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FRAME:
WHAT IT IS THAT IS GOING ON HERE

LAWYER. […] but I say, that the great masters of the mathematics
do not so often err as the great professors of the law[1]

Omnis definitio in iure civili periculosa est;
parum est enim, ut non subverti posset[2]

In the course of the last years, the interest of jurists in Artificial Intelligence has grown worldwide: a new AI Spring has come, stimulating theoretical debate as much as the development of new computational legal tools[3].

[1] Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Alan Cromartie (ed.), Clarendon Press, Oxford, 2005, p. 8

[2] Digest, 50, 17, 202

[3] In relation to China, see: Yadong Cui, *Artificial Intelligence and Judicial Modernization*, Springer Singapore, 2020; Ran Wang, *Legal technology in contemporary USA and China*, in *Computer Law & Security Review*, 2020, 39, p. 2; Jinting Deng, *Should the Common Law System Welcome Artificial Intelligence: Case Study of China's Same-Type Case Reference System*, in *Georgetown Law Technology Review*, 2019, 3, 2, p. 223; for what concerns South America, see: South America: Pedro Inazawa, Fabiano Hartmann, Teófilo de Campos, Nilton Silva e Fabricio Braz, *Projeto Victor. Como o uso do aprendizado de máquina pode auxiliar a mais alta corte brasileira a aumentar a eficiência e a velocidade de avaliação judicial dos processos julgados*, in *Revista Computacao Brasil*, 2019, 39, 1, p. 19; Davi Alves Bezerra, Pedro H. G. Inazawa, Roberta Zumblik, Teófilo E. de Campos, Nilton Correia da Silva, Fabrício A. Braz, Fabiano Hartmann Peixoto, *Descoberta de termos que caracterizam peças jurídicas*, in *Proceedings of the 11th International Conference on Forensic Computer Science and Cyber Law (ICoFCS)*, São Paulo, Brazil, 4-5 November 2019, at https://cic.unb.br/~teodecampos/ViP/alvesBezerra_etal_icofcs2019.pdf; Nilton Silva, Fabricio Braz, Teofilo Campos, Andre Guedes, Danilo Mendes, Davi Bezerra, Davi Gusmao, Felipe Chaves, Gabriel Ziegler, Lucas Horinouchi, Marcelo Ferreira, Pedro Inazawa, Victor Coelho, Ricardo Fernandes, Fabiano Peixoto, Mamede Maia Filho, Bernardo Sukiennik, Lahis Rosa, Roberta Silva, Taina Junquilho, and Gustavo Carvalho, *Lawsuit documents classification using a CNN for Brazil's Supreme Court*, in *The International Journal Of Forensic Computer Science*, 2019, 14, p. 8 http://www.gpam.unb.br/; Ricardo Dalmaso Marques, *Inteligência Artificial e direito: o uso da tecnologia na gestão do processo no sistema Brasileiro de precedentes*, in *Revista de Direito e as Novas Tecnologias*, 2019, 3: Daniel Henrique Arruda Boeing, Alexandre Morais da Rosa, *Ensinando um robô a julgar: pragmática, discricionariedade, heurísticas e vieses no uso de aprendizado de*

The aim of this work is to outline some of the challenges raised by the encounter between law and computational technology in the perspective of the Rule of Law.
The development and spread of such technologies, indeed, goes along with the strengthening of a narrative which, harkening back to a series of criticalities running through the whole history of the doctrine of the Rule of Law, depicts the latter as inevitably facing the risk of degenerating into the Rule of Men and, on the other hand, envisions legal automation as the potential solution of the troubles of law.
The present research will attempt to investigate the assumptions which ground the desirability and, above all, the very intelligibility of the ideal of a *Rule of Machines*. The perspective that I adopt for the purpose of analysing the contrast between Rule of Law and Rule of Machines assumes as the central reading key the concept of normativity. I believe that, indeed, such contrast calls for an investigation of the question of what it means for the law to rule, and, specularly, what it mean to be ruled, and what kind of protection such rule can afford. Such questions, in turn, demand an analysis what constitutes a rule and what it means to follow it.
Starting from the concept of the Rule of Law, I will first illustrate how the latter is both a family resemblance concept and also a particularly contested one. While, on one hand, the most recent debate has acknowledged the existence of a set of common principles which unite the Continental and Anglo-American traditions[4], the history of the Rule of Law ideal is marked by numerous internal tensions. In the Continent, for instance, the significance of the concept was harshly put into question already in the first half of the twentieth century[5]. Whereas, as I will show,

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máquina no judiciário, EMais, 2020; Daniel Becker, Isabela Ferrari, *VICTOR, the Brazilian Supreme Court's Artificial Intelligence: a beauty or a beast?;* Juan Gustavo Corvalán, *Artificial Intelligence, Threats, Challenges and Opportunities. Prometea, the First Predictive Artificial Intelligence at the Service of Justice is Argentinian*, in *International Journal of Digital and Data Law*, 2018, 4

[4] Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in Pietro Costa, Danilo Zolo (eds.), *The Rule of Law: History, Theory and Criticism*, Springer, Dordrecht, 2007, pp. 3, 18; Neil MacCormick, *Der Rechtsstaat und die 'rule of law'*, in *Juristenzeitung*, 1984, 39, p. 56

[5] In this sense, Carl Schmitt maintained that "*[t]he term "Rechtsstaat" can mean as many different things as the world "law" itself and, moreover, just as many different things as the world "state". There is a feudal, an estate-based, a bourgeois, a national, a social and further a natural-law, a rational-law, and a historical-legal form of Rechtsstaat. It is conceivable that propagandists and advocates of all types could claim the word for their own purposes, in order to denounce the opponent as the enemy of the Rechtsstaat. The following saying applies to their Rechtsstaat and concepts of law: 'Law should above all be what I and my friends value'* ", see, Carl Schmitt, *Legality and Legitimacy*, translated by Jeffrey Seitzer, Duke University Press, Durham, 2004, pp. 3, 14. Also more recently, the concept of *Rechtsstaat*-Rule of Law has continued to be the target of charges of vagueness. In this sense, Troper has pointed to the fact that "[*n]owadays, not only is this expression used everywhere and by everyone, not only is the rule of law the subject of countless books, debates and colloquia, but all these discourses are favourable to État de droit, from the liberals, which would not come as a surprise, to the former communists of Eastern Europe, who, after claiming to reconcile it with Marxism-Leninism, now intend to make it an instrument of the transition to the market economy. Such unanimity is necessarily suspect and one cannot help thinking that this constant reference to the État de droit in such different discourses must hide some ambiguities and be based on some confusion. In fact, as soon as one tries to clarify what the rule of law is, one cannot fail to be*

Continental Europe has its own reasons to adopt an at least cautious attitude towards a "relaxed" use of the concept of Rule of Law – which indeed has undergone a Fascist, a Nazi and a Soviet appropriation - the Anglo-American debate is even more distinguished by a guarded attitude. As Tamanaha puts it, *"[t]he rule of law is like the notion of 'the good'. Everyone is for the good, although we hold different ideas about what the good is"*[6]. In this perspective, I will attempt to show how the enthusiasm and distrust aroused by the concept of the Rule of Law are connected to a set of aporias which have emerged along the history of such doctrine. My goal will be to bring out how such aporias can be accounted for as consequential to the concept of rules assumed by the different "families" of conceptions of law which underlie the doctrine of the Rule of Law.

Such analysis, on the other hand, aims at illustrating how the Rule of Machines narrative appropriates elements from such "families" for either supporting its *pars destruens* or justifying its *pars costruens*. I will indeed maintain that the pessimistic stance adopted by such narrative with respect to the Rule of Law rests on two main arguments: the *argument from the inadequacy of jurists* and the *argument from the inadequacy of legal rules*. Respectively, such arguments combine, on one hand, an anthropological pessimistic perspective that assumes the inexorable arbitrariness of legal interpreters and, on the other, a position of normative pessimism with respect to text-driven law: the latter is seen as irremediably incomplete and incapable of determining, nor accounting for, the behaviour of legal actors. Such positions, as I will argue, derive their intelligibility from a certain picture of rules and rule followers which bridges the gaps between different forms of formalism, legal and computational. At the same time, such picture also grounds the optimistic perspective that the Rule of Machines narrative adopts with respect to the potentialities of technology.

In this respect, in the second Part of the research I will attempt to illustrate how machines come to offer a particularly attractive paradigm of rule-governed behaviour for those conceptions of law discussed in Part I. The advent of Turing's computational machines, and their characterization as "*rule following beasts*"[7], can be understood as the introduction of a set of instruments, models for reformulating and addressing the problems of law through a different vocabulary. In this respect, I will attempt to show how the shifting of the perspective of law towards the understanding of rules and rule-following assumed by the computational paradigm

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struck by a number of uncertainties", Michel Troper, *Le concept d'Etat de droit*, in *Droits*, 1992, 15, p. 51, my translation. As the French jurist claims, the *État de droit* is either *"impossible*", in that it is a contradiction in terms, or "*inévitable*", in that, as also Luhmann has underlined, it is a tautology, see Ivi, p. 55; Niklaas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004, p. 370

[6] Brian Z. Tamanha, *The History and Elements of the Rule of Law*, in *Singapore Journal of Legal Studies*, 2012, p. 232

[7] Douglas Hofstader, *Gödel, Escher, Bach. An Eternal Golden Braid*, Penguing Books, Middlesex, 1980, p. 26

triggers a series of questions which stands in a relation of continuity with the conceptual and methodological divide which dates back to the *Methodenstreit*[8].
Precisely by moving from the concept of rules, I will confront the paradigm advanced by *Artificial Legal Intelligence* with an account of normativity which centres on the practice of jurists and their "*artificial reason and judgment"*. I will then argue that the understanding of rules which emerges from such an account can contribute to both the identification of the limits inherent to the ideal of the Rule of Machines and, on the other hand, the valorisation the affordances of the Rule of Law.

[8] Davide Sparti, *Epistemologia delle scienze sociali*, Il Mulino, Bologna, 2002; Id., *Se un leone potesse parlare*, Sansoni, Firenze, 1992; Friedrich Stadler, *From Methodenstreit to the "Science Wars" – an Overview on Methodological Disputes between the Natural, Social, and Cultural Sciences,* in Marcin Będkowski, Anna Brożek, Alicja Chybińska, Stepan Ivanyk, Dominik Traczykowski (eds.), *Formal and Informal Methods in Philosophy,* Brill, Leiden, 2020, p. 77

PART I

RULES, LAW AND THE RULE OF LAW

The present part of the research aims at providing a historical-conceptual framework in which setting the analysis of the relations between the Rule of Law and the Rule of Machines. To this end, I will offer a brief review of the origins and of the main phases of development of the doctrine of the Rule of Law.

I will first outline the transition from the Medieval order to the centralized power which distinguishes the Modern state and show how the establishment of such power calls for the identification of an adequate form of protection from its abuse. I will illustrate how, beginning with the liberal tradition and then during the Enlightenment, a certain understanding of law is assumed as the cornerstone of the ideal of the government.

In § 1.2. I will briefly analyse how, especially in the course of the Nineteenth century, the ideal of the government of law is appropriated and developed within different traditions, briefly focusing on the elaboration of the German *Rechtsstaat*, the French *État de Droit* and the concept of Rule of Law in the American tradition.

Such analysis will attempt to identify the assumptions which have contributed to make the history of the Rule of Law a history of recurrent conceptual aporias, and which, ultimately, underlie the standpoint adopted by the Rule of Machines narrative.

I will show how the doctrines of the Rule of Law elaborated on the basis of normativist and decisionist accounts of law have proved themselves incapable of guaranteeing the protection of rights and liberties from power and failed to provide a satisfactory account of the government of law as a system of rules capable of guiding behaviour and avoid arbitrary power.

In § 1.4 I will argue that such aporias can be accounted for as the result of the concept of rule assumed within the main legal traditions which have contributed to the development of the doctrine of the Rule of Law.

In § 1.5. I will briefly illustrate a series of doctrines which, distancing themselves from the normativist-decisionist roots of positivist legal theory, develop an understanding of law which centres on the concept of order and institutions.

On this basis, in § 1.6., I will contrast the families of conceptions of law discussed in the previous sections with the common law tradition. I will attempt to show that such tradition offers an account of law and its rule which, precisely by moving from a different account of legal rules, is capable of providing a way out from the aporias which distinguish the doctrine of the Rule of Law.

CHAPTER I

THE GOVERNMENT OF LAW

1.1. The Modern roots of the problems of the Rule of Law

The concept of the Rule of Law is commonly associated with the ideal of the Government of Law, as opposed to the Government of Men which had been thematized since the very origins of the Western political-legal discourse[9]. Notwithstanding the forms of continuity with the discussion around the good government and avoidance of tyranny which developed within the political framework of the ancient Greek *politeia* and then the Latin *civitas*, however all the three concepts of Government, Laws and Men which are inherited by the discourse on the Rule of Law have been significantly reinvented by the Modern political, legal and epistemological sensibility. It is, indeed, only with the emergence, from the sixteenth century, of a particular understanding of sovereign power and of the idea of the State that are laid the foundations on which the Modern theories of law are built. At the same time, the discontinuity with the Millennial tradition is marked by the entrance into the picture of the concepts of subjective rights, freedoms and autonomy, as thematized by the liberal tradition.

Throughout the analysis, I will attempt to highlight how the different doctrines of the Rule of Law elaborated from Modernity express a different articulation of basic factors, i.e., the concepts of law, order and power. A major emphasis on or the emergence of a different understanding of one of such concepts, indeed, necessarily reflects on the meaning and role of the others. The relative degree of

[9] Fred D. Miller, *Aristotle's Philosophy of Law*, in Id, Carrie-Ann Biondi (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics, A Treatise of Legal Philosophy and General Jurisprudence, Volume 6*, Springer, Dordrecht, 2015, p. 99; Aleardo Zanghellini, *The Foundations of the Rule of Law*, in *Yale Journal of Law and the Humanities*, 2016, 28, 2, p. 213; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 7; Jerome Frank, *Courts on Trial. Myth and Reality in American Jurisprudence*, Princeton University Press, Princeton, 1950, p. 405

stabilization of the co-constitutive entanglement of these concepts that emerge during Modernity affords a particular thematization of the role of mediation that law plays between power and individuals. On the basis of a dialectic which, from time to time, accentuates the order-dependent or the order-creating character of power and law, the latter come to be conceptualized and concretely articulated as affording the unfettered and compelling expression of power as much as the means of protection against it.

In the first subsection I will outline the political scenario which results from the change of the relation between power and order that takes place between the sunset of the Middle Ages and the emergence of sovereign territorial entities. In the second paragraph, I will show how, on the background provided by the conceptualization of absolute sovereign power, and in response to it, the liberal debate on government defined the main framework within which the different doctrines of the Rule of Law will be developed.

1.1.1. Order, State, Sovereignty

The political-legal scenario which distinguished the late Middle-Age was founded upon a particular understanding of order, power and law. On one hand, order was conceived as self-sufficient, in that it was inscribed in the very nature of being. On the other hand, power, which is undoubtedly present, is however diffused through multiple nodes of a net of reciprocal relations which reflect a decentralized order. Sovereignty, on the other hand, is only an internal moment of such order, which is better distinguished as *suzeraineté*[10]. Order is indeed articulated through a set of *powers* located along ascending and descending hierarchies. The relations within such hierarchies are asymmetrical, but reciprocal: they are relations between a dominant subject and a subject bound trough obedience, but each dependent on the other. Both in theory and in practice, power is limited in strength and far from being all-encompassing: wide areas of social interaction are indifferent to political power which does not interfere with nor aims at controlling them[11].

In this scenario, the concept of law, necessarily detached from a voluntaristic connotation, is co-constitutively related with that of order: the interactions occurring in social reality are grounded on and express a certain legal order which is historically and logically antecedent to political power[12]. The vacuum of power of the Middle Age is therefore to be understood as a *vacuum principis*: what it is lacking, indeed, is a central power: a power isolated, at a "*radical distance from any other subject"*[13], and with the distinctive capacity of expressing itself through a sovereign decision.

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[10] Mireille Hildebrandt, *Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace*, in *University of Toronto Law Journal*, 2013, 63, p. 208

[11] Paolo Grossi, *Mitologie giuridiche della modernità*, Giuffrè, Milano, 2007, pp. 20-21

[12] Ivi, my translation

[13] Pietro Costa, *'In alto e al centro': immagini dell'ordine e della sovranità fra medioevo ed età moderna*, in *Diritto Pubblico*, 2004, 3, p. 819

It is with Bodin's theory of sovereignty that power takes the form of sovereign power, i.e., the power of a sovereign. The French political theorist paves the way for the enfranchisement of political power from the dense order of the Ancient-Medieval conception and for its centralization in the hands of a sovereign. Such power, indeed, must stand out for its absolute character, *ab-solutus*, untied from that dense web of reciprocal bonds with other powers and capable of overcome their resistance. Theorizing the passage from *suzeraineté* to *sovereignty*[14], Bodin marks the transition towards an understanding of sovereign power modelled on the paradigm of *dominium*, the medieval conception of property:

> The people has renounced and alienated its sovereign power in order to invest him with it and put him in possession, and it thereby transfers to him all its powers, authority, and sovereign rights, just as does the man who gives to another possessory and proprietary rights over what he formerly owned[15]

The processes of centralization and disentanglement of the power of the sovereign traced by Bodin are complemented with the drawing of a line which distinguishes, within the concept of law, *lois* and *droit: loi*, indicates the statute law, which Bodin defines as "*le commandement de celui qui a la souveraineté"*[16] which is opposed, on the other, to *droit*, the law conceived as order in the wake of the medieval legal tradition[17]. The emergence of sovereign power rests on the overlapping between law and sovereign decision. The former becomes the instrument through which the State exercises its order-creating power.

Notwithstanding the various element of discontinuity that it introduces, Bodin's political theory is still rooted in the understanding of order of the late-Medieval conception, as evidenced by his reference to the *République* a set of hierarchically ordinated "*corps"* which are tied by relations as those between the whole and its parts[18]. The State and sovereign power are necessary, for Bodin, precisely for protecting of such *corps*.

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[14] Mireille Hildebrandt, *Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace*, cit., p. 208

[15] Jean Bodin, *Six Books of the Commonwealth*, abridged and translated by M. J. Tooley, Basil Blackwell, Oxford, 1967, p. 26

[16] Carl Schmitt, *On Three Types of Juristic Thought*, translated by Joseph W. Bendersky, Praeger Publishers, Westport, 2004, p. 61; Pietro Costa, *'In alto e al centro':* cit., pp. 825-826

[17] Paolo Grossi, *Mitologie giuridiche della modernità*, cit., pp. 31, 36

[18] *"La différence de la famille aux corps et Collèges, et de ceux-ci à la République, est telle que [le] tout à ses parties; car la communauté de plusieurs chefs de famille ou d'un village, ou d'une ville, ou d'une contrée, peut être sans République, aussi bien que la famille sans Collège. Et tout ainsi que plusieurs familles, alliées par amitié, sont membres d'un corps et communauté, [de même] aussi plusieurs corps et communautés, alliés par puissance souveraine, font une République. La famille est une communauté naturelle, le Collège est une communauté civile. La République a cela davantage, que c'est une communauté gouvernée par puissance souveraine, et qui peut être si étroite, qu'elle n'aura ni corps ni Collège, [mais] seulement plusieurs familles. Et par ainsi, le mot de Communauté est commun à la famille, au collège, et à la République ; et proprement le corps s'entend, ou de plusieurs familles, ou de plusieurs collèges, ou de plusieurs familles et collèges",* see Jean Bodin, *Six Livres sur la Republique*, III, vii

It is only with Hobbes that the idea of order undertakes a deeper rupture from the pluralistic and diffuse conceptions which distinguished the Middle Age. Hobbes, indeed, tuned upside down the relation between order and sovereignty: order is possible only as an effect of sovereignty, there can be no natural order, but only an artificial order. On this basis, Hobbes provides a new entanglement between law, order, and sovereign power[19] and, describing the State as a *macro-anthropos* - an Artificial Man - Hobbes fits in, and gives a new sense of direction to, the longstanding idea of "a machine of government"[20].

> For by art is created that great Leviathan called a Commonwealth, or State (in Latin, *Civitas*), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the sovereignty is an artificial soul, as giving life and motion to the whole body[21]

For Hobbes, the sovereign comes into being to protect "natural persons" intended as individuals, and not different *communauté*, as in Bodin's theory. With respect to the State, there is no pre-existing form of political subjectivity, any community, any order, can come into being only by virtue of the sovereign decision. The political community is a consequence, not the source, of sovereignty. In this sense, as Schmitt pointed out, Hobbes represents the first and "*classical case of decisionist thinking*"[22]: the whole law, from norms and statutes, their interpretations, are to be intended as expression of the sovereign decision.
This decision is the expression of a sovereign power which is absolute: not only is the unique source of law and order, but it is itself not subject to any law nor any order. Being sovereign, indeed, means being *legibus solutus*, subject only to the superior laws of God and nature. As Hobbes states in the *Leviathan*

> The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before. For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound[23]

As Maitland put it, "*Hobbes's political feat consisted in giving a new twist to some well-worn theories of the juristic order and then inventing a psychology which would justify that twist*"[24]. The order constituted by the sovereign, indeed, rests on

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[19] Pietro Costa, *'In alto e al centro'*, cit., p. 827
[20] Alain Supiot, *Governance by numbers: the making of a legal model of allegiance*, translated by Saskia Brown, Hart Publishing, Oxford, 2017, p. 19
[21] Thomas Hobbes, *Leviathan*, Introduction
[22] Carl Schmitt, *On Three Types of Juristic Thought*, cit., p. 61; see, also, Id., *The Leviathan in the State Theory of Thomas Hobbes. Meaning and Failure of a Political Symbol*, translated by George Schwaband Eerna Hilfstein, Greenwood Press, Westport, 1996
[23] Thomas Hobbes, *Leviathan*, XXVI, 2
[24] Cecil H. S. Fifoot (ed.), *The Letters of Frederic William Maitland*, Harvard University Press, Cambridge, 1965, no. 303, p. 304, quoted in David E. C. Yale, *Hobbes and Hale on Law, Legislation and the Sovereign*, in *The Cambridge Law Journal*, 1972, 31, 1, p. 124, fn 17

the authority and power which the latter receives through the subjection of each member of the community to its will, reason and judgment. The configuration of the origin of the State as resulting from the reduction of every individual will, reason and judgment to that of the sovereign depends on Hobbes's pessimistic anthropological paradigm and his subjectivist understanding of human reason. The fact that each human is endowed with reason is indeed placed at the root of the problem of order. For Hobbes, each individual has *her* reason, but there is no universal standards or criteria of reasonableness: "*commonly they that call for right reason to decide any controversy, do mean their own*"[25]. It is precisely by following one's reason and judgment that disputes and violence arise, since each individuals feels entitled by the dictates of her own reason to prevail on the other[26]. Right reason, for Hobbes, cannot but be conventional, but the convention that establishes it must be such that it cannot leave space for deviance. This can be realized, and the otherwise unsolvable disputes can end, only if each individual deposits "*his judgment in all controversies in the hands of the sovereign*"[27], and all wills are reduced "*by plurality of voices unto one will*"[28]. As Hobbes maintains in his debate with Bishop Bramhall, the "*Law is all the right Reason we have*":

> The reason whereof is this, that because neither mine nor the Bishops reason, is right Reason, fit to be a rule of our Moral actions, we have therefore set up over our selves a Soveraign Governour, and agreed that his Lawes shall be unto us, whatsoever they be, in the phace of Right reason, to dictate to us what is really good[29]

Since only the acceptance of the sovereign's right reason can guarantee peace, the commands through which such right reason is expressed must be undisputable. Such commands are indeed

> speech by which we signify to another our appetite or desire to have any thing done, or left undone, for reasons contained in the will itself: for it is not properly said, *Sic volo, sic jubeo,* without that other clause, *Stet pro ratione voluntas:* and when the command is a sufficient reason to move us to action, than is that command called law[30]

Only by precluding, on the part of the subject, the exercise of his reason, judgment and faculties of deliberation, the commands expressed by the sovereign through laws can prevent the arising of disputes. The stance the individual is expected to adopt in relation to the commands of the sovereign exemplified by the considerations made by the Philosopher at the beginning of the *Dialogue.* Reporting the results of his study of the laws, he indeed maintains that

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[25] Id, *De Corpore Politico*, 8
[26] "*as when there is a controversy in an account, the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature ; so is it also in all debates of what kind soever*", Thomas Hobbes, *Leviathan*, V
[27] Id., *De Corpore Politico*, II, 8, 5
[28] Thomas Hobbes, *Leviathan*, XX
[29] Id, *The Questions Concerning Liberty, Necessity, and Chance*, p. 147
[30] Id, *Human Nature, or the Fundamental Elements of Policy*, XIII

> I did not much examine which of them was more or less rational; because I read them not to dispute, but to obey them, and saw in all of them sufficient reason for my obedience, and that the same reason, though the Statutes themselves were changed, remained constant"[31]

For the machine of government to work properly, moreover, the same posture adopted by individuals towards the sovereign's laws has to be taken also by the "*magistrates and other officers of judicature and execution*": indeed, they are anything but "*artificial joints*" merely instrumental for the of the sovereign will[32]. Within this framework, rights and freedoms, the *ius*, cannot but coincide with the *silentium legis*, that is, what is not expressly forbidden by the *lex*[33]. As Costa highlights,

> Subjects play a fundamental role: they are the authors on which the creation of the sovereign 'actor' depends. But it is also true that their protagonism stops with the act of 'invention' of sovereignty: once that the sovereign is created, the subjects become the inhabitants of a city which, whereas created for their security, is organized around an urban planning mandated from the top[34]

1.1.2. The "Government of Law", Liberty and Rights

The sixteenth and seventeenth century are distinguished for a growing and renewed attention to the classical "republican" theme of government. This period of political transition is accompanied by a process of intense elaboration of the concept of law, which comes to assume an ever more kaleidoscopic polysemy. As already in Bodin's work, the discourse around sovereignty is told by making reference to, and by distinguishing between *law* and *laws.* These, in turn, are framed into positive and natural understandings of order. As many and different are the threads that can be weaved combining this conceptual matrix, what becomes undisputed is the very setting of the discussion in terms of law. Within this framework, sovereignty and order become increasingly intertwined with the theme of the Government of Law. The position assumed by Hobbes in relation to this ideal was quite clear: the possibility "*that in a well-ordered Commonwealth, not men should govern, but the laws*" was dismissed as "*another error of Aristotle's politics*"[35]. As the English philosopher maintained

> [w]hat man that has his natural senses, though he can neither write nor read, does not find himself governed by them he fears, and believes can kill or hurt him when he obeyeth not? Or that believes the law can hurt him; that is, words and paper, without hands and swords of men? And this is of the number of pernicious errors: for they

[31] Thomas Hobbes, *A Dialogue*, cit., p. 8
[32] Id., *Leviathan*, Introduction
[33] Id., *Leviathan*, XXVI; Id, *A Dialogue*, cit., p. 35
[34] Pietro Costa, *'In alto e al centro'*, cit., p. 833, my translation
[35] Thomas Hobbes, *Leviathan*, XLVI

> induce men, as oft as they like not their governors, to adhere to those that call them tyrants, and to think it lawful to raise war against them[36]

Contemporary to Hobbes, Filmer questioned at its very foundations the ideal of the government of laws:

> We do but flatter ourselves, if we hope ever to be governed without an arbitrary power. No: we mistake; the question is not, whether there shall be an arbitrary power, but the only point is, who shall have that arbitrary power, whether one man or many? There never was, nor ever can be any people governed without a power of making laws, and every power of making laws must be arbitrary: for to make a law according to law is *contradictio* in adject[37]

In fact, it is precisely as that which can be opposed against tyrannical and absolute power, that the concept of law assumes a preeminent position in the legal-political debate on the foundations, forms and the limits of government. For instance, in his *Oceana*, Harrington distinguished two kinds of government. On one hand, as "Government *de facto, or according to modern prudence"* he distinguished political entities subjected to some men that rule "*according to their private interest*": this scenario represents for Harrington an "*empire of men, not of law*s". On the other hand, in what he calls "*Government […] de jure, or according to antient prudence*", what govern are laws which are expression of the common interest. This form of governments is "*an empire of laws, and not of men*". In both cases, "*law must equally procede from will*": what changes is to which that will belongs, and whose interest it expresses: a public, shared interest or the whim of the individual or of the few[38].

In this framework, the concept of law comes to sit at the intersection of the different theories of government and the discourse on liberty and individual rights. It is from the encounter of these discourses that the foundations of the Rule of Law doctrine are laid down. By drawing on Zolo's wording, the perspective which underpins the theory of the Rule of Law can be described as distinguished by *political pessimism* and *normative optimism*[39]. Under the first profile, political power represents the source of a profound contradiction: on one hand, although with different intensity, the sovereign power is emphasized as an element of cohesion, stability and guarantee of order. On the other hand, such power is intrinsically dangerous in that "*by nature, it tends to concentrate, to recursively*

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[36] Ivi

[37] Robert Filmer, *The anarchy of a limited or mixed monarchy. Or, A succinct examination of the fundamentals of monarchy, both in this and other kingdoms, as well about the right of power in kings, as of the originall or naturall liberty of the people. A question never yet disputed, though most necessary in these times*, London, 1648, Preface

[38] See, James Harrington, *The Commonwealth of Oceana*, in John Toland (ed.), *The Oceana and Other Works of James Harrington, with an Account of His Life*, Becket and Cadell, London, 1771, Book I, chapter II

[39] Danilo Zolo, *Rule of Law: A Critical Reappraisal*, in Pietro Costa, Danilo Zolo (eds.), *The Rule of Law. History, Theory and Criticism*, Springer, Dordrecht, 2007, p. 21

reproduce itself, and to become arbitrary"[40]. The attempt to overcome such inherent tension is realized by rearticulating the notion of political power through the concept of law: normative optimism designates an attitude which assumes the law to represent an instrument through which both the protection of the individual and the exercise of the sovereign power can be reconciled. Through its "'*juridicalization'"*[41], political power becomes legal power: having to express itself through law, its force is constrained by legal requirements which make it controllable. Conversely, whatever power is exercised outside the boundaries of law is regarded as pathological. In the definition of power, law and arbitrariness are conceived as mutually exclusive.

In the work of Locke, the optimistic understanding of law is connected to an anthropological paradigm which contrasts with Hobbes's pessimistic stance and reflects - or better, is a reflection - of a different understanding of order[42] . Locke's political-legal theory, indeed, gives a contractarian twist to the medieval conception of a natural order[43]. For Locke, the Commonwealth represents the political frame which, through the adoption of laws, aims at guaranteeing a *quid pluris* of protection to individuals which are considered as born free and equals: the entitlement of fundamental subjective positions pre-exist the State and is strictly connected to the acknowledgment of human's nature of rational being[44]. Through "*established standing laws*" promulgated and known to the people and the institution of "*indifferent and upright judges*" to decide controversies, consociates aim at fostering and securing their possibility to enjoy the goods possessed in the state of nature. Not only laws constitute the scaffolding of such artificial order, but they also stand out against arbitrary and abusive forms of power. Tyranny is defined by Locke as that "*power beyond Right"* which is exercised "*not for the good of those, who are under it, but for [one's] own private Advantage*": but this is

[40] Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, cit. pp. 22-23

[41] Ivi

[42] As Santoro highlights, "*liberal doctrine is from its very beginning a 'discourse' aimed at specifying whom and what should be governed. Thus natural law contractarianism is not to be seen as a political theory developing out of a given anthropological conception, but rather as one developing its own anthropological conception, determining most of those features politically and socially relevant actors are supposed to possess*", see, Emilio Santoro, *Autonomy, Freedom and Rights: A Critique of Liberal Subjectivity*, Springer, Dordrecht, 2003, p. 68

[43] John Locke, *Second Treatise on the Government*, § 76; Pietro Costa, *Il Progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico*, Giuffrè, Milano, 1974, pp. 112-114

[44] For Locke, "*a man's freedom – his liberty of acting according to his own will – is based on his having reason, which can instruct him in the law he is to govern himself by, and make him know to what extent he is left to the freedom of his own will",* John Locke, *Second Treatise on the Government*, § 63; cfr,, also, § 61 "*we are born Free, as we are born Rational*" and § 59 "*in all the laws a man is under, whether natural or civil*" his freedom depends on his being "*capable to know that Law, that so he might keep his actions within the bounds of it* […] *he is presumed to know how far that aw is to be his guide, and how far he may make use of his freedom, and so comes to have it*"

a power to which *"no body can have a right to*"[45], a government based on laws is mutually exclusive with it[46].

Another contribution which will be extremely influential on political theory and on the doctrine of the Rule of Law is represented by the writings of Montesquieu. The French philosopher maintained that the very possibility of liberty depended on the existence of a moderate government, i.e. an institutional architecture designed to avoid the risk of abuse of power[47]. As Montesquieu pointed out, "*constant experience shews us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go"*[48]. In order to prevent this spiral, "*power should be a check to power*"[49], that is, it was necessary to ensure that power was distributed through the articulation of different bodies and competences: "*to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other"*[50].

Both in the Continent and in the United States, the different doctrines of the Rule of Law will assume as central the concerns expressed by the writers of the liberal tradition. However, the core elements of such tradition will be articulated differently in both a temporal and spatial dimension, giving rise to significantly divergent results and delineating more or less ambitiously the scope and contents of the Rule of Law doctrine.

For what concerns the relation between laws and liberty, both Locke and Montesquieu emphasize that laws, on one hand, and respectively, freedom under government and political liberty, on the other, are internally related[51]. There are, however, between the two Authors, some differences which it is worth considering. On one hand, Montesquieu's notion of political liberty puts emphasis on security. The violation of the laws threatens liberty in that it stifles the possibility to rely on others fulfilling the expectations and common standards of conduct that laws, positive laws, have established[52]. On the other hand, while certainly sharing these

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[45] Ivi, § 199

[46] Cfr, ivi, § 202 "*Where-ever Laws ends, Tyranny begins*"

[47] Charles Louis de Secondat, Baron de Montesquieu, *De l'esprit des loix*, Barillot et Fils, Geneve, 1748. English translation: *The Spirits of Laws*, translated by Nugent Thomas, Batoche Books, Kitchener, 2001, Book XI, Chapter IV

[48] Ivi,

[49] Ivi,

[50] Ivi, Book V, Chapter XIV; more than separation of powers, Montesquieu indeed emphasizes the need for the mutual interdependence of the different powers, see, Ivi, Book XI, Chapter VI

[51] For Montesquieu, political liberty is defined by what law permits and what it forbids: it is the liberty not to be "*compelled to do things to which the law does not oblige"* and, on the other hand, not to be *"forced to abstain from things which the law permits*", see Montesquieu, *The Spirits of Laws*, Book XI, Chapter IV. For Locke, freedom under government consists in being able to follow one' own will outside of what is not forbidden by the "standing rule" John Locke, *Second Treatise on Government*, § 22

[52] For Montesquieu maintains that "*[i]f the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behaviour, there is an end of liberty; unless they are taken up in order to answer, without delay, to a capital crime; in which case they are really free, being subject only to the power of the law*", Book XI, Chapter VI; as the French philosopher adds in the following book, *"supposing a state to have the best laws imaginable in this*

components[53], Locke also stresses that freedom depends on the fact that the laws to which one is subject are established by an authority legitimated by consent[54]. The power of creating laws and that of giving them execution is established by consent for the purpose of better preserve *life, liberty and possessions* which, in the state of nature, might be endangered by biases and being one's own judge. Since the government is established to have a *quid pluris* of protection, its power is simultaneously limited[55]. Considering that humans already were entitled of fundamental rights in the state of nature, Locke stresses,

> [i]t cannot be supposed that they should intend, had they a power so to do, to give any one or more an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them; this were to put themselves into a worse condition than the state of Nature, wherein they had a liberty to defend their right against the injuries of others […] Whereas by supposing they have given up themselves to the absolute arbitrary power and will of a legislator, they have disarmed themselves, and armed him to make a prey of them when he pleases[56]

It is already possible to indicate in broad terms two lines of developments which manifest a different articulation of the relation between liberties, laws, and sovereign power. On one hand, the reforms and legal consolidations adopted by Enlightened monarchs, which encountered the favour and encouragement of jurists and political thinkers[57], and exemplified the possibility to unite a form of absolute sovereignty with the understanding of law as that instrument of government that, through its formal characters, could grant legal certainty and security.

On the other hand, especially from the second half of the eighteenth century, the optimistic view of law is combined with the development of a notion of liberty which, being ever more understood as self-determination, promotes a conception of sovereignty which and sets itself in opposition to monarchic regimes. This second perspective, which draws its inspiration from the writings of Locke and Rousseau, will find its expression especially with the American and French revolutions. While

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respect, a person tried under that state, and condemned to be hanged the next day, would have much more liberty than a bashaw enjoys in Turkey", Book XII, Chapter II

[53] In this sense, Locke connects one's freedom to, on one hand, being subject to a "standing rule" which is defined by its common character, that is, generality, and, on the other hand, not to be subject to the "*inconstant, uncertain, unknown, arbitrary will of another man*", John Locke, *Second Treatise on the Government*, § 22

[54] Ivi

[55] Ivi, §§ 135-142

[56] Ivi, § 137; cfr., also, §§ 131, 149

[57] In this sense, discussing the "faults of jurisprudence", Muratori pointed out that "*the most laudable result would be if the Princes were to take a scythe to the root of this problem, cutting short all controversy and bringing inviolable order to everything that should in future come before the courts of justice with new laws and statutes* […] *if Princes write the laws, the only thing they will have in mind is the public good',* quoted in Paolo Grossi, *A History of European Law*, cit., p. 67; Ludovico A. Muratori, *Dei difetti della giurisprudenza*, Rizzoli, 1958, p. 248. See, also, Gaetano Filangieri, *The Science of Legislation*, Emery and Adams, Bristol, 1806; Benjamin Constant, *Commentary on Filangieri's Work*. Translated, edited and with an Introduction by Alan S. Kahan, Liberty Fund, Indianapolis, 2015

the theories elaborated within these different strands diverge on both, the sources and nature of sovereign power and the identification of the political actors to which it should be allocated, that which unite them, and establishes itself as a common thread, is the assumption of a voluntaristic element as central to the understanding of law and order. The different theories of the Rule of Law will attempt to provide an account of the limits that such will encounters.

