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Reasons for Legality: The Moral Ideal of Legality and Legal Positivism
Do Wicked Rulers Dream of Abiding by the Rule of Law?

ABSTRACT

The question of the moral or instrumental nature of law has undergone various philosophical disputes between advocates of legal positivism and its detractors, the last being between Matthew Kramer and Nigel Simmonds centering around the idea of whether or not wicked rulers have prudential reasons to abide by the rule of law. In this article, I review the basic arguments of this controversy and also question its relevance when it comes to affirming or denying the moral neutrality of law. However, the debate is interesting because it clearly illustrates the way in which many advocates of legal positivism have faced the problem of the moral dimension of law. I conclude by questioning many of those assumptions and proposing a different perspective that requires us to compare law with other methods of social control and not to do it exclusively from the standpoint of rulers but also of the ruled.

KEYWORDS

rule of law, legality, legal positivism, freedom

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1. *Introduction*

In the first pages of his book *On the Rule of Law*, Brian Tamanaha reproduces various statements from key political leaders in support of the rule of law: «we must build a system based on the rule of law and should not pin our hopes on any particular leader», «only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law», and

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«now is the time to defend ourselves not with tanks and armed corps but by the rule of law». The surprising thing about these statements is who made them: Hu Jintao, General Secretary of the Chinese Communist Party and President of the People's Republic of China; Robert Mugabe, President of Zimbabwe; and, finally, Abdul Rashid Dostum, Afghan war lord.

In contrast to other values such as freedom, democracy or market economy often reviled outside – and inside – of the western political orbit, the rule of law appears to create universal consensus. This is particularly significant, because no other ideal, says Tamanaha[1], has achieved the global endorsement that the rule of law has. National and international political leaders and authorities do and did manifest their adherence to the rule of law, and none has shown express opposition to the ideals that it embodies.

It is difficult to know what would have happened to a ruler who had expressly positioned himself against the rule of law or what would have been the reaction of his colleagues to such eccentricity, for the simple reason that, as far as I know, such an inappropriate remark has not been uttered even by the most talkative tyrants. To find something like that, we have to go to *academia*, where it is not uncommon for scholars to claim what would be considered scandalous in the political forum. This is the case of Evgeny Pašukanis, Soviet jurist and legal philosopher, who claimed that legality and communism are incompatible since law is fundamental to the functioning of capitalism and that its concepts, principles and forms are expressions of bourgeois ideology. Pašukanis even ventured that law would be dissolved with the introduction of the

[1] TAMANAHA 2004, 3.

Communist society[2]. The unfortunate fate of the socialist lawyer[3] and the fact that the Soviet Union never endorsed his doctrine as official permits us to think that Stalin might easily have been among the dictators and tyrants I referred to and have competed with them in the intensity of his adherence to the rule of law[4].

Should we take as settled the problem posed by the cited leaders' statements arguing that they are hypocrites or impostors anxious to give a patina of legitimacy to their regimes so hiding their crimes or is it possible that the rule of law has a hidden face which makes it particularly interesting in the eyes of tyrants, despots, dictators and mass murderers?

That is the issue that underlies the subtitle of this work[5]: is there any reason why wicked rulers may want to submit to the principles of the rule of law or, on the contrary, are these principles incompatible with the interests and objectives that that kind of rulers normally encourages? I will try to give an answer to this question and analyze its implications for the relationship between law and morality.

[2] PAŠUKANIS 1924, 44-49. With regard to the relationship between rule of law and communism, see also KRYGIER 1990, 654-657.

[3] He was shot to death, a victim of Stalin's purges in 1937.

[4] As a curiosity, that conclusion is confirmed when reading the content of some of the official legal texts of the USSR at the time. For example, Article 112 of what is known as *Stalin's Constitution*, the Constitution of the former USSR from 1936, stated that «judges are independent and subject exclusively to the law».

[5] Perhaps a not too original paraphrase of the title of the novel by Philip K. Dick *Do Androids Dream of Electric Sheep?* which provided the inspiration for the screenplay of Ridley Scott's famous movie *Blade Runner*.

The issue is not new and has already been subject to philosophical treatment. What I am going to do, firstly, is to present the arguments put forward in the legal-philosophical debate as to whether evil rulers have reasons to abide by the rule of law. Secondly, I will discuss what has been said about the importance of that fact for the moral dimension of legality. The whole debate has been mainly developed in two stages: the first starring Herbert L.A. Hart and Lon Fuller and the second Matthew Kramer and Nigel Simmonds. I will refer to both below.

Before that I will clarify what I understand by "wicked ruler" and by "rule of law". I will also set out an explanation of the types of reasons why those who rule may want to do so according to the rule of law. It will be a mere approximation, general in its features, rather than a precise definition, but sufficient for the purpose of this work.

Wicked rulers are defined as those who, either governing in a capricious and arbitrary fashion or consistently and mainly through general and stable norms, show neither concern for the common good nor any kind of concern or even respect for their subjects, not governing, even marginally, according to their interests. Wicked rulers stand in clear contrast to rulers of a constitutional-democratic regime, that is, a political regime which proclaims submission of government to law, outlaws the arbitrary exercise of power, ensures political participation of the people, and guarantees a more or less extensive catalogue of rights and freedoms of citizens, which warrants a certain subordination of the exercise of political power to the common good understood in a way necessarily connected with the citizens' needs, interests and aspirations.

Secondly, by rule of law I understand the state of things occurring when a legal order exists and operates, that is, when it is the case that the actions of its members are subject to

guidance of rules that meet the following requirements: they are rules with a certain degree of generality, they are mostly public, prospective and not systematically retroactive, understandable, possible to comply with, relatively stable and non-contradictory and, most often, they are consistently applied, that is, that there is some congruence between the provisions of the rules and what is actually required by the authorities who enforce them. Rule of law is, therefore, the situation that occurs when those requirements are satisfied in a sufficient or satisfactory way. I will call this set of requirements "principles of legality" or, simply, "legality"[6]. It is common to differentiate among rule of law, rule by law, rule through law or Rule of Law[7], but I am not sure whether these distinctions are real. In my opinion, legality, as just defined, does not merely refer to a very simple state of affairs, but to an ideal. I think there is no mark or threshold which limits where the existence and operation of a legal order ends and where the advanced refinements of the political ideal of the Rule of Law begin, and hence the rule of law goes beyond the minimal conditions implicit in some analysts' views. The existence of a legal order is a hugely dense political ideal. It requires the development of conditions which ensure that *the rule of rules* is actually the case and which avoids, for example, individuals' conduct being directly determined by the will of someone else. It exceeds the mere formal presence

[6] The list of conditions of legality was formulated by FULLER 1964, 39. KRAMER 2004a, 63 and 2007, 101-109 also identifies these conditions and the rule of law. Another important related approach is that of RAZ 2009, 214 and 2009, 225 f., who, however, distinguishes between law and the rule of law as a set of conditions that make law able to guide the behavior of those at whom it is directed.

[7] See RAZ 2009, 212; KRAMER 2007, 103 and 142; BRUDNER 2004, 47; or COYLE 2007, 178.

of coercive rules and, depending on the type of society, will require complex institutional arrangements and very refined conditions – courts, hearings, evidence, trials, reasonable application of the law, etc.[8] – ensuring that, in effect, the members of that society are really subject to the guidance of rules. The rule of law, therefore, includes elements that are sometimes referred to as the Rule of Law, although it does not equal, from my point of view, its more dense variants as, for example, those that consider some human rights or requirements of justice as its logical consequences.

Finally, I will group in two categories the reasons why a ruler could decide to abide by the principles of legality: moral reasons and prudential reasons[9]. This distinction is analogous with that between explanatory reasons – which specify what was the real cause or motives of a decision – and justificatory reasons – aimed at making a right or reasonable decision –, that is, between explaining and justifying. Moral reasons are a type of justificatory reason, which are grounded on the very same values that have just allowed us to define what a wicked ruler is. Hence, rulers' prudential reasons relate mainly to self-interest, i.e., the rulers' reasons for making decisions to the extent that they guarantee their continuity in office, a greater effectiveness of their rule or which enable them to better achieve their own interests. Moral reasons to endorse legality point to the rulers' commitment to the interests of others or their moral commitment to the ideal of the rule of law and its underlying values, that is, to the rulers' conviction about its justice.

[8] Another similar view is WALDRON's (2011, 6) procedural characteristics of the rule of law.

[9] Again following a suggestion of KRAMER 1999, 3, who, it appears, in turn, was inspired by HART 1961, 203.

2. *The first act of the debate: Hart vs. Fuller*

The subject this work deals with was already discussed in the context of the well-known Hart-Fuller debate. A brief reference to some aspects of that debate, in particular, references to the *relationship* of wicked rulers with legality will serve to frame theoretically the details of the issue to which I will refer later.

