# On the Relations between the Rule of Law and Democracy

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ABSTRACT
The essay clarifies the relationships between the rule of law, the separation of powers, and democracy – concepts that are often conflated in public discourse. After distinguishing the different meanings of "separation of powers", the paper reconstructs the rule of law as an institutional arrangement grounded on the specialization and independence of the judiciary and in the subjection of the executive to the law, which, within the liberal state, is complemented by the principles of liberty, equality, and legality. Democracy, by contrast, is understood as a form of government based on meta-rules regulating legislative production: the election of the legislative assembly by universal suffrage, proportional representation, and majority decision-making. The essay argues that there is no necessary conceptual connection between democracy and the rule of law: the nineteenth-century rule-of-law state was not intrinsically democratic, whereas the twentieth-century constitutional state, characterized by constitutional rigidity and judicial review, introduces counter-majoritarian institutions that limit the democratic principle. The result is an analytical reconstruction that sharply separates the three concepts and redefines their relationships in structural terms.

Il saggio chiarisce i rapporti tra Stato di diritto, separazione dei poteri e democrazia, nozioni spesso confuse nel discorso pubblico. Dopo aver distinto i diversi significati di "separazione dei poteri", il paper ricostruisce lo Stato di diritto come assetto istituzionale fondato sulla specializzazione e indipendenza del potere giudiziario e sulla soggezione dell'esecutivo alla legge, che, nello Stato liberale, è integrato dai principi di libertà, uguaglianza e legalità. La democrazia, invece, è intesa come forma di governo fondata su meta-regole che disciplinano la produzione del diritto: l'elezione dell'assemblea legislativa a suffragio universale, il sistema proporzionale e la decisione a maggioranza. Il saggio mostra che non vi è una connessione concettuale necessaria tra democrazia e Stato di diritto: lo Stato di diritto ottocentesco non era intrinsecamente democratico, mentre lo Stato costituzionale novecentesco, con rigidità costituzionale e controllo di costituzionalità, introduce istituzioni contro-maggioritarie che limitano il principio democratico. Ne risulta una ricostruzione analitica che separa nettamente i tre concetti e ne ridefinisce i rapporti in termini strutturali.

KEYWORDS
Liberal rule-of-law state, separation of powers, constitutional democracy, legality, liberty, equality, self-determination, judicial independence, judicial review

Stato (liberale) di diritto, separazione dei poteri, democrazia (costituzionale), legalità, libertà, uguaglianza, auto-determinazione, indipendenza giudiziaria, controllo di costituzionalità

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1. *Separation of Powers* – 1.1 *The Legislative and the Executive* – 1.2 *The Judiciary* – 2. *The Rule of Law* – 3. *Democracy* – 3.1 *Self-determination* – 3.2 *Democracy, Separation of Powers, Rule of Law.*

The expressions *rule of law* and *Stato di diritto* occur in several international treaties. They occur, but they are not defined.

In the North Atlantic Treaty one reads, among other things: «The Parties to this Treaty [...] are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and *the rule of law*»[1]. In the Italian version, the same passage reads: «Gli Stati che aderiscono al presente Trattato [...] si dicono determinati a salvaguardare la libertà dei loro popoli, il loro comune retaggio e la loro civiltà, fondati sui principi della democrazia, sulle libertà individuali e sulla *preminenza del diritto*»[2]. It is worth noting that "rule of law" is translated not as "*Stato di diritto*", but as "*preminenza del diritto*" (supremacy of law), an expression that is, to say the least, unusual.

In the Treaty on European Union we read that "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, *the rule of law*, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". And again: «The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, *the rule of law*, human rights and the principles of international law»[3].