The ideal of law promoted during the Enlightenment finds fulfilment especially in the model represented by the French the Code Civil of 1804[58]. The distinctive

[58] In his "*On the Necessity of a General Civil Law for Germany",* Anton Thibaut, identified codification as the only and necessary instrument to establish a complete, clear and comprehensive legal order. Thibaut describes German law as an "*endless waste of mutually contradictory and destructive rules, wholly fitted to separate the Germans from one another and to make it impossible for judges and magistrates to reach a thorough knowledge of the law. But even complete knowledge of this chaotic miscellany does not lead far; for our whole native law is so incomplete and empty that, of a hundred legal questions, at least ninety must be decided from the adopted legal codes, the Canon and the Roman law*", tranlated in Paolo Becchi, *German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence",* in Damiano Canale, Paolo Grossi, Hasso Hofmann (eds.), *A Treatise of Legal Philosophy and General Jurisprudence Volume 9*: *A History of the Philosophy of Law in the Civil Law World, 1600–1900*, Springer, 2009, pp. 190-197. Once enacted, the Code should have become the only source having legal relevance. Jurists, on their part, should have had related with the Code with a technical and scientific approach. In Germany the path towards the systematization of law that diverged from that of Codification. Among the factors pushing in such direction, some have a geopolitical character: at the time Germany was nothing more than a geographical label and, differently than in France, there was not a sovereign capable of assuming that role of lawmaker. Each of the several German territorial states had its own legal systems formed by statutes and customary laws implanted on a common background resting on the interpretation of the *ius commune.* The space that was not occupied by a sovereign, however, was anything but empty: a flourishing community of academic jurists took over the task to develop a set of methods capable of giving a "systematic" order to existing law. Thibaut's proposal to adopt a code faced the strong opposition of Friedrich Carl von Savigny who replied with his *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the Vocation of Our Age for Codification and Legal Science), a text that laid the foundations of German Historical school. See, Andreas Rahmatian, *Friedrich Carl von Savigny's* Beruf *and* Volksgeistlehre, in *The Journal of Legal History*, 2007, 28, 1, p. 1. The route towards the adoption of a Civil Code, the *Bürgerliches Gesetzbuch* (BGB), which entered into force only on the 1st of January 1900, passed through a different conceptual frame that was elaborated by the Historical School and the Pandectistic School The conceptual foundations for the elaboration of the BGB were laid especially by the work of Puchta and Windscheid. See, Gerhard Dilcher, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, in *Journal of the Max Planck Institute for European Legal History*, 2016, 24, p. 20; Luc J. Wintgens, *From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law*, in *Statute Law Review*, 2010, 31, 2, p. 85. That within which the German legal science takes its beginnings is a cultural *milieu* where mathematics and natural sciences are growingly assumed as a model by political and legal thinkers. Jurists were starting to claim to "*make* discoveries *like the natural scientists"* and *"*[…] *seek to establish universal rules of human conduct as defined by the nature of mankind – something which should be visible to anyone who has the correct outlook",* Paolo Grossi, *A History of European Law*, cit., p. 60. Based on the assumption that natural law contained undisputable truth and that the sources of Roman law contained their expression in form of principles, Gottfried Wilhelm von Leibniz devoted his life to the development of an axiomatic legal system. Convinced that natural law was complete and directly applicable in the cases in which positive law was obscure, Leibniz argued that, through a mathematical-demonstrative method, his system could have provided the one-

right-answer for any legal dispute, see Alberto Artosi, Giovanni Sartor, *Liebniz as jurist*, in Maria Rosa Antognazza (ed), *The Oxford Handbook of Leibniz*, Oxford University Press, 2018, p. 647; M. H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, in *The American Journal of Legal History*, 1986, 30, 2, pp. 95-121; Scott Brewer, *Law, Logic, and Leibniz. A Contemporary Perspective*, in Alberto Artosi, Bernardo Pieri, Giovanni Sartor (eds.), *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*, Springer, 2013, p. 199. Leibniz's theories were diffused within the German juristic community especially by Christian Wolff, who imagined the legal system as a "*collection of truths duly arranged in accordance with the principles governing their connections*", Translated in Nicholas Rescher, *Leibniz and the Concept of a System*, in *Studia Leibnitiana*, 1981, 13, p. 116; Micheal H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, in *The American Journal of Legal History*, 1986, 30, 2, p. 103. In order to understand and make use of such system for practical purposes, the jurist was required to adopt the methods of geometry: *"[…] things may not be brought out into the light [of clarity], unless, setting oneself in the footsteps of Euclid, of the truer, stricter logic of the law; individual terms are defined by exact definitions, individual propositions are adequately demonstrated, and, no less, definitions are thus properly arranged, so that not only may consequences be entirely understood through their prior propositions, but also that the truth of these results be demonstrated through [the truth] of these preceding statements*", Christian Wolff, *Institutiones Juris Naturae et Gentium*, Halle, 1749, quoted in Micheal H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, cit., p. 103. Since law was an ordered system, judicial decision-making should have consisted in the "*logical application of abstract principles and general concepts with a fixed and determinate place in the system"*, Franz Wieacker, *A History of Private Law in Europe, with Particular Reference to Germany*, Clarendon Press, 1995, p. 255. Although the subsequent German legal science abandoned the vision of the legal order as founded on natural law, the methodological approach developed by Leibniz and Wolff was assumed as a starting point by the Historicist and Pandectistic school, see Luc J Wintgens, *From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law*, in *Statute Law Review*, 2010, 31, 2, p. 95. Pandectists aimed at providing a description of the sources of Roman law in the form of a system of interrelated concepts – something that today we would call an ontology: for Georg Friedrich Puchta, one of the leading figures of the school, the task of legal science was "to know legal propositions by their systematic connection: This means knowing them as mutually conditioning propositions deriving from one another, in such a way that we can climb up the genealogy of the single propositions until their principle is found, and can then make our way down from these principles to their farthest offshoots", Georg Friedrich Puchta, *Cursus der Institutionen*, Breitkopf und Härtel, 1881, p. 22, translated in Paolo Becchi, *German Legal Science: The Crisis of Natural Law Theory*, cit., p. 222. As the legal system corresponded to a logically ordered structure – whose emblem is represented by Puchta's pyramid of concepts (*Begriffspyramide*) – the application of legal concepts was understood as a strict logical operation that "*like that of a rule of mechanics or an accurate formula in physics, necessarily leads to a decision which is correct, i.e, just*", see Franz Wieacker, *A History of Private Law in Europe, with Particular Reference to Germany*, cit., p. 343; on the analogies between Pandectism and legal ontologies, see: Meritxell Fernández-Barrera, Giovanni Sartor, *The Legal Theory Perspective: Doctrinal Conceptual Systems vs. Computational Ontologies*, in Giovanni Sartor, Pompeu Casanovas, Mariangela Biasiotti, Meritxell Fernández-Barrera (eds.), *Approaches to Legal Ontologies: Theories, Domains, Methodologies*, Springer, 2011, p. 29; Vytautas Čyras, Friedrich Lachmayer, *Legal Norms and Legal Institutions as a Challenge for Legal Informatics*, in Aulis Aarnio, Thomas Hoeren, Stanley L. Paulson, Martin Schulte, Dieter Wyduckel (eds.), *Positivität, Normativität und Institutionalität des Rechts Festschrift für Werner Krawietz zum 80. Geburtstag*, Duncker & Humblot, 2013, pp. 581. The sophistication and dogmatism distinguishing German legal science became object of criticism of a doctrinal movement whose main protagonist is Rudolph von Jhering, once a leading figure of the Pandectist school. Jhering's attacked the Pandectists' idea of a conceptual system capable of providing detailed rules for every possible case. In particular, in an essay titled "*Im juristischen Begriffshimmel"* (translated in English by Charlotte L. Levy in Rudolf von Jhering, *In the Heaven of Legal Concepts: A Fantasy*, in *Temple Law Quarterly*, 1985, 58, 4, p. 799) Jhering denounced the "*false assimilation of the concepts and methods of legal science to*

elements of the *Code* - its "*esprit de système"* and "*esprit de totalité"* – set it as a revolutionary step aiming to *"arrêter le cours de l'histoire*"[59]. The rupture with the past takes the shape of a political intervention that attempts to fashion the law into "*an organic whole, underpinned by a unitary project, hedged by rigorous guidelines, thoroughly coherent and logically structured*"[60]. As a flip side of political monism, the *legicentric* approach underpinning Codification aims at breaking with the diffuse powers distinctive of the premodern order: all the sources of law of the medieval heritage are wiped out in favour of legislation. All law is reduced to positive law, as expressed in the form of the Code. This feature is best expressed by the dogmas of completeness, according to which the Code had provided a seamless legal order devoid of any gap: any possible dispute could have been settled by such a system of rules. The Code claims its exclusiveness: a re-

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mathematics": contrary to the Pandectist dogmas, legal reasoning was to be seen as something more than pure calculation, as much as the meaning of a legal concept could not be seen as only that which was unfold through deductive methods , see Herbert L. H. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, 1983, p. 266. interestingly, the metaphors that Jhering uses to criticize the work of the Pandectists are that of a series of machines: the *hair-splitting machine,* the *jurisprudential machines,* the *fiction machine,* the *construction machine,* or the *dialectic drilling machine.* See, Rudolf von Jhering, *In the Heaven for Legal Concepts: A Fantasy*, cit., pp. 805, 807, 809. Since, for Jhering, legal concepts were not the representation of an already existing and fixed reality, but instrument developed by engaged subjects to fulfil some social end, legal knowledge could not rely but on the jurists' capacity of "*contemplating with a legal eye the ordinary occurrences of life"*, Rudolf von Jhering, *Jurisprudenz des taglichen Lebens*, Gustav Filcher, 1896, English translation: von Jhering Rudolf, *Law in Daily Life: a collection of legal questions connected with the ordinary events of everyday life*, translated by Henry Goudy, Clarendon Press, Oxford, 1904, Preface; Caroline Humfress, *Telling Stories About (Roman) Law: Concepts, Rules and Rhetoric in Legal Discourse*, in Paul Dresch, Judith Scheele (eds.), *Legalism: Rules and Categories*, Oxford University Press, 2016, p. 79. If we leave aside for a moment the sarcastic picture drawn by Jhering and, as in the case of the School of Exegesis, we look beyond the way Pandectists were presenting their methodology, the insistence on both the idea of completeness and the existence of a one right solution for every case can be read as elements that, instead of giving us an information about the legal system imagined by Pandectist, tell us something about the creative ability of the jurists that of such system were the designers. On the scientific character of Pandectists approach, Paolo Becchi writes that "*the jurist's scientific activity is understood as more than just cognitive, or as exclusively concerned with knowing. For in taking up this task of bringing to light what is only implicit in positive law, legal science becomes in its own turn productive of new law*", see Paolo Becchi, *German Legal Science: The Crisis of Natural Law Theory*, cit., p. 222. As Haferkamp has noticed, notwithstanding the central role it played within the Pandectistic rhetoric, "*Logic was only an auxiliary tool, not a certain path to knowledge. The development of concepts, therefore, was seen as a complex hermeneutic interplay between the thinker and the thought, the contemporary term being* Anschuuung *(observation)*", Hans-Peter Haferkamp, *Jurisprudence of concepts*, cit., p. 433

[59] Jean Carbonnier, *Droit civil. Introduction*, PUF, Paris, 2002, p. 199. As Cappellini highlights "*[…] the Code is the typical son (and we should add, intrinsically revolutionary) of Modernity and its 'Juristic Absolutism': the modern Code arises as an experience alternative to the Medieval legal order (and the Ancien Régime); as an attempt to establish a general (as opposed to 'common') unity in the legal system such as to mark the definitive triumph of the* loi *on the* droit *(according to Bodin's contraposition), of positive law (in itself already just) on justice, of the omnipotence of the legislator on the 'iurisprudentia' of the jurist",* Paolo Cappellini, *Storie di concetti giuridici*, cit., p. 116, my translation

[60] Paolo Grossi, *A History of European Law*, cit., p. 88

elaboration of the written sources of law as that accomplished by medieval jurists would have constituted an intolerable mediation between the sovereign and those subject to his power[61]. Neither legal doctrine[62] nor judges are necessary to establish the meaning of the rules contained in the Code: such meanings have already been thoroughly ascribed and fixed by the sovereign. With respect to positive law, all that jurists are required to do is obey, and if they are judges, *apply* it by matching the case at hand – a proposition about the fact – with the corresponding rule[63].

1.2. The doctrine of the Rule of Law in Modern legal traditions

In the following paragraphs I will analyse the emergence and development of the different doctrines of the Rule of Law in the nineteenth and twentieth century. In the course of the analysis, I will highlight how the elaboration of such doctrine(s) constitutes an attempt to overcome the problems raised by the voluntarist-decisionist understanding of law distinguishing Modern Western legal traditions.
I will first present the Continental tradition of *Rechtsstaat* and *État de Droit* and, contrary to what a historical perspective would require, I will postpone the analysis of the debate on the Rule of Law in the United States and England, respectively, to sections 2.2.2 and 2.6. Admittedly, the relations between the Continental and the Anglo-American elaboration of the doctrine are not only a matter of shared common roots: the adoption of a different sequence of analysis might have emphasized, for instance, how British liberal though influenced the American

[61] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law. Novel Entanglements of Law and Technology*, Edward Elgar Publishing, 2015, pp. 177, 183

[62] To the point that, according to Pierre Legrand "*Napoleon is reputed, upon the appearance, but a few years later, of the first scholarly commentary on the French Code civil by Maleville, to have exclaimed 'Mon code est perdu'"* [My Code is lost]. Pierre Legrand, *Strange power of words: Codification situated*, in *Tulane European and Civil Law Forum*, 1994, 9, p. 11

[63] As reported by Weisst, in this perspective the King of Prussia, Friedrich Wilhelm II, expressly forbade judges "*to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statute*", see Gunther A. Weisst, *The Enchantment of Codification in the Common-Law World*, in *The Yale Journal of International Law*, 2000, 25, p. 458. Any activity different than an act of mere *declaratio* of the law would have been considered a usurpation of power compromising the project of order that the sovereign had pursued through the enactment of positive law. In this picture, acts of volition are the exclusive preserve of the political authority. The competence of the judiciary is limited to those acts of cognition that are necessary to determine what the sovereign has ordered. As the French *Cour de Cassation* affirmed in an *arrêt* adopted on the 25th of May 1814, "*It is not up to the courts […] to judge the law; they must apply it as it is, without them even being allowed to modify or narrow it for any reason, irrespective of its urgency*", my translation; the text of the *arrêt* is reported in Pierluigi Chiassoni, *Scuola dell'esegesi. Progetto di voce per un "Vademecum" giuridico*, in *Materiali per una storia della cultura giuridica*, 2003, 2, p. 342. The Code, in a way, is understood as "self-executing": the existence of the judiciary is justified only by a need of practical nature, that of having someone to process the propositional knowledge in which the law is exhaustively expressed. One could say that, under the ideology of Codification, if there had been mechanisms capable of processing such information, the activity delegated to the judiciary could have been assigned to machines.

constitutionalism, which in turn strongly influenced the French, which, in full circle, impacted the British discussion[64]. The structure of my analysis will inevitably severe a considerable portion of the web of reciprocal connections between the different traditions or, at least, will lack to give them the required prominence. On the other hand, I am interested in highlighting both the continuity of the Continental doctrines with the framework so far delineated as much as I am interested in underlining some discontinuities and specific features which distinguish the Continental and the Anglo-American tradition.

1.2.1. The Continental tradition

1.2.1.1. The German *Rechtsstaat*

The doctrine of the *Rechtsstaat* which is developed in Germany from the first decades of the nineteenth century aims at providing an account of the legal limits of the sovereign power. It is necessary to highlight that, while this was the general aim, the concept of *Rechtsstaat* was appropriated by theoretical perspective expressing different assumptions, resulting in the elaboration of doctrines which articulated in a different manner both the power that had to be limited and what constituted a limit.

A first set of contribution, rooted in a liberal perspective, conceptualized the *Rechtsstaat* as the state in which individual rights are guaranteed from the interference of the sovereign. Such liberal doctrines differed, however, in relation to the foundations of such rights. On one hand, jurists like von Rotteck, inspired by natural law and especially by Kantian legal doctrine, affirmed the conceptual primacy of rights with respect to the State. Under this view, the State was not the source of rights, but it was nonetheless necessary for their protection. On the other hand, von Mohl aimed at providing rights with a foundation in positive law. In this perspective, he articulated the relation between the State and individuals as a relation of citizenship which had to be established by a written constitution.

On the other hand, the concept of *Rechtsstaat* was adopted by a conservative conception connected to the *Polizeistaat*, a doctrine centred on the primacy of the State. For Friedrich Stahl, *"administration requires freedom to act unhindered in order to serve and expand the general interest"*[65]. Accordingly, Stahl elaborated a narrow legal definition of the *Rechtsstaat* as the State whose aim is to "*exactly determine and unquestionably establish the lines and boundaries of its action as well as the free ambits of its citizens in accordance with law*"[66]. Within this

[64] To name the most exemplary, Edmund Burke, *Reflections on the Revolution in France*, edited by Turner Frank M., Yale University Press, New Heaven, 2003

[65] Mireille Hildebrandt, *Radbruch's* Rechtsstaat *and Schmitt's Legal Order: Legalism, Legality, and the Institution of Law*, in *Critical Analysis of Law*, 2015, 2, 1, p. 44

[66] Frriedrich J. Stahl, *Die Philosophie des Rechts*, Volume II, Mohr, Tubingen, 1878, p. 137, translated in Pietro Costa, *The Rule of Law*, cit., p. 91

framework, the legal subject was the people, not the individuals, and rights could be conceived only as a concession of the sovereign[67].

While the liberal conception of the *Rechtsstaat* reached its culmination with the *Declaration of the Fundamental Rights of German People* of 1948[68], that was, however, also the beginning of a rapid decline. The perspective cultivated by liberals of a *Rechtsstaat* based on a constitution acknowledging fundamental rights and binding the Legislator to their respect was indeed interrupted by the *Federal Declaration of 23 August 1851*, which stated that "*[t]he so-called fundamental rights of the German people […] cannot be considered legally valid*"[69].

During the second half of the nineteenth century, the spotlight became the subjection of administrative action to law. From the writings of von Bahr, Stahl's conception of *Rechtsstaat* as the state in which administration is requires to act by means of law was expanded to include a broader understanding of the principle of legality: the concept of *Rechtsstaat* implied the possibility to subject the administration to legal control, that is, the possibility for individuals to demand the enforcement of legal constraints before an administrative jurisdiction.

The main difficulties for a further development of the doctrine of the *Rechtsstaat* were represented by the political-legal assumption of a State distinguished by legal personality, an absolute sovereign will, and the monopoly on the production of law. Against this background, the relation between the State and individuals was articulated under the theory of subjective public rights (*subjektiven öffentlichen Rechts).* In this perspective, Gerber maintained that it was not possible to identify individual rights in a strong sense, as a sphere of liberty opposable to the sovereign will. Rights and liberties cannot but be intended as indirect reflections of the objective law that the State produced in the pursuing of goals that it had set. Such "side-effects", however, were not related to any consideration of the subjective position of individuals and, therefore, the latter were not recognized an entitlement limiting the successive exercise of the sovereign will[70]. These rights did not rest on a necessary relation between the individuals and the sovereign but were the consequences of unilateral precepts that the State gave itself.

Precisely along these lines, the relation between the State and individuals became the focus of the theory of self-limitation of the State that, from the seventies of the nineteenth century, was developed by Jhering and then by Jellineck. Jellineck acknowledged that the State was a "purposeful entity" and that its will was that which produced the law. At the same time, the German jurist maintained that "*the state, by creating its own legal system, establishes itself as a subject of law*"[71].

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[67] Pietro Costa, *The Rule of Law*, cit., p. 90

[68] Gustavo Gozzi, Rechtsstaat *and individual rights in German Constitutional History*, in Pietro Costa, Danilo Zolo (eds.), *The Rule of Law*, cit., pp. 244-245

[69] Ivi, fn 52, p. 257

[70] Pietro Costa, *The Rule of Law*, cit., p. 95

[71] Georg Jellinek, *System der subjektiven öffentlichen Rechts*, Mohr, Tübingen, 1905, p. 32, quoted in Gustavo Gozzi, Rechtsstaat *and Individual Rights in German History*, cit., p. 249

Through the production of objective law, the State established legal relations with individuals, assuming duties and obligations and, conversely, attributing rights which was then bound to respect.
Once again, however, the position of pre-eminence accorded to the will of the absolute sovereign was not put into doubt. It was the State itself which constrained its own activity. Clearly, while this solution applied fully to administrative action, the legislative power did not encounter further legal limits nor institutionalized countervailing powers. The constraints to such power identified within the debate on the *Rechtsstaat* were external to the area of the legal, which coincided with positive law. While by a strict legal perspective it was unconstrained, the sovereign will was nonetheless considered sensible to the socio-historical processes: history, tradition, the idea of the community, public opinion, the people and the sense of law were the safety valves with respect to a legal power which was uncontestably absolute.

1.2.1.2. The French *État* and the *État de droit*

The France of the seventeenth century is distinguished by the emergence of an absolute monarchy accumulating a growing power. Such power results, on one hand, from the identification between the state and the sovereign, notoriously epitomized in the expression by Louis XIV "*l'Etat c'est moi*"; on the other, from the personification of law - as it were, *la loi c'est le roi*[72] - and the attempt to ensure the King with a monopoly on law: on its sources, through the production of *lois*, statute law, aimed at replacing customary *droit*[73]; and on its application, by ordering the courts, in case of interpretative doubt, to refer the case to the King himself[74]. Such growing centralization of power in the hands of the absolute monarch inevitably affected the relations between the sovereign and individuals. Any sphere of freedom was at the mercy of the King's good will, as the sovereign maintained the privilege of issuing the infamous *lettres de cache*, a form of orders through which his will could be expressed unrestrained by any form of control[75].
As anticipated above, it is within this background, and in reaction to it, that a process of reconceptualization of sovereignty emerged, culminating during the

[72] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York, 1977, pp. 47 ff
[73] Notably exemplified by the *Ordonnaces* issues by Louis XIV and Colbert: the *Ordonnance civile* of 1667, the *Ordonnance criminelle* of 1670, the *Ordonnance du commerce* of 1673 and the *Ordonnance de la marine* of 1681
[74] *Ordonnance civile* of 1667, art. 7, tit. I: "*Si dans les jugemens des procès qui seront pendans en nos cours de parlement, et autres nos cours, il survient aucun doute ou difficulté sur l"exécution de quelques articles de nos ordonnances, édits, déclarations et lettrespatentes, nous leur défendons de les interpréter: mais voulons qu"en ce cas elles aient à se retirer pardevers nous, pour apprendre ce qui sera de notre intention"*
[75] As Goodhart points out "[*i*]*t is significant that the French Revolution began with an attack on the Bastille where a few prisoners were held under lettres de cachet, for this was the visible symbol of arbitrary government*". See, Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, in *University of Pennsylvania Law Review*, 1958, 106, 7, p. 959

Enlightenment. Rousseau's elaboration of the concept of *corps politique* and *volonté generale*[76] provides a conceptual framework in which the power of the monarch, exercised through decrees and administrative acts, is identified as a source of risk and is contrasted, on the other hand, with an understanding of sovereign power that, being expressed through general laws, protects for freedom and rights. The new political subject which aspires to such sovereign power is, as especially elaborated in the writings of Sieyès, the nation: "*However a nation may will, it is enough for it to will. Every form is good, and its will is always the supreme law*[77].

With the French Revolution, these theoretical trends came to expression in their most intense – and contradictory - form. The core of the *Déclaration des droits de l'homme et du citoyen de 1789*[78] revolves around the definition of the constitutive relations between rights, law, nation, and sovereignty, attempting to provide a synthesis of the different political-legal traditions discussed above. On one hand, the observance of the law and the separation of powers are identified as indispensable assumptions of the constitution[79]. On the other, an essential bond is sealed between sovereignty and the nation, excluding the possibility of any authority which is not conferred by latter[80]. The Declaration of 1793 reinstates that sovereignty belongs only to the will of the people[81] and stipulates that only the Assembly could express it[82].

Having equated "*the enjoyment and the maintenance of […] rights*" with "*national sovereignty*", the Declaration of 1793 identifies in the Government the source of risk and tyranny and stress as essential the need to implement legal constraints on public functions and secure the responsibility of all the functionaries[83]. The law, which is entrusted with the function to "*protect public and personal liberty against the oppression of those who govern*"[84], marks the boundaries of governmental action: *"[a]ny act done against man outside of the cases and without the forms that the law determines is arbitrary and tyrannical*"[85].

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[76] Jean-Jacques Rousseau, *Du contrat social*, Marc-Michel Rey, Amsterdam, 1762. English translation: *The Social Contract*, Translated by George D. H. Cole, J.M. Dent and Sons, London, 1923, I, VI-VII; II, IV, VI

[77] Michael Sonenscher (ed.), *Sieyès. Political Writings*, Hackett Publishing Company, Indianapolis, 2003, p. 138

[78] To be read together with and in the light of Olympe de Gouges' *Déclaration des droits de la femme et de la citoyenne* of 1791

[79] *Déclaration des droits de l'homme et du citoyen de 1789*, art. 16: "*A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all*". Cfr. Aristotle: "where the laws have no authority, there is no constitution" (*Pol*. IV.4.1292a32).

[80] *Déclaration des droits de l'homme et du citoyen de 1789*, art. 3: "*The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation*"

[81] *Déclaration des droits de l'Homme et du citoyen de 1793*, art. 25

[82] Ivi, art. 26

[83] Ivi, artt. 23-24

[84] Ivi, art. 9

[85] Ivi, art. 11

The idea that permeates the political-legal framework emerging from the Revolution is that of an inexhaustible "*pouvoir constituant*"[86]: as the Declaration of 1793 stated, "*[a] people has always the right to review, to reform, and to alter its constitution. One generation cannot subject to its law the future generations"*[87]. This understanding of the sovereignty has a has a twofold consequence. On one hand, the constituent character of power necessarily weakens the status of constitutional text(s), which can always be subject to modification: since the force of the constitution, and therefore the rights which it declares, lays in the will that posits them, when such will changes, no previous enactment can resist it. On the other hand, such understanding of the relation between sovereignty and legislation affects the role assigned to the judiciary power. The law that the courts were called to "merely apply" consisted in the statutes through which the sovereign will of the nation from time to time found expression: nothing pre-existed or was opposable to such will[88].

The identification between the sovereign will and statutory law in the post-revolutionary France provided the latter not only a with position of pre-eminence, but with an actual incontestable character. In such a context, as liberal thinkers, and especially Benjamin Constant, highlighted, there was no space to conceptualize the possibility of oppressive law: while law and liberty were constitutively related, the French constitutional architecture did not provide institutional guarantees capable of preventing laws to come to abolish liberty entirely[89]. As Laquièze puts it, *"[t]he change in sovereign did not alter the nature of sovereignty, which remained unlimited*"[90].

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[86] As Sieyés "*a nation cannot alienate or prohibit its right to will and, whatever its will might be, it cannot lose its right to change it as soon as its interests require it. […] to whom might a nation thus offer to bind itself? […] can it in any sense impose duties on itself? What is a contract with oneself? Since both sides are the work of the same will, it is easy to see that it can always withdraw from the so-called engagement […] a nation is independent of all forms and, however it may will, it is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and supreme master of all positive law*" Emmanuel J. Sieyés, *Qu'est-ce que le Tiers-État?* in Michael Sonenscher (ed.), *Sieyès. Political Writings*, cit., pp. 137-138

[87] *Déclaration des droits de l'Homme et du citoyen de 1793*, art. 28; is, as it were, sanctioned by the acknowledgment of that which is considered the "*most sacred of rights and the most indispensable of duties*", i.e., the insurrection against the government which violates the rights of the people, see, ivi, art. 35

[88] In this sense, it is worth recalling the Constitution of 1791, which provided that "*[t]he courts may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach upon administrative functions, or summon administrators before them for reasons connected with their duties*". see *Constitution française du 3 september 1791*, Chapter V, art. 3

[89] Referring to the concept of liberty advanced by Montesquieu, Constant observed that "'*La liberté' , dit - il , 'est le droit de faire tout ce que les lois permettent' Sans doute , il n'y a point de liberté , quand les citoyens ne peuvent pas faire tout ce que les lois ne défendent pas ; mais les lois pourraient défendre tant de choses , qu'il n'y aurait encore point de liberté*" Benjamin Constant, *Cours de Politique Constitutionnelle, Tome I, Parte I*, Paris, Didier, 1836, p. 163

[90] Alain Laquièze, *État de Droit and National Sovereignty in France*, in Pietro Costa, Danilo Zolo (eds.), *The Rule of Law*, cit., p. 263. Precisely this conception of sovereignty was questioned by Constant, who maintained that the sovereignty of the body of all citizens meant " *no individual, no group, no faction, can assume sovereignty except by delegation from that body",* but not that *"the*

On one hand, fundamental rights could not be severed by the potentially ever-changing will of the constituent power, with the result that their positive recognition into the Declarations could not but follow the fortune of such acts of expression of the sovereign will[91]. On the other hand, legicentrism provided the basis for the construction of a set of measures directed to control the power of the Government and administration. It is precisely in the context of the discussion of the relations between (statute) law and administration that, in the second half of the nineteenth century, under the influence of the German debate, the French notion of *État de Droit* is conceptualized. The elaboration of such concept can be traced back especially to the works of Raimond Carré de Marlberg, who articulated it as

> a State which, in its relations with its subjects and in order to guarantee their individual status, submits itself to a system of law, and this in so far as it enchains its action over them by rules, some of which determine the rights reserved to citizens, others of which determine in advance the ways and means which may be used to achieve the aims of the State[92]

The *État de Droit* protects the interest of citizens against arbitrary action of state authorities[93]: on one hand, not only the administration cannot act *contra legem*, it cannot act but *secundum legem;* on the other, the rules through which the state has self-limited itself must be invocable by citizens, that is, citizens must have a legal power to act before a jurisdictional authority to obtain *"l'annulation, la reformation ou en tout cas la non-application"* of administrative acts.

Having outlined this frame, Carrè de Malberg can observe that the system established by the French Constitution, which aimed at ensuring the subordination of administrative power to legislation[94], is not an instance of the *État de Droit*, but of the *État Legal*[95]. *État de droit* and *État legal* are presented by Carrè de Malberg as two intersecting circles: the first aims at protecting individual rights and therefore regulates the administration to the extent that the former are impacted; the second aims at subordinating the administration to the legislative power, and

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citizen body or those in whom it has vested the exercise of its sovereignty, can use it to dispose sovereignly of individual lives". He argued that, on the contrary*, "there is a part of human existence which necessarily remains individual and independent, and by right beyond all political jurisdiction. Sovereignty exists only in a limited and relative way […] The assent of the majority is not enough in all circumstances to render its actions lawful. There are acts which nothing can endow with that character"*, Benjamin Constant, *Principles of Politics Applicable to All Governments*, Book II, Chapter I

[91] As Laquièze shows, the value of the rights proclaimed in Declaration of 1789 was object of a dispute between Adhèmar Esmein and Carré de Malberg, on one hand, and Léo Duguit and Maurice Hauriou, on the other; see Alain Laquièze, *État de Droit and National Sovereignty in France*, cit., pp. 267 and ff

[92] Renè Carre de Marlberg, *Contribution à la théorie générale de l'Etat*, Tome I, Paris, 1922, p. 489, my translation; in French: "*Un Etat qui, dans ses rapports avec ses sujets et pour la garantie de leur statut individuel, se soumet lui-même à un régime de droit, et cela en tant qu'il enchaîne son action sur eux par des règles dont les unes déterminent les droit réserves aux citoyens, dont les autres fixent par avance les voies et moyen qui pourront être employés en vue de réaliser les buts étatiques"*

[93] Ivi, pp. 489-490

[94] In particular, Carrè de Malberg points to the art. 3 of the *Loi constitutionelle 25 fevrier 1875*

[95] Renè Carre de Marlberg, *Contribution à la théorie générale de l'Etat*, cit., Tome I, p. 490

therefore encompasses also those cases in which no individual right is at stake; the first aims at protecting individuals against any form of governmental interference; the second represents rather a special form of government. On this basis, Carré de Marlberg concludes that whether, on one hand, the *État Legal* implemented by the French Constitution does more than what is required by an *État de droit*, on the other, it does less: the *Etat de droit*, according to Carrè de Marlberg,is a system of limitation directed not only to the administrative power, but also to the *Corps législatif*, whose action must be constrained by the general rules provided by existing legislation. Referring to Berthélemy, Carrè de Marlberg observes that the respect of the self-imposed legal limits was in the hands of "*la bonne volonté du législateur*" and, therefore, devoid of any legal significance[96]. The realization of an *État de Droit* requires, for Carrè de Marlberg, on one hand, the adoption of a Constitution which determines and protects rights by putting them above the reach of the legislator[97]; on the other, the institution of jurisdictional remedies through which citizens could protect their fundamental rights.

Seen in the light of the previous considerations about the sacrality of the Parliament and its will which distinguished the political-legal framework that prevailed in France after the Revolution, the innovative character of Carrè de Marlberg's work is evident. And, indeed, the Alsatian jurist grounded his concept of the *État de Droit* on a rearticulation of the theory of sovereignty. Carrè de Marlberg had addressed the question of the legitimacy of the power exercised by the *gouvernants: "in whom does sovereignty originally reside?"*[98]. In answering this question, he came to severe the State from its organs: sovereignty was conceived as having an essentially extra-individual character and, therefore, cannot but be identified with the State, understood as the personification of the whole nation. This way, he scaled down the different organs of the State: these, included the legislative power, could not anymore properly be said "*organe constituant*", since within the State there were only "*organes constitués*"[99]. Whereas the State, being the personification of the nation, and therefore the ultimate source of law, could not constraint itself through law, this does not apply to the State's organs, whose activity could be put under the law.

1.2.1.3. Kelsen and Normativism

The German and the French doctrines of the Rule of Law theorized the subjection of administrative action to the law and raised the issue of the jurisdictional remedies required to protect individuals in the case of violation of the latter. At the same time, both traditions, operating withing a positivist understanding of law

[96] Ivi, p. 493; Joseph Berthélemy, in *Revue de droit public*, 1904, p. 209
[97] Ivi, p. 492
[98] My translation; in French: "*La question de la légitimité de la puissance exercée par les gouvernants: en qui reside primitivement la souveraineté?",* Renè Carre de Marlberg, *Contribution à la théorie générale de l'Etat*, cit., Tome II, p. 144
[99] Ivi, Tome II, p. 500

strictly related to the State's sovereignty, struggled in conceptualizing the possibility to identify legal constraints to the latter's will, which remained absolute and the unique source of law.

Kelsen elaborated a solution to the problem of the State's subjection to law through a normativist "turn" in the understanding of law. On the basis of his account of law as an order of norms, the Austrian jurist defined the State as a relatively centralized coercive order. Intended as a juristic person, the State was the personification of such coercive order. Based on these premises, Kelsen maintained that the dualism between the law and the State needed to be abolished and discarded the idea of the State as a *macro-anthropos*, an Artificial Man, as a mythologic representation created by jurists. As he pointed out

> [i]f the identity of state and law is discovered, if it is recognized that the law – the positive law, not the law identified with justice – is this very coercive order as which the state appears to a cognition which is not mired in anthropomorphic metaphors but which penetrates through the veil of personification to the man-created norms, then it is simply impossible to justify the state through the law[100]

The consequence of such reconceptualization of the relation between the State and law, as Kelsen maintained, was that "*the attempt to legitimize the state as governed by law, as a Rechtsstaat, is revealed as entirely useless because […] every state is 'governed by law'*"[101]. Indeed, "*if the state is comprehended as a legal order then every state is a state governed by law (Rechtsstaat) and this terms becomes a pleonasm"*[102]. For Kelsen

> [a] state not governed by law is unthinkable; for the state only exists in the acts of state, and these are acts performed by individuals and attributed to the state as a juristic person. Such attribution is possible only on the basis of legal norms which specifically determine these acts. […] law regulates its own creation. It does not happen, and never can happen, that a state, which its existence precedes the law, creates the law and then submits itself to it[103]

This way, Kelsen severed the connection between sovereignty and the legislative power and paved the way for the subjection of the latter to legal control. The "legalization" of the activity of the legislator was indeed made possible on the assumption that the power of the State was identified with legal power, that is, necessarily expressed through legal norms. Legal norms are distinguished by a certain homogeneity, in that what differentiates them is their hierarchic position. For the legislator to produce legal norms, it has to fulfil the conditions provided by the higher norm which attributes it the norm-making power. Consequently, the exercise of such power could be assessed in the light of the higher norm according to the same logic which afforded to subject the exercise of administrative and judicial power to legislative constraints and controls of validity. For the norm-

[100] Hans Kelsen, *Pure Theory of Law*, cit., p. 318
[101] Ivi, pp. 318-319
[102] Ivi, p. 313
[103] Ivi, pp. 312-313

creating power of the legislator, such control should have been entrusted to a constitutional court.