Fuller[10] claimed that there is some incompatibility between the principles of legality – the already mentioned eight conditions that make law possible, that is, the inner or internal morality of law – and those legal theories which present the concept of law as a simple expression of the will of rulers, which is imposed unconditionally from top to bottom on the ruled. This conception is characteristic of those who, like Hart, insisted on the separation between law and morals, that is, of legal positivists. To illustrate the differences between his own conception of law – built around the idea of morality – and the legal-positivist one, Fuller[11] referred to the rise of national-socialism and said that had German jurists paid more attention to the inner morality of law, it would have been possible for them to resist Nazi law and correct its aberrations[12]. He also underlined that it would have been possible to do so without

[10] FULLER 1958, 659.

[11] FULLER 1958, 660 f.

[12] FULLER suggested that the Nazis' persistent violation of principles of legality destroyed the conditions necessary for any intelligible invocation concerning the existence of a legal duty to obey the laws. In doing so, he asserts that the legal duty has not arisen and thus no contrast is possible with a conflicting moral obligation endowed with greater binding force (ALLAN 2001, 68 f.). Therefore, he is postulating a conceptual identification between law and its internal morality.

resorting to notions such as *higher principles* or *higher law*, hence also marking his distance from the traditional natural law theory.

Hart[13] in *The Concept of Law*, did not pay too much attention to Fuller's assertion, which he attributed to "one critic of positivism", without specifically mentioning him by name. Hart acknowledged that principles of legality and requirements of justice are "closely related", but insisted on the separation between legal control and the demands of justice and quickly resolved the so-called necessary conceptual connection between law and (inner) morality insisting on its compatibility with "very great iniquity".

In the first edition of *The Morality of Law* as a response to that reference, Fuller[14] drew attention to the fact that Hart had not offered any example of a ruler responsible for the commission of enormous wickedness and who was, at the same time, committed to the principles of legality. Fuller seemed sure that Hart would not be able to offer any example[15]. Probably that was the reason why Fuller did not pay more attention to the topic and merely insisted on the idea of reciprocity between ruler and ruled[16] and added that

[13] HART 1961, 206 f.

[14] FULLER 1964, 154.

[15] So WALDRON claims 1994, 263 f.

[16] FULLER 1964, 39-41 said that where the government rules through laws there exists some reciprocity between ruler and ruled. The origin of this thesis is SIMMEL 1923, 186 f., whom Fuller quotes, who pointed out that a despot who threatens his subjects to punish them if they do not act as required, also «himself wishes to be bound by the decrees he issues» so remaining himself subordinate to his own rules: no matter how horrible the punishment may be, the despot is committed not to impose a more severe one. That way, the subordinate is entitled to claim that the punishment would not go beyond the limits set out in the despot's order.

the principles of legality presuppose a conception of the dignity of the human person as a «responsible agent, capable of understanding and following rules, and answerable for his defaults»[17]. Fuller, however, was fairly ambiguous when he came to show the genuinely moral dimension of the internal morality of law: firstly, because he *separated* the internal or legal morality from the external one when he insisted on the ethical neutrality of the former[18]; and, secondly, because he suggested that respect for the principles of legality was a condition for the effectiveness of law. Indeed, for Fuller[19], «some minimum adherence to legal morality is essential for the practical efficacy of law», and in being so internal morality remained linked with «the ways in which a system of rules for governing human conduct must be construed and administered if it is to be efficacious and at the same time remain what it purports to be»[20]. The well-known reference to the case of the carpenter was not too illuminating: for Fuller[21], the principles of legality are like the techniques, skills and tools that a carpenter should use if he wants the house he builds – whether it is a hangout for thieves or an orphans' asylum – to remain standing, so fulfilling its purpose. The simile suggests that principles of legality have

17 FULLER 1964, 162.

18 For FULLER 1964, 153 «law's internal morality [...] is, over a wide range of issues, indifferent toward the substantive aim of law and is ready to serve a variety of such aims with equal efficacy», although a little later, he adds that «a recognition that the internal morality of law may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that *any* substantive aim may be adopted without compromise of legality».

19 FULLER 1964, 156.

20 FULLER 1964, 97.

21 FULLER 1964, 96 and 155.

a purely technical dimension, where the generality, publicity, general prospectivity, etc. are conditions of the efficiency or practical possibility of law and not expressive features of its moral dimension.

Hart[22], in his review of Fuller's book, took advantage of that ambiguity and warned that the principles of legality do not refer to anything outside the law which sets limits or substantial objectives of *moral* character. He emphasized their instrumental dimension when saying that principles of legality are conditions or procedures to ensure «the efficient execution of the purpose of guiding human conduct by rules»[23], but which affect neither the substantive aims and content of the laws, nor if they are just or unjust. To prove it, he also used the simile of the principles of carpentry, emphasizing that they are independent of whether the carpenter is making hospital beds or torturers' racks. For Hart, the principles of legality are morally neutral because, as such, they are compatible with the pursuit of the wickedest purposes. The decision to classify the principles of legality as a morality of law is a source of confusion, as law – like any other purposive activity as, for example, poisoning – has its own principles and to call them «"the morality of poisoning" would simply blur the distinction between the notion of efficacy for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned»[24].

In the *Response to Critics* of the second edition of *The Morality of Law*, Fuller was anxious to make clear the moral nature of principles of legality to neutralize the criticisms – favored by his own ambiguity – which had been made of his

[22] HART 1965.
[23] HART 1965, 1284.
[24] HART 1965, 1286.

thesis. To do this, first of all, he changed his standpoint from that of the legislators – concerned to effectively achieve their own purposes – to the citizens' point of view – mostly concerned to avoid coercion or officials' interference. In this way, he emphasized the protection provided for citizens by the principles of legality and particularly by the requirement for congruence between the promulgated rules and officials' action. He also clarified the meaning of efficacy, namely that it does not refer to achieving certain political or personal goals that might encourage a particular decision, but to the confidence that law and its integrity inspire[25]. Thus, for example, although a retroactive rule could be effective if its purpose is fulfilled, it implies a break with the integrity of the legal order that would undermine its long-term efficacy, which is guaranteed when principles of legality are respected. They are, then, far from being purely short-term considerations and so they are not incompatible with the moral import Fuller attributed to them before. As an ultimate support for this moral dimension[26], Fuller[27] introduces the idea of "managerial direction" as a form of social ordering and contrasts it with *law*. Managerial ordering implies that a superior person, with a specific end, targets certain directives toward a subordinate, who obeys, executes them, and thus serves the purpose defined by the superior. However, where the control is legal instead of managerial, rules regulate the relationship between subjects, who follow them to achieve their own goals and not exclusively those of

[25] FULLER 1969, 202-204.

[26] An exhaustive enumeration of all the reasons advanced by Fuller in support of the moral value of principles of legality can be found in KRAMER 1999, 39-42.

[27] FULLER 1969, 207.

the superior person. Five of the eight principles of legality – publicity, intelligibility, non-contradiction, possibility of compliance and stability – «are quite at home in a managerial context»[28]. However, principles of generality and of faithful adherence by government operate according to a different logic: within managerial contexts, *generality* becomes a matter of mere expedience and subordinates have no right to complain if superiors direct them to depart from requirements prescribed by general orders and the same occurs when superiors do not conform to the rules announced beforehand[29]. In a clear contrast with that situation,

> «law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of the system»[30].

And thus Fuller considers that he has sufficiently justified his thesis about the moral dimension of legality.

3. *The second act of the debate: Kramer vs. Simmonds*

I will refer now to a sequel of that former debate which has recently confronted Kramer with Simmonds. I will go through the different stages of this debate grouping the

[28] FULLER 1969, 208.

[29] FULLER does not think that the remaining principle of prospectivity applies to managerial control, as it is not possible to order today someone to do something yesterday.

[30] FULLER 1969, 209.

numerous arguments put forward around two threads: (a) the debate on the reasons, which analyzes whether wicked rulers can credibly decide to comply with the principles of legality for prudential reasons, and, as a result of that, (b) the moral dimension of legality.

3.1. *The debate on the reasons: legality as an incentive for obedience*

The starting point of the debate is found in Simmonds' criticisms of Hart's thesis according to which the principles of legality are a simple condition for the efficacy of social control. In the chapter on Fuller in the first edition of his book *Central Issues in Jurisprudence. Justice, Law and Rights*, Simmonds[31] points out that if efficacy of social control refers to preventing instability of political regimes or ensuring that the governed comply with the rulers' orders, then the principles of legality are not the instrument that *best* enables them to achieve that goal, but an obstacle to it. A dictator or tyrant wanting to crush political opposition can better achieve this objective by imposing a regime of widespread terror, where police act arbitrarily, based on *ad hoc* decisions, secret, retroactive directives, etc. When political power constrains itself to comply with the requirements of legality, the efficacy of its control is undermined, because where rules are general, public, and prospective, are congruently enforced, etc., the governed know how to act to prevent officials' interference. In the absence of such limitations, any action that irritates leaders is likely to give rise to retaliation by the authority, and the only way to avoid such interference is to be submissive and

[31] SIMMONDS 1986, 119 f.

compliant with what the one who holds the power wants[32]. The constraints that the law imposes on the ruler's conduct cast doubts on the purely instrumental character of legality and open the door to the justification of its moral dimension.