In the Italian version we find: «L'azione dell'Unione sulla scena internazionale si fonda sui principi che ne hanno informato la creazione, lo sviluppo e l'allargamento e che essa si prefigge di promuovere nel resto del mondo: democrazia, *Stato di diritto*, universalità e indivisibilità dei diritti dell'uomo e delle libertà fondamentali, rispetto della dignità umana, principi di uguaglianza e di solidarietà e rispetto dei principi della Carta delle Nazioni Unite e del diritto internazionale»[4]. Here, in short, the rule of law is rendered as "*Stato di diritto*".

Thus – leaving aside the peculiar expression "*preminenza del diritto*" (supremacy of law) – "rule of law" and "*Stato di diritto*" appear to denote the same thing: the classical idea of "nomos basileus", or what is commonly called the "government of laws", as opposed to despotism or arbitrary government. One should note, however, that the English word "law" translates "*diritto*", not "*legge*", since it refers not only to statutes (acts of Parliament) but also, and above all, to the common law.

If one looks at the history of legal thought, however, it is at least doubtful that the two expressions correspond to a single concept. "Rule of law" and "*Stato di diritto*" (or "*État de droit*", "*Rechtsstaat*") belong to two distinct doctrinal traditions: the common law tradition (Dicey, Bingham, and others), and the civil law tradition (Jhering, Laband, Jellinek, Duguit, Hauriou, Carré de Malberg, and others)[5]. The literature on the subject is vast and I will not attempt to summarize it here.

[1] T*he North Atlantic Treaty*. (1949). https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/1949/04/04/the-north-atlantic-treaty.

[2] T*rattato Nord Atlantico*. (1949). https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/1949/04/04/the-north-atlantic-treaty?selectedLocale=it.

[3] T*he Treaty on European Union*. (2016). https://eur-lex.europa.eu/eli/treaty/teu_2016/2025-03-15.

[4] T*rattato sull'Unione europea*. (2016). https://eur-lex.europa.eu/eli/treaty/teu_2016/2025-03-15.

[5] See, e.g., Heuschling 2002; Costa, Zolo 2002; Loughlin 2010.

In Italian public discourse – *toute chose confondue* –, the rule of law, the separation of powers, and democracy are treated as if they were interchangeable notions. In particular, it looks as if there can be no democracy without separation of powers, and no rule of law without democracy.

Some conceptual clarification therefore seems necessary – in the form of a series of redefinitions.

## 1. *Separation of Powers*

It is convenient to begin with the separation of powers. This notion is closely connected with the rule of law (but not with democracy, as will become clear shortly).

"Separation of powers" is a complex and far from univocal notion. The reason is that, in such a phrase, the word "power" is used to denote, indiscriminately and somewhat confusingly, two quite different things:

i. a function of the state;
ii. the body, or set of bodies (state organs), to which that function is attributed.

Accordingly, separation takes different forms depending on whether it is referred to functions or to organs.

### 1.1 *The Legislative and the Executive*

Let us first consider the relations between the legislative and the executive.

(i) *Separation of functions*. If separation is referred to functions, it amounts to "specialization": A function can be said to be specialized when it is reserved to a certain organ, which exercises it entirely and exclusively.

(ii) *Separation of organs*. If separation is referred to organs, it does not amount to mutual independence, despite what the word "separation" might suggest. It amounts instead to a system of reciprocal checks and balances: *le pouvoir arrête le pouvoir*. Powers and counter-powers are, in fact, the opposite of reciprocal independence.

### 1.2 *The Judiciary*

The judiciary requires a separate discussion. This is the aspect of separation that is relevant for the concept of the rule of law.

With regard to the judiciary, separation of powers requires both specialization of the judicial function and independence of judicial bodies. Specialization excludes the possibility that the legislative and/or the executive exercise judicial functions. Independence, above all, excludes the existence of checks and balances constraining adjudication.

(i) *Specialization*. Neither the legislature nor the executive should exercise the judicial function.

Not the legislature: If the determination of violations of the law in concrete cases were entrusted to the same body that is competent to produce the law, both the principle of equality and legal certainty – understood as the predictability of decisions – would be exposed to serious risks. When deciding a concrete dispute, the legislature could enact *ad hoc* norms that are at once individual (thus violating equality), and retroactive (thus undermining predictability of decisions).

