Law Has to Face**

In what sense does the formula of the rule of law still have a function in this perspective?

<sup>41</sup> "This view is bureaucratic because it concerns the conduct of bureaucratic institutions in their relations with isolated individuals". J. Raz, "The Politics of the Rule of Law", *Ratio Juris* 1990, no. 3(3), p. 332.

In order to answer this question I would now like to mention some of the problems that seem to me most important for contemporary law.

First of all, a widespread allocation of political power in centres displaced inside and outside the territorial borders, at times without a recognizable place, is certainly no less a threat to the individual and to communities than the concentration of power in institutional organs that are well identified in composition and competences. What becomes more difficult is identification of the centre of assignment of responsibilities, which is - as Dicey teaches us - one of the most effective ways to control the exercise of power by officials. It is also necessary to consider that the emergence of new competences regarding sectors previously regulated exclusively by state law, and now also by international or supranational organizations, multiplies the number of competent authorities, and hence produces a surfeit of restrictions of individual freedom in the absence well-defined and stable hierarchies.

From this point of view the rule of law should be accompanied not only by a revision of the principle of the separation of powers,<sup>42</sup> but also by common rules on the circulation of authorities and on the interconnections between the corresponding legal orders. All this requires processes of constitutionalization of international law and supranational law, which are being worked on,<sup>43</sup> together with close cooperation among the national constitutions (*multilevel constitutionalism*).<sup>44</sup> It will be necessary, for instance, to resort to the *principle of subsidiarity* as one of the possible ways of putting order among the authorities, giving priority to the one closest to the interests to be regulated and to the individuals affected, this being a solution inspired by the subject dealt with and not by a preset and formal hierarchy of legal sources.<sup>45</sup>

<sup>42</sup> It is well known that one of the sore points regarding Community law is the ambiguous distinction between legislative and executive power, in addition to the judiciary activism of the Court of Justice.

<sup>43</sup> For international law I will mention the emergence of *ius cogens* as a set of peremptory norms that treaties have to respect; for Community law the difficult progress towards a European Constitution.

<sup>44</sup> Cf I. Pernice, "Multilevel Constitutionalism in the European Union", *European Law Review* 2002, vol. 27(5), pp. 511-529 and also M. La Torre, "Legal Pluralism as an Evolutionary Achievement of European Community Law", in: F. Snyder (ed.), *The Europeanisation of Law: The Legal Effect of European Integration*, Hart Publishing, Oxford 2000, pp. 125-138.

<sup>45</sup> As is well known, the principle of subsidiarity was "constitutionalized" by the Maastricht Treaty and implemented by some national constitutions, including the Italian Constitution at art. 118. For the many facets of subsidiarity cf N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford University Press, Oxford 1999, chap. 9.



Secondly, there is the problem of the formation of the legal rule. As is well known, the primacy of the constitution and constitutional law officially makes indeterminacy a structural element of the legal rule.<sup>46</sup> Even when specific rules or ordinary statutes are derived from constitutional principles, these also have to leave room for some elasticity of interpretation, one reason being that they do not constitute a mandatory pathway but simply a choice among the many possible and reasonable ones that wait in the background, as is proper to practical reason. As Waldron has noticed, in a regime of pluralism legislation bears in itself the conflict of values and does not totally resolve it. Disagreement, peculiar to the deliberation process within the production of the law, is in a sense transferred to the phase of its interpretation and application.<sup>47</sup> The courts of justice continue this debate, though within decisions already taken and with an impartial judgment. This means that the predictability of the legal consequences based on the operation of courts is not so much to be sought in the correct formulation of the rules, and does not depend on it. It is mainly to be sought in the possibility of developing from legal standards lines of thought that are predictable. This is both because they are controlled by consolidated legal doctrine and by a class of jurists attentive to practical reasoning in general, and because they are accessible to the common reason of citizens.

Indeterminacy of the rule is also essential for the purpose of the formation of a political community of differences. The dialectics between similarity and difference in legal cases is a typical characteristic of legal reasoning, in which analogy prevails over deductivism. The dissociation is now clear between equality seen as generality of the legislative precept and equality configured as justifiability of discrimination and therefore as reasonableness.

Determinacy of the rule is not an essential requisite of the rule of law, but only of its ideological use, because it leads people to believe it is the only way judges can appear to apply the law rather than make it.<sup>48</sup> What, instead, is an essential requisite of the rule of law is that all grounds supporting a given decision be displayed in the judicial opinion, so that justificatory argument can be subjected to public disagreement, dissent, and correction.