Kramer frontally opposes these theses: for him, the nature of the reasons why leaders choose to abide by the rule of law is crucial to elucidate whether principles of legality have a moral dimension or whether they are simply principles of efficacy. In his book *In Defense of Legal Positivism*, he says that the moral character of the rule of law is proved when it is shown that rulers' adhesion to principles of legality has an inevitably moral significance[33]. It is necessary, therefore, to examine the reasons why rulers choose to abide by the principles of legality: if they are moral reasons, it turns out that the principles have the moral dimension that Fuller and Simmonds attribute to them, but if

[32] A similar thesis is that of MURPHY 2005, 252 f., for whom the absence of rule of law involves the appearance of a state of uncertainty in which citizens cannot anticipate how the ruler will respond to their actions; by contrast, where principles of legality are respected, citizens are confident with regard to what is required of them, and it is unlikely that fear will make them feel impotent. Quoting LINZ 2000, 112, he reminds us that an atmosphere of widespread fear psychically and morally destroys any potential opponent. It also creates an atomized society wherein individuals are unable to feel trust for each other, so spreading insecurity and leading the subjects to act in an over-compliant and submissive way towards authorities. FOX-DECENT 2008, 574 refers to the case of the Disappeared in Latin America and points out how such unconditional and unpredictable repression is particularly effective when it comes to generalizing a feeling of fear among the population and thus discourages the exercise of political opposition.

[33] KRAMER 1999, 62-65.

it were possible to abide by them for purely prudential reasons, then their thesis would collapse.

Kramer[34] considers that there are prudential reasons – that is, self-interest based reasons – for wicked rulers to wish to submit to the principles of legality. Whatever their goals, they will need to deploy and exercise control over economic, social and political life, etc. In order to govern efficaciously on an ongoing basis over human groups of some complexity, rulers need a tool that enables them to structure the thousands of orders they have to address to the population. It is impossible to achieve these objectives if only ruling through particularized orders without a fixed pattern. By contrast, it is possible indeed if rulers express their will through published, stable, intelligible, etc., rules. Ruling in accordance with the principles of legality (1) provides clear-cut direction of orders to the population facilitating their efficacy, (2) fosters incentives to obedience ensuring the correlation between compliance with the rules and immunity from public coercion, and (3) enables officials to coordinate so facilitating them to bring about large scale ruling projects. Kramer is claiming here that the rule of law is a sort of instrumental good for rulers who have evil purposes and hence, that we could rightly assume that they are interested to abide by it, which, in turn, proves its moral neutrality[35].

[34] KRAMER 1999, 67-69 and 2004a, 69.

[35] On instrumental goodness and its relationship with moral goodness, see WRIGHT 1963, 19 ff. and 119 ff. According to his theses, to assert that an act, i.e. ruler's act of abiding by the rule of law, is morally good it is necessary to show that decision to abide by the rule of law was carried out for the sake of someone's good and that any harm to anybody was not foreseeable from the act (1963, 128). This characterization of moral goodness is analogous to the one

Of particular interest is Kramer's reference to congruence between officials' actions and what is established in norms formally in force. For Kramer[36],

> «if people often undergo punishment even when they have conformed closely to the prevailing legal norms or if they often do not undergo any punishment even when they have plainly violated those norms, the inducements for them to abide by those norms will be markedly sapped»[37].

A «regime that wishes to advance its aims efficaciously will have solid prudential reasons for keeping a consistency between its laws-as-enacted and its laws-as-implemented»[38]. It follows that rulers who want to increase the overall effectiveness of their mandates have a prudential reason to exercise coercion consistently, punishing only those who disobey the rules formally in force and ensuring immunity to those who obey them. I will call this argument of Kramer, one of the most disputed of the debate, *incentive argument*[39].

Simmonds responds to Kramer's criticisms in the second edition of *Central Issues in Jurisprudence* and in some subsequent works, where he reaffirms, first, that evil rulers typically have reasons to deploy violence even against those

in the concluding section of this article. However, Kramer's theses relating to the inherently moral dimension of practices are different: for him, the inherently moral character of a practice is demonstrated exclusively according to the type of reasons for adhering to it.

36 KRAMER 1999, 69.

37 Kramer recalls that this relationship had also been highlighted by FULLER 1969, 217.

38 KRAMER 1999, 70.

39 As STEWART 2006, 151 labels it.

who do not regularly disobey enacted rules and, therefore, there is no reason for rulers to wish to be bound by the principles of legality[40]. Should rulers govern through public, precise, and consistently applied norms, they would give room for innovative or creative ways of political opposition and would facilitate its coordination, which would destabilize the regime and convey to the general population an image of the regime's weakness[41]. There is no reason to think that these rulers would cease to wish to resort to paramilitary forces or groups of thugs who informally exercise violence on those who, although acting within the framework of established rules, express disaffection or opposition to the regime through their actions. The informal exercise of violence generalizes fear among the population, thus, individuals lose any incentive to engage in opposition activities and, instead, will prefer to show their enthusiastic support for the regime.

Second, Simmonds adds that the use of violence outside published norms does not weaken incentives for people to comply with them, so rejecting Kramer's incentive argument. Simmonds[42] does not believe that extra-legal activities and violence discourage obedience to formal

[40] SIMMONDS 2007, 85-88 later systematizes the reasons why he thinks so: chilling effect, blocking visibility, blocking visibility by requiring enthusiasm, and dealing with strategic behavior amongst supporters.

[41] SIMMONDS 2004, 101-104. These effects are incompatible with what seems a necessary aim of any wicked ruler, staying in office. Although particular aims of rulers can be very different (custody of religious orthodoxy, creation of a political or social utopia, exploitation of the population, etc.), all of them desire to stay in power (2004, 104). This thesis seems to be confirmed by some relevant political science studies: BUENO DE MESQUITA et al. 2003.

[42] SIMMONDS 2004, 108.

legality and he considers that the incentive argument is "straightforwardly false", because in its original formulation it assumed something extremely bizarre: that the exercise of extra-legal violence is conditional on compliance with formally established rules, i.e. that the thugs of the ruling party in a wicked regime will beat those who have complied with formally established laws. Furthermore, Simmonds[43] points out that there are two cases in which recourse to extra-legal violence clearly does not undermine obedience to formally established obligations: (1) when the citizens, who are punished for violating formally settled rules, «also suffer, on a very frequent but irregular basis, random acts of violence perpetrated by the officials of the regime», and (2) when «citizens are punished for violating the rules formally established, but, with equal frequency, they are also punished for activities obnoxious to the ruling powers, although not prohibited in any published and prospective rule». In these cases, violation of enacted rules results in the imposition of the formally established punishment, but this does not reduce the likelihood of also suffering an extra-legal beating.

Kramer reiterates his commitment to the incentive argument and rejects Simmonds' presupposition that the deployment of extra-legal punishment is conditional on compliance with formally established norms. Kramer[44] states that the greater the difference between the "*perceived* probability" of being penalized if citizens obey the rules and being sanctioned if they fail to do so, the greater is the incentive to abide by the rules. The probability is comparative and the «overall punishment-centred incentive

[43] SIMMONDS 2002, 231 f.
[44] KRAMER 2004a, 85.

consists in the gap between those two probabilities»[45]. To the extent that extra-legal violence reduces that difference, a regime that does not rule according to legality lessens the incentive to comply with formal rules. Kramer[46] insists that, in the latter case, although the incentive to conform to formal legality has not disappeared completely, it has been weakened.

The detailed proof of it is a new version of Kramer's incentive argument based on the *less to lose* effect[47]. As I just noted, the impact on the motivation of individuals when deciding whether to comply with settled norms depends on the comparison of two ratios[48]: the first is the difference between the probability of not suffering any sanction because they obeyed the rules in force and the probability of being punished because they did not, and secondly, the differential ratio between the probability of not being punished when rules are fulfilled and the probability of suffering an informal sanction, i.e. the possibility of an informal retaliation by the authorities. When the differential between the two probabilities is very high, as in regimes that

[45] KRAMER 2004a, 86.

[46] KRAMER 2004b, 7.

[47] KRAMER 2006, 167. The argument was outlined by KRAMER 2004c, 186, who referred to it as the *nothing to lose attitude*. It has been analyzed by STEWART 2006, 157 as the *little to lose effect*.

