ESSAYS

THE FORMAL MEANING OF THE IDEAL OF THE RULE OF LAW*

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Abstract

The "rule of law" is an essentially contested concept. This concept (or ideal) has, however, at least in the Anglo-Saxon tradition, a core consisting in the almost banal fact that public authorities and citizens are «bound by and act consistently with the law». The aim of the article is to examine, from the specific perspective of the Italian doctrine of public law, the following two questions implied by the rule of law: a) to what extent we can say that the rule of law is a concept and to what extent it is an ideal; b) to what extent such an ideal is possible and therefore worth pursuing. The author seeks to answer these questions arguing that also in contemporary legal systems, complex and integrated, the rule of law remains a fundamental part both of our understanding of law and of the way in which we expect a legal system should work, provided that we are aware of the difference between a formal and a substantive conception of the rule of law.

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1. Staatsrecht and the Rule of Law

One of the few Italian scholars who has explicitly put the "rule of law" at the core of his research program wondered some years ago if «this old concept, which they still discuss abroad, if only to analyze its agony, and which in Italy does not even deserve an encyclopaedia entry, could be the key to rethinking the theory of public law», and he founded the new journal "*Diritto Pubblico*" on this question[1].

The aim of the "program" which sprang from this issue was to question the compatibility between public law (as a special system) and the rule of law, purporting the need for a "unique scientific order" of the State as a condition of human liberty. It was no coincidence that the slogan created to synthesize this program of implementation of the rule of law (especially towards the government-public administration institutions) was the following: «one subject, one law, one judge»[2].

Such a program involves the assumption of a point of view about the relationship between public authorities and the law, which is neither neutral nor banal, and which can be included among theories that assign a formal meaning to the rule of law. It is based, indeed, on the simple claim that if people must be

[1] A. Orsi Battaglini, *In limine*, 1 Dir. Pubb. 7 (1995).

[2] Slogan remembered in a recent essay by R. Guastini, *«Un soggetto, un diritto, un giudice». I fondamenti teorici di una giustizia non-amministrativa*, 1 Dir. Pubbl. 29 (2008). On this subject see also L. Ferrara, *Orsi Battaglini e la ricerca dell'unità*, 3 Dir. e Soc. 503 (2008).

guided by rules, it should be really possible to follow such rules. More to the point, what these theories stress is the factor of the stability of law, which depends on the generality of norms which the law is made up of. According to this idea, the law, among other social institutions, is normally one of those typically devoted to stability and not to change. This outcome is pursued, on the one hand, by putting human actions in wider categories (erasing differences) instead of trusting the individual discretion of people, and, on the other hand, by embracing the idea of authority: this gives more importance to what comes from certain sources insofar as they are only such: a book, a group of wise people, a particular court. We may or may not desire a social system like this, and we may or not believe it is achievable (to some extent), but it is difficult to conceive law as an autonomous social institution if we do not take these formal elements into account.

It is, however, doubtful that in using expressions like "rule of law" or "principle of legality" – of which the former is an implementation according to Bobbio[3] – we can grasp a core-meaning shared by legal culture. Even if we extend our view beyond national and continental European boundaries, where "rule of law" means a typical historically determined State organization (*Rechstaat*)[4], we realize that the "rule of law" (*ROL*), is an essentially contested concept[5]. This concept (or ideal) has,

[3] N. Bobbio, *Legalità*, in N. Bobbio, N. Matteucci, *Dizionario di politica*, (1976) p. 518-9. There are some who sustain conversely that the principle of legality referring to the administration represents the implementation of the ROL connected to the non arbitrariness of government (R. Guastini, cit. at 2, p. 31).

[4] G. Palombella, *The Rule of Law and its Core*, in G. Palombella e N. Walker (eds.) *Relocating the Rule of Law* (2009) p. 19.

[5] J. Waldron, *Is the Rule Of Law an Essentially Contested Concept* (in Florida)?, 21 Law and Philosophy 137 (2002); Y. Hasebe, *The Rule of Law and Its Predicament*, 17 Ratio Juris 489 (2004). The syntagma "role of law" is able to express both a conceptual and a symbolic meaning. The ambiguity itself of the word 'rule' makes at least two different meanings possible. According to F. Schauer, *Playing by the rules* (1991) p. 315, it may represent both a system in which the practice of organized administration prevails and the kind of relationship that exists between a rule-based decision-making strategy and the decision-making process adopted by the institution designed by the term law. Naturally the term rule of law can assume different meanings in different contexts. For instance, S. Cassese, *Le basi costituzionali*, in *Trattato di Diritto Amministrativo*, t. I (2003) p. 213, uses the expression "rule of law" in opposition to "principle of legality" insofar as the latter, in the field of administrative law, is interpreted as a

however, at least in the Anglo-Saxon tradition, a core consisting in the almost banal fact[6] that public authorities and citizens are «*bound by and act consistently with the law*»[7].

As Scheuerman effectively wrote «*the "centerpiece" of the rule of law has always been the idea that governmental action must be rendered calculable and restrained: it was the exercise of arbitrary power, of despotism as they dramatically labeled it, that worried liberals as diverse as the bourgeoisie Locke and the rabble-rousing Paine, the aristocratic Montesquieu and the state-building Madison*»[8].

There are three objectives we may traditionally associate with the ROL: to protect against the Hobbesian war of all against all; to enable people to plan their business with reasonable confidence in the legal consequences of their actions; to guarantee at least against some kinds of officials arbitrariness[9].

What in my opinion remains interesting are the following two questions connected to the above mentioned "program": a) to what extent we can say that the ROL is a concept and to what extent it is an ideal; b) to what extent such an ideal is possible and therefore worth pursuing .

2. The roots of the del Rule of Law

One of the reasons why the ROL is an essentially disputed concept is that it entails apparently opposite instances.