<sup>46</sup> Cf. Ch.L. Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law', *The Yale Law Journal* 1994, vol. 103, pp. 997-1030 and, for the political aspect, G. Alexander, 'Institutionalized Uncertainty, The Rule of Law, and the Sources of Democratic Stability', *Comparative Political Studies* 2003, vol. 35, pp. 1145 ff.

<sup>47</sup> J. Waldron, *Law and Disagreement*, pp. 33-42.

<sup>48</sup> J.W. Singer, 'The Player and the Cards: Nihilism and Legal Theory', *The Yale Law Journal* 1984, vol. 94, p. 12.

Thirdly, if we consider the subjects that these partial legal orders deal with, we are forced to recognise that often the corresponding rules do not appear to be dictated by a sovereign will, but to be immanent in the social practices regulated. In the field of economics, technology and science it would seem that arbitrary choices are not possible, but only mandatory lines of action if one wishes to achieve given results. Often, actually, this is not the case at all, since what we have is merely a *diktat* of globalization that rich countries impose on poor ones. Through presumed technical rules human action is driven in such a way as to prevent deliberation and freedom of choice. The demand that these rules be submitted, at least in the phase of their application, to the control of the law belongs to the original requirements of the rule of law.

It is not simply a matter of guaranteeing respect for equality and avoidance of discrimination in the application of these rules, but also of favouring their dialogue with demands belonging to different fields of practical reason, like ethics and politics. For instance, in the practices controlled by the WTO conflicts more and more frequently arise between respect for the principle of free circulation of commercial products and respect for nature or animal or human rights. The WTO has been accused of operating in an ethical void, but now there are signs of some attention to values not strictly quantifiable from a commercial point of view.<sup>49</sup> It is specifically judicial institutions that will have to resolve these conflicts between heterogeneous values, since the law is the language of communication between different types of action.

Fourthly and lastly, it must be noticed that in the usual list of the rule of law there is no reference to contract law. Now this is no longer possible. The weakening of the distinction between the public sphere and the private one, already weak in common law, makes the contract, which has become an autonomous source of law, the main instrument of juridical innovation and the protagonist of a decontextualized law apparently devoid of authority. The contract takes on the role of replacing or supplementing the law, also protecting public interests. The very category of the contract is reduced to the bare bones and is only concentrated in the will of the parts, excluding all other requisites (as is clear from the compilation of the principles of the international commercial contracts made by Unidroit).

The old rule of law does not deal at all with contracts, a place of private autonomy, but as they are now taking on a more and more extensive public function, even causing a rule of contract to be prefigured, then contract law becomes an essential part of the principle of world legality.

<sup>49</sup> "The tune/dolphin case" has become a symbol of how the trade system tries to ignore environmental concerns, but also of the fact that it cannot do so for very long.

## **The Flexibility of the Rule of Law and the Universalization of Positive Law**

Faced with these new demands that challenge the formula of the rule of law, there are ongoing processes in the relations between the partial legal orders considered here, from which indications can be derived as to the direction to follow.

The central role of judges in the circulation of contemporary law is obvious. The existence of a true judicial institution is the unequivocal sign of the transformation of a set of economic and social relationships into a real legal order.

Without the European Court of Justice we could not speak of Community law as a true legal system. The Court of Justice has stressed that its jurisdiction is exclusive in promoting the autonomy of the Community legal order and is binding.<sup>50</sup> The national courts of first instance, in their turn, since they can find themselves in a position to decide whether to accept the supremacy of the European Court or that of the national Constitutional Court, of the Community law or the home law, are compelled to choose between their loyalties to different public institutions. On their attitude depends the success of the aims of the Court of Justice and the facts show that the orientations of the European judges have for the national judges a greater strength of attraction than that of the domestic legislator. There is complicity within the judicial function regardless of the place in which it is practised.

Besides, the judicialization of adjudication procedures, in contrast to traditional diplomatic adjudication, can be regarded as a first necessary condition for an emergent international rule of law. In the four areas of international law considered above - international trade, security, labour, and environmental law - there is an ongoing process of judicialization of dispute settlement procedures and an increase in recourse to them with practical acceptance by defendants. Today in the world over 40 international courts or court-like bodies are at work, most of them established during the 1990s.

