

Two Models of the Rule of Law

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ABSTRACT

All conceptions of the Rule of Law (RoL) can be traced back to two models. The first model emphasises formal features that limit the arbitrary power of rulers. According to this model, the RoL is both a means of organising power and safeguarding those subject to it. The second model considers positive law to result from balancing two elements, dating back to the medieval tradition: *gubernaculum* and *jurisdictio*. The *gubernaculum*, the expression of sovereign power, finds an insurmountable limit in legal practice. Its principles express a true “legal reason”. The judges and jurists are the foremost priests of this legal reason. This essay identifies the pros and cons of both models and attempts to demonstrate that they are incompatible alternatives.

Tutte le concezioni dello Stato di diritto (RoL) possono essere ricondotte a due modelli. Il primo modello enfatizza caratteristiche formali che limitano il potere arbitrario dei governanti. Secondo questo modello, il RoL è insieme uno strumento di organizzazione del potere e di tutela di coloro che vi sono sottoposti. Il secondo modello considera il diritto positivo come il risultato del bilanciamento di due elementi, risalenti alla tradizione medievale: *gubernaculum* e *jurisdictio*. Il *gubernaculum*, espressione del potere sovrano, trova un limite insormontabile nella pratica giuridica, i cui principi esprimono una vera “ragione giuridica”. I giudici e i giuristi sono i massimi sacerdoti di questa ragione giuridica. Questo saggio individua i pro e i contro di entrambi i modelli e tenta di dimostrare che si tratta di alternative incompatibili.

KEYWORDS

law and morality, inner morality of law, legal certainty, enlightenment rule of law, contemporary constitutionalism’s rule of law

diritto e moralità, moralità interna del diritto, certezza del diritto, stato di diritto dell’illuminismo, stato di diritto del costituzionalismo contemporaneo

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All animals are equal
but some animals are more
equal than others
(George Orwell, *Animal Farm*)

1. *Two Models of the Rule of Law: Introductory Remarks*

The Rule of Law (henceforth referred to as RoL) has four characteristics that should be made explicit. It is a notion that is: 1) indeterminate, 2) controversial, 3) endowed with a positive aura, and 4) expansive in force.

Any discourse on RoL requires an analysis in which an explanatory definition of the notion is proposed, as indeterminacy demands. Without this attempt at conceptual clarification, there is a risk of a dialogue of deaf people. The term “RoL” can denote different things.

The fact that RoL is a controversial notion means that we are dealing with one of those concepts that Ronald Dworkin refers to as “interpretive” (see WALDRON 2002). Each proposed definition results from evaluative and ideological choices and aspires to prevail over all others. Therefore, proposing a definition of RoL implies taking a position among a shortlist of alternatives. Consequently, any statement on RoL is ambivalent. It simultaneously answers the questions “What is RoL?” and “How should RoL be understood?” These two questions cannot be separated from each other.

Jeremy Waldron (WALDRON 2008, 3) asserts, «The Rule of Law is one of the most important political ideals of our time». The positive aura surrounding the RoL makes discourses on this notion susceptible to emotional rhetoric. This aspect is also captured by Gerald Postema (POSTEMA 2022, p. 17): «While [the RoL] enjoys a halo of legitimacy, it imposes irritating constraints on those who exercise power and necessitates compromises with other political goals. Consequently, it is vulnerable to capture and rhetorical abuse by those who would retain its halo and minimize its costs. Political ideals with this kind of scope, power, and visibility cannot escape controversy, not just at the periphery but also at its core». In concrete terms, this means that people tend to unite under the banner of the RoL without realising that they are defending different – if not opposing – conceptions of this notion. This is the same phenomenon that characterises discourses on human rights. While we all support human rights, we are furiously divided over the meaning of equality and how to strike the right balance in the event of a conflict between rights (see § 6).

