From the Rule of Men to the Rule of Law and Back Again: Some Skeptical Insights about the Temptation of Judge-Made Social Justice

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ABSTRACT

To avoid being overwhelmed by debates dominated by emotions and "wholesale" moral intuitions, it is advisable to take a step back to revisit the concept of the rule of law and its ideological and historical origins. This inquiry, tracing the reflections of Harold Laski, Franz Neumann, and E.P. Thompson, uncovers an apparent paradoxical stance. The defense of the formal virtues of the rule of law by certain Marxists is understandable insofar as equality before the law proves to be a lesser evil. The alternative, in fact, is a universe dominated by ideals of social justice whose realization depends on market dynamics and judicial subjectivity, thereby risking the consolidation of existing power structures.

Per non lasciarsi travolgere in dibattiti dominati da emozioni e da intuizioni morali "all'ingrosso", è consigliabile fare un passo indietro per rivisitare il concetto di stato di diritto e le sue origini ideologiche e storiche. Questa indagine, ripercorrendo le riflessioni di Harold Laski, Franz Neumann ed E.P. Thompson, porta alla luce una posizione apparentemente paradossale. La difesa da parte di certi marxisti delle virtù formali dello stato di diritto è comprensibile nella misura in cui l'uguaglianza davanti alla legge risulta essere un male minore. L'alternativa, infatti, è un universo dominato da ideali di giustizia sociale la cui realizzazione dipende da dinamiche di mercato e dalla soggettività giudiziale, rischiando così di rafforzare le strutture di potere esistenti.

KEYWORDS
Legalism, dual state, marxism, social justice, intersectionality

Legalismo, stato duale, marxismo, giustizia sociale, intersezionalità

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1. *Introduction*

The volume of work dedicated to defining the "best" concept – or the best conception – of the rule of law, or to comparing different conceptions, is immense[1]. In this regard, I agree with Loughlin (2024, 512) when he states «the rule of law [...] has become a slogan in search of a concept». To avoid needless repetitions, a new work must necessarily establish certain boundaries and adopt methodological decisions. In this brief introduction, I will justify the choice to use history to understand the ideological and virtuous dimensions of the rule of law.

My starting point is twofold. On one hand, I draw from a sharp, polemical, and absolutely intriguing work: Judith Shklar's book *Legalism* (Shklar 1964)[2], which exposes certain aspects of Anglo-Saxon (and wider) legal culture. On the other hand, I use a thoughtful work, David Dyzenhaus's *The Long Arc of Legality* (Dyzenhaus 2022), which is characterized by great historical depth.

Shklar's main critique, reformulated in a later contribution after more than twenty years of academic observation, can be summarized as follows: «contemporary theories fail because they have lost a sense of what the political objectives of the ideal of the Rule of Law originally were and have come up with no plausible restatement. The upshot is that the Rule of Law is now situated, intellectually, in a political vacuum» (Shklar 1998 [1986], 21). It is precisely this "political vacuum" that renders *thick* conceptions especially vulnerable and calls for a skeptical re-examination.

* Earlier versions of this text were presented and discussed at the conference Rule of Law: in books, in minds (University of Bologna, July 7-8, 2025) and at the "Séminaire Théorhis" (Centre de théorie et analyse du droit, University of Paris Ouest-Nanterre, October 16, 2025). I am grateful to the participants on those occasions for their valuable comments. I also wish to extend my sincere thanks to the reviewers and editors of this Journal for their careful work. At an early stage of the project, I was guided by a suggestion from Rodrigo Camerena, which prompted me to undertake a close reading of E.P. Thompson. The text has subsequently benefited, for stylistic revision and linguistic polishing, from the assistance of AI tools.

[1] I will use "concept" and "conception" interchangeably since the confusion surrounding the nature of the rule of law makes it difficult to draw the limits of a concept against which different conceptions could then be compared. For an analysis in terms of concept and conceptions, particularly focusing on Dworkin and Raz, see Loughlin 2018, 662. A good reconstruction of all conceptions can be found in Rose 2004. For a systematization of legalist and non-legalist conceptions, see Barber 2004. For other bibliography, see Puppo 2016.

[2] Pau Luque dedicated a beautiful prologue to the second edition in 1986 (Luque 2021).

A starting point for such a re-examination is to ask a fundamental question informed by Shklar's diagnosis: does a more robust – "substantive" – conception of the rule of law, one that includes requirements like respect for human rights or democracy in its very definition, actually lead to better social justice outcomes? Shklar's work provides a crucial key here because "substantive" conceptions that demand significant social justice from the rule of law correspond to neither of the two major traditions that Shklar identifies (with "some interpretive license"): neither the rationalist Aristotelian tradition nor the institutionalist tradition of Montesquieu (Shklar 1998 [1986], 21). The latter, arguably, has been passed down from Dicey[3] (considered the "father" of the expression – though not the concept – "rule of law") to the present day under the often-derogatory epithet of "formalist" or *thin*.

The reference to Montesquieu will help me to establish a first conceptual point, although it is entirely negative: «In contrast to Aristotle's rule of reason, Montesquieu's Rule of Law is designed to stand in stark contrast not only to simple "oriental" despotism but also to the dual state [...]» (Shklar 1998 [1986], 22). This statement says nothing positive about the nature of the rule of law. In my view, this is precisely where the nature of the rule of law lies: it is a rejection of something, a refusal that can only be understood by reconstructing the historical conditions of its emergence. To unpack this constitutive "rejection", we must examine the two negative poles Montesquieu sets up against the Rule of Law: "oriental despotism" and the "dual state".

The reference to Oriental despotism often invokes the justice of the Kadi, a concept critically evoked by Supreme Court Justice Frankfurter to reassert the judges' duty to follow rules rather than be led by considerations of individual convenience or justice in a specific case: «This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency»[4].

The term "dual state", on the other hand, refers to a fundamental book written by Ernst Fraenkel (Fraenkel 1941), a book largely ignored by rule of law scholars: «That Fraenkel's work informed neither the exchange between Hart and Fuller [...] nor subsequent debate in philosophy of law is [...] one of the great missed opportunity in philosophy of law» (Dyzenhaus 2022, 322).

Following Dicey's invitation to «turn from the formalism of lawyers to the truthfulness of our constitutional historians» (Dicey 1915, 11) – I shall examine a much-debated assertion by the Marxist historian E.P. Thompson: «But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good» (Thompson 1975, 266). This statement has been widely criticized[5], yet it stands as what has been called «one of the greatest defences ever mounted of that concept (and one of the very few penned by a self-described Marxist)» (Cole 2001, 181)[6].

Once we accept that the characteristics consistently associated with the rule of law can only be grasped through history, a further step becomes inevitable: the rule of law appears in history not as a mere fact or an institution, but as an idea and an ideology[7]: «the rule of law existed as an ideal *avant la lettre* de Dicey» (Lino 2018, 740)[8].

An elegant way to frame the rule of law as an ideology is perhaps offered by Raz (Raz 1979 [1977]), who describes it as a virtue. Like any virtue, it is embedded in a particular conception of

[3] The reference work is Dicey 1915.

[4] Justice Felix Frankfurt, Dissenting Opinion, Terminiello v. Chicago, 337 U.S. 1 (1949), available at https://supreme.justia.com/cases/federal/us/337/1/ (accessed June 20, 2025). Regarding the abuse of the metaphor and the historically inadequate nature of references to the figure of the Kadi, see Rabb 2015.

[5] The most famous is certainly Horwitz 1977.

[6] It must be noted that in the footnote, the author mentions another Marxist who defends the rule of law: Franz Neumann, whose contribution I will return to. See *infra* § 5.2.

[7] Even though this aspect cannot be explored in depth, I will limit myself to distinguishing two senses of "ideology": one neutral and one negative. From a neutral point of view, an ideology «represents the imaginary relationship of individuals to their real conditions of existence» (Althousser 1971 [1970], 162).