The most symbolic case is that of the WTO, which compared to the old GATT contemplates a more politically independent adjudication procedure. Above all, an Appellate Body has been created that is made up of experts that

<sup>50</sup> In this connection there has been recourse to the common law doctrine of inherent jurisdiction. The jurisdiction is inherent when it derives exclusively from the nature of the body exercising it. Cf. A. Arnall, "Does the Court of Justice Have Inherent Jurisdiction?", *Common Market Law Review* 1990, vol. 27, p. 701 ff

are not chosen case by case but remain in office for four years and are independent of states, performing functions that are entirely similar to those of the judges of the ordinary courts. This adjudication procedure can exercise compulsory jurisdiction and can be invoked not only by states but also by non-state actors such as individuals, private groups, and supranational agencies.<sup>51</sup> Obviously, many international courts have not reached this degree of development yet, but in any case this is a trend that cannot be stopped, since for pluralism impartiality is more advantageous than partiality and legal expertise more advantageous than *raison d'état*.

If we now look for the reasons for this centrality of the role of judges in contemporary legal pluralism, we easily find them in the fact that the independence of the judicial institution makes it possible that communication between different legal orders that the legislative and administrative institutions generally block. This communication can be expressed on the vertical and official level with the constitution of international and supranational jurisdictions or, on the horizontal and informal plane, in more and more numerous forms of spontaneous collaboration or operational coordination between the national jurisdictions. From here there also derives the need for mutual recognition that is preliminary to communication. It is not only a matter of affinity between people that perform the same functions inside legal systems, but even more a recognition of the methods used for the interpretation of rules and the plausibility and reasonableness of the very rules of the other legal systems.

In the evaluation of this process of globalization of the judicial function it is necessary to proceed with great prudence without underestimating its risks.<sup>52</sup> The multiplication of the relations between the national jurisdictions and the now widespread judicial activism must not be interpreted as the emergence of a global community of courts<sup>53</sup> or as the sign of a new world order.<sup>54</sup> On the contrary they reveal a situation of disorder and the still unsatisfied demand for orderly pluralism.<sup>55</sup> Deeper down it is a matter of facing a new way of conceiving the relationships between legal systems and positive law itself in general.

<sup>51</sup> For this and other similar indications see B. Zangl, "The Rule of Law: Internationalization and Privatization. 4. Is there an emerging international rule of law?", *European Review* 2005, vol. 13, Supp. No. 1, pp. 73-91.

<sup>52</sup> Cf J. Allard, A. Garapon, *Les juges dans la mondialisation. La nouvelle révolution du droit*, Seuil, Paris 2005.

<sup>53</sup> Cf, for example, WW Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement", *Michigan Journal of International Law* 2002, vol. 24, pp. 1-101.

<sup>54</sup> Cf A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton, N.J. 2005.

<sup>55</sup> M. Delmas-Marty, *Le relatif et l'universel*, Seuil, Paris 2004, p. 19.

If we understand positive law as a practice of rules and principles consolidated and diffused in a social group, we may think that it is only valid for this group and not outside it.<sup>56</sup> But in fact sectors of this practice, legal rules, interpretative and deductive methods and legal concepts are communicable from one social group to the other. If a legal way of doing things gives good proof of itself for its effectiveness or for respect for significant values, then it becomes part of a juridical patrimony on which all peoples and all legal orders can draw. Practical reason in its application to law in its long history presents us with a great variety of legal practices concerning the same subject differing from one another in the way of resolving the conflict of values and the techniques used. Among these, those of the most highly developed legal systems have a particular value and a particular capacity to transcend the territorial or cultural spheres in which they have arisen and have come to maturation.

We believe that this extension of a legal practice beyond the legal system in which it arose is also the merit of the application of the traditional rule of law, which has rendered legal procedures reliable. This consolidated juridical patrimony, constituted by pluralistic legal forms of common life, is the effect of the centuries-long application of the rule of law in the most highly evolved national legal systems.

To illustrate what I mean I will give only two symbolic examples among the multiple ones that in general concern the circulation of law, the transplantation or transmigration of legal principles and institutes from one legal order to another, as well as the progressive rapprochement between the systems of common law and those of civil law.

The first example concerns the more and more frequent cases in which foreign law is used by the national courts to interpret domestic law and to fill the gaps in it. In the framework of a closed conception of the legal system such that it has to live on the resources that it finds in itself, an argument based on foreign law makes very little sense and does not allow that predictability of legal consequences to which the tradition of the rule of law referred. It can only be accepted on condition that one abandons a conception of the law as a set of norms dictated by the constituted authorities in order to consider it as what in effect it is, namely a set of interpretative and argumentative practices used in order to resolve problems of common life. Since such problems are in a sense recurrent in all societies and are resolved in a diversified but communicable manner, especially between societies that have reached a similar degree of civilization, it is sensible to learn from the experience of other people.