Finally, the RoL is endowed with an expansive force. Like a phagocytic cell, it tends to incorporate – or at least merge with and/or overlap with – other concepts, such as law, human rights, democracy, and freedom. This increases its scope and, consequently, the potential for misunderstanding (WALDRON 2004, p. 319). The fundamental error, sharply identified by Joseph Raz, is that the RoL is often made to coincide with the *Rule of good law* (RAZ 1979, 210): «Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated».

All conceptions of the RoL can be traced back to two models that differ in their approach to the

alternative between the Rule of Men and the RoL (see also TAMANAHA 2004, 91-113): the “Enlightenment model”¹ and the “model of contemporary constitutionalism”.

2. *The Enlightenment Model of the RoL*

The first model identifies certain characteristics of the law, mainly formal, that enable it to limit the arbitrary power of the governors. In this first version, the RoL would be both a way of organising power and a guarantee for those subject to this power. A famous compendium of this model is proposed by Friedrich von Hayek when he defends the ideal of the sovereignty of law: «Stripped of all technicalities this means that government in all its actions is bound by rules fixed and 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» (HAYEK 2006, 75-76).

The best-known version of this model is probably the one proposed by Lon Fuller. According to this author, for the law to pursue its purpose, which is to govern the conduct of individuals while protecting their freedom and also their dignity, certain errors must be avoided: «The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on ad hoc basis. The other routes are: 2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; 3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; 4) a failure to make rules understandable; 5) the enactment of contradictory rules or 6) rules that require conduct beyond the powers of the affected party; 7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, 8) a failure of congruence between the rules as announced and their actual administration» (FULLER 1969, 39; WALDRON 2010).

Fuller believes that if these errors and, in particular, contradictions and incongruities are avoided, law has “greater affinity” with what is morally good than with what is evil. Herbert Hart is less optimistic than Fuller; he is convinced that this conception of the RoL «...is unfortunately compatible with very great iniquity» (HART 1994, 207).

A conception of the RoL similar to Fuller’s, but in line with Hart’s latter observation, is proposed by RAZ (1979). In short, for Raz, the RoL is an ideal that has more or less the characteristics identified by Fuller, but, unlike Fuller, Raz denies the coincidence between the law and the RoL; for Fuller if a legal system does not respect its inner morality in any way, it is not only a bad legal system but not a legal system at all. On the contrary, for Raz, a legal system can radically disregard the formal characteristics identified by Fuller and still remain a legal system. Moreover, the presence of these characteristics does not guarantee that the law does not radically violate certain moral values or adequately protect the dignity of individuals.

The primary function of law is to regulate human conduct. The RoL ensures that this task is performed efficiently, that the arbitrariness of power is curbed, and that, as Hayek notes, individual freedom is protected. To use Raz’s famous analogy (RAZ 1979, 225), just as a knife serves to cut, law guides behaviour; a sharp knife cuts better than an unsharp one, and a law that respects the RoL ideal guides behaviour more efficiently than a law that does not. A sharp knife, however, can be used to cut bread or a human being’s throat, and similarly, a law that respects the RoL ideal can protect human rights and human dignity as well as trample on both. Even if one were to concede that the Enlightenment RoL always protects individual liberty, since a specific and clear law allows individuals to know in advance what the consequences of their behaviour will be, it remains true that a law that conforms to the Enlightenment RoL can be thoroughly immoral.

¹ I take the expression “Enlightenment RoL” from CELANO 2013.