While Kelsen's theory introduces an element of discontinuity with the voluntaristic understanding of the State which harkened back to Hobbes, in another respect, however, one can sense a form of continuity precisely with another idea of the Hobbesian imagery, the idea of the State as a machinic system. Kelsen removes the sovereign, the "*artificial soul*" of the machine, but this does not affect the latter's functioning: what it has changed, as Schmitt puts it, is that "*[n]ow the machine runs by itself*"[104].

Those extra-legal elements – politics, history, natural law – from which both the German and French doctrine of the Rule of Law had drawn to account for the foundations and the limits of sovereign power are replaced with a higher-grade legal norm having constitutional status. The law as conceived by Kelsen carves out a "pure" niche for itself, but also confines itself there. In this way, it renounces to address what cannot be framed with reference to legal norms: "*to comprehend something legally means […] to comprehend something as a legal norm or as the content of a legal norm-as determined by a legal norm*"[105]. But it also renounces to govern the process which, within the frame provided by law, determines the meaning of a norm[106].

1.2.1.4. The Continental Rule of Law as a *Legislative State*?

The Continental elaboration of the Rule of Law takes shape at the intersection between different theories of the State, of law and of rights. As the identification of the nature and limits of sovereignty changes, so it changes the understanding of the role played by law in the mediation of power and in the constitution of the relation between the State and individuals. The position assumed by rights within the different doctrines, however, tended to be overshadowed by positive, objective, law. As illustrated above, notwithstanding the proclamation of rights as the foundation of the legal order, they often ended up being disposable and deferrable, their status being that of an indirect, secondary effect of the activity of the State. Even when they found direct expression in legislation, the absence of legal remedies and effective counterbalancing mechanism resulted in the confinement of the expectations of protection only in elements external to law.

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[104] Carl Schmitt, *Political Theology*, edited and translated by George Schwab, The University of Chicago Press, Chicago, 2005, p. 48

[105] Hans Kelsen, *Pure Theory of Law*, transaltion from the Second Edition by Max Knight, University of California Press, Berkeley, 1967, p. 70

[106] As Kelsen mantains, "*the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame* […] *The question which of the possibilities within the frame of law to be applied is the 'right' one is not a question of cognition directed towards positive law – we are not faced here by a problem of legal theory but of legal politics*". Hans Kelsen, *Pure Theory of Law*, cit., pp. 350-354

Carl Schmitt moved one of the sharpest – and most controversial – attacks to voluntarist and normativist conceptions of law underlying the Continental doctrines of the Rule of Law. Schmitt maintained that that which is presented as a *Rechtsstaat* in nothing more than a *Gesetzestaat*, i.e., "*only a legislative state, specifically, the parliamentary legislative state*"[107]. For Schmitt, this is the result of the entrenchment of a legal thought dominated by "*a series of simple equivalencies. Law = statute; statute = the state regulation that comes about with the participation of the representative assembly*"[108]. In such framework, any concurring source of law must be excluded: the lawmaker must retain its 'monopoly' of legality.

The whole architecture of the *Rechtsstaat* depends on the priority of statutes. On one hand, the independence of the judiciary and the guarantee against the misuse of power by the administration are direct implications of the subordination of both powers to statute law. On the other, the protection of rights rests on legislative reservation clauses[109].

More in general, it is only on the basis of the assumption of a "*pre-existing and presumed congruence and harmony of law and statute, justice and legality, substance and process*" that the legislative state can ground its legitimacy. On the other hand, only the trust in such form of legality can explain the acceptance to "*subordinate oneself to the rule of law precisely in the name of freedom, [to]remove the right to resistance from the catalogue of liberty rights, and grant to the statute the previously noted unconditional priority"*[110]. As Schmitt points out, absent this assumption,

> the legislative state would be a rather complicated absolutism; the unconditional claim to obedience would be an open, coercive act of domination; and the honorable renunciation of the right to resistance would be an irresponsible act of stupidity[111]

Schmitt investigates this foundational trust in the legislative state by weaving a web of analogies and disanalogies with the political theory of Hobbes. As discussed above, the Hobbesian sovereign is constituted by each individual's waiver to follow her own reason and will and the acceptance of the reason and will of the sovereign. In this respect, as monarchic absolutism was consecrated with the attribution of legality when the sovereign will was expressed through of general and predetermined norms[112], for Schmitt also the parliamentary democracies of his time rested on not dissimilar assumptions. As he highlights

> all the dignity and majesty of the statute depends exclusively and directly […] on this trust in the justice and reason of the legislature itself […]. All legal guarantees and

[107] Carl Schmitt, *Legality and Legitimacy*, translated by Jeffrey Seitzer, Duke University Press, Durham, 2004, pp. 3, 14
[108] Ivi
[109] Ivi, p. 19
[110] Ivi
[111] Ivi, p. 20
[112] Ivi, p. 18

> insurances, every protection against misuse, are placed in the person of the all-powerful lawmaker or in the distinctiveness of the lawmaking process[113]

Parliamentary democracies are undoubtedly distinguished by the specific source of the sovereign will that they assume, i.e., the will of parliament, which expresses the will of the majority which, in turn, expresses the *volontè generale*. However, in Schmitt's view, this does not affect the nature of the entrustment: "*parliament's simple majority decision can be both just and law*": "*il suffit qu'il veut"*[114]. As a result, not differently than in the Hobbesian scheme,

> the lawmaker, and the legislative process under its guidance, is the final guardian of all law, ultimate guarantor of existing order, conclusive source of all legality, and the last security and protection against injustice[115]

In a system in which legality comes to be conceived this way, *"[m]isuse of legislative power and of the lawmaking process must remain out of consideration* […]"[116]. Schmitt's use of "must" is indicative: the circumstance that such possibility is not thematized is not, as it were, a bug of the system, but one of its fundamental features: it is a conceptual necessity deriving by implication from the very conception of sovereignty and law adopted.

Secondly, Schmitt's criticism targets normativist conception of law developed especially by Kelsen. The State-legal order is a web of normative relations and the mechanism driving its dynamic operations is activated according to a strict logic of implication, once the necessary and sufficient conditions provided for the norms hierarchically superior are fulfilled. Schmitt underlines that in Kelsen's picture, norms and facts, *ought* and *is*, run parallel, but belong to different spheres: the first is inviolable, while the second, concrete reality, assumes relevance only when, read in light of the first, is transformed *"into the material basis for the application of norms*"[117].

According to Schmitt, that which emerges from normativism is a "*fixed-functionalistic order*" which lends itself well for a particular area of human life, the "*smooth running, standardized, and orderly process*" that distinguish "*the calculable functioning of human traffic relationships*"[118]. The metaphor elaborated by Schmitt goes further:

> In the framework of scheduled railroad traffic, for example, one can say that here not the personal choices of men, but the impersonal matter-of-factness of the timetable "rules", and that scheduled regularity is "order". The well-regulated traffic on the highways of a modern metropolis offers the best picture of this kind of "order". Here,

[113] Ivi, p. 21
[114] Ivi, p. 24; here Schmitt's target is Sieyès, cfr., *supra*, § 2.1.2
[115] Ivi, p. 19
[116] Ivi, p. 19
[117] Carl Schmitt, *On the Three Types of Juristic Thought*, cit., p. 53
[118] Ivi, pp. 53-54

> too, the last vestiges of human rule and choice, represented by the traffic policeman, appear to be replaced by precisely functioning, automatic traffic lights[119].

A legal order thereby reduced to a hierarchy of norms by no means is in itself capable of ensuring legal protection against power.

The weakness of the formal conceptions of the Rule of Law with respect to the guarantee of freedoms and rights was in effect revealed by the emergence of the totalitarian states, which brought to the extreme consequences the inherent contradictions and flaws of the Continental concept of the Rule of Law. The dogma of the legislator as the source and guardian of rights definitively revealed its inherent dangers, cracking irreparably the assumed nexus between sovereign will and individual protection. Moreover, both in the Nazi Germany and the Fascist Italy, not only the concept of the Rule of Law was object of a vivace debate, but it also became subject to several attempts of appropriation[120]. Indeed, while claiming discontinuity with the focus put on individual rights by the liberal tradition, both the Fascist and Nazi regimes claimed continuity with the tradition of the Rule of Law[121]. On one hand, a positivist-normativist understanding of law was indeed essential for the totalitarian state to establish and maintain order; on the other, the accounts of the relations between state, law and individual elaborated within the German and French tradition lent themselves to the ends of the regimes without too much conceptual difficulty: the totalitarian state, indeed, acted "by means of law" in the respect of formal requirements, such as the generality and abstractness of laws[122].

When the risks connected to a merely formal, or *formalistic*, drifts of the Rule of Law doctrine had made clear the ambiguities underlying the Continental doctrines, it became evident the necessity to elaborate a doctrine of the Rule of Law providing an institutional design capable of both, not leaving individual rights

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[119] Ivi

[120] As Goodhart has highlighted, in relation to Fascists, *"In a Western State, they say, the individual is given undue freedom of action uncontrolled by the law, even though this liberty may be exercised to the detriment of the community; on the other hand, in the totalitarian State this individual freedom of action is strictly controlled by rules of law which have as their purpose the defense of the public interest. It follows, according to this view, that the rule of law is more fully recognized in the totalitarian countries than it is in those which place greater emphasis on the freedom of the individual. This extraordinary paradox illustrates the hopeless confusion into which we can be led unless we understand the exact sense in which the phrase "rule of law" is being used, especially when some of the disputants are deliberately taking advantage of the ambiguity"* see, Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, in *University of Pennsylvania Law Review*, 1958, 106, 7, p. 947

[121] Pietro Costa, *Rule of Law*, cit., pp. 123-129; for the Italian debate, see Sergio Panunzio, *Stato di diritto*, Taddei, Ferrara, 1921; for the German debate, see Otto Koellreutter, *Der Nationale Rechtsstaat*, in *Deutsche Juristen-Zeitung*, 1933, 38, p. 517

[122] As I will discuss *infra*, § 2.3., the idea that a thin and formal conception of the Rule of Law can be consistent with totalitarianism and violations of fundamental human rights is not denied, but actually emphasized in the Anglo-American debate. As Tamanaha emphasizes, "*an effective system of the rule of law may strengthen the grip of an authoritarian regime by renhancing its efficiency*", see Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, cit., p. 242; Joseph Raz, *The Authority of Law*, cit., p. 212

completely in the hand of the Legislator and prevent the sovereign power to become author and actor of the annihilation of rights. The post-war period represents indeed a turning point in the connection between the Rule of Law and individual rights. The rethinking of the meaning of Rule of Law takes place within a "constitutional turn" and under the new light of what Bobbio had called the "*Age of Rights"*[123], a completely renewed horizon of discourse for the law, distinguished by a new vocabulary and an attention focused on the concept of "right" and "person". In this sense, Rodotà has spoken of a process directed at "*constitutionalising the person*"[124], a shift that, in the wake of Hannah Arendt[125], has to be understood as a "*transition from the individual to the person, from the legal subject to a flesh and bone subject, which affords to progressively emphasize the 'destiny of socialization' of the person and the 'destine of nature', of its organism"*[126].

The state-centric perspective that distinguished the nineteenth century conceptions of the Rule of Law is overturned: post-war national and transnational constitutionalism are informed by the centrality of the person and aim at providing a positive foundation to control mechanisms designed to afford the protection of rights from the State. On one hand, the constitutions adopted at the national level not only set forth inviolable rights, but institute jurisdictional control of the constitutionality of legislation. On the other, the establishing of legal orders and institutions at the transnational level adds a further set of constraints to the action of the States and a further level of protection to fundamental rights.

The Rule of Law doctrine develops together with a conception of law that shifts its centre of gravity from the Sovereign-Legislator-statute law to the effective protection of the rights. In the new institutional architecture which is imagined, the distribution of powers means, beside a legislator and executive power under the law, a judiciary which not only is organically independent from the formers but, above all, is entrusted with the task of affording effective remedies to individuals and that, therefore, assumes a primary position and an active role in the shaping of the legal order.

1.2.1.5. The Rule of Law in the European legal framework

The advancement of the conception of the Rule of Law in the Continent can be appreciated by looking at the development of the European legal framework resulting from both the European Convention on Human Rights (ECHR) and the European Union (EU).

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[123] Norberto Bobbio, *L'età dei diritti*, Einaudi, Torino, 1990; in English, Norberto Bobbio, *The Age of Rights*, Polity Press, Cambridge, 1996

[124] Stefano Rodotà, *Il diritto di avere diritti*, Laterza, Roma-Bari, 2012, pp. 148-150

[125] Hannah Arendt, *The Human Condition*, The University of Chicago Press, Chicago, 1958

[126] Stefano Rodotà, *Il diritto di avere diritti*, cit. p. 150

A particular attention to the theory and the practice of the Rule of Law emerges first within the framework of the Council of Europe[127]. Moreover, the transnational character of the Conventional framework results in a particularly interesting encounter between the different legal traditions between the Member States. Especially after the fall of the Berlin Wall, the expansion of the Council of Europe to include the Eastern-European States, formerly under Soviet influence, has triggered a process of harmonisation of the concept of Rule of Law. In this context, the Parliamentary Assembly of the Council of Europe has highlighted the circumstance that the official French text of the Convention expresses the concept of Rule of Law as *prééminence du droit*, and not *État de droit*[128]. The significance of such a difference lies in the fact that it excludes "*a formalistic interpretation of the terms 'rule of law' and* Etat de droit *(as well as of* Rechtsstaat)" as "*supremacy of statute law".* Such an understanding, according to the Assembly, would indeed be *"contrary to the essence of both 'rule of law' and* prééminence du droit*"*[129]. Whatever the expression employed, the notion of *Rechtstaat* and *État de droit* cannot, under the framework of the Council of Europe, being reduced, respectively, to *Gesetzesstaat* and *Etat de la loi*. As the Assembly has stressed, the Rule of Law "*need to ensure the unification that encompasses the principles of legality and of due process*"[130].

Moreover, while the concept of Rule of Law-*Prééminence du Droit* includes the principles of legal certainty and predictability which can be traced back to the strict understanding of legality elaborated within the Continental doctrines of the *Rechtsstaat* and *État de Droit*, the "formal" character of such principles has to be read in the light of the nature of "living instrument" that the Court has attributed to the Convention[131]. On the other hand, the distinguishing elements of the Rule of Law represented by law's formal requirements, the procedures of its enactment, and differentiation of powers, have been turned into the object of positive fundamental rights, such as equality before law, non-discrimination, access to court, fair trial, the right to an effective remedy, the prevention of misuse and abuse

[127] The Rule of Law is identified as the founding principle of the Council of Europe in the Preamble and at art. 3 of its Statute. Moreover, in the Preamble of the Convention, it is acknowledged as part of the Parties' "*common heritage*" that grounds the commitment to institute a legal framework aimed at the "*collective enforcement*" of human rights, see *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Preamble

[128] Council of Europe, Parliamentary Assembly, *The principle of the Rule of Law*, Resolution 1594 (2007), § 3

[129] Council of Europe, Parliamentary Assembly, *The principle of the Rule of Law*, Resolution 1594 (2007). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007, § 4; see, also, Motion for a resolution presented by Mr Holovaty and others, *The principle of the rule of law*, Doc. 10180, 6 May 2004

[130] Ivi, § 5

[131] The living instrument doctrine has been developed within the caselaw of the European Court of Human Rights from *Tyrer v. the United Kingdom*, 25.4.1978, § 31

of power[132]. Such rights, the "subjective side" of the Rule of Law, can be claimed before the Court of Strasbourg not only against the acts of the administration, but against the acts and omissions imputable to State as a whole, including the legislator and the judiciary.

More recently, the concept of Rule of Law has become subject to particular consideration also within the framework of the European Union. Considering the foundational role that the Treaties attribute to the Rule of Law[133], the EU institutions have elaborated a complex set of soft-law instruments aimed at establishing a *European Rule of Law Mechanism*[134] which includes an annual *Report* concerning the Rule of Law situation in the European Union[135]. Under the framework provided by such instruments, the Rule of Law is given a wide scope, encompassing, together with more "classical" concerns of the doctrine - the principles of legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection, independent and impartial courts, fundamental rights, separation of powers, and equality before the law - also democracy, freedom of speech and the fight against corruption. It is, however, the caselaw of the European Court of Justice (ECJ) that has developed and expanded a particular understanding of the Rule of *European* Law. In a series of recent judgments[136], the ECJ has provided an account of art. 19, § 1, 2 of the Treaty on the

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[132] Significantly, in the first case in which the European Court of Human Rights has made reference to the Rule of Law, it has stressed that "*one can scarcely conceive of the rule of law without there being a possibility of having access to the courts*", see *Golder v. United Kingdom*, § 34,

[133] Article 2 of the Treaty on European Union: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"*

[134] COM(2019) 163 "*Further strengthening the rule of law in the Union: state of play and possible next steps*"; COM(2019) 343 "*Strengthening the rule of law within the Union: a blueprint for action*".

[135] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final, https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_it. The Report is redacted on the basis of a Methodology which has to be read in the light of the articulated *Rule of Law Checklist* adopted by the "Venice Commission", see *European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report* https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_methodology_en.pdf; European Commission for democracy through law, *Rule of Law Checklist*, adopted at its 106th Plenary Session, Venice, 11-12 March 2016

[136] In particular, from the so-called *Portuguese Judges case (Associação Sindical dos Juízes Portugueses*, Case C-64/16) and then through more recent judgments adopted against Poland and Hungary. In particular, in the former case the ECJ maintains at §§ 40-45 *"[…] to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a 'court or tribunal', […] on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU […] The guarantee of independence, which is inherent in the task of adjudication […] is required […] also at the level of the Member States as regards national courts".* For an analysis, see Alessandra Favi, *La dimensione «assiologica» della tutela giurisdizionale effettiva nella giurisprudenza della Corte di*

European Union that articulates the relation between national legislator, individual rights and national judiciary in the light of the EU framework. European law rests on and prescribes to the States the implementation of means of effective judicial protection. Such protection would not be guaranteed in a situation in which the national law, that to which the judiciary is subjected, hindered the independence and autonomy of the latter. In such a case, indeed, the sovereign power exercised by the Member State would contrast the sovereignty of European Law. For the latter to rule, it is necessary that the national judiciary is not subjected to a national power which can compel it to disregard European law in the matters falling within the competence of the Union. At the same time, however, the assessment of whether a case is or is not relevant in the light of EU law is necessarily a task that competes to the national judge: as it is not possible to draw an *a priori* formal distinction between cases involving or less EU law, or between components of the judiciary who may or may not be called to apply it, the respect of the requisites of independence and autonomy which are essential under EU law for ensuring effective legal protection cannot be excluded.

In the light of these brief notes on the *prééminence* of law which emerges under the European legal framework, it is worth highlighting the pivotal role that transnational dimension plays in the process of remodulation of the understanding of the Rule of Law and of the underpinning relationship between States, the law, and fundamental rights.

On one hand, the law of the ECHR and that of the EU removes rights from the sphere of intervention of the State, demanding their protection also when the latter acts by means of law; on the other, it informs and constraints the action of the State by setting positive requirements. At the same time, the relation between states and legal subjects is informed by an understanding of law and the way in which the latter is created and administered that combines the primacy of rights and their protection with the strengthening, in both a national and transnational dimension, of the role of the judiciary. The latter, indeed, is entrusted with the central role of re-constructing a multi-level legal system in which certain rights are removed from the sphere of intervention, even by the means of law, of the national State[137]. The increasing importance acknowledged to the role played by the judiciary and the community of jurists under the Rule of Law, however, is all but uncontroversial. Some of the inherent tensions which emerge in this respect can be appreciated particularly in the American legal tradition, which will be discussed in the next section.

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giustizia in tema di crisi dello Stato di diritto: quali ricadute sulla protezione degli individui?, in *Il diritto dell'Unione Europea*, 2020, 4, p. 795

[137] Emilio Santoro, *Diritto e diritti*, cit., pp. 14 ff

1.2.2. The Rule of Law in the Constitutional tradition of the United States

Some of the achievements of the Continental conception of the Rule of Law were reached long before in the political-legal framework of the United States. Before than elsewhere, in the United States emerges an institutional setting which attempts to remove the law – together with certain rights and principles - from the sphere of politics, that is, from the power granted to the majorities that followed each other in the assumption of the vests of the Legislator.

Firstly, few words must be spent on the cultural environment which distinguished the American Revolution and the drafting of the Constitution and of the Bill of Rights. Indeed, the ideological background of the Revolution was permeated by the liberal and republican philosophy of Harrington, Locke and Montesquieu. On one hand, the connection with the Republican tradition and its understanding of law is made apparent, for instance, by article XXX of the Massachusetts Constitution of 1780, where the ideal of a "*government of laws and not of men*" is put in strict correlation with the division of powers[138]. On the other, the Whig narrative that had taken root in England after the Glorious Revolution found in the American colonies not only a fertile ground, but it was actually turned into a doctrine that was used as a ground to confront the oppression of the Motherland. Indeed, the American revolutionaries rewrote the myth of the Ancient Constitution and identified as its grounds the universal rights advanced by natural law theories[139].

Within this framework, the People's right to self-determination became "*the basis on which the whole American fabric has been erected*"[140]. The Constitutional process aimed at providing an institutional setting capable of ensuring a "*government of the people, by the people*" and a "*government of laws and not of men*"[141]. The law is entrusted with the task of both, expressing the sovereign power and, at the same time, defending rights from the risk of arbitrariness. Paine affirmed that *"in America the law is king […] For as in absolute governments the king is law, so in free countries the law ought to be king":* and, as he added, *"there ought to be no other"*[142].

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[138] Massachusetts Constitution, art. XXX "*In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.* https://malegislature.gov/laws/constitution. As Frank highlights, the Aristotelian expression had arrived at John Adams through the reading of the *Oceana* of James Harrington, see Jerome Frank, *Courts on Trial*, cit., p. 405

[139] Brunella Casalini, *Popular Sovereignty, The Rule of Law, and the "Rule of Judges" in the United States*, in Pietro Costa, Danilo Zolo, *The Rule of Law*, cit., p. 205, ff 11-12, p. 231

[140] *Marbury v. Madison*, §133

[141] Frank Michelman, *Law's Republic*, in *The Yale Law Journal*, 1988, 97, 8, p. 1501

[142] Thomas Paine, *Common Sense*, in Nelson F. Adkins (ed.), *Common Sense and Other Political Writings*, Liberal Arts, New York, 1953, p. 32

From the very beginning, however, the American Constitutional history is distinguished by a certain tension with reference to the implications of the law "being king". Such tension, which reflected the understanding of the sovereign power and of its limits within different forms of republicanism, is in some respect similar to the contrast between constituent and constituted power discussed with reference to the French revolution[143]. While, this tension is never completely dissolved, the constitutional design established in the United States affords the taking of a specific direction. The Constitution of the United States introduced a double innovation in the political scenario: a federal, rigid constitution and the attribution of a constitutional status to a set of fundamental rights[144]. The federal character of the Constitution favoured the institution of a legislative power limited by the law. Beside the rules concerning its composition and the procedures for the exercise of its power, the Constitution contained an express delimitation of the areas of intervention of the Legislature[145]. On the other hand, from the case *Marbury v Madison* the Constitution was read as establishing mechanisms for both the assessment and enforcement of such limits. Such mechanism attributed to the Supreme Court the role of "guardian of the Constitution" and articulated the relation between law, individual rights and the judicial power.

First of all, Chief Justice Marshall affirmed that *"[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury*" and identified the affordance of such protection as one of the first duties of the *government* [146]. It is on this basis that the idea of a "*government of laws, and not of men*" comes to imply the necessity that laws provide a "*remedy for the violation of a vested legal right*"[147].

Secondly, Marshall stressed that, as the "*original and supreme"* will of the People assigned powers, it has also established for such powers "*certain limits not to be transcended"*: in particular, the Constitution has defined and limited the powers of the legislature[148]. Marshall then discusses the import of such constitutional limitation. His reasoning centres on the written character of the constitution[149]: for written constitutions not to be considered merely as "*absurd attempts, on the part*

[143] *Supra*, § 4.2.1.

[144] Notably, such inclusion was contrasted by the Federalist. In this sense, Hamilton wrote that "*bills of rights […] are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power",* see Alexander Hamilton, *Federalist no. 84*

[145] Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, cit., pp. 950, 952

[146] *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352, § 57

[147] Ivi, § 61

[148] Ivi, §§ 134-135

[149] Ivi, § 139

of the people, to limit a power in its own nature illimitable"[150], the constitution cannot but be regarded as a "*superior, paramount law, unchangeable by ordinary means*, and therefore not "*alterable when the legislature shall please to alter it."*[151]. As a consequence, "*a legislative act contrary to the constitution is not law*" and, therefore, cannot bind the courts[152]. At this point, Marshall delineates the active role of the court: after having established that the Constitution represents an instrument "*for the government of courts, as well as of the legislature*"[153], the Chief Justice maintains that "[*i]t is emphatically the province and duty of the judicial department to say what the law is*". Consequently, as much as it is up to the court, in deciding a particular case, to settle the conflict between two laws, it is the "*very essence of judicial duty"* to assess whether a law is in contrast with the constitution[154].

As the assumption of such role by the Supreme Court was not uncontroversial, from time to time, depending on the perceived restraint or activism of the latter, the American political-legal debate has seen the re-emergence of the underlaying tension between politics and law, between the democratically elected political actors and the judiciary[155].

The central position occupied in the American tradition by the idea of self-determination, indeed, enters in collision not only with the constitutional control exercised on laws by the Supreme Court but, more in general, with the common law tradition that the American judiciary inherited from England[156]. The strong exposure, especially if compared with the Continent, of the judiciary can contribute to explain the circumstance that it is especially within the American debate that the tension between politics and the law come to be understood as a clash between two different wills competing on the terrain of sovereignty. In this perspective, the theme of the subjectivity of the legal interpreter, which had been a common thread in Continental Enlightenment, resurfaced within the framework of a common law country[157].

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[150] Ivi, § 137
[151] Ivi, § 136
[152] Ivi, §§ 137; 140
[153] Ivi, § 157
[154] Ivi, §§ 141-142
[155] Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, in *Columbia Law Review*, 1997, 97, 1, p. 1
[156] The Lockean perspective, in this sense, distinguishes the "*power to make laws"* from the power *"to make legislators":* for Locke *"the legislature can have no power to transfer to anyone else their authority to make laws*", John Locke, *Second Treatise on Government*, cit., § 141
[157] In parallel, it is interesting to notice the similarities between the arguments put forward by Thibaut and Savigny in the course of their discussion on codification and those that were exchanged by Dudley Field and James Coolidge Carter on the proposal of the New York Civil Code, see Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, in *American Journal of Comparative Law*, 1989, 37, p. 95; Gunther A. Weisst, *The Enchantment of Codification in the Common-Law World*, cit., p. 499

Under the influence of both the ideas diffused by the movements spreading in continental Europe at the turn of the Nineteenth century[158] and the perspective of Pragmatism[159], the American juristic community engaged in a debate that developed in original ways anti-formalist stances, focusing in particular on judicial decision-making[160]. Among the pioneers of American Realism, Oliver Wendel Holmes argued that is a poor picture that which represents law as system that "*can be worked out like mathematics from some general axioms of conduct*": adopting the perspective of the practicing jurists, the future Justice of the Supreme Court highlighted that "[w]*here there is doubt, the simple tool of logic does not suffice"*, since "*general propositions do not decide concrete cases*" [161]. Especially the works of the second generation of Realists focused on the different tools to which jurists have recourse when performing the distinct activities that precede the taking of a legal decision, on one hand, and those that are carried out to justify the decision taken, on the other[162]. When analysing legal practice in the light of such a distinction, as Roscoe Pound argued, the scientific nature of law claimed by formalist doctrines emerged in its deceitfulness:

> I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions. In the philosophy of to-day, theories are "instruments, not answers to enigmas, in which we can rest"[163]

The Realistic approach assumed as central the creative role played by jurists in the making of law. Far from being an array of self-sufficient instructions capable of regulating and settling conflicts, the sources of law were described as a set of

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[158] James E. Herget, Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, in *Virginia Law Review*, 1987, 73, 2, p. 399

[159] The first generation of Realist was inspired in particular by the pragmatism of the American philosopher, C. S. Peirce. See, Note, *Holmes, Peirce and Legal Pragmatism*, in *The Yale Law Journal*, 1975, 84, p. 1123; actually, Pierce, James and Holmes formed a club, the Metaphysical Club, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America*, Farrar, Straus and Giroux, 2001. The second generation of Realists were influenced by the work of John Dewey. Jerome Frank, for instance, commented Dewey's article saying that "[i]*t is of interest that the best available description of the logical method employed by judges is from the pen, not of a lawyer, but of a psychologist*"; see Jerome Frank, *Law and the Modern Mind*, cit., p. 369, n. 1

[160] Herbert L. A. Hart, *Essays in Jurisprudence and Philosophy*, cit., p. 269; Frederick Schauer, *Formalism*, in *The Yale Law Journal*, 1988, 97, 4, p. 509

[161] Oliver W. Holmes, *The Common Law*, Little Brown, Boston, 1923, p. 1

[162] As John Dewey argued in an article that was particularly inspiring for Legal Realists, "*The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies. It unfolds itself gradually and is susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that a definitive solution is reached, that the situation is now determinate with respect to its legal implication. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future*".John Dewey, *Logical Method and the Law*, in *Cornell Law Quarterly*, 1924, 10, 17, p. 20

[163] Roscoe Pound, *Mechanical Jurisprudence*, in *Columbia Law Review*, p. 608. The expression in quotation marks is from William James, *Pragmatism*, Longmans, Green, and co., p. 53.

materials that only after having been put in the hands of the judges can assume the form of a norm and therefore been assumed as ground for a judicial decision[164]. What the Realists ultimately argued is that the functioning of law could not be explained neither as a function of legal text – statutes and judicial decisions – nor as a function of logic.

The scepticism with respect to the determining power of rules and facts, as successively taken up especially by Critical Legal Studies movement[165] fuelled the Constitutional debate on the Rule of Law. Since, in this framework, legal rules are conceived as inevitably indeterminate, the Rule of Law results in being nothing but an exercise of ideological window-dressing which mystifies the forms of political powers driving the operation of the legal system. In this sense, not only the law cannot decide the case, but it can also be turned into a tool of domination whose strength is increased by its appearance of neutrality and legitimacy. The Rule of Law can actually be its opposite, the Thrasymachean "advantage of the stronger"[166].

More than in relation to the impact on rights, the sceptical arguments have echoed on the institutional plane, positioning the Rule of Law at the centre of different frictions. On one axis, the Rule of Law is subject to the tension between the "tyranny of the majority" and the "tyranny of judges", in a crossfire in which each side blames the other for using the formula of the Rule of Law to hide that which

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[164] As John Chipman Gray claimed, what is inscribed into stature law is not a legal norm having, per se, a binding character capable of restraining the judicial activity: "*Statutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as law […] It has been sometime said that the Law is composed of two parts,-legislative law and judge-made law, but, in truth all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts*", John Chipman Gray, *The Nature and Sources of the Law*, Peter Smith, 1972, p. 162. Judge-made law, in turn, is distinguished by similar limits. As, on the other side of the Atlantic, was argued by Carleton K. Allen "*We say that [the Judge] is 'bound' by the decisions of higher Courts. But he is bound only at his own discretion, according to his own judgement. Nothing can make the process of 'binding' merely automatic and mechanical, for the Judge has first to decide, according to his lights, whether the illustration is really apposite to the principle he is seeking. The humblest judicial officer can disregard the most authoritative declaration of the House of Lords unless he considers that the precedent cited is 'on all fours'. It is therefore fallacious to regard the application of precedents in the Courts as a mere functioning of machinery. It is a complex process, depending greatly upon the faculties of individual judges, from which it is dangerous to exclude arbitrarily any element simply by dubbing it 'unauthoritative'",* Carleton K. Allen, *Law in the Making*, Oxford University Press, Oxford, 1927, p. 164

[165] Roberto M. Unger, *The Critical Legal Studies Movement*, in *Harvard Law Review*, 1983, 3, p. 563; Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in David Kairys (ed.), *The Politics of Law. A Progressive Critique*, Basic Books, 1998, p. 641; Mark Kelman, *A Guide to Critical Legal Studies*, Harvard University Press, 1987. For a critical analysis, see: Stanley Fish, *Doing What Comes Naturally*, cit., pp. 5; 226; 307; 380; 404; 416; 496; Brian Z. Tamanaha, *On the Rule of Law*, cit., pp. 105-110; Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, in *Oxford Journal of Legal Studies*, 1990, 10, 4, p. 539

[166] "[…] τὸ δίκαιον οὐκ ἄλλο τι ἢ τὸ τοῦ κρείττονος συμφέρον", Plato, *Republic*, I, 338c. English translation, "[…] *the just is nothing other than the advantage of the stronger*", see Plato, *The Republic*, 2nd edition, translated with notes and an interpretive essay by Allan Bloom, Basic Books, New York, 1968, p. 15

actually is the Rule of Men. On a second intersecting axis, the tension emerges between the sovereign power and the legal institutions designed to control it, opposing the Rule of Law and the Rule of The People.
On the background of these tensions, some "reconsiderations"[167] of the Rule of Law have attempted to directly address the issues raised by the Realist critique and the "argument from the indeterminacy of language"[168]. Conversely, contributions from different perspectives have converged into the re-proposal of a notion of Rule of Law which, assuming arbitrariness as unpredictability and identifying the good to be protected in individuals' (negative) freedom, aims at curbing the power of any lawmaker – the legislator, the judge, the officer – by requiring its will to be expressed into rules respecting formal constraints[169].

1.3. Assessing the debate

From the second half of the twentieth century, both the conceptual assumptions and the institutional setting promoted under the doctrine of the Rule of Law between the two shores of the Atlantic become closer. Arguably, such alignment seems to have occurred similarly to the movement characteristic of a system of communicating vessels. On one hand, indeed, for what concerns constitutional democracy, it cannot be denied that it is the Continental perspective that has got closer to the American tradition through the adoption of rigid constitutions, the entrusting of a prominent role of the judiciary and, above all, the institution of higher courts assigned with the constitutional review of legislation. On the other hand, however, also the conceptual framework that has characterized the Continental discussion on the Rule of Law has found its way in the Anglo-American debate which, to some extent, seems to have harken back to the formal conceptions of the Rule of Law developed in the German and French tradition.
Moreover, the interaction and overlapping between the different perspectives - between the two shores of the Atlantic, between the Continental and Anglo-American debate, and within each of them – seems also to have resulted into that which, from many quarters, is complained as a loss of the conceptual usefulness of the formula of the Rule of Law. A growing awareness seems to have spread in

[167] Margaret J. Radin, *Reconsidering the Rule of Law*, in *Boston University Law Review*, 1989, 69, 4, p. 781
[168] Christian Zapf, Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, in *The Georgetown Law Journal*, 1996, 84, p. 485
[169] On one hand, one can consider the influence of the works of Hayek and Leoni, who criticized the growing interventionism of the welfare State and opposed to such "Rule of Legislator" a set of constraints directed to safeguard the "rules of the game". On the other, Scalia, moving from the assumption of the unavoidable law-making function performed by the judiciary in common law systems, identifies in the crafting of as much as possible precise rules the shelter from discretion and therefore arbitrariness. See, Friedrich A. von Hayek, *The Road to Serfdom*, Routledge, Abingdon, 2006, p. 75 ff; Bruno Leoni, *Freedom and Law*, Liberty Fund, Indianapolis, 1991; Antonin Scalia, *The Rule of Law as a Law of Rules*, in *The University of Chicago Law Review*, 1989, 56, 4, p. 1176

relation to the circumstance that, even before (and, to some extent, probably more than) its concrete implementation, the very possibility to employ the concept the Rule of Law is hindered by the increasing complexity of the debate in which it is discussed: in a way, the concept of the Rule of Law has become victim, at least analytically, of its own success, and it presents itself as universally popular as elusive[170]. While this is not unusual for concepts of a certain value – one need only to think of the concept of justice[171] - many scholars have attempted to overcome such *impasse* and provide a clearer systematic framework, with the result that there have been distinguished "thin" and "thick", "formal" and "substantive", "historicist", and, as I will discuss soon, "procedural" conceptions of the Rule of Law[172]. While, arguably, these analytical efforts might have actually increased the complexity of the debate, in one respect it seems that a certain degree of agreement has been reached, that is, on the "*essentially contested*" character of the concept of the Rule of Law[173].

