The Meaning of Rule of Law

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"What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms -- in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.

We still do not know where the urge for truth comes from; for as yet we have heard only of the obligation imposed by society that it should exist: to be truthful means using the customary metaphors - in moral terms, the obligation to lie according to fixed convention, to lie herd-like in a style obligatory for all ...".

Friedrich W. Nietzsche, *On truth and lie in an extra-moral sense*

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ABSTRACT

This book reports *studies* and *researches* done by the author when he was at University of Cambridge.

Even though the *writer* believes that:

1) a *corpus* of *legal values* should be *written* inside each *Constitution*;

2) and *Judges*, *Lawyers* and *People*, have the ***duty*** to defend *those values* against the *tendency of Power* to go beyond them; …

… the *study* affirms that the *principium* of *Rule of Law* (and/or *Supremacy of Law*) does not include a *corpus* of *legal principles* (and/or *values*) inside itself, as somebody affirmed.

The *principium* of *Supremacy of Law* means "only": the *SUPREMACY of LAW ABOVE the POWER*.

It was a *Revolution*, when *Power* believed to be above the *Law*. It happened, *exempli gratia*, in France during the *Ancient Regime*. *Sovereigns*, *Nobles* and *whoever* had some kind of Power, believed to be above the *Law*. They were used to act above *Law*. Viola P. (1994) gave an example of this. He reported an *anecdote* happened **between** the Duke of Orleans **and** the King of France. When the Duke of Orleans said to the King: "*Majesty, but it is illegal!*", the king answered: "*No, It is legal because I will*".

The *principium* of *Supremacy of the Law* had the aim to end these kinds of *Legal Systems*. It states that *everyone* is under the *Law*. *Sovereigns*, *Nobles*, *Bureaucrats*, *Banks* and *Financial Powers*, are all under the *Law*. In other words, they have to comply with the *Law*. If they do not, they are an *Arbitrary Power*. The *latter* is a *Power* that: **either**, it is not given by a *Law*; **or**, it is used without following the right *procedures*, which bind the *exercise* of that power. As *Power* tends to go beyond its *limitations*, there is *Arbitrary Power* also inside our modern *Legal Systems*. The *principium* of *Supremacy of Law*, hence, is still frequently violated. It is proved by some recent events happened inside the *European Union* and *Institutions*. For example, when the *President of Euro-group* decided to exclude Greece, Varoufakis told him to be illegal (as the Duke of Orleans told to the King of France during the *Ancient Regime*). So, Varoufakis asked for a legal advice. The *lawyers* and *bureaucrats* of the *European Union* answered him that the *President of Euro-group* could act as he/she wants. This is as the *Euro-group* does not exist for the *Law*!! **Hence,** they argued: the ***Euro-group* is above the Law!!!!!** In other words, the *European Union* answered like the King of France during the *Ancient Regime*. But, if the *Euro-group* does not exist, the *Euro-group* is not above the *Law*. Actually, all the *Powers*, *Decisions* and *Acts*, of the *Euro-group* are *illegal*, *unlawful*, *illegitimate*. This is told by the *principium* of *Supremacy of Law*. On the contrary, the *European Union* is a *New Ancient Regime*. Nothing more! Nothing less!

So, how is it possible that the *principium* of *Supremacy of Law* is still violated, nowadays?

This is as the *principium* of *Supremacy of Law* was reduced by *Power* to be a *simulacre a là* Bauderillard (1981). *Power* makes people forget its true meaning. It was done with a very easy game. A new *set* of meanings were put inside *Supremacy of Law*. All of them were *pleasant*, *agreeable* and *fashionable*, principles. But, they were also *void principles* as much as they were *pleasant*. At the end, people have forgotten the real meaning of *Supremacy of Law*. *Power* started again to act above the *Law a là Ancient Regime*!!

INTRODUCTION

Rule of Law's True Meaning

The *principle* of *Rule of Law* is also called ***Supremacy of the Law***. *Rule of Law* is a *principle of Formal Validity*. It states that *Law is above the Power*. In other words, it is the *basic principle* of any *modern Legal System*, after the *French Ancient Regime*!

The *Supremacy of Law* affirms that *Kings* (*Presidents*; *Governments*; *Constitutional Bodies*; *Judges*; *Courts*; *Authorities*; *Committees*; *Groups*; *Bureaucrats*; *Financial Powers*; *Banks*; etc…) are under the *Law*. Their *actions* and *decisions* are *legitimate* **only, and only if**: **both**, the *Law* gives them that kind of power; **and**, they use that power following the *right procedures.*

Otherwise, *Power* is *unlawful*, *illicit* and *illegitimate*.

Their *commands* should not be in force.

In this latter case, people are NOT bind by Power's decisions. *People* have the **RIGHT** to *resist* and to *fight* against those *illegalities*, *illegitimacies* and *unlawfulness*.

Unfortunately, *Power* does NOT like to be bound. As a result, the *principium* of *Supremacy of Law* was reduced to be a *simulacre a là* Bauderillard (1981).

First of all, *Supremacy of Law* was called with a "less evocative" name: *Rule of Law*.

Then, *Rule of Law* was defined with new *pleasant* and *agreeable* principles. At the question: "what is the Rule of Law?", *lawyers* started to give any possible answer. So, the clear, basic and simple, *principium* of *Supremacy of Law* became a *void* and *nebulous concept*.

At the end, People and lawyers started to forget its real meaning.

Meanwhile, *Power* started again to act above the *Law*.

For instance, the *writer* will give some examples that happened at the *University of Cambridge*. They are very useful to understand what it is happening nowadays. What people learn in the *Universities*, people do in the *World*!! Although the writer decided to speak about it with a *satirical* and *ironical* style, the *facts* are *true*.

Rule of Law like Simulacre

As we told *supra*[1], the *principle of Rule of Law* is the *principium* of *Supremacy of Law* above the *Power*. This is its *very Nature*. This is its DEEP REALITY.

However, *images*, in the *flow of the time*, tend to lose their *meanings*. Step by step, they become *void concepts* that: **either**, mask their *deep realities*; **or**, lose any relation with *them*.

[1] *Supra* means *above* in Latin.

According to Bauderillard J. (1981), they become *Simulacres*. Once they are *Simulacres*, they are *void concepts* that can be filled with any arbitrary meaning, which *Power*[2] wants. In this way, *Justice* is reduced to be nothing more than "*the* ***interest*** *of the most* ***Powerful one***" *a là* Trasimacus.

They are a "*mobile army of metaphors*" ready to prostituting itself to any *pro tempore* Power. As *History* and *Social Sciences* teach, the *Winners* and the *Establishment* (Lyotard, 1983) decide what it is *true* and *false*. This is as *Power* and *Knowledge* are the "two faces of the same coin" (Foucault). *Changes* into *Power's relations* become *changes* into *Paradigm's beliefs*. *Changes* into *Paradigm's beliefs* become *changes* into *Power's relations*.

Thus, we should keep in mind this *basic truth*, when we study any *Social Sciences' constructs*. Actually, it does not matter if they are about: Law; Psychology; Economy; Finance; etc… .

Law and Sensemaking

As the *principium* of *Supremacy of Law* was reduced to be a *simulacre*, *Power* can use it like a *Horse of Troy* to *put in* and *put out* from the *Legal System* whatever it wants.

[2] *Power* is used *a là* Foucault.

This makes *Law* be applied in a very *discriminative way*. *Law* will have different meanings for different people. For the majority of people, Law will be an instrument of "slavery" in Power's hands. For a small elitist group, *Law* will be always a *Declaration of Rights* in defense of their own *liberties* and *interests*.

English Legal History, behind what *propaganda* says, it is not an exception. Whereas at Bentham's time, the *common law* was used to defend the privilege of aristocracy above *common people*; nowadays, *Law* is used to defend the *interests* of *financial powers* above *Peoples* and *Nations*.

Thus, the writings of Bentham should be still considered a *current issue*.

According to the Bentham, *English tradition* is committed to "save the *appearance*" with a lot of *rites* and *false beliefs*. *Lawyers' writings*, instead of reviling those trickeries, mask them[3].

Whereas English Lawyers / Judges claim to apply simply "neutral" Law (*Universal Principles*; *Acts of the Parliament*; etc…), they make always *arbitrary* (*discretional* and *political*) choices. They use their *power* to defend the *privilege* of the *Establishment* against *common people*.

[3] *Exempli gratia*, Bentham wrote this about Blackstone's books (one of his "masters").

