Comparative Law and Language

Translating the idea of "*prééminence du droit*": divergent origins and homogeneous evolutions of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto* and *Rule of law*?

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Abstract: The article analyses the different constitutional and national background of the ideas of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto* and Rule of law, to verify how much such concepts can be reciprocally translated. Such ideas are indeed linked by a common purpose: the subjection of political power to law. However, a certain homogeneity in linguistic definitions stay together with a deep heterogeneity in the rules of application, especially looked in an historical perspective. Nevertheless, the European and international integration of the legal systems seems to realize a progressive standardization also in the field of the more general concepts of legal theory, like the rule of law, taking the legislators and the courts toward a "global legality".

Keywords: Rule of law; *État de droit*; Constitutionalism; European Union; Globalization

Summary: 1. The idea of the subjection of political power to law: homogeneity in linguistic definitions and heterogeneity in the rules of application; 2. From the nineteenth-century rule of law to the constitutional rule of law in the post-liberal tradition; 2.1. Plurality of technical institutes of regulation/limitation of politics that contribute to delineating a unitary concept of "rule of law"; 2.2. The development of the technical instruments of liberal derivation in the following evolutions towards the "constitutional" State of right; 3. The standardization of institutions (and terminology) in the internationalization of the concept of rule of law, towards a "global legality"; 4. Concluding remarks: does a common and "translatable" notion run the risk of being less strong than a historically connoted legal concept?

1. The idea of the subjection of political power to law: homogeneity in linguistic definitions and heterogeneity in the rules of application

The law of the European Union has always had to deal with translating the idea of "political order subject to law". In the English version of the Treaties the term defining this concept is *rule of law* whilein the French version the expression is*État de droit,* after the former expression "*prééééminence du droit*", considered less strong culturally, has been abandoned[2]. Together with the Germans term *Rechtsstaatlichkeit* and the Italian expression *Stato di diritto* all these words refer to different historical legal experiences, and to constitutional mechanisms and rules that, although are not perfectly overlapping, share a common enlightenment and liberal culture.

Despite this unitary cultural matrix, it is still difficult to reconcile the continental notions of *État de droit* or *Rechtsstaat* with the rule of law of Anglo-Saxon legal tradition. By its very nature, however, and similarly to many other areas with autonomous notions inside the EU law, the European legal order requires a single, "translatable" notion, which the Court of Justice has developed over time in the form of a European approach to the rule of law.

However, because of the specificity of this principle one might well wonder whether the European rule of law can be qualified a special and autonomous concept. In this regard, the truth is that the principle of the rule of law has relatively recently become part of the "applicative" juridical tools of the European Union, given that its qualification as one of the founding values of the European Union was

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[2] This expression was still present in primary law until the Maastricht Treaty and it is still present at Council of Europe level.

definitely established only with the Treaty of Lisbon, by virtue of Article 2 of the TEU. The codification of the principle of the rule of law amongst the values of the Union has favoured some innovatively concrete applications. Examples are the Communication "A new EU framework to strengthen the rule of law" by the European Commission, and the case-law of the Court of Justice, in some sensitive issues such as asylum, the European arrest warrant or Article 7 TEU.

In particular, the case law of the Court of Justice, and particularly the recent decisions concerning the independence of the judiciary in Hungary and Poland, have has define some practical and operational applications of this principle .

As new will see in this contribution, the practical consequences are relevant, as in the EU case law a new notion of rule of law is emerging, having both substantive and procedural implications, that is at the basis of anextension of the competencies of the EU. This is the result of a grooving attention to comparative law studies, that implies an awareness of the different historical/legal origins of the various national terms, linked to individual legal cultures. Thus, in order to understand what the possible Europeanization, or more radically, "globalization" of a new and homogeneous idea of rule of law consists of, it is necessary to be aware of the historical reasons that different national cultures have outlined in the "pre-eminence of law over politics".

In the traditional Western legal systems the subjection of limits to political power fixed by law has developed over time with different conceptual nuances, reflecting the diversity of state experiences and corresponding inhomogeneous terminologies[3].

This is the background of the well known different taxonomies: the *Rule of Law*[4], of the Anglo – Saxon legal systems, the French *État de droit*[5], the Italian *Stato di diritt,* and the German *Rechtsstaatlichkeit*. Allerms that are largely superimposable regarding their fundamental nucleus, and which respond to a common need to bring back to a single concept the multiple institutions in which the subjection of public power to the law is manifested. pt. However, this partial overlapping clashes with a content having significantly different details, due to the legal traditions to which it belongs[6].

The translation of the terms mentioned, and first elaborated by the French and German scientific circles, has also led other legal systems to employ terminology which, although seemingly homogeneous, conceals a significant lack of congruity in detail. Thus, in Italy, *Stato di diritto* and of the Spanish *Estado de Derecho* are concepts that still express the general idea – literally taken from the French model - of the subjection of political power to the law[7].

The interchangeability of the terms *État de droit*, *Rechtsstaatlichkeit*, *Estado de Derecho,* and *Stato di diritto*, and, a fortiori, the fungibility of these expressions with the term *Rule of Law*, can therefore

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[3] For a reconstruction of the idea of the rule of law in comparative perspective, see P. COSTA, D. ZOLO (eds.), *Lo Stato di diritto. Storia, teoria, critica,* Milan, 2003, and the more extensive references cited therein ("bibliographical essay" on pp. 815 ff.). For general references see also P. KUNIG, *Das Rechtsstaatsprinzip*, Tübingen, 1986; M. TROPER, *Le concept d'État de droit*, in *Droits*, 1992, pp. 51 ff.; K. SOBOTA, *Das Prinzip Rechtsstaat*, Tübingen, 1997; O. JOUANJAN (ed.), *Figures de l'état de droit: Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l'Allemagne*, Strasbourg, 2001; J. CHEVALLIER, *L'État de droit*, Paris, 2010; R. BIN, *Stato di diritto*, in *Enciclopedia del diritto*, Annali IV, Milan, 2011, pp. 1149 ff.

[4] English-language literature refers to the rule of law as the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced, i.e. the so-called principle of government by law.

[5] French-language literature intend for *État de Droit* a state in which all individuals or groups have their activities determined and sanctioned by law, i.e. an institutional system in which public power is subject to law, based on the essential principle of respect for the law ("*primauté du droit*").

[6] See section 2.1 *below.*

[7] For the translation of the term from German into Italian, see S. PANUNZIO, *Lo Stato di diritto* (Parte I, Libri I, II), Città di Castello, 1921, in particular p. 15 and A. SALANDRA, *La giustizia amministrativa nei governi liberi,* Turin, 1904, in particular p. 14 on the reasons for the choice of translation of the German term. Again for the translation of the term in Italian, see V.E. ORLANDO, *Introduzione al diritto amministrativo*, in *Primo Trattato completo di diritto amministrativo italiano*, Milan, 1897, pp. 33 f. where he translated *Rechtsstaat* as *Stato giuridico* (legal state) and maintained the close connection of the concept with that of *Stato costituzionale* (constitutional state). On the matrices of the Spanish idea of *Estado de Derecho*, see J.A. SANTAMARIA PASTOR, *Fundamentos de derecho administrativo*, Madrid, 1988, pp. 192 ff.

be founded on a basic homogeneity that characterizes the state experiences of the Western legal tradition. However, uncritical translation risks emerge when this interchangeability ignores the persisting differences that are present, despite a strong process of homogenization[8]

Examining the evolution of the rule of law in the Western legal history is therefore essential for a conscious translation of the concept in the various experiences. At the same time, reflections on the best possible translation, and on the linguistic interchangeability among the various national experiences, constitutes a precious opportunity to verify the "historical" nature of the Rule of law itself. The concept is historically contextualized, having represented an evolutionary idea of the social order at the basis of numerous profiles of modern state organization[9]; and the dynamics of this idea continue to determine new manifestations of juridical and political relations, and will do so into the future and "beyond" the State (with the affirmation of European and global concepts of legality)[10].

The Rule of law can be "historically" identified in the form of a state which has asserted itself as an anti-thesis to the absolute state, distinguishing itself by the presence of technical-normative instruments suitable for subjecting executive political power to the rules of law; a form of state which safeguards human rights and freedoms, together with the guarantees of the social state, limiting legislative political power (constitutional state of law)[11] in the form of rigid constitutions

The idea of a "statehood subject to law" has derived from a German-speaking scientific environment, where the term *Rechtsstaatlichkeit* appeared in the 19th century[12], even if this concept, albeit in a less organic and structured way, can be found in some previous scientific discourses ,. It has persisted with the same terminology in the state forms of the 20th century as well and continues to condition the analysis paradigms of the growing supranational and "global" juridical/political dimension.