[8] See also Loughlin 2018, 659; 2024, 512.

the good and in the social practices thought to realize that good. Yet many scholars of the rule of law, it may be argued, omit to specify which conception of the good they regard as "best".

But Raz says something even more interesting: it is a virtue not so much because it helps us achieve the good. Rather, it is a virtue in the sense that it limits the harm produced by the underlying mechanism: the law. If law, generally speaking and based on historical observation, tends to generate something negative, then we can imagine a set of protections to limit that harm. In this sense, Raz, recognizing the numerous risks of arbitrary exercise of legal power, emphasizes how «the rule of law does help to curb such forms of arbitrary power» (Raz 1979 [1977], 220). He is very clear in conceiving the rule of law as a more or less achievable idea, thus aligning with the "ideological" treatment of the rule of law: «In so far as conformity to the rule of law is a moral virtue it is an ideal which should but may fail to become a reality» (Raz 1979 [1977], 224). If Raz's position, like that of the majority of authors who defend the "original" idea of the rule of law, is essentially liberal, understanding the Marxist defense of the rule of law requires a major effort.

This effort begins with a historical reconstruction. Therefore, following Thompson, I will first reconstruct the English legal context that generated the idea of the rule of law and gave it positive value, despite its undeniably bourgeois dimension (§ 2). The same context can help to explain Laski's reflections on state authority. Like Thompson, Laski – though equally critical – allows us to focus on those few aspects of the rule of law whose sacrifice would come at a very high cost, even for those who fight politically for social changes rather than defend the status quo (§ 3). Then, I will show that the reasons for defending the rule of law, with its flawed formalism, are always the same: the danger of judicial despotism (Orientalism) and the Dual State. To do so, I will rely on the reflections of Fraenkel and Neumann. The latter, in a move that anticipates Thompson, criticized the bourgeois aspect of the rule of law; nevertheless, he understood its crucial importance, especially within his own context: that of a Jewish Marxist lawyer under the Nazi regime. These authors understood and described the moment when the formal rule of law(s) is suspended in the name of a higher ideal of justice (the Nazi one) (§ 4). Finally, in conclusion, I will suggest that the new trend pushing to make the rule of law thicker – to turn it into a battleground for greater social justice – is a tendency that can only seduce those who ignore history. This path inevitably leads to prioritizing certain conceptions of substantive justice: those held by the ruling elites. If there is a way to change society in a sense more favorable to the disadvantaged, perhaps that way is the "traditional" one, whether through gradual legislative reform or revolution. Particularistic judicial interventions, while generating self-satisfaction in the lawyers who solicit them and in the judges who grant them, neutralize the social forces that, instead of organizing collectively, seek access to individual solutions. Whether this is good or bad will depend on the ideology of the person judging the phenomenon. My only goal here is to introduce a skeptical perspective (§ 5).

2. *The Rule of Law in the General Context of English Judicial System*

While it would be interesting to reconstruct a thousand details, I will limit myself to a few key points. First, following Douglas Hay (1975), I will distinguish three components of the judicial institution, one of which is undoubtedly the rule of law (2.1). I will then move on to analyze the reasoning that leads E.P. Thompson (1975) to defend the rule of law, even after legitimately demonstrating its classist nature (2.2).

2.1 *The Rule of Law between Majesty and Divine Mercy*

Hay distinguishes three dimensions of justice, which translate into three sets of rules or prerogatives. The jurisdictional system is characterized by its rituals (2.1.1.), by justice (2.1.2.), and by mercy (2.1.3.).

2.1.1 *The Sacred Character of the Process*

The ritualistic aspect requires little comment. It is what lends majesty to the process, a way of sacralizing something essentially irrational. It is an «elaborate ritual of irrationality» (Hay 1975, 27): «In its ritual, its judgments and its channelling of emotion the criminal law echoed many of the most powerful psychic components of religion. The judge might (...) emulate the priest in his role of human agent, helpless but submissive before the demand of his deity» (Hay 1975, 29)[9].

This system could be supported by acts of faith, or it could seek another, perhaps more rational, kind of support. It was the struggles of the eighteenth century, especially in the field of criminal law, that helped to establish the principles of the rule of law (Hay 1975, 32).

2.1.2 *The Virtue of Formal Justice*

The relevance of virtues is clearly evoked by Hay, as he alludes to the need for a «bench that was both learned and honest»; this virtue ensured «even the poorest man was guaranteed justice in the high court» (Hay 1975, 32). The empirical accuracy of this statement is not important right now[10]. One of the ingredients for ensuring this protection was the observance of procedural rules, even the most formal ones.

The legal system (and the criminal system in particular) ceased to be simply the «creature of a ruling class» and became a «power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself» (Hay 1975, 33). An element that reinforced this popular sentiment is another classic characteristic of the rule of law: «Equality before the law». This meant, specifically, that even influential and powerful people could be convicted: «The crime was punished with unremitting severity event though it was often committed by impecunious lawyers of good family» (Hay 1975, 33)[11].

The conclusion of this evolution was the following: «The law was held to be the guardian of Englishmen, of all Englishmen. Gentlemen held this as an unquestionable belief: that belief, too, gave the ideology of justice an integrity which no self-conscious manipulation could alone sustain» (Hay 1975, 35).

We must now consider another dimension that, as I will show, proves to be a constant threat to the rule of law, even if it often appears to be a more immediate source of justice. The "prerogative of mercy" belongs not only to the king but also to the justices of the peace.

2.1.3 *The Pitfall of Arbitrary Mercy (the Oriental Shadow)*

The use of mercy opens the door to the risk of arbitrariness, precisely what Beccaria denounced: judges use their prerogative to decide based on their own subjectivity. The importance of this dimension could completely erode the rule of law-based system. Hay recalls how Weber, analyzing the work of the justices of the peace, compares it «to 'Arabic khadi justice'» (Hay 1975, 40).

For now, I will limit myself to recalling how a French judge perceived the English mercy system – a perception that helps us understand the atmosphere of the great change brought about by the French Revolution. Charles Cottu described what he saw during a visit to a criminal court: «they make no effort to obtain proofs of the crime, confiding its punishment entirely to the hatred or re-

[9] According to Robert Jacob, «[el] ritual eucarístico provee el paradigma a la producción de la verdad judicial en el *common law*. Porque el *common law* continúa a su manera, simplemente habiendo reemplazado el juicio de Dios por el jurado, la producción de una verdad judicial que es una verdad de tipo sacramental, que es una verdad del deber ser» (Jacob 2016, 33). More generally, on the phenomena of the sacralization and desacralization of law, see Puppo, Sucar 2023.

[10] See, for instance Langbein 1983.

[11] Hay evokes the case of Dodd, an individual who, even after his death in 1777, lived on in the popular consciousness to symbolize the fact that «the law treated rich and poor alike» (Hay 1975, 33).

sentment of the injured party» (Cottu 1822, 37)[12]. This sentence concentrates many issues that I will return to in the conclusions: 1) the rationality of evidence-taking; 2) empathy as a judicial virtue (or vice); 3) resentment as a source of populism (criminal, and beyond); 4) the victim as a source of law.

Because the legal ideal associated with the rule of law has been criticized for its classist nature, especially by Marxists, it becomes interesting to reconstruct the defense of the rule of law by the Marxist E.P. Thompson (Hay's mentor). This defense earned him, as even Waldron had to note, the harsh criticism of the Harvard "crits" (Waldron 2023, 166; 2021, 131, specifically footnote 9).

2.2 *An "Unqualified Human Good"?*

History teaches that the legal system has always been an expression of the power of a single class. And yet, within the context of such potentially unlimited domination, the rule of law intervenes precisely as a virtue that mitigates harm. For this reason, it should not be discarded without caution, as its absence would not mean social justice but an even more damaging exercise of power.