In any case, this model of the RoL treats those subject to the rules as adults, in the sense that it aims to affect human behaviour in an open and non-underhanded manner, leaving individuals themselves the choice of whether or not to follow the rules, knowing *ex ante* the consequence of their decision. The communicative stance through which norms influence behaviour implies that the governors recognise the dignity of individuals as responsible agents, capable of autonomous choices. In this way, the governors pay respect to the governed (CELANO 2013, 198). To better understand this observation, it is sufficient to notice the differences between an order and other forms of constraints on behaviour, such as preference manipulation and symbolic influence. Preference manipulation imposes a constraint on someone's behaviour by influencing their desires and preferences through different means – drugs, hypnotic practices, and so on. The preference manipulation cancels the faculty of choice of the individuals involved. In addition, it is an insidious means of affecting the behaviour of others because it acts “behind the back” of the person subjected to it. Those who are manipulated believe they are free, although they are not. Similarly, one who is subject to symbolic influence makes no choice, but merely performs a mechanical behaviour produced by the power of suggestion of the symbol. After all, a behaviour or attitude induced by a symbolic influence is very similar to the movement of the knee under the pressure of the doctor's reflex hammer. Even in the case of a symbolic influence, the constraint on behaviour escapes the perception of the victim.

3. *The RoL Model of Contemporary Constitutionalism*

This model of RoL originated in common law legal culture and was theorised by authors such as Edward Coke and later Albert Dicey. Unlike the previous model, this latter does not focus on formal and procedural constraints on sovereign power; rather, according to this model, positive law is not exhausted in the law produced by the sovereign power but is the outcome of the balance between the two elements of the pair, dating back to the medieval tradition, *gubernaculum/jurisdictio*. The *gubernaculum*, which is an expression of sovereign power, finds an insurmountable limit in the related legal practice, which is governed by its principles, which, in turn, express a genuine “legal reason” whose priests are first and foremost the judges and, secondly, the jurists. The characteristics of this RoL model are well summarised by Mauro Barberis (BARBERIS 2016, 17): «The law *par excellence*, for common lawyers, has always been the common law, produced not by Parliament with the intention of producing it, but by judges, as an unintended effect of the resolution of concrete cases submitted to them. At least since the 19th century, moreover, it is not so much a matter of the individual judicial decisions – in themselves no less intentional than the laws of Parliament – as of the complex of principles or *rationes decidendi* that can be derived from these decisions: a complex that, as such, does not correspond to the intentions of the individual judges nor of any other legislator in the flesh».

This model of RoL presupposes (a) the existence of values and principles expressed by legal practice and unchangeable (or, at least, not modifiable in the manner of legislation) and (b) cooperation between institutions, in particular between parliament and the courts.

With the transition from the modern state to the contemporary constitutional state, this second model has also been reconsidered by jurists and legal philosophers belonging to the civil law legal culture. This is largely due to the socio-institutional differences between these two forms of state.

If sovereignty is the hallmark of the modern state, the “crisis of sovereignty” is probably the case of the contemporary state (FERRAJOLI 1997). After the end of the Second World War, the sovereignty of nation-states was doubly limited. Internally, the sovereignty of parliament is limited through the introduction of rigid constitutions, i.e., that can only be amended through an aggravated procedure compared to that of ordinary laws, and long constitutions, i.e., containing a declaration of rights. Externally, the end of the absolute sovereignty of states, which consisted in the *ius ad bellum*, is estab-

lished by the birth of the UN and the promulgation of the Universal Declaration of Human Rights.

In short, if the nineteenth-century liberal state – the modern state – recognises as the only limits to state sovereignty the “procedures” that the legislature must comply with to create valid law, the constitutional state adds to the procedural limits also “substantial” limits, limits of “content”, that prevent the legislative power from doing or deciding whatever it wants. In the constitutional state, the dialectic between *gubernaculum* and *jurisdictio* appears inescapable.

In this case, the purpose is not, as with the Enlightenment RoL, to protect individual liberty through a determinate law but to guarantee the moral correctness of the legal system through a flexible law produced not only by the legislative power but also by the judicial power. It is easy to see that these aims are not compatible.

A clarification is needed at this point. The two RoL models, precisely because they are models, exert a normative force: they outline an ideal, they do not “describe” what it is. The preference for one or the other is therefore associated with reasons that can be traced back to the ideological-political sphere. On the other hand, it cannot be denied that, especially in practical rationality, changes in reality play a not insignificant role in orienting choices in favour of certain world views and not others. This means, in short, that the prevalence of certain models over others depends at least in part on the ability of these models to successfully interpret reality. This second model, therefore, deserves special attention precisely because it expresses the ideological substratum of contemporary law, even though, in recent years, demagoguery, populism, and the crisis of democracy have put both models of RoL in a checkmate.