The affirmation of the "rule of law" coincided with the end of absolutism andthe affirmation of the bourgeoisie between the 18th and 19th centuries. In this political and social environment, it claimed economic power and political power, leading to a radical transformation in the structure of society and in the concept of the State[13].

As the holder of political power in the absolute state was free from any external limit, then the rule of law is a juridical-organizational response to the historical parenthesis of absolutism, aimed at neutralizing the negative effects on social dynamism by introducing guarantees in favour of the freedom of individuals (producers). During the previous period of the Middle Ages, the relativization of power passed through the political plurality of the different bodies like -corporations, sovereign, feudal systems -)[14]. The response of the rule of law was based on the fact that the power of the State was the result of the political plurality of the subjects. A response consisting in the combination of the already achieved unity of the nation-state (and the loss of legal particularism) with a limitation of the relative political power of the state through its juridical regulation.

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[8] Persisting differences which derive from the diversity of national traditions in the historical emergence of the various forms of state. See paragraph 3 *below.*

[9] On the historicity of the basic conceptions of the rule of law see P. Grossi, *L'Europa del diritto*, Roma-Bari, 2007 (also for a critique of modern generality and abstractness as a means of hiding the diversity of social reality).

[10] See B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of global administrative law*, in *Law and contemporary problems*, 2005, pp. 15 ff.

[11] See point 2.2 *below.*

[12] The paternity of the explication of the category of the *Rechtsstaat* must be attributed to R. von Mohl, *Die Geschichte und Literatur der Staatswissenschaften,* I, Graz, 1855 (and See I. Jennings, *The Law and the Constitution*, London 1959, p. 48), although the use of analogous categories - in a more or less explicit way - is certainly previous, and identifiable for example in the constitution adopted by the revolutionary Constituent Assembly of 1789 (see R. Carré de Malberg, *Contribution à la Théorie générale de l'État,* I, Paris, 1920, p. 489) or to broader and much earlier theories, such as that on Bodin's sovereignty (See B. Kriegel, *Etat de droit ou Empire?*, Paris, 2002, pp. 82 ff.).

[13] See M. Fioravanti, *Lo Stato di diritto come forma di Stato. Notazioni preliminari sulla tradizione europeocontinentale*, in R. Gherardi, G. Gozzi (eds.), *Saperi della borghesia e storia dei concetti fra Otto e Novecento*, Bologna, 1995.

[14] On legal particularism, surpassed by the rule of law and the age of codification, see P. Grossi, *L'ordine giuridico medievale*, Roma-Bari, 2002, in particular pp. 223 ff.

Therefore, the basic idea is to legally regulate state public power. In this sense, the English experience is particularly emblematic of the passage (and continuity*)* from medieval schemes of *(*pluralist*)* limitations of power to modern schemes of (normative*)* regulation of the same[15]. In the English constitutionalism of the 17th Century, the so-called "glorious English revolution", that fought against the absolutism of the Stuart dynasty, led to guarantee pluralism not by re-fragmenting national power, but by continuing to recognize the unity of the Crown and its sovereignty. Such Crown sovereignty was limited by its necessary expression through Parliament (King in Parliament)[16]; in this sense, the limitation of the sovereign power passes through a series of normative documents *(*Bill of rights, Habeas Corpus, Act of Settlement) that basically sanctioned the inviolability of the fundamental rights of citizens (bourgeois included), and the subordination of the King to Parliament as a representative political body. [17].

Although historically the basic structures of the idea of the rule of law emerged spontaneously from the limitation of absolutism in England (in the absence of a full theoretical reflection on the same), the conscious proclamation of the normative paradigm of the rule of law instead came about (in conceptually planned forms) through the two great eighteenth-century revolutions, the American and the French. It was the latter that imported the principles of the liberal state into the Old Continent. Indeed, the English customary system had been translated into the American Declaration of Independence and the subsequent Constitution which, as written documents, were more easily conveyed[18].

The rule of law as an ideology, thus, goes hand in hand with the origin of constitutionalism, marking the development of nation-states between the late eighteenth and early nineteenth centuries[19]. The concept of the rule of law presupposed, as a datum common to all national experiences of constitutionalisation, that the actions of the state (understood as state-apparatus, and therefore as executive power) should always be bound by, and conform to, the laws in force: thus the state subjects itself to compliance with the rules produced inside the same state-system, self-limiting its non-legislative public powers. The more mature constitutionalism, therefore, consists in the transition from the rule of law to a "constitutional" rule of law, even the sovereignty of parliament having been subjected to legal rules.

The reason for the existence of an arrangement of normative limitation of political power was clearly identifiable in the intention to regulate - on the basis of rational (legal*)* rules, and not mere (political) force - the clashes of interests emerging within the state borders. This was already stated in the rule of law developed in the liberal era with the limitation of executive (and judicial*)* powers, even if it lakes of a clear limitation of legislative power.

There are in fact different approaches to the organization of the plurality of interests, that emerge

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[15] On the more mature conceptualisation of the category in English law the author of reference is A.V. Dicey. See in particular A.V. DICEY, *Introduction to the study of the law of the Constitution*, and ID. *Lectures on the relation between Law and Public opinion in England during the Nineteenth Century*, London, 1914. For more details on the preceding evolution - of which Dicey takes the lead - see A. BABINGTON, *The Rule of Law in Britain from the Roman Occupation to the present day*, Chichester, 1978.

[16] On the process of institutionalisation of sovereignty in representative bodies, and its contribution to the construction of the category of rule of law, for the English experience see J.D. GOLDSWORTHY, *The sovereignty of parliament: history and philosophy*, Oxford, 1999. More generally, also as regards the continental experience, the author of reference is R. Carré de Malberg, for a synthesis of whose thought see G. BACOT, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple ed souveraineté nationale*, Paris, 1985.

[17] Furthermore the Parliament allies itself with the judicial, as technical power, in contrasting absolutism, therefore expressing an alliance between the bourgeoisie and the aristocracy in the common interest of limiting absolute power by means of juridical norms. Cfr. the Bill of Rights, but also the Magna Carta (1215), the Petition of Right (1628), the Act of settlement (1701) and the Parliament Acts (1911, 1949). See also the Claim of Right Act, 1689.

[18] On American constitutionalism and its contribution to the rule of law, in particular for its importance as a model for the evolutions of statehood in continental Europe, see A. DE TOCQUEVILLE, *De la Démocratie en Amérique,* 4 vols., Paris, 1848.

[19] C.H. MCILWAIN, *Constitutionalism and the Changing World*, London, 1939; ID. *Constitutionalism: Ancient and Modern*, Ithaca (NY), 1947.

from the interactions between individuals and organized collectivities. And such differences are at the basis of the different structures of the forms of state, definable as different the arrangements of the relations between the public dimension and citizens.

Therefore, a *Interessenjurisprudenz* (jurisprudence of interests) approach to these problems highlights how not all of the interests that may come into contact with each other are necessarily compatible. Subsequently, the need arises for different subjective positions, originally equi-ordinate ("interests of fact") to be legally qualified by parliamentary and governmental activity. This gives different protections and allows some interests to prevail, to the detriment of others[20]. Thus, the rule of law represents an answer to the question as to which interests should prevail: the organisational solution of the rule of law is based on the idea that interests are legally qualified (i.e. are not relevant just by their pre-political force), and the governance of them is subject to the rationality of law (and not to the arbitrariness of men, *Obrigkeitsstaat).*

It's about solving the conflict between interests, making them compatible or , as a possible alternative, protecting one of those interest in conflict, to the detriment of the others. These choices integrate political options, but in the logic of the rule of law they must obtain stability, through a codification of the rules, in order to assume rationality and predictability. Therefore, only a legally qualified interest can receive protection by the system. In parallel with the idea of the rule of law and constitutionalism, as a consequence, the liberal 19th century was strongly characterised by an idea of codification of law, synergic with the more general tendencies to overcome both absolutism and legal particularism[21].

The function of politics consists in the legitimate exercise of the power to qualify interests and to confer corresponding protection of differing intensity. Exercising this power takes place through the production of legal norms. The function of the legal dimension in the rule of law consists in the protection of interests, selected and qualified by politics and against possible subsequent injuries threatened by politics itself , at the executive, or even legislative level in the "constitutional" rule of law.

Thus politics, in turn, becomes subject to the law, which limits its manifestations with different intensity, according to whether the legal limit is inserted in the legislative source or in a rigid constitutional source, suitable to confer normative rationality also to the political discretion expressed in the Parliament. The liberal form of state is then characterised by the juridical recognition of the legitimacy of the existence of a plurality of political positions, even the minority ones enjoying juridical spaces of guarantee. This is important to survive the possibly arbitrarily penalising exercise of majority executive power. Subsequently, rule of law arises as the main political tool of a naturally democratic state[22].