The *American Realism* clarified that *Judges* do NOT apply neutrally the *Law*. Judges *create* and *change* the *Law* in each case. They do (always) political choices. Also Perelman demonstrated this. He gave some good historical examples of how, the same Law got very different interpretations and applications. The latters followed the *pro tempore* political ideas. This is possible for different reasons. But, an *army of Troy's Horses* makes it far much easier.

The *allegories* of the *Classical Literature* are still very useful for understanding the present time. A *Horse of Troy* does not need to be necessary physical!! It could be everything, even a *theoretical concept*.

Thanks to them, the *Establishment* can use *Law* (as well as: Psychology; Economics; etc…) to lead people: **both**, to do; **and**, to believe; … what they want. Weick's studies about ***sensemaking*** and **en*act*ment** are very useful for understanding these dynamics. They should not be limited for approaching the working contexts inside the Companies.

All in all

There are two wrong views. The first one, *nothing* can be known (Post-modernism). The second one, *everything* is true. Both of them reduce *Truth* and *Justice* to be *whatever* Power wants. They allow *Power* to c*ontrol* people with *sensemaking*. But,

sensemaking has nothing to do with *Truth* and/or *Justice*. *Sensemaking* is just *Power's manifestation*.

This is what it is happening inside the *Social Sciences* (*Legal System*; *Psychological constructs*; *Finance*; etc…).

As Nietzsche wrote: "*This world is the will to power — and nothing besides*! And you yourselves are also this will to power — and nothing besides!" (Nietzsche, *Will to Power*).

RULE OF LAW

Rule of Law "is an ambiguous expression" that can have different meanings for different writers (Hood Phillips O. and Jackson P., 1987).

Hence, a clarification of the concept (advised by *analytical jurisprudence* and *philosophy*) is indispensable, at the present tense.

In absence, we could just enhance entropy. Everyone will speak about different things, using same words.

At the present time, there is no agreement among lawyers about the *nature* of *Rule of Law*. Lawyers, Judges and Academics, defined *Rule of Law* differently. Moreover, *Rule of Law* presents different conceptualizations: **both**, among *legal Traditions and Systems*; **and**, inside each *legal Tradition* and *System* (such as: English Common Law; Canadian Legal System[4]; etc…).

For instance, according to *American constitutionalism*: "the rule of law promises predictability in social life by placing constitutional limits on the kinds of power that governments may legitimately exercise, as well as on the extent of those

[4] *Exempli gratia, Rule of Law* has received three different approaches in Canadian Constitutionalism: *rule of law* like impartial administration of rule; *rule of law* like procedural fairness; *rule of law* like substantive justice (Conklin W. E. 1989).

governmental powers" (Shapiro I., 1994). Otherwise, this cannot be true for Countries such as: Australia. Australian Constitution simply regulates the exercise of the sovereignty. It does not state any *legal principle* and/or *value* able to lead and to bind the *Power*. Hence, *Rule of Law* is a mere *principle* of *formal validity* (like Hart's *rules of recognition*) for those Nations with an "amoral constitution". Everything is valid, if the *Power* acted under the *Law*.

American conceptualization of *Rule of Law* has its foundation in a written constitution. This is ontologically constituted by two *corpora* (parts). The first *corpus* gathers the regulations about the exercise of sovereignty (*exempli gratia*, the relation among the *Constitutional Bodies*). The second *corpus* gathers a set of *political* and *legal principles* that bind the actions of *Sovereignty*. This latter was the *hard core* of the *Social Contract*. So, if the *Sovereignty* acts against those *values*, each *Judge* can refuse to apply those *Acts* and/or *commands*.

Law rules *Nations* **only, and only if,** each person (it does not matter his/her social *strata*) can "win" the *Sovereignty* each time the *Sovereignty* acts above the *Law*. But, this must happen in a substantial way. It is not enough that it exists only theoretically speaking.

Rule of Law has also another aim: to prevent any kind of despotism, also that one of the *pro tempore* Majority above the Minorities. But, this could happen **only, and only if**, Nations are ruled by *constitutional principles* (Schwartz B. 1955).

Allan (1993) considered this point inside *English Discourse*. He recognized that "… the problem lies (in) the difficulty of articulating a coherent doctrine which resists a purely formal conception of legality – according to which even brutal decrees of a dictator, if formally "valid", meet the requirements of the rule of law – without instead propounding a complete political and social philosophy". Allan (1993) confirmed that *Rule of Law*, inside *English constitutionalism*, looked like a *secondary rule* of Hart, as: "rule of law is able to distinguish between commands of a legitimate government from those of anyone else".

Allan (1993) stated that it is "very doubtful whether it is possible to formulate a theory of rule of law of universal validity".

On the contrary, the present writer affirms that it is possible. It is enough to exit from the Babel Tower. It is enough to go back to the original and real meaning of *Rule of Law*: *Supremacy of Law* above the *Power*.

Nevertheless, Allan (1993) affirmed that *Rule of Law* is a living part of the *English Constitution*. It is able: **both**, to bear some legal moral values and principles; **and**, to bind the sovereignty of the parliament. But, Allan is hugely wrong. According to *English Constitutionalism*, Westminster Parliament has no limit (Barendt,1998). In other words, "there is no legal limit to what the "Queen – in – Parliament" can enact in a statute" (Wilson, 1979).

This is historically well proved.

Rule of Law like Universal Principle of any Legal System

The present writer disagrees with Allan. He believes that it is possible to formulate a *theory* of *Rule of Law* of *Universal Validity*. It is enough to remember its original and deep meaning. *Rule of Law* is the *principium* of *Supremacy of Law*. This *principium* states the *SUPREMACY of LAW ABOVE the POWER.*

It was a *Revolution* when *Power* believed to be above *Law*. It happened, *exempli gratia*, in France during the *Ancient Regime*. *Sovereigns*, *Nobles* and *whoever* had some kind of Power, believed to be above *Law*. They were used to act above *Law*. Viola P. (1994) gave an example of this. He reported an *anecdote* happened **between** the Duke of Orleans **and** the King of France. When the Duke of Orleans said to the King: "*Majesty, but it is illegal!*", the king answered: "*No, It is legal because I will*".

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were also *void principles* as much as they were *pleasant*. At the end, we have arrived to the present time. *Lawyers* are lost inside *nebulous concepts*. *Power* has started again to act *a là Ancient Regime*.

English constitutionalism is used like example for understanding how it has happened.

RULE OF LAW AND ENGLISH LEGAL SYSTEM

According to: Dicey (1902); Heuston (1964); the *Report* of the *Committee on Ministers' Powers* (1932); … the *Principium* of the *Supremacy of Law* born in the Middle Ages. Then, it was challenged and questioned only during the Stuart time. Some evidences, which are usually used, are:

1) According to M. Allen *et al.* (1994), the Bracton principle: "*quod Rex non debet esse sub homine sed sub Deo et Lege*" quoted by the King in the *Prohibitions del Roy* (1607);
2) the *Petition of Right* (1628);
3) the abolition of the: *Court of the Star Chamber*; and *Privy Council*'s jurisdiction in England (1641);
4) the *Glorious Revolution* (1688);
5) the Dicey's *Doctrine on Rule of Law* (1885);
6) and, the *Report* of the *Committee on Ministers' Powers* (1932).

The work of Dicey has strongly been influential. Indeed, Dicey represents the final highest peak of the conceptualization of *Rule of Law*.

On the contrary, the *Report* of the *Committee on Ministers' Powers* (1932) is an "*Official Recognition"*. The *Report* states: "The supremacy or rule of law of the Land

is a recognised principle of the English Constitution". According to the *Report*, it has always been a living part of *English Law* since the Middle Age.

Although *Rule of Law* have been recognized a *characteristic* of *English Politics* and *Legal System* since the Norman Conquest (Dicey, 1902)[5], *Role of Law* has always been a *nebulous concept*, at the end.

On one hand, everybody agrees that *Rule of Law* has been a fundamental principle of *English Legal System*. On the other hand, nobody knows what *Rule of Law* means!! Actually, it should be a very useful principle!!

Hence, our first *Quest* is to answer at the question: "What does *Rule of Law* mean?"

For answering at the question, the Dicey's work should be examined.

DICEY

Dicey (1902) affirmed *Role of Law* to include three different *principia*:

1) the *Absolute Supremacy* of the *Regular Law* as opposed to *Arbitrary Power*;

[5] The other *English Legal System's characteristic* was: the *principle of Supremacy* of the "Central Government".

Until the *Glorious Revolution*, the *Central Government* was represented by the *Crown*.

