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Rule of Law and Constitutional Democracy

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The rule of law is a traditional concept much used but little examined in its current magnitude. It is a cornerstone of contemporary constitutional democracy as underscored by its paramount role in cementing all of the transitions from authoritarian or totalitarian regimes to constitutional democracy. Moreover, rule of law is one of the three essential elements of modern constitutionalism with protection of human rights and limitation/separation of government powers. However it is not clear what precise characteristics the rule of law must possess to ensure a working constitutional democracy. Thus there is no consensus on what rule of law stands for, even if it is fairly clear what it stands against. In order to determine how the rule of law might contribute to establishing the legitimacy of constitutional democracy in a contemporary pluralistic society, I shall first focus on the essential jurisprudential characteristics of the conception of rule of law in three different legal traditions (German, French and Anglo-American) and then on the contrast between procedural and substantive safeguards. Secondly I will try to point out the apparent convergence which has occurred between these different traditions. Finally I will describe how rule of law could reconcile the need for predictability with that for fairness in its “globalized” formula, which has been recently shaped by sovranational hard law and soft law rules (with particular reference to the Venice Commission activity).

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The idea of the rule of law as the foundation of modern states and civilizations has recently become even more talismanic than that of democracy, but what does it actually consist of? So far, on one hand scholars have ascertained that, in the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function and that no one within the polity be above the law. Moreover, that rule of law is one of the three essential elements of modern constitutionalism with protection of human rights and limitation/separation of government powers. We've also realized that in absence of the rule of law constitutional democracy would be impossible and that the rule of law is a cornerstone of contemporary constitutional democracy as underscored by its paramount role in cementing all of the transitions from authoritarian or illiberal regimes to constitutional democracy¹. Still, on the other hand we've found a paradox at the heart of the rule of law, since that ideal demands certainty and condemns ambiguity in the law, but the ideal itself appears unclear and somehow uncertain. As a matter of fact "there is no consensus on what the rule of law stands for even if it's fairly clear what it stands against"². Like the concepts of equality or liberty the descriptive meaning of the rule of law is dependent on the prescriptive meaning one ascribes to it. Consistent with this, the rule of law has come to mean different things within different legal traditions, even within a single tradition it is often not clear whether the rule of law ought to be largely procedural or substantive and a few constitutional texts make express reference to the concept (German, Turkish, Spanish and some of the new East-European constitutions).

Then, in order to determine whether and how the rule of law might contribute to establish the legitimacy of constitutional democracy in the contemporary pluralistic society it is necessary to deal with the following issues. Firstly we have to observe the

1 Jeremy Waldron, "The Concept and the Rule of Law", *Georgia Law Review*, Vol. 43, 2008; NYU School of Law, Public Law Research Paper No. 08-50. Available at SSRN: <http://ssrn.com/abstract=1273005>

2 Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern California Review*, Vol. 74, 2001, p. 1309.

connection between rule of law and constitutional democracy and modern concept of the rule of law in three different legal traditions. Secondly we will explore the progressive convergence which has occurred between these notions during the 20th century due to the increasing internationalization and transnationalizations of the rule of law. Thirdly we will evaluate the usefulness of addressing the rule of law as a practical legal concept still able to guide and to constrain the exercise of democratic power.

Rule of law and constitutional democracy : which kind of nexus ?

The background presuppositions to take into consideration when talking about constitutional rule of law are “pluralistic society” and “legitimacy as consent”. Constitutional democracy under the rule of law could be superfluous or even undesirable in a close knit homogeneous society deeply religious and ruled by leaders who are widely believed to have direct access to divine commands and to impart proper instructions and directions to the community. In contrast, in heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieve political cohesion with minimum oppression. Because people in pluralistic societies do not share the same values or interests, the legitimacy of their fundamental political institutions ultimately depends on some kind of consent among all those who are subjected to such institutions³. The long-standing tradition that conceives institutional legitimacy and political justice in terms of consent is the one established by social contract theory, as

³ Thomas M. Franck, “Democracy, Legitimacy and the Rule of Law: Linkages” (1999). NYU Law School, Public Law and Legal Theory Working Paper No. 2. Available at SSRN: <http://ssrn.com/abstract=201054> or <http://dx.doi.org/10.2139/ssrn.201054>; Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy”, *Southern California Review*, Vol. 74, 2001, p. 1313.

articulated by Hobbes, Locke, Rousseau, Kant and, more recently, Rawls. The key dimension of that theory is the recognition that the legitimacy of government depends on the consent of the governed, but there is no agreement as to what constitutes adequate consent (actual consent for Locke and hypothetical for Rawls). Furthermore, consent is also the basis for legitimacy in theories which do not fall within the social contract paradigm but which nonetheless bear great affinity with it, such as Habermas' one.