Such political plurality goes on to translate into the recognition of the plurality of interests and the legitimacy of their reciprocal conflict, so that pluralism is a connotative element of the institutional forms of the liberal state[23]. Pluralism, as an interest of the system, is thus elevated to a founding value in the "constitutional" state of law, which guarantees the plurality of alternative political directions, also limiting the political discretion of the legislator. In the 19th century rule of law was intended in a "liberal" way, and therefore pluralism had manifested itself in a limited electoral competition to acquire

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[20] For the two most important contributions to the legal theories of interests see R. VON JHERING, *Der Zweck im Recht*, Leipzig, 1877, as well as P. HECK, *Gesetzesauslegung und Interessenjurisprudenz*, in *Archiv für die civilistische Praxis* (AcP) 112, 1914, pp. 1 ff. and ID. , *Begriffsbildung und Interessenjurisprudenz,* Tübingen, 1932.

[21] Among the extensive literature on the reasons and ideological premises of codification see G. TARELLO, *Storia della cultura giuridica moderna: assolutismo e codificazione del diritto*, Bologna, 1976.

[22] See B. MIRKINE-GUETZÉVITCH, *Les constitutions de l'Europe nouvelle*, Paris 1932, 15, for whom the rule of law is "*la démocratie exprimée en langue juridique*", since only democracy can achieve the "*supématie du droit*". See also L. CARLASSARE, *Sovranità popolare e Stato di diritto*, in S. LABRIOLA (ed.), *Principi e valori del regime repubblicano*, Bari, 2006, pp. 163 ff, for whom popular sovereignty and the rule of law in our culture are indissolubly joined.

[23] But on the (re)emergence only later of a more modern idea of pluralism, no longer in the order but (again) of the orders, J-G. BELLEY, *Le pluralisme juridique comme orthodoxie de la science du droit*, in *Canadian journal of Law and Society*, 2011, pp. 257 ff.

the legitimacy to exercise the legislative function, with suffrage notably restricted by the census[24].

Between the late19th and the beginning of the 20th century, the dynamics of the electorate on basis of the census had historically determined a disproportion in the representation of the interests of determined social classes, while the model of the form of a state "under the rule of law" was already abstractly compatible with legal protection of variegated - and not necessarily homogeneous - individual subjective positions.

Alternatively, other forms of state have represented experiences of legal recognition of a single interest instead, always prevailing: for example, the will of the monarch (in the form of the absolute state), religious authority (in the form of the confessional state), national interest (in the form of the authoritarian state), the interest of a social class (in the form of the Soviet socialist state). However, these state experiences are not "lawless states", as the law is present, but the options for qualifying the admissible interests are regulated upstream: the function of the law is not that of limiting politics, or to regulate the political clash, but to legitimize a single political option to the detriment of the others (and so, to eliminate the political clash).

Power is therefore always regulated by the law but there is no "true" rule of law when the function of the legal order is not that of regulating politics in its plural options, but only to legitimize and give strength to a single ideological option; insofar the pluralism of institutional systems, and the pluralism in the system is not recognized)[25]. In its historical manifestation, the conceptual construction of the rule of law was therefore structurally functional to found the democratic form of state, as a guarantee of the rights of individuals against the arbitrariness of qualifications of interests, pre-established in unilateral ways.

2. From the nineteenth-century rule of law to the constitutional rule of law in the post-liberal tradition

This characteristic feature, common to the systems inspired by the idea of the rule of law is, however, realised by means of a plurality of legal institutions, contributing together to limit and regulate the political power through legal norms. This plurality of technical instruments, yet, gives rise to a uniform tradition, also because the constitutionalism of the liberal and post-liberal states always moves from a common need: that of giving a legal qualification to factual interests that is not left to the sole arbitrariness of politics, but to procedural rules - in the liberal state - or even substantial rules - in the constitutional/social state- that act as a guarantee of the plurality of interests.

Modern legal systems have replaced the complexity of legal particularism with that of the structure of the system of sources of law; here, legal norms are ordered according to a hierarchical criterion, with the individual sources being given differentiated effectiveness. In this sense, the function of politics - rationalized, in the rule of law, by forcing it to express itself in the forms prefigured by the legal system - is also exercised through the choice of the degree of intensity of protection to be conferred on some interests with respect to others. The provisions of the Constitution confer protection of the highest intensity on a series of interests, while other subjective positions are only granted protection by a majoritarian political choice or by the option of administrative discretion[26].

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[24] The "bourgeois" representation that emerged, was then legitimized to exercise the legislative power by qualifying the homogenous interests of the majority, without adequate constitutional guarantees of the positions of interest of the minority , with a formal but not substantial equality that imposed the necessity of a "constitutional" system, which could not be considered as a substantial "constitutional" system (with the only limitation being the equal treatment of the homogenous interests, and not the constitutionally necessary positive actions, which the legislator had to implement in favour of the weaker positions of interest). On representative democracy, and its manifestations in the liberal era (with census restriction), as opposed to classical direct democracy, see B. CONSTANT, *De la liberté des anciens comparée à celle des modernes*, discours to the Athénée royal de Paris, 1819.

[25] On the organicistic/institutionalistic vision of law see S. ROMANO, *L'ordinamento giuridico*, Florence, 1918 and M. HAURIOU, *Principes de droit public*, Paris, 1916.

[26] There is thus a formal structure of sources, traceable to Kelsen's idea of *Stufenbau*, at the basis of the legal manageability of power. In this sense, the rule of law is a formal approach to power, so that according to J.F.

The political dialectic in the rule of law is therefore rationalized as a guarantee against arbitrariness, but not suppressed, as being the guarantee of pluralism; thus, the development of political discretion within the spaces admitted by the legal system becomes the essential moment of choice of the values founding the community, and of allocation of the means necessary to achieve the ends thus identified. The political dimension in the rule of law is characterised by the freedom of choice of means and ends. This freedom is maximum in constituent power and degrades in intensity when the public power uses normative instruments other than the Constitution to exercise discretion, making decisions taken on the rationalised form of statutes, regulations and administrative measures. Only at the constitutional level the interests are selected and qualified in order to obtain the maximum intensity of legal protection. Differently, regulating social life through other sources of law means that every manifestation of politics subsequent to the predisposition of the Constitution (constitutional revision, state and regional legislative function, regulatory function) is in some way bound to the normative choices of a superior level of power[27]. It is precisely the extension of this logic of maximum constraint of political power from the law (to which the flexible Constitution was equated) to a rigid Constitution (which also constrains Parliament) that has characterized the passage from an idea of a mere rule of law to a perspective of a "constitutional" rule of law.

The rule of law, therefore, is a compound of institutes and technical solutions implemented in order to rationalize politics and put the choices of the qualification of interests under the control of legal rules; rules which, when regulated by the Constitution, with a restriction to the amendment process that would also lead to the controllability of legislative power (*i.e., to constitutional justice*), realizes an evolution of the idea of the rule of law which is particularly strong and connected to the most mature manifestations of constitutionalism.

2.1. Plurality of technical institutes of regulation/limitation of politics that contribute to delineating a unitary concept of "rule of law".

In the face of the historical and theoretical premises as described above, the rule of law is a concept that responds to a unitary need for the legal limitation of power. This limitation is achieved through institutions and instruments of a normative nature, the plurality and different combinations of which, in the various national experiences, have not diminish this common function. The idea of the rule of law remains identifiable even when its components, with which the regulation of political power is technically pursued, vary.

A coherent form of state, characterized by the rule of law, derives from the synergetic combination of various individual institutions, such as the separation of powers, the principle of preference for the law, the reservation of the law, the supremacy of Parliament, the principle of legality, the provision of interpretative criteria, a *référé legislatif*, authentic interpretation, and the modalities of access to judicial review for the protection of rights. These technical institutions, although present in some legal systems even in the pre-liberal era, were developed and strengthened only with the establishment of the idea of the rule of law, through their reconduction to a systematic unity.

The idea of the rule of law thus gives strength to the single normative instruments of limitation of power, connecting them together in such a way as to render their action coherent with a unitary ideology identifiable in the first constitutionalism. The rule of law therefore becomes an intention of synthesis, making visible the technical solutions useful to guarantee, through legislative rationalisation, that the individuation and qualification of interests remains a monopoly of politics and is carried out in

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Stahl the *Rechtsstaat* does not express the purpose or object of the state's activity, but only the way and method of achieving them. In these terms a formal conception of the rule of law has been affirmed, in which the system of sources is an abstract structure, in which free contents are then inserted (and the guarantee component is essentially in the formal/procedural element). See J.F. STAHL, *Die Staatslehre und die Principien des Staatsrechts*, Heidelberg, 1856, in particular p. 138.