[48] KRAMER 2006, 172 f. – expressively – illustrates that by referring to the experience of a former prisoner in a Japanese concentration camp, who recounted how random executions of internees moved them to rebel against the guards. They felt that they had less to lose with their subversive attitude, considering the probability of being shot at random. According to the same experience, KRAMER goes on to tell, the regular application of the orders given by the guards – that is, the punishment of offenders and only the offenders – encouraged prisoners to abide by the discipline of the jailers.

respect the principles of legality, there is a lot to lose from the breach; when deciding whether to comply with a norm or not, one has to decide between the (almost) certainty that one will not suffer any type of sanction if one obeys and the (almost) certainty if in breach. However, when regimes often resort to extra-legal violence, the difference is less, and so citizens have less to lose if they disobey the rules: in this case, individuals choose between the certainty of been sanctioned if they violate and the probability of being extra-legally sanctioned if they obey and so they can easily feel that they have *less to lose* with the breach. That is the reason why there is a greater probability that many of them will engage in illicit or even subversive activities, thus reducing the effectiveness of the norms laid down by rulers. Governments interested in ensuring greater efficacy of their mandates would then have a reasonable reason to minimize the less to lose effect, maintaining as great a gap as possible between the rate of punishment for the obedient and for the offenders, which can only be achieved by ensuring immunity for the former and punishment for the latter[49].

[49] STEWART 2006, 157-159 has questioned this conclusion for two reasons: according to the first, Kramer did not consider the cost of compliance when calculating the differences between obedience and disobedience in legal and extra-legal regimes. For the answer to the question "will citizens obey the law?" does not depend only on their desire to minimize the cost of punishment, but also on the cost of compliance. The second reason relates to the irrational nature of the less to lose reasoning, because, although little, something is always lost. Therefore, those who reason in less to lose terms choose to behave in a way that is not justified on the basis of a rational analysis of costs and benefits. KRAMER 2006, 177 responds to the first objection saying that his analysis refers exclusively to the motivational impact of the probability of being punished and not of the totality of circumstances that may influence the decision to comply

This cannot be realized unless principles of legality – especially the congruence between rules and officials' action – are respected. All this demonstrates again the instrumental character of legality and, therefore, its moral neutrality.

Simmonds[50] rejects the less to lose argument, mainly because it presupposes a scenario where resorting to extra-legal violence is totally random, a situation which he considers unlikely. He also suggests that Kramer has introduced significant changes in the comparison of the two scenarios concerning the individuals' character[51] and the motivating factors of the reasoning process of individuals. In one instance, Kramer presents an individual whose motivation is just to avoid the sanction entailed by non-observance of formally established norms, while, in the other, there is an individual who wishes to avoid *any* kind of act of violence, whether formal or extra-legal: the result is that what individuals want to avoid is now broader, and is due to factors that were not present in the first scenario[52]. If we consider these factors as relevant conditions for the efficacy of norms, then why not consider too that those circumstances that make individuals' lives desirable or undesirable are also a condition of the efficacy of formal legality. Healthy and happy individuals suffer more when

with or breach the rule. In response to the second objection, KRAMER 2006, 167 notes that his analysis goes beyond the framework conditions of rational choice theory and he declares he is also interested in the motivational effect of irrational but empirical circumstances, as, for example, inter-subjective comparisons, proportions and ratios.

50 SIMMONDS 2007, 91.

51 SIMMONDS 2006, 184 f.

52 SIMMONDS 2005, 83 and 2007, 93 f.

punished than ill or unhappy ones and hence the former are more motivated to obey the rules than the latter, because they might have a stronger desire to avoid the distressing effects that imprisonment has on their lives: they feel they have more or a lot to lose. By contrast, ill or terribly unfortunate individuals are more indifferent to formal coercion as they feel they have less to lose, and hence would be prone to breaking the rules. Given that wicked rulers who strive to increase the efficacy of their rules can achieve their goals by increasing the difference between the unpleasantness of being punished and life *out of jail*, and given that this can be achieved by making potential offenders' lives more pleasant, then it is plausible to conclude that wicked rulers have prudential reasons for reducing the impact of evil contingencies (such as disease, unemployment, etc.) on the lives of their subjects and for ensuring their well-being and happiness. Simmonds considers that that logic has a devastating effect on Kramer's incentive argument and uses it to reduce to absurdity his theoretical conclusions concerning the relationship between rulers' attitudes towards legality and its moral dimension: following Kramer's logic, neither well-being nor happiness are moral ideals given the instrumental use evil rulers can make of them. This, according to Simmonds, is plainly absurd and proves that Kramer's argument, according to which the usability of law for perverse purposes shows its moral neutrality, is also wrong[53].

Finally, Kramer[54] rejects the argument of evil contingencies, pointing out that repression, legal or extra-legal, is one thing and the impact on the subjects of natural

[53] Kramer's reply and some extra-considerations on wicked rulers and acts of justice can be found at KRAMER 2011, 198 ff.

[54] KRAMER 2008a, 28 f.

disasters, diseases, natural death, etc. is a different one: they have no common source. It seems to be empirically evident that individuals do not include the latter factors within the frame of reasons whose balance leads them to decide whether to obey the norms, whereas the foreseeable consequences in terms of punishment that follow their decisions are obviously included.

Thus we arrive at the end of the debate on the reasons without having a clear answer to the question as to whether rulers wishing to foster obedience have prudential reasons for complying with the principles of legality. One of the reasons for this is that it is unclear whether the question itself is a philosophical or an empirical one. For it is uncertain whether the plausibility of the claim that wicked rulers have prudential reasons to abide by the rule of law has to be tested by reference to a philosophical framework or if, by contrast, it has to be empirically tested to show that it is in fact the case that actual rulers do abide by the rule of law for prudential reasons. While in the first case the plausibility of the answer hinges on its consistency with a set of fundamental theoretical premises, in the second it depends on the presentation of examples of real rulers or realistic socio-political scenarios that proves whatever claim has been made. Neither Kramer nor Simmonds follow a fixed pattern in their answers, as both oscillate between the philosophical or empirical nature of the debate. Consequently, they present real or imaginary socio-political scenarios to suit what is needed to prove their own subsequent conclusions or to refute those of his opponent. Simmonds, for example, assesses realistically the factors that foster the emergence of political opposition and hence he concludes that wicked rulers have no prudential reason to abide by the rule of law, because if they did they would facilitate resistance. However, when he comes to reducing to absurdity Kramer's less to lose argument, he is very

formalistic in considering which factors are relevant in anticipating the efficacy of the rules and he rejects, with little or no empirical support, that extra-legal repression is a relevant one. Kramer, on the other hand, on many occasions is quite clear about the theoretical nature of the debate, so claiming that it is not necessary to test the cases presented empirically[55]. However, he does not hesitate to switch to *realistic mode* when he tries to reinforce his less to lose argument, thus enabling several realistic factors to be taken among those that motivate citizens to obey the rules. He also reasons empirically when he assimilates the impact of extra-legal violence with that of the severity of punishments when individuals balance the pros and cons for obedience. As we shall see later, whether the debate on the reasons is a theoretical, empirical or a mixed one is relevant when it comes to proclaiming who won.

3.2. *The moral dimension of legality*

Among Simmonds' arguments there is a second main thesis, concurrent with that on the reasons, whose terms, in my opinion, question the relevance of this debate understood as a way of justifying or denying the moral value of legality. Simmonds[56] says that «the qualified serviceability of moral

[55] For KRAMER 2004a, 66 f. it is not necessary to demonstrate empirically or cite examples of actual wicked rulers in fact motivated by prudential reasons, or to statistically demonstrate the frequency with which this happens. The demonstration of the thesis of prudential reasons is philosophical and not empirical, because it does not concern the factors that motivate them in fact, but the reasons that *would motivate* them if they understood the usefulness that those factors have for the achievement of their purposes.

[56] SIMMONDS 2005, 63.

practices for self-interested goals does not undermine the claim of those practices to embody moral standards; nor does it suggest that the practices are morally neutral». To say otherwise is to confuse the value of a practice with the correctness of an individual's action or with the virtue of the agent, as Simmonds[57] distinguishes between the value of Fuller's *precepts* and the value of the *action* of the ruler who decides to follow them. Also he underlines that the subject of his dispute with Kramer relates to the first question and not to the second. Therefore, to assert the moral value of the precepts one «must point to some recognizable moral value that is embodied in the eight precepts or desiderata», because the question of virtue or reasons of the one who decides to abide by them is a different matter[58].

Simmonds[59] says that when people are governed by rules that comply with the principles of legality, their duties and freedoms depend on the law and not on the will of others. This is the reason why law is endowed with moral value. This claim finds its definitive formulation in the *thesis of law as a moral idea*. The thesis states that the concept of law is an archetypal concept and that the archetype of law has a moral import because it expresses a moral ideal, namely, freedom.

[57] SIMMONDS 2009, 390.

[58] SIMMONDS 2011a, 136-138. KRAMER 2008a, 30-33 also acknowledges that the arguments suggested in the course of his dispute with Simmonds correspond to two distinct issues: (1) the first concerns the intrinsically moral nature of the principles of legality and (2) the second relates to the moral character of the act of compliance with those principles, although for him this last point is the "paramount issue" on which his controversy with Simmonds is based.

[59] SIMMONDS 2004, 129.