From the *Glorious Revolution* to now, the *Central Government* was represented the *Parliament* (Loveland I., 1996). This latter is composed by three *organs*: the *Crown*; the *House of Lords*; the *House of Commons*.

2) The *Equality* of *every man* in front of the *Law*. This principle includes two aspects: a) everyone has to obey to the *Law*; b) everyone is subordinated at *ordinary tribunals' jurisdiction*;
3) The *belief* that: "the law of the constitution … are not the source but the consequence of the rights of individuals, as defined and enforced by courts".

Whereas these three *principia* seem "reasonable" at a first consideration, they hide plenty of trickeries and practical problems. The latters make them be: *void concepts*. At the end, they drop to be *political slogan*, *propaganda* and *marketing*! Nothing more! Nothing less! Indeed, they have been used in very different manners as History proved.

First Principle

According to Dicey, the first principle affirms: "… no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".

This principle seems to be affirmed by Courts in different times. For instance, in Black – Clawson LTD v. Papierwerke waldhof aschaffenburg AC (1975), Diplock

stated: "The acceptance of rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it"[6].

Although this principle appears to be *plain* in the *English constitutionalism*, it is not as *plain* as it can appear. Indeed, it is not possible to define *clear boundaries* **between** an *arbitrary* use of power **and** "what" it is not!

Although Dicey (1902) stated this principle to be able to limit the *arbitrary power*, Heuston (1964) gave contrary evidences. Heuston (1964) wrote that it is "difficult to distinguish between regular law and arbitrary power". For instance, *Law* can give *arbitrary power* to someone. In this case, the two dimensions overlap!! Heuston (1964) presented two historical *leading cases*. The first one happened in 1627. The *Court of King's Bench*, in Darnel's Case, granted the King of a common law legal power to imprison *anyone* on suspicion without cause shown!! The second one happened in 1941. The House of Lords, in Liversidge v. Anderson, recognized the legitimacy of statutory legal power (similar to the previous) granted by the Parliament to the Home Secretary!!

As a result, Heuston (1964) affirmed that the *supremacy of law* simply requires that everyone (in any position) "must be prepared to justify his acts by reference to some

[6] *Exempli gratia*, you may see *Black – Clawson LTD v. Papierwerke waldhof aschaffenburg* AC (1975) in: Keir D. L. and Lawson F. H. (1979), *Cases in Constitutional Law*, Oxford: Oxford University Press.

statutory or common law power which authorises him to act precisely in the way in which he claims he can act". Therefore, *Rule of Law* does NOT limit any *arbitrary power*[7]. It means only that power should be given by Law. Nevertheless, even this is not so plain[8]!! As I told *supra* (above), a *nebulous concept* allows to be applied in very different manners from *case* to *case*. At the end, a "different" *Legal System* exists for *everyone*! But, this is *nothing*, really *nothing*, if You compare: *Law*; with *Psychology*. Whereas the *former i*s still bound by *facts*, the *latter* is just *pure fantasy* of the Psychologists!! Nowadays, the *huge abuses* are done, indeed, with *Psychology*.

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[7] *Exempli gratia*, *Entick versus Carrington* (1765).

Entick sued two king's messengers (armed with *warrant* of the *Secretary of State* for arresting him) for: having trespassed into his house and goods; and, illegitimacy of the *warrant*. The *Secretary of the State* was **not** able to justify the *warrant's legitimacy* within any *specific law*. He argued that those warrants had always been issued and none complained for them!!!!!

Camden C. J. declared: "This power, so claimed by the Secretary of the State, is not supported by one single citation from any law book extant… If it is law, it will be found in our books. If it is not to be found there, it is not law" (*Entick versus Carrington*, 1765).

The *act* of the *Secretary of State* was "unlawful" as: it did not comply with the *principle of Formal Validity*.

[8] *Exempli gratia*, in *Malone versus Metropolitan Police Commissioner* (1979), Robert Megarry V-C states: "… England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what it is expressly forbidden". In this case, the tapping of telephone was lawful as "simply … there is nothing to make it unlawful". In other words, the *discretion of power* was affirmed above *Role of Law*. This happened as: no *corpora* of *moral values* exist inside *English Constitution*. Thus, an *arbitrary* use of Power is not prevented.

The decision was appealed to the *European Court of Human Right*. The *Court* affirmed that: UK ***violated*** the ***article 8*** of the ECHR (*Malone versus United Kingdom*, 1984).

On the contrary, Dicey affirmed that *supremacy of law* "excludes the existence even of wide discretionary authority on the part of the government". But, *English Legal History* proved this to be untrue!!

According to Jennings (1943), Dicey's ideas derived from the *doctrine of laissez – faire*. In other words, Dicey described *his political choices* rather than *empirical facts* about *English Constitution*. Jennings (1943) observed that Dicey neglected completely: **both**, the existing wide *Discretional Powers* of the *Public Authorities* and *Government*; **and**, the *Unlimited Power* of the *Parliament*.

"Parliament … can pass what legislation it pleases. It is not limited by any written constitution. Its powers are not only wide, but unlimited." (Jennings I., 1943).

Sovereignty of the Parliament* versus *Rule of Law

The *principium* of *Sovereignty of the Parliament* prevails onto *Rule of Law* as there are not any *substantial principles* and/or *values* able to limit the former. All the attempts, which were made[9], failed.

According to Heuston (1964), the *principium* of *Sovereignty of the Parliament* was developed "almost entirely by the work of Oxford men" such as: Hobbes;

[9] *Exempli gratia*: Dicey (1902); Raz (1977); Allan (1993).

Blackstone; Dicey. This *principium* states that: "what the parliament doth, no power on earth can undo" (Dicey, 1902).

Although Wilson (1979) recognized that *Rule of Law* does not limit the *Sovereignty of the Parliament*, he attempted to justify some limitations to Executive's powers. But, Wilson (1979) failed in his attempt. *Exempli gratia*, the arguments are; contradictory; nebulous; rhetorical games. For instance, Wilson (1979) argued that the "arbitrary power … (of) the Executive is in the hands of the Parliament … If it clearly grants the Executive wide arbitrary power then the Executive has wide arbitrary power. … the principle of rule of law …justifies the principles developed by the courts that powers should only be used for the purpose for which they have been granted"[10].

What does all this mean?

It means simply: *Executive* should comply with the *principle of formal validity*; and, *Courts* can verify if it happened. Nothing more! Nothing less!

[10] Some of these principles quoted by Wilson (1979) are: "The power should be used for the purpose for which they were given"; "The power should be exercised by the person or body by whom they were intended to be exercised"; "The authority must be free to make a genuine exercise of any discretion which has been given to it"; "The authority in exercising its power should observe any procedures which have been expressly laid down in the statute or which the courts will imply into it".

This is as *English Law* lacks a *corpus* of *legal values* and *moral principles* able to bind the *arbitrary use* of Power.

English Legal System, indeed, is quite different from *Italian Legal System*. In the latter, the *Parliament* and the *Government* have not arbitrary *Powers*. Their Powers are limited by a *corpus* of *moral values* written in the *Constitution*. The *Constitutional Court* can *annul*, *invalidate* and *cancel*, all those *legal norms* that do not comply with *those constitutional principles*.

In U.S.A., on the contrary, each *Judge* can deny application to *norms* (*Acts* and *Statutes*) that are in contrast with *Constitution*[11].

Only in these latters Nations, *Rule of Law* can limit the *arbitrary use* of *Power*. Indeed, *Power* cannot go beyond some *moral limitations* written in the *constitution*. This is as: first, *Rule of Law* affirms the *Supremacy of Law above the Power*; second, a *constitutional corpus* of *legal values* and *principles* binds *Power*.

This is not possible inside *English Legal System*. Although *Role of Law* affirms the *Supremacy of Law above Power*, at the end, there is not any *constitutional corpus* of *legal values* and *principles* able to limit *Power*!!

[11] The difference is: *Italian Constitutional Court* eliminates the unconstitutional *norm* from the *Legal System*; *American Judges* (USA) can ONLY deny application to *norms* (*Acts* and *Statutes*) that are unconstitutional for a singular case. But, they continue to exist inside the *Legal System*.

Power can be limited **only, and only if**:

1) a *corpus* of *moral values* is written inside the *Constitution* (in other words, in the *Social Contract*);
2) *Courts* and *Jurists* (*lawyers*) are *brave* and *able* enough to defend those *values* against *Power's tendency* to go beyond them;
3) There is a real division of *Powers*. *Powers* should be able to balance and limit each other.

English Legal System lacks all of them, as it is shown *infra* (below).

