THE RULE OF LAW: A FUNDAMENTAL SAFEGUARD OR AN INSTRUMENT OF PLUNDER?

A discussion of Ugo Mattei & Laura Nader, *Plunder - When the Rule of Law Is Illegal* (2009) organized by the Law School, University of Naples Suor Orsola Benincasa – Convenors: Giacinto della Cananea & Tommaso Edoardo Frosini.

1. Tommaso Edoardo Frosini, University Suor Orsola Benincasa – Naples, *Introduction. A Defence of the Rule of Law*

In this short introduction, I will argue that Mattei and Nader's critique of the Rule of Law deserves full attention by public lawyers, although, on the merits, it is fundamentally flawed.

Mattei and Nader's critique ought not to be neglected for two reasons. First of all, they focus on the Rule of Law, which is not simply a general principle of public law. Rather, it lies at the very heart of constitutionalism as we know it. The has been a limit to the exercise of sovereignty, well before becoming a limit to the will of the majority, in institutional frameworks based on democracy. From this point of view, the Rule of Law is not an exclusive prerogative of a limited club of Western democracies. Indeed, it is frequently invoked in many others, in order to limit and structure the exercise of discretionary powers by those who govern. Second, and by no means less important, unlike other kinds of limits of the exercise of powers by the sovereign, the Rule of Law favours the supremacy of law. It limits the powers of the executive branch, which must respect the rules laid down the legislative and is constantly placed under the supervision of the courts. At the same time, it limits the powers of legislators, because of the rigidity of the law.

That said, Mattei and Nader's book has three main weaknesses. First, even a quick glance to the literature concerning the Rule of Law shows that it has a variety of meaning. Such meanings include, in particular, both a conception of law founded on general rules, which is particularly relevant for imposing constraints on government, and the fundamental idea of equality before the law, regardless of personal aspects, which leads to a

sort of universality. The connection with common law expresses still another meaning of the rule of law. If we bear these meanings in mind when considering Mattei and Nader's analysis, the first two meanings look more relevant than the third and possibly others, but there is not even a brief explanation.

Second, whatever our ideas about the meaning of the Rule of Law, historically it has provided a set of principles, designed to keep government within its legal bounds. Only if the Rule of Law is recognized as a central tenet of the legal order, is it possible to affirm that there is no fundamental difference between rulers and ruled and, as consequence, that the former and the latter are equally bound by it. The fact that Mattei and Nader bring some evidence of the insufficiencies and weaknesses of the rule of law in some institutional and cultural environments may not, and does not, cancel neither those merits nor the potentialities of the rule of law in other environments. In other words, the problem is not the rule of law, but, rather, how it is enforced.

Last, but by no means least of all, although adopting an explicitly critical approach, Mattei and Nader do not provide us with any ideas regarding the solutions that may be adopted in order to cope with the insufficiencies and weaknesses that they point out. In other, and clearer, words, the book has a *pars destruens*, but lacks a *pars construens*.

2. Gianni Ferrara, University of Rome "La Sapienza", *The Virtues of Critical Constitutionalism*

In every decade, in my experience, there are only few legal books that are not simply helpful, but necessary, and Mattei and Nader's *Plunder* is one of such books, for three fundamental reasons. Firstly, from an empirical point of view, they deal with what is probably the main problem of our epoch for constitutional law,

that is to say the fact that the rule of law lacks legitimacy. Secondly, although much of this book contains an empirical analysis of the inadequacies of the rule of law in modern systems of government, at the same time, it is also an important contribution from a jurisprudential point of view. Thirdly, it puts into question the constitutionalism of our time.

Plunder is, first of all, a book that describes, with an impressive set of data, how the rule of law has not only lost its function of imposing constraints on the most powerful and wealthy, because it has been transformed into something else. More precisely, it has become an instrument of oppression in the context of global capitalism. In this respect, perhaps the most important message of *Plunder* is that there is an intrinsic connection between the rule of law, as a conceptual structure, and the hegemony of Western countries, in particular the US.

