Rule of Law: Hierarchy of Norms in Legal Reasoning

MARIA CRISTINA **REDONDO**
University of Genoa, Italy - CONICET,
Argentina.
E-mail: cristina.redondo@unige.it

ABSTRACT

This article offers a conceptual reconstruction of the rule of law as a political-institutional and normative ideal. Adopting an epistemic internal point of view, it clarifies the methodological assumptions underlying this reconstructive enterprise. On the basis of a minimalist conception largely aligned with Joseph Raz's account, the article argues that a rule-of-law state necessarily exhibits two structural features. First, it must be a constitutional state, incorporating a subsystem of rigid and hierarchically superior norms that serve as criteria of validity for ordinary legal norms. Second, it must recognize an internal hierarchy among constitutional norms, in virtue of which the principles constitutive of the rule of law enjoy hierarchical supremacy even vis-à-vis other rigid constitutional norms. This dual hierarchy has significant implications for legal reasoning: it excludes balancing in conflicts involving rule-of-law principles and requires their unconditional prevalence, without thereby entailing the invalidity of competing constitutional norms. The article concludes by outlining the implications of this account for the concepts of hierarchy, validity, and the identity of a rule-of-law state.

Questo articolo propone una ricostruzione concettuale dello stato di diritto come ideale politico-istituzionale e normativo. Adottando un punto di vista interno di tipo epistemico, esso chiarisce i presupposti metodologici che sottendono tale operazione ricostruttiva. Sulla base di una concezione minimalista in larga misura allineata all'impostazione di Joseph Raz, l'articolo sostiene che uno stato di diritto presenta necessariamente due caratteristiche strutturali. In primo luogo, deve essere uno stato costituzionale, che incorpori un sottosistema di norme rigide e gerarchicamente superiori, le quali fungono da criteri di validità per le norme giuridiche ordinarie. In secondo luogo, deve riconoscere una gerarchia interna tra le norme costituzionali, in virtù della quale i principi che costituiscono lo stato di diritto godono di una supremazia gerarchica anche rispetto ad altre norme costituzionali rigide. Questa duplice gerarchia ha implicazioni rilevanti per il ragionamento giuridico: essa esclude il ricorso al bilanciamento nei conflitti che coinvolgono i principi dello stato di diritto e richiede la loro prevalenza incondizionata, senza che ciò comporti l'invalidità delle norme costituzionali concorrenti. L'articolo si conclude delineando le implicazioni di questa ricostruzione per i concetti di gerarchia, validità e identità dello stato di diritto.

KEYWORDS

Rule of law, constitutional hierarchy, internal point of view, legal validity, constitutional identity

Stato di diritto, gerarchia costituzionale, punto di vista interno, validità giuridica, identità costituzionale

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1. *Introduction*

This work is an exercise in conceptual reconstruction of the notion of the rule of law. First, I discuss some aspects concerning the methodological approach that such an exercise entails. I then adopt a minimal concept of the rule of law to advance some ideas that do not concern the concept in general, but rather the specific normative ideal that the individual instances (individual states, that is) falling within the scope of application of this concept ought to satisfy. My aim is to highlight two characteristics that, according to this ideal, the legal system of a state governed by the rule of law should satisfy. A state governed by the rule of law must necessarily: (i) be a constitutional state, that is, contain a subsystem of norms of higher hierarchical rank – rigid norms – which lay down the conditions of validity of ordinary norms; and (ii) recognize an internal hierarchy among the norms that belong to the subsystem of constitutional norms.

2. *A Few Conceptual and Methodological Premises*

In the first part of this work, I would like to clarify two general ideas concerning the concept of the rule of law and the methodological approach that I shall adopt in its analysis. These preliminary remarks, in my view, will prove relevant when presenting the theses that I intend to defend in the second part.

There are multiple theories concerning ordinary concepts in general, but I do not consider it necessary to dwell upon them in this context. Setting these theories aside, we may regard as philosophically well established the idea that the concept to which I intend to refer is an instance of a specific type of concept: namely, a political-institutional concept. And, as legal theorists commonly observe, political-institutional concepts are endowed with a normative or regulative content, which is typically contested.

The first idea I wish to emphasize is that, when we use a concept, the users or participants in the relevant practice, through their linguistic attitudes and behaviors, constitute the rules governing its use (which, in the case of an institutional concept, impose the application of regulative rules) and, in doing so, adopt towards those rules a practical and reflective attitude that is usually referred to as the internal point of view. This attitude is practical (prudential, moral, or political) insofar as it involves, on the part of those who accept the rules, the adoption of a policy of behavior that is favorable to them. This implies, among other things, that for the participants or acceptants of the practice the accepted concept is not radically indeterminate. On the contrary, as just noted, the participants are precisely those who accept that, although imprecise or not fully determined, the concept is nonetheless delimited and governed by certain rules. In other words, it is impossible – because contradictory – to be at once an acceptant and a sceptic with respect to the constitutive rules of a concept. By hypothesis, an acceptant assumes that the use of the concept is guided and delimited by the very rules that they themselves accept and constitute.