Second Principle

According to Dicey (1902), *Rule of Law* affirms the *equality* of every man in front of the Law. "Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals". In other words, Dicey affirmed: a) the existence of *identical rules* for everyone; b) the *absence* of *special privileges*. Actually, this principle is quite controversial. Alder (1989) affirmed to be a "ridiculous proposition" as Dicey's statement has always been *untrue* in every time. The existence of *different conditions* and *special privileges* among people has always been part of the *Very Nature* of *Every Government*.

Moreover, if we consider the difference between *formal equality* and *substantial equality*, Dicey's idea will be far … far …far more *untrue*. The *formal equality* is a pleasant and agreeable *declaration*. But, it is *void* and *useless* as much as it is agreeable! The *substantial equality* is just a *Utopia*. It has never ever existed in the World[12]. *Exempli gratia*, the *article 3* of *Italian Constitution* affirms the *formal* and *substantial equality* among *Italian Citizens*. The *Republic* had the duty to remove any obstacle to this. Well, it is clearly evident that *substantial equality* does NOT exist even in Italy. So … … .

Nonetheless, Alder (1989) believes even the *formal equality* difficult to be realized at full circle.

Third Principle

According to Dicey (1902), the third principle is the absence of general principles. It means "… the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determinating the rights of private persons in particular cases brought before the Courts; whereas

[12] Nietzsche copes with the difference between *substantial* and *formal equality* (Epis L., 2015, *Nietzsche on Rule of Law and Democracy*).

under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of constitution".

According to Dicey (1902), a *corpus* of *fundamental moral principles* does not exist inside *English Legal System*. They are only "the consequence of the rights of individuals, as defined and enforced by the courts".

In other words: on one side, he created a *vicious circle*; on the other side, he did not say anything of useful.

On one hand, indeed, *everything* is enforced by the Courts is Law. As a result, Courts have to enforce those individual rights defined and enforced by them(selves)!!!! (*Vicious circle*).

On the other hand, Courts have to enforce any *act* of the *Parliament*. In this latter case, the *rights of individuals* are only "what" the *pro tempore Majority* of the *Parliament* chooses they are!! Indeed, "no Parliament can bind its successors or be bound by its predecessors" (A. Beale, 1994).

The Westminster Parliament has no limit (Barendt,1998). "There is no legal limit to what the "Queen – in – Parliament" can enact in a statute" (Wilson, 1979).

All in all

Behind Dicey's pleasant words, *Rule of Law* is nothing more than a *principle of Formal Validity*. *English Legal History* is clear. Dicey has attempted simply to use *Rule of Law* like a *Horse of Troy* to put inside the *Legal System* his *political ideas*.

The reason could be noble, but he chose the wrong way. He made *Rule of Law*: a *nebulous concept*; a *set* of *pleasant words* that mask the reality. In this way, *Role of Law* started to be applied in *different manners*. It makes the *Legal System* to be applied differently from person to person!!

ALDER

John Alder (1989) criticized the Dicey's *doctrine* of the *Rule of Law*. He wrote: "His rule of law could not therefore be regarded as a statement about what British law is necessary like. It could be either a political statement as to what the law should be like, or a statement about what the law happened to be like at the time".

According to Adler (1989), *Rule of Law* is a *political idea*. "The majority of modern lawyers would regard the rule of law as essentially a political or moral idea, although none the less important for that, since it affects the way the law is developed and applied".

So…, we should give a look at the *political ideas* of two influential English lawyers: Raz and Allan!

RAZ AND ALLAN (University of Oxford versus University of Cambridge)

Raz (1979) and Allan (1993) are two of the most influential Lawyers in England, at the present time. Hence, we should examine their *political idea*.

As Dicey did, they gave to *Role of Law* some different meanings. They attempted to "re-define" *Rule of Law* as a *set* of *Moral* and *Legal Principles*. But, their attempts have leaded to create a *contradictory* and *nebulous concept*, as I told *supra* (above).

It is not a case that: everyday *legal practice* has refuted what they affirmed.

Their different views are expression of the *Historical Rivalry* between the two Universities.

RAZ

Raz (1979) attempted to challenge the "skeptic" view.

According to Raz, "rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree". From this idea, some "substantial" principles can be derived by *Intuition*[13].

But, Raz's theory is in contradiction with *English Legal History* and *Legal Practice*.

[13] *Intuition* seems to be a *characteristic* of the University of Oxford's *actual Jurisprudence*. Also Finnis, indeed, based all his work about *Natural Law and Natural Rights* on *Intuition*!

"All law should be prospective". Are you sure? Do you remember "Gold Standard"?

One of the principles, which Raz got by *Intuition*, was: "All law should be prospective …". Whereas this principle appears to be true inside most of the *Legal Traditions* (*exempli gratia*, Italian one), it is false inside *English Legal System*!!

English Parliament, for example, violates this "principle" in 1931 with "gold standard". The *Government* ordered to the *Bank of England* to not exchange *Notes* into *Gold*. Then, the *Parliament*: **both**, created an *Act*, which made "the paper currency inconvertible"; **and**, ratified all the *illegal actions* done by the *Government* and the *Bank of England* before the *Act* (Jennings I. 1959). In *English Tradition*, *Banks* and *Financial Matters* have always been above *Law*!!

Also at the *University of Cambridge*, this principle is not followed at all. An example is given in the Appendix[14].

[14] See Appendix, *Does "Rule of Law" mean that "All law should be prospective" a là Raz? NO, NO, NO, and still NO! Rarely have I seen a desperate case as You are! … But … wait a moment. Who is Raz? Here at Cambridge, we have never ever heard about Him. Here at Cambridge, we do not say that name!*

"Law must be capable of guiding the behaviour of its subjects" & its Logic Inferences!

Raz tried to infer some *logical consequences* from his basic *Intuition*: "law must be capable of guiding the behaviour of its subjects". But, these *deductions* are: according to the *Formal Logic*, ***invalid***; according to the *Logic of Value*, a ***rhetorical game***, a ***sophism***. Nothing more! Nothing less!

First, Raz confused the *Principium* of *Supremacy of Law* with a *judgment* about *Law's Nature* and *Aim*.

Second, Raz put together some *ideas* that he gathered from different *historical experiences*. Then, he told them to be a *logic consequence* of his basic "*Intuition*"!!

Next, Raz pretended to have used *Formal Logic* for inferring them. But, he could not. *Law* is a *normative language*. *Formal Logic* can be used only within *descriptive language*. The *Logic of Value*, on the contrary, can be used with *normative language*. But, the latter is just *Rhetoric*, *Sophists' Art*, for supporting some *argumenta* instead of some others. It does not allow *inferring* anything of *true* or *valid*!!

In other words, Raz forgot the *Law of Hume*. Yet, Hume was Scottish. So, it is normal that Oxford men do not like him!

Law of Hume; Formal Logic and Logic of Values

The *Law of Hume* is an important *criterium* of *demarcation* **between** *empirical facts* and *not empirical facts*. The *Law of Hume* defines the boundaries **between** the *Realm of Formal Logic* **and** the *Realm of Logic of Values*. Only in the former: **both**, the *statements* can be evaluated in terms of *true* and *false*; **and,** the *reasonings* in terms of *valid* and *invalid*. In the letter, none of them are possible.

This is as *everything* is just: a *political choice*; a *game of rhetoric*; a *sophism*; a decision made to defend some *interests* against others. The *Logic of Value*, or *New Rhetoric a là* Perelman, does NOT permit any control on: **both**, validity; **and**, truth; … about what it is said.

So, Raz cannot apply the *formal logic* within the *normative language*[15]!!

As a result, he put inside to *Rule of Law* his Political ideas.

[15] There is only one case where it is possible. The *structure* of the *sentence* is a *syllogism*. The *main assumption* is given by the *Legal Norms*. The *second assumption* is given by the *Facts*. The *conclusion* is given by the *logic consequence* between these two *assumptions*. **Yet, this *syllogism* tells only: the *formal structure* of the *sentence* is *logic***. It does NOT tell *anything* (at all) about the *content* of the two *assumptions*. Both of them can be *false* and *untrue*. Thus, a *logic conclusion* can be made by *false/invalid* assumptions.

All in all

Raz made several mistakes. They were so huge that: if students had made them, they would not have passed their exams!!

Soooo …,

… why has *Raz's theory* been so influential?

It was only because he was a Lecture of the University of Oxford. Indeed, everybody, who supported his theory, was used to say: "*ipse dixit*"!; "*ipse dixit*"!; "*ipse dixit*"!.