In the following sections – taking advantage of the Dworkinian distinction between the “rule-book” model of the community and the community of principle (DWORKIN 1985, 9-32) – I try to highlight some limits of the latter model of RoL (represented by the community of principle) and some merits of the former model (represented by the rule-book model).

4. *The Political Community, According to Ronald Dworkin*

DWORKIN (1986, 190-224) maintains that a political community has essential points of contact with what he calls genuine communities, such as family, friendship, work relationships, and so on.

Genuine communities are characterised by “reciprocity”; a member of such a community is only responsible for and obligated to other members insofar as they are also responsible for and obligated to her. While everyone in the community doesn’t need to agree on the specific responsibilities and obligations of each member, it is required that there be a general and widespread understanding of the responsibilities and duties that come with membership. For example, Dworkin observes that a friendship does not require each person to feel obligated to break a promise to help a friend in need. It is sufficient for all to share a willingness to make significant sacrifices to help a friend. From this basic agreement, the concrete determination of the sacrifices appropriate to a friendship becomes a matter of interpretation.

The reciprocity that characterises genuine communities must fulfil four conditions.

Firstly, community obligations are “special” obligations; they only apply within the group and differ from obligations to non-members. For example, the loyalty one owes to a friend differs from the loyalty required in all social relations that do not fall under friendship.

Secondly, community obligations are “personal” in that they are not (at least not exclusively or primarily) obligations towards the group as a collective entity, but rather towards individuals within the community or institution. For example, Dworkin argues that each family member is obligated not only to preserve the family’s good name or enhance its prestige, but also to support relatives in need.

Thirdly, these obligations stem from a broader concern for community members.

Finally, this general concern must be addressed equally to all community members. This does not mean there cannot be hierarchies or role differences between community members. The role

of parents within the family is different from that of children; such differences, however, are legitimate if they are in the interest of all and, more precisely, in the equal interest of all. Consequently, communities organised through a caste system, for example, in which some individuals are less valued than others, are not genuine communities. Therefore, they do not give rise to community obligations or responsibilities.

From this analogy between genuine community and political community, Dworkin defends a specific model of political community, which he calls the community of principle. In the following paragraphs, I question the analogy between genuine and political communities and put forward some objections to the community of principle.

5. *Two Models of a Political Community*

Dworkin presents three models of political community: the *de facto* community, the “rule book” community, and the community of principle. Only the latter two are relevant here, as they correspond to the Enlightenment RoL and the RoL of contemporary constitutionalism.

The “rule book” model requires a general commitment to obey the rules. Rules are obeyed not only as a matter of strategic expediency, but also because one believes they are obligated to follow them. However, the obligations to obey are strictly bound by what the rules provide. These rules are a compromise between the conflicting individual values and interests, rather than the outcome of an interpretive practice of more general principles that hold the community together.

This model, which at first sight seems adequate at least about pluralist communities, does not pass Dworkin’s rigorous scrutiny of associative obligations. In particular, it disregards the third and fourth conditions that specify the reciprocity that characterises genuine communities. People may be motivated by purely personal and selfish interests. Once a rule has been established, they will commit to respecting and enforcing it, regardless of its content. However, this commitment is too weak to be considered an expression of concern for others, which is characteristic of genuine communities. Finally, according to Dworkin, the relationship between the members of a “rule book” community is based on some version of the fair-play argument. When participating in a cooperative enterprise – and a well-ordered, rule-based society can be considered such an enterprise – those who restrict their freedom for the greater good are entitled to demand the same from those who benefit from their behaviour. It is unfair to benefit from the sacrifices of others and then refuse to do one’s part. For Dworkin, this argument provides an insufficient foundation for building a political community. According to the fair-play argument, a political authority is justified if it improves the welfare of those subject to it. If this means that a political authority is only justified if it can maximise general welfare more effectively than any other system, then the fair-play argument is too demanding. Conversely, if “otherwise” means that any authority is better than no authority, the argument is too broad.