Accordingly, in undertaking the theoretical task of a reconstruction, albeit partial, of a concept in use – by showing, *inter alia*, cases of correct or incorrect application – we are in a certain sense also accepting or adopting an internal point of view with respect to its content. However, this

point of view differs from that of the participant or acceptant. It is an epistemic internal point of view which, on the one hand, does not imply agreement with what is accepted, nor the belief that it is justified or true[1]. On the other hand, it may lead to the descriptive conclusion that the concept, contrary to what the participants assume, is wholly incoherent and/or radically indeterminate[2].

To adopt an internal point of view in an epistemic sense with respect to certain rules means to accept the semantic inferences that can be drawn from the identified concept, or the truth of conclusions concerning the application of that concept. In short, it is an acceptance, or internal point of view, that may be – but is not necessarily – accompanied by an attitude or internal point of view in an ethical-practical sense (prudential, moral, political, and so on)[3].

There exists an extensive discussion concerning the very idea of the internal point of view, which I shall not revisit in this text. In any case, I believe it is indispensable to distinguish the two senses just identified, to avoid an ambiguity common to a large part of the literature. The present work seeks to understand the content of an important regulative ideal to which most contemporary Western democracies profess adherence, and it aims to identify some of the ideas that the use and application of the concept designating this regulative ideal implicitly presuppose. Consequently, it adopts – and could not but adopt – an internal point of view in the epistemic sense[4].

I said that the concept of the rule of law is of an institutional nature. The analysis of this type of concept requires a distinction between two types of norms or rules that are closely connected to one another: semantic or constitutive rules, and regulative or prescriptive ones. There is also an extensive literature on this distinction, which I shall not address here. I would merely like to point out that, on the basis of these two types of norms, it is generally acknowledged, on the one hand, that there exists a form of normativity of a semantic-epistemic kind, which justifies the validity or invalidity of acts that conform or fail to conform to constitutive rules, and, on the other hand, a form of normativity of an ethical-practical kind (often reduced to a "moral" normativity), which justifies political, legal, moral, etc., approval or blame, depending on the type of prescriptive rule with which a given behavior conforms or conflicts.

I draw attention to this classic distinction between constitutive and regulative rules to emphasize that adopting an internal point of view in a semantic or epistemic sense with respect to the rules governing the use of a concept does not amount to the exclusive acceptance of constitutive rules. In other words, we should not think that the internal point of view in a semantic or epistemic sense consists in the acceptance of semantic rules, whereas the internal point of view in an ethical-practical sense would amount to the acceptance of regulative-prescriptive rules. Reflection on my initial remarks suffices to reveal that this assimilation is misguided. There are moral and political-institutional concepts whose definitional or constitutive rules include the fulfilment, or the aspiration to fulfil, certain regulative rules. When one reconstructs a concept of this kind, one accepts – at least in an epistemic sense – the content of the concept that involves such regulative rules. Accordingly, from this perspective, legal theorists adopt – and could not but adopt – an inter-

[1] See Cohen 1988. According to Cohen, the notion of acceptance does not imply that of belief. Against this interpretation, see Clarke 1994.

[2] I thank an anonymous reviewer for drawing attention to this possibility.

[3] The distinction I present was initially introduced by Redondo 2018. Some corrections can be found in Redondo 2023, especially in 458-464, and in Redondo 2022.

[4] In much of the literature, it is assumed that the adoption of an internal point of view ultimately implies a practical and justificatory stance with respect to certain patterns of behavior and to the concrete actions or institutions to which they refer. In this sense, it involves a positive or favorable attitude toward them. At times, however, the expression is used in a very broad, almost trivial sense, to refer generically to the attitude of anyone who takes a stance – whether favorable or unfavorable – toward something and accepts certain political or moral values. In this broader sense, it becomes almost impossible to engage in a theoretical enterprise without adopting an internal point of view in an ethical-practical sense. In any case, when I emphasize that adopting an internal point of view in the semantic or epistemic sense does not amount to adopting it in the ethical-practical sense, the latter must be understood in a non-trivial way, namely as a positive and justificatory attitude with respect to specific values, institutions, or patterns of behavior.

nal point of view, at least in the epistemic sense, with respect to the regulative rules embodied in the institutional concepts they analyze and employ, as well as in the normative systems they study.

The second general idea I would like to emphasize is that the concept of the rule of law, among other characteristics, displays two well-known properties. First, as I have already mentioned, it is a normative and contested concept. For example, in order to qualify as a rule-of-law state, must a state protect certain fundamental substantive rights, such as the right to health? Or is it sufficient that it comply with certain forms of law-making, interpretation, and application?