Interlude: Obiter Dictum (Social Psychology; Rousseau; Hobbes)

Social Psychology is something of exhilarant. *Social Psychology* is one of the *few disciplines* that are *worth* to be studied in *Psychology*. *Social Psychology* shows how the *Worst of Human Behaviours* is not the *outcome* of *individual dispositions* and/or *traits*, but the results of ***psychosocial mechanisms*** such as: *conformism*; *social pressure* (Asch S. E., 1951, 1955 a, 1995 b, 1956); *compliance to Authority* (Milgram S., 1963, 1965, 1974; Hofling C. K. *et al.* 1966; Brief *et al*. 1991; Brief *et al*. 1995); *groupthink* (Esser J. K., 1998; Esser J. K. and Lindoerfer J. S., 1989; Moorhead G. *et al*. 1991); *effect of mere exposition* (Zajonc R., 1968); *social norms* (Sherif M., 1935,

1936, 1937); *social identity* (Zimbardo, P. G. 1972, *Prison's Experiment*); etc…; etc… .

Truly, each *individual* is a *genius* (a real *GENIUS*), and "endless" GOOD *a là* Rousseau (*Emile*), until he/she is NOT corrupted by society. Society "transmutes" its members in "stupid beasts" (*a là* Hobbes)!! If the *group's stupidity* is increased, the *person's foolishness and brutality* are also increased!! So …, both Rousseau and Hobbes are right. *Human beings* born "endless good" in their *natural state* as Rousseau stated. Then, *society* makes them become "stupid beasts" as Hobbes (and even Rousseau) argued. But, Hobbes was wrong when he suggested his *Leviathan*. A *central power* (which: decreases *individual rights* and *liberties*; and, enhances *social control*) *creates* and *enhances* only *brutality*. It will increase *social conflict* and *violence* as it produces a permanent *captivity*. The *Global Panopticon* makes this be even stronger. Indeed, Hobbes' ideas[16] were developed in England under a *Central Power*. Hobbes had never known *human beings* in their *Natural State*, but he knew English people educate at the University of Oxford!! The *brutal* and *violent human beings*, who he knew, were the result of that kind of society and education. Hobbes wanted to ingratiate himself with the existing *Central Power*, when he wrote the Leviathan.

[16] *Exempli gratia* : *Homo Homini Lupus est*; *Bellum omnium contra omnes* ; etc… .

The *groupthink*, the *conformism*, the *social pressure*, the *compliance to Authority*, the *social identity*, leads people to act *irrationally*. Under those *factors*, people lose their *natural* and *original ability* to act like *intelligent* and *moral beings*.

Indeed, the *Psychosocial Mechanisms* tend to **prevail onto *Individual's REASON* and *MORALITY***[17]. Rarely are individuals an exception! The *Academic World*, indeed, is moved by those *mechanisms*. The same *psychologists*, who pretend to know them, are determined more than others by them[18]! *Psychologists* do not help *individual freedom* and *determination*, but *social homologation*. This is a fact. We should not be surprised that a *recent experiment* has found people to be more inclined to *compliance to Authority* than they were at Milgram's time. But, this is very dangerous. As History taught and proved, all the *Worst Things*, which happened in the *Human History*, happened when the *compliance to Authority* prevailed onto *individual reasoning* and *determination*.

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[17] The present writer studied plenty of these *phenomena* mainly among: *Psychologists*; *Legal and Academic Contexts*; *Neighbour's relations*; *Group's dynamics*.

[18] Actually, *psychologists* are the worst of all. They are so obsessed to appear *normal*, that they tend always to:

1) comply with *Authority's Requests* (it does not matter how much they are *illegitimate*, *illegal* and/or *amoral*);
2) *Homologate* them(selves) to the *groupthink*;
3) Etc… .

They consider *mentally ill*, whoever acts outside their *Normal Distributions*. Thus, they *enslave* themselves inside the *Normal Distributions* they created. Then, they attempt to *enslave* all the rest of people inside their *Normal Distributions*!! At the end, they are both *prisoners* and *gaoler* of a *New Tyranny*: the *theocracy* of the *idol Homologation*. Like *Procrustes*, they cut out everything they believe to be outside the *standards* they give!

At the end, the *psychosocial mechanisms* have to be considered for studying any *Social and Psychological Science* and *Construct*, as they work: **both**, *intra* the *experts' group*; **and**, *infra* the *experts' group*. *Psychosocial mechanisms* are the *deus ex machina*.

An Example of Psychosocial Mechanisms in Legal Setting

During a *Civil hearing*, a *Judge* invented a *regulation* that did not exist. He was not crazy. He wanted: **both**, to state his power; **and**, to taste the ability of *lawyers* to defend legality. He took the *Code of Civil Procedure* and he pretended to read a *regulation*. But, he invented one completely.

At the hearing, twenty *lawyers* (more or less) were present for different reasons. None of them recognized the mistake. Only one person (who was NOT a Lawyer, yet[19]) was able to recognize that the *Judge* was inventing the *regulation*! He took the *Code* and started to read the *real one*, meanwhile all the rest of the lawyers continued to believe at the *inexistent regulation* that the *Judge* invented[20]!! It was extremely amazing to see them!! After the mistake was clarified, some of the *expert Lawyers*

[19] And, then who chose to not become like them!

[20] This shows how much strong *social mechanisms* and *Authority obedience* are.

People tend to follow ***uncritically***: *Authority*; and *Majority*!!!!!

But, … remember the *lemmings*! Remember the *lemmings*! Remember the *lemmings* before following the *Majority*!!!!!

continued to believe in the *inexistence regulation*!! Outside the Court's room, they argued that maybe it was not on the *Code*, but in some other *Act*!?!?!?

Back to Raz …

To sum up, the success of *Raz's theory* cannot be explained by *legal reasons*. But, it can be elucidated by those *psychosocial mechanisms*, I told *supra* (above).
People believed in *Raz's theory* as he was a *Lecturer* of the *University of Oxford*. It was enough for them. It was not a matter that his *theory* was *nonsense* inside the *English Legal Tradition*!!

Paine versus Burke: General Will and Historical Experiences

English Legal System, indeed, is not based: **either,** on *ontological principles* (*a là* Natural Law); **or**, *General Will* (*a là* Paine). It is based on *historical rights* (*a là* Burke). The *latters* have been created by, and reflect the, *pro tempore relations of Power* among *people* and *social strata / classes*.

The *General Will a là* Paine, indeed, requests a *Social Contract*. In other words, the *Social Contract* is the *Written Constitution* of a Nation. Whereas most of the *Modern Legal Systems* are based on a *Written Constitution*, *English Legal System* is NOT.

English Legal System is, in somehow, still based on *Historical Rights a là* Burke. This means people's *rights*: **both**, do not come from any *eternal ontological*

principle; **and**, do not come from any *social contract*. But, people's *rights* come from the *pro tempore relations of power* that are negotiated, continuously, inside the *social conflict and dynamics*.

For these reasons, the *Westminster Parliament*: **both**, has no limit; **and**, cannot be bound by its previous decisions.

It can enact what it pleases, as whatever it pleases to the *Parliament* represents and reflects the *pro tempore rights* and *relations of power* that have been determined by the *eternal social conflict*.

An example of a Legal System a là Burke.

An example of a *Legal System a là* Burke is given by the *International Law*.

After the *Second World War*, the International Tribunal of Nuremberg (1945) and Tokyo (1946) were created. They were an *act of creation* made by the Winners. These Tribunals did not comply: **either**, with the ongoing *International Law*; **or**, with existing *eternal international principles*. It was a mere *act of creation*, which was able to transmute the *International Law*: **from,** a *Law for States a la'* Grotius; **to,** a *Legal System* that includes *individuals* like possible titular of *rights* and *duties a la'* Kelsen. It was simply as: the *pro tempore* "most powerful" *a là* Trasimacus wanted it. Nothing more! Nothing less!

Before the International Tribunal of Nuremberg (1945) and Tokyo (1956), this has never happened.

For instance, after the First World War, this kind of proposal was considered impossible. France and England proposed the creation of a *Tribunal* for processing the German Imperator "… for supreme offence against international morality and sanctity of treaties" (Greppi E., 2001). But, according to the *International Law*, it was unmanageable as *International Law* refers only to States' *responsibilities*. *International law* could not be applied to *individuals* (Orlando V., 1940).