According to the community of principle model, the rules that govern members’ behaviour do not result from a compromise between individual interests. Instead, they are the outcome of a common understanding that aims to realise the community’s shared values and principles in the best and broadest way possible. These values and principles are not metaphysical or absolute; instead, they have a historical character and arise from discussion within the community. Rather than viewing it as a necessary compromise to be part of the community, each person accepts the interpretation of the principles that deviates from their interpretation because they are aware that their reasons have been taken into account, as well as those of everyone else. Moreover, precisely this awareness justifies obligations arising from norms that are not entirely shared.

The community of principle model combines two fundamental theses from Dworkin’s conception of law: the integrity thesis and the idea that law is an interpretative social practice. The integrity thesis presents law as a social practice centred on congruent principles and values. In contrast, the thesis of law as interpretation asserts that the identification of law stems from an

interpretative process characterised by the value of law's integrity: «Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbor when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship» (DWORKIN 1986, 189-190; MACCORMICK 2009).

The concept of a political community contrasts with the complexity of contemporary Western societies. In short, political communities are different from genuine communities. However, this aspect can be set aside here. What I am interested in questioning is the idea, which also underpins the RoL of contemporary constitutionalism, that a political community is a collection of individuals sharing a common pattern of justice. In general, this model of RoL is based on the idea of fidelity to law (POSTEMA 2022, 65 ff.) and the idea that law is an interpretative social practice in which everyone is equally entitled to put forward their interpretation of the principles of the community. This model views law as a set of horizontal relationships between equals, rather than vertical relationships involving the exercise of force. However, force is an indispensable element of law (SCHAUER 2015), and concealing it can be dangerous, as a force acting behind our backs is far more frightening than one that is openly exhibited.

6. *The RoL of Contemporary Constitutionalism and the Community's Shared Values*

A community of principle is built around shared values. In such a community, political decisions do not arise from compromises and negotiations between conflicting interests and values, but from the correct application of shared principles and values to a given situation. This is the essence of the ideology of contemporary constitutionalism.

Examining the limitations of this ideology in light of the actual characteristics of contemporary constitutional Rule of Law enables us to highlight the conceptual and pragmatic limitations of the community of principle model (SCHIAVELLO 2016).

A crucial aspect of the "age of rights" (BOBBIO 1996a) was the idea that the most crucial step had been taken once human rights were recognized. The problem was finding a universal agreement on which rights should be recognised. Once this was achieved, the only remaining task was to protect them.

The importance of this universal agreement on human rights is also evident in the fact that contemporary legal-philosophical and philosophical-political literature consciously avoids seeking a justification that could ground a universal consensus on human rights. There is a fear that searching for a philosophical foundation for human rights could lead to radical divisions and thus weaken the agreement on rights.

Attempting to address the issue of the philosophical basis of rights is destined to fail for several reasons. The main reasons are listed below.

Firstly, the language of rights is indeterminate, so interpretative activity aimed at identifying their meaning or content presupposes the exercise of broad discretion. Attributing one meaning to a provision expressing a right rather than another requires engaging in argumentative-justificatory activity that cannot avoid the philosophical question of foundation.

Secondly, there are many rights. Over the years, the increasing number of declarations of rights has led to an ever-growing list. This creates the potential for conflicts (if not in theory, then certainly in practice) between the rights of different individuals. The plurality of rights creates problems: which right should prevail (after weighing up the options)? What is the correct trade-off between conflicting rights, where possible? Once again, the problem of grounding arises.