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subjection of administrative authority only to the legislative acts of the Parliament. With regard to disagreements about values which support the ROL see P.P. Craig, *Legislative Intent and Legislative Supremacy: A Reply to Professor Allan*, 24 Ox. J. Legal Stud. 585-6 (2004). For a recent analysis of the ROL both from a historical and a political-legal point of view see B.Z. Tamanaha, *On the Rule of Law* (2004).

[6] Somehow «es plausible sostener que los sistemas juridicos, tal como los entendemos contemporaneamente, constituyen en alguna medida ejemplos de rule of law» (M.C. Redondo, *Sobre Principios y estado de derecho*, in M.C. Redondo, J.M. Sauca, P.A. Ibañez, *Estato de derecho y decisiones judiciales*, (2009) p. 9).

[7] B.Z. Tamanaha, *The Rule of Law: an Elusive Concept*?, in G. Palombella e N. Walker, cit. at 4, p. 3.

[8] W. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law, (*1994) p. 68-9.

[9] In this sense see R.H. Fallon Jr., *"The Rule of Law" As a Concept in Constitutional Discourse,* 1 Col. Law Rev. 7-8 (1997).

In such an illustrious philosopher as Aristotle, considered the founder of the ROL tradition, we can already find the terms of the modern discussion, synthesized in the maxim about "government by law, not by humans" extracted from a famous fragment of "Politics": «It follows therefore that it is preferable that law should rule rather than any single one the citizens. And following this same line of reasoning further, we must add that even if it is better that certain persons rule, these persons should be appointed as guardians of the laws and their servants (…) Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetition»[10].

Those who believe that law is something which deals with reason (including some ideal of fairness) will understand the requisite of the ROL implied in this fragment as an attitude of legal institutions to facilitate the use of reason. This requires a belief in the fact that it is reasonable to entrust oneself to the discretion of the decision-makers and not to the rigidness of rules[11]. Those who, conversely, consider law as a way to reduce risks of individual judgment, will interpret this fragment as the need to confer little, or if possible, no discretion, on decision-makers[12].

Such an opposition becomes clearer when we consider other statements by Aristotle. In the fragment quoted above, he says in hard cases the ROL could only limit itself to specify which subjects must have the legal responsibility of deciding the case through appropriate procedural rules[13]. In *Nichomachean Ethics* he adds that «all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. (…) And this is the nature of the equitable, a correction of law where it is defective

[10] Aristotle, *The Politics*, ch. III, ed. T.A. Sinclair, (1992) p. 226.
[11] L.B. Solum, *Equity and the Rule of Law*, in I. Shapiro, ed., *Nomos XXXVI: The Rule of Law*, (1994) p. 120.
[12] A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1182 (1989).
[13] Aristotle, *Politica*, III, 1287.

owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts»[14].

In the Rhetoric he sustains, further, that the solution of all problems must be decided in advance, according to the widest extent, through general norms[15].

So, it is true that Aristotle's discourse points out an unavoidable tension between universalism and particularism, but, on the one hand, this doesn't necessarily threaten the *ROL*, on the other hand, it seems quite clear that Aristotle considers the universalism of law more desirable than case by case decision-making (particularism). This has not prevented us from developing a centuries old controversy «about whether judge-made law is to be regarded as the epitome of the Rule of Law or as part of the problem that the Rule of Law is supposed to solve»[16], starting from the unarguable authority of Aristotle in Western culture.

3. Formal and substantive conceptions of the Rule of Law

A necessary move to try to attenuate the above mentioned ambiguity is to consider the distinction between the formal and substantive conceptions of the ROL, or as other scholars prefer to say between legalistic or non-legalistic conceptions[17].

Non-legalistic or substantive conceptions are those which believe that the State should justify the treatment of individuals with reference to the common good, which should include, for example, basic freedom of thought, speech, conscience and association[18]. But, as Joseph Raz explains, rule of law is different

[14] Aristotle, *The Nichomachean Ethics*, ch. V, ed. D. Ross, (1998) p. 133.
[15] Aristotele, *Retorica*, I, 1354.
[16] J. Waldron, cit. at 5, p. 142.
[17] N.W. Barber, *Must Legalistic Conceptions of The Rule of Law Have a Social Dimension*?, 4 Ratio Juris 474 (2004).
[18] N.W. Barber, cit. at 17, p. 481-2.

from rule of good law[19]. In the latter meaning the ROL loses every specific function, while it becomes interesting if it indicates the conditions which the law must accomplish to fulfill its function of pivot in guiding human conduct[20]. The intuition at the basis of the concept is, therefore, that the law must be capable of guiding the behaviour of its subjects. It is precisely in this sense that the ROL must be a formal concept[21]. As Raz observes, Friedrich August von Hayek has provided one of the clearest and most powerful definitions of the idea of the ROL: «Nothing distinguishes more clearly a free country from a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game, the individual is free to pursue his personal ends, certain that the powers of government will not be used deliberately to frustrate his efforts»[22].

As for the above mentioned function of "pivot" there have been endless attempts to individuate requisites that a legal system should possess for this outcome. One of the most famous and influential lists is the one provided by Lon Fuller, according to which the law should undertake the seven following conditions: generality, adequate publicity, non retroactivity, intelligibility, non contradictoriness, stability, consistence (that is the practical possibility for a disposition to be followed), plus an eighth referring to the congruency between the behavior of officials and

[19]J. Raz, *The Authority of Law. Essays on Law and Morality*, (1979) p. 211, who argues that the RoL has nothing to do with ideals such as democracy, justice, human rights, etc. We can find bad legal systems which deny human rights but which, however, perfectly accomplish the RoL.

[20] A. Marmor, *The Rule of Law and Its Limits,* 23 Law and Philosophy 5 (2004).

[21] J. Raz, cit. at 19, p. 214. V. B.Z. Tamanaha, *On the rule of Law,* cit. at 5, p. 91-101.