The archetypal dimension of the concept of law entails conceiving it as based on an archetype consisting of an ideal system showing full compliance with Fuller's eight *desiderata*. Actual instances of law, that is, true legal systems, approximate to the archetype of law in varying degrees according to their compliance with principles of legality[60]. This conception of the concept of law has an important complement: the archetype of law expresses a moral ideal, freedom as independence from the power of others[61]. Assuming the truism that being free is the opposite of being a slave, Simmonds[62] outlines a notion of freedom where what matters is not the number of optional actions permitted to the subject, but whether these options depend on the will of another[63]. Although a slave owned by a benevolent and permissive master may be free to an important extent, for Simmonds a slave is not free because the actions that he can perform depend entirely on the will of the master. One can, therefore, be free, even though few actions are permitted, if that range of actions does not depend on the will of another but on rules. Simmonds's thesis[64] is that where rules govern the behavior of individuals, they are free in the sense that they are dependent on the rules set forth by others, but not directly

[60] SIMMONDS 2005, 66. The formulation of this thesis appeared in SIMMONDS 2004, 118. KRAMER 2007, 105 has criticized the archetypal nature of the concept of law.

[61] SIMMONDS 2008, 256.

[62] SIMMONDS 2007, 101.

[63] The notion has a close relation with the idea of freedom as non-domination of civic republicanism (PETTIT 1997 or SKINNER 1998). On this relationship see SIMMONDS 2011b, 619 f. For a criticism of both notions see KRAMER 2008b and 2010.

[64] SIMMONDS 2005, 87 f. and 2007, 101.

on their will. Were full compliance with Fuller's desiderata achieved, individuals' behavior would only be determined by rules and so they would be free as not being dependent on the will of anyone else, but on legal rules. Hence, the more an actual legal system complies with Fuller's principles, that is, the more it resembles its archetype, the more freedom as independence its subjects enjoy.

Critics of this thesis can underline the simple fact that the domains of freedom depend on the content of legal rules, and that since the content of legal rules depends on what authority has issued, in the end there are no domains of freedom at all within which one can be independent of the will of another, since being dependent on the content of laws equals being dependent on the will of the authority that issued them[65]. From my point of view, this is too serious a criticism to require us to qualify the way Simmonds defines freedom. It is true that legality at first sight does not guarantee substantial limits to the ruler's will[66], that is, it does not pose a limit to what can be decided, but certainly it does on *how* to decide. There is no limit on the will, but on the way it deploys and affects the subjects. Where principles of legality are respected, the ruled may still be dependent on the will of the ruler to a very significant extent, but, at least, rulers cannot act as they *please in whatever way they please*, for they have to adhere to some procedural conditions: their will must be expressed prospectively, publicly, consistently, etc.[67]. Being dependent upon the rules imposed by someone

[65] That is, for example, the sense of KRAMER's criticism (2010, 842).

[66] Perhaps with the exception of the principles that oblige him not to demand impossible or inconsistent things.

[67] BRUDNER 2004, 38-43 and 2012, 190-198 view of the transition from *de facto* to *de iure* authority seems to me a good explanation of that contrast.

else's will is not the same as being dependent directly upon his will: legality is the key difference; a formal one, but still a difference. When citizens are governed according to the principles of legality, they depend on rules, but not directly on the boundless will of whoever has enacted these very rules and being dependent upon rules, they are free from the ruler's will. The freedom that Simmonds refers to is, perhaps, better defined if we think of it as independence from the *unrestrained* will of another. So being a legal subject is, conceptually, incompatible with the fact of being subject to the unfettered will of rulers.

Kramer has of course criticized these theses of Simmonds in the frame of their controversy. Kramer[68] does not believe that legality can be considered morally worthy by the *simple* fact that its existence promotes or secures other desirable phenomena, such as law enforcement, social coordination or individual freedom. The reason is that the fact that a phenomenon X is a necessary condition for existence or occurrence of another phenomenon Y, which is morally good, is in itself not a sufficient reason for attributing Y's moral value to X. The demonstration of this thesis, called *the no-transmissibility thesis*, is based on the claim that law is also a means to achieve heinous goals. Were the thesis not true, the moral value of any phenomenon which legality is condition of would apply to legality too. In this case, the rule of law would acquire the positive or negative value of its effects, which would again show its moral versatility.

Simmonds[69] rejected the no-transmissibility thesis by pointing out that what is really relevant is not the fact that some "bads" can be pursued through the rule of law, but the

[68] KRAMER 2008a, 34.
[69] SIMMONDS 2009, 393.

fact that we can do that by other means different than legality. It does not seem to be the case that there are evils which have to be *necessarily* performed through law. However, it seems that certain goods, such as justice, common good and freedom, can be achieved *only* through the rule of law. Regarding the transmissibility of the value of freedom to legality, Simmonds denies there is a transmission in the strict sense, for there are not, let us say, two poles, the transmitter and the receiver, but rather a close logical connection between rule of law and the moral good of freedom as independence, as the former always expresses and carries out the latter. There is no transmission, but identification between the moral good and legality, which are logically inseparable[70]. Simmonds's argument[71] is that «whenever law governs, the value of freedom as independence is to that extent realized», which means that «to the extent that we are governed by institutions approximating to full compliance with Fuller's eight precepts, we enjoy a degree of freedom as independence that can be enjoyed in no other way»[72].

4. *A relevant debate?*

The feeling one gets after reviewing these theses is complex and contradictory. The fact that the contenders have not

[70] A similar approach is found in OAKESHOTT 1983, 140 who considers that the very idea of law is also linked with a specific type of morality, and so it is impossible to understand the rule of law without recognizing at the same time a certain conception of human beings and of what their dignity requires. See also LETWIN 2005, 319.

[71] SIMMONDS 2009, 395.

[72] SIMMONDS 2011b, 618.

achieved any relevant agreement could lead us to the conclusion that everything was sterile. However, the result of the vehemence with which they contrast their points is that their fundamental standpoints on the rule of law and its moral dimension are shaped – with the qualification I shall refer to immediately – with clarity. This is, undoubtedly, a point in favor of the way in which the controversy was carried forward.

Disagreements, as we have seen, are many and they even affect the point of the issue that was being disputed. For Kramer, in fact, there are two issues: that which relates to the morality of the principles of legality and that which refers to the nature of the reasons for complying with them. Both are joined in the same debate, since the existence of prudential reasons for complying with the principles shows *eo ipso* the moral neutrality of legality. For his part, Simmonds is very clear that law is a moral idea, but he does not seem to be so clear about the relationship of this thesis with that relating to the reasons why leaders may want to follow the rule of law. Despite having suggested that the debate on the morality of the principles of legality and that concerning the reasons for the action of abiding by them are independent to a certain extent, he never claims plainly that these are two fully independent issues. So, for example, Simmonds[73] says that the morality inherent in the principles of legality is clearly revealed when we realize that self-interested considerations provide reasons to comply with them *only to some extent*, while morality requires full compliance. He then admits that the question of the level of compliance is related with the principles and not with the acts of compliance, for were self-interested considerations

[73] SIMMONDS 2011a, 139.

to motivate a full level of compliance, precepts would lack moral value.

In my opinion, Simmonds enters the debate on the reasons when, in fact, he did not need to do so, because its subject-matter is only a derivative and hardly significant aspect – I even dare to say that it is not significant at all – for his central thesis concerning the moral dimension of the principles of legality. This (con)fusion ends up affecting the clarity of his main thesis. In addition to that, it gives his opponent one important victory, for Simmonds seems to accept Kramer's presupposition that the nature of the reasons why rulers decide to abide by the principles of legality is decisive when it comes to asserting the moral nature of legality *as such*.

As posed, the debate repeats the approach of the original one: Simmonds[74] expressed his intention to prove the moral dimension of legality by exploring aspects that Fuller had not developed enough, precisely because he quarreled with Hart in the debate concerning rulers' instrumental use of legality. Interestingly, Simmonds makes the very same mistake and so he tussled with Kramer in the debate on the reasons. Simmonds's central thesis remains unscathed although blurred, as was Fuller's. In both cases it happens as a result of a certain *clumsiness* of their promoters: in Fuller's case for suggesting a simile which favored his rival's theoretical position and in Simmonds's case for entering an unnecessary debate and so accepting his opponent's presuppositions. The debates also have similar ends: Kramer is victorious in the debate on the reasons for raising the debate itself, whatever the outcome, and so was Hart for focusing his debate on the

[74] SIMMONDS 2009, 382.

instrumentality and efficacy of the rule of law casting a shadow over its moral import.

There was, from the very beginning, an alternative way available for Simmonds, one that requires him to resolutely assert the moral dimension of legality and openly declare that the existence of prudential reasons for submitting to the principles of legality is not relevant to prove their moral neutrality, because the moral relevance of legality relies on the fact that its principles do embody some moral value clearly recognized as such and is not affected by the kind of reason, prudential or moral, to abide by them.

However, before directly addressing that value, I shall explain in more detail the reasons why I believe that the debate on the reasons is not significant to elucidate the moral nature of legality. From my point of view, (1) the debate on the reasons is built on presuppositions which are empirically dubious. Moreover, and even apart from this consideration, (2) its conclusion is philosophically irrelevant for assessing the moral value of legality, which, finally, (3) needs to be addressed from a different perspective. Let's look at all the three aspects.