Why did I say "political cohesion with minimum oppression"? Might consent to constitutional democracy and rule of law legitimate coercion instead of eliminate it? Indeed, constitutional democracy itself can be oppressive since it implements the will of political majorities thus coercing political minorities to contribute to the realization of the majority objectives even in cases of strong disagreement. For its part, the rule of law itself can be coercive inasmuch as citizens are subjected to laws with which they disagree or which they find oppressive; many types of coercion are likely to be imposed largely through implementation of the rule of law. Such a tangle can be overtaken if we look at the consent in question as akin to consent in contract, where uncoerced agreements between the parties at the time of making the contract legitimates subsequent enforcement of such contract even against a party who has come to regret her or his original agreement. Similarly, if constitutional democracy and the rule of law can be genuinely legitimated on the basis of the consent stemming from universal suffrage, the mere fact they may also be coercive would not necessarily nullify their legitimacy⁴.

Still, for present purposes we must pay attention to the split which can occur between these two concepts we've been facing. The core of the rule of law-democracy nexus is the recognition that building democracy and the rule of law may be convergent and mutually reinforcing processes whenever the rule of law is defined in broad and ends-based terms rather than in narrow

4 Leonardo Morlino et al (eds), *Rule of Law and Democracy*, Leiden, The Netherlands, Brill, 2010, p. 30 ss.; Richard H. Fallon Jr., "The Rule of Law as a Concept in Constitutional Discourse", *Columbia Law Review*, Vol. 97, 1997, p. 7.

and procedural terms. In other words, the nexus is strong when the rule of law is conceived in its relationship with substantive outcomes, like justice, democratic governance and accountability⁵. This distinction resorts to the opposition between *thin* and *thick* conceptions of the rule of law. Formal and substantive notions are certainly related and some scholars argue against a thin/thick dichotomy pointing at the fact that in situations of social and political change both formal and substantive features of the rule of law may be “thinner” or “thicker”. However, in general terms, a focus on thin definitions places emphasis on the procedures through which rules are formulated and applied, whereas thick definitions aim at protecting rights and frame it within the broader human development discourse. One view has been held by Professor Joseph Raz by asserting that “a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirement of the rule of law better than any of the legal systems of the more enlightened Western democracies. The law may institute slavery without violating the rule of law”⁶. Lord Bingham sharply disagreed by affirming that a state which represses or persecutes sections of its people cannot be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration

5 Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept?”, *Law and Philosophy*, Vol. 21, 2002, p. 137; Brian Z. Tamanaha, “A Concise Guide to the Rule of Law”, Florence Workshop on the Rule of Law, eds Neil Walker and Gianluigi Palombella, Hart Publishing Company, 2007; St. John's Legal Studies Research Paper No. 07-0082. Available at SSRN: <http://ssrn.com/abstract=1012051> Ronald Dworkin, “The Rule of Law: Keynote Speech”, European Commission for Democracy Through Law (Venice Commission), in co-operation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law under the auspices of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, in Reports of the Conference on “The Rule of Law as a Practical Concept”, Lancaster House, London, 2 March 2012, pp. 5-11; also in *Law of Ukraine*, Vol. 4, 2013, pp. 7-13.

6 Joseph Raz, “The Rule of Law and its Virtue”, *Law Quarterly Review*, Vol. 93, 1977, p. 208.

camp is the subject of detailed laws duly enacted and scrupulously observed⁷.