[27] On the roles of constituted power and constituent power among the extensive literature, see the voluntarist approach of C. SCHMITT, *Verfassungslehre*, München-Leipzig, 1928. In the recent literature, see M. LOUGHLIN, N. WALKER, *The paradox of constitutionalism: constituent power and constitutional form*, New York, 2007, and the more extensive references cited therein.

constitutional forms.

The political method of producing norms was affirmed - or confirmed - as prevalent both in the common law and the civil law tradition. In common law the idea of the supremacy of Parliament was developed to protect the system from the absolutist drifts of the sovereign; differently, in the continental civil law tradition, this idea emerged once the absolutism consolidated at the end of medieval legal particularism had been overcome Law is created through the legislative function by an elective and representative political assembly, which is entrusted with the task of qualifying interests, then binding the executive and judicial powers to these qualifications

The idea of the "separation of powers", elaborated by Montesquieu in the 18th century, is central to the rule of law in order to subject the executive and judicial powers to the will of the legislative power, a political will that has been formalized into norms[28]. The rule of law, also for historical reasons, is therefore the manifestation of an attitude of diffidence towards the executive power (monarchical) as well as towards the judicial order. The system of the sources of law that follows consequently corresponds to the scheme of the *Stufenbau* and a hierarchy, manifesting the separation of the powers, between sources entrusted to Parliament (superior) and sources entrusted to the executive power or - possibly - to the judiciary (inferior). Thus, a separation among powers that is not neutral, but which identifies a clear preference for the power of Parliament, which through the "law" limits the power entrusted to the execution of the political will formalised in law (according to a limitation of politics through law that sees the legislative as a power that is still unlimited)[29].

The rule of law - as a form of state - assumes that the physiognomy of *Rechtsstaatlichkeit* (literally "legal state") [30], founded on the principle of preference for the law as the typical source of the sovereign power. This idea of rule of law is at times be preferential to the detriment of other sources, through the institution of the *riserva di legge* (reservation of the law), establishing that specific subjects have to be regulated only by the law, and not by other sources, has the precise scope of protecting democracy, guaranteed by parliamentary representation, and avoiding the dangers of the absolutization of power connected to the dynamics of majority power, typical instead, of executive power[31]. There is a corresponding attitude of diffidence towards both the acts of the executive (regulations and individual measures), and the typical acts of the judiciary function (case law decisions). In fact, the principle of Parliamentary supremacy is expressed through the principle of legality, conditioning the expressive powers of the implementation of the system, in a way that is indifferent to the third party and independence of the same (if judicial) and to the political nature that the same can continue to express in autonomous forms (if executive/government).

The principle of legality can be understood both in a formal sense - as the mandatory necessity of conferring executive and jurisdictional functions by law - and in a substantial sense - already determining in law the broad content of the exercise of implementing the powers of the system. In both cases it an essential element of the rule of law, once again realized with different solutions in the various juridical experiences[32].

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[28] *See* from C.L.S. DE MONTESQUIEU, *De l'esprit des lois*, Genève, 1748. See also M.J.C. VILE, *Constitutionalism and the Separation of Powers*, Oxford, 1967 for more extensive references.

[29] A preference based on a formal structure of sources, in the hierarchical form of the *Stufenbau* mentioned above. Precisely for this reason Kelsen saw the rule of law as a concept absorbed in statehood: if one recognizes the state as a legal system, every state is a rule of law, and this term becomes pleonastic, H. KELSEN, *Reine Rechtslehre,*. See in this sense also M. TROPER, *Le concept d'État de droit*, in *Droits*, 1992, pp. 51 ff.: the idea of a state subject to the law is misleading, whereas it is more correct to speak of a state '*soumis au juge*', not to the law.

[30] See M.-J. REDOR, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste française 1879-1914*, Paris, 1992.

[31] See S. FOIS, *La riserva di legge*, Milan, 1963.

[32] In particular, with a considerably lesser extension to the judiciary in common law experiences, where the rule of law does not imply those elements of distrust for the judiciary typical instead of the continental tradition of *État de droit.* On the relationship between the rule of law and the Italian Constitution, mediated by the principle of legality, see the critical considerations of S. FOIS, *Legalità (principio di)*, in *Enciclopedia del diritto*, vol. XXIII, Milan, 1973, pp. 659 ff.

However, the principle of legality in the rule of law always implies, regardless of the extent of its formal or substantial component, the subordination of administrative acts to the law through the well-known "judicial review". The normative and institutional system - based on the separation of powers - is conceived as divided into a function of producing and applying norms in an administrative way (with the government as the head of public administration), and sometimes subject to strong "normative" compressions even if carried out in a judicial way. In fact, the common intention is to exhaust the dimension of politicity (i.e. of the free choice of the means and ends of state action, qualifying the interests) in the production of norms, and to eliminate, or at least strongly reduce, any residual discretion in the application of norms.

In the civil law legal systems, the affirmation of constitutionalism, which is accompanied by the emergence of the "continental" translations of rule of law, leads to the development of the concept of the judge as the "*bouche de la loi*" (literally, the mouth of the law), with the predisposition of interpretative criteria aimed at limiting the creative power of judges[33]. In this perspective, the judicial application of the law is reconstructed as a mere ascertainment of norms, an exclusively cognitive activity, assuming that a norm is susceptible to a single objectively ascertainable meaning[34].

In France at the time of the Revolution - coherently with this vision - the interpretation of the law by the courts was forbidden; a prohibition which had been proceduralised through the "*référé legislative*", providing that judges, in case of doubts of an interpretative nature, were under the duty of requesting the intervention of the *Cour de cassation* (Council of Cassation).[35].

Such a connotation of the *État de droit*, evidently, is not part of the legal culture of common law; thus, the meaning of "rule of law" which was developed before the conceptualization of the "État de droit on the continent is specifically connected to action of the executive power of the State. In the British experience, the distrust of the judiciary - typical element of the French revolution - is almost unknown, since the judiciary and Parliament have historically been allied in limiting the attempts of the Stuart dynasty to assume absolute power[36]. This affects the English notion of "rule of law", as a principle of limitation of political power by the judiciary, originated in a system where the primary source of the law is not legislation, but case law, which is founded on the well know "stare decisis" (rule of binding precedent)[37].

In this regard, the meaning of "rule of law" in England, proved to be more adherent to a concrete reality than to a revolutionary conception of the rule of law, as far as its extension to the judiciary, rather than only to the executive political power, was concerned.

The original structure of the rule of law, in its meaning was elaborated on the Continent, was therefore strongly linked to the legal-positivistic philosophical orientations, tending to reduce the law to legislation, i.e. to the political-normative will of the historical legislator[38]. The aspiration to make the

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[33] Reference is therefore made to Montesquieu's conception, to the judge as " bouche de la loi " and to the *syllogisme judiciaire*. See K.M. SCHÖNFELD, *Montesquieu en "La bouche de la loi"*, Leiden, 1979.

[34] On cognitive theories of interpretation, see most recently for more references G. PINO, *Interpretazione cognitiva, interpretazione decisoria, interpretazione creativa*, in *Rivista di filosofia del diritto*, 2013, pp. 77 ff.

[35] This was a political body of parliamentary origin, which would provide the exact interpretation with which the judge would then resolve the case, thus respecting the separation of powers. Only later would the Council of Cassation be transformed into a court of last instance (with nomofilactic function, i.e. with the task of ensuring the uniform interpretation of the law). See P. ALVAZZI DEL FRATE, *Aux origines du référé législatif: interprétation et jurisprudence dans les cahiers de doléances de 1789*, in *Revue Historique de droit français et étranger*, 2008, pp. 253 ff.

[36] See in particular the decision of 1610 of the Court of Common Pleas in *Thomas Bonham v College of Physicians*, 8 Co. Rep. 107 77 Eng. Rep. 638, and the well-known opinion of the Chief Justice Sir Edward Coke rendered there, which formed the basis of the idea of legal limitation of royal power (and then of judicial review of legislation).

[37] Among the extensive literature see for a critical reconstruction of the institution M. SHAPIRO, *Toward a Theory of "Stare Decisis"*, in *The Journal of Legal Studies*, 1972, pp. 125 ff.

[38] For the instrumentality of legal positivism to the ideas of legal limitation of power, which can be traced back to the Enlightenment (as the philosophical current at the origin of the rule of law), see J. WALDRON, *Kant's Legal Positivism*, in *Harvard Law Review*, 1996, pp. 1535 ff.

supremacy of the law effective, guaranteeing it from the dangers of changing meanings over time underlying the hermeneutic phenomenon, is well exemplified by the tool of so-called "authentic interpretation", the interpretation given by the same body that has formulated the norm. This instrument is still used today in various legal systems, and in which the aspiration remains to exhaust the possible extension of the *voluntas legis*[39] on the level of the *voluntas legislatoris*.