An important implication of this is that the radical separation of the study of law from the study of politics, a late nineteenth-century construct, obscures the real functions performed by the legal institutions. In this sense, the time is ripe for a rethink of the way we conceive the law, the isolation of legal science from other social sciences. The cooperation between Ugo Mattei, a private lawyer and an expert of comparative law, and Laura Nader, an anthropologist, opens a new perspective. A critical legal approach does not only demonstrate that the positivist construct fails to respond to the felt necessities of our epoch. In this moment of crisis, it also serves to achieve another goal, that is to say to discuss the persistent influence of Kelsenian theory of law. Put it briefly, such theory conceive the law as system of norms. In this context, what matters more, socially and legally, is that people must obey the law. As a result, the fundamental questions posed by legal science are those concerning the validity of legal norms and their enforcement. Other questions are neglected, including the most fundamental one, that is to say why do people obey the law. They do so, arguably, because the law has a democratic legitimacy and serves to the preservation and promotion of social interests.

Once it becomes empirically evident that the edifice of public law that we have built is based on hegemony, and the individualistic assumptions of both legal institutions and the underlying doctrines are openly criticized, not only the rule of law, but modern constitutionalism, seen as a whole, must be discussed. If we consider the two revolutionary periods of modern constitutionalism, the American and the French, a strong contradiction soon emerges between the universality of personal rights and the right of property. This contradiction was attenuated by the efforts made to build welfare states during the twentieth

century. Such efforts ultimately seemed to fail, due to the action of vested interests, but fortunately some public institutions oppose to them. Their role is important not only in order to shape the edifice of public law, but also from the point of view of constitutional doctrines, to the extent to that it demonstrates the persistent necessity of militant constitutionalism. Mattei and Nader's book is a very important effort in this sense.

3. Giacinto della Cananea, University of Rome "Tor Vergata", *The Rule of Law As An Instrument of Plunder? An Epistemological Perspective*

The are two reasons why Mattei and Nader's *Plunder* is important for public law and deserves, therefore, being discussed. First, *Plunder* sheds light on the role of law in current processes of globalization. Mattei and Nader seem right when they do not simply assume ex *hypothesi*, but demonstrate empirically that the increasing mobility of capitals and the greater economic wealth that this can generate may favour some human enterprises, but can, and do often, produce exploitation of natural resources and oppress the poor and the weak. No unbiased observer can fail to recognize this. Second, from a continental, and particularly from an Italian, point of view, the questions they raise with regard to public law thoughts are, in my view, methodologically correct, although the answers they give are not necessarily the only possible ones. I agree with them that we need to go beyond self-assuring ideas about the Rule of Law. For too long a time, in this country, public lawyers have, more or less consciously, accepted the opinion expressed by Vittorio Emanuele Orlando at the end of the Nineteenth century, that is, that after re-unification of the country was achieved, the task of legal culture is to consolidate its institutions. The underlying conception of legal analysis as an objective and neutral task, which occasionally gives rise only to disputes about the correct use of the same method, does not correspond to today's reality. My analysis of *Plunder* thus begins with the recognition that constitutional law is not only about processes, but calls into question substantive principles and values. As a consequence, we need some methodological placeholder around with which or within which to structure

conversations about the evolution of traditional guarantees, such as the Rule of Law.

That said, it is precisely on methodological grounds that Mattei and Nader's analysis is not entirely convincing. First of all, their analysis faces a problem which is typical of the functionally oriented empirical literature that seeks to evaluate the functioning of constitutional safeguards. This problem is not simply the usual difficulty with constructing good empirical studies of the impact of legal rules. Such efforts are undermined at the outset by the their failure to specify and defend previously a set of criteria by which to evaluate the points of strength, if any, and the weaknesses that they find empirically. To discover that, in our case, the Rule of Law raises high expectation but disappoints them, or that it protects effectively some interests as opposed to other (which deserve equally or even more legal protection), provides only a minor premise for some ultimate conclusion about the goodness or badness of the Rule of Law. The question thus arises of what is the major premise that would permit convincing evaluative conclusions to be deduced, which requires a clarification on epistemological grounds. A basic distinction must be drawn between partial judgments and more general or overall judgments. While the former are based on analyses concerning one or some specific aspects of either a set of rules or a general principle of law, the latter are the result of all the analyses concerning the relevant aspects of the phenomenon taken into account. This explains why partial judgments may and do differ - the choice of a specific issue often obscures or distorts other issues. There is nothing wrong, of course, in choosing a set of issues which shed light on the weaknesses of the Rule of Law. However, if we want to build more general conclusions, we should also wonder whether there are counter-examples and, if so, consider their implications.