<sup>56</sup> Cf F. Viola, *II diritto come pratica sociale*, Jaca Book, Milano 1990.

If the law were only a matter of legislative will, then it would not be clear what we could ever learn from the legal commands proper to other peoples and the norms proper to foreign legal systems. But if the law is essentially a problem-solving enterprise, that is to say is a subject of practical reason,<sup>57</sup> then it makes sense to observe how others have faced the same problems and to investigate what rational relations there are between the case that we have to resolve and the way in which similar cases have been resolved in other parts of the world.<sup>58</sup> This is a task of adjudication and legal doctrine. This means that the requisite of the predictability of legal consequences must take into account these interpretative and argumentative resources in order to extend to the whole field of juridical practical reason.

A different case is that in which the foreign law is taken into consideration in order to limit the application of the domestic law, as happens for cultural rights.<sup>59</sup> Here the principle of the territorial validity of the law is blended with its cultural and personal character and this is founded on such constitutional guarantees as equal protection, freedom of association and religion, the right to counsel, and the right to a fair trial. This also confers a certain importance on legal practices not because they have in themselves an exemplary value, but because in this way the people that find their identity in them are respected.

The second example concerns directly, but not exclusively,<sup>60</sup> European Community law.

With the aim of ensuring unity that is not uniformity and differentiation that is not anarchy, the European Union pursues an orderly legal pluralism.<sup>61</sup> The government of differences is mainly ensured by judgments of equivalence regarding the rules and the guarantees present in every national arrangement for the protection of interests or needs judged to deserve Community tutelage, as well as the instruments contemplated for ensuring the effectiveness of those guarantees. Once the substantial parity between the national disciplines and

<sup>57</sup> "Law is an argumentative discipline". N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, Oxford 2005, p. 14.

<sup>58</sup> Though I do not agree with Waldron in considering this as an example of *ius gentium*, I follow his conclusions. Cf J. Waldron, "Foreign Law and the Modern *Ius Gentium*", *Harvard Law Review* 2005, vol. 119, pp. 146-7.

<sup>59</sup> I refer, for example, to the problem of cultural evidence (or cultural defence) as an excuse for the otherwise criminal conduct of immigrant defendants. Cf A.D. Renteln, *The Cultural Defense*, Oxford University Press, New York 2004.

<sup>60</sup> There are similar practices in American law and in the WTO, but the European ones conserve the peculiarity of not taking place within a federation or international organization.

<sup>61</sup> "United in diversity", says the Preamble to the European Constitution.

the legal irrelevance of the differences have been established, mutual recognition is achieved of the validity of the relevant rules, which consequently lose their exclusiveness.<sup>62</sup>

Inside the European juridical space there are different legal ways of doing things, all legally and axiologically equivalent, all equally valid, though belonging to different legal systems. Consequently - following pioneering decisions by the Court of Justice - it has been recognized that each national operator has the right to choose the rules of that legal system that are considered most advantageous or favourable and on this basis to go forward with his or her own action. Hence for some subjects, and not only those relating to economy, a real choice of the law can be made by those that also submit to it.<sup>63</sup> It is not only a matter of choosing the norms, but also the regulatory authorities and courts of justice (*forum shopping*).

Admission of the lawfulness of this practice is a major challenge to consolidated concepts of the theory of the legal system, such as the uniqueness of the rule of recognition, the exclusiveness of the setting of norms, the compact structure of the system, the primary role of the law and the dichotomy between public and private sphere. People speak of regulatory competition between legal systems that are induced to attract consumers of norms, offering them more favourable conditions, with the danger of a race to the bottom in the guarantees of rights.<sup>64</sup> It is to be noted that this implies a change in the very concept of legal norm, from a pre-constituted datum to an object of choice or product (*law as a product*).<sup>65</sup> These are all unresolved problems that we cannot discuss here.<sup>66</sup> We wonder what effects this can have regarding the reformulation of the rule of law.

The weakening of the exclusive character of state law is due to the constitutional need to ensure greater bonds between the law and the human person. It

<sup>62</sup> Mutual recognition is seen as an alternative mechanism of integration, and if compared with harmonization appears to be more respectful of the principle of subsidiarity. In general, cf M. Gnes, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, Giuffrè, Milano 2004.