[22] F.A. Hayek, *The Road to Serfdom*, (1944) p. 54. It is to be said that the last part of the Hayek's sentence, in which he points out a connection between the ROL and political freedom, is not consistent, according to Raz, with the formal version of the ROL.

what rules establish[23]. To these requisites we can add some doctrines of the separation of powers, at least in the sense – implied by some of the conditions we have just listed – that organisms which respectively produce and apply the law are different from each other[24].

Fuller, like many others, points out that these criteria should be integrated in a system and that the implementation of each of them is a question of degree, as they do not all have the same importance[25]. They figure out a structure of a legal system which is in some respects even utopian, and which however poses a question of degree regarding the objectives indicated not only for their reciprocal importance but also for their practical achievability[26]. No legal system could effectively fulfill the above mentioned eight requisites and as a matter of fact none actually fulfils them.

Moreover these requisites constitute causes for disputes and disagreements. Some of these requisites are in fact vague: when is a statute reasonably stable? Some requisites may be in conflict with each other: for example the determinacy of norms with the stability and supremacy of the law over the decisions of judges[27].

Nonetheless, the ROL seems to remain an unavoidable concept from a theoretical point of view and an ideal continuously recalled by lawyers and non-lawyers. A more detailed analysis of the ROL's ingredients can explain the reason for this.

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[23] L.L. Fuller, *The Morality of Law* (1969), It. transl. *La moralità del diritto (*1986) p. 65 ss.

[24] See M. Jori, *Interpretazione e creatività: il caso della specialità*, Criminalia. Annuario di scienze penalistiche 218 (2010).

[25] Many lawyers have provided alternative lists, often similar to Fuller's list. According to T. Endicott, *The Impossibility of the Rule of Law*, 19 Ox. J. Legal Stud. 1-2 (1999), this ideal requires that: «laws must be open, clear, coherent, prospective and stable; legislation and executive action should be governed by laws with those characteristics; and there must be courts that impose the rule of law».

[26] J. Raz, cit. at 19, p. 222.

[27] We can think about the case of a vague rule written in a legislative act replaced by a clear rule created by courts, which, at the same time, fails to comply with the criteria of the supremacy of legislative law and the stability of law, but complies with the requisite of the determinacy of rules.

4. The "ingredients" of the Rule of Law

The above mentioned requisites can be divided into two groups, respectively corresponding to the two fundamental faces of law: rules and their application.

The criteria of the first group are those related to the need that law is made up of directives designated to permit an actual guidance of action. We can say that the appropriate form for a norm to be a "rule" represents, from this point of view, an indispensable requisite of the ROL, and that this appropriate form consists of generality[28], completeness and definitiveness[29]. They are the properties of a rule suitable to achieve that basic need of a normative order consisting in correcting a lack of coordination, deliberative costs and mistakes due to inexperience which accompany a particularistic decision-making strategy[30]. In other words these properties allow for the allocation of decision-makers responsibility, choosing whether to adopt, through "serious rules"[31], a universalistic strategy (which we can associate with other values commonly connected with the ROL, such as predictability and equality of treatment[32]) or to rely on the sensibility of particular decision-makers.

One of the main functions of the ROL, as we said, is to foster the coordination of actions through the self-direction of people, also in cases in which the legal system establishes forms of control to respect the law, entrusted to the public administration.

We can consider the two following legislative rules. According to art. 4 of the legislative decree n. 152 of 2006, «the environmental evaluation of plan, programs and projects have the aim of guaranteeing the compatibility of human activities with the conditions for a sustainable development». According to art. 5 of the Ministerial Decree n. 1444 of 1968 «in new factories and similar constructions included in D zones, the surface which is to

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[28] Both from the subjective and objective point of view (see A. Marmor, *The Rule of Law* cit. at 20, p. 9-15).

[29] R.S. Summers, *Form and Function in a Legal System. A General Study,* (2006) p. 136-164.

[30] L. Alexander, *Law and Formalism*, 1 Revista Argentina de Teoría Jurídica, vol VI 21 (2005).

[31] L. Alexander, cit. at 30, p. 18.

[32] All things that «*enable and facilitate efforts of citizens to rely on the law and to plan their lives accordingly*» (R.S. Summers, *The Place of Form in the Fundamentals of Law*, 14 Ratio Iuris 123 (2001).

be destined to public spaces or collective activities, public gardens and parking places, cannot be less than 10% of the whole surface destined to such buildings».

It seems clear that the first rule does not pursue the objective of allowing people to coordinate their own reciprocal actions, applying the rule by themselves; while the second rule is much more consistent with the above mentioned objective. The first rule contains vague, ethically controversial or evaluative terms; so those who want to follow norms like this should look for a solution by themselves: as a matter of fact the norm does not provide a real help. In such a hypothesis the aim of the rule is, probably, not to guide conduct but to confer decision-making power – depending on different hypothesis – on judges or administrative officials, who, in turn, may use such power either in a case by case way or producing, albeit in an informal structure, more definite rules[33].

But the problem of vagueness and ambiguity of the terms of law is a part of law itself – since it is based on ordinary language – and a certain degree of unpredictability is nonetheless unavoidable.

However, vagueness in itself in not necessarily bad for the ROL, just as the discretion which derives from such vagueness, as in norms like those quoted above about the powers of administrative authorities, is not always bad[34]. Some controlled administrative discretion, in circumstances such as environmental evaluations of projects, can be considered more desirable than no discretion[35]. In this respect we should recall that there are two kinds of general rules deliberately aimed at posing limitations to the unpredictability caused by particular commands (especially administrative acts and regulations): those which grant the powers needed to emit lawful orders and those which instruct the decision-makers about how to use these powers.