4.1. *Debate on the reasons: empirically weak*

In my opinion, the assertion that evil rulers have prudential reasons for complying with the principles of legality can prove neither any feature of the law nor ground its definition if it is shown that this claim enjoys no empirical support. No theory of law which adheres to a mundane view of law – I mean theories which, unlike some Natural Law theories, do not claim that law is a sort of metaphysical entity or that it is located somewhere beyond social or historical reality – should be developed either on the basis of unrealistic presuppositions about its object or attribute to it empirically questionable features. If we characterize law depending on

presuppositions which are not verifiable or are demonstrably false, we are neither referring to it as something mundane nor describing law as it is, but rather as it would be in a different world from this one[75].

That necessity is particularly strong in the case of legal positivist theories as they show a strong adherence to the social sources thesis, which is a robust version of that mundane view of law as it emphatically claims the positivity of its rules and the social nature of law itself[76]. Hence, positivist legal theorists when asserting the moral neutrality of law or its instrumental nature must have some empirical support for the scenarios or instances on which those conclusions are postulated. Presuppositions relating to why rulers abide by the rule of law cannot be either a leap of faith or be built in the air. The debate on the reasons and the hypotheses concerning the moral or prudential nature of the rulers' reasons when they decide to abide by the principles of legality must necessarily have some empirical support[77].

[75] This is neither the law as it is nor the law as it should be, but a sort of law *as it would be*.

[76] That also seems to be what FULLER 1964, 154 meant when he confessed he was puzzled with some unrealistic claims of Hart in his book, *The Concept of Law*, which «aims at bringing "the concept of law" in closer relation with life».

[77] KRAMER 2004c, 172 seems to assume all that when he claims that legal positivists should not focus on bare logical possibilities when putting forward their theses, as they would render their position too arid and jejune to be of any real interest. However, surprisingly, when he tries to prove that evil rulers have prudential reasons to abide by the rule of law, he fails to refer to their actual motivations, since, in his view, these would be purely empirical considerations which should not be among the assumptions of the dispute between supporters and detractors of legal positivism. Hence, that a particular wicked ruler does not appreciate the reasons

What might be the empirical support for the assertion that there are prudential reasons for rulers to abide by the principles of legality? From my point of view, that support can be psychological and socio-political.

From a *psychological point of view*, we can try to find out whether those who are usually attracted by political and governmental responsibilities show any trace of the character which makes them particularly prone to act on the basis of either self-interested considerations or universal ethical principles[78]. However, the interest of this issue does not seem to go beyond the province of behavioral psychology and it is hardly a relevant support to ground theses on the nature of law and its relation to morality.

Socio-political research is, however, more promising. It inquiries into the actual reasons why rulers abide by the principles of legality considering not the rulers' psychological character, but rather what conditions them, in particular, actual ethical constraints and also economic, political or, in general, social circumstances. In this context, it seems obvious to say that it is possible to abide by the principles of legality for moral reasons. It is obvious that rulers exist or have existed who have made decisions based on moral

that would motivate him if he were aware of what best promotes his interests may not be relevant if we were to probe the theoretical plausibility of those reasons. What the relationship is between this theoretical possibility and social facts is not clear to me: what would happen if no perverse ruler were actually motivated by the reasons that should motivate him theoretically? Is that not a mere logical possibility that leads us to a result of little interest?

[78] Reference to self-interested considerations and universal ethical principles as motivation for action is based on KOHLBERG's (1984) well-known theory of moral development stages. His considerations are analogous with Kramer's distinction between moral and prudential reasons.

motivations, that is, who have decided according to the interests of others and not themselves[79]. And it is equally obvious, maybe even more so, that there are and have been rulers exclusively moved by prudential considerations, that is, exclusively guided by their own interests[80].

Furthermore, it is possible to find rulers who end up embracing significant moral causes for prudential reasons. I will refer to a few socio-political studies which show that it is frequent for rulers to adopt for prudential reasons relevant decisions concerning matters which are the moral high ground, such as democratization, redistribution of income and reduction of levels of inequality. Thus, for O'Donnell and Schmitter[81] – relevant exponents of *transition literature* –, the motivation of agents and groups involved in processes of political transition from autocratic regimes is mainly due to their *desire to preserve and increase their political power* over other rival groups and agents. These authors even suggest that it is possible to build a democracy without democrats, where the members of a non-democratic elite, hence not morally motivated by democratic values, successfully lead a process of democratic transition. Another well-known theory valid for the purposes of my argument is that of R.B. Collier[82], who argues that it is the *desire to obtain or remain in power* that encourages

[79] Some have even become *ethical icons* for these kinds of decisions. Think of Lincoln, Gandhi or Mandela.

[80] However, some studies in political science refute that twofold claim on the grounds that typical rulers only govern in the interest of others when it matches with what best promotes their self-interest and, primarily, their interest to survive politically BUENO DE MESQUITA et al. 2003, 8-26.

[81] O'DONNELL, SCHMITTER 1986.

[82] COLLIER R.B. 1999.

political elites to offer something to voters in exchange for what they hope to obtain, namely, voters' support. This is, again, what explains democratization reforms. Finally, the hypothesis of Acemoglu and Robinson[83] is very expressive in referring to political and fiscal reforms carried out in Great Britain and other Western countries in the 19th century. These reforms consisted in the expansion of the franchise and were followed by fiscal reforms which gave rise to some redistribution of income and a reduction in the levels of inequality. However, according to these authors, the motivation of the reformers was much less moral than prudential, because they made those decisions primarily for *their interest in staying in power*, avoiding social unrest that would have triggered revolutionary processes which would have put their privileged position at risk.

Oddly, the only moral practice that wicked rulers seem reluctant to embrace is legality, the very same practice that legal positivists consider as morally neutral. The philosophical explanation of this claim is located later in this article and is the reverse of its final conclusion: law not only ensures some degree of independence of the governed from their rulers; legality also has important effects on political power, but its fundamental effect is not an enabling one, i.e. law does not widen or refine its ability for action or decision, for power has various modes of expression which are not legal. Legality has a fundamentally limiting effect on the will of those who wish to rule over a political community and usually those who aspire to decide on something or someone do not want to be constrained by any

[83] ACEMOGLU, ROBINSON 2000.

kind of limitation on how to do it or what to do[84], unless they have a moral reason to do so.

That is precisely what follows from Ferguson's explanation[85] of the causes which explain the success of western civilization all over the world during the last five centuries – economic and political competition, property rights, science, medicine, consumer society and the work ethic – and, particularly, of the imitating stance of some non-western nations. Ferguson says that China and several other countries have copied some of these factors, undertaking some policies aimed at improving the quality of life, life expectancy, or levels of literacy of the population. However, the only *killer app* that the aforementioned rulers show resistance to abide by is the rule of law. That is precisely the decision that right now is

[84] Something similar happens with checks and balances, an institutional arrangement which shares certain features with legality. COLLIER P. 2007, 146 f. contrasts checks and balances with electoral competition and says that electoral competition is easy to introduce in societies where it does not exist because it fits well with the interests of ruling elites, since the electoral competition favors corrupt from honest politicians. However, checks and balances are "political orphans", because those who govern or aspire to govern are those who have to establish and take care of them, but they are also those who end up losing with their introduction. That is the reason why COLLIER P. 2007, 156 considers that checks and balances are a sort of public good, although insofar as they only benefit the ruled and necessarily limit rulers, they may better be considered a sort of social or civil good, where those who are competent to settle them are those who do not benefit for them, and those who benefit are not competent to introduce them.

[85] FERGUSON 2011, 1 and 11 f.

pressing, so Ferguson claims[86], Chinese Communist Party leaders: whether to further the recognition of the rule of law, so definitively consolidating the levels of economic and social progress, or not to do so for fear of losing their privileged political, economic and social position. Anyway, it seems that for self-interested wicked rulers it is quite clear that if there is something that risks their privileged position it is precisely what Kramer means that it is in their interest to do if they want to keep that very position.

Hence, it is not so obvious that there are prudentially motivated wicked rulers who decide to abide by the principles of legality. It seems actually that they have viable alternatives. Rulers of paradigmatic evil regimes such as Stalinist USSR or Nazi Germany carried out huge projects of exploitation, subjugation and extermination of the population and did not have to resort to the principles of legality to sustain them through time or to expand them in space. The size of the Soviet Union and the duration of Stalinism seem to prove sufficiently that there are alternatives to the rule of law which enable coordination of official action to be achieved and the actions of the ruled to be guided. These alternatives made it possible that a paradigmatically perverse political regime, such as Stalin's, could govern for decades throughout the vast territory of the Soviet Union[87]. The case of the resolutions

[86] FERGUSON 2012. He quotes Chinese opponents He Weifang and Chen Guangcheng.