On the other hand, whatever definitional properties one is prepared to accept, the concept of the rule of law is a clear example of a vague concept. This means that at least some of its properties admit of gradual application and give rise to the well-known problem highlighted by the *Sorites* paradox: What threshold of secret laws, or of judicial corruption, must be crossed before a state can no longer be regarded as a rule-of-law state (that is, before the concept can no longer be applied)?

In this regard, the idea I wish to emphasize is that, when a concept of the rule of law is used, participants, in adopting an internal point of view in the practical sense, cannot be skeptical[5]. In other words, although they may be mistaken, they necessarily assume that such a concept (i) although contested, is not, and cannot be, self-contradictory or radically indeterminate, and (ii) although gradual and vague, presupposes a limit, a threshold that demarcates a domain of applicability and inapplicability.

The first point (i) implies that, although there may be deep disagreements, at least some of them are conceived as merely epistemic disagreements – that is, disagreements for which there is a correct answer. When a concept is used from an internal–practical point of view, it is excluded that it may have just any content. On the contrary, it is assumed that the concept has – albeit a contested one – a coherent identity; that is, the possibility that its content be contradictory is ruled out.

The second point (ii) implies that, although logic allows that a gradual property may be paradoxically applied to an individual case that displays that property to a degree zero, the pragmatics of language use, again from an internal-practical point of view, does not allow this and requires that, to be applicable, such a property not only be present, but be present to a sufficient or satisfactory degree. Thus, for example, although the property of being faithful to the law is a gradual property, and although logic allows the possibility of correctly concluding that an interpretation intentionally contrary to the law is an interpretation faithful to the law (albeit to a degree zero), the pragmatics governing the use of the concept does not permit this. Certainly, given its vagueness, the concept does not determine a precise limit; however, the presupposition is that such a limit is necessary and that we must acknowledge it at the moment of using or applying the concept.

Consequently, considering what I have said about institutional concepts in general, it should be noted that those who use or apply a concept of the rule of law – unlike those who merely describe its uses and applications – adopt an internal point of view in the practical sense. From this point of view, such a concept cannot (in a normative sense) be regarded as a content that tolerates any interpretation and/or application whatsoever. The semantic normativity inherent in the use and application of a concept precludes the possibility of considering that the same concept is simultaneously applicable and inapplicable, or that it applies to a situation and to its opposite. In this sense, the belief in the coherence of the concept constitutes a minimal presupposition of the use of a concept by those who adopt an internal point of view in the practical sense.

At the same time, whatever the specific content of the concept of the rule of law may be, those who use or apply the concept – and not necessarily those who merely describe its use and

[5] The adoption of a skeptical position with respect to the meaning of linguistic expressions – and, in the specific case, with respect to the meaning of the expression *rule of law* – makes sense only as a metalinguistic position, that is, as a descriptive theory aimed at illustrating the different ways in which that expression is used in first-order language. In other words, it cannot be presented as a normative position that presupposes the acceptance of a given concept, nor, *a fortiori*, as a proposal for a rational reconstruction of the concept itself.

application – understand it as having determinate limits, that is, as having an identity such that its contestation or denial would result in the abandonment of the concept in question or in its replacement with another concept. Accordingly, although disagreements do in fact exist as to what its content is or what exactly the properties that define it require, a participant-acceptant presupposes that the concept is internally coherent and that it has certain "essential" or "necessary" contents that make it the concept it is, rather than a different one. In other words, the members of a social group share a concept only if, explicitly or implicitly, they agree that certain properties or certain paradigmatic cases function as criteria of application. Without an agreement of this kind, however minimal, one cannot say that they share – or that a social group has – a concept of the rule of law.

For example, let us suppose that, within a given political community C, there is agreement on the idea that the rule of law requires a legal system that regulates the behavior of its members through non-contradictory, public norms that are interpreted and applied with fidelity. In other words, let us suppose that in C there exists a minimal agreement to the effect that the regulative ideal to which the concept refers includes at least three of the eight principles proposed by Lon Fuller[6]. Such an agreement allows us to say that the social group C has or shares a concept of the rule of law. The existence of this concept, however, admits, in the first place, the existence of deep disagreements concerning other possible characteristics of the concept: does the rule of law require that norms be "clear" and non-retroactive? In the second place, it also admits deep disagreements concerning the precise content and the applicability of the three requirements previously mentioned: what does it mean, exactly, that norms must be public or faithfully applied? When are two norms contradictory?

Accordingly, as I already noted, from the point of view of users or those who accept the practice, disagreements in this case cannot extend to the extreme of admitting (a) the incoherence of the content of the concept or (b) the applicability of the concept to cases in which the requirements that define it are not satisfied to a sufficient or satisfactory degree. Following the example proposed, although the concept of "faithful interpretation" is vague, its application is excluded in a case in which we know that the interpretation has been intentionally distorted to achieve illegitimate ends, that is, a case in which the interpretation would be faithful only to a degree zero. Strictly speaking, the application of the concept would be logically possible, but it would paradoxical and ultimately excluded when the concept is used from an internal point of view in the practical sense. From this perspective, every gradual concept becomes scalar and requires a decision concerning the threshold beyond which its application is no longer considered correct or admissible.