Thus, the continental rule of law emphasises the predictability of the exercise of judicial power, as it is closely linked to legality, while the rule of law emphasises such predictability by investing the judicial order itself in a more direct way with functions of direct guarantee of justice and equity (in addition to, and before, legality)[40]. In both cases, the access to judicial protection for the protection of rights (against the arbitrariness of the government) becomes an essential element of the rule of law, to which the idea is implied. Indeed, it is through the guarantee of the rights of the individual (at a micro level, of single normative institutions) that became possible to guarantee the affirmation of a just order (at a macro level, of the form of State)[41].

The conceptualisation of these categories, strongly conditioned by the enlightenment but already widespread in Western legal experience and thought *(albeit in fragmentary forms, and not organic as has been the case since the end of the 18th century*), is implicitly assumed - with mature scientific reflection - in the German idea of *Rechtsstaatlichkeit*[42]. In particular, the first full adulthood of the concept of *Rechtsstaatlichkeit* can be traced back to Immanuel Kant, who conceived it as a theoretical constitutional state, developed from the observation of revolutionary constitutions, and based on the idea of the supremacy of a normative text over politics[43]. This supremacy then constituted the guarantee for the implementation of Kant's fundamental idea: that through a state "of law" one could naturally guarantee peace within and among nations, thus marking with this new category (emerging in those years in German public law)[44] the start of an evolution of the form of state in a liberal direction. An evolution that was no longer just spontaneous, but consciously oriented to the logic of the rule of law, and was characterized in itself by a strong (pre-juridical) idea of "justice", which along with the development of rigid Constitutions would only then, however, enjoy the necessary guarantees.

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[39] For example, art. 73 of the *Statuto Albertino* (the Italian Royal Constitution of 1848), placed in the context of regulating the judicial order, stated that "the interpretation of laws, in a manner that is mandatory for all, is the exclusive responsibility of the legislative power". For a comparative overview of authentic interpretation please refer to F. GUELLA, *Retroattività delle prescrizioni normative sull'interpretazione: interpretazione autentica e disposizioni definitorie in prospettiva comparata*, in *DPCE (Diritto Pubblico Comparato ed Europeo)*, 2010, pp. 1310 ff.

[40] On the evolutions and contaminations/differences of the different national experiences of statehood regulated by law see L. HEUSCHLING, *Le renard d'un comparatiste: l'Etat de droit dans et au-dela des cultures jurudique nationales*, in *L'Etat de droit en droit international*, Paris, 2009, pp. 41 ff. For Dicey's theorization on the *rule of law* it would then be consistent not to translate *Rechtsstaat* with rule of law, but with constitutional government (oriented to certainty and predictability of law, while the rule of law is predominantly focused on the ideas of *justice* and *fairness*); for ideas in this sense see J. FINNIS, *Natural law and Natural Rights*, Oxford-New York, 1980, p. 272 and J. RAZ, *The rule of law and its virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford, 1979, pp. 210 ff. For the assimilability of the different concepts of statehood regulated by law see N. MACCORMICK, *Der Rechtsstaat und die rule of law*, in *Juristenzeitung* 1984, 65 ff. and G. FASSÒ, *Stato di diritto e stato di giustizia*, in *Rivista internazionale di filosofia del diritto*, 1963, pp. 116 ff.

[41] For the idea of the "state of rights", the close connection between the form of the liberal state (of law) and the protection of the rights of liberty (as subjective rights that can be claimed against the state), in Italy has been underlined in particular starting with F. RUFFINI, *Corso di diritto ecclesiastico italiano,* Turin, 1924, pp. 156 ff.

[42] Among the extensive literature see for example M. STOLLEIS, *Rechtsstaat*, in A. ERLER, E. KAUFMANN (cur.), *Handwörterbuch zur deutscher Rechtsgeschichte*, IV, Berlin, 1990.

[43] See I. KANT, *Zum ewigen frieden*, Königsberg, 1795.

[44] For an illustration of the German debate see L. HUESCHLING, *État de droit, Rechtsstaat, Rule of Law*, Paris, 2002, taking into account the substantive and formal differences with the rule of law. That the *Rechtsstaatprinzip* is oriented towards criteria of material and procedural justice has been argued by P. KUNIG, *Das Rechtsstaatsprinzip*, Tübingen 1986, pp. 333 ff., and already by U. SCHEUNER, *Die neuere Entwicklung des Rechtsstaats in Deutschland*, in E. FORSTHOFF (Hrsg.), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt, 1968, pp. 490 ff.

2.2. The development of the technical instruments of liberal derivation in the following evolutions towards the "constitutional" State of right

Unlike the nineteenth-century octroyed Constitutions, which were flexible insofar as they could be modified by ordinary law, the fundamental texts developed in post-liberal constitutionalism have increasingly assumed the character of long, programmatic, rigid, and guaranteed constitutions, with consequent conditioning of the form of State.

Having overcome the liberal/bourgeois form of state, the need to also include a bill of rights (oriented to the protection of individual rights against the arbitrariness of the parliamentary majority) in the constitution alongside the frame of government (directed to regulate the subdivision of government power between the monarch and the hegemonic classes)[45], has made the most modern constitutional texts more articulated, with long lists of guarantees of liberties (not only negative, but also integrated by the provisions of social rights) which flank the more strictly institutional provisions (on the abstract exercise of power).

Indeed, with the extension of the tasks of the public administrations, and the introduction of positive intervention in the economy and civil society (in the social state), there is an overcoming need for minimum regulation, typical of the liberal state, requalifying the interests of the poorest segment of the population in a first phase as legally relevant interests (through the ordinary legislation for the protection of labour, between the end of the 1800s and the beginning of the 1900s) and, in a second phase (in continental Europe, with the constitutions of the second post-war period), as interests endowed with the maximum intensity of protection. The Constitution itself imposes the promotion of such interests as a future political programme for the legislator (especially if it is a question of socially conditioned rights), using directly prescriptive subjective legal positions[46].

This complex of individual rights (no longer just negative, implying an abstention of public power from interfering in freedoms) has therefore also necessitated protection, in order to be effective, against the choices of the parliamentary majority. The legislative power being subjected to constitutional law just as - in the first manifestations of the rule of law - the executive power had been subjected to legislative law.

This result in particular has been achieved through the rigidity of the Constitution and its constitutional adjudication, which implies - in the hierarchy of the sources of law - the super-ordination of the constitutional norm to the legislative one: every modification of the Constitution (both for the dispositions on the form of government, and for those on the protection of rights) requires a procedure of aggravated revision, in such a way that ordinary law cannot contrast with the qualification of the protected interests already carried out in the constituent moment. In addition, in the case of violation, a system of constitutional justice can provide for the annulment (in the centralized systems of control) or the disapplication (in the diffused systems) of the statutory law itself.

This hierarchical relationship underlines how the dimension of political discretion, remaining in the hands of the ordinary parliamentary legislator, is narrower than that of the constituent legislator, the former being bound by the pre-selection and pre-qualification of interests carried out in the Constitution[47]. The principle of preference for the law is thus substituted by the principle of preference for the Constitution. The principle of formal and substantial legality now also binds the political

[45] On the frame of government and the bill of rights as typical contents of constitutions (and essential in order to be able to speak of a constitution), see art. 16 of the *Déclaration des Droits de l'Homme et du Citoyen* (1789): "*Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution*".

[46] On the relationship between the rule of law and the welfare state see for two perspectives of different legal tradition H.W. Jones, *The Rule of Law and the welfare state*, in *Columbia Law Review*, 1958, pp. 143 ff. and P.G. Grasso, *"Stato di diritto" e "Stato sociale" nell'attuale ordinamento italiano*, in *Il Politico*, 1961, pp. 807 ff., who highlights the antithesis of the two forms of state, pointing to the possible prevalence of the welfare state under the push of the democratic system.

[47] See on the subject of rigid constitutionalism, and its premises and consequences, A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Padua, 1997.

discretion of the legislator. The attitude of distrust is also extended towards Parliament and ordinary law, the institution of the law reserve is finally integrated by the so-called reinforced law reserve (in which it is the Constitution itself that dictates part of the contents that the statutory law must then transpose, or procedural aggravations for the approval of the same)[48].

If these evolutionary features of the form of state - from a state under the rule of law to a constitutional state under the rule of law - are linked to the idea of the rigidity of the Constitution, it must then be reiterated that such rigidity only makes sense to the extent that the aggravated procedures of constitutional revision are also guaranteed by a system of constitutional justice[49]. In fact, in this new perspective, even the law is subjected to a control of jurisdictional legitimacy, which was the first to develop in American constitutionalism in the form of diffuse control (starting with the case of *Marbury v. Madison*, in 1803)[50], and which in continental systems has instead undergone developments in the form of centralised control (starting with the Kelsen idea which has been applied in the Austrian system since 1920)[51].