[87] ACEMOGLU, ROBINSON 2012, 128 f. reproduced a statement made by Stalin in 1937 which is quite expressive of his contempt for the values of predictability and stability of official action implicit in the idea of legality: «only bureaucrats can think that planning work ends with the creation of the plan. The creation of the plan is just the

adopted at the infamous Wannsee Conference is another example of what was said. Such resolutions are probably one of the examples that best show that it is possible for an evil ruler to implement a very complex determination – the extermination of millions – without having to comply with virtually any of Fuller's principles. At first glimpse, we immediately notice that Wannsee Resolutions were secret, retroactive, inconsistent with other promulgated rules, unintelligible in that they used misleading terms, etc.[88] None of these factors, unfortunately, was a handicap for the efficacy and coordination of the Nazi officials involved in the *final solution* when executing their leader's will. Detachment and degradation of legality, in any of the above scenarios, was neither detrimental to the coordination of official action, nor made the strict control of affected populations difficult, nor prevented those rulers from carrying out perverse projects of domination of enormous complexity.

beginning. The real direction of the plan develops only after the putting together of the plan». They add that what Stalin wanted to affirm and maximize was his own discretion to reward individuals or groups that were politically loyal and to punish those who were not. This unique Soviet version of post-plan planning illustrates the existence of alternatives to law as a method of social control and also the possibility of ruling on a large scale without having to abide instrumentally by the principles of legality.

[88] It is particularly shocking that they *condemned* to death millions of people under a simple racial classification instead of having ordered something, maybe extremely evil or disgusting, but at least *possible to* comply with. This unverified possibility at least would have given those unfortunate people the opportunity of acting in a way consistent with promulgated provisions and maybe would have enabled them to save their lives. It would have also implied the ruler's limitation and the reciprocity between rulers and ruled that Fuller referred to.

4.2. *Debate on the reasons: philosophically irrelevant*

The debate on the reasons is thus affected by an insurmountable problem: if we *philosophically* consider that any recognized moral principle is a prudential one when it is credible for a ruler to decide to abide by it for self-interested reasons, then all known *moral* principles would be *morally neutral*, maybe with the exception precisely of legality. If *philosophically* all morally recognized principles as such are morally neutral principles, the distinction between moral and prudential principles ceases to have any interest. Hence, there is nothing of interest in the affirmation that the principles of legality are morally neutral, since it is plausible to think that they can be accepted for prudential reasons, because almost any moral principle can also be accepted for those very reasons.

It is also relevant to note from the examples above that legality is not a necessary condition of the possibility of ruling, for there are a number of forms of social control that do not entail ruling in accordance with the principles of legality[89]. Legality is not the only method of social control available and, as we shall see immediately, law does not equal any form of expression of the will of those who actually command.

[89] Stalinist planning, already mentioned, could be one of them. FULLER's references to managerial direction (1969, 207), to organization by common aims or by reciprocity (1978, 357) or even to «conditioning people to be good» (FULLER 1964, 164) can be cited as alternative methods too. Also BRUDNER's (2004, 38) despotic rule or SIMMONDS's (2002, 244) references to New Monia are expressive of these methods and of the need to *compare* societies ruled through law with societies ruled by different techniques.

And finally, the cited examples prove that it is also theoretically implausible to assess the moral import of a practice upon the agent's reasons for acting. In my opinion, the moral value of a practice and the reasons of its *practitioners* follow different logics. As seen, Simmonds[90] distinguishes between the moral value of precepts or principles and the moral value of actions, but he never completely separates these two questions. And Kramer, although indirectly and exceptionally, also acknowledged that the moral value of a practice does not depend on the reasons of those who practice it. When referring to gambling at cards, he points out that while it is conceivable that there are people who gamble for moral reasons, that does not affect the moral value of gambling as «an empty and degrading mode of conduct»[91]. Indeed, the moral consideration of gambling, as such, is independent of the type of reasons of the people who gamble. This is not the proper place to analyze causes of gambling, but we can say that the reason why it has a negative moral consideration could well be that we morally value that our future is the result of our own efforts, creativity, inventiveness or other similar capacities, but not the result of something mainly fortuitous that happened in a zero-sum game. This is a social assessment referring to a social practice as such and that is what determines its moral value. The moral value of gambling does not depend on the actual reasons why people play the lottery or cards, even if they do so with the hope of ensuring a good future for themselves or their children, because in this case gambling would have a favorable consideration. Apart from more precise substantiation of this assumption, what I want to highlight is that the reasons

90 SIMMONDS 2009, 390 f.
91 KRAMER 2004c, 177 f.

why participants in a social practice engage in it are not determinant of its moral dimension, because constitutive decisions on the moral value of the practice are not equivalent to the reasons for the decision to practice it.

The same applies to rulers and legality. References to the reasons removed as being superfluous, the issue that really should concerns us is whether legality does or does not have any moral value as such and why. Simmonds's answer is yes and his reason is because legality equals freedom as independence. Kramer's negative response based on agents' reasons can certainly be rescued as referring to law as such, as its features. In that case, according to Kramer, legality would be morally neutral due to *its* equal serviceability for good and evil as far as *law* (1) provides clear-cut direction of orders to the population, (2) fosters incentives to obedience, and (3) enables officials' coordination, regardless of the nature of rulers' reasons to abide by it. However, even so, I think that this correlation between that description of law/legality and its usability for evil collides with the problem of its dubious empirical evidence, which could prove that there is no correlation at all or that that description of the rule of law is not the best available to us. It might also be that legality does ensure other goods that are incompatible with the purposes or aims of wicked rulers, namely, Simmonds's freedom as independence. However, this reasoning requires radically varying the standpoint from which the moral dimension of legality is being assessed.

4.3. *The moral dimension of legality revisited*

In my opinion, the study of the moral dimension of legality goes far beyond the study of rulers' reasons to abide by the rule of law. It requires us to investigate the moral significance of the fact that a society is ruled through law, that is, to morally assess this fact. To do that, first we have

to consider the fact that a society is ruled by law in *comparison* with available alternatives. Secondly, when assessing the moral value of legality, we should be careful not to ascribe to law the merits or demerits that correspond to those who use it. And lastly, the advantages or disadvantages of the use of law as a method of social control and its moral import have to be assessed not only from the point of view of rulers, but also from the standpoint of the *governed*. These three assumptions have traditionally been neglected by advocates of legal positivism, who were neither interested in studying the advantages and disadvantages of the rule of law in relation to *other* available instruments of social control, nor have they been very careful when putting the blame for merits or demerits on the right side, nor did they consider the moral dimension of law from the standpoint of the *ruled*.

Kramer's theses are paradigmatic of the neglect of the first assumption, but he is not the only example available. We have already seen how Hart – taking advantage of Fuller's *clumsiness* – also proceeded that way when he compared law with carpentry techniques and attributed to law the value of the purposes and deeds of rulers, as you value the carpenter's activity considering the objects he crafted; but Hart never considered the advantages or disadvantages of alternative techniques to craft these very objects. Raz is, however, the one who best illustrates the narrowness of this legal positivist approach. For Raz[92], law is an instrument in the hands of humans for the accomplishment of various purposes and the rule of law is not in itself a moral virtue, but simply the way through which law efficiently performs its own purpose: guiding the behavior of individuals by rules that are applied by judges.

92 RAZ 2009, 225.

Raz appealed to the simile of the sharp knife, inspired by Fuller/Hart's carpenter, to show that the knives' property of "being sharp" is only the expression of the excellence of the qualities of the object to which it relates. A knife is not a knife if it does not cut, and cutting is the way in which an object is a knife, but cutting does not guarantee that the knife is only useful for valuable purposes. The same occurs, according to Raz, with law, which achieves its purpose when it is efficient at influencing the behavior of its subjects. Law achieves that purpose if it complies with the principles of legality as the method that enables it to carry out that function. The moral value of law or knives depends on what is done with either tool, but not on the fact that they, respectively, rule or cut.

As I suggested, there are several reasons why these similes are open to criticism: it is possible to talk about the value of a tool not only depending on what you can do with it, but also considering the *advantages or disadvantages* that it has when being used for a particular purpose *in comparison* with other tools available. From a certain point of view, it is true that a knife can be used by a surgeon or a robber to achieve their respective goals. However, it is relevant if the use of the knife has any advantage over the use of a different tool for each of the mentioned purposes. If the end is surgery and the alternative method is a blunt stone, the knife obviously has important advantages. Something similar happens when we compare the perverse use of the knife: there is no doubt that being assaulted with a knife offers certain *advantages* over the possibility of being assaulted with an automatic weapon. Clearly and by reference to the simile that opened this discussion: the question, from my point of view, is not the fact that the carpenter manufactures a torturer's rack, but if it is preferable that racks are manufactured by a craftsman instead of by any other available manufacturing technique,

such as an assembly line at an industrial plant. Consider also what comes from comparing bullets with gas at the time of perpetrating genocide: obviously bullets can be used for terrible purposes, but – crudely put – the fact that a genocide planner constrains himself to using bullets instead of gas presents certain strictly comparative advantages for his potential victims compared to an unrestricted one[93].

These variants of the simile illustrate an additional framework from where to reflect on the moral value of legality: the question is not only whether legality enables rulers to do good or bad things, the question is whether there is any reason to prefer *law being used* rather than using any other available methods of social control[94].