Although the English Prime Minister Lloyd and his French colleague Clemenceau argued the existence of two *legal precedencies* (the cases of Luis XVI, in France; and Charles I, in England), the *wisest* and *sagest* Italian Prime Minister Orlando (an outstanding jurist) observed that both of them were a *legal precedence* only inside the *National Law*, but not inside the *International Law*.

They simply stated that a *sovereign* can be judged according to the *National Law*. But, they do not say that *International Law* can be applied directly onto individuals, even if they are organs of the State (such as: imperator).

ALLAN

Whereas Raz started from *Intuition*, Allan (1993) began from the "*general living idea"* (which *English lawyers* have about *Rule of Law*). According to Allan, *English*

Lawyers understand *Rule of Law* as "… an amalgam of standards, expectations, and aspirations". *Rule of Law* "encompasses traditional ideas about individual liberty and natural justice, and, more generally, idea about the requirements of justice and fairness in relations between government and governed".

Allan's method was better than Raz's method. As I explained *supra* (above), *English Legal Tradition* is not based onto *ontological principles*, but *historical rights*. Hence, Allan (who has been a finer lawyer than Raz) wanted to start from the *pro tempore* idea, which Lawyers had at that time, about *Rule of Law*.

Unfortunately, *Rule of Law* lost its deep meaning. What he found was a *simulacre*, as I explained *supra* (above).

Rule of Law like: Substantial and Procedural Fairness; Natural Justice; Equality; Separation of Powers …

According to Allan, *Rule of Law* expresses the: *concept* of *Justice* (*substantial* and *procedural fairness*); *notion* of *Equality*; *Universal Suffrage*; *Separation of Power*.

Actually, Allan failed to formulate a *descriptive theory* of the *Rule of Law*. Allan presented: **either**, his own *Legal* and *Political idea* about *Rule of Law*; **or**, the *pro tempore* more fashionable *Legal* and *Political idea*, which *English Lawyers* had about *Rule of Law* at that time.

But, *Rule of Law* is *not* what Allan said! The *facts* give opposite evidences.

For instance, *Rule of Law* does not include at all, the *separation of Power*.

Separation of Power and English Legal System

Rule of Law has *nothing* to do with *Separation of Powers*.

Separation of Power is a different "subject matter" (Conklin W. E., 1989). Moreover, it is NOT a principle of *English constitutionalism*.

Although one of the first philosophers, who formulated the *doctrine* of the *Separation of Power*, was John Locke in the 1690; the *English Constitution* has never ever recognized any *real division* of *Powers*, as it was done, *exempli gratia*, in France and/or in U.S.A. (Fenwick, 1993).

According to Fenwick (1993), the *division of Powers* inside the *English Constitution* does not exist. There is *nothing* of Montesquieu's ideas.

The "judges can create law".

"The ministers, who are member of executive, sit as members of the House of Commons which is a legislative body".

"Lord Chancellor is a minister as well as head of the judiciary, and it is also a member of the House of Lords in its legislative capacity".

"The executive can effectively determinate the legislative output of Parliament, theoretically a separate body".

On the same advice, Schwartz B. (1955) stated "in Britain the doctrine of the separation of powers today means little more than an independent judiciary".

English constitutionalism is based on the *fusion of Powers* rather than their separation (Barendt E., 1998). According to Bagehot W., "the efficient secret of English … constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers".

This is confirmed by the *Report* of the *Committee on the Ministers' Power* (1932): "In the English constitution there is not such thing as the absolute separation of legislative, executive, and juridical power; in practice it is inevitable that they should overlap".

This is an *evidence* of how *everything, REAL EVERYTHING,* can be put inside a *simulacrum*!

Universal Suffrage

Universal Suffrage is not part of *Rule of Law* at all. It is a *political choice*, a *legal principle* and/or *value*, which is completely autonomous, independent, from *Rule of*

Law. Otherwise, the same *English Legal History* has confuted *Universal Suffrage* to be an aspect of *Rule of Law*!!

Equality

I have already spoken about it, when I wrote about the *second principle* of Dicey.

Procedural and Substantial Fairness

Rule of Law does not include any *procedural* and *substantial fairness* as it is proved by *English Legal History* and *Practice*. On the contrary, it requests only the *formal respect* of the *Law*.

Indeed, when *Rule of Law* is not applied like *Supremacy of the Law above Power*, *Rule of Law* expresses the *principle* of *Formal Validity*. Nothing more! Nothing less!

But, it is more *fashionable* to tell people that *English Legal Tradition* overflow of *Fairness* (*procedural* and *substantial fairness*)! However, this is just political *propaganda*. They are *empty words*, behind which there is a simple principle of *Formal Validity*. That is all, Folks!!

Unfortunately, even this principle of *Formal Validity* is not respected most of the time. So, *Rule of Law*, at the end, loses all its meanings. Under the *sermons* about *fairness*, there is nothing.

An example of this happened at the *University of Cambridge*, *Faculty of Law*. It happened where, the best Lawyers were. It is reported in the appendix.

It shows how *Rule of Law* is not applied: **either**, like *formal validity*; **or**, *procedural* and *substantial fairness*. But, it is applied as: **both**, *Power* can do whatever it pleases; **and**, *Authority* can and must use its powers to hide its own responsibilities.

Fairness is an "inexistent" reality. It exists as long as people are forced to be silent. It exists as long as all the abuses, unlawfulness and illegalities, are hidden.

RULE OF LAW LIKE PRINCIPLE OF FORMAL VALIDITY

To sum up, *Rule of Law* is the less evocative name of the *principium* of *Supremacy of the Law above the Power*.

It means two basic things.

First, it affirms that any *Power* to be legitimate have to be: **both**, given by *Law*; **and**, used complying with the *procedures* and *porpoises* that *Law* stated.

Second, for anyone in any position, it affirms a *principle of formal validity*. This principle requests people to obey and to apply *Law*.

In other words, *Rule of Law* is the *basic command* of a *Legal System*.

The *principium* of the *Sovereignty of the Parliament*, on the contrary, states that *Parliament* is the only *subject* that it is above *Law*. This is why *Parliament*: **both**, can create and change the *Law*; **and**, cannot be bound by previous *Law*.

These principles are not a *tautology* as Raz (1977) affirmed. They are the two basic constituents of any *modern Legal System*. Without them, the *modern Legal Systems* cannot exist. Without them, only *Ancient Regime* and *despotism* exists.

I have to make a clarification.

This principle makes a distinction between two situations. In the first one, a person has some kind of power onto other persons. In the second one, there is not the former condition. In the first case, it is allowed to do only what the Law allows to do. In the second case, it is allow doing everything, except what the Law denies.

Replying to the critics about this idea of Rule of Law

Rule of Law, as I postulated, has been accused to be unable to distinguish **between** a *despotic government* **and** a *democratic one* (Turpin C., 1995; Raz 1977). These critics are unjustified and unfounded for the reasons I have explained *supra* (above).

Actually, *Rule of Law* can distinguish **between** a *despotic government* **and** a *democratic one*, **only, and only if,** it means *Supremacy of the Law above Power*. Truly, the distinction **between** *despotic governments* **and** *democratic governments*

cannot be done by a concept of *Rule of Law*, which is reduced to be a *nebulous* and *vague concept* as some authors have done.

As I explained, it makes *Rule of Law* become a *simulacre* of its real meaning. It has two consequences: **first**, the attention is moved from *Supremacy of Law above Power* to something else; **second**, *Rule of Law* becomes a *vague concept*, an instrument of *Legal Mystification a là* Bentham. In the latter case, *Rule of Law* can be applied in different manners from case to case. At the end, a *Despotic Government* will be possible behind the appearance of a *Democratic one*!!

There is only one way to distingue between *despotic governments* and *democratic governments*. The *democratic governments* need three elements:

1) *Rule of Law* applied like *Supremacy of Law above Power*;
2) a *corpus* of fundamental principles and values written inside a Constitution (*Social Contract*);
3) *Judges*, *Lawyers* and *people*, who are brave enough to defend those *values* against the tendency of *Power* to go beyond them.

Without these three conditions, there is only a *despotic government*. It could be more *evident* (overt) or more *veiled* (covert), but it remains a *despotic government*.

Although *English constitution* is "one of the first" (Boutmy E., 1891), it has not evolved into *lex scripta*. *English Lawyers*, instead of attempting to create a *corpus* of

legal values, have tried to put some of them inside *Rule of Law*. But, it was the wrong choice. It leads to create *vague concepts* as I have told.

On one hand, according to Jeffrey Jowell (2000), some authors attempted to transform *Rule of Law* in a principle of *institutional morality*, as it was the only *instrument* they had to: **both**, limit "the abuse of power"; **and**, force power to be fairly exercised.