[33] V. F. Schauer, cit. at 5, p. 345.
[34] T. Endicott, cit. at 25, p. 17; A. Marmor, cit. at 20, p. 14-15.
[35] J. Raz, cit. at 19, p. 222.

5. Principle of legality in the public administration

The latter, as is well known, is a central theme of administrative law, concerning the meaning itself of the principle of legality. From the point of view of the Italian legislative system, scholars continue to debate on whether the Constitution has established, in addition to the "right of the Parliament to the last word", the right of the Parliament to the "first word"[36]: in other words if and how a formal legislative act must be the parameter for administrative power including regulatory power.

In this respect we can stress two main aspects.

The first deals with the connection between the rule of law (The State founded on law) and representative democracy. The latter is not a necessary ingredient of the ROL in a strict sense: however, from an historical point of view, it is undoubtedly true that parliamentary democracy and separation of powers have been the area in which the ROL has grown in the modern era. Moreover a political theory of the ROL is surely allowed to add further ingredients to the formal ones and also claim that they do not derive from a political theory but from the law system. There is, however, a common opinion among public law scholars that the value of legality is above all in its derivation from parliamentary legislation.

The second aspect deals with the content that is to be given to this legality. It is common to distinguish between a substantive and formal legality. Oddly in this context the substantive legality is such as to recall more the formal than the substantive conception of the ROL. In fact it requires that the norm which grants the administrative authority the power is not "blank", but it effectively constrains the power of administration to a great extent both from a material and procedural point of view. So this closes the technique of legality to the dominant way of conceiving the principle of "reserved to the law" ("*riserva di legge*")[37]. What further characterizes this doctrine is the search for an anchor for

[36] M. Dogliani, *Il principio di legalità dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima*, 1 Dir. Pubb. 13 (2008).

[37] With regard to these issues see R. Cavallo Perin, *Potere di ordinanza e principio di legalità*, (1990) p. 126, also for references to the literature about public law. See also G. Sala, *Potere amministrativo e principi dell'ordinamento*, (1993) p. 244.

the official legislation: especially the persuasion that such a requisite constitutes a legal necessity on constitutional grounds[38].

I would like to concentrate on the first aspect. According to an important doctrinal view the core of legality is in its connection with the principle of parliamentary sovereignty, insofar as it guarantees fundamental rights through the features of the procedures with which law is created. In particular the legislation has an axiological content of a guarantee of rights because it is an expression of the subject (democratically representative) which is able to solve conflicts of interests coming from society, insofar as it has certain typical requisites of the institutional bodies which directly represent the people. Such requisites are the dialectic between the majority and the opposition, the publicity of parliamentary procedures (versus the secrecy of governmental procedures), the inclusive and reversible character of legislation, fairness as a whole, the diachronic element of legislature, which is not relative to a single act[39]. As we noticed above - with some lexical complexity - this is the aspect which is defined as the law in a formal sense, that is as an act of the "representative body", in opposition to the substantive meaning of law, that is a cluster of legal norms[40].

This aspect is, therefore, directly connected to the representative democratic regime, the political system in which the principle of legality has developed in Western Society[41], but it does not affect, as we noticed, requisites, either formal or substantive, necessary for the ROL[42]. The two approaches are not necessarily compatible. Let us think, for instance, of the way in which the problem of administrative decision-like statutes ("*leggi-provvedimento*") is treated. According to the formal conception of

[38] See Constitutional Court n. 32/2009. In the past, on the contrary, the Constitutional Court seemed to express a tendency towards the sufficiency of the formal legality (see for example Const. Court n. 201/1987).

[39] In this direction see M. Dogliani, cit. at 36, p. 15-16.

[40] For the formal conception of the ROL legal norms have requisites not only of generality and abstractness, but also of "precision" and they pursue multiple objectives: certainty, consistence, accountability, efficiency, justiciability (R.S. Summers, *A Formal Theory of the Rule of Law*, 2 Ratio Juris 131 (1993).

[41] For a view which aims to identify the historical-constitutional premises of the principle of legality in Italian legal system, see. A. Romano, *Amministrazione, principio di legalità e ordinamenti giuridici*, 1 Dir. Amm. 115 (1999).

[42] B.Z. Tamanaha, cit. at 5, 13.

the principle of legality such statutes should be considered an infraction of the principle itself, while according to the democratic-representative approach to the ROL (primate of the Parliament) these statutes are fully consistent with the principle of legality (and this was the position of the Constitutional Court for a long time)[43].

It is just about this specific aspect of the principle of legality that we find the main divisions: for supporters of a full and clear implementation of the ROL it is above all important that norms come from a directly representative institution[44]; for others the element necessary and sufficient for the legality of administrative action is the pre-existence of a rule which outlines the decision.

Sabino Cassese, in an open dispute with the idea of the principle of legality as asking for a previous conferring power rule of the legislative power, observes that «the principle of legality has a limited value and simply expresses the need to respect the law, when there is a law […] When a legislative discipline is absent we ought to guarantee that the administration does not decide in a case by case fashion, so risking a violation of the principle of impartiality […] the principle of legality assumes, then, the meaning of a predetermination, through a legislative act or an administrative regulation, of the general criteria of administrative action»[45]. It must be said that – though not always in a coherent way – case law (not only administrative courts) seems to propend for the idea that a legislative act is not always needed to confer a power, as a non primary source of law would be sufficient[46].

In the direction indicated by Cassese, if, on the one hand, the principle of legality «has a more restricted range, on the other hand, it has a wider range, since it is referred to what that French call *règle de droit* […]»[47]. This "rule of law" has positive and

[43] With regard to this M. Dogliani, *Riserva di amministrazione*?, Dir. pubbl. 675 (2000); for the prohibition of statute-like decisions, see S. Spuntarelli, *L'amministrazione per legge*, (2007) p. 132.