3. *On the Content of The Concept: The Ideal of The Rule of Law*

The concept of the rule of law comprises a set of values, principles, and prescriptive rules – that is, a regulative ideal. Depending on how robust the ideal is taken to be, a distinction is drawn between a merely formal and a substantive conception of the rule of law. My concern here is to make explicit two general characteristics that form part of the ideal of the rule of law in any of its versions, whether formal or substantive.

To maintain that a state qualifies as a state governed by the rule of law implies that it has a legal system incorporating the values, principles, and rules that define this kind of state. But this is not all. It also implies, on the one hand, that the state is characterized by a specific model of legal order: a model in which those values, principles, and rules function as criteria of validity or invalidity for the remaining norms or legal acts. In other words, it is necessary not only that the

[6] See Fuller 1969, 39.

legal system incorporate the rule-of-law ideal, but also that it be structured in such a way that the values, principles, and rules defining the rule of law occupy a hierarchically superior position within the system.

At the same time, to claim that a legal system can be regarded as the legal system of a state governed by the rule of law means that the values, principles, or rules that define this type of state constitute a subsystem of hierarchically superior norms, the elimination or systematic violation of which allows one to infer that the legal system in question has lost its identity – namely, that it is no longer the legal system of a state governed by the rule of law. Certainly, this amounts to attributing to the legal system an identity that is neither merely formal nor merely textual[7]. However, this does not necessarily mean that the legal system contains a specific document – namely, a formal constitution – in which its hierarchically superior principles are explicitly listed. In this essay, I am primarily thinking of the legal systems in the *Civil Law* tradition, which do contain a constitutional document. But a state may be a state governed by the rule of law and recognize the hierarchically superior status of certain principles by conferring rigidity upon them, that is, by establishing aggravated procedures for their amendment, without being endowed with a specific constitutional document.

It is also worth noting that a legal system may incorporate the ideal of the rule of law by conferring upon it the status of a condition of validity for the remaining norms, without expressly declaring in any text (constitutional or legislative) that those norms determine its material identity. The legal system of a state governed by the rule of law necessarily confers upon such norms a superior and rigid character, that is, it protects them through special mechanisms of amendment, but it does not necessarily confer upon them an intangible character. Certainly, a state may explicitly self-declare, in a text called a "constitution" or elsewhere, the unamendable character of the principles of the rule of law, just as, for example, the Italian state explicitly declares in Article 139 of its Constitution that the republican form of the state may not be subject to constitutional revision. However, in the same way in which a state may be republican by rigidly protecting the norms concerning that form of state without the need to establish that such norms are "unamendable", "inviolable", or "intangible", a state may be a state governed by the rule of law by rigidly protecting the norms concerning that form of state even if it does not explicitly declare or establish the intangible or unamendable character of the principles that express the ideal of the rule of law.

In this respect, the difficulty initially noted in connection with the application of any vague concept arises once again. How many of the norms that define the rule of law (or the republican state) would have to be abandoned or permanently violated so that a state is no longer a state governed by the rule of law (or a republican state)? Certainly, since this is a vague concept, such a limit is not determined. Nevertheless, in general terms, we can say that beyond a certain limit a legal system loses its identity as a state governed by the rule of law and no longer falls within the scope of application of this concept.

The characteristics previously mentioned have some further implications. As is well known, the concept of a constitution is itself contested. Nevertheless, there is a widely shared sense according to which the term "constitutional" is applied to supreme norms, that is, to norms occupying the highest hierarchical position within a legal system. This implies that the legal system of a state governed by the rule of law must conform to the model of the constitutional state, in

[7] According to Riccardo Guastini, the identity of a state governed by the rule of law is a political, legal, and axiological identity (cf. Guastini 2019). A rule-of-law state is therefore endowed with an "ethically dense" material constitution, in which certain values, principles, and rules are recognized as supreme. On the identity of the constitution, see also Baquerizo Minuche 2024. From a formal point of view, however, a state that, in accordance with the procedural rules of its legal system, abandons the principles and rules that define the rule of law does not lose its identity: formally, it remains the same legal system. It does, nonetheless, lose at least part of its material identity, insofar as that identity is, by hypothesis, determined by the principles of the rule of law.

which, by hypothesis, norms exist at two hierarchical levels: constitutional norms, which are rigidly protected and lay down rules and principles functioning as criteria of validity, and ordinary norms, which must comply with the criteria established by constitutional norms in order to be valid within the system. In this sense of "constitution", a constitutional state is not necessarily a state endowed with a document called a "constitution", nor is it necessarily a state governed by the rule of law. The latter point follows from the fact that nothing prevents a state from having a constitution – i.e. a subset of rigidly protected (superior) norms that function as criteria of validity for the remaining norms – without incorporating among norms of this kind those that define and protect the rule of law[8]. However, every rule-of-law state is necessarily a state endowed with norms of constitutional rank: one that protects, or "entrenches", a subset of norms by conferring upon them the highest hierarchical status, and that includes among these norms those that characterize the rule of law[9].