On the other hand, *English lawyers* love *ambiguous concepts*, despite *lex scripta*[21]. This is as: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them" (Bishop Hoadly, 1717). Ambiguous concepts give Lawyers far more power to be free to interpret Law as they like. This allows *Law* to be applied in very different ways from case to case, as it was argued by Bentham. It is an instrument of *Legal Mystification*.

[21] Latin for: written Law.

LAW'S MYSTIFICATION

Bentham described five *instruments* for *mystifying Law*. But, *mystification* is not only a *legal issue*. It is a common *Social* and *Psychological Sciences* affair[22].

Bentham's five mystification instruments

The first instrument employs *descriptive* instead of *normative* statements. This allows full *arbitrary* power. Those statements become: for someone, *compulsory commands*; for someone else, *not obligatory directives*.

The second instrument uses *wide* and *void concepts*. They can be interpreted, from time to time, from person to person, as one likes.

The third instrument applies *legal simulation*. They make *fiction* become more important than *facts*.

The fourth instrument engages *pseudo-descriptive* statements. They are in their appearance *descriptive*, but they tend to lead people: *conducts*; and, *beliefs*.

The fifth instrument involves *pseudo-technique* language. It makes the *discourse* be incomprehensible for *profane* people.

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[22] In particular, it is very common in Psychology. The present writer has studied plenty of cases of *Mystification*, which were done by Psychologists. Moreover, whereas *Law* is bound by *facts*, *Psychology* is not. Most of the things, psychologists say, are only their own *fantasy*! Psychology is only a game of *interpretation*. So, it is very easy for them to abuse of their *power* and *position*. See: Epis L. (2011/2015), *De Nova Superstitione – Alcune Questioni sullo Status Epistemologico della Psicologia, Psicopatologia e Psicanalisi*. Published in: www.lukae.it. See page "*Psychology & Epistemology – Psicologia & Epistemologia*".

Rule of Law and Legal Mystification

Rule of Law had its own *clear meaning*. It expressed the *principium* of the *Supremacy of the Law above the Power*. Then, it was made a *nebulous* and *void concept*.

In this way, its *original meaning* has been weakened. So, it has become an *instrument of mystification* since it began to be a *nebulous concept*.

Exempli gratia.

From one hand, people believe to live in a *Legal System* based on: *procedural* and *substantial fairness*; *equality*; and plenty of other *noble principles*.

On the other hand, they do not simply "exist"! They are NOT for everyone! They are applied in very different manners from case to case.

BIBLIOGRAPHY

Alder J. (1989), *Constitutional and Administrative Law*, London: Macmillan,

Allan T. R. S. (1993), *Law, Liberty, and Justice – The Legal Foundations of British Constitutionalism*, Oxford: Oxford University Press

Allen M., Thompson B. and Walsh B. (1994), *Cases and Materials on Constitutional and Administrative Law*, UK: Blackstone Press Limited.

Asch S. E. (1951), Effect of group pressure upon the modification and distortion of judgment. In H. Guetzkow (ed.), *Groups, leadership and men*. Pittsburgh, PA: Carnegie University Press.

Asch S. E. (1955 a), Opinions and Social Pressure in *Scientific American*, November 1955, pp. 31 – 35

Asch S. E., (1955 b), Studies of independence and conformism: a minority of one against a unanimous majority. *Psychology Monographs*, 70, 1 – 70.

Asch S. E. (1956), Opinions and social pressure. *Scientific American*, 193 (5), 31-35.

Barendt E. (1998), *An Introduction to Constitutional Law*, Oxford: Oxford University Press

Beale A., *Essential Constitutional Law*, London: Cavendish Publishing limited, 1994

Byron G. G. [1788 – 1824] (1841), *Childe Harold's pilgrimage : complete*, London: C. Daly

Blondel E. (1991), *Nietzsche: the Body and Culture – Philosophy as a Philological Genealogy*, London: The Athlone Press

Boutmy E. (1891), *Studies in Constitutional Law*, London: Macmillan and Co.

Brazier R. (1991), *Constitutional Reform*, Oxford: Clarendon Press

Brief A. P., Dukerich J. M., & Doran L. I. (1991), Resolving ethical dilemmas in management: experimental investigation of values, accountability and choice. *Journal of Applied Social Psychology*, 21, 380 – 396.

Brief A. P., Buttram R. T., Elliott J. D., Reizenstein, R. M., & McCline R. L. (1995). Releasing the beast: A study of compliance with orders to use race as selection criterion. *Journal of Social Issues*, 51, 177 – 194.

Cameron F. (2002), *Nietzsche and the "Problem" of Morality*, New York: Peter Lang

Conklin W. E. (1989), *Images of a Constitution*, Toronto: University of Toronto Press

Cotterrell R., *The Sociology of Law*, London: Butterworths, 1992.

Davey N. (1991), Hermeneutics and Nietzsche's early Thought, in Ansell-Pearson K. (ed.), *Nietzsche and the Modern German Thought*, London and New York: Routledge

Davis K. C. (1980), *Discretionary Justice - a preliminary enquire*, USA: Greenwood Press

Detwiler B. (1990), *Nietzsche and the Politics of Aristocratic Radicalism*, Chicago: University of Chicago Press

Dicey A. V. (1902), *Introduction to the study of the Law of the Constitution*, London: Macmillan and Co.

Duffy M. F. and Mittelman W. (1988), Nietzsche's Attitudes Toward the Jews, in *Journal of the History of Ideas*, Vol. 49, No. 2. (Apr. - Jun., 1988), pp. 301-317. Retrived the 15 December 2005 in the World Wilde Web at the URL: http://links.jstor.org/sici?sici=0022-5037%28198804%2F06%2949%3A2%3C301%3ANATTJ%3E2.0.CO%3B2-F

Epis L. (2001), *Ermeneutica Giuridica – verso una Teoria Generale*, Tesi di Laurea di Dottore in Giurisprudenza, Università di Genova, Italia). Opera attualmente non pubblicata. Thesis for the degree of Doctor in Law, University of Genoa, Italy. At the moment, it is not published.

Epis L. (2011 / 2015), *De Nova Superstitione. Alcune Questioni sullo Status Epistemologico della Psicologia, Psicopatologia e Psicanalisi*. Published in: www.lukae.it. See page: "*Psychology & Epistemology – Psicologia & Epistemologia*".

Esser J. K. and Lindoerfer J. S. (1989), Groupthink and the space shuttle Chyallenger accident: Toward a quantitative case analysis. *Journal of Behavioral Decision Making*, 2, 167 – 177.

Esser J. K. (1998). Alive and well after 25 years: A review of groupthink research. *Organizational Behavior and Human Decision Processes*, 73, 116 – 141.

Fenwick H. (1993), *Constitutional and Administrative Law*, London: Cavendish Publishing limited

Greppi E. (2001), *Crimini di Guerra e contro l'umanita' nel diritto internationale*, Torino: Utet

Greenstein F. I. (1975), personality and Politics, in Greenstein F. I. And Polsby N. W. (eds.), *Handbook of Political Science*, *Micropolitical Theory* (Vol.II), USA: Addison – Wesley Publishing Company

Heuston R. F. V. (1964), *Essays in Constitutional Law*, London: Stevens and Sons

Herling D. (1995), *Briefcase on Constitutional and Administrative Law*, UK: Progressive Printing

Hobbes T. [1588-1679] (1909), *Leviathan*, Oxford: Clarendon Press

Hofling C. K., Brotzman E., Dalrymple S., Graves N. & Pierce C. M. (1966), An experimental study in nurse-physician relationships. *Journal of Nervous and Mental Disease*, 143, 171 – 180.

Hood Phillips O. and Jackson P., (1987), *Constitutional and Administrative Law*, London: Sweet and Maxwell

Holderlin F. (1822), *Hyperion, oder der Eremit in Griechenland*, Stuttgart: J.G. Cotta; English translation in Holderlin F. (1994), *Hyperion and selected poems*, New York: Continuum

Hume D. [1711 – 1776], (1739), *A Treatise on Human Nature*, London: printed for John Noon

Hume D. [1711 – 1776] (2000), *A Treatise on Human Nature*, Oxford: Oxford University Press

Hunt L. H. (1991), *Nietzsche and the Origin of Virtue*, London and New York: Routledge

Keir D. L. and F. H. Lawson (1979), *Cases in Constitutional Law*, Oxford: Oxford University Press

Kelsen H. [1881 - 1973] (1970), *Pure Theory of Law*, Berkley: University of California Press

Jennings I. (1943), *The Law and the Constitution*, London: University of London Press

Jowell J. (2000), The Rule of Law, in Jowell J. and Oliver D. (eds) (2000), *The Changing Constitution*, Oxford: Oxford University Press

Loveland I. (1996), *Constitutional Law – A Critical Introduction*, London: Butterworths

Markie P. (2004), "Rationalism vs. Empiricism", *The Stanford Encyclopedia of Philosophy (Fall 2004 Edition)*, Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2004/entries/rationalism-empiricism/

Montinari M. (1975), *Che Cosa Ha "Veramente" Detto Nietzsche*, Roma: Astrolabio – Ubaldini Editore

Milgram S. (1963), The behavioral studies of obedience. *Journal of abnormal and social psychology*, 67, 467 – 472.