The context in which Thompson wrote allows us to connect his reflections even more closely to those of Neumann who, having experienced the collapse of the Weimar Republic firsthand and later studied under Laski, shared this lineage of critical but apprehensive thought. The link becomes explicit in Hay's observation: «Thompson believed the 1970s to be an authoritarian moment, with a strong smell of Weimar» (Hay 2021, 212).

Here, the crucial point is not whether Thompson's position is compatible with Marxism. What matters is how the rule of law can be a preferable state of affairs, even from the viewpoint of someone highly critical of the liberal, bourgeois, and classist state. The question is precisely: preferable to what? The answer has already implicitly emerged: it is preferable to a world where power lies in the hands of the ruling class and is, moreover, exercised without limits. In short, eliminating the rule of law does not eliminate the power that it "celebrates" and helps to exercise; eliminating or weakening it would only give free rein to the savage exercise of those same powers.

To avoid misunderstanding, Thompson reiterates a solid point of any Marxist analysis: «the rule of law is only another mask for the rule of a class» (Thompson 1975, 259)[13]. But once the obvious has been stated, a cautious analysis is necessary. Thompson's first observation is sharp: it may be obvious that law is an instrument of oppression, but would anyone think that «the rulers had need of law, in order to oppress the ruled»? (Thompson 1975, 261). Law is merely a tool, not the cause, of oppression. Therefore, even though he agrees that «the law [...] may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation», we must delve deeper, as limiting oneself to this impression means mystifying reality (Thompson 1975, 262).

The first characteristic of law that must be noted is that the way law oppresses is quite different from "gross manipulation" (Thompson 1975, 263). Thompson does not claim his observation is universal; however, it would apply, at least, to England. To evaluate law and the rule of law, we must judge them in light of the centuries of absolutism that preceded them. What does this observation suggest? The ruling class began to exercise power through "legal forms", forms that had an inhibiting effect. The resulting conclusion is the one we have already announced: «there is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, beetween arbitrary extra-legal powers and the rule of law» (Thompson 1975, 264-265).

[12] Cottu notes, however, in a footnote, that cases of murder constitute an exception (Cottu 1822, 38).

[13] Laski, whom I will also return to, expresses this with disarming clarity: «At bottom, only the Marxian interpretation of law can explain the substance of law. There cannot, that is, be equality before the law, except in a narrowly formal sense, unless there is a classless society. For the unstated assumption of all law in any society in which the instruments of production are privately owned is the inherent necessity of maintaining the system of class-relations through which the privileges of private ownership are secured to their possessors» (Laski 1938, VIII).

The same dangerous illusion persists today. Many contemporary critics of the rule of law's mere formalism – those who would the rule of law to include social justice requirements and not be limited to ensuring that set of rules and institutions that were imposed, not without difficulty, in England and later in other states – suffer from a form of historical amnesia.

According to Thompson, instead of being a serious defect, the rule of law is a «cultural achievement of universal significance» and an «unqualified human good» (Thompson 1975, 265-266). What is important to emphasize is not so much the conclusion (which, coming from a Marxist, remains notable), but rather the direct warning to those who dare to minimize this good – who are even more numerous today than they were then: they commit «a desperate error of intellectual abstraction» (Thompson 1975, 266).

The antidote against an excess of abstraction (which allows for harsh criticism of a certain institutional arrangement due to a cognitive inability to assess its goodness, rather than just pointing out its flaws) is history. What I said in the introduction about the proliferation of conceptions, increasingly demanding in terms of substantive justice, seems to align with Thompson's warning. When one ignores the history of institutions and the complexity of the societies in which they function, one can say almost anything.

At this point, it is worth asking: is this just a historical exercise? Are these isolated statements? A closer look at one of the authors in the Dicey tradition allows us to give a more theoretical breadth to Thompson's relatively intuitive conclusions. Put differently: to find a similar position, we only need to look among the many authors who have written and reflected on state authority, seeking out those who have not ignored history. For this reason, I chose Harold Laski.

3. *Harold Laski: A Constructive Critique of the Rule of Law*

It is within this historical context that the analysis of Harold Laski gains its full clarity. Given his trajectory (3.1), Laski can be considered a focal point connecting England, the United States, Germany, and France. Reconstructing his ideas – those of a liberal socialist who became a Marxist – confirms some important nuances, the same ones captured by Thompson: the importance of the rule of law as protection of the most vulnerable people against the perversion of power (3.2), and the need of approaching the rule of law under the scrutiny of historical facts (3.3).

3.1 *Why Laski? A Brief Biographical Note*

One of the reasons Laski deserves particular attention is his biography, which allowed him to live through two World Wars while developing an extremely rich body of communication across various contexts (at least: France, Britain, Germany and the US). Laski was so influential that he generated the expression "Age of Laski", referring to the years 1920-1950; Léon Blum compared him to Montesquieu or Tocqueville (Newman 1993, 354-355)[14].

Given Laski's near absence from the usual references of legal philosopher[15], a question spontaneously arises: what interrupted my own ignorance of this author? Once again, I must thank Judith Shklar. Citing the excerpt that evokes his ideas will serve to introduce his thought. As noted, Shklar insists on a certain (and ideological) blindness to the rule of law deficiencies. It is in this context that she turns to Laski: «Even before turning to Marxism, Harold Laski assumed that no amount of personal impartiality could save the English judiciary from its upper-class outlook»

[14] When he visited Italy as a representative of British Socialism, Benedetto Croce travelled from Naples to Rome specifically to meet him (Martin 1953, 183).

[15] In my personal journey, I first encountered it in a text by the legal historian Horwitz (Horwitz 1997, 578-579). But, being cited by a historian to illustrate an aspect of UK political history, it had not been given due attention.

(Shklar 1964, 11; the philosopher refers to a text dedicated to the methods of judicial appointment, published in 1926: Laski 1932, ch. VII).

What must be highlighted is the "even before". While it is obvious that a Marxist analysis sees the judicial institution as an expression of the ruling class's power (as we have already observed), that such a statement comes from a "moderate" author is noteworthy. A deeper understanding of Laski's thought thus allows us to grasp the rule of law, so to speak, without projections – neither optimistically liberal nor pessimistically Marxist. The rule of law with its flaws (e.g., the illusion of judicial independence and impartiality) but also with its virtues, at least when compared with other forms of power organization.

Laski's output is immense, and therefore I do not intend to offer an exhaustive reconstruction of his thought here. I will only attempt to convey the essence of his position, which is simultaneously critical of and charitable toward the rule of law.

3.2 *The Individual Judgment on the Moral Quality of Legal Norms*

The starting point for understanding Laski's approach is an observation made from the perspective of the recipient of the state's legal norms:

> «He examines what is done in its name and makes a judgment upon the moral quality of the order he is asked to obey. He knows, that is, that legal power, as such, is at every instant subject to perversion. No Government is, for him, entitled to permanent credit merely because it is a Government. It is liable to error, to perversion, to deliberate misuse of power. It may, consciously or unconsciously, identify the interest of a class or a group or a party with the interest of the community, and legislate upon the basis of that supposed identity. It may do this in good faith; it may do this, also, in bad faith» (Laski 1932, 249).

Once this starting point is clarified, the role played by the rule of law becomes understandable. It is also interesting that Laski, despite writing in the Anglo-Saxon context, also uses the term *Rechtsstaat* (Laski 1932, 250)[16]. The same emerges from the explicit statement by Neumann, in the thesis supervised by Laski himself, when he refers to the state «in which laws but not men were to rule (the Anglo-American formula) – i.e., the *Rechtsstaat* (the German formula)»; the sovereignty of such a state was necessary, above all, for Neumann, «to destroy local and particularist forces, to push the church out of temporal affairs» (Neumann 1936, 22).