An inescapable corollary of the commitment to the ideal of the rule of law is that the norms that define or protect it are not only rigid constitutional norms that establish criteria of validity for subordinate norms; in addition, they prevail in the event of a conflict with other rigid constitutional norms that establish criteria of validity independent of the rule of law. In other words, the constitutional rules and principles that define the rule of law are norms of higher hierarchical rank even with respect to those that, although also constitutional, neither define nor protect the rule of law. Certainly, this idea forms part of the ideal – that is, of what ought to occur within a state in order for it to constitute a state governed by the rule of law. Indeed, a state that does not acknowledge that all the norms and principles of its legal system must be subordinated to the ideal of the rule of law – namely, that they must be created, interpreted, and applied in conformity with it – can hardly be regarded as a rule-of-law state.

Consequently, for a state to qualify as a rule-of-law state, it is necessary that it recognizes two types of hierarchy among legal norms. The first type is connected to the well-known criterion of *lex superior*, according to which, in the event of a conflict between norms of different rank, those situated at the highest level within the system prevail. The preference established by *lex superior* is an unconditional one, independent both of the content of the norms that come into conflict and of the circumstances in which the conflict arises. Under the presupposition that a legal system is the legal system of a rule-of-law state, one may therefore infer that the norms that define or protect it form part of the highest level of the system: they constitute the criteria of validity for all other norms of lower rank and prevail in the event of a conflict with them. In other words, they are rigid constitutional norms of the system and determine the invalidity of norms or decisions that fail to comply with them[10].

The second type of hierarchy is a hierarchy among norms of the same type, that is, among rigid constitutional norms which, by hypothesis, constitute criteria of validity for ordinary norms. This type of hierarchy presupposes that any conflict among constitutional principles in which norms that define the rule of law are involved (that is, norms that determine the material identity of the state *qua* state governed by the rule of law) must be resolved by means of a model of reasoning that, both in its procedure and in its outcome, exhibits the state's commitment to the principles of the rule of law, in a manner respectful of its own material identity. Such a model must respect the special preference that this type of state assumes in favor of a core or subset of values, principles,

[8] What has been said implies a positivist conception of law: whether a state is a state governed by the rule of law or not is a contingent fact and depends on the norms of its own legal system. By contrast, for an anti-positivist position, the ideal of the rule of law is part of a necessary morality, without which a normative order could not be regarded as law. Cf. Fuller 1969.

[9] As an anonymous reviewer observed, it would be erroneous – and historically false – to maintain that a state governed by the rule of law is necessarily endowed with a constitutional document. However, it would be equally erroneous to maintain that a state governed by the rule of law is not endowed with constitutional norms, in the precise and widely shared sense that I have adopted here.

[10] On the notion of hierarchy, see Rodríguez 2017.

and rules within the set of norms that it regards as rigidly constitutional. A state governed by the rule of law, by virtue of being such, commits itself to act and decide, first and in all cases, in accordance with the principles that characterize it. It is this abstract preference that determines its identity as a state governed by the rule of law.

The recognition of the hierarchically supreme position of the principles that constitute the rule of law vis-à-vis other rigid constitutional norms does not imply the invalidity of the norms that come into conflict with those principles[11]. Conflicts between constitutional norms in which this hierarchy comes into play are normally instances of partial–partial contradictions, in which two conceptually independent norms, by virtue of the factual circumstances, cannot be complied with simultaneously[12]. The superior hierarchy of the norms that define the rule of law means that, in the specific case in which the conflict arises, the solution that is consistent with the ideal of the rule of law must always prevail, whereas the solution required by the conflicting norms must always give way or adapt to what is required by the principles of the rule of law.

Clearly, this hierarchy is not independent of the content of the norms that come into conflict; nevertheless, it is an absolute preference, not conditioned by any factual circumstance. The existence of the conflict may depend, and usually does depend, on factual circumstances, but the preference does not. The unconditional preference in favor of the principles that define the rule of law is a conceptually necessary property of every rule-of-law state.

Accordingly, it must be acknowledged that, within a rule-of-law state, not all conflicts among constitutional principles are to be resolved – as is usually assumed – by means of balancing. Strictly speaking, a conflict between a constitutional principle that defines the rule of law and one that does not cannot be resolved through balancing. This is because balancing provides a procedure for addressing conflicts among principles that occupy the same hierarchical position and, by hypothesis, allows for the possibility that any principle may prevail over, or yield to, another, depending on the circumstances.