<sup>63</sup> This opportunity for choice is not to be confused with the *choice of law* (and more broadly the *conflict of laws*) in American or English law, in which the judge must decide the applicable law on the basis of the norms of international private law.

<sup>64</sup> Cf N. Reich, "Competition between Legal Orders: A New Paradigm of EC Law?", *Common Market Law Review* 1992, vol. 29, p. 861 ff.

<sup>65</sup> Cf R. Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle", *Journal of Law, Economics & Organization* 1985, no. 1, p. 225.

<sup>66</sup> Cf A. Zoppini (ed.), *La concorrenza tra ordinamenti giuridici*, Laterza, Roma-Bari 2004.

is not enough to determine the structural forms that a law must have and even to determine the procedures that must be followed by officials: it is also necessary that the laws be conceived as rules to which each person could voluntarily conform his or her own behaviour. And in this connection there is no better solution than that which allows the person to choose the law to follow.

If it is true that one of the fundamental needs underpinning the rule of law is to enable individuals to plan their own existence and to act consequently, then the choice of the law on determined conditions perfectly suits this aspiration. The pluralistic order of domestic and global society must be blended with the order of the people and, in the end, be functional to the latter. There is a growing demand for Law-Rule as Self-Rule, reconciling the two premises of constitutionalism: government of the people by laws and government of the people by the people. But this is only possible if the political engagement is seen as a form of human good constituting different social and cultural identities common to one another.<sup>67</sup> Otherwise, the spectre of a rule of men and not of law would return.

Nevertheless it is necessary to specify that the choice of the law is not production of a new law, but implies the prior existence of legal rules, of interpretative and argumentative practices, of legal ways of doing things. It is not even the supermarket of norms, but the world of practical reason applied to human coexistence. It shows a great variety of legal solutions, which differ from one another in cultural particularity and greater sensitivity to some values to the detriment of others. These legal institutions are not invented by individuals, but produced by use, self-generated and self-correcting.<sup>68</sup> The pluralism of legal orders, their mutual recognition and their interconnection make the exclusiveness unacceptable both because each of them is incomplete and because its legislation is one of the many possible ones. The constituted authority serves more to make sure that individuals follow a coherent course of action than to establish once and for all what it has to be. The authority guards the order, but it does not always have sovereignty over its content.

There is thus formed by accumulation a world patrimony of practical knowledge about the use of the law, about rights and justice.<sup>69</sup> We are not talking about a uniform or systematic corpus of legal principles and orientations,

<sup>67</sup> F. Michelman, "Law's Republic", *The Yale Law Journal* 1988, vol. 97(8), pp. 1500-03.

<sup>68</sup> R. Forst, "The Rule of Reasons. Three Models of Deliberative Democracy", *Ratio Juris* 2001, vol. 14(4), p. 374.

<sup>69</sup> The usual reference to the common constitutional patrimony or to the juridical principles common to civilized nations does not render well the idea that I intend to express here, i.e.



but a reservoir of legal forms of common life that have withstood the test of history and are in a sense universalizable and interchangeable, that is to say not imprisoned in cultural enclaves. Reasonableness in a sense makes positive law itself universal.

## Conclusion

After this approximate and incomplete analysis of legal pluralism connected in some way with the national legal systems, we can formulate some conclusive considerations.

The rule of law can be observed from two points of view: as a regulatory model and as a sum of the essential characteristics of the legal enterprise.

The traditional formula of the rule of law has been consolidated - as mentioned - in reference to socio-political contexts linked to the nation-state or to cohesive political communities and constitutes, together with democracy and the protection of rights, a necessary defence for the protection of human dignity. But its content is controversial and its application uncertain.<sup>70</sup> On what condition can it be considered to be respected?

People discuss how we are to define the desiderata that traditionally constitute the rule of law. The interpretive theory of law and the hermeneutical theory of law have shown that "the law" is not a fixed set of standards of any sort,<sup>71</sup> that the norms are not the presupposition but the result of the interpretation, that the legal rule is the one formed in the light of the particular case. The legalistic conception of the rule of law is an ideal that has turned into an ideology that serves to hide the real practice of the law.<sup>72</sup>

Actually political power does not succeed in controlling the meaning of the norms that it has emanated even when it desperately aims at entrenchment. These meanings are produced by social life in a way that eludes the restrictions imposed by the formal legislative procedures.<sup>73</sup> The identity and the continuity

intercultural communication of legal practices and forms of life rather than minimal convergence in principles.