This very establishment of a legal framework begets its own fundamental tension, shifting the focus from the structure of power to the problem of individual acceptance. The recipients of the norms, much like Hart's protagonist of "social acceptance", wonders if and why they should conform to the norms[17]. Laski is not mistaken: it is an essentially psychological and historical issue, and thus contingent. Regardless of the content of any legal norm, our ideal recipient of norms, before offering his allegiance to positive law, «have sought in every age institutional means of limiting the power of their governors» (Laski 1932, 250).

If sovereigns claim legitimate authority, they must demonstrate certain virtues – the Razian virtue of the rule of law being undoubtedly one of them. Translated into contemporary theoretical terms, Laski's argument holds that satisfaction of Raz's dependence thesis cannot be presupposed[18]. Laski also criticizes the Hobbesian argument that obedience is necessary to avoid anarchy.

[16] This suggests that, despite the differences, the rule of law and the *Rechtsstaat*, at least for Laski, are merely two different expressions referring to the same phenomenon – or at least the essential and common part of a set of phenomena: «both concepts provide similar answers to similar questions» (Barber 2003, 444).

[17] Hart 1994 [1961]; Puggioni 2022.

[18] Although it cannot be explored in depth here, I would venture to say that Laski's theory of authority should satisfy the critics of Raz's theory. For one example: Hershovitz 2011. For an analysis of Laski's theory in light of Raz's theory of authority, see: Muñiz-Fraticelli 2014; Puggioni 2022.

According to Laski, it cannot be assumed *a priori* that the government, with its legal norms, is acting in the name and for the good of the collectivity:

> «That judgment, obviously, must be pronounced by those who are to be affected by it. To say that they must accept it because its rejection imperils peace is to argue that order is, and always must be, the highest good. I do not see that it is possible to take this view on any scrutiny of historical facts» (Laski 1932, 252).

This scrutiny leads us directly to Laski's core methodological point: any statement about state authority cannot remain in the void of theoretical assumptions but must be grounded in historical facts.

3.3 *Scrutinizing Historical Facts: a Case for Methodological Positivism?*

Laski accompanies his appeal to "historical facts" with fleeting references to those who resisted Charles I in 1642, the French Revolution, or even Russia in March 1917.

He suggests that states have always exercised power "for particularistic ends" in the past and will continue to do so in the future. For this reason, the people – as the recipients of the norms – must never abandon their judgment on the goodness of the laws. This stance is rooted in a distinct methodological approach. His position perfectly aligns with methodological positivism, as when he states that «legal claims are merely legal, and, as such, have no necessary connection with justice» (Laski 1932, 253); his positivism is expressed even more explicitly elsewhere: «The sovereign State makes positive law; it does not make a law in which there is any inherent relation to justice. Such a positive law is merely an expression of power; power is morally neutral until its substance is examined» (Laski 1932, 261). His disciple Neumann captures this core idea with extreme brevity, anticipating Shklar, when discussing the ethical value of the rule of law: «Paradoxically enough, this ethical function lies in the rigid divorce of legality from morality» (Neumann 1942, 362).

From this separation of law and morality follows a specific diagnosis of the central problem. The real challenge is the internationalization of law, not its moralization. On this crucial point, Laski and Kelsen find common ground in their shared pacifist outlook. Unsurprisingly, then, Laski converges with Kelsen on the international project, despite offering a profound critique of Kelsen's "formalism"[19].

Laski's theoretical framework is ultimately pragmatic. His friendship with Holmes and certainly his familiarity with American pragmatism[20] allow him to assert that the quality of every act of the sovereign will derive from its consequences, which must be analyzed from different perspectives; one social group may consider a certain policy adequate, but another group may not. Although there may be legal unity (we might say: in Kelsen's sense), this legal unity does not necessarily correspond to moral unity (Laski 1932, 259). The pluralism of moral values is reflected in distinct judgments regarding the legitimacy of individual norms. It can be said that, if the state exhibits the virtue of the rule of law, all norms partially reflect the authority that comes from the sovereign's own submission to its norms and procedures. As we saw with Hay, the fact that criminal norms apply to everyone, even the rich and the noble, generates good reasons among the poorer classes not to consider criminal law abusive.

At this point in the argument, we must open a parenthetical note that will show the disconcerting relevance of Laski's thought. This relevance is twofold: in methodological terms, it shows his dialogue with the legal theory of his contemporaries, particularly Kelsen, whom he criticizes for excessive formalism and his illusion of purity. Yet, precisely by citing Kelsen, he shifts the

[19] On the difficulties that arise when attempting to project the state-level virtue of the rule of law into the international sphere, I refer to Puppo 2016. On some characteristics proper to international "governance" that make it a structure profoundly incompatible with the virtues of the rule of law, and on some good reasons for rejecting the fulfillment of international obligations, see also Puppo 2013, 2018, 2019.

[20] «This theory of internal limitation upon the action of authority is essentially a pragmatic one» (Laski 2020 [1919], 26).

discussion to the international level, alluding to that "international rule of law" which has only relatively recently become an object of study for specialists.

> «A State, therefore, cannot legally will what it pleases; it can only will what is consistent with the superior will of the international community. Its personality is a capacity in its rulers to act for that end, but for no other end.
> From this, I infer the supremacy of international law over the law of any given individual State. I assume that a jurisprudence which seeks to be scientific has no alternative but to regard the community of States as what has been termed a *civitas maxima* the law of which is primary over all other law. States, in this conception, appear to me as provinces of this *civitas maxima* whose authority is derived from the rules discovered to be necessary for the maintenance of the common international life» (Laski 1932, 268. In the omitted footnote, he refers to Kelsen 1989 [1920])[21].

In the new preface to the third edition of *A Grammar of Politics*, in 1934, the same type of analysis is conducted with more decisive tones that reveal his Marxism:

> «Capitalism, in a word, is rooted in a system which makes power the criterion of right and war the ultimate expression of power. No reconciliation is possible between its necessary policies and the idea of a world-community founded upon the sovereign State's surrender of its right to be judge in its own cause» (Laski 1938, no page).

The dominant analyses of State authority are therefore unsatisfactory – John Austin, for example, but we could add a whole tradition of Anglo-Saxon analytical legal theory extending up to a few decades ago – because they do not go beyond the borders of the nation-state (cf. Waldron 2013). But, above all, they are unsatisfactory because they tend to resolve the issue in a purely formal manner, forgetting that the problems of jurisprudence «have an origin which is meaningless apart from a system of special historic conditions in Western Europe» (Laski 1932, 270)[22].

Concluding this presentation of Laski's main insights, we can see that his methodological stance – which insists that law cannot be understood in isolation from its social and historical context – resonates powerfully with a contemporary position like Jeremy Waldron's. It is not about confusing positive law and morality. It is about clearly establishing the necessity of studying the legal phenomenon starting from a historical horizon that only makes sense if an end is identified. Just as Waldron (2023, 40-41) argues, against Raz's conception, that the concept of the rule of law conceptually precedes that of law, Laski concludes:

> «A theory of law, in fact, which does not start by postulating an end for law, can never explain why law ought to be obeyed; and there is, surely, no point in making rules except upon the assumption that they are entitled to obedience. If we assume that law is made in order to satisfy human demands at that maximum which is socially possible we have at least a criterion by which to create an effective system of values» (Laski 1932, 274).

[21] On Kelsen's theory, and especially for a reading of it robustly anchored in history and pacifism, see Puppo 2020a. For some critical observations on the compatibility of this pacifist vision with his defense of democracy, see also Puppo 2024.

[22] In this sense, according to the sharp reflection of Loughlin (2018, 659), Shklar's bitter critique of Dicey is unfair: «Dicey's concept of the rule of law was indeed peculiarly English, but Shklar was wrong to disparage it as an 'unfortunate outburst of Anglo-Saxon parochialism'. He did not presume to present a general constitutional theory. Since his objective was to provide an account of the basic principles of British constitutional law, he understandably depicted the rule of law as a trait of national character».