As we have seen, a state governed by the rule of law commits itself to act and decide, first and in all cases, in accordance with the principles that materially characterize it. In this sense, within this type of state, the technique of balancing is not suitable for dealing with conflicts in which principles that constitute the rule of law, and to which hierarchical priority is accorded, are involved. Consequently, balancing applies only (i) in cases of conflicts that involve exclusively principles constitutive of the rule of law, which occupy the same hierarchical position, or (ii) in cases of conflicts that do not involve principles connected with the ideal of the rule of law.

It may be questioned whether there exist conflicts among constitutional principles the resolution of which does not involve – if not principles – at least some of the values that define the rule

[11] The notion of a "principle" is notoriously ambiguous. In the sense articulated by Dworkin, principles are standards that do not apply in an all-or-nothing fashion, but instead have a gradual dimension of weight or importance. Accordingly, when principles come into conflict, the fact that one prevails does not entail the invalidity of the other, which remains part of the legal system as a reason that may carry weight in other cases. In this sense, the norms that define the rule of law, when they conflict with other norms of the same type – that is, with other constitutional principles – operate as principles in Dworkin's sense. By contrast, when these same norms conflict with ordinary norms, they operate as rules: they apply in an all-or-nothing manner, are applied by *modus ponens*, and render incompatible norms invalid.

[12] It should be noted that the notion of partial-partial contradiction was originally conceived for cases involving contradictions between rules whose deontic content consists in determinate actions (for example: "one must pay", "it is forbidden to park", "it is permitted to vote"). In such cases, a partial-partial contradiction implies that the solutions imposed by both rules cannot be satisfied simultaneously. The deontic content of principles, by contrast, does not consist in determinate actions (for example: "norms must be public", "fidelity to the law is required", "the law must be comprehensible"). Accordingly, when a partial-partial contradiction arises between two principles, this means that, in the specific circumstances of application, some – at least one – of the behaviors required by one principle are incompatible with some – at least one – of the behaviors required by the other. However, even in such circumstances, there may exist other behaviors, also required by the principles involved, that allow them to be honored simultaneously.

of law. If this were so, that is, if one holds that the resolution of every conflict necessarily invokes the values and principles of the rule of law, this implies that, although balancing is possible and required among principles that are conceptually independent of the ideal of the rule of law, both the process and the outcome of the balancing must always respect the values of the rule of law, which enjoy a hierarchically superior position.

4. *On the Hierarchy of Norms*

For the sake of greater clarity in presenting the characteristics just mentioned, I shall assume that we share a concept according to which the ideal of the rule of law roughly coincides with the set of principles analyzed by Joseph Raz in his work *The Rule of Law and Its Virtue*[13]. Certainly, the content of this ideal may vary from one state to another. Some states may accept a more robust conception that includes, for example, the prohibition of war or the protection of certain social rights. However, I take Raz's proposal as my point of departure because I assume that it is a coherent concept and that it captures some of the essential or necessary characteristics of what is regarded as a state governed by the rule of law in contemporary Western societies.

The thesis I defend is minimalist in scope and conceptual and ontological in nature. As I have already argued, a state governed by the rule of law, by definition, recognizes the values that characterize it and explicitly incorporates a set of principles and rules designed to protect them. This does not mean that such a state necessarily assigns the highest hierarchical rank to all norms that may be associated with the rule of law. Rather, it does so only with respect to a specific conception that captures those essential or necessary properties without which a state could not properly be described as a "rule-of-law state"[14]. According to this thesis, an essential feature of the rule of law consists not merely in the incorporation of principles requiring, for example, that legal provisions be public, intelligible, stable, and capable of compliance. It also involves recognition of the dual hierarchical superiority of such principles. In other words, a state governed by the rule of law acknowledges that these principles, insofar as they constitute the very ideal of the rule of law: (i) function as fundamental norms of the system, serving as criteria of validity for every legal norm; and (ii) invariably prevail over any other fundamental principle or criterion of validity whose content is independent of the ideal of the rule of law.

To understand this essential feature of the rule of law, it is necessary to reflect more carefully on what the recognition of this dual hierarchy entails. On the one hand, the fact that certain principles occupy the highest hierarchical position within the legal system implies, as has been said, that they have a constitutional character. And the constitutional character of a norm presupposes its rigidity. A norm can be regarded as fundamental and function as a criterion of validity for ordinary norms only if it cannot be modified through a procedure identical to that by which an ordinary norm is created. Its enactment and amendment can take place only through a special procedure that is more demanding than the ordinary one[15]. This conception of constitutional norms contradicts the idea according to which a constitutional norm does not prevail by virtue of its superior hierarchy, but is of superior hierarchical rank because, and insofar as, it prevails in a conflict with other norms. In other words, the notion of hierarchy that I am employing requires

[13] See Raz 1979, 210-229, esp. 214-218.