[44] See, for instance, A. Travi, *Giurisprudenza amministrativa e principio di legalità*, 1 Dir. Pubbl. 108 (2005); more recently N. Bassi, *Principio di legalità e poteri amministrativi impliciti*, (2001) p. 117.

[45] S. Cassese, *Le basi costituzionali,* cit. at 5, p. 202.

[46] A. Travi, cit. at 44, p. 108.

[47] S. Cassese, cit. at 5.

negative aspects. The second concerns the difficulty for general legislative norms to keep administrative decision-making under control[48]. The positive aspect is that the norms that guide administrative agencies are not only to be found in the legislature, but also in the Constitution, international treaties, European Union directives and regulations, and in secondary sources of law. In addition we can find these norms in the "general principle of law", some of which «are created by courts themselves that extract them either from the same norms … or from criteria of a more general kind»[49]. In this phenomenon the distinguished scholar glimpses an affinity with the "Anglo-Saxon tradition", that is with a prevalently case law legal system, in which doctrine takes part in the formation of law.

Is this approach compatible with the formal conception of the ROL? Yes, insofar as it considers both the need for a normative predetermination of public and private subject conducts and the need to limit the discretional privileges of administrative authorities – through a sort of cooperation between legislators and judges[50]. No, insofar as he puts on the same level every type of norm (rules, standards, principles)[51], without stressing that they

[48] With regard to the discussion concerning the legitimacy of regulatory decisions of government, see R. Baldwin, *Rules and Government*, (1995) p. 60.

[49] S. Cassese, cit. at 5, 204.

[50] A very interesting field of investigation concerns the compatibility between the so called "regulation", which is increasingly entrusted to administrative authorities, and the values of the ROL. "*Regulation*", as has been said, «*is an intimate, albeit not affectionate, process of negotiation, threat, bargaining, compromise, and confrontation that cannot be subjected to fixed, pre-established rules without becoming either excessively lax or excessively harsh*» (M.M. Feeley, E.L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons,* (1998) p. 348). The point is that, apart from the kind of legal sources and procedures through which regulations are produced, «*by focusing on the issue of whether or not the rule of law is constitutive of law, we can too easily miss the possibility that legislation of the sort Rubin considers may in fact be part of a regulatory regime which does, nonetheless, comply with rule of law requirements*» (L. MacDonald, *Positivism and the Formal Rule of Law: Questioning the Connection*, 26 Austl. J. Legal Phylos. 125 (2001).

[51] Questioning about principles, especially principles like reasonableness or proportionality – putting at stake the balancing of interests or values – often causes a shift towards a substantive conception of the ROL. However, also those who think that this ideal must pragmatically take into account a number of approaches (among which the substantive one), sustain that there are at least two reasons for minimizing the commitments of a substantive theory of the

are different from each other. This idea is, moreover, more suitable for a system characterized by a slight separation of powers as in the relationships between the State Members of the European Union, the Union itself and the "global order".

The issue of the deriving of powers from standards[52] – calling into question the creative role of courts – is, on the contrary, viewed with displeasure by those who adopt a substantive conception of the principle of legality (that is, apologizing for the linguistic confusion, a formal conception of the ROL), not only for the difficulty in acknowledging the conferring of power as coming from the representative body (that in some cases of standards written in a statutory act may be possible), but also because it weakens the strict legality of administrative power.

6. Application of Law

The theme of the application/creation of law allows us to go back to the Fullerian ingredients and particularly to those of the second group concerning the articulation[53] of the last condition, called "consistent application"[54], in a series of more defined criteria. These regard the guarantee that the machine created to have the law respected, fulfills this objective effectively and appropriately: the guarantee of the independence of courts, whose duty is to apply the law to the cases under their scrutiny (citizens can be guided by the law only if judges apply its norms faithfully, since judges are those who actually establish what the law in every single case,); fair trial; the role of courts limited to conformity to the rule of law, without powers of decision-making;

ROL. The first is the persistent fact of moral disagreements; the second is the lack of attractiveness of the ROL if it is not distinguishable from a theory of substantive justice (R.H. Fallon Jr., *"The Rule of Law" As a Concept in Constitutional Discourse,* cit. at 9, p. 53-54).

[52] We can find an example of this approach in the case law of administrative courts about the so called "self made review" (the power of annulling and revising a previous decision without a judicial review), entrusted to administrative authorities – also in the absence of a written statute – starting from the principle of the inexhaustibility of administrative power (see. A. Travi, cit. at 44, 116).

[53] Made by J. Raz, cit. at 19, p. 216-218.

[54] «*A very complex requirement which entails a whole range of principles and practices*» (A. Marmor, cit. at 20, p. 7).

the exclusion of discretionary powers regarding criminal prosecution.

The first point is the most important, because it means that judiciary independence is a necessary condition for the correct application of law, even though it is not a sufficient condition for this.

The requisite of the exclusion of decision/making powers seems to be the consequence of the independence of courts, but also in this case we need to understand what such an exclusion really means: in fact, either we should accept a cognitive approach to the interpretation of law[55], or some kind of choice at the moment of application is in some cases unavoidable. It is a question of degree: on many occasions a full congruence between general norms and single decisions is possible, on other occasions this cannot occur (for instance when the relative rules are vague). In this second case we need to establish if the choice must be limited to the public administration or if it belongs to the court. And also this interpretive decision can depend on establishing to what extent the requisite of judicial independence is satisfied. Much can be said about this regarding administrative courts in Italy[56].

7. Decline of the ROL?

Those who claim that the ideal of the ROL is undesirable would be radically dissenting from most of what we have sustained so far, even though they would probably argue that the ROL is either conceptually inconsistent or empirically false. But in doing so they would probably attribute a series of features to the ROL which are quite far from its core. The many skeptical positions regarding the ROL in Italy share the conviction that we

[55] A thing that entails a lot of conceptual and practical problems. Moreover, unlike what is generally believed, a cognitive approach to interpretation of law is not included among the necessary requisites of the ROL. An inclination towards certainty – that is towards the importance of text – does not entail at all an adherence to epistemologically fallacious theories, such as the ones according to which it is sufficient to take into consideration the words written in a statute to get the only right answer to a legal question.