So, it is necessary, for example, to analyze to what extent some evils that would became probable or possible

[93] For instance, if we admitted that it is possible to carry out a genocide with respect, at least, up to a certain threshold of the principles of legality, still we would have to wonder whether that legally-carried-out genocide would have been more or less effective than one carried out with no regard for legality. If it turns out to be less, then law would still preserve some of its moral dimension. In a similar sense, RUNDLE 2009, 87-89 who compares the situation of Jews subjected to laws passed in Nazi Germany from 1933 and until *Kristallnacht* and the situation that resulted from the implementation of the Final Solution by the SS. As I mentioned above, the Final Solution is not a good example of "exterminatory legality", because in many relevant aspects it was anti-legal, even though it is often included in generic considerations relating to Nazism, as an example of how law can be unjust.

[94] That preference should be defined from the same ethical standpoint that allows us to define when a ruler is wicked. That is, the very same principles and values on which we ground the claim that ruler's decisions are evil have to be used to assess the desirability of the rule of law as a method of social control *vis a vis* other methods available.

when using other methods of social control become improbable or impossible when using law. In the same way, it is relevant to check to what extent law furthers certain benefits or values in comparison to what is obtained through the use of alternative instruments of social control. As Fuller[95] famously said «not any substantive aim may be adopted without compromise of legality». Adherence to legality «is always likely to reduce the efficiency for evil of an evil government, since it systematically restricts their freedom of manoeuvre»[96]. Law is a method of social control, risky as all methods of social control, but not all of them are similar from the point of view of the risk of evil they produce or its intensity: «law is a mode of governance and governance is the exercise of power. But that power should be channeled through these processes» – legal formalities and procedures and due process – «through forms and institutions like these, even when that makes the exercise of power more difficult or requires it occasionally to remove from the field defeated, is exactly what is exciting about rule by law»[97]. Consider also the above mentioned incompatibility between legality and the worst evils such as exterminatory or genocide regimes: in fact, Rundle[98], referring to Fuller, stresses the link between legality – or the form of law – and the agency of individuals and how legality entails a significant limitation of the powers of the rulers in favor of their subjects' ability to act. All these questions, and not only a putative responsibility of legality for rulers' evils which might have been caused otherwise, have to inspire the reflection on the moral import of legality.

95 FULLER 1964, 153.
96 FINNIS 1982, 274.
97 WALDRON 2012, 217 f.
98 RUNDLE 2012, 2.

Law is, of course, intimately related with coercion, compulsion, violence or power, but they are not strictly the same, as many legal positivists seem to assume when dealing with the moral value of legality. In addition to that, legal positivism seems to assume a strictly instrumental conception of law where law is useful for the various purposes of those who govern and has the value of the purposes for which they use it. This standpoint has a significant effect, as it holds law responsible for the merit or demerit of the purposes for which it has been used, but it is not interested in (theoretically) accounting for the responsibility of the *one* who is using it as an instrument. I think that the responsibility for law's purposes should correspond to the one who uses it as a tool: strictly speaking, the moral merits of good purposes achieved by using law corresponds to those who decide to pursue those goals and, conversely, if law is used to pursue heinous purposes, the one to blame is the one who pursues these objectives through law[99].

This consideration is related to the *mysterious disappearance from the scene* of the ruler in the legal positivist analysis of the instrumental nature of law. Raz[100] not only says that the rule of law is the way in which law is efficient, but he also *imputes* to law the responsibility for inevitably creating a great danger of arbitrary power, which «the rule of law is designed to minimize». Conformity to the rule of law does not cause any good in itself, except for the evil that it helps to prevent, but «the evil which is avoided is the evil which could only have been caused by the law itself». Marmor[101] seems to

[99] As seen, we should still consider whether the evil caused would have been worst had it been pursued through a different method.

[100] RAZ 2009, 224.

[101] MARMOR 2010, 672 f.

reproduce that same argument when stating that publicity or prospectivity of the rules does not prevent any evil that had not previously been caused by the mere existence of the rules: «if there is no law, then there are no such evils that need to be avoided». Also Gardner[102], who considers that law makes possible and facilitates certain forms of oppression, later claims that the rule of law appears to protect people against such law-enabled and law-facilitated oppression.

In my opinion, holding law or legality responsible for the risk of arbitrariness, exploitation, oppression, etc. is like putting the blame on the knife for the injury which a robber causes with it[103]. The first on whom to put the blame for caused evils are those who rule in order to achieve certain bad purposes, but not necessarily the instrument they use, provided there was a variety of tools or methods of social control available. For who are ruling and how they rule are different questions – as the knife is not the same as the one who wields it –, and because there are alternative non-legal methods of social control, useful for rulers and that guarantee that they achieve their goals. The moral merit or demerit of the goals is one thing and that of law is another that, as I have already said, depends on assessing its significance for the attainment of those goals in relation to other available alternative instruments[104].

[102] GARDNER 2010, 257.

[103] Again, putting the blaming on law for implementing torture or slavery conceals the fact that legality is defined as the rule of a subject through rules and, therefore, it is incompatible with treating individuals as objects or pieces of inert material we can freely act upon (FULLER 1964, 163; SIMMONDS 2007, 101; RUNDLE 2012, 132-136).

[104] I think this assessment is consistent with the distinction between external and internal morality of law which FULLER 1964, 153-156 referred to. Assessing the moral value of ruler's purposes for whose

And, finally, it is also relevant when we come to assess the moral value of legality that we consider the point of view of the ruled: is there any morally significant advantage when one is ruled through law in comparison to the situation where one is ruled by alternative non-legal methods of control? As I have said, this point of view is missing from the legal positivist inquiries. Fuller[105] thinks so when he accuses legal positivism of conceiving law as a one-direction projection of authority over the individual, where law arises from an authoritative source and impacts on the ruled, without considering any element of reciprocity or cooperation between ruler and ruled. Allan[106] also claims that «an exclusive focus on governmental objectives, by contrast with the ends of ordinary private law, can undermine our analysis of law by obscuring its most important functions», namely, it makes the cooperation of individuals possible and enables them to pursue their own interests in a common framework of justice. And Coyle[107], who considers that law, legality and governance are related to a moral wisdom and a tradition of civility[108], warns us that the prevailing legal theory has neglected the moral dimension implied in the fact that legal norms provide agents with the ability to formulate and address their own

achievement law is used is the province of external morality, while the moral advantages of legality in relation to other alternative instruments of rulers is the field of internal morality. The relationship between the moral value of law and the values it realizes has been highlighted, in a similar sense, by SIMMONDS 2009, 393.

[105] FULLER 1969, 192.

[106] ALLAN 2001, 58.

[107] COYLE 2007, 163 ff.

[108] Although he focuses on the "legal order of the English polity", his conclusions can be easily extrapolated to modern and contemporary legal systems. See also OAKESHOTT 1975, 185 ff.

concerns and integrate them in a public context of interaction endowed with moral relevance. This *horizontal* dimension was, according to Coyle, supplanted by an instrumental conception of law, which obscures its significance by focusing attention upon the descending structures of authority. Legality becomes, then, a concept subordinate to that of governance, rule of law a synonym of rule *by* law, and law itself an instrument at the service of some objectives or principles that are part of abstract theories of justice, usually made from the perspective of rulers and to be implemented by them.

By contrast, the standpoint of the ruled is implicit in Simmonds' thesis of law as a moral idea, already discussed. It is also the point of view Hayek[109] adopts when he describes the "Rule of Law", stripped of all technicalities, as a set of great principles that ensure that

> «the government in all its actions is bound by rules fixed announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge».

Unlike the legal positivist approaches, Hayek does not confuse law and power, but he clearly distinguishes them and he also makes plain the perspective of his analysis, as the subject of "foresee" and "plan" is not the ruler, but the ruled.

4.4. *Final remark*

The Kramer-Simmonds exchange, and particularly the way the debate on the reasons was unfolded, offers us a

[109] HAYEK 1944, 75.

paradigmatic example of the way in which advocates of legal positivism have tried to resolve the question of the moral value of law. Those approaches are affected by numerous problems: not only are they formulated based on presuppositions which are hardly verifiable from an empirical point of view, but they also avoid the comparison of law and other methods of social control as well as the moral assessment of the advantages or disadvantages of using law; they identify law with the rulers' will or power; they conceive law just as an instrument for the achievement of the rulers' purposes; they impute to law itself the responsibility for the risks and dangers involved in the exercise of power, when those same risks can also be caused when political power uses non-legal instruments of social control; and finally they avoid to consider the point of view of the ruled when assessing the moral import of law. As I have already set out, the question of the moral value of law is not related to the reasons of those who rely on legality for the achievement of their ends, nor does it correspond to the purpose for which the authority may decide to use it. Rather it requires that we never forget that rulers have various methods to achieve their ends and so we have to consider the advantages or disadvantages that the use of law entails for the ruled compared to what may result from the use of non-legal instruments.

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