The rule of law in three different legal traditions

Any attempt to put more flesh on the concept of the rule of law benefits from a brief comparison among the different legal traditions that have given shape to the modern concept of the rule of law, namely the German, the French and the Anglo-American⁸. These conceptions all endorse the rule of law in the narrow sense, but otherwise diverge significantly from one another in addressing the problem created by the rise of modern state: the tension between government power and individual rights⁹. The *Rechtsstaat* model, which had its intellectual origins in Kant's theory, is squarely predicated on a sort of symbiosis between the law and the state, where law becomes inextricably tied to the state as the only legitimate channel through which the state can wield its power. In actuality the concept has evolved since its first implantation towards more positivistic

7 Tom Bingham (ed), *The Rule of Law*, London UK, Penguin Books, 2011, p. 213.

8 The authorship of the notion is still undefined. For different opinions see Ivor Jennings, *The Law and the Constitution*, London, University of London Press, 1959, p. 48 and Blandine Kriegel, *Etat de droit ou Empire?*, Paris, Bayard Culture, 2002, p. 82. The topic is diffusely approached in James R. Silkenat et al (eds), *The Legal Doctrines of the Rule of Law and the Legal State*, *Ius Gentium: Comparative Perspectives on Law and Justice*, 38, Springer International Publishing, 2014.

9 Kaarlo Tuori, "The Common Core of the Rule of Law and the *Rechtsstaat*", European Commission for Democracy through Law (Venice Commission), in co-operation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law under the auspices of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, in *Reports of the Conference on "The Rule of Law as a Practical Concept"*, Lancaster House, London, 2 March 2012, pp. 13-17; also in *Law of Ukraine*, Vol. 4, 2013, p. 14; Pietro Costa, "Lo Stato di diritto: un'introduzione storica", *Lo Stato di diritto*, eds Pietro Costa and Danilo Zolo, Milano, Feltrinelli, 2002, p. 94.

configurations accordingly to which the *Rechtsstaat* made possible the systematic deployment of a legal regime poised to accommodate a plurality of conceptions of the good¹⁰. As we know, from a historical standpoint the shift from a Kantian to a positivistic *Rechtsstaat* was traceable to the failure of the liberal revolution of 1848 in Germany. As a consequence of this failure, there followed a de-emphasis of fundamental rights as constitutional principles, coupled with the emergence of a conception of the *Rechtsstaat* as primarily formal in nature. And according to this the *Rechtsstaat* was not concerned with the content or purpose of the law of the state, but only with the methods employed by the state to foster its realization. In the end, the Kantian ideal of individual autonomy and formal equality to be promoted by treating all persons as ends rather than means, falls short both from formal and from substantive viewpoints. From a formal standpoint, it remains too abstract, and from a substantive standpoint, consistent with the Weimar experience, it is insufficiently universal. Positivistic rule through law, on the other hand, makes for increasing predictability, which is particularly important as social and legal relationships become more complex without providing assurances that law will be fair. The current *Rechtsstaat* “seeks to reconcile the need for predictability with the quest for autonomy through commitment to substantive values entrenched of respect for human dignity as the paramount constitutional value”¹¹.

The French *Etat de droit* is much more recent than the German model and was originally derived from the latter¹². The French term is a literal translation of the German *Rechtsstaat* adapting and transforming the concept found in nineteenth century

10 Rainer Grote, “Rule of Law, *Rechtsstaat* and *Etat de droit*, in Constitutionalism, Universalism and Democracy: A Comparative Analysis”, eds Christian Starck, Baden-Baden: Nomos Verlagsgesellschaft, 1999, pp. 278-281.

11 Tuori, “The Common Core of the Rule of Law and the *Rechtsstaat*”, p. 15.

12 Jacques Chevallier, “L’État de droit”, *Politix*, Vol. 7, no. 28, 1994, pp. 163-165; Marie J. Redor, “De l’État légal à l’État de droit. L’évolution des conceptions de la doctrine publiciste française, 1870-1914”, *Politix*, Vol. 7, no. 27, 1994, pp. 193-197.