[56] See A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia «non-amministrativa» (Sonntagsgedanken),* (2005) p. 60.

should be aware of a "crisis" or deep decline of the concept at stake, even though - and I want to stress this point again - this "perception" is very often "polluted" by the prescriptive objective to shed discredit on the formal meaning of the ROL.

The fact that is principally purported as a symptom of the crisis of the ROL is the "normative mess", which deprives the legal system of the requisite of stability and certainty: confusion both between legal sources at state level and in the relationship between state legal sources and other sources at regional, local and supranational level (EU, global institutions); bad quality and too many legal rules; increasing appropriation by the government of Parliamentary prerogatives etc.

The issue would require a long and articulated exposition, but we can fix some points.

In a recent article a scholar used the term "critical facts" of the system of legal sources to refer to a series of "violations" grouped in three categories[57]. These factors of crisis of the principle of legality affecting the formal characteristics of the production of law are: a) violations of written rules regarding the production of law; b) violations of rules regarding the unwritten production of law (implied rules); c) deviations from an ideal pattern of a system of law sources. In this article each of these infractions is analyzed with reference to the different types of sources of law: ordinary legislation; urgent decrees by government; delegated legislation; simplification and normative rearrangement; annual simplification legislative acts and unified texts; regulations and other normative acts made by the government; orders of the Prime Minister; regulations of independent authorities.

The interesting thing which this analysis shows is that almost all the cases of violations regard either a «determined ideal pattern of the system of legal sources» or just a presumed (unwritten) rule. Some examples, limited to the legislative branch, give an idea of this. Let us think, first of all, of the violations regarding the technique used to make a legislative act, for instance, the statutes consisting of a few articles with hundreds of paragraphs. In such a case in order to identify the violation we

[57] See L. Geninatti Satè, *I fatti critici del sistema delle fonti e la crisi del principio di legalità,* 3 Dir. Pubbl. 885 (2005).

need to sustain that this praxis represents a betrayal of the purpose of art. 72 of the Italian Constitution, according to which legislative power is given to the parliamentary assemblies. This would mean that parliamentary assemblies must actually have the power to establish what the content of a statute is, but when a bill is prepared by the Government in a manner that hardly makes it possible to do so (as in the above mentioned cases of articles of enormous length), Parliament would be deprived of its own prerogatives. Then, we may wonder whether the violation of the principle of the action reserved for the public administration through decision-like statutes, may be really considered a violation, since the existence itself of a space of decision reserved for the public administration against the legislature is highly disputed. Let us also think of norms which establish the so called delegification and simplification of the legislation, which, according to many scholars appears to show a tendency towards a deep reform of the system of legal sources, such as requesting a revision of the principle of legality because of the erosion of boundaries between legislation and regulation. The author points out a clever consideration when he wonders whether to stressing these threats to ideal or presumed requisites of legality could turn in favor of critics of the idea itself of the ROL in a parliamentary regime.

When, in other words, someone moves from these remarks to a judgment of inadequateness (not of a particular cluster of legal norms) but of the principle of legality as such, he makes an improper leap from a descriptive to a prescriptive argument. The proof of this shift is in the circumstance that generally the claim about the inadequateness of the ROL, which should be founded on a very accurate and difficult empirical inquiry, is considered to be self evident. Actually, to establish the degree of distance or proximity of a legal system from the ROL in general terms, we need to examine every single aspect of legal phenomenology, also taking into account whether and to what extent decision-makers themselves adopt strategies aimed at creating more stable and certain rules than the ones promulgated by legislators.

As a scholar has recently observed, we can see a tendency to deduce negative judgments about law from claims about facts regarding its bad quality, implying that, on the contrary, in the times of the liberal State the laws were all perfectly intelligible,

provided with the requisites of generality and abstractness, etc.[58] We meet standard arguments like the following: while the domain of the bourgeoisie of the XVIII Century would guarantee uniformity which allowed the functioning of a State based on the ROL, the pluralism of the contemporary State would cause such a conflicting social context, with the consequent legislative mess typical of the democratic system, leading to the necessity to give up the guarantees offered by written law in favor of different kinds of guarantees provided by institutions more suited to facing the challenges of a complex world.

As well as the aspect regarding the quality, function, structure, etc., of the written law there are also other factors of stress, such as the eclipsing of the division of powers; the affirmation of the "result-oriented" administration, also related to the increase in the activities of public service carried out by public bodies with a corresponding decrease in the action regulated according to "formal legality"; the questioning of the independence of courts also favoured by the "discovery" of the non mechanical nature of the application of the law[59]. They are all issues of great importance, but for which – as for the question of normative disorder – it is hard to believe that they have such a novel character as to undermine the ideal of the ROL.

The real threat to the conceptual and empirical sustainability of the ROL comes, instead, from the so called globalization, insofar as it seems to attack the overall historical and conceptual construction on which the ideal of the ROL has developed[60]. The problem is too complex to be mentioned in this

[58] It is common to implicitly sustain that «judgments about values regarding the law, stated in the past by theorists of the ROL, were founded on judgments about facts (obviously dealing with facts which were very different from contemporary facts). It is the procedure which is incorrect (since a judgment about values cannot be deduced by an observation about facts) and it is the starting point which is misleading (that is that Orlando, Cammeo or Carré had a real world before them, which was absolutely different from the contemporary world, made up of an Olympian, general and abstract legislation). It is not true that administering through legislation, as a systematic and not episodic trend, is a recent phenomenon».

[59] With regard to all these profiles see R. Bin, *Lo Stato di diritto*, (2004) p. 67 and more recently M. Dogliani, cit. at 36, p. 18.