Not the executive, for at least two reasons: First, the use of force – the application of sanctions – must be grounded on a prior and impartial determination of a violation of legal norms (otherwise it would lack justification). Second, the acts of the executive themselves are subject to judicial review.

Here, separation of powers is connected not with democracy (as will be shown later), but with the rule of law.

(ii) *Independence*. If judges were appointed, renewed, or removed by one of the other two powers, their impartiality and political neutrality would not be guaranteed.

## 2. *The Rule of Law*

By "rule of law" – the "government of laws" – one usually means a legal order in which public powers are subject to the law. But which public powers are at issue? Certainly the executive and the judiciary. Certainly not the legislature – with the exception of the Constitutional state – since the legislature is the source of the law.

From an institutional point of view, the rule of law therefore reduces to, and practically coincides with, the following two elements: (a) on the one hand, the specialization and independence of the judiciary; (b) on the other hand, the subjection of the executive to the law and the judicial review of its acts.

In a liberal state, however, the rule of law is characterized not only by a certain arrangement of powers, but also by a certain content of the legal order: on the one hand, the principle of legal equality; on the other hand, the principles of liberty and legality.

As to the principle of equality, this is not the place to go into detail. It will suffice to say that it is a meta-rule requiring the equal distribution of rights.

Now, any (modern Western) legal order consists of two levels, or layers, of rules:

i. rules of conduct, addressed to private individuals, which deontically characterize behavior (as obligatory, prohibited, permitted, optional);
ii. power-conferring meta-rules or meta-rules of competence, which establish and delimit the public powers of producing and applying the law, using non-deontic modalities: power (or competence), liability, disability, immunity.

However, in a liberal state, the rule of law requires that each of these two sets of rules have its own closing principle.

The set of rules of conduct is closed by the principle of liberty, also known as the general "exclusive" or "negative" norm: "Everything that is not expressly prohibited (to private individuals) is tacitly permitted". A celebrated formulation can be found in Article 5 of the 1789 French Declaration of the Rights of Man and of the Citizen: «Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas»[6].

The set of competence rules, by contrast, is closed by the principle of legality: roughly speaking, "Everything that is not expressly permitted (to public authorities) is tacitly prohibited".

Both principles require clarification.

(a) The principle of liberty, thus formulated, is a tautology, since deontic modalities are interdefinable and "permitted" is logically equivalent to "not prohibited". What matters, however, is to understand that one thing is a behavior that is permitted (in a negative or weak sense, so to speak) merely because it is not prohibited – and is therefore susceptible of being prohibited in the future; another thing is a permission (strong or positive) laid down by a norm that expressly confers a liberty right.

The distinction between negative permission and positive permission becomes particularly important when the positive permission in question is a liberty right guaranteed by a rigid constitution. A constitutional liberty is something quite different from a "natural", pre-legal, liberty that exists (only) where positive law does not reach.

[6] National Assembly of France. (1789). *Declaration of the Rights of Man and of the Citizen* (August 26, 1789). https://www.legifrance.gouv.fr.

This way of thinking (which dates back to seventeenth-century legal theory) presupposes that there is no obligation without a rule establishing it. Accordingly, "natural" liberty is coextensive with legal gaps, understood in an elementary sense as forms of behavior that are not deontically regulated and are therefore indifferent. This is the idea of the "empty space of law", elaborated by Karl Bergbohm and Santi Romano: the set of forms of conduct, or legally relevant states of affairs, with respect to which the law is silent[7].

(b) As to the principle of legality, its deontic formulation, offered above and symmetrical to that of the principle of liberty, is appealing but conceptually inaccurate, since what is at issue here are not deontic notions, but Hohfeldian ones (that is, concepts elaborated at the beginning of the last century by the American jurist W. N. Hohfeld, intended to disambiguate the notion of subjective right)[8]. Not obligations and permissions, but powers and liabilities. Strictly speaking, one should say: "Everything that is not authorized is unauthorized". Again, a tautology – apparently. But not quite.