In this context, I believe that it is particularly interesting to analyse the arguments which ground the claims in favour of formal, minimal, thin conceptions of the Rule of Law, that is, conceptions distinguished by a minimum content such as "*Government officials and citizens are bound by and abide by the law*"[174]. One of the aims of formal conceptions is that of keeping the notion of Rule of Law safe and viable. Such perspectives are indeed cultivated on the assumption that a solid conception of the Rule of Law requires not to treat democracy, fundamental rights and the Rule of Law "*as if they meant the same thing, and are indissolubly linked together*"[175]. On the contrary, it is important to maintain a "*sharp analytical separation*"[176] between these concepts[177]. The need to keep fundamental rights and the Rule of Law apart is justified on the consideration that

> [t]here is no uncontroversial way to determine what these rights entails. All general ideals – like equality, liberty, privacy, the right to property, the freedom of contract, freedom from cruel punishment – are contestable in meaning and reach[178]

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[170] Brian Z. Tamanha, *The History and Elements of the Rule of Law*, cit., p. 232
[171] Alf Ross, *On Law and Justice*, cit., chapters XII ff
[172] Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *Public Law*, 1997, p. 467; Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, in *Columbia Law Review*, 1997, 97, 1, p. 4; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, cit; Frank Michelman, *Law's Republic*, cit., p. 1501; Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, cit.
[173] In this sense, especially Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, cit.; see, also, Margaret J. Radin, *Reconsidering the Rule of Law*, cit., p. 791; Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, cit., p. 7
[174] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, cit., p. 233
[175] Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, cit., p. 943
[176] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, cit., p. 236
[177] I will not discuss the relation between the Rule of Law and democracy, but I want to point out that such relation is not necessary and biunivocal: as Troper highlights, while every democracy must ensure the Rule of Law, there can be the Rule of Law without democracy.
[178] Brian Z. Tamanaha, *On the Rule of Law*, cit., pp. 103-104

In this perspective, it is argued, the lack of precision and the disagreement which distinguish substantive legal concepts might, in tun, overwhelm the conception of the Rule of Law[179]. At the same time, the quest for analytical restraint is complemented with the assumption that asking too much to the Rule of Law would be a dangerous move, like putting all eggs in one basket. In this sense, Tamanaha maintains that

> a society and government may comply with the rule of law, yet still be seriously flawed or wanting in various respects. […] The rule of law may be a necessary element of good governance and a decent society, but it is certainly not sufficient[180]

As Raz claimed, the Rule of Law is not to be confused with the "*Rule of Good Law*"[181]. The theory of the Rule of Law, ultimately, should concerns itself only with the constraints which distinguish the form of law, not with its content.
On one hand, the concerns that drive these positions are commendable and, on the other, the focus on analytical precision and the attempt to provide the Rule of Law with a narrow, but hardly disputable, set of essential requirements can undoubtedly be attractive. I believe, however, that, as I will attempt to show in the remainder of this Chapter, given the assumptions on which their objectives are pursued, formal conceptions cannot, in the long run, hold their promises. The strength of such theories rests indeed in the clear identification of the set of formal requirements whose fulfilment will guarantee the achievement of the Rule of Law. On the other hand, the weak point of formal accounts relates to the question of what, in the first place, guarantees the respect of such formal requirements. As I will argue, the application of a concept such as that of a formal requirement is ultimately no different in nature by the application of a substantive, procedural, etc., concept. And what makes the difference in the application of such legal concepts cannot rest in the - irreducibly contestable - qualification of the former as "formal". Whatever its label or classification, the application of a concept involves what counts as following a rule. In this respect, I will argue that those problems which are more immediately retraceable in the formal conceptions of the Rule of Law are actually the top of an iceberg and indeed are present in any conception of the Rule of Law which is grounded in a formal understanding of the concept of rules. In doing so, I will try at the same time to stress the relevance which undeniably distinguishes formal aspects of rules - and, in particular, legal rules – by discussing the conditions of possibility of the latter in light of the normative practices performed

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[179] For what concerns the notion of human rights, Goodhart maintained that, since *"[i]t is possible to debate such questions indefinitely, for no two countries have ever been in agreement concerning the nature of these basic rights, and how they can be guaranteed",* the uncertainty of fundamental rights, *"bound to be vague"*, risks infecting the concept of the Rule of Law. According to the Author, the Rule of Law has to be distinguished because "*these basic rights only receive practical recognition when they are adequately protected by the rule of law. In other words the rule of law is the machinery by which effect can be given to such basic rights as are recognized in any particular legal system*"See, Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, cit., p. 945

[180] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, cit., p. 236

[181] Joseph Raz, *The Authority of Law*, cit., p. 211

by jurists. I believe that addressing the doctrine of the Rule of Law in light of the concept of rules not only provides a keying for explaining and understanding the successes and failures of such doctrine, it also affords a standpoint for better grasping some of the challenges posed by the computational turn in law and the emergence of the ideal of a Rule of Machines.

To this end, in the next paragraphs I will briefly outline some of the different elaborations that have emerged within the recent debate, focusing in particular on the formal and procedural conceptions. I will then argue that the vulnerable points of such conceptions, irrespective of the formal, substantive, procedural, etc., requirements which they identify, depend on the very understanding of law which they assume, that is, law as a system of formal rules. I will maintain that, beside questioning the validity and accuracy of such different conceptions, it is even more necessary to discuss both what such accounts of law *do as an account* of law and the felicity conditions on the basis of which they can do it.

I will then consider a set of perspectives which, in reaction to positivism, and in part by harking back to the themes belonging to the legal tradition prior to the birth of the Modern State, have articulated a different understanding of law which centres on the concept of institution and legal order.

1.3.1. Formal conceptions

Differently from the French and German nineteenth century tradition, the formal conceptions of the Rule of Law under discussion extend the scope of the legal constraints from the administration only to also embrace the power of the Legislator. After the Second World War, the analysis of the Legislative power was greatly impacted by the elaboration of the principle of legality and the concept of fidelity to law developed by Lon Fuller. Notably, Fuller assumed the very possibility of speaking of a "Nazi legality" to be an oxymoron. According to the American jurist, it is not enough that "*a system [calls] itself law*", "*the name of law*" can – or better, *should* - be denied whenever such a system does not respect some requisites[182]. Fuller identified eight principles defining that which he called the "morality of law": generality of law, public promulgation, prospective character, intelligibility, consistency, practicability, stability, and congruency between the law and the behaviour of the officials[183].

I will come back later to Fuller's doctrine but, for the moment, I want to emphasize that things start to become problematic when, from values thought as defining the morality of the legislator, Fuller's eight principles and similar lists of requirements are taken as a set of formal conditions expressing the necessary and sufficient conditions that legal rules have to fulfil for better performing the role of governing behaviour; and at the same time, such functional requisites are taken as the only

[182] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, in *Harvard Law Review*, 1958, 71, 4, p. 660

[183] Lon L. Fuller, *The Morality of Law*, pp. 46-95

conditions whose respect can ever be demanded under the theory of the Rule of Law[184]. This approach, indeed, frames the discourse on the Rule of Law as a discourse on formal rules and their qualities. As Radin underlines, when appropriated by instrumental-formalist perspectives, Fuller's eight principles are actually reduced to two: "*there must be rules*" and "*those rules must be capable of being followed*"[185].

This approach is exemplified by the conception elaborated by Raz in *The Rule of Law and Its Virtue*[186], according to which the Rule of Law represents the "excellence" of law and it is accomplished when the law performs optimally its function of guiding behaviour. Raz claims that the Rule of Law "*is essentially a negative value*"[187]: the function that it performs is "negative" in that it consists in preventing the exercise of arbitrary power. For Raz, indeed, the greatest danger of arbitrary power is inevitably that which is "*created by the law itself"*: the creation and application of law can indeed be a source of instability, obscurity, or turn out into a retrospective exercise of power[188]. Correspondingly, the virtuous aspect of the Rule of Law consists in the addressing of the forms of arbitrariness that are manifested in the creation and application of law: on one hand, it prevents that the legislator adopts secret laws, or change them abruptly; on the other, it aims at ensuring that the action of both the administration and the judiciary strictly falls within the lines drawn by the law. Such "virtue", then, can be appreciated not by looking at the goods that the law aims at securing, but by looking at what the law *qua* law, i.e., as an instrument for the government of behaviour, is capable to secure:

> Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law[189]

The Rule of Law is attained when the law is capable of ruling, that is, of guiding behaviour in an efficient manner. Raz illustrates his point with the metaphor of a knife:

> "[a]s with some other tools, machines […] a thing is not of the kind unless it has at least some ability to perform its function. A knife is not a knife unless it has some ability to cut" […] the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. […] A good knife is,

[184] cfr. Emilio Santoro, *Diritto e diritti*, cit., p. 106
[185] Margaret J. Radin, *Reconsidering the Rule of Law*, cit., p. 785-786
[186] Joseph Raz, *The Authority of Law*, cit., p. 211. It is worth noting that, at a later time, Raz has elaborated a different account of the Rule of Law, which he calls "*principled faithful application of the law*", which largely revisits the theory under discussion; see, Joseph Raz, *The Politics of the Rule of law*, in *Ratio Juris*, 1990, 3, 3, p. 331, 335. Indeed, one may say that the conception that he denotes as "*the Rule of Law as an aspect of bureaucratic justice*" resembles in many aspects his former elaboration, see, ivi, p. 322
[187] Joseph Raz, *The Authority of Law*, cit., p. 224
[188] Ivi
[189] Ivi, pp. 225-226

> among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value[190]

The form of arbitrariness that Raz's understanding of the Rule of Law aims at contrasting is unpredictability and deviation from that which is predicted. Arbitrary power is like a deviation from the rails and, accordingly, the aim of the Rule of Law is to ensure that such rails are crafted in such a way that they are underailable. As a consequence, the law can be said to rule when it works as an efficient instrument, a well-oiled machine in whose functioning one can rely, whatever the identity of the rule-maker and the function to be performed[191]. The lack of fulfilment of formal requirements on the part of the law-maker, as much as the unfaithful execution of legal rules on the part of the administration and the judiciary, clogs the rule-machine and indirectly frustrates the possibility to form expectations; it ruins the execution of the plan adopted through laws. Raz's conception of law rests on a certain conception of rules and of the role they play in citizens' life. Both on the side of the rule-maker and on that of citizens' self-application of rules, what is emphasized is the capacity to calculate the consequences of actions. Both the rule-maker and citizens are subjects who make plans – a plan of general order the former, a life plan the latter – by projecting rules. The Rule of Law protects individuals in the sense that it attempts to minimize the possibility that the law becomes the cause of a frustration of individual expectations, expectations which, in their turn, are expectations that the law, as clearly stated, will be so implemented[192]. On the other hand, by optimizing the conditions necessary for law to guide behaviour, it aims at increasing the degree of obedience to law of both officials and citizens[193]. For what concerns the judicial system, indeed, the concern that the Rule of Law address is that "*the courts apply the law correctly*[194]".

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[190] It goes without saying that, in the context of the present research, Raz's instrumental understanding of law is justified, *inter alia*, on the assumption of the neutrality of technology cannot but ring an alarm bell. As Kranzberg's law maintains, "*[t]echnology is neither good nor bad, but never neutral"*[190]. Raz anticipates the possibility of undesirable consequences of the Rule of Law, since he admits that not only the Rule of Law is compatible with every kind of regime, but also "*with gross violations of human rights*" and that "*it has no bearing on the existence of spheres of activity free from governmental interference*". However, this cautionary note does not yet account for the implications that result from the very understanding of law as a neutral instrument for governing social behaviour. I will discuss in more depth the relevance of this aspect in the light of computational turn in the next chapters, while for the moment I am interested in stressing some implications which one may consider internal to the Rule of Law debate. See, Joseph Raz, *The Authority of Law*, cit., p. 221; Melvin Kranzberg, *Technology and History: "Kranzberg's Laws"*, in *Technology and Culture*, 1986, 27, 3, p. 544. See the discussion in Mireille Hildebrandt, *Smart Technologies and the End(s) of Law*, cit., p. 162

[191] The principles of virtuous rule-design are to be adopted not only in relation to statutory legislation, but also applies to judges especially in common law countries where their decisions formally constitute sources of law as precedents. See, also, Antonin Scalia, *The Rule of Law as a Law of Rules*, in *The University of Chicago Law Review*, 1989, 56, 4, p. 1176

[192] Joseph Raz, *The Authority of Law*, cit., p. 222

[193] Ivi, p. 214

[194] Ivi, p. 217

In this respect, formal conceptions harken back to the more ancient roots of the Rule of Law, the idea there is a good in being governed by laws, whatever their content, and this good is the good of the law *qua rules*.

1.3.2. Procedural conceptions

While acknowledging the importance of the formal requirements of law, many Authors have highlighted the need to provide an account of the Rule of Law based on a broader set of elements[195]. In particular, it has been emphasized that formal theories adopt a particularly narrow perspective in relation to the activity performed by courts: either such activity is discussed in pathological terms, that is, as a moment of internal breakdown of the machinery of legal rules – and as a sabotage made by judges' will or cognitive limitations - or it is not subject to particular attention. In this perspective, Waldron maintains that the Anglo-American debate is distinguished by a tendency to either ignore the procedural dimension of the Rule of Law "*or worse, [to assume] thoughtlessly that [it] is taken care of by calling the formal dimension 'procedural')*"[196]. As the Author

[195] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press, Oxford, 2005, chapter 2; Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *Nomos*, 2011, 50, p. 16; Id., *The Concept and the Rule of Law*, in *Georgia Law Review*, 2008, 43, 1, p. 1; Id., *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, in *Law and Philosophy*, 2002, 21, p. 137

[196] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., p. 1. In the eyes of a Continental jurist, this may indeed appear as a particularly interesting circumstance since, from an historical perspective, it is precisely within the Anglo-American common law tradition that the cradle of the rights to a fair trial and the due process have found their start. Not to talk about the Inquisition, one can consider that the Continental doctrines of the Rule of Law have developed in a context in which procedural rights, the right of defence and, in general, the judicial institutions were not comparable to those provided by common law systems (nor, clearly, to those required today by art. 6 ECHR). Indeed, one may also argue that part of the attention that Continental theories pay "upstream", at the level of the legislation, is the counterpart of lack of trust in the capacity of the procedures of adjudication to represent a locus of protection of the legal subject. The extremely poor conditions of the legal procedures in the Continent have been reported by Enlightenment reformers, from Beccaria to Muratori, to Voltaire, condemning an intolerable, irrational, obscure administration of justice (see, also, Dicey's account of the multiple incarcerations suffered by Voltaire, in Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, 10th Edition, The Macmillan Press LTD, London, 1979, pp. 189-190). On the other hand, common law processual systems implemented processual guarantees already in the seventeenth century: the right to silence after the Lilburn case in 1641, the Habeas Corpus act in 1679, the right to confrontation, which was established after the tragic execution of Sir Walter Raleigh, who was convicted on the basis of accusations made by Lord Cobham under torture because of the rejection of his celebre claim: "*Proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face*". From the Enlightenment, many authors of the Liberal tradition showed admiration, or at least a keen interest into the difference between their system of origin and the institutional architecture and the legal procedures of the countries belonging to Common Law tradition, as in Voltaire's *Letters on the English*, or Montesquieu's analysis of the English constitution in *De l'esprit des lois* (XI, VI; XXII, XIX); and, lately, the analysis of the constitution of the United States elaborated by Alexis De Toqueville in *Democracy in America* . For what concerns the Continent, one can take as a counter-example Gaetano Filangieri's praise of a statute issued by Ferdinand IV, the King of Naples, in 1774 - the Dispaccio reale del 23 settembre 1774 - which compelled judges to make public the reasoning behind their judgments. The fact that, as Filangieri highlights, the introduction of this procedural rule encountered the strong resistance of the jurists of the kingdom, is illustrative of the low level of

points out, while positivist scholars tend to discuss of the activity of courts in terms of mere outputs, the essential features of any legal system and the Rule of Law cannot be explained without paying due attention precisely to the judicial procedures through which legal norms are applied and disputes are settled[197]. Contrasting the positivist emphasis on the "*command-and-control"* or *"norm-and-guidance"* aspect of law[198], Waldron claims that the Rule of Law cannot be accounted for without acknowledging the importance of, on one hand, the "*highly proceduralized hearings in which problems are presented to a court*" and, on the other, "*the various procedural rights and powers possessed by individual litigants in relation to those hearings*"[199].

For MacCormick the Rule of Law cannot be said to exist unless an individual is granted the **"***right of the defence to challenge and rebut the case made against it*". Indeed, as he added, *"[t]here is no security against arbitrary government unless such challenges are freely permitted"*[200]. In this perspective, these conceptions show that the particular value that formal accounts of the Rule of Law attach to the virtue of rules in contrasting arbitrariness cannot obtain unless there are in place effective remedies.

On the other hand, both Waldron and MacCormick acknowledge a certain friction between the demands of the formal and the procedural conception of the Rule of Law. MacCormick presents it as the "*puzzle about the apparent conflict between law as that which is arguable, and law as that which guarantees security and stability in social life within a state under the Rule of law"*[201]. As he highlights

> indeterminacy [of law] is in a curious way magnified by the very same considerations that lead to the demand for determinate law. For the dialectical or argumentative character of legal proceedings is a built-in feature of a constitutional setting in which citizens are able to challenge any case laid against them. […] A vital part of the guarantee of liberty in the governing conception of the Rule of Law is that the opportunity to mount such a challenge on fair terms and with adequate legal assistance be afforded to every person. And yet that same governing conception calls for relatively clear and determinate law in the form of pre-announced rules[202]

For Waldron, the tension between the procedural conception and the formal requirement that relate to legal determinacy is "*largely unavoidable*"[203]: the "*diminution of law's certainty*" is the "*price*" to be paid for sustaining the

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entrenchment of the value of procedural rights in the legal mentality of the time. See, Gaetano Filangieri, *Riflessioni politiche su l'ultima legge del sovrano, che riguarda la riforma dell'amministrazione della giustizia*, Morelli, Napoli, 1774, part I, § I.

[197] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., pp. 12-13; Id, *The Concept and the Rule of Law*, cit., pp. 20-24; 60

[198] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., p. 22

[199] Ivi, p. 11

[200] Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 27

[201] Ivi, p. 22

[202] Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 26

[203] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., pp. 18-20

dignitarian aspect of the Rule of Law, that is, acknowledging the individual addressee of legal norms as "*beings capable of explaining themselves*"[204].

MacCormick, conversely, adopts a different position. The Scottish jurist, indeed, stresses the need to acknowledge that a conception of the Rule of Law which not only ignores, but sets itself in antithesis to the "*Arguable Character of Law*" cannot but be traced back to "*a misstatement in the emphasis it gave to certainty in law*"[205]. According to MacCormick, while certainty undoubtedly plays an important role in any legal system, one should not misrepresent the requirements necessary for its realization: as he puts it, "*[a]ll the care in the world may be devoted to preparing the source materials of law*" but *"[w]hatever care is taken, the rule-statements […] are always defeasible, and sometimes defeated under challenge by the defence. Law's certainty is then defeasible certainty*"[206].

I believe that MacCormick's approach, by attempting to overcome the idea of a necessary incongruence between the different requirements of the Rule of Law, has a number of merits. On one hand, it helps emphasizing that that which is performed through judicial procedures is not only a "negative" forms contestation, a defence against an imposition by the State, along the model of the defendant in criminal law. Many are indeed the cases in which the obstacles to the enjoyment of rights are not represented by the State's action, but by its inaction. Legal procedures, in these cases, are the locus in which, by exercising her right of action, the individual seeks not only legal protection *from* the State, but *by* the State. Moreover, as I will discuss more thoroughly in the next paragraphs, an approach aimed at dissolving the tension between formal and procedural requirements paves the way for the acknowledgment of the circumstance that the very entitlement of rights and the scope of the protection they offer is, necessarily, a matter that constantly requires to be settled, but that can never be settled once and for all. That the existence of legal procedures is essential for the very concept of rights is in this sense comforted also by Feinberg's consideration that *"[t]here is, after all, a verb 'to claim', but no verb 'to right'"*[207].

In this light, I believe that the perspective assumed by MacCormick facilitates an understanding of the procedural conception of the Rule of Law that, instead of putting them in contrast, affords to reformulate the relation between the certainty of law and the certainty of legal protection as co-constitutive. Indeed, it makes possible to highlight the fact that not only procedures for arguing and contesting the law are not in tension with formal requirements, but actually constitute a necessary precondition for the latter to obtain. Well beyond the nomophylactic

[204] Ivi, pp. 19, 16
[205] Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 28
[206] Ivi
[207] Joel Feinberg, *The Nature and Value of Rights*, in *Journal of Value Inquiry*, 1970, 4, p. 250

function performed by higher courts, judicial dispute resolution contributes indeed to the clarity, certainty and predictability of legal rules[208].

Lastly, an approach directed at dissolving the tensions between formal and procedural requirements has a deeper implication on the very understanding of the legal phenomenon, in that it highlights that an account of law *qua* rules not only is not set against, but actually rests on the contexts in which the latter are invoked *as* rules, that is, the practices in which they are used *as*, and given the meaning of, rules. In other words, the tension which ultimately such perspective dissolves is the tension between legal rules and legal practice. For this reason, I believe that such approach is particularly suited to question the very standing of a picture of the legal phenomenon in which, on one hand, the machine of law moves on its own tracks and, on the other, all individuals can do is trying to predict the import of legal rules for either avoiding the train or, at best, hoping to jump on it.

1.4. The aporias of the Rule of Law and the different *types of juristic thought*

While in the previous discussion of the Continental tradition I have tried to highlight the shortcomings that distinguished formal conceptions of the Rule of Law with reference to legal protection, I will now try to question the capability of such doctrines to actually fulfil the narrower aim that they assume, i.e., providing an account of the Rule of Law as a system of rules capable of guiding behaviour and avoid arbitrary power.

As discussed above, in the seventeenth century Filmer maintained that a government without an arbitrary power was impossible, that every law-making power is necessarily arbitrary and the idea of subjecting law-making to legal constraints was a contradiction[209]. The different conceptions of the Rule of Law that have been examined have attempted to prove Filmer wrong. However, I am afraid that what the brief reconstruction that I have sketched actually shows is that, before anything else, the history of the Rule of Law is the history of the attempts to overcome the aporias that the theory itself had generated. I believe that the aporias in which the different theories had incurred do not depend that much on the specific formal, substantive or procedural conceptions of the Rule of Law adopted but rather, to recall once again the words of Schmitt, on the kind of "juristic though" which informs each conception. To put it differently, the difference that

[208] In this perspective, one may recall that which, in his discussion of validity, Ross indicates as an "*apparent paradox": "the more effectively a rule is complied with in extrajudicial legal life, the more difficult it is to ascertain whether the rule possesses validity, because the courts have that much less opportunity to manifest their reaction*". See, Alf Ross, *On Law and Justice*, cit., p. 36. From a practical perspective, one may argue, no statutory rule is more uncertain than the one just introduced in the legal system. Only after some time, through the clashes of interpretations and the meaning of the statute "unfolds" or, better, is constructed by the activity of jurists. Case-law and the doctrinal debate that jurists develop on the text contribute to the creation of that context in which only a rule can become clear and predictable.

[209] *Supra*, § 1.1.2.; Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy*, cit.

makes a difference is how one understand "Law" and, in turn, the way in which the latter is supposed to "Rule". Such understanding, indeed, constitutes the canon against which the Rule of Machine narrative afforded by the computational turn measures itself, both in positive – i.e., what it is that which law is expected to provide, and which machines might provide better – as much as in negative – i.e., what are the inherent limits and aporias of law which machines might overcome.

I will now attempt to show that, on one hand, the aporias in which the theory of the Rule of Law runs into can be traced back to the inherent tensions that underlie formalist understanding of law, and that, on the other, irrespective of its wideness, any conception of the Rule of Law which is grounded on a similar understanding will at some point see the re-emerging of such aporias. This will allow me to set the ground for the discussion of some of the assumptions of the Rule of Machines which I will examine in Part II.

As discussed above, formal conceptions of the Rule of Law are distinguished by a set of common assumptions: that it is necessary to shield the law from the magmatic contestability of substantive concepts; that a safe space for the law can be carved out by making use of only rigorous normative concepts and formal requirements; that the virtue of the conception of the Rule of Law so fashioned rests in its neutral instrumentality. Precisely because of these assumptions, however, this kind approach has to make compromises with the possibility of being self-standing: at its beginning or end, the law as a system of rules distinguished by formal requirements loses its ground and is forced to land on "something else" which is not itself a legal rule. Conscious of this deficiency, moreover, such conceptions seem to be doomed to rest in fear that, at every step, that "something else" which is not a legal rule – as the subjective will of the interpreters - takes the place of the latter. In this respect, Kelsen's project to provide the "purest" account of law by presenting it as a system of norms has, in a way, marked the limits of such an account: for the very reasons why a normativist explanation is able to account for many features of a system of law, it has to give up the explanation of other features and leave them to other disciplines. Moreover, based on the very same normativist assumptions, the notion of the Rule of Law is reduced to a pleonasm[210]. In a way, the alleged strength of formal conceptions lies in their narrowing the scope of the problems that interest the jurist to those which are assumed as solvable by the very account of law they rest on. The problems which are left outside of such delimited area of relevance, however, do not cease to exist, nor to have an impact on law, for the reason that they are not tractable through a certain conception of legal rules.

While the contour of this kind of juristic thought is more easily detectable in formal conceptions of the Rule of Law, I will argue that a formalist understanding of law can be in fact be compatible with certain versions of the substantive and procedural

[210] *Supra*, § 2.3.1.3.

conceptions, with the result that the difference between the latter and the former is all but substantial: on the contrary, such difference might come down to just the larger number of requisites that are assumed as necessary for a system to be regarded as satisfying the criteria of the Rule of Law. In any such case, indeed, the remaining problem is ultimately that no formal rule can guarantee the respect of a system of formal rules. In this sense, the formal conception of the Rule of Law and the formalist conceptions of law cannot provide a satisfying account of that which is its own main assumption, i.e., the possibility to assess whether a legal rule actually fulfils the formal conditions on which it should rests.

1.4.1. Rules, norms and commands

Once again, the formal conceptions of the Rule of Law adopt an understanding of law centred on expressed rules. These rules are introduced by a lawmaker - which may coincide only with the Legislator, or also with the judiciary - according to formal-procedural requirements. These requirements ensure that the rules thereby adopted can fulfil their function, that is, governing behaviour. As discussed above, the identification of law with rules can be traced back to the political-legal theories developed at the rise of absolutism. To a large extent, indeed, the formal conceptions are informed by the account of legal rules in terms of commands of the sovereign and, at the same time, present problems similar to those in which Hobbes had incurred at the time[211]. For the English philosopher, as discussed above, the possibility of any form of order rests on the recognition of a set of commands capable of defining standards of behaviour in an indisputable manner. Only the stable and certain execution of the order planned by the sovereign affords the security of individuals. Hobbes insisted on the fundamental importance of the formal requirements that the sovereign commands must fulfil for achieving their purpose: they must be declared "*Publickly and plainly*"[212], otherwise their ignorance would excuse their addressee: the knowability of the law was indispensable for obedience. On the other hand, the fulfilment of such requirements is assumed as sufficient for a subject to be in the condition of adopting the rule-command as the reason guiding her behaviour. In this perspective, it should not surprise that the Philosopher of Hobbes's *Dialogue* maintains that the mastering of the law does not require any special form of reason and can indeed be achieved in

[211] To be sure, with Hart, positivist theory has acknowledged the need to shift the focus from coercion and assume authority as the founding element legal systems and distinguishes them from other systems of behavioural regulation: the motivating force exercised by law is not the force exercised by a robber's gun pointed at one's head, see Herbert L. A. Hart, *The Concept of Law*, cit., pp.19 ff. However, I do not believe that this affects the point I am making. One can notice, indeed, that the concept of authority as that form of recognition which makes commands "*content-independent peremptory reasons*" is indeed inspired by Hobbes, see Herbert L. A. Hart, *Commands and Authoritative Legal Reasons*, in Id, *Essays on Bentham: Jurisprudence and Political Theory*, Oxford University Press, Oxford, 1982, pp. 253 ff

[212] Thomas Hobbes, *Leviathan*, cit., XVII, XXVI

two months[213]. This already identifies one of the problematic assumptions on which the formal requirements rests. In this respect, one can recall the reply given by Hale in his commentary on the *Dialogue:* that "*Men are not born common lawyers*"[214].

Of course, the fact that the law might not be clear does not mean that the law does not *ought to be clear*. This is indeed the very reason behind the adoption of such a formal requirement as a condition for the Rule of Law.

Precisely the work of Fuller, however, offers valuable insights in relation to the inherent limitations of a "formalistic understanding" of formal requirements[215]. First of all, Fuller's discussion of the eight principles is preceded by the premise that the precision with which one can formalize standards of conduct "*is never complete*" [216]. As he points out:

> It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty. The notion of subjecting clarity to quantitative measure presents obvious difficulties. We may content ourselves, of course, by saying that the legislator has at least a moral duty to try to be clear. But this only postpones the difficulty, for in some situations nothing can be more baffling than to attempt to measure how vigorously a man intended to do that which he has failed to do. In the morality of law, in any event, good intentions are of little avail […]. All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman[217]

Exception made for promulgation, Fuller maintains, "*[w]ith respect to the demands of legality […] the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay down very many compulsory steps towards truly significant accomplishment*[218]. Fuller identifies as the origin of this apparently unbridgeable gap between expectations and realizations in the fact that a formalistic understanding of the requirements of legality would severe them from the implicit dimension which distinguishes the legal phenomenon and, therefore, with the role norms play in the practical reasoning of citizens[219]. Moreover, in his celebrated debate with Hart, not only Fuller dismiss the English philosopher's "*pointer theory of meaning*"[220], but rejects the self-sufficiency of any

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[213] Thomas Hobbes, *A Dialogue*, cit., p. 11

[214] Matthew Hale, *Reflection*, cit., p. 505.

[215] In particular, his discussion with Hart, Lon L. Fuller, *Positivism and Fidelity to Law*, cit., p. 630; and the reply to his critics in the second edition of *The Morality of Law*, Lon L. Fuller, *The Morality of Law*, cit., pp. 187 ff

[216] Id., *The Morality of Law*, cit., p. 41

[217] Ivi, p. 43

[218] Ivi, p. 44

[219] Lon L. Fuller *Human Interaction and the Law*, in Id, *The Principles of Social Order*, Duke University Press, Durham, 1981, p. 212; Gerald J. Postema, *Implicit Law*, in *Law and Philosophy*, 1994, 13, 3, p. 361

[220] Lon L. Fuller, *Positivism and Fidelity to Law*, cit., pp. 668-669

textual rule and stresses as inevitable the recourse to extra-textual elements[221]. The *"craftman pride"* cannot, after all, collapse that difference between legal rules and legal texts, which unavoidably re-emerges anytime, and especially when the settling function of formal requirements is most needed: in the cases of disagreement. On the other hand, nobody – not even the legislator - *ad impossibilia tenetur*. It is clear that the public accessibility of legal texts and the publicity of the legal procedures are important and necessary requirements, but never sufficient. In no modern legal system there can exist a person which can be expected to actually have knowledge of the whole law in force. This applies also to experienced jurists, included the judges of the highest courts. Incidentally, for someone to give legal advice, she must have completed a degree in law, several months of traineeship, have passed a written and an oral exam; and even when this training is complete, often, the legal system is so complex that outside one's specific area of specialization, not only a lawyer might advise her clients to refer to someone more expert, but she has a specific deontological duty to this effect. But even within one's area of expertise, no amount of theoretical knowledge or experience can ensure a complete understanding of the "rules". But this, to be sure, is not to be taken as (only) a matter of cognitive limitations, which might be overcome by a superhuman, or a machine: even assuming a complete knowledge of the rules formulated into text, that would not guarantee the knowledge and understanding of the law in force.

The point is that the problems relating to the clarity of legal rules applies also to the kind of second-degree rules which formal requirements consist of. This in my view, represent a first counterargument to those positions which justify the adoption of a formal understanding of the Rule of Law on the basis the excessive disagreement which distinguish substantive concepts. Indeed, it is not clear in what sense the "formal" character of the formal requirements should save them from the kind of disputability that, on the other hand, is assumed as inevitably affecting fundamental rights. In fact, a look at the "life" of formal requirements into the practice of law can offer an example of the degree of sophistication that legal disagreement can reach precisely in relation to questions of formal legality.

The capacity of a rule to govern behaviour, as much as the degree of knowability and predictability it can afford, does not rest on and cannot be explained in terms of another legal rule. In that formal requirements are conceived as rules concerning rules, they cannot but relocate the trouble to a further step of the pyramid. Any further formulation of the legal rule will still "*hang in the air"* along with the formulation of the rule which it is supposed to ground, therefore being incapable of providing any actual support: by themselves, no such formulations can determine what would be legal and what arbitrary[222]. Taken in isolation, therefore, legal rules and the meta legal rules about them cannot help: no other added rule can prevent

[221] Ivi, pp. 664, 666

[222] Ludwig Wittgenstein, *Philosophical Investigations*, cit., § 198

them to be just empty formulas, allowing the triumph of despotism in the name of the law.

Legal rules and the rules concerning rules, far from being the solution to the problems of the Rule of Law, risk keeping coming back as a source of problems. Once again, with Montesquieu, one can reaffirm that "*power should be a check to power*"[223]. But this does not seem a result that one can achieve when both the power to be checked and the power which is supposed to check it are conceived as legal powers expressed through formal rules.

For Hobbes, this would have been a nonsensical problem in that, for him, the sovereign *is* the sovereign precisely because it *decides* as sovereign: it is not bond to anything, neither itself. This way, the problem of arbitrariness is solved at its roots. There is no such thing as arbitrariness where the sovereign's will has no standards against which it can be assessed: it is itself, in each of its manifestations, the one and only source of any standard. The sovereign is like Carroll's Humpty Dumpty, who claims that "[w]*hen* I *use a word […] it means just what I choose it to mean—neither more nor less*"[224]. This, however, is a solution that cannot be accepted by any conception of the Rule of Law.

When built on an account of law as formally expressed legal rules, the same set of problems which distinguish formal conceptions recur also in the case of substantive account of the Rule of Law. As discussed above, for Locke and the liberal philosopher inspired by natural law tradition, law was not only the command of the sovereign. The concept of law was given a wider scope and a sacred character in virtue of its being, before all, the source of a set of fundamental rights. Such rights existed prior to the institution of the state and represented a limit to sovereign power. Following more or less closely the Lockean path, most of the doctrines of the Rule of Law have been developed under a framework inspired by natural law and contractarianism within which, from time to time, the limits of sovereign power and the possibility to control it have been identified in the consensual foundation of such power or in its compliance with higher grade principles the understanding of which was shared by any rational being. Reason was, at the same time, the parameter of validity of law and legitimacy of the State. The will of the sovereign can be considered law as long as it is the expression of the consociates' will and conforms to the reason expressed in the natural law principles. In a way, the sovereign power is itself subject to another sovereign. However, also in this case, the "control" of the sovereign on the sovereign comes down to the assessment of the relations of conformity and compatibility between two rules, one of superior and one of inferior degree[225].

As discussed above, the procedural conceptions of the Rule of Law have dug below the surface of formal accounts and, by unearthing and putting at the centre the

[223] Montesquieu, *The Spirits of Laws*, Book XI, Chapter IV
[224] Emilio Santoro, *Diritto e diritti*, cit., p. 156; Davide Sparti, *Se un leone potesse parlare*, cit., p. 111
[225] Michel Troper, *Le concept d'État de droit*, cit., p. 62,

arguable character of law, have shed light on the constitutive relation that ties the capacity of rules to guide behaviour, legal protection of individuals and the functioning of the jurisdictional procedures and legal remedies. The direction pointed by procedural theories, however, not only does not ask to leave the shovel but, on the contrary, it invites to keep digging. One may indeed wonder what it is that makes legal procedures possible and effective. What, of such remedies, affords the possibility of successfully defeating a rule which, until then, was assumed as legally certain? On which grounds do legal proceedings guarantee the possibility to identify the act of a state official as arbitrary and, correspondingly, the scope of an individual right? What, of such procedures, makes sure that law is not only arguable, but that it can also be meaningfully argued?

That judicial procedures may not be capable to afford legal protection is not a mere eventuality, but in fact a widespread perception that has been assumed as the starting point of the present research. As in the popular saying, "*nobody is more deaf than those who don't want to listen*": too often this proverb is echoed even in those legal system in which not only the State is formally under an obligation to provide effective remedies, but these are actually implemented through detailed formal provisions and the setting up of concrete institutions, like courts with independent judges which conducts public hearings in which parties are granted the rights of defence. And yet, notwithstanding the apparent existence of the whole "pedigree" of a legal procedure, legal protection might still be reduced to its empty shell.

It is clear that the case of a judiciary who "does not want to listen" would not be solved by introducing a rule of the type "listen for real!". The question concerning the conditions of possibility of effective procedures for arguing and contesting the law requires an answer that does not bring us back to square one, i.e. formal requirements of rules and their inherent limitations: under penalty of getting trapped in an infinite regress, the procedures aimed at grounding the assessment of the respect of formal requirements cannot be themselves grounded on the respect of formal requirements. For not finding oneself into the formalistic aporia, just moved a step further, it is necessary to still make a step, but in a different direction.

Adapting the Duhem-Quine thesis of underdetermination of theory to this case, one could argue that the fact that the explanation of the Rule of Law in terms of formal conditions is compatible with the "evidence provided" does not exclude the possibility of alternative and more accurate explanations. On the other hand, formal conceptions can be understood as simply providing a grammatical definition of a certain state of affairs in the form "these conditions being present, the Rule of Law attains". In this sense, these conceptions identify a set of meta-rules directed to the rule-makers; however, the formal conceptions do not provide an account of how the fulfilment of the requirements provided by such meta-rules should be achieved. And, indeed, given the formalist conception of rules they assume, they cannot provide such account without incurring in an infinite regress.

The Rule of Law doctrine cannot offer more than this because the assumed understanding of legal rules cannot offer more than this. To which extent the sacrifice of a broader understanding of law and of the Rule of Law is worthwhile depends on both, what it is lost and, on the other hand, what it is supposed to be gained from a formal account. With respect to the former, for instance, Tamanaha acknowledges the limitations of the formal account of the Rule of Law in its being compatible with tyrannical rules and in the existence of many circumstances in which formal legality, due to both the under and over-inclusiveness of formal rules and their having all-or-nothing consequences, may not be beneficial [226]. Raz, moreover, launches a call not to "*[sacrifice] too many social goals on the altar of the rule of law*"[227] and makes clear than "[*i]f the pursuit of certain goal is entirely incompatible with the rule of law, then these goals should not be pursued by legal means*"[228].