German legal thought so radically that the French expression came to acquire a completely different meaning from that connoted by the positivistic *Rechtsstaat*. Indeed, in its current meaning as understood in French legal theory *Etat de droit* does not mean “state rule through law” but rather constitutional state as legal guarantor of fundamental rights (against the infringements stemming from law made by parliament). Unlike *Rechtsstaat* or “rule of law”, the French option does not refer to law as a whole, but rather to fundamental rights as having the force of law. In other words, the *Etat de droit* is the legal regime shaped by fundamental liberal rights which places constraints on the *Etat legal*. As Carré de Malberg predicted, the *Etat de droit* could not be fully realized until the adoption of constitutional review of parliamentary laws (a development that took place in France in 1971 when the Constitutional Court invalidated for the first time a law for infringement of a fundamental right enshrined in the 1789 Declaration of the Rights of Man). France’s recourse to the *Etat de droit* as a check on the laws issuing from parliamentary democracy is a stunning development in a culture long persuaded that parliamentary democracy would best express the nation’s will and at the same time adequately protect its citizens’ fundamental rights. According to Rousseauian roots, the conflict between clashing individual interests and the common good of the polity could be resolved through pursuit of democratic selfgovernment¹³. The key to Rousseau’s democracy, oriented towards the general will, is self-restraint as a free assumption of responsibility. The representatives of the people acting after the repeal of feudal privileges could easily be expected to legislate in the common interests of all, particularly to the extent that bourgeois interests were projected as being universal. Consistent with this all laws of parliament, regardless of their outcome, were perceived as expression of the general will¹⁴. If there were room for fulfillment of both the general will and part of the objectives issuing from private wills, then the need for self-restraint and the requisite sacrifices regarding self-interest might well be outweighed by the benefits of increased participation in

13 Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy”, p. 1331.

14 Jean J. Rousseau, *The social contract*, Charles Frankel ed, New York , Hafner Pub. Co., 1947, p. 18.

democratic lawmaking and enhancement in the scope of selfdetermination. If, however, adherence to the general will requires complete suppression of private interests, then Rousseauian legitimation of law would remain unpersuasive as it is difficult to see why someone would give up nearly everything one holds dear to take an active role in producing laws poised to frustrate one's most cherished objectives¹⁵.

Let's go to the Anglo-American version of the rule of law. Although the British, like the French, have a long tradition of parliamentary sovereignty, they have developed a positive attitude towards judicial power which has enabled them to cast the judge as a protector of the citizenry rather than as the enemy of the people. Unlike the United States, the United Kingdom does not have a written constitution and its judges thus do not have as clear a mandate as their American counterparts to provide a check against legislative powers. Nevertheless the Anglo-American tradition, relying on the common law, has developed a strong sense of the rule of law along which rule of law functions as a buffer between the interests of the state and those of its citizens rather than depending exclusively on the state as such¹⁶. The modern theory of rule of law was brought into attention in particular by Professor Dicey. At his sense this principle resulted from the existing common judge-made law over the years and had three core features. First that no person should be punished but for a breach of the law, which should be certain and prospective so as to guide peoples' action and transaction and not to permit them to be punished retrospectively. Second that no person should be above the law and that all classes should be equally subjected to the law. Third that the rule of law should emanate not from any written constitution but from the common-law¹⁷.

15 Roger D. Masters, *The Political Philosophy of Rousseau*, Princeton NJ, Princeton University Press, 1968, p. 315; Michel Troper, "Le concept d'État de droit", *Droits*, Vol. 15, 1993, p. 51.

16 Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, 2002 ; Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law", *American Political Science Review* , Vol. 91(2), 1997, p 245.

17 Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed, Oxford, 1915, p. 44. See also Gianluigi Palombella,

The limit of this position has been the belief that any discretionary power would inevitably lead to the arbitrary exercise of power, since in the first half of the twentieth century discretion was seen as necessary for the decision-making required in an increasingly complex society.

In its American version the rule of law is grounded on a written constitution designed to provide legal expression to preexisting, inalienable fundamental rights. These rights are deeply rooted in Lockean vision of natural rights as belonging to the individual and as preexisting and transcending both the social contract and civil society. In accordance with this vision, the individual agrees to the social contract and the civil society in order to secure better coordination in the enforcement of his or her rights. This, in turn, imposes two essential duties on the state: the negative duty to refrain from interfering with its citizen's enjoyment of their rights and the positive duty to discourage or punish private infringements of fellow citizens' rights through the provision of police protection and the enforcement of private contracts. In other words, if natural rights were universally accepted and sufficient to allow everyone to fulfill his or her welfare needs, then legal standards could be automatically set and no room would be left for politics, and the rule of law would boil down to the deployment of procedural safeguards which mediate between right holders, the state and potential or actual infringers. It becomes clear from this rough outline how the rule of law can be invoked even against the state. Then serious questions can rise about the existence and viability of the rule of law: first the one produced by the tension between the need for legal predictability and the common law's experimental approach; second the one generated as a consequence of the clash between the need for binding and transparent criteria of judicial application of relevant legal norms and the great latitude enjoyed by common law judges prone to blurring the distinction between law making and judicial interpretation¹⁸. Inasmuch as sources of law and judicial actors

"The Rule of Law and its core", Relocating the Rule of Law, eds Gianluigi Palombella and Neil Walker, Hart Publishing Ltd, 2009, p. 39.

