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TWO INTERPRETATIONS OF THE RULE OF LAW

Since antiquity, the rule of law has been juxtaposed to the rule of men. The ideal of *isonomìa,* of the equality of all citizens before the law, was promoted by the reform of Athens's constitution by Clisthenes, which represented the democratic turn of Athens's politics. The rule by men could grant neither impartiality nor stable expectations of government's actions, let alone equality of treatment: the rule of men depended on the character, the inclinations, the virtues and the vices of rulers engendering unpredictability in the life of the polis and discretionary power about which citizens had no control. Both Plato and Aristotle set apart the rule of law from the rule of men, arguing that only the former could provide a just and stable polis. The generality of law is a guarantee of impartiality, predictability and equal treatment of all citizens by the political institutions; by the same token, state coercive power is thus limited.

Such ancient ideal became part of the liberal outlook from the beginning of modernity as the alternative to the absolute power of the sovereign. Historians of political thought trace the development of the rule of law to processes taking place in England from the *Magna Charta Libertatum* (1215) to the *Habeas Corpus* (1679) up to the *Bill of Rights* (1689) which marked limits to the sovereign power towards its subjects. And typically the limits to the power of the king was entrusted to the law, either to a written Constitution, in the continental tradition, or to the common law and material constitution in the English tradition. In either case, the leading idea was that the law should represent the barrier to the discretionary power of the ruler, to despotism and to the unfairness of being subjugated to the will of the ruler, to his/her whims and favoritism. The development of doctrine of the rule of law was complex and followed different paths in different contexts. In England,

Locke's *Two Treatises of Government* (1689) argued for the state's limits in front of individual's rights; in France Montesquieu in his *Esprit des Lois* (1748) advanced the idea of a written constitution with a clear separation of institutional powers as the proper implementation of the rule of law ideal. In the United States, the *Federalist papers* precisely expressed the view that the Constitution, as a barrier against despotic government, should be supplemented by Federal courts, independent from government, as the impartial interpreters of the Constitution in defense of citizen's rights. In Germany, following from the Kantian legal doctrine, the ideal was developed in the doctrine of *Rechtsstaat*, that is a state constrained by constitutional law, against any arbitrariness of power.

However, I do not intend to reconstruct the history of the doctrine and of the practice of the rule of law, but, rather, to focus on two possible interpretations of the ideal which have marked two different legal and political traditions. In general, as we have seen, the ideal of the rule of law aims at limiting the state power over its citizens, by circumscribing the legitimate sphere of government's action within constitutional boundaries and by declaring that the government itself is bound to the law and accountable if it infringes it. The separation of powers and the independence of the judiciary grant that both citizens and rulers are equally subject to the law. In turn, the limitation of government by the constitution implies the legal equality of all citizens, on the one hand, and the predictability of the legal system, on the other. Both justice and stability are thus served by the ideal of the rule of law. The two values can however be stressed differently, and in case one at the expenses of the other, in the two alternative interpretations of the rule of law I have been referring above. The first interpretation is typically embodied in classical liberalism, especially in the Anglo-American tradition, but also in French constitutionalism, and emphasizes the defense of individual liberty rights against state's power. The second interpretation, represented by the German tradition of the *Rechtsstaat*, instead stresses the predictability of the system and the consequent effect of producing orderly and stable expectations in society. The first interpretation privileges the citizens' perspective aiming primarily to the defense of their rights against any abuse of governmental power. The second interpretation instead, assumes the standpoint of the state and of its orderly organization and

predictability against arbitrariness and disorder. I am not saying that the first perspective excludes the second, and viceversa, I am just saying that the stress is decidedly different in the two interpretations.

These two understandings of the rule of law can be exemplified, respectively, in the analysis of Friedrich Hayek, in his *The Constitution of Liberty* (1960) and of Max Weber's description of the formal-legal type of power in *Economy and Society* (1922). Hayek reconstructs the origin of the rule of law in the seventeenth century England, under the influence of the Greek ideal of *isonomia* and of Cicero, and points out the following requirements: 1) the rule of law should rely on abstract rules, as opposed to instructions. 2) It should provide certainty. 3) It should grant equality in virtue of the generality of laws. In this way: "Because the rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the powers of all governments, including the power of the legislature" (205). In Hayek's view, the rule of law is first and foremost a limitation of state coercion vis-à-vis citizens, a limitation exercised by laws that must be placed in the context of his general vision of social evolution. In this respect, Hayek marks his distance from the formal version of constitutionalism embodied in legal positivism: he thinks that all laws should conform to certain substantive principles which are embodied in the legal tradition and which represent the source of constitutional rules, whether written in a formal Constitution, like the American one, or implicit in the substantive constitution like in the English case. In any case, constitutional rules provide the framework within which individual liberty can express itself, in the double sense that individual action is freed from arbitrary coercive state power, and that it can count on stable expectations to pursue its goals. Instead, Max Weber's presentation of the ideal type of legal-rational power precisely reconstruct the *Rechtsstaat*, and assumes the standpoint of the state and of its characterizing features. Even discounting the specific sociological, and not normative, perspective aimed at distinguishing different kinds of political power, Weber presents this type of power as superior to the other two types (traditional and charismatic) because a) it is governed by impersonal formal rules, hence independent from personal relationships, b) it embodies knowledge and competence in its administration. In this sense, it is a better modality of exercising the power,

because is more efficient, stable, predictable and impartial, given that it has done away with personal relationship[1]. It may be the case that a more stable and predictable state has also the side effect of allowing more individual liberty than any arbitrary power. Yet the protection of individual rights is not what the *Rechtsstaat* has been spelled out for.

In the contemporary political philosophy, the rule of law, in the interpretation of Rechtsstaat, is definitely faded away, while in the liberal interpretation is actually embodied in the outlook of liberal democracy, as a necessary requisite. Moreover, there is an aspect of ideal of the rule of law which is still at the center of the debate. As we have seen, the rule of law is meant to minimize state coercion and any abuse of state power. This aim is subscribed by the crucial concern for the justification of coercion present in contemporary studies on democratic legitimacy. This issue represents in fact an enlargement of the ideal of the rule of law, since it does not refer simply to the extant legal framework for circumscribing the legitimate state action, but actually questions the legal framework itself by means of the democratic principle. The democratic principle affirms that state coercion is legitimate iff it is acceptable by anyone who is subject to it, that is each citizen. Some may see this justificatory endeavor as beyond and beside the boundary of the rule of law. I think instead that it is a development of the same ideal in the context of contemporary pluralistic democracy.

References

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[1] This type of power has its own drawbacks in the dependence of the rules from the competent bureaucracy, but this issue needs not concern us here.