It might seem that the insistence on values, on an end for law, necessarily invites a substantive conception of the rule of law. But it would be a mistake to draw such a conclusion. In fact, this value, whatever it may be, must be analyzed in light of that set of formal and procedural characteristics that marked the emergence of the rule of law in the British context. Laski sees its limitations, but seeing the limitations also helps to see the virtues, especially from a Marxist perspective. The greatest vice has already been evoked: the daily work of the courts consists in «protect the interests of the existing order», i.e., «the wants and needs of those who dominate the economic system at any given time» (Laski 1932, 278). Despite this, the authority of law can still be built upon «its conscious effort to respond in an equal way to the widest demands it encounters» (Laski 1932, 295). Laski does not deny the difficulty of this task, nor its "nobility". A balanced response must be nourished by comparing different historical experiences. This very method leads Laski to acknowledge the paradox and not to overlook the "greatness of legalism" that Shklar identifies:

> «The great paradox revealed here is that legalism as an ideology is too inflexible to recognise the enormous potentialities of legalism as a creative policy, but exhaust itself in intoning traditional pities and principles which are incapable of realisation. This is [...] the perennial character of ideologies. It should not, however, in this case, lead one to forget the *greatness of legalism* as an ethos when it expresses itself in the characteristic institutions of the law» (Shklar 1964, 112, my emphasis).

For Laski, the stability guaranteed by the rule of law does not justify everything; innovation is necessary, although, he specifies: «I do not ask the lawyer to be a knight-errant for dubious causes, I do not plead that he should be a fanatic for innovation» (Laski 1932, 296). The last section will be precisely dedicated to analyzing this image – with its oriental undertones – given that the contemporary judicial universe is highly populated by *knight-errants* and *dubious causes*, all seasoned with some version of moral perfectionism. The rule of law, with its flaws, remains perhaps the only refuge against the arbitrariness of the ruling classes, even (and especially) when powerful interests adopt the guise, and the rhetoric, of vulnerability.

4. *The Golden Rule Against Arbitrariness: Judicial Review and Equality Before the Law*

For those who adhere to its ideology, the rule of law defines absolute evil in one word: arbitrariness. From Beccaria to Hart, this is the recurring nightmare – the almost natural human tendency towards subjective judgment. Thus, the rule of law emerges, humbly, as an alternative to the arbitrariness implied by human government, dominated by emotions and sympathies (4.1). This antidote, often underestimated, is constantly at risk of dilution, as the paradigmatic case of the Nazi State demonstrates (4.2.). Yet the danger goes unrecognized, concealed by the demagogic skill of the dominant class beneath the attractive promise of material justice (4.3).

4.1 *The Danger: The Executive's Tendency to Avoid Controls*

It's well known that Dicey constructed his idea of the rule of law in opposition to the French system, which he viewed as an example of arbitrariness[23]. Laski, precisely because he was familiar with the French, English, and American systems, was aware that the concept of arbitrariness is subjective: «It is clear, for instance, that into the idea of justice arbitrary control cannot enter; but it is not less clear that opinion may differ as to what is arbitrary control» (Laski 2020 [1919], 25).

Dicey, it must be recalled, reproached the French for the fact that not all acts and not all people were subject to the ordinary jurisdiction. Indeed, the French system, since the time of Napoleon

[23] It must be noted that Dicey would later modify his judgment on the French case. On that evolution, see Walters 2016.

and the creation of the Conseil d'État, has been characterized by the presence of an administrative jurisdiction. For Dicey, this constituted a violation of the principle of equality before the law.

However, Laski, who was familiar with French Law, particularly Duguit and Hauriau, knew that Dicey's conclusion was hasty. The problem wasn't administrative justice, which had, in fact, been able to control governments by arguing the "*excès de pouvoir*", and also satisfy the population's needs, especially thanks to the clearly socialist-tinged theory of public service[24]. The real problem, perhaps the only real one, is the constant possibility of the executive escaping judicial control. Dicey himself, in the introduction added in 1918, demonstrated, on the one hand, awareness of the scarce control exerted by ordinary English judges over the executive, and, on the other, the possibility that the French system might offer better guarantees: «It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the Government of the day, might not enforce official law with more effectiveness than any Division of the High Court» (Dicey 1915, xlviii).

Laski radicalizes this doubt:

> «What is needed is rather the frank admission that special administrative courts, as on the Continent, are needed, or the requirement of a procedure in which the rights of the private citizen have their due protection. What, in any case, is clear is the fact that the official will not, in any other way, be substantially subject to the rule of law» (Laski 1919, 463).

For Laski, then, the biggest problem of the rule of law is not its alleged "humility" in the social sphere, but its insufficient application: «Careful analysis of the responsibility of a public servant suggests that the rule of law means less than may at first sight appear» (Laski 1919, 450). Any system in which the executive is ultimately allowed to evade all forms of control, which permits the executive to act without ensuring that citizens' interests are protected, is dangerous: «the irresponsibility of a government official in this aspect is, at bottom, excused only by introducing exactly that notion of state which it is the purpose of the rule of law to avoid» (Laski 1919, 459).

4.2 *The Rule of Law Dissolved in the Dual State*

This situation that Laski alludes to is none other than the Dual State described by Fraenkel (1941), in which the normative state (subject to rules) coexists alongside the prerogative state:

> «On the one side was the 'normative state', which contained whatever remained of the law and the institutions of the Weimar legal order together with the statutory regimes enacted after 1933 and implemented through those institutions. On the other side was the 'prerogative state', which consisted of the apparatus of the Nazi Party wherein the leader's will [...] was the ultimate source of authority» (Dyzenhaus 2022, 322)[25].

The Dual State, understood in a broad sense, also describes seemingly harmless realities, such as those where certain segments of the population see their needs interpreted as superior to others, in light of certain moral conceptions. Even without the terrifying image of a Nazi party in government, the rule of law is eroded by any emergency (ecological, humanitarian. and so on), as the

[24] It seems that Laski found great inspiration in Duguit's work for his theory of authority, centered on the needs of real people, and not on fictions: «the only justification of any policy is the contribution it makes to the social need» (Laski 1917, 1190).

[25] Also for Fraenkel, the rule of law and the *Rechtsstaat* seem interchangeable: «The Normative State, however, is by no means identical with a state in which the 'Rule of Law' prevail, i.e., with the *Rechtsstaat* of the liberal period» (Fraenkel 1941, 71).

effect is the same: to create two parallel paths, where one responds to equality before the law (its forms and its slowness: legislative change), while the other responds to superior needs for justice (and the speed of change through executive and judicial means). Whether it is Nazi justice or vegan justice, only our sympathies (or our empaties) change, not the impact on the rule of law. Agamben, for example, explicitly evoked Fraenkel's notion of the Dual State to describe certain characteristics of the COVID era:

> «The paradigm of law is replaced by that of vague clauses and formulas, such as "state of necessity," "security," "public order," which, being indeterminate in themselves, need someone to intervene to determine them. We no longer deal with a law or a constitution, but with a fluctuating force-of-law that can be assumed, as we see today, by commissions and individuals, doctors or experts completely external to the legal order» (Agamben 2021).

All dangers converge towards the creation of a particularistic justice system, corresponding to the image, already evoked, of "*kadi justice*", a justice that cannot exist without, to reuse Laski's image, a lawyer acting as a "knight-errant for dubious causes", being a "fanatic for innovation". The dubious cause, analyzed in light of who funds it[26], is often supported by wild powers that want to impose a certain form of material (in)justice, often exceeding the formal and rational limits of abstract and general law.