[14] This position rests on the assumption stated at the outset. The aim of this essay is to offer, from an epistemic internal point of view, a partial reconstructive analysis of a concept that participants accept and toward which they adopt an internal point of view in the practical sense. As already noted, it would be incoherent to suppose that those who adopt this stance, at the moment of using the concept, regard it as radically indeterminate. For them, the concept possesses essential properties that normatively guide its use and that, if disregarded, either undermine its applicability or lead to its erroneous use. This is precisely what it means to adopt an internal point of view in the practical sense.

[15] See Bayón 2004, 67-118.

the rigidity of the norms to which the property of being hierarchically superior is attributed (that is, constitutional norms). More generally, it contradicts the concept of a flexible constitutional norm, according to which norms of this hypothetical superior rank are not violated, but rather modified, by norms that fail to comply with them. In accordance with the concept of hierarchy that I am adopting, hierarchically organized legal systems have a stable structure or stratification. In this sense, "hierarchies", if they are such, cannot be mobile or unstable[16].

There is no doubt that the expression "hierarchy" can be understood in different and even contradictory ways. However, as I noted at the outset with regard to concepts in general, with respect to the concept of hierarchy a skeptical position that admits its radical indeterminacy is not available when the term is employed from an internal point of view in the practical sense, which is the point of view that, at least in part, this essay seeks to reconstruct. This is because, if such radical indeterminacy were admitted, both the use of the concept and its very reconstruction would turn out to be contradictory. For example, one would have to admit the possibility that the same norm N1 is and is not hierarchically superior to another norm N2 and, consequently, that a norm N3 is simultaneously valid and invalid, or that a decision D4 is at once correct and incorrect, depending on how –contingently – a conflict between norms is resolved.

For this reason, and consistently with its premises, the "realist" or "skeptical" position that admits the existence of a variable hierarchy among constitutional norms – and its individual case-relative character – cannot present itself as a normative-reconstructive position with respect to the concept of hierarchy. Rather, it can only be understood as a metalinguistic and descriptive account: either of how the term "hierarchy" is actually used, or of what, as a matter of fact, may occur in the application of norms by the users or operators of the legal system.

It is undeniable that, in cases of conflict, the effective preference accorded to constitutional norms is contingent, and that their hierarchical position – supreme by definition – may in practice be disregarded or even violated by the operators of the legal system. However, if we accept the premise that the constitutive rules of a concept – in this case, the concept of normative hierarchy – have a normative character (in the semantic or epistemic sense), then this undeniable possibility cannot be described, at the metatheoretical level, by claiming that the norms of the legal system have a mobile or variable hierarchy. Such a claim would rest on a mistaken use of the notion of hierarchy and would contradict one of its defining properties: namely, that a hierarchy does not depend on how conflicts are resolved, but instead provides a criterion that guides their resolution *ex ante*.

If a hierarchy exists between two norms, this means that, in the event of a conflict, one of them – the one identified by the hierarchical criterion – must always be preferred over the other, regardless of the circumstances. From this perspective, if the criterion of preference is made dependent on variable circumstances, this implies that, strictly speaking, no hierarchy exists between the conflicting norms.

Legal systems are normally understood as systems endowed with a hierarchical structure that guides, *ex ante*, the resolution of possible conflicts: (i) a vertical hierarchy, according to which there exist norms of higher rank and norms of lower rank, and, in the event of a conflict, the preference criterion established by *lex superior* requires that priority be given to the superior norms; and (ii) a temporal and horizontal hierarchy among norms of the same rank, according to which, in the event of a conflict, the preference criterion established by *lex posterior* requires that priority be given to norms enacted at a later time. Without entering into further distinctions – which would be necessary for a more thorough analysis of these types of hierarchies – it is worth noting that it is problematic to maintain that the principle of *lex specialis* allows for the establishment of a hierarchy of norms in the strict sense[17].

[16] On the possibility of a "flexible" hierarchy, see Guastini 2001, 147.

[17] A more thorough analysis would require distinguishing between a static and a dynamic approach to law. As for the problematic character of the principle of *lex specialis* as a principle capable of generating a hierarchy among norms, see Rodríguez 2017, 184-186.

In conclusion, it is appropriate to reiterate that the existence of legal operators who use language in a contradictory manner, or who violate the hierarchy of norms, is an ineliminable possibility. However, from a methodological point of view, a theoretical position that points to or describes such situations should not accommodate an incoherent use of the concept of hierarchy. If one does not wish to employ or reconstruct a concept that is intrinsically incoherent, it is necessary to clarify that a hierarchy – insofar as it constitutes a criterion that establishes *ex ante* which norm must be preferred in the event of a conflict – cannot be mobile or unstable; that is, it cannot, by hypothesis, depend on the way in which operators actually resolve the conflict.