On the other hand, the narrowness of the conception of law *qua* formalized and predictable rules and the conceptions of the Rule of Law which rest on it are praised for affording analytical precision and for avoiding disagreement. However, not only, as a too-short-blanket, such accounts leave many relevant aspects of law uncovered, but they also prove unsatisfactory precisely with respect to the values they purport to achieve. Indeed, as discussed above, formal conceptions promise to afford a high degree of conceptual analyticity. However, it is not at all clear that such degree of analyticity is actually gained.

An account of the Rule of Law built on a conception of law intended as formalized rules seems destined to a troubled relationship with itself. The idea that the focus on a set of expressed formal rules is unsatisfactory for sustaining the Rule of Law is emphasised especially by the attempts to transplant the formal apparatus of the Rule of Law in countries extraneous to such tradition: as Stromseth, Wippman and Brooks put it,

> without a widely shared cultural commitment to the idea of the rule of law courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper. […] The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes. Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing[229]

But even beside such examples, it is acknowledged that, when intended as a system of formal rules, the Rule of Law cannot be understood as self-standing. Tamanaha points out that

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[226] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, cit., pp. 241-243; Id., *On the Rule of Law*, cit., pp. 119-122

[227] Joseph Raz, *The Authority of Law*, cit., p. 228

[228] Ivi

[229] Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Cambridge University Press, New York, 2006, pp. 76; .310

> [f]or the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary and proper aspect of their society. *This attitude is not itself a legal rule*. It amounts to a shared cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations and surviving episodes in which the rule of law had been flouted by government officials. […] When this cultural belief is not pervasive, the rule of law will be weak or nonexistent[230]

However, in the moment in which it acknowledges the need for a non-formal foundation, this position is deemed to shake the idea of a system of formal rules in its entirety. On one hand, if the Rule of Law cannot work on the basis of a legal rule, it arouses the suspicion that also the other legal rules are not capable of functioning on the basis of other rules, and may themselves require some further ground. On the other hand, the fact that one, many, or all believe in and are committed to the Rule of Law does not in itself constitute a guarantee of the actual respect of its requirements. Clearly, being committed to the Rule of Law and its formal requirements is not the same thing as respecting the Rule of Law and fulfilling its formal requirements[231]. *Mutatis mutandis*, it seems that formal theories tend to come back in full circle to the Hobbesian solution: for rules to work as rules, what is required is a previous form of commitment to obedience through which one accepts to let herself be guided, from that point blindly, by the rules.

Under another perspective, moreover, I believe that failing to provide a *legal* account of the conditions of possibility of the Rule of Law would not only be a conceptual defeat for jurists, but a concrete threat for law and legal protection. In the history of law and of the Rule of Law, the setting of their foundational conditions of possibility have been subject to "outsourcing" by natural law theories, by some strands of Legal Realism and Law and Economics, and now by theories inspired to Artificial Intelligence: from time to time, a long list of elements – divine law, innate rationality, psychological traits, sociological, economics, moral principles or computational explanations - have been and still are suggested as candidates for providing law with a solid foundation, or else, are offered as criteria for the assessment of its rationality, efficiency, reasonableness, justice. An account of the Rule of Law which renounces to look for its *legal* foundations risks opening the door to a process of erosion of the autonomy of law which may end up in legitimizing its substitution with a different system for governing behaviour. I do not believe this process is unavoidable as much as I do not believe that law cannot provide the foundations that the Rule of Law requires.

Indeed, I believe that the very reason why the only option left is "outsourcing" the possibility of existence of the Rule of Law to a "*cultural belief*", or an attitude which "*is not itself a legal rule*", is, once again, the very understanding of legal rules on which the account of the Rule of Law rests on. On the other hand, whether

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[230] Brian Tamanaha, *The History and Elements of the Rule of Law,* in *Singapore Journal of Legal Studies*, 2012, p. 246, emphasis added

[231] cfr., Id., *Philosophical Investigations*, cit., § 202

not a *legal* rule, that on which the Rule of Law is supposed to rest would nonetheless be a rule – i.e., following one's will or commitment to respect the Rule of Law - and, in that, it would not solve the problem of foundation, but only relocate it out of the legal sphere. Having this in mind, I believe that the main difficulty in which the formalist conceptions incur depends on the language that jurists have imposed themselves in the representation of law and legal rules[232]: a language and a corresponding representation which consider rules as akin to rigid mechanisms. In this picture, the understanding of the *hardness of rules* is conceived in the same manner in which it is considered the *hardness of the material* of which mechanisms are made[233]. The perspective significantly changes if one does not look at law as formulated rules but as rules that are *followed* or *non-followed*, that is, rules embedded and put into use within ordinary life and legal practice. In other words, if one wants to conceive as foundational a certain "culture", one should not take off the *juristic* lenses and, through them, should attempt to see it as a *legal* culture constituted by the interplay of interactions in which legal rules come into being, are respected, violated and discussed, are learned, taught, and handed down.

I will come back to this, but it is now necessary to take a step back. The considerations made so far in relation to rules seem to lead to the inevitable conclusion that those accounts that fashion both the problems of the Rule of Law and their solutions in terms of formalized rules cannot, by themselves, honour the promise of providing guiding behaviour nor a stable ground for discerning arbitrariness from law.

"*And yet it works*": not only a look at current legal systems does not license the conclusion that "anything goes" but, on the contrary, though certainly with various shades, law seems capable of providing both constraints to power and legal protection those who are subject to that power. Even more, constraints and legal protection are claimed, presented and discussed precisely by making reference to the vocabulary of formal requirements: jurists talk of determinate, general, predictable rules, they discuss them in terms of syllogistic procedures, rules of evidence, and through fair procedures of hearing. Deadlines are respected (or also failed), decisions which lack formal requirements are cancelled, people manage to fill their tax declarations, officers are convicted for the abuse of their powers, defendants are acquitted because a statutory provision did not meet the conditions of legality, statutes are declared unconstitutional, and so on.

This seems to contradict the conclusions just reached, either one or the other: or formal rules and their requirements actually work, as the "practice" seems to show us, or formal rules and requirements cannot work, as the "theory" seems to imply. Or, actually, what is wrong is precisely such a dichotomic framing of theory and practice. There may indeed be a different, further explanation capable of

[232] cfr. Ludwig Wittgenstein, *Philosophical Investigations*, cit., §§ 115; 119

[233] Id, *Remarks on the Foundations of Mathematics*, IIII, § 87

accounting for not only the cases in which formal rules work, but also for those cases in which, notwithstanding any apparent deficiency from a formal perspective, they do not. Clearly, this perspective requires to provide an account of how a formalist conception of law and the Rule of Law can function without deferring its foundation to a further legal rule or an external, i.e., non-legal, background.

For this purpose, I believe that one should again take the cue from the fact that, lacking a certain degree of familiarity with the concepts of rules and their formal requirements, one would hardly be able to make sense of what is going on in a legal discussion. And indeed, in legal practice, all jurists make reference to rules and their formal requirements. I believe that the parenthetical element here is of great importance: it is precisely "in legal practice" that rules and formal requirements are put in use, and it is in legal practice that they can be of use. When putting them into use in practice, jurists are not that much describing something, they are doing something[234]. More than what is made reference to, the very act of making reference, and the conditions of its success, represent that which requires to be accounted for in order to understand the Rule of Law and its conditions of possibility.

Whereas one generally complains that something works in theory, but not in practice, I believe that in this case the opposite is true: the formalist conception of rules can only work in practice and not in theory. This is due, on one hand, to the fact that the theory, as a theory, cannot fully account for the practice and, on the other, to the fact that what makes formalism work in practice is precisely the circumstance that, within practice, formalist *talk* does not count as a theory, but as an action whose capacity to produces legal effects depends on conditions of felicity instituted and sanctioned by the practice itself.

I believe that, along these lines, one can attempt to advance a perspective in which formal, substantive, procedural accounts of the Rule of Law, as much as the value that each account tends to emphasize, are not to be seen as alternative or opposing, but as expressions of elements belonging to different levels of analysis of law. Under such perspective, each of these conceptions corresponds to different forms of interaction, or, as it were, language games, that are played with the concept of law in different contexts and on the basis of different felicity conditions. To some extent, the familiar relation that these different games entertain between themselves are built one on the top of the other. But this does not mean that their interplay can be fully accounted for as a vertical, top-down or bottom-up, relation.

I believe that most of the puzzlements, clashes and aporias that emerge at the theorical level can be explained, and in this light perhaps dissolved, as the result of the overlooking of the co-constitutive and circular relations in which each of the different games entertains with the others. To put it differently, jurists do different

[234] As Wittgenstein tells his interlocutor "*You interpret a grammatical movement that you have made as a quasi-physical phenomenon which you are observing*", Ludwig Wittgenstein, *Philosophical Investigations*, cit., § 401; see, also, John L. Austin, *How to do things with words*, cit., *passim*

things which different accounts of law, but none of them can claim completeness and exhaustiveness. For not only each of them is intelligible only on the basis of the others, but they all depend, in their performative character, on the background of practices which constitute the possibility for such conceptions to make sense as and being understood as accounts of law.
Normativist-decisionist thought, in particular, tends either to address these issues only incidentally, to assume them dogmatically as the unquestioned axioms of the system, or to postulate the need of external foundations to law.
One can take the cue from the famous passage in which Hart maintains that, whereas the open texture of law implies that rules cannot fully determine their application,

> […] the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case. This salient fact of social life remains true, even though uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case[235]

Not only it is precisely this "*salient fact of social life*" that must be put under scrutiny, but that it is necessary to provide an account of it capable of stressing the legal character of both the "fact" and its "saliency". In this perspective, the next section will briefly introduce the work of a set of juristic schools which have attempted to explore the blind spots of formalist theories of law and to provide a legal analysis of them.

1.5. Law, Order and Institutions

As discussed *supra*, before the birth of the Modern State, legal thought was distinguished by a particular understanding of the relations between law and order, as exemplified by the Continental experience of the *Ius Commune* during the Middle Age[236]. Moreover, along the analysis of the lines of development of the concept of law and of the Rule of Law, some of the conceptions mentioned - as those relating to natural law, or the German Historical School and the traditions inspired to organicism - emphasized the relations between the law and rationality, or the identity of a particular people, or its history and customs.
The success of positivism, however, tended to either obscure or to absorb alternative conception of law. Yet, especially at the turn of nineteenth and twentieth century, a certain dissatisfaction was spreading with respect to the dominant accounts of law that were hinging on either voluntaristic doctrines of the State or Kelsenian normativism. Against this background, different jurists explored and emphasized a relation between the concept of law and that of order which contrasted with the perspectives centred on the primacy of the state on law and on

[235] Herbert L. A. Hart, *The Concept of Law*, cit., p. 135
[236] see, *supra*, § 2.1

the reduction of the latter to a hierarchy of norms. Such contributions offered an account of the legal phenomenon that focused on an institutional dimension and attempted to provide an explanation of law through the concept of organization.

This approach is exemplified by the works of the French jurist Maurice Hariou, which introduced the idea of a "*ordre juridique objectif s'établissant de lui-même dans le choses politiques*"[237] and identified its foundations in a "*situation ètabile*[238]. Within the German debate, an example of such approach is represented by the work of Erich Kaufmann, who maintained that relational legal concepts (*juristische Relationsbegriffe*) in which written laws are expressed could only be given sense in the light of the underpinning real legal concepts (*juristische Dingbegriffe*)[239].

A further example is then offered by the institutional theory of the *ordinamento giuridico* (legal order) developed in Italy by Santi Romano[240]. In particular, Romano maintained that "*the legal order, taken as a whole, is an entity that partly moves according to the norms, but most of all moves the norms like pawns on a chessboard"*[241]. That between law and institutions is understood as a relation of co-constitution: the one derives its effectiveness from the other and, in turn, the latter depended for its existence on the stability provided by the former. The conceptual framework provided by Romano in the second part of *L'ordinamento giuridico* offers a pluralistic understanding of institutions in which the State cannot be seen as "the" legal order: on the contrary, it is understood as one among various institutions and corresponding legal orders and, as such, it is underlined its dependency on a pre-existing legal order. On the basis of such assumptions, Romano's position contrasts with those theories of the Rule of Law centred on the idea of the State's self-limitation. Indeed, according to Romano's account of law, any State was necessarily limited, as it were, by design, in virtue of its being dependent on a pre-existing legal order. In this respect, Romano highlighted that, consequently, in analysing the power exercised by State through the enactment of statute law, one should have not that much emphasized how such power established law but, on the contrary, the circumstance that such very power was itself grounded on a legal order which could have not be reduced to statute law.

Schmitt found in the institutional theories of Hariou and Romano the key to conceptualize a third type of jurist thought besides, and in opposition to, the decisionist and normativist thought which he had identified as the underpinnings of positivism. The account of law thereby developed, the *Konkretes Ordnungsdenken*

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[237] Maurice Hariou, *Principes de droit public*, Larose et Tenin, Paris, 1916, p. 7

[238] Ivi, pp. 22-23; 164

[239] Pietro Costa, *The Rule of Law*, cit., p. 117; Emanuele Castrucci, *Tra organicismo e "Rechtsidee". Il pensiero giuridico di Erich Kaufmann*, Giuffrè, Milano, 1984, pp. 137-138

[240] Santi Romano, *L'ordinamento giuridico*, Mariotti, Pisa, 1917, English translation Mariano Croce (ed.), Santi Romano, *The Legal Order*, Routledge, Abingdon, 2018; Stefano Pietropaoli, *Ordinamento guiridico e* konkrete Ordnung*: Per un confronto tra le teorie istituzionalistiche di Santi Romano e Carl Schmitt*, in *Iura gentium*, 2012, 2, p. 1

[241] Santi Romano, *The Legal Order*, cit., p. 7

(concrete legal order thinking)[242] is grounded on the assumption that "*'order' is also juristically not primarily 'rule' or summation of rules, but conversely, rule is only a component and a medium of order*"[243].

As discussed above, for Schmitt the account of law provided by normativist thought expressed an understanding of order which fitted well only in those areas of life centred on a functional regularity, on the model of traffic-regulation[244]. However, according to the German jurist, not only such the understanding of order as functional regularity was not suitable for many spheres of human existence, actually, in many cases, it put at risks the "*specific legal nature of concrete order*"[245]. Such order has an institutional origin and rests on "*concepts of what, in itself, is normal, the normal type and the normal situation*" which cannot be reduced to the "*calculable function of a standardized regulation*": such concepts

> have one particular juristic substance, which no doubt recognizes general rules and regularities, but only as the emanation of this substance, as something deriving only from its concrete particular, inner order, which is not the sum of those regulations and functions. […] The concrete inner order […] resists, so long as the institution endures, every attempt at complete standardization and regulation[246].

While norms played an important role for the interpretation and application of law, Schmitt considered legal rules as secondary legal phenomena. As he highlighted, the legal order, like any concrete order, does not derive from general norms the concept of normality on which it is grounded, on the contrary, general norms depend on the existence of a specific order. Schmitt's account puts the emphasis on the process through which order produces norms: norms change as a result of the change in the order, more than the other way around[247]. Indeed, legal regulations do not create the order, and, conversely, they can make sense only to the extent that they both assume a given order and operate within its framework[248]. No norm can detach itself from the concrete reality it aims at regulating: it can "*elevate itself over the concrete situation only to a very limited extent, […] only to a certain modest level*" [249]. As Schmitt emphasizes

> [i]f it exceeds this limit, it no longer affects or concerns the case which it is supposed to regulate. Il becomes senseless and unconnected. The rule follows the changing situation for which it is determined. Even if a norm is inviolable as one wants to make

[242] Carl Schmitt, *On Three Types of Juristic Thinking*, cit.; at the same, it should be stresses that Schmitt's elaboration distances itself from both Hariou and Romano: see, Mireille Hildebrandt, *Radbruch's* Rechtsstaat *and Schmitt's Legal Order: Legalism, Legality, and the Institution of Law*, cit., pp. 59-63; Stefano Pietropaoli, *Ordinamento guiridico e* konkrete Ordnung, cit.. In particular, in the second part of his book, Romano had emphasized the heterogeneity of the legal order, recognizing the juristic character of non-state institutions and their legal orders

[243] Carl Schmitt, *On the Three Types of Juristic Thinking*, cit., p. 48

[244] Ivi, p. 54

[245] Ivi

[246] ivi

[247] Ivi, p. 56

[248] Ivi, pp. 48, 56

[249] Carl Schmitt, *On the Three Types of Juristic Thinking*, cit., p. 56

> it, it controls a situation only so far as the situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared[250]

I believe that this brief account of the institutional and order-centred conceptions of law emerged in the first half of the twentieth century can be adopted as a starting point for the following considerations.

One on hand, against a *formalistic* background in which the law was reduced to formal relations of implication and compatibility between norms, as Pietropaoli underlines, institutional theories offered a perspective which assumed the law as the *form* of social relationships. In so doing, they oppose law's form "*only to that which cannot but be anti-social: the individuality*"[251]. This achievements, I believe, deserves to be emphasized in a twofold direction: on one hand, in that they afford to contrast the possibility to envisage a "solitary jurist", or sovereign, absolute from the interpersonal dimension of law and the constitutive relation it holds with society; on the other hand, in that the interactive character of the legal order and the relation between law and society that is brought to the fore does not result in the reduction of law to sociology. On the contrary, as highlighted by Portinaro, the institutional theories of law were the "*defence strategies of the jurists' citadel sieged by sociologists, when the weapons of natural law were already of no use and positivist formalism had lifted the bridges and sealed itself in the tower*"[252]. The interactive and social dimension to which institutional theories open the door are indeed appreciated through juristic eyes and framed under a legal vocabulary.

In the light of the above, I believe that not only the jurists' citadel cannot be said secured, but that, on the contrary, formalistic conceptions of law are still providing the means to breach its walls, facilitating the siege conducted by non-legal theories and, lastly, by computational law.

Admittedly, the jurist finds herself having to provide an account of her discipline at the intersection of different tightropes: she has to account for the social dimension of law, but being careful not to become sociologistic; she has to account for the formal rules and requirements that distinguish legal systems, but being careful not to become formalistic; she has to account for the order and regularity of law, but being careful not to surrender to the *nomologic* perspective which distinguishes natural sciences. Perhaps more than elsewhere, such needs have been not only felt, but continuously addressed, in the context of the historical study of the legal phenomenon. In this light, the historian of law Paolo Grossi maintains that "*[t]he law, because of its tendence to incarnate, before being power, norm, system of formal categories, is experience*"[253]. The concept of "experience" is central to

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[250] Ivi

[251] Stefano Pietropaoli, *Ordinamento guiridico e* konkrete Ordnung, cit., p. 16, my translation

[252] Pier Paolo Portinaro, *La crisi dello jus publicum europaeum*, Edizioni di Comunità, Milano, 1982, p. 46, quoted in Stefano Pietropaoli, *Ordinamento guiridico e* konkrete Ordnung, cit., p. 20

[253] Paolo Grossi, *Mitologie giuridiche della modernità*, cit., p. 52; for extensive discussion of the concept of legal experience between Italian historians of law see: Paolo Cappellini, *Vedi alla voce 'Esperienza Giuridica': Senso e non senso di una problematica*, in Id., *Storie di concetti giuridici*,

many different approaches and traditions, as notably, empiricism and pragmatism. Precisely through the latter perspective - which, as discussed above, inspired the work of Holmes - the concept of experience has found one of its more renowned expressions in the legal debate, that is, "*experience*" as that which constitutes the "*life of the law*"[254]. On the other hand, by way of the empiricist perspective, as developed within computational sciences, a further understanding of experience, intended as data, is assuming an ever-increasing role in law[255]. However, the concept of experience to which Grossi makes reference is better understood - and gains the significance which I find more interesting for the questions under discussion - within the frame provided by the hermeneutic tradition. The account of hermeneutics offered by Gadamer in *Warheit und Methode*[256] distinguishes different understandings of "experience": on one hand, the concept of experience belonging to the scientific method; on the other, the concept of subjective experience - *Erlebnis*[257] - of Romantic Historicism; lastly, a concept of experience – *Erfahrung*[258] – which Gadamer enhances as standing out from the others in that it is defined by the internal relations it entertains with other concepts as, in particular, that of tradition – *Überlieferung*[259] -, that of belonging – *Zugehörigkeit*[260] - and that of hearing - *Hören*[261]. This form of experience implies a relation of belonging that is expressed in the subject being addressed - *Anrede*[262] - by the tradition, participating in a language and being able to hear such language. This is not, as in the case of *Erlebnisse*, the repetition of someone else's subjective experience[263]:

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cit., p. 137; Francesco Cerrone, *Sull'esperienza giuridica: Capograssi, Orestano, Giuliani*, in *Rivista di Diritto pubblico*, 2016, 3, p. 963; Enrico Opocher, *Esperienza giuridica*, in *Enciclopedia del Diritto*, XV, Giuffrè, Milano, p. 735.

[254] *Supra*, § 2.2.2.

[255] *Infra*, § 3.6.

[256] In the following footnotes, I will quote the work of Gadamer by making reference, in the order, to the pages of the German original text, Hans Gadamer, *Warheit und Methode*, Mohr Siebeck, Tubingen, 1972; the Italian translation, Hans Gadamer, *Verità e metodo*, translated by Gianni Vattimo, Bompiani-Giunti Editore, Milano-Firenze, 2019; and the English translation Hans Gadamer, *Truth and Method*, translated by Joel Weinsheimer and Donald G. Marshall, Continuum Publishing, New York, 2004

[257] Ivi, German, p. 66ff; Italian, p. 145ff; English, p. 53ff

[258] Ivi, German, pp. 352-363; Italian, pp. 715-737; English, pp. 341-351

[259] I believe it might be useful to refer to the insightful considerations contained in the translators' preface of Gadamer's Truth and Method in relation to the concept of : *"We are likely to think of 'tradition' as what lies merely behind us or as what we take over more or less automatically. On the contrary, for Gadamer 'tradition' or 'what is handed down from the past' confronts us as a task, as an effort of understanding we feel ourselves required to make because we recognize our limitations, even though no one compels us to do so. It precludes complacency, passivity, and self-satisfaction with what we securely possess; instead it requires active questioning and self-questioning*", Hans Gadamer, *Truth and Method*, translated by Joel Weinsheimer and Donald G. Marshall, cit., p. xvi

[260] Hans Gadamer, *Warheit und Methode*, cit., German, p. 462; Italian, p. 933; English, p. 454

[261] Ivi, German, p. 466; Italian, p. 941; English, p. 458

[262] Ivi, German, p. 467; Italian, p. 943; English, p. 458

[263] Ivi, German, p. 387, Italian, p. 783, English, p. 385

this experience implies taking part to an interaction akin to that between the ego and the alter which are partners of a communication[264].

I believe that the idea of a necessarily communicative, and therefore non private, individualistic, dimension of experience and, on the other hand, the awareness that such interactive dimension rests on a shared relation of belonging to a common tradition are, to a certain extent, the distinguishing traits of a particularly interesting *legal* experience of which, so far, I have withheld the analysis: the experience of the English common law. Beyond the fact that the very formula "Rule of Law" has been elaborated for the first time in the English jurisprudence, I believe that the particular significance that such concept has assumed in such context can be appreciated precisely in view of the relation of "belonging to a tradition" which characterizes the common law experience. As I will try to show in the following paragraphs, the conception of the Rule of Law elaborated by Dicey is grounded on a particular understanding of the continuity of the present with the centuries-old elaboration of law which is "*handed down from the past*"[265]. I believe that the way in which law, rules, order and normative practices are entangled within this account of law offers a particularly interesting perspective to confront both the historic troubles of the Rule of Law and those questions which arise today in relation with the computational turn. In particular, such approach provides a starting point for attempting to re-frame and dissolve the different tensions highlighted in the previous paragraphs. Dicey's concept of the Rule of Law, and the common law tradition which constitutes its background, indeed, provide an account of the relations between the law, legal protection and the practice of jurists which dissolves those tensions between legislator, judiciary and rights that runs through both the Continental and Anglo-American discussion; on the other hand, through an elaborate understanding of legal practice, it dissolves the tension between the formal aspect of legal rules, the effectiveness of their normative force and their capacity to afford protection. Recalling the point illustrated above[266], I will try to show how the common law tradition offers an original account of legal rules and of "what it is for them to rule"; how such an original character depends on the epistemological perspective that it adopts in explaining law. I will then maintain that, whether the question of the alternative or complementary character of such an understanding of law with respect to those advanced by the legal traditions discussed so far is open to discussion, the perspective and insights offered by the common law tradition raise a series of critical elements of direct concern for the Rule of Machines narrative which will be taken up in Part II.

To this end, after having illustrated Dicey's account of the Rule of Law, I will discuss how the common law tradition assumes as the core of its account of law the practice of jurists and their artificial *reason and judgment*.

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[264] Ivi, German, pp. 64-367, 449 ff; Italian, pp. 739-745, 907ff; English, pp. 351-354, 442ff

[265] cfr, *supra*, fn 259

[266] *Supra*, § 1.4.

1.6. The Rule of Law and the English Common law tradition

Dicey maintains that the English constitution rests on two fundamental principles: the sovereignty of the Parliament and the Rule of Law. In the light of the above, one will easily recognize how Dicey's assumption is in line with most of the conceptions developed on the Continent during the nineteenth century. As discussed above, it was precisely the attempt to manage the tension between these two principles that often determined the failure of such conceptions. However, in the Diceyian perspective, such principles are far from being opposing forces: on the contrary, the English jurist assumes that between the sovereignty of the Parliament and the supremacy of the law of the land exists a virtuous circle according to which the realization of one principle favours the other[267]. I will first analyse Dicey's examination of the Rule of Law and I will then come back to its relation with the Sovereignty of Parliament.

Dicey identifies the three main understandings of the concept of Rule of Law. The first enshrines the principle of legality. As he puts it, such principles expresses

> the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

Secondly, the Rule of Law expresses the principle of formal equality, which Dicey interprets as

> the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ; there can be with us nothing really corresponding to the "administrative law" *(droit administratif)* or the "administrative tribunals" (*tribunaux administratifs*) of France […]

Lastly, Dicey maintains that

> The "rule of law" […] may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, *are not the source but the consequence of the rights of individuals, as defined and enforced by the courts*; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land[268]

A fist example of the synergies between Parliamentary Sovereignty and the Rule of Law is offered in the course of the analysis of the constraints to which in England the administration is subjected. According to Dicey, the Crown have no power to

[267] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, 10th Edition, The Macmillan Press, London, 1979, p. 406

[268] Ivi, p. 202, emphasis added

infringe rights "*except under statute*": even in case of emergency, it is forced to ask and obtain aid from Parliament[269]. The notion of Rule of Law provided so far by Dicey seems to largely overlap with the principle of legality of administrative action, a requirement that, as discussed in the preceding sections, even in their "thinnest" formulations, was assumed as central by the Continental notion of *Rechtsstaat* and *État de Droit*. However, as Dicey highlights, even when the executive obtains extraordinary powers, the fact that they are conferred by a statute implies that they can never be "*really unlimited*". These inherent constraints to which the executive power is subject depends, not much and not only on the Parliament, but one on the countervailing power of the judiciary:

> The English executive needs therefore the right to exercise discretionary powers, but the Courts must prevent, and will prevent at any rate where personal liberty is concerned, the exercise by the government of any sort of discretionary power[270].

The posture of the English judiciary is exalted by Dicey through a comparison with France, where "*administrative ideas - notions derived from the traditions of a despotic monarchy - have restricted the authority and to a certain extent influenced the ideas of the judges*"[271]. For Dicey, the opposite is true in England: here it is the common law and its "*judicial notions*" that "*have modified the action and influenced the ideas of the executive government*"[272].

Another point of departure from the Continental perspectives can be identified in the use that Dicey makes of the term "Rule of Law", which he interchanges with "*supremacy of the law*"[273] which is in turn associated with "*the security given under the English constitution to the rights of individuals*"[274] and "*legal equality*"[275]. This is an element of distinction with respect to Continental tradition of the time, as highlighted by Dicey, but also before the more recent "formal" and "thin" understanding of the Rule of Law. But the distinctive element of is the emphasis put by Dicey on the role of courts and effective remedies: the key of Dicey's system of the Rule of Law is the juristic class and its practice as the guardian of rights. While Dicey explicitly refers to the Latin maxim, *ubi jus ibi remedium*[276], arguably, his point is better expressed by inverting the terms: *ubi remedium ibi ius*:

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[269] Ivi

[270] Ivi, p. 412. As Santoro points out, the system of guarantees afforded by the Rule of Law can be appreciated by looking at Dicey's analysis of the *Suspension of Habeas Corpus Acts* and of the *Acts of Indemnity*, see Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., pp. 180-185; Albert V. Dicey, *An Introduction to the Law of The Constitution*, cit., pp. 229 ff

[271] Albert V. Dicey, *An Introduction to the Law of The Constitution*, cit., p. 414

[272] Ivi

[273] Ivi, p. 195

[274] Ivi, p. 184

[275] Ivi, p. 193

[276] Ivi, p. 199

> the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts

Dicey's discussion of the risks of arbitrary administrative power goes beyond formal legality: indeed, not only any power received by the Executive is "*confined by the words of the Act itself"* but, *"what is more, by the interpretation put upon the statute by the judges*" [277]. This last remark leads the way to clarify Dicey's conception of legality and the relation between the sovereignty of Parliament and the Rule of Law[278].

Many Authors have highlighted that, while Dicey assigned to the courts a central role for the protection of individual rights against the arbitrary power of the executive, not only the English jurist left the individual without any protection from a Legislature but, even more, he attributed to the Parliament an unlimited sovereignty. As Santoro highlights, this apparent *impasse* can be overcome by considering not only the conceptual framework within which *The Law of the Constitution* was elaborated but, above all, by paying particular attention to the way in which Dicey modulated the relationship between Parliament and courts[279].

On one hand, the position that Dicey attributes to Parliament has to be read in light of the diffusion of the Austinian analytic jurisprudence. According to this view, the identification of a sovereign is, before all, a conceptual prerequisite for any discourse to qualify as a legal discourse. And indeed, Dicey does not deny, but embraces, the Austinian dogma of the absolute sovereignty of Parliament: as for Austin, being sovereign means having an absolute power, i.e. non limitable by any other organ or agent. Nonetheless, he provides an understanding of Parliamentary sovereignty which completely shifts its meaning. On one hand, Dicey maintains that Parliamentary sovereignty "*contributes greatly […] to the authority of the judges and to the fixity of the law*"[280]. On the other, having made clear the Parliament is sovereign and "*supreme legislator*", he emphasizes that, however, differently than the Crown, the Parliament is not a "*ruler*", in that it cannot make use of the powers of the executive government[281]: the will of this absolute sovereign, therefore, "*can be expressed only through an Act of Parliament"*[282]. This passage has a crucial consequence: "*from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land*"[283].

> The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges. A Bill which has passed into a statute

[277] Ivi, pp. 413-414
[278] Ivi, Chapter XIII
[279] Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., pp. 161-162
[280] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, cit., p. 408
[281] Ivi, p. 409
[282] Ivi, p. 407; cfr. Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., p. 175
[283] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, cit., p. 413

> immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent[284]

The Parliamentary sovereignty, in essence, consists in the power to create legal *texts*, not the *law*. As Santoro highlights, the keystone of the constitutional system outlined by Dicey consists in the fact that the legislator and its will disappears as soon as it has been expressed into a legislative text[285]: the will of the legislator is uttered through – and, as just highlighted, *only* through - legislative texts which becomes law once they are subject to judicial interpretation. Unless situated within a formalistic conception of language, indeed, it is clear that Dicey's emphasis on the fact that judges are constrained only by the reference to *"the words of the enactment*" is far from implying a complete subjection to the will of the sovereign. On the contrary, coupled with his insistence on the fact that the judiciary does not take into consideration anything but the legislative text, the result is that, in their interpreting activity, judges must "*let the text speak for itself*" without any reference to the intention of the legislator[286].

Since only the activity of the courts can translate statutes into individual norms, the English constitution subjects the activity of the legislator not only to formal constraints, but also to limitations that affect the content and scope of its acts[287]. Such limitations are not expressed into a specific legal text, but in the way in which any legal text is made *speak for itself* in the activity of ordinary courts.

While Dicey does not dedicates a general analysis to the activity of reading and letting speak legal texts, this should not be understood as an omission[288]: on the contrary, this can be read as a particularly eloquent circumstance whose sense can be appreciated by highlighting its connection with a further set of considerations made by the English jurist. While, on one hand, Dicey interchanges the expression Rule of Law with "*predominance of legal spirit*"[289], on the other, he maintains that, in their interpretative activity, judges "*are influenced by the feelings of magistrates no less than by the general spirit of the common law*"[290]. Read in the context the relationship between the judge and legal text, these remarks seem to point in a specific direction: the possibility to consider only the letter of the text rests on the assumption that judges are distinguished by a reading-attitude which is informed

[284] Ivi, pp. 407-408
[285] Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., p. 176
[286] Ivi
[287] Ivi, p. 180
[288] At the same time, Dicey's point should not be read as endorsing the Realist-like position according to which whatever the courts say is the law: this, indeed, would at best ensure a formal protection of rights, devoid of any content
[289] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, cit., p. 195
[290] Ivi

by the common law. Embedded within this frame, the common law judge will find that the legal texts she is confronted with cannot be read "*as saying*" something that clearly conflicts with that corpus of the common law which makes the very reading of text *as law* possible.

In Dicey's constitutional system, courts are entrusted with the task of managing the conflicts arising within the law: the interpretive activity of the courts avoids the possibility that the introduction of an apparently anomalous legislative text determines the breakdown of a continuous series in which the corpus of law has been read as affording legal protection of rights.

It is along these very lines that the hard-wired connection between rights and remedies that Dicey identifies as the core tenet of the Rule of Law has to be investigated. Once again, indeed, as the Author highlights, such connection *"depends upon the spirit of law pervading English institutions"*[291]. As he maintains, the protection of rights and liberties is secured by the English constitution, "*assuming the bench to do their duty*"[292]. Once again, the fact that such "duty" is not explicitly articulated in Dicey's work is the sign not of an omission, but of the particularly entrenched assumptions with regards to the connection between law, rights and legal practice that ground Dicey's concept of the Rule of Law. In light of the Continental perspective, but also of the contemporary conceptions of the Rule of Law discussed above, the fact that one could assume as a "natural" - or, better, constitutive - duty of the bench not only that of protecting rights, but of protecting rights *from* the acts of the legislator is all but obvious.

In the outline provided by Dicey, the fact that in England constitutional rights and liberties have arisen through judicial decisions is presented as a merely historical circumstance[293]. However, as I will discuss later, in the legal tradition in which Dicey is embedded, that which is presented as *historical* assumes a particular significance. An indication in this direction emerges from the comparison that Dicey draws between the English Constitution and the Continental charters of rights. As Dicey observes

> The fact, again, that in many foreign countries the rights of individuals, *e.g.* to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended. *They are something extraneous to and independent of the ordinary course of the law*.
>
> The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law

[291] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, cit., p. 199
[292] Ivi, p. 229, fn 1
[293] Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., p. 167

> of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation[294]

On one hand, only when rights are embodied in the law the former can be considered secure. This embodiment, however, cannot be achieved merely through the implementation of formally valid rules. On the other, the difference that Dicey draws between the English Constitution and the Continental declarations of rights is not a difference between a positive and non-positive recognition of fundamental rights, but between two strategies, two practices through which such rights become, and can be said to be, part of positive law[295]. An attempt to grasp this particular understanding of positive law to which Dicey's elaboration hints requires to pay attention to the background in which *The Law of the Constitution* was set. As Santoro highlights, *"[i]n Dicey's framework […] the rule of law reflects and incorporates ideas and values around which common law has gradually developed"*[296]. In the next paragraphs, I will then attempt to provide an account of the common law tradition which grounds Dicey's concept of the Rule of Law.

1.6.1. The common law and its "*spirit*"

At the times when Dicey was writing the *Law of the Constitution*, England was pervaded by a widely diffused rhetoric which exalted the merits of the law[297]. In the course of the different seasons of conflicts that had broken out, from those between the monarchy and Parliament during the seventeenth century, to those between different social classes during the eighteenth and nineteenth century, the law came to be perceived *"not an instrument in the hands of either party but rather the prize at stake"*[298].

The exaltation of law was not, however, a mere rhetoric or, at least, such rhetoric had real performative effects. According to the celebre analysis carried out by Edward Thompson, in adopting law as the medium through which securing the defence of their interests, the ruling classes committed themselves to a system which "*could not be reserved for [their] exclusive use"*: the "*immense efforts*" made to *"project the image of a ruling class which was itself subject to the rule of law"* resulted in the rulers being *"prisoners of their own rhetoric"*[299]. The way in which law became embedded within the common feeling actually provided an "*unqualified human good*": for Thompson, indeed, an important and effective

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[294] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution*, cit., pp. 200-201, emphasis added

[295] Ivi, pp. 198-200. Indeed, when comparing the French Constitution of 1791 and the Constitution of the United States, Dicey calls the attention to the circumstance that, while both provide written statements and declarations of rights, only the latter provides the required remedies

[296] Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., p. 172

[297] For a reconstruction, see Emilio Santoro, *Rule of Law and "Liberties of the English"*, cit., pp. 153-160

[298] Ivi, p. 158; or, as Thompson puts it, the law was *"less an instrument of class power than a central arena of conflict"*, Edward P. Thompson, *Whigs and Hunters. The Origin of the Black Act*, Penguin Books, London, 1975, p. 264

[299] Ivi, pp. 263; 265-266

difference was marked between arbitrary power and the Rule of Law, and the latter provided not only an instrument for channelling conflicts, but also a means to grant a means of effective protection which became available also to the lower classes[300].
For sure, the "enthusiasm for the law" diffused in the England of the nineteenth and eighteenth century was also a reflection of the political-legal theoretical framework of natural law and contractarianism elaborated by Locke and, more in general, by the Republican traditions[301]. However, beside the more political-institutional discourse, the exaltation of law as capable of affording protection cannot be accounted for without placing it in a narrative that was crafted before all within the community of legal practitioners. In the words of Coke, law was *"the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all"*[302].
In the following paragraphs, I will outline the account of law that was elaborated by the common lawyers and, in particular, that which has been defined as the classic common law[303], a legal doctrine which developed over two centuries and that was deeply rooted into legal practice.
I will first provide a sketch of the context in which such paradigm emerges and then I will attempt to bring out some of the insights emerging from such tradition which, I believe, provide extremely precious conceptual tools to better understand law and the foundations of the Rule of Law.