[60] See R. Bin, cit. at 59, p. 103, who entitled the last chapter of the book «the ROL without the ROL?».

work[61]. What we need to mention, instead, is the approach that aims to redefine the principle of legality according to elements and assumptions different from those which are usually associated with its core meaning, sustaining the existence of a ROL of the global system.

This idea is strictly connected to the emergence of a global administrative law, an unexciting name, as has recently been said[62], to mean certain processes in action in the global order, which consist of a set of procedural rules and normative standards promulgated outside the national institutions and, at the same time, not belonging to the international public law. Standards which are imported in this sphere of regulation are based upon administrative law principles such as transparency, participation, and justiciability. It is a kind of answer to the need to control globalization which has no regard for the need to govern globalization itself through democracy.

As regards this body of norms of various genres – «agreement-norms and unilateral norms; external imposed norms and norms developed inside global institutions; global norms and national norms which have been applied to global institutions (for instance, those of the country where the headquarters of the organization is); hard and soft law»[63] – the ROL is often invoked. According to Cassese «the great number of norms, the development of principles and rules, the settlement of courts, enables us to say that the administrative global system has a high degree of institutionalization (or legalization as the American scholars prefer to say). This is in direct relationship with the extension of the effectiveness of global decisions towards citizens, organizations and national companies (just think of tradable emissions regulated by the Kyoto agreement). Indeed the more the action of global organizations increases and goes beyond State boundaries and domestic public bodies, the more it becomes important to secure the respect of the rule of law, the principle of

[61] For an approach to this issue and above all for some initial bibliographical references see S. Civitarese Matteucci, *La forma presa sul serio*, (2006) p. 110.

[62] S. Chesterman, *Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance*), in *New York University School of Law - Public Law & Legal Theory, Research Paper Series*, Working Paper no. 09-52, September 2009, http://ssrn.com/abstract=1435170, p. 4.

[63] S. Cassese, *Il diritto amministrativo globale*, 2 R. T. D. Pubbl. 337 (2005).

participation, and the duty to justify every decision, in order to guarantee a protection for citizens, organizations and companies not only from the States and other national public powers, but also from new global public powers»[64].

As we can see it is a picture of a global order or system (which seems to be identified just thanks to the reference, albeit evocative, to the ROL), which uses a somewhat thin version of the ROL[65]. This version is so thin – from the point of view of requisites of the formal version of the ROL – as to induce the impression that even in this description there are prescriptive elements aimed at fostering the ideal, also useful in a domestic discussion, of a system founded on the principles-judges binomial, already expressed in the above mentioned argument of this author.

An issue only partially analogous concerns the ROL in the EU legal system. According to a recent opinion, this legal system appears to be quite far from the principle of legality even though the Court of Justice (since the Les Verts case) qualifies the EU as a «community based on law», and the Treaty of Maastricht has welcomed the principle of the ROL (art. 6.1 EUTr): «the failure of division of powers and the hierarchy of legal sources to become enrooted; executive powers entrusted to national administrations, and above all a remarkable "jurisdicialization" of the principle of

[64] S. Cassese, *Il diritto amministrativo globale*, cit. at 63, p. 338.

[65] The version which R.H. Fallon Jr., cit. at 9, p. 30, calls The Legal Process Ideal Type, that is to say procedural fairness in creation and application of law; connection between the concept of law and reasonableness; a reasoned elaboration of connection between certain authoritative legal sources and certain rights and responsibilities in particular cases; judicial review. According to this author, however, this ideal type is compatible with the ROL only if it is accepted as a complementary or subsidiary instrument of the ideal types that he calls "historical" and "formal". About the role and the affirmation of due process law as a general principle of the "global public law", see G. della Cananea, *Al di là dei confini statuali*, (2010) 133 ss. It is quite clear, in other words, that these concepts are different even though somehow complementary. As the analysis of della Cananea shows perspicuously, procedural fairness is a fundamental resource in the complex and multifaceted legal relationships which arise beyond the State, and we would say that the more there are vague or no rules of conduct at all (as often in supranational level) the more procedural fairness is the very limit of arbitrariness of public and private powers. However, on a prescriptive ground, it does not affect the worth of pursuing the ideal of the formal rule of law as much as possible also in this present era of globalization.

"community based on law", entrusted to the strong creative role of the Court of Justice, have so far prevented this principle from being outlined according to the outcomes of the continental tradition of administrative legality. In the Charter of Nice, the right to a good administration and an equal and impartial treatment (art. 41), is specified through the right to be heard, have access, and give reasons, which without doubt evoke justiciability more than legality of administration»[66].

The warning is, in other words, to take into consideration the real meaning of the terms used, because the expression "rule of law" often refers exclusively to the submission of every act of application of the EU law to the control of a court[67].

8. Are we keeping dreaming?

Other scholars - sincerely worried about the above mentioned phenomena of abandoning the principles of the ROL have begun to look for new answers which do not betray the values of the ROL.

In a recent article it has been sustained that lawyers have four possible arguments to face the crisis of the ROL, some implying, however, a substantial and radical abandonment of it: a) nihilism; b) an anchorage to scientific rationality (as in the doctrine of law and economics); c) a return to natural law; d) a cautious historicism[68].

Putting aside the first three, we can briefly consider the latter, which is the approach the author recommends. Starting from a positive historical judgment of the Italian tradition of public law doctrine, he purports that we should rely on doctrine and case law because they are an expression of an objectivity responding to the regulative idea of the ROL: «an authoritative and elaborate law made by doctrine and courts can surely subsidize the dispersed legislation; so, as far as possible, a solid

[66] B. Sordi, *Il principio di legalità nel diritto amministrativo che cambia. La prospettiva storica*, 1 Dir. Amm. 5 (2008).
[67] V. K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in Common Mkt. L. Rev. 1625 (2007).
[68] M. Dogliani, cit. at 36, p. 22.

and certain law, apt to "create limits" and bear the various functions of the principle of legality»[69].