The shift in the legal paradigm, which can be fatal, was magnificently captured by Franz Neumann regarding Nazi legal theory:

> «Even the principle of equality before the law, the fundamental principle of the *Rechtsstaat*, is rejected. National Socialist legal theory replaces the legal person by the 'concrete personality', demagogically calling upon Hegel as its authority, forgetting that Hegel had refused to discard formal equality before the law [...]» (Neumann 1942, 365).

It will be necessary to delve into this transition from the abstract legal person to the "concrete personality", also in light of the reference to Hegel – more important than it seems, both philosophically and legally – to understand the dangers that still threaten the rule of law. First, however, it is appropriate to reconstruct the panorama described by Fraenkel and Neumann, whose work «is testimony to the strength of analysis of individuals who had a keen sense of justice and the rule of law» (Oette 2017, 834). As recently recalled in a splendid work on the Frankfurt School, «Neumann practiced and wrote widely about law, working fiercely with other left-wing lawyers, including his Berlin law partner Ernst Fraenkel, to defend Weimar against right-wing critics» (Scheuerman 2021, 313).

It's necessary to return to the choice of expressions that, for Fraenkel, describe the two dimensions of the State coexisting in the Dual State: the "normative state" and the "prerogative state" are expressions, especially the former, that say a lot. They are not just "labels": this opposition captures the essence of the "National-Socialist communal theory". The rejection of the rule of law is inseparable from anti-Semitism, given that, for the Nazis, normativism and the rule of law were an expression of Judaism opposing the realization of welfare and (Nazi) justice:

> «The foremost requirement of 'German' thinking is an uncompromising opposition to 'Jewish' intellectuality, which is condemned because its main concepts are said to be abstract and universal. The proposition that there should be norms of general validity in order to protect the individual's liberty from infringement by the political sovereign, the dictum that the individual can only be punished in accordance with the law, the doctrine of equality before law – all these ideas are labelled and condemned

[26] Regarding this drift, especially in the United States, which consists of the creation of a true market for "just causes" a market in which "social justice" is sold, see Pan 2025.

> as 'Jewish' normativism. The coldly impersonal and abstract norm which is rationally arrived at and rigidly fixed does not guarantee the welfare of the community and hence is prejudicial to the triumph of 'justice'» (Fraenkel 1941, 140).

It's not superfluous to recall that Hegel considered Kant "Jewish", probably for his insistence on the universalism of moral norms and his cosmopolitanism: «Kant's thought, whose Protestant filiation is so evident, was very quickly interpreted as profound Judaism. Let us recall that he was immediately greeted as a kind of Moses, and that Hegel saw in him an ashamed Jew» (Derrida 2008 [1991], 272).

It is perhaps superfluous to specify that this anti-normativist philosophy tends to coincide with Schmitt's philosophy, to which Fraenkel constantly refers, emphasizing the continuity between the Weimar positions and those expressed during the Nazi regime, particularly in *Über die drei Arten des rechtswissenschaftlichen Denkens (On the three types of juristic thought)* (Fraenkel 1941, 143): «the juristic theory of the fascist state is decisionism» (Neumann 1942, 365).

The Dual State makes two forces coexist: the strength of rules and the equality before their application; the strength of material justice realized beyond formal procedures. Fraenkel develops his theory on the coexistence of these forces based on a meticulous analysis of jurisprudence, grasping the transition towards the total annulment of all guarantees for Jews, except in rare cases where protecting Jews meant protecting the market. The position of the judges in a 1937 case must be literally reproduced:

> «In a trial hearing on family law the Naumburg Appellate Court (*Oberlandesgericht*) on April 20, 1937 had decided that 'the law now – no less than before – is binding for every judge. He may, of course, interpret it within the framework of a racially oriented conception of law, but he cannot disregard it without very good reasons. Such judicial conduct is indispensable if the law is to possess stability and calculability. This feature must be regarded as essential to the state even when in individual cases they obstruct the dispensation of material justice. Even the interests of the ethnic community in the maintenance of German racial purity cannot afford to ignore the pressing demand that the la be applied and legal stability be preserved.'» (Fraenkel 1941, 88-89).

4.3 *The Promise of Material Justice: The Magical Weapon of the Ruling Class*

As the German judges say, material justice can be obstructed by the rule of law. Such reflection is among the most common among defenders of substantive conceptions of the rule of law. Unsurprisingly, this judicial view, reconstructed by Fraenkel – almost a "normativist resistance" – was censored by the Nazi Minister of Justice, as it could ensure protection, even to Jews. Such radical view rapidly prevailed that same year. As mentioned, the only reason to ensure a minimum of protection for Jews was the risk that its denial would interfere with the market and entrepreneurial freedom. Since «a strict application of the procedures of the Prerogative State would have disturbed the normal course of economic life», «[o]nce Jews had been eliminated from the economic life, it was possible to deprive them of all legal protection without adversely affecting the economic system» (Fraenkel 1941, 89-90). Neumann states it with extreme brevity: «A precipitate liquidation of Jewish holdings would have disrupted German economic life» (Neumann 1942, 103). Thus, «[i]n 1937 the Supreme Labor Court [...] justified the denial of all legal protection to the Jews by saying that 'the racial principles expounded by the National-Socialist Party have been accepted by the broad mass of the population, even by those who do not belong to the party'» (Fraenkel 1941, 92).

If the duality of the State is clear with Fraenkel, the subversive mechanism through which Nazi material justice erodes the rule of law becomes clearer with Neumann. Vague clauses and the invocation of principles are so many Trojan horses that allow the little justice for the most vulnerable, ensured by the rule of law, to be besieged and then destroyed.

Anticipating Thompson, Neumann shows the two economic faces of the rule of law. As a good Marxist, he first recalls that:

> «The rule of law is, moreover, necessary as a pre-condition of capitalist competition. The need for calculability and dependability in the legal system and in administration was one of the motives for restricting the power of the patrimonial princes and of feudalism, leading ultimately to the establishment of Parliament with the help of which the bourgeoisie controlled the administration and budget while participating in the modification of the legal» (Neumann 1936, 40).

Yet «this class rule was calculable, predictable, and, hence, not arbitrary» (Neumann 1936, 46). Not only that: the Weimar experience had shown the capacity of the bourgeois rule of law to accommodate institutions favourable to the most fragile classes:

> «the poor and the workers benefited to a large extent from the rationality of law. This was all the more true after the development of a system of law permitting poor persons to sue without cost which after 1918 experienced an extraordinary expansion and made the legal system of the Weimar period the most rationalized system in the world. It was rational not only in the sense of creating calculability but also in an eminently social sense, in so far as the advantages of rational law also benefited the working classes and the poor» (Neumann 1936, 46).

This observation must be read in light of Nazi legal theory. Behind the rational law which, «after all, serves also to protect the weak» (Neumann 1942, 365), are the socialists who, in the German philosophical tradition, are largely Jewish, even if, as Marxists, they are absolutely anti-religious. Whether one places oneself with Hans Kelsen[27] on more moderate liberal-socialist positions, or with Gustav Landauer[28], killed in the Munich riots, on more anarchist positions, or on more scholastically Marxist positions like the philosophers gathered in the Frankfurt School, the State and its law are seen for what they are: «Law is merely an *arcanum dominationis*, a means for the stabilization of power» (Neumann 1942, 365). Only the rationality of the rule of law – and a normativist and cosmopolitan interpretation of the State – can limit the damage caused by power.

The second noteworthy aspect is the lucid analysis of the erosive effect of the principles of judicial application. Neumann identifies the *free law school* (*Freirechtsschule*) as responsible for the destruction of rational law, the subtle entry onto the scene of a new form of natural law. General clauses and principles are its weapons.