In public law, unauthorized means formally invalid – that is, invalid independently of the content of the act concerned. This is because, while there are pre-legal liberties "in nature" (that is, legally indifferent forms of behavior), there are no pre-legal powers or competences. Legal power – unlike mere factual power – is an artificial creation of positive law. There is no legal power without a rule that confers it. In short, the principle of legality is therefore nothing more than a rule concerning the validity of the acts of public authorities. In a rule-of-law state, such validity is subject to judicial review.

No need to say that a state qualifies as a rule-of-law state if, and only if, this set of principles is effectively applied.

## 3. *Democracy*

Democracy – the last concept that needs clarification in this context – is nothing other than a form of government (or of state, or of regime, as some might prefer to say). That is, in the final analysis, a set of meta-rules governing the production of law. Which should not be confused with the content of the law.

In a democratic form of government, the meta-rules at stake confer the legislative function – the power to enact general norms binding on the entire community – on an assembly elected by universal suffrage under a proportional system, and deciding by majority. This is the core of democracy. Everything else is secondary.

Two marginal remarks are in order.

(a) First, the direct election of the executive (or of its Head: be that the president of the republic or the prime minister, for example) has nothing to do with democracy. It is, rather, a characteristic feature of regimes that are at least tendentially autocratic – "elective autocracies", as Michelangelo Bovero aptly calls them[9] – in which the executive tends to be insulated from parliamentary control and significant political powers are transferred from the legislature to the executive.

(b) Second, any majoritarian electoral system contradicts the democratic principle (with the possible exception of a two-round system with very small constituencies, as many as there are seats to be filled). The democratic principle requires equality of the vote. Yet in a majoritarian system votes clearly do not have equal weight: The votes of the majority weigh more.

This is even more evident in systems that provide for a so-called "majority bonus", where the holders of the "bonus" seats represent no one, since they have not been elected by anyone.

7 Bergbohm 1892; Romano 1925.

8 Hohfeld 1913; Hohfeld 1917.

9 Bovero 2015.

The so-called majority bonus prefigures the "tyranny of the majority". Moreover, the majority thus produced is fictitious, since it is artificially created by a non-proportional electoral law.

With the aggravating circumstance that such a fictitious majority endangers the qualified majorities typically required by constitutions to protect constitutional rigidity, minorities, and the independence of those organs (such as constitutional courts) that are meant to guarantee the constitution and/or political minorities and/or citizens' rights and liberties.

### 3.1 *Self-determination*

The axiological foundation of the democratic form of government lies in the political principle of self-determination, albeit (inevitably) tempered by the majority rule. According to this principle, citizens should obey only themselves – that is, the laws that they themselves have willed, directly or at least through their elected representatives.

The principle of self-determination presupposes that certain fundamental civil and political liberties are guaranteed (at least personal liberty, free speech, freedom of the press, freedom of assembly, freedom of association) as well as equality among citizens – that is, their political equality and not so-called substantive (social) equality, which depends on social facts and, if anything, on the content of the law rather than on the mode of its production.

Another clarification is needed here. If equality and fundamental liberties are guaranteed by statutory law or by a flexible constitution – that is, a constitution freely amendable by the legislature – then they are merely necessary presuppositions of self-determination. If, by contrast, they are guaranteed by a rigid constitution, not amendable by "ordinary" acts of parliament, then they constitute limits on the legislature (that is, on the political majority) and therefore limits on democracy itself.

Constitutional democracy is thus a limited form of democracy. Constitutional rigidity and, even more so, judicial review of legislation are counter-majoritarian institutions. Constitutional judges – or supreme court justices, where the review is decentralized – are counter-powers to legislative power.