5. *On the Dual Hierarchical Superiority of the Norms that Define the Rule of Law*

A state's commitment to the values of the rule of law is reflected in the recognition of the hierarchical superiority of a subset of principles that constitute a specific conception of the rule of law (hereafter, PROL). This hierarchical superiority manifests itself in two distinct ways. On the one hand, as we have just seen, it requires that the PROL be configured as a specific type of norms within the legal system: they are necessarily fundamental norms, endowed with a rigid character, which establish conditions of validity for the remaining norms. An obvious consequence of this feature is the invalidity of norms, acts, or decisions whose content contradicts or fails to comply with the PROL[18]. On the other hand, their hierarchical superiority requires that the PROL necessarily prevail in the event of a practical conflict with other norms of the same type but not related to the rule of law (that is, other rigid norms that establish additional conditions of validity).

There are different types of practical conflicts[19]. In any case, the incompatibility present in a conflict among constitutional norms is not normally of a logical nature. The contents of the norms that enter a practical conflict are not necessarily in contradiction with one another. In this sense, the difficulty is not of logical origin, but empirical. This means that, by virtue of the specific characteristics of the individual case that render them applicable, not all the behaviors or states of affairs required or justified by constitutional norms can be realized simultaneously. In other words, the norms require or justify behaviors or states of affairs that, in the circumstances in which they are to be realized, become incompatible with one another, that is, they cannot occur jointly.

This type of conflict is therefore relative to specific circumstances of application. However, it should be emphasized that what depends on the circumstances is the existence or non-existence of the conflict, not the priority of the PROL. The priority of these principles is stable and inflexible and rests exclusively on the fact that, by hypothesis, we are dealing with a legal system that commits itself to respecting the rule of law.

The hierarchical superiority of the PROL therefore requires that, in circumstances of conflict, the behaviors required or justified by those principles always take priority over those required or justified by the other fundamental norms. As I noted already, this priority does not mean that the fundamental norms that conflict with the PROL must be declared invalid or inapplicable. On the contrary, the conflict presupposes that the conflicting norms are valid and applicable to the case.

It follows that, in cases of practical conflicts in which the PROL are involved, the decision-making authorities of a state governed by the rule of law possess *ex ante* a criterion for resolving the conflict: the solutions justified by the PROL always prevail. And the solutions required by other

[18] Certainly, different senses of "invalidity" can be distinguished, as well as different types of consequences associated with it, which I cannot address in this context. The difficulty typically arises because, in a certain sense – namely, validity understood as membership in, or mere existence within, the system – norms that contradict the PROL may still be described as "valid". However, the hierarchical superiority of the PROL requires that such norms be declared invalid, that is, that they be expelled from the system.

[19] See Canale 2017, 37-44.

fundamental principles, in the cases and to the extent that they prove incompatible with the PROL, give way or are overridden. In such circumstances, however, the defeated principles retain their validity and practical relevance; this means that they continue to require an interpretive effort aimed at honoring them in some alternative manner.

Principles are general norms that admit of different forms of concretization and of satisfaction or fulfilment. If a principle comes into conflict with another principle in a given case, even though it need not prevail, it nonetheless requires the search for other modes of fulfilment compatible with what is demanded by the prevailing principles; or, in cases in which it is not possible to find any compatible avenue of satisfaction, it requires or justifies compensatory or remedial measures that offset such impossibility. It is not appropriate to pursue this feature further here, but it should be recalled that, in general, a principle that is defeated or yields – unlike an invalid norm – does not lose its rational force merely because it is insufficient to prevail in the situation of conflict[20].

For this reason as well, in conflicts in which the PROL are involved, the technique of balancing does not appear to be applicable. The balancing procedure typically concludes with the identification of a single rule applicable to the individual case, or of a single conclusive reason. However, if we admit that all the principles involved in the conflict retain their practical relevance, the resolution of the conflict cannot consist in a single response grounded exclusively on the prevailing reasons. Necessarily, in addition to the solution required or justified by the principles that prevail (in this case, the PROL), there must also be a solution required or justified by the principles that, although they do not prevail, remain relevant reasons[21].

In conclusion, in these pages I have proposed an exercise in the analysis of the concept of the rule-of-law state. If what has been said is correct, then a state governed by the rule of law necessarily has a legal system that incorporates and configures, as fundamental and rigid norms, a set of rules and principles that concretize and constitute a specific conception of the ideal of the rule of law. These norms determine its identity as a rule-of-law state. A state may qualify as a state governed by the rule of law without expressly declaring its adherence to this ideal. In turn, if a state is a state governed by the rule of law, it recognizes that the norms that concretize this ideal not only constitute conditions of validity for the remaining norms, but also always prevail over other fundamental and rigid norms, in the cases and to the extent that they prove incompatible.

[20] See Gardner 2007, 100-103; see also Gardner and Macklem 2002, ch. 11.

[21] On the "residual" force of reasons, see Hurley 1989, 125-135.

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