The epistemological argument brings in the normative argument. As I said earlier, I agree with the authors, as well with Ferrara, that we need to develop a style of public law thought which is able to reflect more adequately the relationship between law and society. However, this style must also recognize the normativity of law, that is, its deontological dimension (the *ought*). There is little hope of understanding law, not only public law, if we leave aside this normative or deontological dimension. Of

course, the nature of this normative elements is itself problematic, but it cannot be neglected. If, for example, we consider freedom of the press under the first Italian Constitution, the Statuto Albertino, it is easy to observe that it was respected by liberal governments, while it was eroded and eventually cancelled by Fascism. The constitutional provision according to which the law represses the abuses of the press was even considered as the foundation of political censure. But it would be incorrect to consider this as a weakness of such guarantee, while it depended on political forces and ideologies. It is not a minor merit of Mattei and Nader's book to remind us of the need to be aware of such political forces and ideologies in the field of public law.

4. Ugo Mattei, University of Turin, *A Reply*

Although the co-author of *Plunder* (Laura Nader could not be here today, but her contribution to the project of this book and to its achievement has been of fundamental importance) could be satisfied of the debate provoked by the book, I believe that at least some points ought to be clarified.

First of all, I'm aware that while the choice of focusing on the Rule of Law, both as a concept and as a constitutional principle, does not require particular explanations to an American audience, other countries, also within the Western world, use more or less different concepts and principles. However, since this is a book about law and globalization in our epoch, which is characterized by the hegemony of American legal institutions and ideologies, the choice to focus on the Rule of Law was inevitable, for Nader and myself.

Second, and partly as consequence of this, I'm afraid that I have to say that I find quite odd what Frosini said earlier, that is, that he was shocked by our critique of the Rule of Law. What is shocking is not the fact of criticising such a venerated legal principle but, rather, the unquestioning acceptance of received and formalistic views about it. One thing is to say that our empirical analysis is wrong (but neither Frosini nor anybody else said this), or partial as della Cananea argued, another is to refuse even the idea of a critical analysis. Such a conclusion is unacceptable, for a twofold reason. On the one hand, if only part of our empirical analysis is correct, our attempt to demonstrate

that too often current views about the Rule of Law are simply complacent and distorted by the formalism which still dominates many public law thoughts. On the other hand, even if our analysis had not provided empirical evidence of the distorted use of the Rule of Law, to accept such unquestioning enthusiasm about it would mean to deny the value of critical thought, which is the cornerstone of social sciences, and of science as such.

Last but not least, those who accept, against any evidence, the received and complacent conception of the Rule of Law which we criticize in our book, should at least be aware of the distorted effects that derive from it. The effect of formalism is to neglect issues of distributive justice. This effect is magnified by the growing diffusion of law and economics doctrines. In particular, the Chicago school economic analysis of law, although enriched by the analytical apparatus of modern economy, rests on the assumption of the "rational economic man", and on liberal views about justice, which is considered almost exclusively as commutative justice. My argument is, instead, that the only kind of State which can be morally justified is a positive State, which does not seek justice only though the courts or alternative dispute resolution tools, but also through redistributive justice. Our task, as critical observers, is therefore to dismantle the ideology of the Rule of Law, which is used by those who benefit from current processes of globalization, in order to bring back in constitutional discourses the interests and the views of the losers, and if possible to seek to improve their condition.