This "recipe" may be only superficially considered a simple acknowledgment to the judge made law based on principles, an approach that cannot be associated with the idea of the ROL supported in this work. It is, on the contrary, an extreme attempt to defend the core of the ROL (to produce stability and certainty) giving up the aspect (conceptually unnecessary) of the creation of legal norms by legislative assemblies. The author invite us to be aware of the total ineptitude of Parliaments to make laws capable of guaranteeing that the legal system «is in a good state»[70], to go back to a sort of "sapiential law". It is clear that this solution requires the sharing of a positive ethical judgment about the corporation of lawyers and above all a commitment to the political legitimacy of such an appointment. But these are issues we cannot face here for reasons of space.

In the field of administrative law, there are even distinguished scholars who react to the tendency to forsake "the paths of legality"[71]. We are referring, firstly, to the recent theory according to which it is plausible to repropose apparently traditional patterns to contrast the factors of "deconstruction", viewed particularly in the practice of statute-like decisions and in the "escape" into "private law"[72]: the need for a more effective separation of powers and the return to the "construction" of administrative law rooted on the ROL conceived as a guarantee of the typicality of powers and the predictability of administrative decisions regardless of their content. Also in this case, therefore, we find an invocation of the role of the doctrine in recalling «patterns and principles of the ROL» to «contrast the anarchy of the legislator».

What in this approach appears original, and somehow countercurrent, is the identification of an impulse towards new configurations of the substantive legality coming from the EU law, which, almost paradoxically, would impose new normative standards against the domestic formal legality, but at the same

[69] M. Dogliani, cit. at 36, p. 69.
[70] J.M. Finnis, *Natural Law and Natural Rights*, (1992) It. transl. *Legge naturale e diritti naturali*, (1996) p. 294.
[71] F. Merusi, *Sentieri interrotti della legalità*, (2007) p. 9.
[72] F. Merusi, cit. at 71, p. 27.

time guaranteeing fundamental rights and liberties coming from the erosion of discretional powers conferred on public administration by domestic law.

We can, finally, look at the "crisis" from a different perspective as well, which, starting from a full adherence to the ideals of the ROL, considers the latter as factors that must still produce their innovative effects on the Italian legal system (even in the new context of considerable integration among legal systems). The point is not to go back to broken paths, but to draw new ones. This is the perspective which takes us back to the beginning of this article. It aims to determine, through adherence to the ROL, the dissolution of public law as a special branch of the legal system and so a complete rewriting of the language of rights, the dynamics of public power, and the judicial review of administrative action. For this reason it has been recently noticed that the point of reference for this approach seems to be Albert Venn Dicey, one of the main historical figures of the ideal of the ROL[73].

9. (Without any) conclusion

There are no conclusions to draw. The only issue to stress is that the arguments about the ROL are essentially political ones. The important thing, in other words, is not to disguise precise choices about values as empirical facts.

Those who follows the ideal of the ROL claims that this has two different kinds of virtues[74].

The first concerns the conceptual side, actually the concept of law itself. With regard to this the effective image used by Raz is to compare law to a knife: a knife is not a knife if it is not able to cut, law is not law if it is not able to guide human behavior, albeit ineffectively[75]. This means that, although the ROL is also a political ideal and therefore among the premises that a lawyer should assume, there is a part of such an ideal that concerns a value rooted in the law as a law, insofar as it is an instrument to pursue social outcomes, a kind of social institution which is to be

[73] R. Guastini, cit. at 2, p. 33.
[74] The two different meanings of the term "virtue" referring to the ROL, which I speak about in the text, have been outlined by N.W. Barber, cit. at 17, p. 477.
[75] Raz, cit. at 19, p. 225-6.

used – like all devices – in the appropriate way. This inherent value is not a value in a moral sense, but just the value of the instrument as such, to be projected for the guidance of human conduct. Its specific virtue is to be morally neutral. This is, according to Raz, the virtue of efficiency, the virtue of the instrument as an instrument.

We cannot exclude, and this is the second aspect, the possibility to associate other virtues in the moral sense of this term with the ROL, although the ideal does not include all the virtues which a fair political system requires: for instance, impartiality, which can be better assured by general rules; public discussion and transparency, which can be fostered by an adequate publication of norms; more protection for the autonomy of citizens, which follows from a convinced adherence of courts to the ideal of the ROL; and we cannot exclude that sometime these virtues may also make it preferable to reduce the sharpness of the "knife"[76].

I shall end as follows. If the consistency between the rule of law and a single legal system is, after all, a question of degree (no law exists without a minimum amount, a full achievement of the ideal is not of this world), the extent to which a legal system is inspired by the ROL depends, mainly, on empirical factors. As has been argued, the "impossibility" of the ROL does not derive from conceptual or theoretical reasons, but more simply from the "infidelity" of officers in following the law and the incapacity (or convinced choice) of legislators to pursue the ideal[77]. But this does not mean that we should not keep on criticizing "unfaithful" judges and officers and that we should give up, for example, prescribing the use of a more appropriate and rigorous legal language to different legislators[78].

[76] This is the thesis stated by A. Marmor, cit. at 20, p. 8, according to whom it is not true that if «the sharper the knife, the better it cuts», then «the more a legal system instantiates the conditions of the rule of law, the better it functions in regulating human conduct». We can think, for instance, of the case of a not clear rule, depending on a political compromise, that is better than no rule at all. Indeed this compromise has permitted the promulgation of the norm which limits, at least partially, the discretion of the decision makers.

[77] T. Endicott, cit. at 25.

[78] M. Jori, *La pragmatica di Claudio*, http://server.fildir.unimi.it/Jori_home.html.