Milgram S. (1965), Some Conditions of Obedience and Disobedience to Authority. *Human Relations*, 18, pp. 57 – 76

Milgram S. (1974), *Obedience to Authority*, New York: Harper and Row

Moorhead G., Ference R., & Neck C. P. (1991). Group decision fiascoes continue: Space shuttle Challenger and a revised groupthink framework. *Human Relations*, 44, 533 – 550.

Nietzsche F. W. [1844 – 1900](2001), *The Gay Science*, Cambridge: Cambridge University Press

Nietzsche F. W. (1998), *Twilight of the Idols*, Oxford: Oxford University Press

Nietzsche F. W. (2003), On Truth and Lie in the Extra Moral Sense, in *The Human Event Web Reader* (spring 2003), Arizona State University, retrieved the 18 December 2005 at the Wilde World Web, at the address: http://www.public.asu.edu/~jacquies/172-reader-2003.html

Nietzsche F. W. (1907), *Beyond Good and Evil*, Edinburgh: The Darien Press

Nietzsche F. W. (1995), *Human, All Too Human I*, USA: Stanford University Press

Nietzsche F. W. (1995), *The Complete work of Friedrich Nietzsche*, USA: Stanford University Press

Nietzsche F. W. (1967), *Thus Spake Zarathustra*, London: George Allen and Unwin LTD

Nietzsche F. W. (1994), *On the Genealogy of Morality*, Cambridge: Cambridge University Press

Nietzsche F. W. (1970 e 1977), *La mia Vita*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *La Nascita della Tragedia*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Sull'Avvenire delle Nostre Scuole*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977),David Strauss, *L'uomo di Fede e lo Scrittore*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Sull'utilita' e il Danno della Storia per la Vita*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Schopenhauer come Educatore*, Milano: Adelphi

Nietzsche F. W. (1970 e1977), *La filosofia nell'Epoca Tragica dei Greci*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Umano, Troppo Umano I*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Umano, Troppo Umano II*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Aurora*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *La Gaia Scienza e Idilli di Messina*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Cosi' Parlo' Zarathustra*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Al di la' dell Bene e del Male*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Genealogia della Morale*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Crepuscolo degli Idoli*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *L' Anticristo*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Ecce Homo*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Scritti su Wagner*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Ditrambi di Dionisio*, Milano: Adelphi

Nietzsche F. W. (1970 e 1977), *Appunti Filosofici*, 1867 – 1869, Milano: Adelphi

Orlando V. (1940), Il processo del Kaiser, in *Scritti vari di Diritto Pubblico e Scienza Politica*, Milano

Perelman C. (1959), *La Giustizia*, Torino: Giapichelli

Perelman C. (1979), *Logica giuridica – Nuova Retorica*, Milano: Giuffre'

Perelman C. and Olbrechts – Tyteca L. (1958), *Traité de l'argumentation - la nouvelle rhétorique*: Paris : Presses universitaires de France

Popper K. R. (1995), *The Open Society and its Enemies*, London : Routledge, 1995.

Posner M., Goldsmith R. and Welton K. E. (1967), Perceived distance and the classification of distorted patterns in *Journal of Experimental Psychology*, 81, 10-15

Posner M. and Keele (1968), On the genesis of abstract idea, in *Journal of Experimental Psychology*, 77, 353-363

Pruss A. R. (2002), *Ex Nihilo Nihil Fit: Arguments New and Old for the Principle of Sufficient Reason*. The article was retrieved in the World Wide Web. It was read the 15 December 2005. The internet address is written above: http://www.georgetown.edu/faculty/ap85/papers/ENNFtalk.html

Raz J. (1979), *The Authority of the Law – Essays on Law and Morality*, Oxford: Oxford University Press

Rohls J. (1995), *Storia dell'Etica*, Bologna: Il Mulino

Rousseau J. J. [1712 – 1778] (1993), *Emile*, London: Dent

Schutte O. (1984), *Beyond Nihilism: Nietzsche Without Masks*, Chicago: University of Chicago Press

Schwartz B. (1955), *American Constitutional Law*, Cambridge: Cambridge University Press

Shapiro I. (eds) (1994), *The rules of law*, nomos XXXVI, New York: New Your University Press

Sherif M. (1935), A Study of some social factors in perception in *Archives of Psychology*, number 187

Sherif M., (1936). The psychology of social norms. New York: Harper.

Sherif M. (1937). An experimental Approach to the Study of Attitudes in *Sociometry*, 1, pp. 90-98

Sherif M., 1935, 1936, 1937

Simmonds N. E. (2005a), Law as a Moral Idea, in *University of Toronto Law Journal*, 55, 61-92

Simmonds N. E. (2005b), Jurisprudence as a Moral and Historical Inquiry, in *Canadian Journal of Law and Jurisprudence*, 18, 1-28.

Spinosa B. [1632-1677] (1996), *Ethics*, London: Penguin

Sternberg R. J. (2000), *Psicologia Cognitiva*, Padova: Piccin

Sokel W. H. (1983), Political uses and abuses of Nietzsche in Walter Kaufmann's Image of Nietzsche, in *Nietzsche Studien*, 12, pp. 436-442

Strong T. (1976), *Friedrich Nietzsche and the Politics of Transfiguration*, Berkeley: University of California Press

Thiele L. P. (1990), *Friederich Nietzsche and the Politics of the Soul - A Study of Heroic Individualism*, USA: Princeton University Press

Thomas Mann [1875 – 1955] (1948), *Nietzsches Philosophie im Lichte unserer Erfahrung*, Berlin: Suhrkamp

Turpin C. (1995), *British Government and the constitution – Texts, Cases, and Materials*, London: Butterworths

Vattimo G. (1974), *Il Soggetto e la Maschera – Nietzsche e il Problema della Liberazione*, Milano: Bompiani

Vattimo G. (1988) *The End of Modernity: Nihilism and Hermeneutics in Post-modern Culture*, trans. John R. Snyder. Cambridge: Polity Press.

Vattimo G. (1992) *The Transparent Society*, Johns Hopkins University Press.

Vattimo G. (1986), The End of (Hi)story, *Chicago Review* 30 (4): 20-30.

Viola P. (1994), *E' Legale Perche' lo Voglio Io. Attualita' della Rivoluzione Francese*, Roma – Bari: Laterza.

Warren M. (1985), Nietzsche and Political Philosophy (in Nietzschean Explorations) in *Political Theory*, Vol. 13, No. 2. (May, 1985), pp. 183-212; retrived the 17/ Dicember/ 2005 in the World Wilde Web at the URL: http://links.jstor.org/sici?sici=0090-5917%28198505%2913%3A2%3C183%3ANAPP%3E2.0.CO%3B2-R

Wicks R. (2004), Friedrich Nietzsche, in *The Stanford Encyclopedia of Philosophy (Fall 2004 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2004/entries/nietzsche/>.

Wilson G. (1979), *Cases and Materials on Constitutional and Administrative Law*, Cambridge: Cambridge University Press.

Wittgenstein L. (2001), *Tractatus Logico-Philosophicus*, London: Routledge, 2001

Woodward A. (2002), Nihilism and the Postmodernism in Vattimo's Nietzsche, in ISSN 1393-614X *Minerva - An Internet Journal of Philosophy* Vol. 6 2002,

retrieved in the world wide web at the address: http://www.ul.ie/~philos/vol6/index.html#ccc the 10/12/2005

Zajonc R. B. (1968). Attitudinal effects of mere exposure. *Journal of Personality and Social Psychology*, 9 (Monograph Suppl. No. 2, part 2).

Zimbardo P. G. (1972), *The Stanford Prison Experiment*. A Slide – Tape Presentation produced by Zimbardo P. G., P.O. Box 4395, Stanford, Galif 94305.