¹⁸ Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", p. 1339.

could be set against one another, parts of the state apparatus could be mobilized against others. Thus US federal constitutional norms can be invoked to invalidate inconsistent legislation emanating from one of the states and by setting the judicial branch as independent from the legislative and the executive branch the federal Constitution enables judges to invalidate laws enacted by the Congress. These difficulties may be surmounted if the lack of predictability associated with the common law could be tempered by procedural safeguards or if the dynamic of the common law system could foster predictability in ways that are not dependent on rules and if the realm of judicial intervention could be ultimately constrained by principle¹⁹.

The progressive convergence between these notions during the 20th century: towards a sovranational notion of the rule of law?

In the 20th century two developments have especially brought the rule of law and the *Rechtsstaat* doctrine closer to each other: the rise of administrative law and the increasing internationalization and transnationalization of the rule of law²⁰.

In Germany, elaborating administrative law was already in the early 20th century seen as the primary task in strengthening the *Rechtsstaat*. In turn, in the UK one of the paradoxes of post-Diceyan development is that administrative law, far from being an external opposite as it was for Dicey, has come to occupy a central place within the rule of law doctrine. Thus in contemporary accounts the principles and remedies of administrative law exhaust much of the contents of the rule of

¹⁹ Jeremy Waldron, The Rule of Law and the Importance of Procedure (October 6, 2010), NYU School of Law, Public Law Research Paper No. 10-73. Available at SSRN: <http://ssrn.com/abstract=1688491> or <http://dx.doi.org/10.2139/ssrn.1688491>

²⁰ Luc Heuschling, “Le renard d’un comparatiste : l’État de droit dans et au-delà des cultures juridique nationales”, *L’Etat de droit en droit international. Colloque de Bruxelles de la SFDI*, SFDI, Pedone, 2009, pp. 41-67. See also Pierre Rosanvallon, *La crise de l’État-providence*, Paris, Poitns, 1992, p. 59.

law²¹. Evidently, the main background factor to the rise of administrative law is the expansion of administrative discretion which has accompanied the rise of the welfare state and the growing involvement of government in economic and social regulation. In front of this new context, even in common law countries safeguards against arbitrary governmental powers have been sought in specific administrative law tools. Indeed “the grounds for judicial review in the UK have much in common not only with the requirements of the German principle of proportionality, but also with the French *détournement du pouvoir* which, in turn, has greatly influenced the administrative law of the Nordic countries”²².

The second background factor explaining the lowering of the wall separating the British and the continental European doctrine is the increasing internationalization and transnationalization of the rule of law which is due to the sharing of the same international human rights instruments, the European Convention on Human Rights being the most prominent of those. Despite the impossibility to report here in detail the multiple ways international treaties make reference to the principle of the rule of law, it is nonetheless worthwhile to dwell on some Council of Europe documents and activities which testify to its strong commitment to promote and strengthen the rule of law *in and among* the member states²³. The Preamble to the Statute of the

21 Jeffrey Jowell, “The Rule of Law and its Underlying Values”, *The Changing Constitution*, eds Jeffrey Jowell and Dawn Oliver, 7th edition, Oxford, Oxford University Press, 2011; Daniel Mockle, “Le débat sur le principes et les fondements du droit administratif global”, *Cahiers de Droits*, Vol. 53, 2012, pp. 31-32.

22 Kaarlo Tuori, “The Common Core of the Rule of Law and the Rechtsstaat”, p. 16; Robert McCorquodale ed., *The Rule of Law in International and Comparative Context*, London, British Inst of Intl & Comparative Law, 2010.

23 Jeremy Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law”, *The European Journal of International Law*, Vol. 22, 2011, p. 315; Randall Peerenboom, “Human Rights and Rule of Law: What's the Relationship?”, *Georgetown Journal of International Law*, Vol. 36, 2005; UCLA School of Law Research Paper No. 05-31. Available at SSRN: <http://ssrn.com/abstract=816024>; Olivier Corten, “L'État de droit en droit international : quelle valeur juridique ”, *L'Etat*

CoE underlines that “the devotion of the member states to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law principles which form the basis of all genuine democracy”. The Preamble to the European Convention on Human Rights states that “the government of European countries are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law” (notably the expression rule of law has been translated into French by *prééminence du droit* and not by *État de droit*).