In these latter experiences, centralised control (in which the decision on the constitutional legitimacy of a law is entrusted to a single central judicial body, and not to any judge) is expressed by the Constitutional Court, whose members - unlike ordinary judges - are not chosen through a bureaucratic method (a public competition) but are appointed in a way that allows judges to be identified on the basis of *intuitus personae*, and, precisely because of their greater "political" nature, can intervene in derogation of the separation of powers, annulling the laws contrasting with the Constitution (and not only disapplying them, with an approach that would be less invasive with respect to the powers of Parliament, but which can only be envisaged in models of widespread control where there is a mechanism of *stare decisis*)[52].

The configuration of the constitutional state of law subsequently affects the jurisdictional function, obliging the judge to not apply legislative law in contrast with the constitution, either directly disapplying it, or raising an incidental question of constitutionality before the Constitutional Court.

The idea is affirmed whereby "judges are subject only to the law on condition that the law is constitutionally legitimate", so that it is contextually recognised that the judge is not called upon to "automatically" apply the law (according to merely cognitive theories of interpretation) but is called upon to apply it "conditionally", by its constitutional legitimacy; which provokes the need for his prior evaluation of the constitutional legitimacy of the statutory law itself, with evident recovery of evaluations and discretion in the hermeneutic function[53].

In this way, the supremacy of the law follows the supremacy of Parliament, whose role is circumscribed by the constraint of formal and substantial conformity of the statutory law with the Constitution. Furthermore, the statute, in a context of a rigid Constitution, no longer operates in an exclusive "regime of monopoly" but finds itself "competing" with a normative system that tends to be pluralist and articulated with other methods of producing law, to which the Constitution reserves spaces of regulation on the basis of the principle of competence (so that it is the hierarchical superiority of the constitutional text that allows its subordinate sources to be articulated, not only by hierarchical degrees, but also by spaces of competence).

As such, a complex system of interactions develops between institutional bodies and subjects, all

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[48] See for the first affirmation of these institutions (to a lesser degree of intensity in a context of a rigid constitution) what is set out above in par. 2.1. (regarding the ordinary law reserve, distrust of the executive, the principle of legality and preference of law).

[49] For a general overview of comparative legal systems on the subject of constitutional justice see, among the extensive literature, M. CAPPELLETTI, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato,* Milan, 1968; ID. *Judicial review in the contemporary world*, Indianapolis, 1971.

[50] See P.W. KAHN, *The Reign of Law. Marbury v. Madison and the Constituction of America*, New Haven, 1997.

[51] See H. KELSEN, *Judicial Review of Legislation*, in *The Journal of Politics*, 1942, pp. 183 ff.

[52] For a comparative study on the organization of the judiciary see M. CAPPELLETTI, *Dimensions of justice in contemporary societies: studies of comparative judicial law*, Bologna, 1994; ID., *Le pouvoir des juges: articles choisis de droit judiciaire et constitutionnel comparé*, Paris, 1990.

[53] On the evaluative elements of legal discourse, see among the extensive literature R. ALEXY, *A theory of legal argumentation: The theory of rational discourse as theory of legal justification*, New York, 1989.

invested with normative (or interpretative/applicative) powers which are not only different in terms of hierarchical position, but also in terms of material spaces of intervention; powers which, furthermore, are reciprocally intertwined in a system of checks and balances where federation and member states (or regions), Government and Parliament, judicial power and political power, all find themselves carrying out connected - but separate - tasks, guaranteed in their reciprocal connections by the constitutional discipline (which is placed above the entire system)[54]. The constitutional state of law, much more than the rule of law, therefore proposes the legalisation of politics at a constitutional level (subjecting politics to legal discipline, in an institutionally balanced system) and the consequent jurisdictionalisation of politics itself (subjecting politics to judicial control, with widespread or centralised constitutional justice).

In a system of checks and balances guaranteed by the Constitution not only is the executive power subject to the law (as in the original rule of law), but the more eminently political legislative power also finds itself encountering new legal limitations.

Such a system of interactions, and checks and balances, is, in particular, the connoting element which is placed at the base of the rule of law of the British formulation, where the passage to a rigid Constitution has instead been lacking, so that the formulation of the rule of law has not been as up-to-date with the continental (and American) evolutions of the "constitutional" state of law from the point of view of the introduction of a system of constitutional justice (although with the Human Rights Act 1998, and the declaration of incompatibility, there has been a hint of the logic of judicial control on the politics expressed in Parliament)[55].

In the face of this, the minimum common denominator between the continental ideas of the (constitutional) State of law and the modern application of the rule of law in the United Kingdom, seems to be constituted by the very idea of a judicial function that participates in the system of institutional weights and counterweights, with a wide interpretative power and a decisive participation in the guarantee of rights. All this legitimizes evolutions in the sense of a "juristocracy" which would characterize the western models, where the rule of law, updated to the new interpretative theories, would have led to an important judicial activism, as a truly connoting trait of the rule of law (and of most modern legality)[56].

In the United Kingdom, a substantial space of interpretative discretion - and its role in the system of checks and balances - was already peacefully admitted on the basis of the tradition of the first affirmation of the rule of law. The comparison between "rule of law" and post-liberal continental conceptions of the (differently translated) "state of law", would therefore show how the component of the function of jurisdictional "control" in the idea of rule of law - underlying the principle of legality (central in the first affirmation of the continental idea) - is, in truth, recessive compared to the centrality of a function of the judiciary power of "contributing" to the creation of the legal order, together with Parliament.

The British idea of rule of law would therefore be more founded on values of loyal collaboration between the judiciary and politics, rather than external control, compared to the continental approach, and in this character - along with the idea of judicial activism that has spread in the most recent theoretical reflection, also within the continental systems - the passage from the rule of law to the constitutional rule of law is substantiated[57].

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[54] On the relationship between rule of law and checks and balances, see A. SCALIA, *The rule of law as a law of rules*, in *The University of Chicago Law Review*, 1989, pp. 1175 ff.

[55] See A. KAVANAGH, *The elusive divide between interpretation and legislation under the Human Rights Act 1998*, in *Oxford journal of legal studies*, 2004, pp. 259 ff. and ID., *Constitutional Review under the UK Human Rights Act*, Cambridge, 2009. See also R.A. EDWARDS, *Judicial Deference under the Human Rights Act*, in *The Modern Law Review*, 2002, pp. 859 ff.

[56] See R. HIRSCHL, *Towards juristocracy: the origins and consequences of the new constitutionalism*, Harvard University Press, 2009; L.F. GOLDSTEIN, *From democracy to juristocracy*, in *Law & society review*, 2004, pp. 611 ff.; M. GRABER, *Foreword: from the countermajoritarian difficulty to juristocracy and the political construction of judicial power*, in *Maryland Law Review*, 2006, pp. 1 ff.

[57] On the physiological or pathological character of judicial activism, among the vast literature see K.D. KMIEC, *The Origin and Current Meanings of "Judicial Activism"*, in *California Law Review*, 2004, pp. 1441 ff. On the

The systematic centrality of interpretative discretion, as an emerging dimension - from the point of view of judicial activism, in the legal experiences of the most recent constitutionalism - therefore constitutes a characteristic feature of the evolution of the post-liberal form of state. This recovery of interpretative discretion is evident - even in the continental models of centralised control of constitutionality - in particular if one analyses the typology of the sentences of the Constitutional Courts, which are not only acts of a negative legislator (annulling the law) but also jurisdictional measures truly productive (in a positive way) of a new law, intervening with manipulative statements[58] (which add or modify parts of the legal system)[59].

In the constitutional state of law, therefore, all powers are limited: both the legislative by the constitution, and the judicial by the technical character of its mode of expression. In this sense, it is particularly relevant to highlight how it is the so-called supreme principles of the system (of a juridical nature, and therefore referable to the sphere of legitimacy) that limit both the political discretion (parliamentary and executive) and the interpretative discretion (of the ordinary or constitutional judge) to the maximum degree.

The supreme or fundamental principles of the constitutional order represent the fundamental nucleus of an evolved idea of constitutional legality, and an application of the logic of the rule of law (understood as the possibility for the juridical to limit arbitrariness) that reaches the widest practical extension. These principles, however, are in turn problematic to manage on a logical-formal level, being identified by way of interpretation of the essential nucleus of the preceptive values characterising the form of State and the constitutional order[60]. We are dealing, therefore, with principles whose individuation is already connoted by spaces of discretion (and by elevated political content), but whose protection, however, is claimed to be brought back to the sphere of juridical power, and not of politics.