1.6.1.1. The classic common law paradigm

Since its very beginning, the classic common law paradigm stands out against the most preeminent concurring accounts of law, i.e., positivism and natural law[304]. Indeed, it addresses the entanglement between the concepts of order, sovereignty and law by providing an account of law which, distancing itself from the normativist and decisionist paradigm discussed above, assumes as its core the practice of jurists and their language. Under a historical perspective, the common lawyers develop their doctrines in reaction to that process of centralization of power in the hands of the King that, as discussed in relation to Continental Europe, accelerated sharply in the course of seventeenth century. The common lawyers

[300] Ivi, p. 266
[301] *Supra*, § 1.1.2.
[302] Sir Edward Coke, *The Second Part of the Institutes of England Containing the Exposition of Many Ancient and Other Statutes*, Crooke, London, p. 56
[303] My reconstruction is built on Emilio Santoro, *Rule of Law and "Liberties of the English",* cit.; Id., *Diritto e diritti*, cit.; Gerald J. Postema, *Bentham and the Common Law Tradition*, Oxford University Press, Oxford, 2019; Alfred W. B. Simpson, *The Common Law and Legal Theory*, in Id. (ed.), *Oxford Essays in Jurisprudence*, Second Series, Oxford University Press, London, 1973, p. 77; Gustav Radbruch, *Der Geist des englischen Rechts*, Vanderhoeck and Ruprecht, Gottingen, 1958, Italian translation, Alessandro Baratta (ed.), *Lo Spirito del diritto inglese*, Giuffrè, Milano, 1962; David E. C. Yale, *Hobbes and Hale on Law, Legislation and the Sovereign*, in *The Cambridge Law Journal*, 1972, 31, 1, p. 121; John G. A. Pocock, *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge, 1987
[304] Emilio Santoro, *Diritto e diritti*, cit., pp. 144 ff; 163 ff

defended an account of law directed at constraining the sovereign power. Through the myth of the Ancient Constitution[305], common lawyers presented the common law as a customary law deriving its force from its immemorable character and, therefore, from a time antecedent to the King. The significance of the pre-existence of the law respect to the King was not only historical, but it also affected the authority of the latter. For common lawyers, the sovereign's power rises as already limited by the law and, even more so, cannot affect the rights afforded by the common law [306]. In essence, the sovereign does not operate in a *vacuum*: not only its will cannot wipe out those legal bonds that precede it, but its very power is built and depends on a pre-existing order.

At the end of the Civil War, not only the threat of absolutism was deflated, but the account of the relations between law and sovereign power advanced by common lawyers was appropriated at political level and assumed as "official history"[307]. On a theoretical plane, however, such an understanding of law had to be defended from the criticism of Hobbes. As discussed above, for Hobbes, any possible order, social or legal, depends on the sovereign: as his *Philosopher* tells the *Lawyer* in the *Dialogue*, "*there must be law-maker before there were any laws*"[308]. Within the discussion between Hobbes and the common lawyers, the political theme of sovereignty intertwines with the legal and epistemological plane[309]. Hobbes questioned "what the law is" in order to establish "who it is its master"[310], and this framing put into discussion the nature of law, its operation, the role of reason.

At the same time, throughout its development, the common law tradition has preserved a series of distinguishing characters which sets it apart from other theories which, similarly, pay particular attention to the relations between order and law. This is true of the theories emerged on the Continent at the turn of nineteenth and twentieth century, as for instance Schmitt's concept of *Ordnung* discussed above[311], but also, I believe, for those more recent theories which, yet, claim a continuity with the common law tradition. With regard to the latter, worthy of particular attention, especially for its link with a doctrine of the Rule of Law, is the concept of *spontaneous order of rules* developed by Hayek[312]. Notably, Hayek

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[305] John G. A. Pocock, *The Ancient Constitution and the Feudal Law*. cit., *passim*

[306] Ivi, p. 164

[307] Emilio Santoro, *Diritto e diritti*, cit., pp. 121 ff

[308] Thomas Hobbes, *A dialogue between a philosopher and a student of the common laws of England,* cit., p. 34

[309] The difference of perspective, as Postema points out, already makes itself evident in the different metaphors employed by the two parties to picture the legal order: whether, on one hand, in Hobbes are recurrent images of mechanics and discrete processes, in the works of common lawyers prevails the image of continuous flux and organic life, see, Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 10

[310] Thomas Hobbes, *A Dialogue…*, cit., *passim*; David E. C. Yale, *Hobbes and Hale on Law, Legislation and the Sovereign*, in *The Cambridge Law Journal*, 1972, 31, 1, p. 121

[311] *Supra*, § 1.5

[312] Friedrich A. Hayek, *Law, Legislation and Liberty, Volume I: Rules and Order*, University of Chicago Press, Chicago, 1973, p. 36; Id., *Notes on the Evolution of Systems of Rules of Conduct*, in Id., *Studies in Philosophy, Politics and Economics*, University of Chicago Press, Chicago, 1966, p. 66

harkened back his theory to common law especially in the context of his criticism of Legislative despotism[313] and the Rule of legislators[314]. Hayek maintained that the intrusions of legislators and administration in spheres of social interaction – before all the market -, manifested an example of the Rule of Men prevaricating on the Rule of Law. Even if, formally, performed through legal acts – legislation, decrees, etc. - these interventions constituted the artificial imposition of an order that was centrally planned by "Men". Such top-down exercise of power despotically distorted the otherwise spontaneous order of rules gradually grown as result of the decentralized activity of individuals[315].

Precisely in this respect, Waldron enlists Hayek within those scholars who are dazzled by "*an almost mythic reverence for common law, not conceived necessarily as deliberately crafted by judges but understood as welling up impersonally as a sort of resultant of the activity of courts*"[316]. Waldron's criticises Hayek with respect to the possibility of understanding the "spontaneity" of the legal order as "*a magic that somehow absolves us from human rule"* and, ultimately, as excluding the idea that "*the Rule of Law […] is, in the end, the rule of positive law […]"*[317]. The critiques voiced by Waldron offer a starting point to attempt to clear the field and provide an account of the understanding of order and law elaborated by the classic common law tradition. As I will attempt to show, indeed, contrary to Hayek's position, for the classic common lawyers, the spontaneity of order and its "men made", artificial, character are to be seen in combination, not in opposition. This, in turn, rests on an account of the positivity of law which, on the other hand, does not overlap with the understanding advanced by legal positivism. The legal order of the classic common law tradition is indeed *spontaneous,* in that it is not *posited*, but also *artificial*, and *positive,* in that it is *not natural*. The comparison with Hayek, moreover, will afford to highlight an important aspect of the way in which the common law tradition understands the normativity of rules and the locus in which such normativity unfolds and is manifested. The different account which Hayek elaborates in this respect will assume particular relevance in confronting the assumptions of the Rule of Machines.

In the following pages I will attempt to show that the prima facie oxymoronic vibe that such account may elicit is in fact to be understood as a sign of the distinctiveness of the conceptual framework of the classic common law with respect to accounts provided by other strands of the modern legal tradition. I will argue that, precisely those elements which qualify the classic common law as eccentric with respect to both positivist and natural law theories offer a set of

[313] Danilo Zolo, *The Rule of Law. A Critical Reappraisal*, cit., p. 45
[314] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., p. 25
[315] Friedrich A. von Hayek, *The Road to Serfdom,* cit., Chapter VI
[316] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, cit., p. 25
[317] Ivi

reading keys of the legal phenomenon capable of complementing and solving the tensions of the latter. At the same time, I will attempt to show how the framing offered by classic common law affords to provide an account of the Rule of Law and an understanding of the positive character of law which centres on a strong link between legal protection or, better, its very possibility, and the normative practices performed by jurists.

1.6.1.2. Legal order and positive law

For what concern the spontaneous and natural character of the legal order, it is first of all within the debate internal to the modern common law tradition the more evident contradictions and weaknesses of the mythologic account promoted by the Whig rhetoric have been subject to critical analysis. Dicey, for instance, directly addressed the myth that *"the constitution has not been made but has grown*" by qualifying it as a "*current but misguiding statement"*. In the opinion of the English jurist "*[t]his dictum*, if taken literally, *is absurd*"[318]. In this sentence, however, the parenthetical element is as much important as the main statement. On one hand, Dicey refers to a passage in which John Stuart Mill, in a clear Austinian fashion, stresses that any political institution is necessarily *made*, and it is made by a human act of will[319]. On the other, however, Dicey adds to this account an important consideration:

> […] the dogma that the form of a government is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will and energy, does, though in a loose and inaccurate fashion, bring into view the fact that some polities, and among them the English constitution, have not been created at one stroke, and, far from being the result of legislation, in the ordinary sense of that term, are the fruit of contests carried on in the courts on behalf of the rights of individuals[320]

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[318] Albert V. Dicey, *An Introduction to the Study of the Law of Constitution,* cit., p. 196, emphasis added

[319] I report here Mill's passage: "*Political institutions (however the proposition may be at times ignored) are the work of men, owe their origin and their whole existence to human will*. *Men did not wake up on a summer morning and find them sprung up*. *Neither do they resemble trees, which, once planted, are 'aye growing' while men 'are sleeping.' In every stage of their existence they are made what they are by human voluntary agency*", see John Stuart Mill, *Consideration on the Representative Government*, Longman, London, 1865, p. 4; for Mill's enthusiastic endorsement of Austinian jurisprudence, see John Stuart Mill, *Austin on Jurisprudence,* in Robson John M. (ed.), *Collected Works of John Stuart Mill*, University of Toronto Press, Toronto, 1991, Volume XXI, p. 53; Emilio Santoro, *Diritto e diritti*, cit., p. 197

[320] Albert V. Dicey, *Introduction*, cit., p. 196; cfr. Emilio Santoro, *The Rule of Law and the "Liberties of the English"*, cit., p. 166; in the *Lecture VI*, Austin maintained that "[*i]n most societies […] the constitution of the supreme government has* grown*",* and then immediately clarified that this doesn't mean that the constitution "*hath come of itself, or is a marvellous something fashioned without hands"*. Interestingly, Austin connected this consideration with an account of the ideal of the government of laws which, to some extent, resembles Hobbes's passage on the "error of Aristotle" discussed *supra*, § 2.1.2: "*though we say of governments which we mean to praise, 'that they are governments of laws, and not governments of men,' all human governments are governments of men: And, without men to make them, and without men to enforce them, human laws were just nothing at all, or were merely idle words scribbled on paper or parchment*". However, Austin deviated in a

On one hand, Dicey links the "spontaneous growth" of the English Constitution, that is, of the set of rights and liberties of the English, with the "spontaneous growth" of the corpus of the common law. On the other, he qualifies such "spontaneity" as meaning "not *at one stroke*", but not as meaning "*not positive*".

According to Austin, the constitution was not made by "*the original members of the society",* but it was the result of a *"work of a long series of authors, comprising the original members and many generations of their followers"*[321]. However, once again, what is assumed as the target of criticism is the capacity of the myth of the Ancient Constitution to be seen as an adequate foundation, not the need to affirm the constitutional foundation of the protection of rights. As Austin continues, the "*maxims*" which the sovereign is compelled to observe cannot be traced back to the very formation of society, in that they "*have arisen insensibly since the society was formed*"[322]. As Austin maintained, "*with more or less of exactness, slowly and unsystematically*", the constitution has emerged from "*positive moral rules of successive generations of the community (and, perhaps, positive laws made by its successive sovereigns)"*[323]. For Austin the circle is closed and the positivity of law is ensured by assuming that not only judicial decision is positive law, but also that, precisely through the decisions made by judges, also customs, which are otherwise merely positive morality, becomes law "properly so called"[324].

Under the modern paradigm of common law, spontaneous growth is not contrasted with positivity and, in turn, the latter is not conflated with the law of a centralized legislator. In this sense, as Radbruch pointed out, the English legal positivism means the establishment of law, not of statute law[325]. At the same time, although indirectly, the work of "positivization" which Austin recognized as operated by courts is still accounted for by postulating as its foundation a sovereign decision which authorizes them so.

Undoubtedly, the account provided by Austin and the successive elaborations of positivist doctrines offer a scheme of interpretation which proves extremely useful

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decisive manner from the Hobbesian path by arguing, as Dicey would do, that the constitution has not been made "at once". He also added that constitutions have not been determined "*agreeably to a scheme or plan*", John Austin, *The Province of Jurisprudence Determined*, Cambridge University Press, Cambridge, 1995, p. 275

[321] John Austin, *The Province of Jurisprudence Determined*, cit., p. 275

[322] Ivi

[323] Ivi

[324] *"Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law5 is clearly evinced by its conduct, though not by its express declaration*". John Austin, *The Province of Jurisprudence Determined*, cit., p. 35

[325] In this passage, Radbruch explicitly adopts as his own the very words of a reviewer of a precedent edition of *Der Geist des englischen Rechts*, Gerhard Erdsiek, in *Dutsche Rechtszeitung*, 1946, quoted in Gustav Radbruch, *Lo spirito del diritto inglese*, cit., p. 48

for making sense of what is going on in a court of law, or in Parliament, or in daily life, so far as law is concerned. However, the concept of positivity of law developed within the positivist tradition does not exhaust all the possible accounts of such concept and, and the same time, prevents the valorisation of a further dimension of the legal phenomenon. Such dimension, indeed, become visible only when a particular kind of lenses are worn. In this perspective, I believe that the framing through which common lawyers have grounded their account of the relations between law and order provide a particularly interesting conceptual toolbox. For common lawyers, indeed, the ordering capacity of law was not exhausted, and could not be accounted for, by making reference only to legislation, neither when intended strictly, i.e., the statutes enacted by Parliament, nor when intended widely, i.e., including judicial legislation. The legal order cannot be explained as posited by the statutes enacted by the legislator and by the decisions made by judges in that the law is not reducible to either: statutes and decisions are indeed *formulations* of law, not the law. The latter is that which grounds and make possible the former, and not the other way around.

With this respect, the ancient Medieval conception of law, taken up especially by Coke and Blackstone, considered both enacted law and judicial decisions as performing a declaratory, not creative function. Even when the interventions of formalization were more substantial, as in particular those made by the legislator, they were described as a systematization, not an innovation, of law. For common lawyer, there was a dimension of law which pre-existed its positive formalization and continued to exist after it. This dimension of law escapes regimentation and can never be reduced to the different and changing formulations in which it can be expressed. The law, as Sir Davies put it "*can be recorded and registered no-where but in the memory of the people"*[326]. In this perspective, those which can be considered as posited by an act of will are only the *formulations* of the law. The law of England, on the other hand, "*cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record"*[327].

Similar considerations apply with regard to the positivist understanding of judicial legislation as "law properly so called". As Blackstone maintained, "*the law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake* the law"[328]. More recently, Simpson has maintained that, while it is undisputable that judicial decisions are the result of volitive acts expressing the opinion of judges, and that that such decisions create precedents, this does not imply that it is possible to give

[326] John Davies, *Irish Reports (Report of Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland),* Sarah Cotter, Dublin, 1762, p. 3

[327] Ivi

[328] William Blackstone, *Commentaries on the Laws of England, Book I: Of the Rights of Persons,* Oxford University Press, Oxford, 2016, p. 53 (Book I, Introduction to Section III, 71)

an account of the common law as exhaustively expressed or expressible into the formulation of rules made by judges[329]. The British historian is indeed keen to emphasize that "*creating a precedent is not the same thing as laying down the law":* as he maintains, "*[t]here exists no context in which a judicial statement to the effect that this or that is the law confer the status of law on the words uttered* […]"[330]. The principles that are developed and applied by common lawyers, as Simpson points out by taking up Pollock, "*have never been committed to any* authentic forms of words"[331]. Any formulations of rules of the common law have to be conceived of similar to grammarian's rules[332].

Simpson takes seriously Bentham's point of criticism, namely that "*[a]s a system of general rules, the common law is a thing merely imaginary"*[333]. Indeed, unless one denies *in toto* the existence of such thing as the common law, not only Bentham's scepticism leaves open the possibility, but actually calls for an explanation of it in terms different than those provided by a formal approach to law[334]. Indeed, whereas not explainable in terms of rules, and notwithstanding the impression that it might places "*a particular value upon dissention, obscurity, and the tentative character of judicial utterances*", yet, the common law has proved to be a system distinguished by "*a very considerable measure of agreement as to the practical application of law in actual cases*"[335]. Especially in the second half of twentieth century, positivist jurisprudence has provided an account of the stability of common law in terms of tests and secondary rules[336]. However, as Simpson highlights, the common law was capable to successfully institute a legal order distinguished by coherence and stability centuries before the formalization of the doctrine of *stare decisis* and the idea of *ratio decidendi.* Consequently, the nature and functioning of the common law can hardly be explained *as a result* of the operation of tests and secondary rules as elaborated by the positivist tradition[337]. Indeed, these tests and rules cannot be seen as the reasons determining the effectiveness and coherence of the legal order, nor the agreement between jurists, but only as *ex post* attempts to explain such features. This conclusion is confirmed, according to Simpson, by the circumstance that when there is a wide agreement between jurists with respect to law, no need is felt for the introduction or reference to tests and secondary rules; on the other hand, "*if [consensus] is lacking to any*

[329] Alfred W. B. Simpson, *The Common Law and Legal Theory*, cit. p. 93
[330] Ivi, p. 86
[331] Frederick Pollock, *A First Book of Jurisprudence*, 3rd edition, Macmillan and Co., London,1911, p. 249, emphasis added
[332] Albert W. B. Simpson, *The Common Law and Legal Theory*, cit., p. 94
[333] Jeremy Bentham, *A Comment on the Commentaries*, in James H. Bums, Herbert L.A. Hart (eds.), *A Comment on the Commentaries and A Fragment on Government*, The Athlone Press, London, 1977, p. 124; see, also, Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 283
[334] Alfred W. B. Simpson, *The Common Law and Legal Theory*, cit., pp. 89-90
[335] Ivi, p. 90
[336] Notably, Hart's rule of recognition, see Herbert L.A. Hart, *The Concept of Law*, cit., *passim*
[337] Alfred W. B. Simpson, *The Common Law and Legal Theory*, cit., pp. 77; 90-91; 97-98

marked degree it seems highly unlikely that such rules […] will be capable of producing it"[338].

Under the common law paradigm, in other words, an account of law centred on formalized rules, i.e., legislation and judicial decisions, is considered as highly unsatisfactory. In this respect, common lawyers are firmly convinced that no legal theory can be successful unless capable of accounting for the connection that the law entertains with the customary practice of the English people and its continuity over time. The classic view, indeed, presents the common law as a system of customary law. As Davies emphasized

> […] the *Common Law* of *England* is nothing else but the *Common Custome* of the Realm: and a Custome which hath obtained the force of a Law is always said to *be Jus non scriptum* […] a matter of fact, and consisting in *use* and *practice*"[339]

As I will attempt to show in the following pages, common lawyers' defence of such account of law provides an interesting articulation of the problem of legal agreement and disagreement, of the ordering capacity of law, and of their stability over time. With respect to the latter, the common law paradigm is distinguished by a particular sensitivity to the element of time: history and tradition provided the conceptual scaffolding within which common law was both practiced and accounted for. In particular, a central place is occupied by the idea of continuity. As Blackstone maintained, "*the only method of proving, that this or that maxim is a rule of common law is by showing that it hath been always the custom to observe it*"[340].

As it emerges especially in the work of Hale, when referred to law, continuity does not mean being identical to itself, static: or, better, it is precisely with respect to the understanding of identity that the work of the English jurist offers the more interesting insights. Hale, indeed, understood law as a flux, and portrayed it through the celebre metaphor of the ship of the Argonauts, or with that of the human body which, whereas has completely renewed its cell after a certain period of time, is still considered the same[341]. As later maintained by Blackstone, the

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[338] Ivi, p. 98

[339] As Davies points out, "*For a Custome taketh beginning and groweth to perfection in this manner: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a Custome; and being continued without interruption time out of mind, it obtaineth the force of a Law. And this Customary Law is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth. […] But a Custome doth never become a Law to bind the people, untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law."* John Davies, *Irish Reports*, cit., p. 4

[340] William Blackstone, *Commentaries on the Law of England, Book I*, cit., p. 51 (Introduction to Section III, 68)

[341] "*As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials. And as Titius is the same man he was forty years since, though physicians tell us, that in a tract of seven years, the body has scares any of the same material substance it had before*", Sir

development of the common law is constant and imperceptible, like "*the changes of the bed of a river, which varies its shores by continual decreases and alluvions*"[342].

Given this constant change, the identity of law over time cannot be considered as a matter of objective identity, i.e., identity of the formulations in which it is expressed, nor an historical fact, that is, the same legal custom having been followed since immemorial origin. This would have been hardly ascertainable and, as Hale maintained, any such evaluation could not go beyond what common lawyers can actually know of the past: for common lawyers there was, indeed, an empirical difficulty in tracing the evolution of law[343], but one should not come to think that the issue was an empirical matter. Indeed, Hale's observation that the continuity of law in time cannot but assessed on the basis of "what we know" was anything but an act of capitulation[344]. On the contrary, it is the key to understanding how common law actually constructed continuity and discontinuity. In this perspective, the historical, "objective", fact of the identity of law and its formulations of law is totally irrelevant, what is relevant is the present conviction of such origin and continuity. What common lawyers can ascertain, indeed, is that a certain understanding of law has been considered as it was always in force, as it is proved by its continuous renewed reception. Hale's account, in other words, by centring on the present conviction of the continuity with the past, assumes use as the foundation of the common law[345]. As Postema highlights

> [w]hat, then, ensures the identity of the Argonaut's ship through all its mutations? Nothing but the shared conviction that it is the same ship that left the port forty years earlier, says Hale; that is, nothing but the present practice of regarding it as continuous. Thus, law rests ultimately, in Hale's view, on an important social fact: the fact of a widely shared conviction and practice of regarding certain rules, regulations, institutions, and procedures— both substantive and formal or constitutional— as historically validated law of the land. This conviction and practice involves treating recognized similarities with the laws and forms and practices of previous times as family resemblances, as commonalities uniting a people over time. This conviction regarding the continuity of law is essential to the present sense of civic identity, in Hale's view. The sense of living a common life, the tie that binds the components of

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Matthew Hale, *History of the Common Law of England*, in Gerald J. Postema (ed.), *Mattew Hale. On the Law of Nature, Reason and Common Law. Selected Jurisprudential Writings*, Oxford University Press, Oxford, 2017, pp. 142-143; Emilio Santoro, *Diritto e diritti*, cit., p. 159

[342] William Blackstone, *Commentaries on the Laws of England, Book IV: Of Public Wrongs*, Oxford University Press, Oxford, 2016, p. 264 (Chapter XXXIII, 402); cfr., also, Ludwig Wittgenstein, *On Certainty*, § 99; and Heraclitus' river fragments, see Leonardo Taran, *Heraclitus: The River Fragments*, in *The Society for Ancient Greek Philosophy Newsletter*, 1989, 253

[343] Considering that Coke was the first jurist to publish his opinions – the English Reports - as Chief Justice of the Court of Common Pleas in 1609. Until then, most judicial opinions were not published in written, but annotated by the lawyers present to the hearings

[344] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 22

[345] Similarly, as discussed above, Austin maintained th87at, whatever their origin, constitutional guarantees draw their force from "*the current opinions which actually enforce those maxims",* see Austin, *The Province*, cit., p. 275

> the present social order into a unity, is the shared conviction that this social entity and common life extends backwards and forwards in time like a family[346]

The fact that the law is in continuous evolution means that it is being continuously subject to reformulation and reception. That which, under a different perspective, emerges from this account is that while the formulations of the law may change or remain the same, the law is not the formulas in which it is expressed, but what those formulas mean. Continuity and discontinuity, identity and difference, and the stability of the general framework of law, therefore, are something that is *made* by jurists through their constructive reading of the law.

On the basis, it is possible to outline the role that formalized law, i.e., statutory and judicial legislation, play in the classic common law framework. In contrast to the position of disfavour towards legislation, which was expressed by Coke and Blackstone[347], Hale marked the passage towards an understanding of the relation between law and its positive enactment in terms of *integration*. When approached in the light of the theories of Austin – the philosopher of language, not the jurist – Hale can be read as shifting the attention from the questions "who posits positive law" to the question "where is positive law posited", that is, in which circumstances can something be taken, understood, grasped *as positive law*. Hale does not aim at denying the relevance of criteria of formal validity of law, on the contrary, that which he provides is an account of how the latter can actually work. In doing so, moreover, he clarifies the relation between law and its formulation.

For Hale, to become law, legislation and judicial decisions require to be *incorporated* in the body of the common law[348]. Hale's account centres on an understanding of law as a *substratum* in which any formalized rule must find its place. The incorporation in the *substratum* consists indeed in the appropriation of written law by legal practitioners, in its integration as part of the body of customs. In Hale's account there is not an a priori rejection of the written formulation of law, but only the awareness that any such formalisation would not be anything but tentative, corrigible hypothesis, open-handed proposals[349]. Any written enactment comes to be regarded *as law* only when interwoven within the normative practice of the community which it aims at regulating.

The picture of the common law that emerges from the classical paradigm is that of a form of law capable of affording continuity in discontinuity and to filter, accommodate or reject the attempts to transplant legal innovations. There is, with respect to the customary nature of the common law, a further aspect that is

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[346] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 23

[347] see Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., pp. 15 ff. In a similar vein, Davies maintained that "*For the written Laws which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no*", Sir John Davies, *Irish Reports*, cit., p. 4

[348] Emilio Santoro, *The Rule of Law and the "Liberties of the English"*, cit., pp. 176-179; Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., pp. 25-27; 36

[349] Ivi

necessary to consider. As Pollock put it "*[i]n short, the Common Law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so*"[350]. The point is who are those who *"had occasion to consider the matter"* and "*to make it so*". As Pollock remarked

> [t]he current description of Common Law as the custom of the realm is not, then, to be dismissed as unhistorical. We have only to remember that the king's judges undertook, from an early time, to know better than the men of any particular city or county what the custom of the realm was[351]

In this respect, Simpson has provided a further articulation of the relation between the concept of custom and the common law. The British historian maintains that the characterization of the common law as customary law is in part misleading. As he points out, general proposition of common law can hardly be thought as the expression of the customs observed by the English people. Thus, more than as a *system of customary law*, the common law is better portrayed as a *customary system of law*, that is "*a body of practices observed and ideas received by a caste of lawyers*"[352]. According to Simpson

> [t]hese ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted by both example and precept as membership of the group changes. The ideas and practices which comprise the common law are customary in that their status is thought to be dependent on conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning. […] such a view of the common law does not require us to identify theoretical proposition of the common law – putative formulations of these ideas and practices – *with* the common law, any more than we would identify statements of the customs observed within a group with the practices which constitute the custom[353].

That which, once again, affords continuity in discontinuity and within which legal texts produced by the legislator and courts can be made *count as* law is a customary practice, and it is the customary practice of the community of jurists. I believe that such an account of the role played by the concept of custom with respect to law is fundamental for the understanding not only of common law, but of any legal system. It is worth, however, to anticipate some potential objections. One might raise the question of whether such a *re*-presentation of the common law as the practice of jurists does also affect the *self*-presentation of jurists, i.e., the justification that they are expected to provide with reference to their practice. An account of law so much focused on the juristic community - or the *caste of lawyers*,

[350] Friedrick Pollock, *A First Book of Jurisprudence*, cit., p. 250
[351] Ivi, p. 252
[352] Alfred W. B. Simpson, *The Common Law and Legal Theory*, cit., p. 93, emphasis added
[353] Ivi

as Simpson calls it – may threaten to sever the relation it entertains with the common, public dimension from which, on the other hand, it draws its legitimacy.
The answer lies in the very method which distinguishes the practice of common lawyers, i.e., the particular form of mediation performed by jurists which their practice consists of. In the light of this, it can be explained how both, on one hand, the common law can establish a stable legal order which does not rest on a system of formalized rules, and, on the other hand, how such order draws and preserves its legitimacy. In the next paragraph, I will attempt to show how the customary nature of such legal system is connected to a particular understanding of the relation between law and legal practitioners. I will maintain that, while such relation starts to emerge, first, with Coke's formulation of the idea of the "*artificial reason and judgment* of the law"[354], it gains a particular significance for the present discussion especially in the account offered by Hale, which allows to refashion it as the "artificial reason and judgment *of the jurists"*.

1.6.1.3. Artificial reason and judgment

The concept of reason, and its relations with law, occupies a central position in the common law tradition. Not only the definition of the nature and role of reason was one of the most hardly debated issue in the dispute between common lawyers and Hobbes but, such concept was also differently elaborated within common lawyers.
On one hand, as discussed above, for Hobbes, that between law and reason was a relation of identification: law was reason, and there was no reason outside the law, because it was the sovereign, *his reason*, who, through law, established the standard of right reason[355]. On the other hand, the natural law perspective, as seen with Locke, postulated a faculty of natural reason shared by all human beings which non only transcended the positive law, but was actually provided the standards of rationality through which the law itself could be assessed. In this perspective, reason could grasp the first principles running through it[356].
Common lawyers oppose the idea that a natural reason could both create and stay in judgment of the law. Coke maintained that "*Neminem oportet esse sapientiorem legibus: No man (out of his owne private reason) ought to be wiser than the Law"*[357]*:* not even the King, as he maintained in his discussion with James I[358]. The

[354] Sir Edward Coke, *Prohibitions Del Roy*, 1607, Michaelmas Term, 5, James I, in *Reports*, volume 12, pp. 65; emphasis mine, in Steve Sheppard (ed.), *The Selected Writings and Speeches of Sir Edward Coke, Volume I*, Liberty Fund, Indianapolis, 2003, p. 1378
[355] *Supra*, § 1.1.
[356] In this sense, Blackstone's position can be considered ambiguous in this sense, since he considered the possibility to consider law "*as a rational science*" grounded on fundamental principles William Blackstone, *Commentaries on the Laws of England, Book II: On the Rights of Things*, Oxford University Press, Oxford, 2016, p. 1 (Chapter I, 2)
[357] Sir Edward Coke, *Institutes of the Lawes of England*, Part I, § 138, in Steve Sheppard (ed.), *The Selected Writings and Speeches of Sir Edward Coke, Volume II*, Liberty Fund, Indianapolis, 2003, p. p. 126; Sir Edward Coke, *Calvin'S Case, Or The Case of the Postnati*, 1608, Trinity Term, 6, James I, in Steve Sheppard (ed.), *The Selected Writings and Speeches of Sir Edward Coke, Volume I*, cit., p. 596

law, as Coke argues, is "*the perfection of reason"*[359] , "*an act which requires long study and experience, before that a man can attain to the cognizance of it*[360].
In his *Reflections*, Hale attempted to provide the common law practice with a foundation safe from those, or better Hobbes's, criticisms addressing the tottering basis provided, on one hand, by the historical justification - the idea of the immemorial origin of custom – and, on the other, by the assumption of an immanent reasonableness of the law. By leveraging on the specific character of law and the problems is it called to address, Hale elaborates an account of reason which provides a justification of law that is internal to legal practice. As he points out

> [o]f all kinds of subjects whereabout the reasoning faculty is conversant, there is no one of so great a difficulty for the faculty of reason to guide itself and come to any steadiness as that of laws for the regulation and ordering of civil societies and for the measuring of right and wrong when it comes to particulars[361]

First of all, Hale highlights the inherent limitations of natural reason. Indeed, while, in the abstract, the reason common to all rational beings allows for the achievement of agreement on what is to be considered right and wrong, rarely there is agreement *"*[*w*]*hen it comes to particulars",* i.e., once general notions are applied in particular cases, instances and occasions. Moreover, precisely those who are most excellent in theoretical reasoning – "*casuists, schoolmen, moral philosophers*" - are those who disagree the more when it comes to practice[362].
The different demands and requirements of, respectively, theoretical and practical reason, moreover, are particularly accentuated in the case of law. Indeed, law poses specific practical challenges: "*it is a thing of the greatest difficulty so to contrive and order any law that, while it remedies or provides against one inconvenience, it introduceth not a worse or an equale one*"[363]. The intrinsic difficulty in making, interpreting and applying law depends first of all on the object that the law aims at regulating. As he puts it, *"the texture of human affairs is not unlike the texture of a*

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[358] Sir Edward Coke, *Prohibitions Del Roy*, cit., pp. 64-66. I hereby reproduce the entire passage: "*A controversy of Land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the Common Law: Then the King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great endowments of nature; but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it; And that the Law was the Golden metwand and measure to try the Causes of the Subjects; and which protected his Majesty in safety and peace: With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege"*
[359] Sir Edward Coke, *Institutes of the Lawes of England*, cit., § 138
[360] Id., *Prohibitions Del Roy*, cit., pp. 64-66
[361] Sir Matthew Hale, *Reflections on Mr Hobbs his Dialogue of the Law*, in Gerald J. Postema, *Mattew Hale. On the Law of Nature, Reason and Common Law.* cit., p. 189
[362] Ivi, p. 190
[363] Ivi

diseased body labouring under maladies": *"it may be of so various natures that such physic as may be proper to the cure of one of the maladies may be destructive in relation to the other and the cure of one of the disease may be the death of the patience"*[364].

Once again, Hale's remarks revolve around the concept of identity and the fact that this is a property which is not inscribed in the nature of things, but that is necessarily established: that agreement in application, i.e., in judgment, is difficult to achieve, and that, on the other hand, even when it is achieved, it does not necessarily constitute a genuine solution derives from the fact that human actions are so different and their meaning so dependent on circumstances that even when they are the "same" from a material perspective, no two actions are in every way commensurate[365].

These features of the law and human affairs call for a specific expertise. The latter cannot be achieved without, first, "*a very large prospect*" not only of the case at present, but of all those which may emerge, second, "*a great experienced judgment*" to consider pro and contra and, third, "*great skill*" to apply the remedy and minimize the risk of inconveniences. Acquiring these abilities requires the establishment of a deep relation with the law. The jurist has to learn to understand the law as the repository of the wisdom and experience of all those who have contributed to its fashioning, the product of centuries of application, trial and error, and amendments, the *"practice or mischief"* of the past and the "*expositions of the judges of former times"*[366]. As the incorporation of such experience into the law have required long time and effort, so the capacity to appreciate and better valorise them is not acquired through "*the bare exercise of the faculty of reason*" which everyone possesses, but "*must be gained by the habituating and accustoming and exercising of that faculty by reading, study, and observation*"[367]. Only those who have had an education in study of the English law become "*fitter judges and interpreters of the law*"[368]: the "*conservation of laws within their bounds and limits*", "*the certainty of law and the consonancy of it to itself*", and the avoidance of arbitrariness can be ensured only by being "*well-informed by study and reading what were the judgments, and resolutions and decisions of the former ages and of other courts and tribunals*"[369].

As it emerges from the work of Hale, the reason of the law is the legal reason*ing* and judgment of jurists, a form of reasoning that has been informed, and informs, the articulation of reasons over a large body particular and different cases. The standards of reasoning are adopted and developed within the practice of the community of jurists and establish what constitutes a legal argument, and within

[364] Ivi, p. 191
[365] Ivi, p. 192
[366] Ivi, p. 195
[367] Ivi, p. 193
[368] Ivi, p. 194
[369] Ivi

this practice legal arguments are learnt, fashioned, taken up, discussed, criticised, used as a reference and renovated.

This practice, in which the artificial legal reasoning is constituted and carried on, is the source of both the ordering capacity of law and of its capacity to maintain its legitimation. The self-justification that common law offers is, in one sense, methodological: the artificial reasoning and judgment of jurists affords responsiveness and reviewability with respect to the circumstances and how they are presented. This is possible by virtue of a structured practice of articulation of reasons, and rearticulation of them any time they are challenged. The law can never be taken as something granted, but it needs to be continuously sustained "as one goes along". This practice of fashioning law and providing reasons for it cannot be but context-sensitive in that its very task, giving reasons in the application of law, is context-dependent. The capacity of jurists to elaborate the best solutions to legal issues depends indeed on their being "*men of observation and experience in human affairs and conversation between man and man*"[370]. In this sense, it cannot but remain close to the common repository of meaning and experience, which provide the raw material for crafting solutions which better fit the particular circumstances[371]. In this, the activity of jurists is not an external imposition of order, but the practice which is capable to express and valorise through the language of law an order which emerges from the shared background of social interaction[372]. In this sense, the practice of law is co-constitutive with social order: on one hand, it is informed by and, on the other, it informs social interaction.