Third, protecting rights costs (HOLMES, SUNSTEIN 1999). The exercise of any right by citizens presupposes that the state has planned spending policies guaranteeing their protection. The fact that rights cost makes it necessary to make justified choices. The justification of policy choices inherent to the protection of rights (or, rather, the protection of one right at the expense of another) presupposes an interpretative activity aimed at determining the content of rights, some

form of balancing or trade-off, and so on. For the reasons seen above, this calls into question the foundation of rights.

Fourthly, we must consider the intricate relationship between rights and democracy. The proliferation of rights, coupled with the role of judges as guardians of those rights, reduces the discretionary choices available to political power. Judges' erosion of political power is one of the defining features of the RoL of contemporary constitutionalism (see § 3). Moreover, disagreement over rights is a structural feature (as is disagreement over justice, politics, and law more generally) (WALDRON 1999). Consequently, the belief that rights delineate an area removed from decision-making is a dangerous fiction, since decisions taken by a majority or a "judiciary aristocracy" are "disguised" as mere recognition of pre-existing rights.

Finally, a particularly demanding challenge to the reassuring idea that there is a universal consensus on human rights comes from pluralism. Pluralism evokes the notion of incommensurability. A genuinely pluralist society is one in which there are instances of genuine divergences, i.e., divergences that cannot be rationally composed. This conclusion is all the more pertinent in multicultural societies, which are characterised by multiple cultural entities – i.e., multiple symbolic universes that give meaning to individuals' life plans – that aspire to preserve their ever-changing identity of origin and participate in everyday political life. The original nature of cultures renders the problem of incommensurability even more significant than it is in the context of pluralism.

These difficulties do not deter supporters of the RoL of contemporary constitutionalism. As we have seen, they resort to ideas such as fidelity to the law and the interpretive community. The values shared within a political community are indeed controversial. However, all community members are encouraged to express their views on these values. In the interpretative contest that follows, the better argument will prevail. At this point, everyone is expected to show loyalty to the law because they have had the opportunity to express their interpretation of the community's values and are treated with equal consideration and respect.

However, this is a simplified version of RoL's second model. According to this model, law is an interpretive social practice in which the only permissible form of coercion is that of the best argument (see § 5). In an interpretive-argumentative contest, the only permissible coercion is the persuasion without coercion of good arguments. However, as Aristotle taught, reason is founded on the *endoxa* – our intuition and judgment. The problem is that «in a pluralist society – one characterised by different individuals and groups embracing different yet reasonable ideologies, world-views, and conceptions of what is good and just – there is no shared fund of *endoxa* about many bitterly debated issues. [...] Thus, [...] in a pluralist society, about many controversial issues, no argument is possible: there are no common reasons. Moreover, if we understand "genuine reasons" to be considerations that would persuade a universal audience and assume that reasonable pluralism is not contingent but structural to a free society, then on many crucial issues, "genuine" argumentation will not be possible in a pluralist society» (CELANO 2009, 249-250). If this is the case, the best argument is often the one defended by those with the most power to be heard.

7. Two Models of the Jurist

Two different models of jurist and judge correspond to the two alternative models of RoL (BOBBIO 2007).

The first model portrays the jurist as a "guardian" and custodian of an existing body of norms. According to this model, the jurist's main activity is interpretation. It should be noted that, in this model, interpretative activity involves little or no discretionary decision-making by the interpreter. The concept of the jurist-custodian emerges from ideological and political choices relating to the understanding of the principle of legality, the relationship between powers, and the authority of the state. This conception of legal knowledge considers the latter subordinate to political power. In this respect, the words of 19th century French jurist Charles Demolombe are meaningful: «My credo, my profession of faith, is also: texts first! I am publishing a *Code Napoléon* Course: my aim

is therefore to interpret and explain the *Code Napoléon* itself, considered as living law, as applicable and mandatory law. My preference for the dogmatic method will not prevent me from always taking the very articles of the law as a basis» (BOBBIO 1996b, 83).