Above all, although the existence of supreme principles that are truly exclusively normative in character (and not the result of a political decision) can be debated, their preceptive function within the post-liberal form of the state remains undeniable. In fact, the functions of the supreme principles of the constitutional order are to be found both in orienting interpretative discretion so as in limiting the constitutional revision (rationalising it not only in consideration of logical-formal needs, but also directing it towards fundamental values coherent with the political setting of the system, founding judgments of reasonableness and balancing of rights)[61]. This mean that even the legislator who intervenes with the aggravating process of approval of constitutional laws cannot act without limits[62], all power - even that of constitutional amendment - therefore being subjected to the law (and, in particular, to "supreme" constitutional law).

3. The standardization of institutions (and terminology) in the internationalization of the concept of rule of law, towards a "global legality"

The idea of a law able to bind power is confronted today with a context in which the system to be considered (for the purposes of regulating the manifestations of power) is no longer only the domestic one, but also the international and supranational one (which assumes its own specific value of guarantee

normal character of a strong role of the judiciary in the rule of law see G. Treves, *Considerazione sullo Stato di diritto*, in *Rivista trimestrale di diritto pubblico*, 1959, pp. 399 ff., which brings the *Stato di diritto* closer to the rule of law and to due process precisely because it does not imply only a 'state according to law or according to the constitution' but also 'a state according to a judge', with the related values of independence and impartiality.

[58] On the Constitutional Court as a positive legislator see E. Cheli, F. Donati, *La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali*, in *Diritto pubblico*, 2007, pp. 155 ff.

[59] While recognising to the constitutional justice only the function of "legitimacy", without interference in the "merit" of the political decision. See for example - for the Italian system - art. 28 of law no. 87 of 1963: "The review of legitimacy of the Constitutional Court on a law or an act having the force of law excludes any assessment of a political nature and any review on the use of the discretionary power of Parliament".

[60] See C. Mortati, *La costituzione in senso materiale*, Milan, 1940.

[61] The identification of a hierarchy of norms within the Constitution also has consequences on the methods of judgement: an element of strengthening of the balancing of values is introduced as a technique of judgement of the Constitutional Court, and the use of the principle of reasonableness is reinforced.

[62] See for Italian law Constitutional Court no. 1146/1988.

of rights, and not only of regulation of the relations between States)[63]. It is a question of verifying whether a "global rule of law" therefore exists, suitable to make up for that crisis of sovereignty and crisis of the national State which is highlighted as characterizing the present historical phase, binding also the new supra-state expressions of power.

Therefore, it must be ascertained whether the (partial) overcoming of the state is also leading to the overcoming of the rule of law, and of its basic institutions (when applied to supranational and international phenomena), or whether the basic idea of the rule of law and the principle of legality can even survive in the supranational dimensions of regulation instead.

Today, rather than a radical crisis of the state, we are in fact witnessing a transformation of the modes of action of the state, with new manifestations of statehood beyond national borders[64]. At the same time, it is legitimate to expect a transformation of the rule of law which - as has happened with rigid constitutions - leads to an updating of its categories in the direction, this time, of the applicability of the persistent need for normative limitation of power, also to interests of a cross-border dimension (and therefore to expressions of supra-state political and financial power).

The distinguishing feature in an era of globalisation is the need for interests to be redefined in a system with increasingly uncertain boundaries[65]. The interests of consumption, production, savings, taxation, etc. must take into account the crisis of national sovereignty and, in its place, the *de facto* power of the markets, which require new regulation at a supra-national level. In this context, the already established tendency to set standards of common rights at the international level[66] has also been supplemented by the need for a re-regulation of economic and social phenomena - which goes hand in hand with the *de facto* blurring of national boundaries - to avoid uncontrolled dynamics in global markets. In the impossibility of adequately guaranteeing rules and rights at the state level, the need arises for higher-level systems; systems that must themselves be juridical (deriving from the states), and hopefully, through their legal nature, aim at limiting power according to the paradigms of the "government of laws" and the "government of judges" seen previously applied for national experiences (in place of an arbitrariness of politics and interests, which from national would become transnational, and as such would be even less controllable).

Global legality is therefore accompanied by forms of power that assume ever greater spaces of uncontrollability, placing themselves as an alternative to state political power. In particular, it is a question of international power, when the level of integration between state systems remains low, or supranational power, when integration is more substantial, and carried out through international organizations that - like the EU - operate directly into the systems of member states. Powers that are used to efficiently regulate the economic phenomenon and de-territorialized interests, no longer controllable by the state.

Financial globalisation has also brought with it the partial globalisation of law, with global institutions aiming to regulate power, both political (with supranational and international charters of rights) and economic (with a highly articulated international and supranational discipline to regulate the

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[63] On the role of rule of law in the internationalization of law see in general E. SANTORO, *Diritto e diritti: lo stato di diritto nell'era della globalizzazione*, Turin, 2008 and the wider literature cited therein.

[64] See among the vast literature S. CASSESE, *La crisi dello Stato*, Roma-Bari, 2002 and the references cited therein.

[65] Among the vast literature on the implications of globalization see S. STRANGE, *The retreat of the state: The diffusion of power in the world economy*, Cambridge, 1996.

[66] Among the international human rights instruments, which have established standards of protection to which states have bound themselves in various forms and measures, see e.g. some of those adopted at the UN and with convention status: the Second Facultative Protocole to the International Covenant on Civil and Political Rights to Abolish the Death Penalty (CCPR-OP2-DP); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Facultative Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the Facultative Protocol to the Convention on the Rights of the Child, regarding the involvement of children in armed conflict (CRC-OP-AC). There are also declarations with a scope always extended to all the United Nations, but with a lesser degree of juridicisation, and numerous regional conventions (such as the ECHR).

markets, which seems to be directed towards the construction of a new *lex mercatoria*)[67].

In this sense, state sovereignty stands as an obstacle to the market, and a global market, therefore, undermines the effectiveness of sovereignty. However, in the most recent legal experience state sovereignty certainly does not seem destined to be replaced by an empty space of law, but by the emergence of new global rules, and of new integrated (appropriately or not) categories of legality (made of the common logic to the rule of law, *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, etc.)[68].

These rules and categories are set in a peculiar system, like the international one is, where there is no sovereign subject and the modes of relation between the subjects acting in such a context tend to be equal (on a formal level), operating through sources of law that can be traced back to an agreement (international treaties) or to custom. In this context, the paradigms of the rule of law must be adapted to the peculiarities of a system of diffused power, so that the first guarantee for the national rule of law lies in the necessary acceptance of external constraints. Such globalization of law, however, lead to dangers of coercion of the weaker national positions, and to a selective transposition of the guarantees developed in the different legal traditions[69]. The capacity of the categories of the State of law (of western origin) to also pass to the international and global level, with a rule of law that has become a common terminology in the global ambit (and is also incorporated in the institutions and in the international agreements), is therefore certainly prospectable, but it is necessary to verify the effectiveness in the face of the interests to the protection of which it becomes instrumental.

In other words, the transfer of sovereignty in an era of crisis of the state is accompanied by a global transfer of the rules of the rule of law, but used for purposes and in ways that do not coincide with the traditional ones, and applied to national systems (in this circulation of legal models) that originally carried values other than the rule of law[70].

This transition has therefore taken place partially, and in varying degrees in the various institutions (depending on their aims): in the WTO with requirements for the protection of rights placed as exceptional limits to the dominant interest in trade, being incorporated in the case-law of the panels used to settle disputes rather than in the treaties themselves[71]; in the UN, on a level that is still largely political, with little remedial effect but with a broad rhetoric of rule of law[72], which is instead used in properly legal forms and much more practical in the context of bilateral agreements and related international arbitration[73]; in the IMF and the World Bank through the democratic conditionality of

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[67] See, e.g., F. GALGANO, *The New Lex Mercatoria*, in *Annual Survey of International & Comparative Law*, 1995, pp. 99 ff.

[68] In the Italian literature see especially the writings of S. CASSESE, *C'è un ordine nello spazio giuridico globale?* In *Politica del diritto*, 2010, pp. 137 ff.; ID., *Oltre lo Stato*, Roma-Bari 2006; ID. *Il diritto globale*, Turin 2009.

[69] See M. BUSSANI, *Il diritto dell'Occidente*, Turin, 2010.

[70] On the subject, for example, on the so-called *Asian values*, and their alternative or non-alternative character to the *rule of law*, see among the vast literature R. PEERENBOOM (ed.), *Asian discourses of rule of law*, London, 2003; ID. *China's long march towards rule of law*, Cambridge, 2002; X. LI, *'Asian Values' and the universality of human rights*, in *Philosophical dimensions of public policy*, 2003, pp. 171 ff.

[71] See J. BACCHUS, *Groping Toward Grotius: The WTO and the International Rule of Law*, in *Harvard International Law Journal*, 2003, pp. 533 ff.