With respect to jurists and legal subjects, the legal tradition is not something alien, or at distance: these actors, indeed, are always situated within such tradition and only by being situated within it a certain form of experience, knowledge and understanding becomes possible[373]. The body of law accumulated in the past does not operates by unidirectionally determining the present, but it constitutes a horizon of meanings within which jurists move and which, in turn, is moved by jurists. As Gadamer points out in his analysis of the hermeneutic circle, it is through "*the interplay of the movement of tradition and the movement of the interpreter"* that understanding unfolds:

> The anticipation of meaning that governs our understanding of a text […] proceeds from the commonality that binds us to the tradition. But this commonality is constantly being formed in our relation to tradition. Tradition is not simply a

[370] Ivi, p. 190

[371] In this sense, Hale's arguments cannot but bring to mind the Aristotelian considerations with respect to the link between practical knowledge and the capacity to valorise the appropriateness to specific circumstances – *tous prattontas* – and occasions – *pros ton kairon*, paying attention to the particulars - *to eschaton*. See Aristotle, *Nicomachean Ethics*, Book II, 2, 2-3, 1104a; Book VI, 8, 9, 1142a. Cfr., also, Albert R. Jonsen, Stephen Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning*, University of California Press, Berkeley, 1988, pp. 66 ff

[372] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 16

[373] Cfr, Hans Gadamer, *Warheit und Methode*, cit., German, p. 363; Italian, p. 737; English p. 354

> permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves[374].

As the German philosopher observes, *"[e]ven the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated"*[375]. The tradition exists, essentially, in the acts of preservation through which it is carried on and renewed, acquiring a new value in light of the present[376]. In this perspective, as Postema emphasises, the reading of the common law operated by jurists defines

> a common past and, thus, a common point of orientation for the present - a common world around which a community can form. The Common law, then, not only defines a framework for social interaction, a set of rules and arrangements facilitating the orderly pursuit of private aims and purposes, but it also publicly articulates the social context within which the pursuit of such aims takes on meaning. It is the reservoir of traditional ways and common experience, and it provides the arena in which the shared structures of experience publicly unfold[377]

On the basis of these considerations, it is possible to further articulate the implications of the understanding of the common law as, in the words of Simpson, a customary system of law. First, whether, on one hand, the law entertains a co-constitutive relation with the practice of jurists, such practice is not self-confined with respect to social interaction. Its legitimation is grounded on the ordering function that it performs and this, in turn, rests on its capacity of providing a channel to give expression, shape and solve conflicts.

Secondly, the implications of the account of law in terms of customary practice can be extended beyond the common law. In the course of his analysis, Simpson identifies a dichotomic opposition between the common law and legal orders based on a system of expressly formulated rules. While Simpson maintains that the common law *is not* a system of rules in this particular sense, he admits that it *could become* so whereby it was undertaken the Benthamian project of codification[378]. In this respect, on the basis of the above considerations, I believe one can doubt that this possibility could actually become a reality. Hale's account of incorporation of legislation and, more in general, the analysis of the role and significance of formalized rules in legal practice afford to maintain that, even in the case of codification, the customary character of the legal order would not be lessened. Codification of wide areas of law would undoubtedly determine a change with respect to a legal practice *accustomed* to a more episodic intervention of legislation. But this would not result in a qualitative transformation: codification

[374] Ivi, German, p. 298, Italian, p. 607; English p. 293
[375] Ivi, German, p. 286; Italian, p. 583; English, p. 282
[376] Ivi
[377] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 72
[378] Although I believe that the role performed by this hypothesis in Simpson's exposition is that of a rhetorical device, an argument *ab absurdum*, and not as a commitment, it is nonetheless a hypothesis that is worth exploring

would change the practice of jurist, the framework they adopt as a common reference but, that which would change is nonetheless the *practice of jurist*. What would not change is the fact that it is a practice nor the role it is inevitably called to play *as practice*, in giving sense to codified rules and making them law. On the contrary, one can argue that, as in the case of legal codes, the more one aims at implementing a systematic and exhaustive regulation of life through a set of formalized rules, the more the latter's complexity increases and, therefore, the more the handling of the rules thereby formulated requires to be backed by the practice of jurists.

I believe that the merit of the common law tradition is that of offering a perspective capable of overcoming the aporias in which the formalist account of law discussed in the previous section incurs, and to do so by showing that there is a level of understanding of legal rules which cannot be exhausted with the consideration of their formulation. Throughout the account of law provided by the common lawyers, formulations of rules are not anymore something which "hangs in the air"[379]: overturning the perspective, the common law tradition gives an account of the role played by expressed rules from the viewpoint of the interactions in which they are handled, read, "let speak for themselves", by jurists. In a way, the common law tradition sets formalized rules in their place: legal practice. In so doing, not only it does not downsize their importance but, precisely by avoiding their hypostatization, it actually proves itself capable of properly valorising their role. Such formalization of rules, or rather, the texts – legislative, caselaw, doctrinal - in which they are expressed, indeed, play a constitutive role for the practice of jurists: only by reading and studying of those texts, by acquiring the capacity to make reference to them, i.e., to use them competently, one can enter that conversation with the past, that repository of experience that affords to build continuity among discrete things and carry on the ordering capacity of law. At the same time, the normativity is constructed with and on the basis of legal texts and formalized rules, but not *by* them. In this respect, I think it is interesting to connect the perspective provided by the common law tradition with Fish's considerations on the relation between formalized rules and practice. According to Fish

> practice is already principled, since at every moment it is ordered by an understanding of what it is practice *of* (the law, basketball), an understanding that can always be put into the form of rules - rules that will be opaque to the outsider – but is not produced by rules[380]

As he maintains

> [t]he moral of the story […] is not that you could never learn enough to know what to do in every circumstance, but that what you learn cannot finally be reduced to a set of rules. Or, to put the case another way (it amounts to the

[379] Cfr, *supra*, § 3.__;
[380] Stanley Fish, *Doing What Comes Naturally*, cit., p. 124

> same thing), insofar as the requisite knowledge *can* be reduced to a set of rules ("Take only good shots," "Consult history"), it will be to rules whose very intelligibility depends on the practices they supposedly govern[381]

1.6.1.3.1. Rules, Order, Reason and Practice

As anticipated above[382], the arguments so far discussed, are, in many respects, consonant with the account of the common law that is defended by Hayek. and with the idea of spontaneous order of rules on which such account is grounded. Adopting a strongly anti-voluntaristic stance, the Austrian philosopher distinguishes two kinds of order, on one hand, *cosmos*, a "*grown" "endogenous"* order and, on the other, *taxis*, a *"made", "exogenous"* order[383]: transposed into the legal field, these forms of order are in part reflected by, respectively, the order of *nomos* - "*the law of liberty*" – which results from the spontaneous development of an order which man has not made[384], and *thesis*, an order pursued through the implementation of *"rules of organizations"* which are the *"free inventions of the designing mind of the organizer*"[385]. In *nomos*, the law pre-exists both temporally and logically to legislation and the maintenance of such order is entrusted to judges[386]. Inspired by the works of Polanyi and Ryle, Hayek emphasized the role played by the implicit knowledge, know-how and unarticulated skills which guide the activity of judges and individuals in their interactions within the legal order. This know-how is contrasted with, on the other hand, the limited capacity to put into words the rules one is following in doing a certain kind of activity[387]. The law in which the legal order consists, in this perspective, can never be exhaustively articulated into formally expressed rules.

Precisely because of their apparent similarity, I believe it is worth discussing some fundamental differences between the assumptions grounding the account of the common law tradition which I am advancing and those which ground the perspective of Hayek. Not only the implications of such assumptions, in my conviction, are such that the envisaged similarity ultimately results being more apparent then substantial, but the differences make a difference precisely with respect to elements which, I believe, will be of particular significance for the discussion of the relations between law, rules and machines. As anticipated, and as I will attempt to show in the following, the intelligibility and desirability of a Rule of Machines and the understanding of the relations between the latter and the Rule of Law depends to a large extent on the epistemological and anthropological perspective one adopts precisely with respect to what constitutes a *rule* and what it is

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[381] Ivi
[382] *Supra*, § 1.6.1.1.
[383] Friedrich A. Hayek, *Law, Legislation and Liberty*, Volume I, cit., pp. 34-37
[384] Ivi, p. 90 ff
[385] Ivi, p. 117
[386] Ivi, pp. 81, 91 ff
[387] Friedrich A. Hayek, *Rules, Perception and Intelligibility*, in Id., *Studies in Philosophy, Politics and Economics*, cit., pp. 43-44, ff; Id., *Law, Legislation and Liberty*, Volume I, cit., pp. 29-30; 74 ff

for it *to rule*. In this light, I believe that is particularly important to briefly examine the internalist account of rule following which Hayek poses at the foundation of the order of rules and illustrate the way in which the understanding of rules it assumes stands in contrast with the perspective centred on the normative practices of jurists which emerges from the common law experience.

Hayek defines his approach as evolutionary rationalism[388]: it aims at explaining how an order can grow spontaneously from an evolutionary process which is not imputable to human will. The explanation of such evolutionary process, in turn, is provided through the adoption of a perspective inspired to methodological individualism which rests on a strong subjectivism centred on individuals' epistemic privacy. While Hayek maintains that the human is "*a rule-following animal*"[389], the account of rules and rule-following that he elaborates resembles, in many respects, that provided by Turing and the neural connectionism paradigm that I will discuss in Chapter III[390]. Within Hayek's account, rules are described as either regularities or dispositions[391], a pattern of response that is evoked in the individual by a certain type of situation and, on the other hand, rule-following is explained as fundamentally the result of an internal, and private, mental process[392]. Individuals - or the elements of the spontaneous order[393] - act like "profilers", detecting and reacting to regular patterns in their environment. Without the individual being consciously aware, her nervous system acts as a "*movement pattern effector*" and "*movement pattern detector*" which determine, respectively, her action to be "*guided by rules, movement patterns, ordering principles*" and her capability to perceive action as "*conforming to such rules or patterns*"[394]. In other words, humans – or, better, their minds – are *made of rules*, but not *rule-makers*:

[388] Friedrich A. Hayek, *Law, Legislation and Liberty*, Volume I, cit., p. 29

[389] Friedrich A. Hayek, *Law, Legislation and Liberty, Volume I: Rules and Order*, Routledge, Abingdon, 2019, p. 12

[390] Friedrich A. Hayek, *Rules, Perception and Intelligibility*, in Id., *Studies in Philosophy, Politics and Economics*, cit., pp. 49-51; cfr., *infra*, Chapter II. In a different perspective, one can highlight the similarity with the understanding of "positive laws" which distinguished Montesquieu's analysis. Not without reason, *Law, Legislation and Liberty* is opened with a quote from *De l'Esprit des lois*: "*Intelligent beings may have laws of their own making; but they also have some which they never made",* Friedrich A. Hayek, *Law, Legislation and Liberty*, Volume I, cit., p. 8; Montesquieu, *De l'Esprit des lois*, Book I, Chapter I

[391] Friedrich A. Hayek, *Law, Legislation and Liberty*, Volume I, cit., pp. 29, 71-77; Id., *Rules, Perception and Intelligibility*, cit., pp. 51, 55, 57

[392] Id., *Rules, Perception and Intelligibility*, cit., pp. 60-62. As Hayek concludes, "*all we can talk about and probably all we can consciously think about presupposes the existence of a framework which determines its meaning, i.e.,* a system of rules which operate us *but which we can neither state nor form an image of and which we can merely evoke in others in so far as they already possess them*", emphasis added

[393] Id., *Notes on the Evolution of Systems of Rules of Conduct*, in Id., *Studies in Philosophy, Politics and Economics*, University of Chicago Press, Chicago, 1966, p. 66

[394] Friedrich A. Hayek, *Rules, Perception and Intelligibility*, in Id., *Studies in Philosophy, Politics and Economics*, cit., p. 45

their action is action according to rules, but not rule-following action in the sense which I will more thoroughly articulate in Part II[395].

The evolution of the order and its rules occurs through a process of selection which not only is not the result of a predetermined plan, but which also prescinds from any form of shared understanding between the individual elements of the order: in his discussion of *Verstehen*[396], indeed, Hayek addresses the question of "*what, and how much, we must have in common with other people in order to find their actions intelligible and meaningful*"[397] by developing an internalist account of understanding. As he points out

> […] our capacity to recognize action as following rules and having meaning rests on ourselves already been equipped with these rules. This 'knowledge by acquaintance presupposes therefore that some of the rules in terms of which we perceive and act are the same as those by which the conduct of those whose actions we interpret is guided[398]

In Hayek's perspective, what is common to a group of individuals are the features of their mental structure and the rules by which the latter is governed. On one hand, the "*intelligibility of communications and other acts rests on a partial similarity of mental structure*"[399] and, on the other, *"everything we can express (state, communicate) is intelligible to others only because their mental structure is governed by the same rules as ours"*[400]. These rules, for Hayek, can never be shared nor communicated. This does not depend, as it were, on individuals' lack of vocabulary, but on their unawareness of the rules they follow[401]. Since rules, for Hayek, are the patterns of regularity that individuals detect, and whose detection drive their action, not only the former are unknown, but unknowable. As he emphasizes

> we may well have a name for the whole or describe conduct as expressive of an attribute of character […] In one sense we thus know what we observe, but in another

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[395] Id., *Law, Legislation and Liberty*, Volume I, cit., p. 18

[396] Friedrich A. Hayek, *Rules, Perception and Intelligibility*, cit., pp. 58-59

[397] Ivi, p. 59

[398] Ivi. Comparing Hayek's account with that provided by Gadamer, one may claim that, for the former, the understanding of other individuals attains to an *Erlebnis* made possible by the similarity of their internal rule-perception and rule-action mechanism. They are not, however, capable of the kind of experience and understanding which Gadamer distinguishes as *Erfahrung* and *Verstehen* in that there is no such thing as a shared dimension outside of the inner individual's private epistemic states and implicit knowledge. As Gadamer emphasizes "*understanding is not based on transposing oneself into another person, on one person's immediate participation with another. To understand what a person says is […] to come to an understanding about the subject matter [in der Sprache Verständigen], not to get inside another person and relive his experiences (*Erlebnisse*). We emphasized that the experience (*Erfahrung*) of meaning that takes place in understanding always includes application*", see, Hans Gadamer, *Warheit und Methode*, cit., German, p. 387: Italian, p. 783; English, p. 38. Consequently, it seems that, under Hayek's epistemological assumptions, the supra-individual dimension is reduced to a sort of "social *Umwelt"* which, however, is not a *Welt*, see, ivi, German, p. 447; Italian, p. 903; English, p. 440

[399] Friedrich A. Hayek, *Rules, Perception and Intelligibility*, cit., p. 60

[400] Ivi, pp. 60-61

[401] Ivi, p. 48

> sense we do not know what it is that we thus observe. […] we recognise the actions of others as being of a known kind, of a kind however which we are able to describe *only by stating the meaning* which these actions have to us and not by pointing out the elements from which we recognise this meaning[402]

If, notwithstanding the limitations of their knowledge and awareness, individuals show the ability to, first, orientate themselves in the natural and "social" environment, second, transfer and acquire by imitation the rule-guided (or better, regularity-guided[403]) perception and action, and third, communicate between themselves, this can be explained in terms of their pattern recognition neural mechanism[404].

With respect to Hayek's account, it is worth highlighting that, as Postema points out, the Common Law tradition is grounded on the idea that the observance of rules is not restricted to "*routinized repetition of past actions*", and indeed requires the exercise of "*an essentially social capacity*"[405]. This capacity implies being able to

> judge what I know others in the community would regard as reasonable and fitting (where their recognizing the reasonableness is in part reciprocally dependent on their recognition that I would so regard it). These judgments can be made with confidence (though they are not infallible), not because one is a good predictor of their behaviour, or has special insight into their secret consciousness, but simply because one understands at a concrete level the common life in which we all participate. Just as to learn to speak a language is to develop the social competence to produce and to recognize creative uses of language, so too to become fluent in the language of 'human affairs and conversation' is to acquire the social capacity to make judgments that even in novel cases one can be confident will elicit recognition and acceptance as appropriate from the community. There is nothing mysterious or metaphysical in this notion of a social capacity. It simply rests on the idea that some practices, and the beliefs and attitudes blended into an interpretation of them, are entirely common[406]

Assuming the perspective of Hayek, one may object that this account of the common law is entirely compatible with the theoretical framework elaborated by the Austrian philosopher: such "social capacity" is simply part of the inarticulable, private, know-how which each element of the legal order possesses.

There is, however, an important difference between the two accounts. Hayek's conviction that the articulation, verbalization, or statement of rules are inexorably defective depends on an understanding of rules and rule-following which, I believe, cannot match that which distinguishes the common law tradition. While undoubtedly, as I have highlighted, the latter warns against *stated* rules, on the other hand, not only it does not despise, but actually assumes as its constitutive features, the activity of *stating* rules.

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[402] Ivi, emphasis added
[403] Ivi, p. 56
[404] Ivi, pp. 49-51
[405] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., p. 75
[406] Ivi

In Hayek's view, the statement of rules is inexorably defective because what he demands is an explanation which is quantitatively and qualitatively different from what the articulation of a rule means within a normative practice: it indeed seems to amount to an actual description of, on one hand, the patterns of regularity "outside" the individual, i.e., the rules-regularities detected in the environment and in the behaviour of other individuals with which she interacts, and, on the other, the regularities "inside" her, i.e., the mental-neuronal structure which both *does* the detection and profiling of the regularity and *(re)acts* upon it. When intended in this sense, it is clear that one cannot but agree with Hayek's claims that no articulation or statements of rules in words is capable of accomplishing this task. That is not, however, what the practice of law requires.

Under the understanding of rules advanced by Hayek, I might be able to play tennis, i.e., having the implicit knowledge of the rules, but I would not be licensed to consider myself capable of *stating the rules* of tennis unless I was also able to explain, for instance, the law of gravitation, the mechanics of my body and how I manage to anticipate the direction of the ball. But this is just not part of the rules of tennis. Not only the statement of rules such as the law of gravitation is not required, but it would not be enough to secure my compliance to the rules of tennis. Indeed, even I was able to exhaustively state the physical, mechanical, neuronal, psychological, etc., rules determining my action, this would not help me in winning the game (not to justify my behaviour and avoid my expulsion, whether, although with perfect awareness of myself and the environment, I had thrown the racket to my opponent).

The distinctions which apply to tennis courts, apply even more so in courts. What matters in not much *what is,* or *can be, known*, but *what is needed to be known* and *the way in which* such knowledge assumes importance and is put into action. While, for Hayek, the articulation of a rule should *explain how* an individual acts according to a rule, the articulation of rules that takes place in legal practice amounts to *justifying that* the individual act counts as a correct application of a rule[407]. This is more and less than giving an explanation of the pattern of regularity, it is justifying action by reference to the rule, that is, articulating the rule as the reason for an action.

The fact that, as Hayek puts it, individuals are only able to "*state the meaning*" of actions they encounter does not constitute, under the perspective of common law as a customary system of law, an unsuccessful attempt at rule-articulation: there is nothing else to be articulated, in that it is precisely at the level of meaning that legal practice and legal effects operates. At this level, the allegedly private, non-shareable knowledge, or the working of one's mental structure, simply do not represent relevant elements, in that legal practice is constituted by shared, *public*, criteria. The regularities grasped and the distinctions made within legal practice -

[407] Cfr. Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, § 4

for instance, what constitutes a violation of rights in different settings - are those which result from the mastering of techniques which find application, i.e., are meaningful, within the framework provided by a normative practice. Such techniques derive from the practice in which are used their inherently public character, in that public is dimension in which they are applied, taught, explained, articulated and justified. The common law tradition and the idea of the artificial reasoning and judgment emphasises an important difference between the rule *stated*, i.e., the formulated rule, and the *act of stating* and *formulating* the rule. Stating and formulating rules is itself part of the practice of following the rule. Such task is not accomplished by, nor does require, providing the description of a mechanisms, but complying with the standards of reasonableness which are common to a certain rule-governed practice. It is meaningful interactions, "the conversation between jurists" in which such standards are developed and enforced, that constitute the locus in which *what counts as the rule* and what it is the protection that it affords is determined.

1.6.1.4. "Assuming the bench do their duty"

I believe that the common law tradition has the merit of both making clear - and to do it in a legal perspective - that while rules can be formalized in many possible ways, *following them* is a custom, a practice[408]. By combining two metaphors introduced by Postema in relation to classic common law, and extending them to law more in general, one may say that legislation, both statutory and judicial, together with the formal requirements which distinguish them, is the top of an iceberg in the broad sea of legal practice[409]. Or one may develop the metaphor further and juxtapose law with pack: not only, like icebergs, it floats on the seawater of legal practice, but it is also made of the very same water that supports it, a crystallization of it which, season after season, melting and freezing again, continuously changes. It is worth noting that, in this metaphoric scenario, the worst future that can be imagined is not that much the global warming, but a new ice age. In the following part of the thesis, I will attempt to provide a deeper analysis of this risk and the considerations that, in my opinion, should guide its assessment with respect to the formalization of law into computational law.

For the moment, I want to highlight the implications of this account of law with respect to the concept of the Rule of Law. In this perspective, I want to address the significance of that which may be seen as the "other side of the coin", i.e., that under this account of law no formula, no formal restraint seems capable, *a priori* and by itself, neither of taming the arbitrariness of power nor of ensuring the protection of rights. This circumstance might assume relevance in relation to the question of *how* to protect rights from arbitrariness and, even more, in relation to

[408] Ludwig Wittgenstein, *Philosophical Investigations*, §§ 199, 202. This argument will be subject to a more in-depth analysis in Chapter III

[409] Gerald J. Postema, *Bentham and the Common Law Tradition*, cit., pp. 18, 27

the question of *what* is to be protected, and *from what*. On the basis of the previous discussion, I believe that the common law tradition offers a framework which not only can provide an answer to these questions, but also to do so by showing that actually these are not separate nor separable questions. As both, that which requires protection and the procedures for affording it, are not something that can be exhaustively formalized, they are equally something that cannot be severed. As I will try to show, an answer to such question(s) can be drawn from the common law experience by extending to rights the considerations made in general with respect to law.

The fact that the express formulation of rights can be considered all but a straightforward issue is evidenced among other things by, on one hand, a series of positions discussed in the course of the analysis - as the opposition of the Federalists to the inclusion of a Bill of Rights in the American Constitution[410] or Dicey's analysis of Continental constitutions[411], and, on the other, by more recent developments among which one can include the doctrine of the "living instrument" character of the European Convention of Human Rights developed by the Court of Strasbourg[412]. Especially the latter developments emphasise that the understanding and protection of rights calls for a necessarily context-sensitive approach which can enter into conflict with formalities and formalism: it is along these lines, indeed, that the limits and advantages of a formal articulation of rights presents itself with respect to the perspective of computational law[413].

A recurring *tòpos* of the discussion about rights is represented by the reference to Aristotle's metaphor of the leaden rule used by the builders of Lesbos. As the Greek philosopher presents it, such rule "*is not rigid but can be bent to the shape of the stone"* and thereby affords to make a ruling *"fit the circumstances of the particular case*"[414]. In taking up this approach, it is my conviction that it is important to stress that, differently from the stone referred to in the metaphor, in the case of rights, not only their "measure", but the very "thing" which is measured, does not exist independently of the act of measuring: in fact, it actually comes into being with it. In this sense, the protection of rights, cannot be severed

[410] *Supra*, § 1.2.2.

[411] *Supra*, § 1.6.

[412] *Supra*, § 1.3.1.5.. In this respect, moreover, it is discussed how the introduction of indicators of the violation of certain rights, while justified as a way to guarantee more certainty and protection of the right at stake. However, the result of such formalization is often the focusing of the attention only on the assessment of the indicators and the exclusion of the violation of the right whenever the indicators are not identified, thereby turning sufficient conditions into necessary conditions and stiffening the possibility to appreciate the concrete case. I permit myself to refer to my research on the violations of art. 3 of the European Convention of Human Rights in cases of prison overcrowding, see Gianmarco Gori, *I diritti dei detenuti tra giurisprudenza Cedu e politiche penali*, in *L'Altro Diritto*, 2017, http://www.altrodiritto.unifi.it/materiali/gori.pdf; pp. 18-23; 145-154

[413] See, for instance, Sandra Wachter, Brent Mittelstadt, Chris Russell, *Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI*, in *Computer Law and Security Review*, 2021, 41, 105567

[414] Aristotle, *Nicomachean Ethics*, V, 1137a, 30; Albert R. Jonsen, Stephen Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning*, cit., p. 68; Chapter II, *passim*

from the particular kind of interaction in which "such things as rights" take form and their existence is sustained, that is, the "conversation" between jurists. Their protection depends indeed on a practice distinguished by a shared legal understanding of what those rights, and the formulas in which are expressed, mean. Such understanding can be achieved to the extent that the participants of the practice are able to grasp, recognize and valorise that which requires protection. This capacity, in turn, as emphasized by Gadamer and Taylor, rests on the openness, and responsiveness, which distinguishes dialogic interaction[415]. This dialogue articulates a relation in which subjects and object belong together (*Zugehorigkeit*)[416]. This relation of belonging is brought about by the ego being addressed by the alter of the communication, and the capacity of the former to listen what the latter has to say[417]. This requires a form of engagement, the establishment of a bond with that which one aims at understanding by putting it in relation to one's own "*linguistic orientation to the world*"[418].

This kind of dialogue can be entertained with legal tradition, with text, with another participant of the practice, with a subject which requires protection and, in general, with the *con-text* within which the encounter with the latter occurs. Coming to an understanding with them consists in the constitution of a shared meaning. This, as Gadamer underlines, is a linguistic fact: language is the medium within which the understanding between the partners of the communication themselves, and with respect to the object of their communication, comes into being[419]. The achievement of such understanding which, as Gadamer puts it, represents an event which *comes into language, takes place through* appropriation and interpretation[420]. In this respect, the German philosopher underlines an aspect with respect to tradition which, however, can be extended to the other alter of the dialogue:

> This linguistic communication between present and tradition is […] the event that takes place in all understanding. […] Inasmuch as the tradition is newly expressed in language, something comes into being that had not existed before and that exists from now on. […] There is no being-in-itself that is increasingly revealed […] but, as in genuine dialogue, something emerges that is contained in neither of the partners by himself[421]

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[415] Hans Gadamer, *Warheit und Methode*, cit., pp. German, p. 363, Italian, p. 737; English p. 352; cfr. Charles Taylor's discussion of "dialogical action", Charles Taylor, *To Follow a Rule*, in Id, *Philosophical Arguments*, Harvard University Press, Cambridge, 1995, pp. 171-173

[416] Hans Gadamer, *Warheit und Methode*, cit., German, p. 465, Italian, p. 939; English p. 456

[417] Ivi, German, p. 466, Italian, p. 941; English p. 458

[418] As Gadamer maintains, "*person seeking to understand something has a bond to the subject matter that comes into language through the traditionary text and has, or acquires, a connection with the tradition from which the text speaks*", ivi, German, p. 300; Italian, p. 611; English, p. 295

[419] I have allowed myself to translate in this way the expression "*die the Verstandigung der Partner und das Einverstandnis uber die Sache",* see, ivi, German, pp. 297, 387; Italian, pp. 605, 783; English, pp. 292, 385.

[420] Hans Gadamer, *Warheit und Methode*, cit., German, p. 467; Italian, p. 943; English, p. 459

[421] Ivi, German, p. 466, Italian, p. 941; English p. 458

Through this dialogue or, again, the conversation between jurists, the meaning of the tradition, of a text, of an action, of a context, are constantly widened. In the field of law, and especially with respect to rights, the occurrence, and the sustaining, of such a dialogic process of understanding is of fundamental importance. As Santoro highlights, the capacity to see, hear, and understand the "private troubles" of individuals, i.e., to see them *as* legally relevant facts, and then, to transform them into "*public"* - and legal - *"issues'"*[422] is fundamental for both, the rights which, because of the lack of formal recognition, or also for the ineffectiveness of remedies, "are not yet", and the possibility to extend legal protection[423].

The common law tradition acknowledges that this capacity to understand and see is not a natural disposition, and that it cannot be taken for granted: it is an artificial capacity that has to be learnt, exercised, refined and sustained through close reading of the texts and listening to "human conversation": jurists are entrusted with a role of mediation which can be accomplished only through immersion and engagement into interaction with the community of normative agents, a responsive attitude towards "particulars" and sensitivity to change. In this light, the common law tradition is capable of emphasizing the constitutive character that is played by the formalization of the rules concerning rights, and to do so by changing, to some extent, what such formalization consists in: not just the expression of the rule, but the process of articulation of legal reasons which, within legal practice, provide the grounds for a particular understanding of such rule. With respect to such process of articulation, Maine made an extremely relevant observation in relation to judicial practice:

> when new circumstances arise, we use our old ideas to bring them home to us; it is only afterwards, and sometimes long afterwards, that our ideas are found to have changed. An English Court of Justice is in great part an engine for working out this process. New combinations of circumstances are constantly arising, but in the first instance they are exclusively interpreted according to old legal ideas. A little later *lawyers admit that the old ideas are not quite what they were before the new circumstances arose*[424]

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[422] Emilio Santoro, *Private Troubles and Legal Imagination: Legal Clinics a Radical View*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2020, 12, 1, p. 16

[423] "*Legal discourse and the judicial decisions that mark it certainly play an important role in the process of objectifying reality. The legal system, in other words, in our societies is not only a practical instrument of regulation, but also, and above all, a way to strengthen a binding system of beliefs and to give meaning to everyday life. The "jurist's imagination" is therefore a fundamental tool to trigger the (cultural) process, to transform public indifference to individuals' personal distress into a concern for their conditions of weakness and disadvantage, to transform these conditions from "personal troubles" to, if not public issues, at least situations worthy of legal protection.* […] *Jurists' discourse has a fundamental importance on how the conditions of weakness are objectified and internalized, and become part of common sense. Only if their use of normative texts is based on the importance of offering forms of legal protection (rights) and proceduralisation of conflicts can interpreters help to restore a dignified life to marginalised persons",* Ivi

[424] Henry S. Maine, *Lectures on the Early History of Institutions*, 7th edition, John Murray, London, 1914, Lecture VIII, p. 229, emphasis added

In the light of the above, I believe that the scope of this remark should be extended to encompass the interactions between the community engaged with law. As a community of interpreters, it indeed constitutes, as Fish characterizes it, an "*engine of change",* i.e., *"an ongoing project whose operations are at once constrained and the means by which those same constraints can be altered*"[425]. Only the articulation and exchange of legal reasons between jurists can both perform a function of stabilization of law and, at the same time, afford its development. The formalization of legal reasoning produces legal texts which the following practice can appropriate and transform into reference points for the generation of new rights or a new understanding of old rights.

On the other hand, understanding and its interactive character assumes relevance for legal protection with reference to the case of the judge who "does not want to listen" discussed above[426]: the possibility to advance through a legal argument a different reading - and therefore meaning - of one's action, of the rules that qualify the latter, and of the consequences of such qualification, depends on the fact that the addressee of such argument is prepared to listen and able to come to a potentially new understanding.

Placed into this framework, it is possible to better grasp that almost unarticulated statements of Dicey, i.e., that the protection of rights under the Rule of Law is ensured by the courts being guided by the "*general spirit of the common law*" and by the bench doing "*their duty*"[427]. The former and the latter can indeed be understood as constitutive elements of the legal practice to which Dicey was referring to. For Dicey, being a common law judge means having learnt, through the interactions with the tradition and the other jurists, to use the law, the rules formalized in text, in a way that is consonant with a certain horizon of meaning. In this perspective, the jurist is a subject constitutively distinguished by certain *prejudices*, in the sense pointed at by Burke and then retrieved and expanded by Gadamer[428]. As the latter points out, belonging to a tradition implies sharing a set of "*fundamental, enabling prejudices*"[429]. The activity of legal practitioners, in this sense, is informed by a set of prejudices which are an element of self-identification of the community of jurists of the common law. Any reading of legal texts – or the acts through which the text is "let speak for itself" – is thereby constrained by and oriented towards a framework biased in the direction of legal protection. Rights are indeed the vocabulary through which legal issues are framed, assessed and settled: the language of law requires that the discussion is conducted by making reference to, and by providing reasons and justifications for and against, the recognition of rights. Similarly, also the definition of arbitrariness depends on jurists' capacity to

[425] Stanley Fish, *Doing What Comes Naturally*, cit. pp. 146-150
[426] *Supra*, § 1.3.
[427] *Supra*, § 1.6.
[428] Edmund Burke, *Reflections on the Revolution in France*, cit., p. 183; Hans Gadamer, *Warheit und Methode*, cit., German, p. 277, Italian, p.565; English p. 274
[429] Hans Gadamer, *Warheit und Methode*, cit., German, p. 300; Italian, p. 611; English, p. 295

use law as a tool to make it possible to see something *as* an arbitrary act. The assessment of whether or not an act is arbitrary rests on the justifications that are accepted with reference to that act, and in the shared standards through which their admissibility is evaluated. A tyrant's claim that what he has done is *exactly what the rule prescribes* cannot be but addressed on the basis of an assessment of what does and what does not constitute a legitimate justification for the advancement of such an understanding of "what the rule provides". This assessment is not operated by the formalized rules and their requirements, but by the formulation-understanding of such rules as demanding, in the case at hand, the respect of a set of requirements which are commonly understood as necessary.

These are reasons why the constitutive dependence of rights on legal language is, before all, the dependence of rights on law *as* language, i.e. a form of communication, of interaction, within which the occurrence of understanding can take place.

On the other hand, under this perspective, one can second common lawyers' claim that the law is an order distinguished by a positive and objective character[430], and that such features characterize the protection that it affords against arbitrariness. Once again, in this view, as in Wittgenstein's metaphor, the "hardness" of the rules which affords legal protection and to curb arbitrary power cannot be understood as the same kind of hardness which may distinguish a material[431]. The hardness, objectivity and positivity of the rule which affords legal protection rests in it having been made effective through the appropriation from the community of jurists. The objectivity of the law and of legal protection derives from a form of linguistic objectification which attributes to certain situations their identity and meaning, making them "objective". By being "*learned and internalized by users of a language with the connotation and meaning conferred on them by that language",* these meaning become part of the common sense and carry on the development of the legal tradition[432]. As Santoro highlights, harkening back to the work of Wright Mills, this objectification has a biunivocal character:

> past objectification structures language, and therefore the world, but it is the use of language that allows the world to be structured. So when a language changes the way things are seen, makes them no longer be seen as private troubles but as public issues, it changes how the world is structured and, consequently, how the speakers will internalize the world itself.[433]

Legal protection depends on a responsive judiciary, and of jurists more in general, which understand the affordance of legal protection, to put it in Diceyian terms, "as their duty". The fulfilment of such duty implies not making pass *as* law an act that would radically contrast with the body of rights embedded in the legal tradition.

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[430] Emilio Santoro, *Diritto e diritti*, cit., p. 168; Pietro Costa, *Civitas, Storia della cittadinanza in Europa*, Volume 1: *Dalla civiltà comunale al settecento*, Laterza, Bari, 1999, p. 216

[431] *Supra*, § 1.4.1.

[432] Emilio Santoro, *Private Troubles and Legal Imagination: Legal Clinics a Radical View*, cit., p. 16

[433] Ivi

The objectivity of the legal order, the tangibility of the protection of rights and the effectiveness of the remedies against arbitrariness is in this sense dependent on the practice of the jurists: as it were, "these are the walls of law, these are the walls of rights"[434].

One can therefore agree with Tamanaha that it is not itself a "legal rule" that which affords legal protection and grounds the Rule of Law. However, it is necessary to specify that this applies only when legal rules are understood formalistically, as something capable of standing out from the practice in which they are followed. As the common law tradition shows, the point is not that rules cannot be self-applying, self-interpreting or self-justifying, but that rules are precisely that which is applied, interpreted, justified, i.e., what comes into being through the public activity of application, interpretation and justification of rules: to think otherwise is to confuse rules with their formulation.

I believe that the account of law, rules and practice which emerges from the common law tradition offers a better understanding of not only the *loci* in which power - legal and arbitrary – resides but, before all, of the interactions through which the very distinction between the two takes shaped. In this way, it also points the direction where to look for articulating protection, but it also helps to identify the strong points on which leveraging as much as those which require to be reinforced.

On one hand, it shows that, before the formulation of rules, what really matters is the activity of reading and giving sense to those formulations. Precisely with reference to the protection of rights, this account of the relation between law and jurists has proved capable of emphasizing the points of strength that legal practice presents also in the cases in which the pressure exercised by sovereign power is stronger, as it is shown by Dicey's analysis of the cases of emergency[435]. But this can also be shown in the case of totalitarian legal systems. Even in the face of the introduction of normative texts directed at the annihilation of fundamental rights, and notwithstanding the weakening of the formal procedures aimed at implementing checks and balances to the sovereign power, the reading of legal texts juristic practice has proven capable of affording a certain margin of protection to individual rights. In this respect, through an analysis of the case-law of the Fascist period, Speciale shows that a skilled – and courageous – class of jurists had been able, on some occasion, to minimize the negative impact of the provisions adopted by the regime[436]. Interestingly, such an undertaking was performed on the basis of an understanding of the relation between legal rules and legal order which resembles that developed by Hale within the common law framework. In this case,

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[434] Here I make reference to the anecdote told by Plutarch according to which King Agesilaus II, questioned about the reason why the city of Sparta did not have walls, answered by pointing to his fellow citizen and exclaiming: "*these are the Spartans' walls*", see Plutarch. *Moralia*, Volume III, translated by Frank Cole Babbitt, Harvard University Press, Cambridge, 1961, p. 257

[435] *Supra*, § 1.6.

[436] Giuseppe Speciale, *Giudici e razza nell'Italia fascista*, Giappichelli, Torino, 2007, pp. 55-59

racial laws, it was argued, could not revolutionize the whole, complex and sedimented legal order. To the extent that such legislative texts did not find their place within the legal system, they could not impact it the entrenched forms of regulation of social interaction and the protection afforded by it minimize, in some cases, the impact of racial laws. The fact that this understanding of the legal order was supported by reference to legality and formalism suggests that Hale's metaphors of the incorporation in the *substratum* of law applies also to a legal culture informed by the veneration for legal certainty and formalism, such as the Italian one first twentieth century. In fact, it is precisely in a legal culture of this kind that, whatever the account it gives of itself, the legal *practice* reflects that artificial reasoning and judgment of jurists.