<sup>70</sup> Cf J. Waldron, "The Rule of Law as a Theater of Debate", in: J. Burley (ed.), *Dworkin and His Critics*, Blackwell, Oxford 2004, pp. 319-336.

<sup>71</sup> R. Dworkin, *Justice in Robes*, Harvard University Press, Cambridge, Mass., p. 234.

<sup>72</sup> Cf, for example, A. Scalia, "The Rule of Law as a Law of Rules", *The University of Chicago Law Review* 1989, vol. 56(4), pp. 1175-88.

<sup>73</sup> "Precepts must 'have meaning', but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call

of a legal system are not given by the persistence of the formal principle of validity, but by the continuity and identity of the society of which it is an expression.<sup>74</sup> Hence in legal practice there is an irrepressible demand for direct participation of society in the formation of the legal rule, since the law is not a book of rules but an interpretative social practice.

This situation is subsequently complicated when the continuity and the identity of the society behind the legal system are lost. The fragmentation of the legal orders, each of which appropriates to itself parts belonging to the state legal system, reveals not only the widening of the confines of society, but also the impossibility of considering it as a unitary whole defined once and for all. There is no longer a single interpretative community, but many of them, which vary in relation to the type of action, the commitments taken on and the consequences of the decisions.

In conclusion, merely revisiting of the traditional formula on the basis of the principle that perfectionism can be counterproductive<sup>75</sup> is not enough: we need a transformation of it towards a *constitutional rule of law* accompanied by a deliberative democratic method.<sup>76</sup> There remains the danger that, insofar as international law and Community law interfere in domestic law, the ambiguity of the rule of law will also be transmitted to domestic law and that the relations between legal institutions will be destabilized.<sup>77</sup>

If, instead we look on the rule of law as the general ideal of diffusion of legal practice in the government of human affairs, then we have to observe that it is enacted in varying degrees depending on the situation of the social contexts. On one side we have social orders still needing to be made legal to an acceptable degree, such as the international organizations; on the other there are

formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion". R.M. Cover, "Nomos and Narrative", *Harvard Law Review* 1983, vol. 97(1), p. 18.

<sup>74</sup> Cf J.M. Finnis, "Revolutions and Continuity of Law", in: A.W.B. Simpson, *Oxford Essays in Jurisprudence*, Second Series, Clarendon, Oxford 1973, p. 69.

<sup>75</sup> This even applies to the fundamental principle of non-retroactivity of laws. Cf Ch. Sampford, *Retrospectivity and the Rule of Law*, Oxford University Press, Oxford 2006, pp. 266 ff.

<sup>76</sup> R. Fallon, "'The Rule of Law' as a Concept of Constitutional Discourse", *Columbia Law Review* 1997, vol. 97(1), pp. 1-56. The constitutional rule of law continues to be a formal model and hence is not to be confused with Dworkin's rights conception or with that of T.R.S. Allan, *Constitutional Justice. A Liberal Theory of the Rule of Law*, Oxford University Press, Oxford 2001. Both are substantive conceptions of the rule of law.

<sup>77</sup> Cf Th. A.J.A. Vandamme, J.-H. Reestman (eds.), *Ambiguity in the Rule of Law*, Europa Law Publishing, Groningen 2001.

complex legal formations that already imply being legal to an elevated degree, like for instance European Community law.

It is obvious that the former approximate to the ideal of the rule of law by rounding down, while the latter represent a further expansion of it and imply its success. But all of them address the principles of natural justice, the composition and accessibility of courts, legal reasoning as a form of public reason, and the review powers of judges, as well as the responsibility of all those people that have the authority to emanate, to execute or to apply the legal rules. All these desiderata are much more important than the general characteristics of the laws, which in the list established by Fuller played a central role.<sup>78</sup>

We can well consider the traditional formula of the rule of law as the *virtue of a legal system* already existing but we now have to consider the rule of law at work in contemporary law in all its extension as the legal becoming of social and political orders that progressively submit in their own way to the dominion of law, i.e. a living rule of law in progress, and in this way also succeed in conversing with one another, which is necessary to reconstructing a political identity in the world of fragmentation.

<sup>78</sup> As an example of this broadened form of rule of law see D.M. Betty, *The Ultimate Rule of Law*, Oxford University Press, Oxford 2004.