> «An unexpressed natural law came to be applied without restriction or inhibition. The period from 1918 to 1933 was characterized by the almost universal acceptance of the doctrine of free discretion (*Freirechtsschule*), by the breakdown of the rationality and calculability of law [...] by the victory of legal standards of conduct over true legal norms. [...] By their reference to extra-legal values they destroyed the formal rationality of law. They gave the judge amazingly broad discretionary powers [...]» (Neumann 1942, 364).

This topic would deserve further discussion, but I will conclude here to establish the bridge to current events, characterized by apparent social progressivism:

[27] Despite the open criticism of Kelsen's theory by both Laski and Neumann, who deemed it guilty of "naive purity" a commonality of purpose exists among Neumann, Fraenkel, and Kelsen. In this regard, see Dyzenhaus 2023, 273. For a political reading of Kelsen's theory, centered on Judaism, see Puppo 2020a. I venture to suggest, interpreting Neumann's words, that the criticisms of Kelsen were mainly motivated by the fact that, in difficult times, his hiding behind purity left the field open to Schmitt's decisionism: «The pure science of law has done as much as decisionism to undermine any universally acceptable value-system» (Neumann 1942, 46).

[28] On Landauer, see Mendes-Flohr, Mali 2015.

> «Before 1918 the "free law" school demanded discretionary power for the judge in order to infuse progressive ideas into a reactionary legal system. But already in 1911 Max Weber warned: "It is moreover not at all certain that the classes which today enjoy only negative privileges, particularly the working class, can expect the gains from an informal administration of law that the jurists assume will flow from it"» (Neumann 1936, 55-56).

The same phenomenon developed in the United States, with the Law and Society movement and a certain idea of progressivism tied to judicial activism. From there, it spread throughout the American continent, thanks also to the academic colonialism of Yale and Harvard. The already cited Morton Horwitz sees the Warren Court as a good example of progressivism, a way of using constitutional interpretation to realize social policies (Horwitz 2025 [1998]). Horwitz truly trained generations of jurists in the Anglo-Saxon world, making this way of viewing judicial activism mainstream[29].

The dominant trend seems to have underestimated the fact that «[a] legal system which derives its legal propositions primarily from these so-called general principles [...] is nothing but a mask under which individual measures are hidden» (Neumann 1936, 29). What I previously emphasized, concerning the "concrete personality" that came to replace the legal person with the Nazis, is fueled by these individual measures. But these individual measures are so many tools to reinforce power and to weaken the working classes who were gaining ground thanks to legislative reforms:

> «The rediscovery of "general principles" serves to destroy a system of positive law which had incorporated many important social reforms; it destroys the rationality of law. [...] The conclusion is justified, therefore, that in a monopolistic economy "general principles" operate in the interest of the monopolists. The irrational norm is calculable enough for the monopolist since his position is so powerful that he is able to manage without the formal rationality of the law» (Neumann 1936, 57-58)[30].

5. *Conclusions*

The preceding analysis reveals a perverse relationship between a rhetoric invoking social justice for every "concrete personality" and a neoliberal legal practice that strengthens the power of a few by making vulnerability little more than a sector of the global market. In these final remarks, I would like to tie together a few central ideas. I will begin by recalling the foundational conflict between the abstract legal person and the concrete, situated self – a tension that has long shaped legal and political theory (5.1). This tension finds a powerful, and troubling, new expression in today's politics of identity, which often transforms social justice into a marketable form of vulnerability (5.2). Yet history offers a striking counterpoint: some of the most compelling defences of the rule of law's formal constraints came not from its liberal champions, but from its Marxist critics (5.3). The stakes of this debate become clear in a concrete legal conflict, where courts are asked to choose between adapting law to evolving social principles and upholding its formal certainty (5.4).

[29] Sugarman 2011, 504: «Horwitz was an inspiration to those seeking to treat law as part of society, to transcend both the traditional chasm between law and justice and the dominant ahistorical tendencies in law schools».

[30] Obviously, Horwitz 1977, 566, would not be of the same opinion; according to him: «[b]y promoting procedural justice [the rule of law] enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage».

5.1 *The Foundational Tension: Abstract Norms vs. Concrete Personalities*

The first line of reflection is the opposition perhaps easiest to grasp. On one side, Kant's universal subject, inseparable from the idea that the person, as a moral subject, has primacy. From there, especially thanks to the Platonic interpretation of his ideas, all forms of legal universalism have developed, the most famous being that of Kelsen (Puppo 2020a, 2020b). On the other, the spirit that is embodied in history, the people as a concrete reference: nationalism and not cosmopolitanism. We can recall how Laski, citing Kelsen, insisted that the rule of law can only make sense if conceived on a global scale, i.e., with states subjected to rules.

This opposition is revived in Weimar in the debates between Kelsen and Schmitt. This aspect must be underlined for various reasons. Firstly, Fraenkel opposes the *normative state* to the *prerogative state*. The sovereign's prerogative, as known since the Roman *iustitium*, is to declare the state of exception (Puppo 2013). There is therefore a strong conceptual relationship between normativism and the rule of law, as well as between decisionism and its negation, i.e. authoritarianism. Laski perfectly understood where the battle lies when, in a 1926 letter to Justice Holmes, speaking of Kelsen, he described him as being in a battle against Hegel: «I was impressed but not convinced, by a clever German book by one Hans Kelsen of Vienna, *Allgemeine Staatslehre* which puts the Hegelian case with, I think, great ability» (DeWolfe Howe 1953, 830). Although the Kelsenian idea that every state is a *Rechtsstaat* has often been underestimated, his normativism means precisely this: the dissolution of raw power into legal norms. If law is not conceived as a set of norms, then the rule of law is not even conceivable. The Dual State, therefore, is nothing but the Kelsenian State subverted by the Schmittian State.

This theoretical opposition is not a relic of the past. It actively shapes a contemporary logic that recasts justice in identitarian terms and transforms social claims into instruments of market governance.

5.2 *Identities, Principles, and the Market of Vulnerabilities*

This foundational tension finds its contemporary manifestation in the opposition between liberalism/universalism and communitarianism/identity politics, replaying the conflict between the abstract legal person and the concrete individual and communities. Charles Taylor takes the stage of the debate, starting from a reading of Hegel, to account for the particular situation of multicultural societies and from there meditate on identity politics.

Here, however, one must avoid a trap, and this is where Neumann's words about Hegel help us. Neumann accuses the Nazis of making a demagogic use of Hegel. In fact, Neumann reminds us that Hegel never denied the importance of formal equality before the law. What does this mean? It means that one must not confuse two ways of accounting for multiculturalism and concrete suffering. It can be done through legislation, in which case equality before the law is not violated, or by allowing every particular case to be resolved in light of the concrete intersection between different identities, based on an *ad hoc* balancing of different legal principles. Problems arise if the law-makers create conditions of indeterminacy and then allows good lawyers to fight to favour their clients before administrators and judges who are more or less empathetic with their causes.

This difference between the abstract level of general rules and the concrete level of judicial "empathy" finds a perfect illustration in the modern concept of intersectionality, «the new face of identity politics» (Shi 2018, 274)[31]. Its analytical power can be harnessed in two very different

[31] For an in-depth analysis of the concept of intersectionality, see Bello 2020. I developed an initial critique of the identitarian excesses of intersectionality in Puppo (mns-a). On the relationship between intersectionality and neoliberalism, see Shi 2018. More generally, on the mutual critique between proponents of intersectionality and Marxists, see Bohrer 2018.

ways. Used as a tool for legislation – to reshape the social structures that produce vulnerability – it need not compromise equality before the law. But when deployed as a "profile" in judicial proceedings, where it is meant to determine the "fairest" outcome for each "concrete personality", it risks betraying those it claims to protect. The truly vulnerable, who lack access to sophisticated legal representation, are the first to suffer.