[72] For references to UN documents referring to the rule of law, see O. CORTEN, *L'Etat de droit en droit international: quelle valeur juridique ajoutee?*, in *L'Etat de droit en droit international,* Paris, 2009, pp. 13 ff. In the Report of the Secretary-General S/2004/616 of the UN Security Council (Rétablissement de l'état de droit et administration de la justice pendant la période de transitino dans les sociétés en proie à un conflit ou sortant d'un conflit) a definition of the rule of law is given: "*Il désigne un principe de gouvernance en vertu duquel l'ensemble des individus, des institutions et des entités publiques et privées, y compris l'État lui-même, ont à répondre de l'observation de lois promulguées publiquement, appliquées de façon identique pour tous et administrées de manière indépendante, et compatibles avec les règles et normes internationales en matière de droits de l'homme. It implies, on the other hand, measures to ensure respect for the principles of the primacy of law, equality before the law, accountability to the law, and equity in the application of the law, the separation of powers, participation in decision-making, legal certainty, the refusal of arbitration and the transparency of legal procedures and processes*".

[73] See in particular the case law of the arbitration panels of the International Centre for Settlement of Investment Disputes (ICSID).

clauses that (sometimes) subject the financing of development programs to respect the rules of the rule of law[74]. In the face of this variegated panorama, above all it is the experience of the European Union where this passage from the state level to the supra-state level, not only of sovereignty but also of the rules (and therefore of the logic of the rule of law), has taken place in a more complete manner, despite the fact that there is still a democratic deficit that makes its implementation partial.

The homogeneity between normative solutions and judges' interpretations manifested in different constitutional systems, and therefore the existence of shared juridical traditions (of which a certain level of spontaneous dialogue between the courts of different states is emblematic[75]), is at the basis of the highest levels of implementation of the institutions of the rule of law within some regional realities, among which the European area is certainly of primary importance. In this area, in fact, both the ECHR system developed in the Council of Europe, and the regulatory framework of the European Union, have based their operation on numerous institutions that can be traced back to the tradition of the rule of law. This has been done both at an interpretative level, with the implementation of the rule of law schemes in the case-law of the Court of Justice[76] and the European Court of Human Rights, and at a positive level, with catalogues of rights based on the legal tradition of Western constitutionalism, and a real reference to the constitutional traditions common to the member states as a source of general principles (with the consequent physiological transit of the institutions guaranteeing the rule of law at a supranational level, when considered "common")[77]. A process of homogenization linked to a fungible use of national categories, insofar as they can be traced back to a common legal tradition, which, in the ambit of the EU institutions has also led to the interchangeable use of the terminology - of the rule of law, *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, etc. - while not ignoring the different origins and detailed applications.

Despite these traits of adherence of the supranational order to the idea of the rule of law, the basic shortcomings in the transposition of adequate guarantees of rights remain evident, especially if one considers the phenomenon from the point of view of the democratic nature of the supranational context. This is even more evident in the context of the financial crisis, with the connected unsustainability of social rights, which highlights the tendency towards government by technicians instead of government by-laws or judges, where the *sozialstaat* has led to the crisis of the *rechtstaat*. And also in the European Union the operation of the stability pact and the various fiscal pacts highlights a situation in which the most politically delicate decisions (against social rights) are taken at a supranational level, outside the direct representative system.

4. Concluding remarks: does a common and "translatable" notion run the risk of being less strong than a historically connoted legal concept?

Fundamental choices are thus taken in seats more distant from representation because, with globalisation, the level of interests has become wider, and the consequent qualification needs new dimensions (in which the democratic nature of the system is, however, diluted)[78]. The force of supra-state economic facts - where the market stands as a rational institution in itself, to which politics and law both become instrumental - thus emerges in all its strength in a context where state sovereignty has been relativized. On the reality of market facts, without boundaries, political power and the legal system

[74] See, for example, E.R. GOULD, *Money talks: Supplementary financiers and international monetary fund conditionality*, in *International Organization*, 2003, pp. 551 ff.

[75] See, for example, G. DE VERGOTTINI, *Oltre il dialogo tra le corte: giudici, diritto straniero, comparazione*, Bologna, 2010.

[76] In particular, from ECJ, *Les Verts*, C-294/83 (23-04-1986) it was stated that the European Community is a "community of law"; see par. 23 of the judgment.

[77] See art. 6, par. 3, TEU. It should also be noted that in the new Eastern European constitutions explicit references to the rule of law are very frequent (see e.g. articles 1 and 9.2, Czech Const. Czech Republic; Art. 4, Const. Bulgaria; Art. 2 and 51, Const. Poland; Arts. 1 and 7, Const. Russia; Arts. 1 and 134, Const. Slovakia;) and to the social state under the rule of law (see e.g. Art. 1 Const. Serbia; Art. 10, Const. Estonia; Art. 2 and 3a, Const. Slovenia; Art. 1.3, Const. Romania).

[78] See, for example, K. FEATHERSTONE, *Jean Monnet and the 'democratic deficit' in the European Union*, in *JCMS: Journal of Common Market Studies*, 1994, at 149 ff.

cannot affect in a truly authoritative way, and only a partial control is possible, aiming at rationally regulating its management (within a series of possible technical solutions) rather than entrusting the choice of democratically preferable options to the political will (possibly untied from what is financially/technically admissible)[79].

The power of technology, therefore, emerges in a supra-state context characterised, by its nature, by important deficits of democratic representation. A context in which new mechanisms for the recovery of a global rule of law would therefore be needed to ensure new forms of effective manifestation of the basic idea of the rule of law: no longer to just bind political power to law, but also to bind technical/financial power to adequately effective legal rules.

The recovery of the rule of law in the global context, which is lacking in terms of representative institutions, however, takes place partially outside of democratic channels, through jurisdiction (which already in previous phases has represented a fundamental element of guarantee in the rule of law and in the constitutional state of law)[80]. When there is a remedy in the international or global context, the judge of the same tends to use the tradition of the rule of law as a strong reference model.

Thus, the rule of law - the idea that power is subject to normative rules - re-emerges even in the international and global arena, although often outside the channels of representation (which had been the origin of the rule of law): global legality survives insofar as it is linked to the justiciability of rights even at the supra-state level, although democracy is mediated by the state and, therefore, by the executives that engage at international level, so that the citizen, at the end, loses representation. The category of rule of law, and the related terminology, nevertheless return to be a strong element of guarantee, in a context where power is no longer limited by sovereignty, but where it is still compressed within the constraints of legal logic.

In this context, the European Union is a particularly rich system for the application of the rule of law. On the one hand, the creation of a union has required the use of autonomous legal notions, so that the Court of Justice or the Commission speak indistinctly of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, rule of law, etc. (translatable into all the languages of the member states), as concepts in which the different common constitutional traditions are summed up. On the other hand, the permanence of national sovereignties and differentiated constitutional identities (recognised by the European Union itself, expressly after the Lisbon Treaty) requires that the rule of law be used with caution "against" states. Does a common and "translatable" notion ultimately risk being less strong than a legal concept that is nationally and historically connoted?

The case-law of the Court of Justice concerning violations of judicial independence in Poland and Hungary leaves the question open. The progressive reinforcement of the rule of law in the process of European integration and in the area of freedom, security and justice seems to be accompanied by different trends: on the one hand, in the institutional evolution of the Union, there is the gradual absorption of the principle of the rule of law into primary law, so that the rule of law is no longer a generic political synonym of legality but becomes a common container for specific individual rules conditioning the member countries, such as the independence of the judiciary. On the other hand, it becomes difficult for the Court of Justice to apply these individual detailed rules as it has to justify their homogeneity against national approaches to legality, that unfortunately have remained (or are trying to became again) historically differentiated. However, this difficulty can be overcome by a real cultural

[79] On the suitability of the same logic of the rule of law to limit technology, as a pre-existing requirement of globalization and connected to the welfare state (where the action of the administration can no longer be limited to the execution of the law according to the dictates of the principle of legality, but must develop its functions by "technicalising" itself in order to ensure a wide range of services to society), see E. FORSTHOFF, *Der Staat der Industriegesellschaft*, München 1971, pp. 105 ff.

[80] Representation, on the other hand, was characteristic of the original idea of the rule of law. In this regard, it has to be stressed how the concept of law and legislative power is, for liberal theorists of the *Rechtsstaat*, inclusive both of the content aspects (generality and abstractness) and of the profiles pertaining instead to representation; see in particular E. BÖCKENFÖRDE, *Gesetz und gesetzgebende Gewalt*, Berlin, 1958, pp. 178 ff. On the figure of the judge in supra-state contexts, as an agent of juridification of the global administrative order, see instead among the vast literature S. CASSESE, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Rome, 2009.

evolution of the common and autonomous legal concepts of the Union, which is not limited to a single translation but aims at establishing a strong European culture beyond the different words of the national law.

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