### 3.2 *Democracy, Separation of Powers, Rule of Law*

Given the confusion that characterizes public discourse, some further clarification is required concerning the relations between democracy, separation of powers, and the rule of law.

(i) As regards the separation between the legislative and the executive, democracy would require specialization of the legislative function: only the legislative assembly should have the power to enact general rules binding on the whole community.

Yet in no constitutional system is the legislative function strictly specialized, since the so-called "executive" function never consists in the mere enforcement of the law. To begin with, governments are always endowed with legislative initiative and, above all, with more or less extensive normative powers: at least secondary powers (consisting in enacting rules with a lower rank than the statutory ones), but almost always primary normative powers as well, that is, powers competing with the legislative function (decrees having the force of law). The legislative function, in short, is not fully reserved to the body called "legislative". Moreover, governments invariably enjoy powers that escape any legislative predetermination, for example in the field of international relations.

All this contradicts the democratic principle, which sits uneasily with an executive that legislates or co-legislates.

In a democratic form of government – and only in such a form – the executive is separated, but not "independent", from the legislature, in the sense that its acts are subject to legislative rules.

In parliamentary systems, the executive is politically responsible to the legislature, which may deny it confidence and thereby force it to resign. It should be noted that this holds in parliamentary systems, not in a presidential one, in which the executive does not depend on the confidence

of the legislative assembly. Legislative primacy over the executive would appear consistent with the democratic principle. Yet this same principle is contradicted by the veto power over legislation and by the power to dissolve the legislative assembly –powers that the executive typically holds, at least in parliamentary regimes.

It should also be said that, in some systems (roughly speaking, parliamentary regimes), and in any case according to certain juristic doctrines, the head of state is regarded – rightly or wrongly – not as the head of the executive, but as a "fourth power", a so-called "neutral power", functioning as guarantor of the proper functioning of the constitutional process. This calls into question not so much the separation of powers as the identification of the powers themselves (not three, but four – leaving aside constitutional judges, whom I will address shortly).

(ii) As regards the judiciary, it should first be observed that the democratic principle, properly understood, requires not that judges be chosen "democratically" – that is, elected by the people, on the basis, it is assumed, of one or another political orientation – but, on the contrary, that they be subject only to the law (the outcome of democratic deliberation), independently of their political preferences. And therefore that they be selected on the basis of technical competence, not political inclination.

On the other hand, in a constitutional democracy – characterized by a rigid constitution and judicial review of legislation (exercised, depending on the system, by a constitutional court or by the courts in general) – the legislative function is divided between two distinct bodies: the legislature and the constitutional judge. The latter, despite its judicial nature (in terms of decision-making procedure), concurs in the legislative function, at least "negatively", by removing unconstitutional laws from the legal order (and sometimes positively, through so-called "additive" or "substitutive" decisions).

Constitutional rigidity and judicial review are counter-majoritarian and therefore non-democratic institutions.

Constitutional rigidity defeats the democratic principle because it limits legislative function, in particular the majority rule, since constitutional amendment typically requires qualified majorities.

Judicial review of legislation defeats the democratic principle because it involves a judge interfering with the legislative function. It also conflicts with a central aspect of the separation of powers. On closer inspection, the constitutional judge is something other than part of the judicial power: It is an institution that again calls into question not so much the separation of powers as the very identification of the powers in question.

(This is not the place to examine the normative function – and thus, in a broad or "material" sense, "legislative" function – exercised by ordinary judges by virtue of their interpretive powers).

(iii) Finally, as regards the relations between democracy and the rule of law, two points must be made: (a) the nineteenth-century "legislative" or "liberal" rule-of-law state had little or nothing to do with democracy; (b) the twentieth-century "constitutional" rule-of-law state – characterized by constitutional rigidity and judicial review of legislation – openly contradicts the democratic principle, in the manner just described.

The "government of laws", however, says nothing about the nature or structure of the legislature, which is not necessarily a democratic body. In short, there is no conceptual connection between the rule of law and democracy.

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