Since the rule of law is clearly accepted as a fundamental ingredient of any democratic society, traditional divergences given to that notion did not prevent the growth of a spread consensus on the core meaning of the rule of law and the main elements contained within it. And above all this did not prevent CoE from looking for a solid/stable definition, according to the following statement by Tom Bingham: “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”. Then CoE has identified the rule of law’s indispensable constituent in these specific principles (European Commission for Democracy through Law-Venice Commission, Report on the Rule of Law, adopted by the Venice Commission at its plenary session, Venice, 25-26 March 2011):

-legality including a transparent, accountable and democratic process for enacting laws and public decisions: both at international and national level procedural standards of participation and justification have the ability to structure

de droit en droit international. Colloque de Bruxelles de la SFDI, SFDI, Pedone, 2009, p. 13. For the EU policies about the rule of law see Erik O. Wennerström, *The Rule of Law and the European Union*, Uppsala, Iustus Förlag, 2007 and Giacomo Di Federico, “The Protection and Promotion of the Rule of Law in the European Union: state of the art, criticalities and future perspectives”, in this Volume at p...

discretion and constrain authority in a way that surely consolidates the rule of law²⁴;

-legal certainty which is essential to the confidence in the judicial system and to productive business arrangements so as to generate development and economic progress; to achieve this confidence the state must make the texts of the law easily accessible and moreover it must apply the laws in a foreseeable and consistent manner; this encompasses a special care of the legislative drafting and requires respect for the principles of non retroactivity and of *res judicata*;

-prohibition of arbitrariness: although discretionary power is actually necessary to perform a range of governmental tasks in modern complex societies, such power should not be exercised in an arbitrary way; consequently the law must clearly indicate the scope of any such discretion and the manner of its exercise;

-access to justice before independent and impartial courts: everyone should be able to challenge governmental actions and decisions adverse to their rights or interests; normally these challenges should be made to courts of law, but some countries allow alternative challenge to more informal tribunals from which appeal may lie to a court; the role of the judiciary is essential for the rule of law and it is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact in accordance with a sufficiently transparent and predictable interpretative methodology; independence means that the judiciary has to be free from external pressure and is not controlled by the other branches of government (especially the executive); impartial means that the judiciary is not, even in appearance, prejudiced as to the outcome of the case; additionally there has to be a fair and open hearing and a reasonable period within which the case is heard and decided;

-respect for human rights: although we've seen that respect for human rights and respect for the rule of law are not necessarily

24 Joana Mendes, "Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures", I.CON, Vol. 12, No. 2, 2014, pp. 370-401.

synonymous, there is a great deal of overlap between the two concepts and many rights enshrined in documents such as the ECHR also expressly or impliedly refer to the rule of law (the right of access to justice, to a legally competent judge, to be heard, *ne bis in idem*, to an effective remedy, to a fair trial or due process, presumption of innocence); other rights may also have rule of law connotations, such as the right to expression which permits criticism of the government of the day and even rights such as the prohibition of torture or inhuman or degrading treatment or punishment;

-non discrimination and equality before the law: formal equality is an important aspect of the rule of law provided that it allows for unequal treatment to the extent necessary to achieve substantive equality and can be stretched without damage to the underlying principle to the notion of nondiscrimination which, together with equality before the law, constitutes a basic and general principle relating to the protection of human rights.

Final remarks

Legal provisions referring to the rule of law, both at the national and international level, are of a very general character and do not define the concept in much detail. This has led to doubting the very usefulness of addressing the rule of law as a practical legal concept. Liberal conceptions tend to convey a formal meaning of the rule of law, stressing generality, prospectiveness, stability and clarity as qualities that rules ought to have according to the paradigm of the rule of law; substantive conceptions, which emerged in the period that followed Western totalitarian experiences, underline the values that inform the law and are usually associated with the interventionist role law acquired in the welfare state. Nonetheless, formal and substantive conceptions are in a symbiotic relationship. And their increasing inclusion in international texts and case-law, especially those of the ECHR Court, has given a sort of new life to this dynamic notion by converting its original role of impalpable and somehow ambiguous pillar of the national state legitimacy, not necessarily in a democratic context, in a concrete and deeply shared way of being and acting which identifies the actual big community of constitutional democracies.