Here, a misleading rhetoric on the central role of victims intervenes; Shklar herself wrote important pages on this topic. The two dimensions – legislative reform and judicial adjudication – must not be confused, even on a strictly moral level; Shklar (1990) argues that one must listen to the voices of those who claim victim status; but this must be done to revise our principles of justice, not therefore to resolve concrete cases. The experience of the intersectional victim must inspire new legislation, moving from principles of justice constructed from a particular attention to the victims' experiences. But the experience of victims must not become a source of law, especially since «victims are neither always capable nor willing to identify themselves correctly» (Kaufmann 2020, 591). Given this indeterminacy, the risk is that resentment is confused with injustice, a phenomenon that is at the origin of a punitive populism[32] that adds cruelty to what already exists. This clearly shows that the attention owed to victims does not mean, for Shklar, an attention directed by criminal law, and even less by judges: «Although Shklar is calling on us to listen to all experience of injustice, her primary concern is to place limits on (rather to expand indefinitely) the scope for judgment, condemnation, and punishment of such injustices. Otherwise, we become arrogant, cruel, and tyrannical» (Fives 2020, 170).

Exemplary punishment does not matter to victims but to activists: the risk is that attention is paid to the experiences of activists and not to the experiences of victims[33]. A corollary of this risk is the faculty, promoted in the market of vulnerabilities, of self-attribution of identity and the resulting victim status, intersectional or not. This situation perfectly describes reality: victims do not really matter; they are only necessary means to acquire power in the market of vulnerabilities[34]. For real victims (perhaps not for those who self-proclaim themselves as such), even for Shklar, the rule of law remains preferable (Shklar 1998 [1986]). Far worse is the authoritarian statism characterized by «a decline in the rule of law and in judicial punishment of well-defined offences in favour of surveillance and pre-emptive policing of the potentially disloyal and deviant» (Dimick 2021, 170).

5.3 *The Paradoxical Defence: Marxist Normativism vs. Neoliberal Principialism*

This neoliberal perversion – which correlates identity politics with neoliberal governmentality – operates through a specific, corrosive mechanism: it systematically converts collective grievances into individual claims, dissolving the very subject of solidarity. This systematic dissolution of the collective into competing individual claims clarifies what, throughout this work, emerged as a seemingly inconceivable position: the Marxist defending the rule of law. For the Marxist, the true enemy is neither the legal norm nor the "State" as such, but a certain idea of the State. Without delving into Marxist debates about a future with or without "law"[35], it is enough to observe how, in Weimar, liberal socialists, like Kelsen, or Marxists, like Neumann, converged in identifying the value of rules – the rationality of normativism – as the primary antidote against the savage force of power. Every erosion of the "positivism of rules" is a step towards the victory of principles and

[32] Regarding this judicial drift, especially in Latin America, see Puppo 2018.

[33] «American Abolitionists were not themselves the victims of slavery, and, she observes, 'in no way could they identify with the slaves, be part of their society, or become blacks'» (Fives 2020, 164, quoting Shklar 1993, 195).

[34] For a preliminary exposition and discussion of these ideas, see Puppo (mns-b).

[35] My personal opinion would correspond to Laski's position: «the juridical is, in Laskian terms, both the object and the means by which the revolutionary process takes place» (Puggioni 2025, 185).

the material justice they express. But, as perfectly shown by Neumann, the victory of principles is not the victory of the most vulnerable: it is the indirect victory of the privileged classes.

Current reality confirms this analysis: principialism makes law pliable, and its primary beneficaries are those with the greatest "argumentative" power. They no longer need decree a state of exception; it suffices to employ creative interpretation and invoke some *ad hoc* criterion of material justice. Even when it seems that segments of vulnerable populations receive some type of benefit, this favours the dominant class since the fact of obtaining it, or not, results from individual actions which, even if successful, do not compromise the collective social status quo. There is a «correlation between the logic of contemporary identity politics and neoliberal techniques of governmentality. Neoliberalism constitutes an assault on collective solidarity» (Shi 2018, 277). Although intersectional analysis originated as a structural analysis with goals compatible with Marxism and feminism, the identity drift turns intersectionality into a weapon in the hands of the dominant class, which funds fragmented activism and "sells" social justice to obtain, as compensation, the neutralization of collective social actions. Here the dominance of the concrete personality returns, over both the liberal individual subject and the socialist collective subject:

> «The subject of neoliberalism is the entrepreneur of the self; the burden for care falls completely on the individual. The neoliberal authenticity-fantasy states that the only thing of importance is the inner-core of the self, which is inviolate. ...The neoliberal subject is the subject of trauma; revealing the true self has become an imperative in a confessional culture, in which recognition of suffering is equatable to personhood» (Shi 2018, 288).

When this drama is staged in courtrooms, the application of the cold, general, and abstract rules is itself perceived as a kind of insult. In this theatre, the popularity of a ruling is merely its rating in the market of sympathies. It seems, for example, that citizens in the United States penalize the Supreme Court when it protects the rights of groups they do not "like" (Zilis 2022). Applying the law can offend. The judge, caught in this bind, may feel compelled to re-construct it and re-signify every word to align the meanings with each "concrete personality" perceived sensitivity.

A particularly revealing test of this tension arose from an unexpected quarter: the claims of a historically dominant group – men – to victim status. The resulting case, however, had the salutary effect of reawakening in English judges their historical allegiance to the rule of law.

5.4 *Legal Certainty vs. Ideological Re-signification: A Case of Resistance*

The great success of principles in the judicial sphere has led to the development of what Guastini (2011) has called "legal construction". Here, I only want to emphasize two observations by Guastini: on the one hand, jurists have developed the art of making ambiguous words that would not be so, and thus making an "easy case" a "hard case". Such *ad hoc* production of ambiguity is never innocent but responds to theoretical and often genuinely ideological choices. The *lawyer's knife* is therefore always lying in wait.

This peril was perfectly grasped and averted by the judges of the English Supreme Court in a widely debated case concerning the meaning of the word "sex" in anti-discrimination law. While the general debate often took a demagogic and ideological course, the Court, with notable sobriety, upheld the fundamental principle of legal certainty. Much like those German judges in 1937 who resisted sacrificing their "formal legal conscience" to the demands of Nazi material "justice", English judges reaffirmed the core of the rule of law: legal certainty overrides ideological re-signification. In doing so, they betrayed the expectations of those who thought that superior demands for justice allowed for attributing a completely new (social) meaning to a term whose meaning (biological) had never been questioned. In the specific case, the conflict was between a male prerogative, argued from dubious principles, and the defence of female vulnerability, grounded in the stability of rules. The Court's reasoning was unequivocal and merits full reproduction:

> «175. It is significant, however, that there is only one definition of sex. The concept of sex is of foundational importance in the EA 2010. The words sex and woman appear across different parts of the Act and in many sections. It would be surprising if the words sex and woman were intended to have different meanings in different sections or parts of the EA 2010, as the Inner House concluded, especially given the definitions of "man" and "woman" in section 212(1) of the EA 2010. Indeed, it would offend against the principle of legal certainty and the need for a meaning which is constant and predictable, especially in the context of an Act with the purposes we have identified, and which has such practical everyday consequences for so many individuals and organisations in society.
> 176. The general rule, as we have said, is that words or terms used more than once in the same legislation are taken to have the same meaning whenever they appear, and the general purpose of an interpretation provision is to fix the meaning of such a word or term throughout the legislation in question. This presumption can be rebutted where the context requires, even where a saving for context does not appear in the definition section. But this is likely to be rare and giving a variable meaning to a defined term is generally only done where it is clear that there is a genuine drafting error resulting in differential usage of the word or term in the text of the legislation [...]»[36].

It would be wise for the contemporary universal devotees of the "right to the free development of personality" – a mantra invoked by the privileged claimant in this case, and often weaponized against the application of the austere general law – to recall that the Nazis, too, championed the free development of the concrete personality: that of the Aryan community.

[36] For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) https://supremecourt.uk/cases/uksc-2024-0042.

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