The second model portrays the jurist as a “creator” of law, playing a full role in legal practice and contributing to the legal system’s modification, integration, and transformation. According to this model, Bobbio argues that the jurist’s main activity is the creation of law. Even when the jurist self-presents himself as the creator of law, the activity that characterises him is always interpretative. What changes from the first model is the jurist’s attitude towards interpretation. In the former case, the jurist adopts an attitude of self-restraint. In contrast, in the latter, he expands his discretion to the maximum through recourse to principles, programmatic norms, and constitutionally oriented interpretation.

Several factors influence the prevalence of one model over another. The first factor relates to the legal system in which the jurist operates (“institutional factor”). A legal system can be either closed or open. A legal system is closed if it is a systematic body of rules tending towards completeness and expressed in a specific language. It is open if the rules are “fluid”, i.e., indeterminate and continuously changing, and if «the jurist is involved in creating new law alongside the legislator and judge». (BOBBIO 2007, 36). The Enlightenment RoL can be depicted as a closed system, whereas the RoL of contemporary constitutionalism is open.

The second factor depends on the general social situation (“social factor”). The stability or change of a society depends on the influence of change factors on existing cultural patterns.

The last factor stems from the prevailing conception of law among jurists and how the relationship between law and society is “calibrated” (“cultural factor”). Law can be viewed as an autonomous, largely self-referential system, a subsystem within a broader system, or a superstructure built upon the social and economic structure. If the law is considered a sub-system of the social system, it becomes interesting to explore its role within society. In other words, it is important to understand whether the law is at the centre or periphery of the social system.

It is difficult to deny that contemporary law is an open system continuously transforming due to globalisation, and is characterised by pluralism and multiculturalism (see § 6). Furthermore, the law is increasingly understood as a reflection of society, which implies that today’s model of the jurist is what Bobbio calls “creative”: «in this perspective the main activity of the jurist is no longer the interpretation of a law already made but the search for a law to be made, *in fieri*, not so much the *validation based on an analysis of the formal sources of the law that is, as the legitimation, based on the material principles of justice, of the law that is to be*» (BOBBIO 2007, 37-38).

8. Conclusion

The theses that I have defended in this essay are threefold.

Firstly, there are two RoL models, each of which has many versions. These two models are alternatives because they pursue different values and goals. The Enlightenment RoL cherishes individual freedom and, for this reason, identifies certainty as the fundamental value of law. The RoL of contemporary constitutionalism considers law an interpretative social practice centred on specific shared values. To realise these values, the law must be flexible and judges must be given broad discretion. However, this fatally reduces the certainty of the law, and with it, the freedom of individuals. In short, the first RoL model treats individuals as adults because it does not act behind their backs. It gives each individual the freedom to decide whether or not to follow the law, with full knowledge of the consequences of their actions.

On the other hand, it risks fostering an acquiescent and accommodating attitude towards the law, which, by eroding individual autonomy, produces a regression to childhood. If the law is considered a practical authority, we must do what it asks us to, not because we choose to, but because it asks us to. Contemporary law and today’s prevailing legal ideology openly challenge the original

myth of legal certainty. The constitutionalisation of legal systems increases the law's flexibility to the detriment of certainty and requires everyone – legislators, judges, and individuals subject to the law – to assume their responsibilities and the risks involved.

The second thesis is that although the RoL of contemporary constitutionalism presents law as a social practice built around horizontal and not vertical relationships and minimises the role of force, the image does not coincide with the reality of things. The difference from the Enlightenment RoL is that, in that case, force acts openly in front of individuals. In contrast, in the case of the RoL of contemporary constitutionalism, it acts behind their backs.

Finally, the two models are not elaborated in vacuo but express the zeitgeist of different legal experiences. The Enlightenment RoL expresses the ideals of the modern state, while the RoL of contemporary constitutionalism is that of contemporary constitutional states. There is a tendency to present these two models in continuity, but they are alternative models.

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