In conclusion, the point is not that a certain legal tradition is necessarily good, *in that* it is a tradition. Clearly, a tradition can be conservative, or insensible to the acknowledgment of certain situations as worthy of legal relevance and protection. However, as long as it is a tradition, and precisely because it is a tradition, that which sustains and carries it on, i.e., the continuous re-articulation of meaning and understanding through human interaction, also affords the possibility to challenge and change it.

CONCLUSIONS

WE HAVE NEVER BEEN FORMALIST

At the cost of an unavoidable simplification, in the previous sections I have attempted to identify two main "families" of conceptions of the Rule of Law and I have attempted to track their reciprocal assumptions and their development in different legal traditions: on one hand, a family which explains law according to a normativist-voluntarist framework, on the other, a family of accounts of law centred on the idea of order, institution and practice.

I have therefore argued that the aporias which distinguish the conceptions of the Rule of Law traceable to the normativist-decisionist family depend on the formalistic understanding of legal rules which such families assume.

Through the discussion of the paradigm of the common law and the conception of the Rule of Law elaborated within such tradition, I have shown that such aporias can be dissolved through an understanding of law and legal rules which better accounts for how law can rule *in practice* by assuming as central the normative *practices* of jurists.

The discussion of the formalist aporias has led to the conclusion that, once again, *in practice*, as Stanley Fish puts it, *"the abandonment of formalism* […] *has always and already occurred"*[437]. On the other hand, such claim does not dismiss the importance of formalist theories, nor makes legal formalism a straw man[438]. The reject of formalism as a form of exhaustive explanation of the concept of law and its functioning, indeed, does not preclude to appreciate the role that the language of formalism plays in the life of the law[439]. That inherited from formalism is indeed a

[437] Stanley Fish, *Doing What Comes Naturally*, cit., p. 7

[438] Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging,* cit.; Hans-Peter Haferkamp, *Jurisprudence of concepts*, cit. p. 433. What Brian Leiter notes in relation to the United States – i.e. that "[f]*ormalism* […] *is quite obviously the official story about adjudication in the public culture*" - is even more true for countries belonging to civil law tradition, where a formalist representation of law distinguishes not only how law is law is taught in universities but, more importantly, how it is discussed into the courtroom. Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, cit., p. 127

[439] There are indeed several contexts in which presenting law as a discipline informed by formal constraints seems perfectly appropriate. A description of law in formalist terms can be useful to give an account of law in relation to both its sources and adjudication; a formalist explanation of law is the assumption on which, in many political-legal discourses, the division of powers is grounded; as ostensive definitions play a fundamental role in learning a language, a formalist presentation of law may be appropriate for didactic purposes. Interestingly, this seems to be the merit that Holmes recognized to Langdell's systematic approach: "*[T]he book is published for use at a law school, and … for that purpose dogmatic teaching is a necessity … A professor must start with a system as an arbitrary fact, and the most which can be hoped for is to make the student see how it hangs together,*

vocabulary that is part and parcel of legal profession, a constitutive part of their practice and of their identity[440]. Once it ceases to be thought as constraining *from above* the practice of jurists and it is redefined in terms of as a set of techniques that operate *from within* it, it is possible to investigate "what jurists do with formalism", i.e., the conditions of felicity and the criteria of justification instituted within such practice.

In this light, missing to appreciate the illocutionary dimension in which the vocabulary of formalism is spoken - purposes, audience, contexts, etc., - rules may prove to be strongly inappropriate. Taking formalist ideas - that of law as complete system of rules, of the possibility of an algorithmic recipe for solving any legal case – and the assumptions on which they are grounded - meaning as a function of formal signs or formalizable circumstances - outside of their "context of use" may lead to particularly dangerous perlocutionary effects. One of the contexts in which the transplant of such ideas risks turning out to be particularly infelicitous is that of the debate on Artificial Intelligence and law. Formalism, being a *fictio* that fulfils its constitutive role in the context of legal practice thanks to the affordances of natural language, risks becoming *grotesque* and, ultimately, dangerous, when assumed as a model to be implemented through an infrastructure in which what is defined in a formal way remain such independently of any context.

In a similar fashion, I have attempted to deescalate the contrast between the Rule of Law and the Rule of Men, a contrast which can be seen as a further consequence of formalist understanding of rules. The cyclical re-emerging of such opposition seems a non-disposable tool of the legal-political rhetoric of Western societies. As such, from time to time, from different angles, it lends itself to be used to criticise the power of *some* men by opposing them the force of the law. Read in this way, the pair Rule of Law-Rule of Men still presents itself as a formula which remains entirely "internal" to legal discourse, the domain of law *and* men. However strong

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and thus to send him into practice with something more than a rag-bag of details", quoted in Patrick J. Kelley, *Holmes, Langdell and Formalism*, in *Ratio Juris*, 2002, 15, 1, p. 31. When speaking of the role of logic in legal practice, even a critic as Holmes acknowledged that "[t]*his mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home*". Before concluding that "*certainty generally is illusion, and repose is not the destiny of man*", indeed, Holmes not only had recognized that "[t]*he language of judicial decision is mainly the language of logic*", but he also conceded the understandability of the role played by logic as an answer to a basic human need, "*that longing for certainty and for repose which is in every human mind*" Oliver W. Holmes, *The Path of the Law*, in *Harvard Law Review*, 1897, 10, 8, p. 460

[440] Pietro Costa points to the fact that *[w]hatever the hermeneutic theories supported, whatever the tenor of the dissertations on the 'will of the legislator' and on the limits of interpretation, the professional class of jurists was not limited to ascertain, to register "the law that is", but it has continuously prefigured, imagined, recommended 'the law that is not', while the theory of the 'descriptive' and 'merely applicative' character of judicial interpretation did not work at all as an effectively working constraint for its quotidian professional activity, but only as a component of the 'class rhetoric', as a piece of an effective persuasive strategy*", Pietro Costa, *Discorso giuridico e immaginazione. Ipotesi per un'antropologia del giurista*, cit., p. 23, my translation

the tension that can emerge, the opposition between "law" and "men" never really marks a break between the two.

As it is emerged in the course of the analysis, the claim that "we have never been formalist" is not new at all. On the contrary, every season of legal debate has seen the emergence of some perspective that claimed to have identified the limits of formalism. However, the very fact that the announcement of the death of formalism is such a recurrent feature of legal debate is indicative of the fact that the state of health of formalism in legal thought is not that poor. This depends on the fact that, on one hand, the problems of law identified and addressed by formalism, *as framed by formalism*, have never been solved and, on the other, that such problems are not framed as problems *of* formalism, but problems which might be solved with more formalism.

> It is one of the greatest anomalies of modem times that the law, which exists as a public guide to conduct, has become such a recondite mystery that it is incomprehensible to the public and scarcely intelligible to its own votaries. The rules which are supposed to be the guides to action of men living in society have become the secret cult of a group of priestly professionals. The mystic ritual of this cult is announced to the public, if at all, only in a bewildering jargon. Daily the law becomes more complex, citizens become more confused, and society becomes less cohesive.

While this passage resembles the criticism that Enlightenment thinkers moved against the *ius commune* almost three centuries ago, the author is Judge Lee Loevinger and the state of the law that he is describing is that of American law in 1949[441]. As the problems he identifies, as I will show in the next chapter, also the solutions that Loevinger articulates can be framed in the in the furrow of a formalist perspective. In Loevinger's path, however, there is a game changer: the approach that he advocates is what he calls Jurimetrics, and it is based on the use of computers.

The powerful metaphor of the computational machine, as much as the actual availability of computational tools, afford the development of different entanglements between the concept of rules and formalist perspectives. Next to the legal formalism and the related picture of rules discussed so far, the encounter with machines opens a horizon in which the law can actually experiment different epistemological approaches to the concept of rules and rule-governed behaviour. In this perspective, the claim that "we have never been formalist" can be seen as a consequence of the fact that "we just did not have the appropriate tools". In *What Computers Can't Do*, Dreyfus has moved a comprehensive critique against the assumptions and agenda of Artificial Intelligence. Adopting a perspective inspired by hermeneutics and phenomenology, Dreyfus has emphasized the inherent limits of computing machines when compared to embodied and embedded humans[442].

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[441] Lee Loevinger, *Jurimetrics. The Next Step Forward*, in *Minnesota Law Review*, 1949, 33, 5, p. 40

[442] Hubert L. Dreyfus, *What Computers Can Do*, MIT Press, 1972; see also the revisited edition, Hubert L. Dreyfus, *What Computers* Still *Can't Do*, MIT Press, 1992

Taking the opposite perspective, the very same reasons that define the area of what computers *can't do*, in opposition, also define what computers *can do* and *humans can't do*. In the perspective of legal formalism, the mechanical character of computers ceases to be a bug and becomes a feature: since that of code and data is a realm that rests upon forms of unambiguous and inviolable constraints, through computers, formalism "could become true".

On the other hand, the claim that "we have always been formalist" can be overturned: "we have always been formalist, but we have been looking for the wrong rules". In this sense, I have briefly referred to a series of perspective endorsing a sceptic stance towards the capacity of legal rules to account for the rule-following behaviour of jurists. Shifting the focus from a system of rules as expressed signs does not rule out the possibility to address the legal phenomenon in machinic terms, explaining legally relevant behaviour as determined by rules of which might differ from or complement those formally enacted into legal text.

In the next Part, I will present an analysis of how the computational turn has contributed to the development of new forms of understanding of rules and law. I will also attempt to show that, starting from "what computers can do", a certain narrative recovers and takes to the extreme the assumptions underlying the different families of accounts of law discussed above, igniting the tension between the Rule of Law and the Rule of Men. In this light, I will emphasize the risk that through the different reading keys and the concrete tools provided by Artificial Intelligence, the Rule of Law-Rule of Men opposition might be "taken too seriously" and encourage the belief that a law separated from "men" has finally become possible.

PART II

WHAT COMPUTERS CAN DO

In the following chapters I will discuss how the discourse on law, rules and what counts as following them informs and is in turn informed by the encounter between jurists and the paradigm of computational machine, i.e., how the understanding of law and rules interacts with the machine metaphor and the computational tools developed and, on the other, how the machine metaphor and computational tools are shaped by a certain understanding of law and rules. In particular, I will attempt to identify the relations that are established between *computer rules* and *legal rules* and how, in turn, such relations affect the the account of what it is for the law to rule.

In Chapter II, I will first present the approach to computational machines developed within the research agenda of Jurimetrics and Juscybernetics. I will then discuss the main paradigms of Artificial Intelligence, i.e., GOFAIL – Good Old-Fashioned AI and Law – and the more recent data-driven approach. In the course of the analysis, I will attempt to show how, from the early days to the more recent developments, different accounts of the relations between law, rules and machines are expression of different versions of the behaviourist and cognitivist assumptions which distinguish the computational paradigm: on one hand, an approach directed at expressing into a computational formalism law, intended as a system of norms-rules, and the processes of *legal reasoning* which perform the application of such rules; on the other hand, an approach which aims at detecting and formalizing rules-patterns capable of accounting for the actual behaviour of legal actors even beyond their aware reasoning and their capacity to formulate them.

I will then discuss the emergence of the ideal-type of the Rule of Machines, i.e., the idea that automation could solve the troubles and aporias of the Rule of Law. To this end, in Chapter III I will attempt to unearth the assumptions which ground such ideal by tracing the connection that it entertains with the framework drawn in Part I, i.e., the conception of rules distinguishing the normativist and decisionist tradition on one hand, and the understanding of rules centred on the idea of order, on the other. Taking back the discussion of the common law tradition, I will then attempt to outline the differences between artificial legal intelligence and jurists' *artificial reason and judgment* and, in turn, how such differences affect both the intelligibility and desirability of the Rule of Machines.

CHAPTER II

MACHINES, LAW AND ARTIFICIAL INTELLIGENCE

F: Yes. But this is the thing that I would not have expected. That animals, which are themselves able to see things ahead and act on what they think is going to happen - a cat can catch a mouse by jumping to land where the mouse will probably be when she has completed her jump - but it's just the fact that animals are capable of seeing ahead and learning that makes them the only really unpredictable things in the world. To think that we try to make laws as though people were quite regular and predictable.
D: Or do they make the laws just because people are not predictable, and the people who make the laws wish the other people were predictable?
F: Yes, I suppose so.[443]

Are you not confusing the hardness of a rule with the hardness of a material?[444]

2.1. The *Informationskrise des Rechts:* computational machines and the jurist

During the post war period, both common law and civil law systems faced a significant increase of the amount of legal texts. The increase of legal sources, which can be traced back to the birth of transnational legal orders, but above all to the rapid growth of the welfare state, distinguishes a period marked by a common

[443] Gregory Bateson, *Steps to an Ecology of Mind*: *Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology*, Jason Aronson Inc, Northvale, 1987, p. 41
[444] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, § 87

feeling within the legal community, that of – as Spiros Simitis called it in 1970 - a crisis of legal information (*Informationskrise des Rechts)*[445].

Already in 1946, the advent of the first computers drove Louis O. Kelso to ask the question "*Does the Law Need a Technological Revolution"* [446]? The answer Kelso advances is clearly affirmative, and the reasons he advances are particularly interesting. In Kelso's article, the concerns for the crisis of legal information are connected with two elements: one relates to the cognitive abilities of the human jurist - "*he cannot remember everything he has ever read* […] *cannot read everything that is relevant*"*;* the other comes on top of such cognitive limitation: the legal ICTs the jurist has at his disposal hinder further the possibility to access the required legal information.

Kelso maintains that "*modern lawyer's tools do not enable him to cope with the legal problems that arise today*", and the reason is to be identified in the fact that "*science has pretty much left the lawyer where it found him before the industrial revolution*". The solution that Kelso envisioned is the computer as a "*mechanized storehouse of knowledge*", a goal along the lines of what will be called the documentary paradigm and that will be adopted by the program of Legal Informatics[447], i.e. developing instruments for helping the jurist in coping with the information necessary to fulfil her role by increasing the availability of legal sources, the forms of communication and the tools for organizing legal practice. In this sense, if the tool is revolutionary, the intended use that Kelso promotes can be appreciated as springing largely from a perspective internal to the legal practice and as distinguished by continuity with the past.

In parallel, the call for a technological revolution in law is interpreted in a more radical way by research programs that envision computational machines as tools capable not only of "augmenting" legal practice, but of promoting a rethinking of law and of its relations with scientific approaches. The most representative of such attempts to reframe law through the use of computational technology are those conducted under the paradigm of Jurimetrics and Jus-cybernetics.

2.2. Jurimetrics

As anticipated in the previous chapter, the call for a revolution in law is not only endorsed, but radically reinforced by Lee Loevinger, who in 1949 wrote the manifesto of a new approach to law. As he put it, "[*t*]*he next step forward in the long path of man's progress must be from jurisprudence to jurimetrics, which is the scientific investigation of legal problems*".[448]

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[445] Spiros Simitis, *Informationskrise des Rechts und datenverarbeitung*, Müller, Karlsruhe, 1970; Italian translation, Id., *Crisi dell'informazione giuridica ed elaborazione elettronica dei dati*, Giuffrè, Milano, 1977

[446] Louis O. Kelso, *Does the Law Need a Technological Revolution*, in *Rocky Mountain Law Review*, 1946, 18, 4, p. 378

[447] Jon Bing, *Computers and Law: Some beginnings*, in *Information Technology*, 2007, 49, 2, p. 71

[448] Lee Loevinger, *Jurimetrics. The Next Step Forward, in Minnesota Law Review*, 1949, p. 483

While, on one hand, the pioneering character of the approaches and solutions advanced by Loevinger are in themselves worthy of attention[449], what is even more interesting for the present analysis is the theoretical paradigm within which Loevinger's criticism, claims and proposals take place: in this perspective, what needs to be asked is "from where" the "step" of Jurimetrics is to be taken, and "where" is the "forward" toward which such step is supposed to lead. Indeed, notwithstanding the fact that the parable of Jurimetrics went ascending as quickly as it went descending, and that such trend can be traced back mainly to the criticism received by its conceptual frame of reference[450], the perspective expressed by Loevinger not only did not follow the fortunes of the discipline he inaugurated, but on the contrary, as I will argue, not only is got ahead, but is actually very timely.

The most radical element of Loevinger's contribution lays in his reformulation of the relations between law and science, which he bases on an interesting account of each of the two. On one hand, Loevinger engages in a review of the legal philosophical debate from the Ancient Greece to the dispute between Realists, Formalists and Naturalists in American scholarship. From such analysis, he draws the conclusion that

> remarkably little information has been conveyed by the millions of tracts, essays and volumes which have been cast upon the waters by earnest thinkers. Ideas have floundered and drowned in the sea of words called jurisprudence, and the flotsam has been mostly froth[451]

For Loevinger, the fact that more than twenty centuries of debate have not led to approaching an agreement on answers to "the fundamental questions of law" is the ultimate reason to cast doubts on both the questions asked and the methods adopted in looking for answers. In his words, jurisprudence is "*a sterile study"* that both ask "*meaningless questions*" and tries to answer them through "*futile methods*"[452].

That which Loevinger depicts is a methodological war, and if he is so comfortable in destabilizing and delegitimizing jurisprudence is because both his *vis polemica* and the *pars costruens* he articulates are well grounded in a different theoretical framework, i.e., that advanced by the neo-positivist perspective[453].

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[449] The "problems of Jurimetrics" identified by Loevinger goes from the study of the behavior of witnesses, and in particular the investigation of a valid and statistically reliable method to detect deception; the behavior of judges and legislators; legal language and communication; legal procedure and recordation; non-aberrant personal maladjustments; "aberrations of behavior"; "unintentional personal injury"; "macrolegal techniques of investigation". See, Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., pp. 484-488

[450] See, *infra*, § 2.3.

[451] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 467

[452] Ivi

[453] The reference points Loevinger makes are, respectively, Bertrand Russel, Hans Reichenbach, Rudolf Carnap, Percy W. Bridgman and Karl Popper when discussing science and George A. Lundberg, Felix Kaufmann and Theodore M. Newcomb when discussing social science.

Loevinger promotes a strong empiricist stance: not introspection and speculation, but investigation and observation - "*doing something and observing the results*"- are the only methods capable of generating knowledge[454].
The applicability of such method is justified by the fact that nothing prevents the investigation of law in terms of empirically verifiable behaviour: "*man and his behavior are as much a subject for scientific investigation as any other natural phenomenon*"[455]. Loevinger's enthusiasm for science[456] translates into the aspiration to establish methodological monism[457], a unified method of investigation that is reminiscent of Otto Neurath's idea of a unified science (*eintheurswissenschaft)*: if for Neurath *"[w]hether the statistical behaviour of atoms or of plants or of animals is being investigated, the methods of stating a correlation are always the same"*[458], for Loevinger

> The most appealing of the arguments against the trial of scientific methods in social fields is the ego-inflating assertion that while planets, plants, elements and atoms can all be studied objectively, man himself is so uniquely distinguished from all the rest of the cosmos that he is forever beyond the range of science.[459]

In this perspective, the attack to jurisprudence is a passage from the general to the particular: jurisprudence is an instantiation of a more general philosophical method, and it has to be discarded as any kind of philosophy that is based on *a priori* speculations and not on the observation and verification of facts: along the lines of Wittgenstein's conclusion of the *Tractatus* "*What we cannot speak about we must pass over in silence*"[460].
Jurisprudence "*is based upon speculation, supposition and superstition; it is concerned with meaningless questions*" and, as he puts it, "*bears the same relation to a modem science of jurimetrics as astrology does to astronomy*"[461].
The only way out is to face the inadequacy of a model of law based on such

[454] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 472
[455] Ivi
[456] "*The power and achievements of science had by then become so impressive that they seemed to promise a method of solving all problems, social and legal, as well as those arising out of the physical environment*", Lee Loevinger, *Jurimetrics: Science and Prediction in the Field of Law*, in *Minnesota Law Review*, 1961, 46, 2, p. 256
[457] Georg H. von Wright, *Explanation and Understanding*, Routledge & Kegan Paul, London, 1971, p. 4
[458] Otto Neurath, *Philosophical Papers 1913-1946*, edited and translated by Robert S. Cohen and Marie Neurath, D. Reidel Publishing Company, Dordrecht, 1983, p. 68. It should be noticed that Loevinger seems to abandon verificationism to adopt falsificabilism between 1949 and 1961, when Loevinger outlines more fully his account of science. Loevinger seems to follow Popper's elaboration, of whom he quotes *The Logic of Scientific Discovery.* See, Lee Loevinger, *Jurimetrics: Science and Prediction in the Field of Law*, cit.
[459] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 476
[460] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, § 7
[461] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 483

metaphysical assumptions and frame law as the science of social control of behaviour[462].

Given these premises, Loevinger treats any objections to an empirical investigation of the social field as an unjustified dogmatism that he compares to the attitude of those who refused to look through Galileo's telescope[463]. The sharing of such an attitude by the class of jurists is indeed identified as the main obstacle that hinders legal progress. In this perspective, the fact that legal practice has not been able to provide "*anything like a rational system for performing their principal function of deciding particular controversies*[464]" is not an accidental feature, but a structural consequence of how lawyers deal with law.

At this point, the computer is introduced in Loevinger argumentative strategy precisely to reinforce his characterization of the flaws of legal practice. In this perspective, Loevinger brings to the fore the advances of science that have led to the realization of "*machines capable of imitating thought processes in a logical fashion"*[465] and asks the question "[*w*]*hy should not a machine be constructed to decide lawsuits?"*[466]. The perspective presented in the answer he advances, however, sets aside any discussion of the merit of such machines and points straight to legal practitioners: the reason why legal machines have not been realized yet is that legal reasoning is an illogical and intuitive, if not arbitrary, process that takes place at a "*sub-verbal (and usually subconscious) level*": therefore, the answer is that, under the current state of law, what would lack is the very material to be "*put into the machines*" [467].

Machines are conceived as, on one hand, a useful instrument to explain the laws that govern the current behaviour of legal subjects and, on the other, as the tool that makes it possible to conceive and design an alternative system of behavioural regulation capable of replacing the present one.

3.2.1. The three areas of Jurimetrics research

While interested in strongly demarcating it from jurisprudence, Loevinger refuses to give a systematic definition of the tasks and object of research of Jurimetrics. As he points put in his 1963 article, a precise definition of such discipline is

[462] Ivi, pp. 478-479; along these lines, Frederike Beutel proposed to establish an "experimental jurisprudence" based on the transfer of "*the techniques and knowledge so successfully developed in the physical sciences […] into the field of social control",* see Frederick K. Beutel, *Some Potentialities of Experimental Jurisprudence as A New Branch of Social Science*, University of Nebraska Press, Lincoln, 1957, p. 4

[463] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 482

[464] Ivi, p. 470

[465] Here Loevinger's reference point is the just published work of Norbert Wiener, *Cybernetics, or Control and Communication in the Animal and the Machine*, Wiley, New York. 1948

[466] Lee Loevinger, *Jurimetrics. The Next Step Forward*, cit., p. 471

[467] Ivi, p. 472

"*unnecessary, and perhaps impossible*" since "[*a*]*s in any pragmatic discipline, the definition will be given by the activities of its practitioners"*[468].

An attempt to coordinate the field of research was made by Hans Wolfgang Baade, who in 1963 collected and edited in the volume *Jurimetrics* a first set of research experiences. After having premised that "*field is presumably as vast as the law itself*", Baade identifies the three main area until then explored by Jurimetrics as "*electronic data storage and retrieval; behavioral analysis of decisions; and the use of symbolic logic*" [469].

While the first area of research essentially overlaps with the already diffused paradigm I have referred to as "documentary" use of computers, that of storing and retrieving information[470], the "law and logic" research is more specifically expressive of Loevinger's thesis. As seen in the previous paragraph, Loevinger did not see legal decision making as logic-driven activity. Then, Jurimetrics logic research is not aimed at explaining human legal reasoning, but to correct and channel it. To put it differently, the interest in logic is not that much in human logic, but in computer logic. While lawyers can go along with concepts and procedures that, being rooted in jurisprudence, are vague and conflicting, computers would immediately show potential inconsistencies. Indeed, as Loevinger had indicated since his 1949 article, machines operate logically and therefore only what obeys the laws of logic can be put into a machine. That which is computer's only "*inescapable theoretical limitation",* i.e., that *"every term and operation must be made explicit and nothing can be presumed, assumed, implied, or based on intuition"* becomes, in this perspective, not a bug, but a feature: the possibility to encode into the computer is seen as a logical test case[471]. The research in logic are directed precisely towards the exploration of the methods for disambiguating and correcting the illogicity of human law.

This approach is exemplified by the work of Layman E. Allen, the precursor of legal design. Assuming that "[a] *large amount of the litigation based on written instruments* […] *can be traced to the draftsman's failure to convey his meaning clearly*", Allen directs his concerns to the forms of uncertainty in legal language that are not deliberate - the cases of "*inadvertent ambiguity"*[472] or *"drafting ineptitude"* - and to the need to minimize the *"necessity for judicial legislation"*[473].

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[468] Lee Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, cit., p. 8

[469] Hans W. Baade, *Foreword*, in Id. (ed.), *Jurimetrics*, Basic Books, 1963, pp. 1-4

[470] The volume edited by Baade contained the article William B. Eldridge, Sally F. Dennis, *The Computer as a Tool for Legal Research*, in Hans W. Baade, cit, p. 78; Loevinger discusses the project **"**Lex" he was developing at the Antitrust Division's and systems for the micro-image storage of documents Lee Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, cit., pp. 22; 26

[471] As Loevinger puts it *"[…] computers can do anything we tell them to do; their only absolute limitation is our ability to provide instructions. Even this limitation has uses, for it permits us to test the clarity and consistency of our own thought and expression",* Lee Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, cit., pp. 31-32

[472] Layman. E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, in *The Yale Law Journal*, 1957, 5, p. 833

[473] Ivi, p. 878

The solution he advances is the adoption of legal documents drafting techniques centred on "*a compromise between expression in ordinary prose and expression in the mathematical notation of symbolic logic"*[474]: a syntactic normalization of norms realized by substituting connectives with logical operators and by representing the structure of the norm in a conditional form[475].

The third approach identified by Baade, that of quantitative predictions is the area of research that best expresses the behaviouristic underpinnings of Jurimetrics and the critical attitude towards legal practice. In the perspective of behaviourists, as it may sound ironical for the contemporary reader, the problematic black-boxes that it was time to open were the judges' mind, and data-driven predictions were seen as the mean to address such problem[476].

The leading scholar of the field is identified in Glendon A. Schubert, one of the most "*active in the effort to introduce behavioral science to legal studies*"[477]. In the many research he conducted at the turn of the Sixties[478], Schubert was interested in explaining the political behaviour of judges through the empirical and quantitative toolbox. As Sydney S. Ulmer highlighted, contrary to most of the fields in which social scientists operate, the behaviourist methodological approach was particularly suited for the field of law, as distinguished by a great quantity and availability of relevant data systematically recorded

> For it is well known that some forms of data, when collected in sufficient quantities, will reveal certain patterns or regularities. These regularities have analytical value. Once observed, they may be projected into the future in a predictive fashion. The lawyer, like everyone else, proceeds in this fashion. But if stare decisis is his guiding principle, he may base his prediction on one or a few cases in which decision went his way. It is beyond dispute at this point in time that with such an approach, precedent can be found for almost any point of view, either directly or by analogy. It is possible that a focus on regularized patterns of data or behavior provides a safer predictive route[479]

Along these lines, the research of Fred Kort aimed at identifying and expressing in mathematical terms a set of factual elements considered as having influenced the decisions of courts in determinate area of judicial review. Through such formalization, Kort aimed at producing accurate prediction of the decisions in the

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[474] Ivi

[475] Layman E. Allen, *Towards a Normalized Language to Clarify the Structure of Legal Discourse*, in Antonio A. Martino (ed.), *Deontic Logic, Computational Linguistics and Legal Informaton Systems*, North-Holland Publishing, Amsterdam, 1981, p. 349

[476] Cfr. Micheal A. Heater, *Legal Structures for Law Machines*, in Costantino Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, North-Holland, Amsterdam, 1982, p. 120

[477] Walter Berns, *Law and Behavioral Science,* in Hans W. Baade (ed.), cit., p. 188

[478] Glendon E. Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, in *American Political Science Review*, 1958, 52, p. 1007; Id., *Quantitative Analysis of Judicial Behaviour*, The Free Press, Glencoe, 1959; Id. (ed.), *Judicial Decision-Making*, The Free Press, Glencoe, 1963

[479] Sidney S. Ulmer, *Quantitative analysis of judicial processes: some practical and theoretical applications,* in Hans W. Baade (ed.), cit., pp. 166

remaining cases of the area of research selected. Such empirical analysis, as Kort underlines, is totally indifferent to *"what the Court said by way of reasoning*"[480].

2.3. Jurimetrics v. Jus-cybernetics

Within the debate following the publication of Baade's volume, Jurimetrics tended to be separated from the documentary and logic lines of research and identified specifically with the mathematical-statistical approach adopted particularly in behavioural analysis of decisions[481]. It is precisely in such a shape that Jurimetrics *strictu sensu* came across criticism both in America and Europe.

While some voices directly addressed the research in the field of prediction of judgments – and, in this perspective the more eloquent voice is that of Frederick B. Wiener, who defined computer predictions as a *"nonsense cubed-and worse"*[482] - the primary object of the dispute revolves around the epistemological and methodological assumptions that Jurimetrics had borrowed from behavioural science.

In parallel with a general ongoing discussion in American social science[483], in the legal field, Jurimetrics fuelled the polemic between jurisprudence and behaviourism.

In law, the behaviourist paradigm was indeed since its very start as successful as vexed. On one hand, apart from Jurimetrics itself, the enthusiasm for the behaviourist approach is evidenced by the establishment of a "*Law and Behavioral Science Program*" at Yale[484]. On the other, also within in the milieu of Legal Realism, to which Jurimetrics in part attempted to harken back, behaviourism was object or harsh criticism, as exemplified by Jerome Frank, who labelled Watson's research as pseudoscience[485].

Walter Berns directly addressed the claims and the methods adopted by Glendon, Ulmer and Kort[486]. Making reference to the work of Franklin M. Fisher[487], he highlighted that the prediction of decisions assumed a set of circumstance that do not admit legal change

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[480] Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, in *The American Political Science Review*, 1957, 51, 1, pp. 1

[481] Ejan MacKaay, *Jurimétrie, informatique juridique, droit de l'informatique*, in *Thémis*, 1971, 1, p. 4

[482] Frederick Bernays Wiener, *Decision Prediction by Computers: Nonsense Cubed-and Worse*, in *American Bar Association Journal*, 1962, 48, 11, pp. 1023-1028

[483] *Ex multis*, Charles Wright Mills, *IBM Plus Reality Plus Humanism = Sociology*, in Irving L. Horowitz (ed.) *Power, Politics and People. The Collected Essays of C. Wright Mills*, Oxford University Press, Oxford, 1963 p. 568

[484] R. D. Schwartz, *The Law and Behavioral Science Program at Yale: A Sociologist's Account of Some Experiences*, in Journal of Legal Education, 1059, 12, 1, p. 91

[485] Jerome Frank, *Courts on Trial*, cit., p. 160. As Frank adds: *"'Descartes,' remarks Bertrand Russel, 'said, 'I think, therefore I am'. Watson says, 'there are white rats, therefore I don't think'".*

[486] Walter Berns, *Law and Behavioral Science*, in Hans W. Baade (ed.), *Jurimetrics*, cit., p. 185

[487] Franklin M. Fisher, *The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods*, in American Review of Political Science, 1958, 52, p. 321

> The scientific method requires that the experiment lend itself to replication, so as to permit testing of the findings made during the first experiment. Other cases cannot be predicted with any assurance, since we can never be sure that a factor, concerning whose weight we have no information, will not be important enough to alter the decision. The case for prediction rests on the elimination of chance.

The areas in which predictions are accurate are those in which the law is settled to a point that all that quantitative methods can add is not predictive power, but an increased power of analysis. However, the areas of law which are more interesting and worth of analysis are those which are more complex and dynamic. Even without considering the methodological obstacles presented by such research, the insights provided by quantitative analysis risk of being of no use for jurists. As he put it

> If the new behavioral study of law promises merely to "identify the factors" in a case, but to do so more precisely than was done in the past, it will be doing what scholars in the past regarded as only the first step in their work.[488]

Another perspective is that offered by Julius Stone, who, in an essay titled "*Man and Machine in the Search for Justice or Why Appellate Judges Should Stay Human*", moves a comprehensive critique of the behaviouristic approach to law[489]. Stone not only criticizes the methodological feasibility of the observatory perspective claimed by behaviourists, but he also questions its relevance for a *legal* perspective that centres the analysis of decisions on a normative and engaged dimension[490].

Along these lines, the analysis of Stone addresses the relations between law and computers by introducing two particularly interesting observations. On one hand, whether or not meaningful in a legal perspective, Stone maintains, predictions of judgments *do something* to law. In this sense, Stone points to what he calls the "'*feedback' or 'Heisenberg effect' of scientific prediction on future decisions*"[491] and draws attention to the risk that such feedback "*transmutes past actual behavior into spurious present justice*"[492]. On the other hand, reflecting on Loevinger's assertion that, to be computable, "*nothing can be presumed, assumed, implied, or based on intuition*", Stone draws the conclusion that "*machines cannot will to do justice as men can do and judges are required to try to do*"[493].

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[488] Walter Berns, *Law and Behavioral Science*, cit., p. 199; cfr., also, Frederick B. Wiener, cit., p. 1028

[489] Julius Stone, *Law and the Social Science in the Second Half Century*, University of Minnesota Press, Minneapolis, 1966, p. 54

[490] Stone traces back the substantial "risk of error and naivete" of such methodology to the fact that it was developed within political sciences and simply extended to law

[491] Ivi, p. 55

[492] Ivi, p. 84

[493] Ivi, p. 82

2.3.1. The continental perspective and Juscybernetic

A parallel discussion of the relations between law and computers takes place in the European scenario. Given a set of some more or less nuanced differences between American and European perspectives – e.g., the fact that the European debate was less influenced by Behaviourism; that most European countries were distinguished by a civil law system; that Western and Eastern Europe maintained an active dialogue with researchers from Soviet Union - the discussion between the two shores of the Atlantic is distinguished by interest as well as criticism.

A cross-section of such discussion is provided by the research of Mario Losano, who develops a critique of both the method and the object of Jurimetrics through a comparative analysis of the conceptual and infrastructural differences underpinning the European and the American approach.

Losano notices that, while the European researchers had enthusiastically explored both the field of documentary systems and that of computer applications based on logic - of which he provides a detailed survey – the Jurimetrics approach had not met the same interest[494].

The reasons for the lack of success are identified in both the method and the object of Jurimetrics. First of all, Losano points to the chaotic character of such research. What Baade had presented the research in Jurimetrics as connected by their being all "*products of the 'computer revolution'*[495], Losano underlines that that was not just one, but the *only* common feature that distinguished the field founded by Loevinger[496]. The main target of criticism, however, is Loevinger's conception of science, and its applicability to Law.

Losano highlights the limits of Loevinger's empiricism. By addressing only what is quantifiable, Jurimetrics confines itself to a reductionist mathematisation that is incapable of grasping and expressing fully what the law is. As he asks, "*What is the point of talking of a measuring of the law? […] Is it permissible to call generically 'law' that which is measured and quantified?"* [497]. What Jurimetrics seems capable of providing is not much more than judicial statistics, and not an explanation of the law *tout court*. In this perspective, it is particularly interestingly, especially in light of the current developments of ALI, that Losano dedicated a paragraph to the "*disinterest of European jurists for the prediction of judgments*"[498].

The most unsurmountable obstacle that the empiricist framework assumed by Jurimetrics encounters is that an explanation of law in behavioural terms is in stark contrast with the established tradition of European legal science and its focus on the normative dimension of law.

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[494] Mario Losano, *Giuscibernetica. Macchine e modelli cibernetici nel diritto*, Einaudi, Torino 1969, p. 96
[495] Hans W. Baade, *Forewords*, cit.
[496] Mario Losano, *Giuscibernetica*, cit., p. 102
[497] Ivi, p. 104
[498] Ivi, p. 97

Losano's criticism of the approach endorsed by Loevinger, however, does not imply a denial of the potentialities of computational tools. In this light, the lack of success of Jurimetrics can be understood in light of the existence of an alternative conceptual framework under which developing the relations between computers and law. Such framework, which proved much more suited to accommodate the assumptions of European legal science, was provided by Norbert Wiener's cybernetic theory[499]. Among the first contributions, Lucien Mehl adopted cybernetic theory to provide an account of administration as the science of government[500]. Contemporarily, on the other side of the iron curtain[501], the relations between cybernetics and law were investigated at the Czechoslovak Academy of Sciences of Praha by a group of researchers leaded by Viktor Knapp[502].

In this background, Losano attempts to "put to system" the different lines of research by elaborating a conceptual basis for the field of *Jus-cybernetics*[503].

Losano identifies the main vantage offered by cybernetic theory in its explanatory power, i.e., the suitability of its vocabulary for grasping and expressing law as a system, and for giving a formal account of the dynamics of its internal and external relations; on the other hand, contrary to Jurimetrics, Juscybernetics afforded to explain law as a system of *norms*, not as a system of regular behaviours.

Losano identifies different areas of research that he couples into two macro-categories: on one hand, two levels of theoretical inquiry aiming at explaining law through juscybernetics models – i) law as a subsystem and ii) law as a system of norms; on the other hand, two levels of empirical investigation aiming at developing legal informatics application - iii) analysis of the system of norms, iv) practical application of the preceding approaches. As the Author illustrates:

> I. Law as a whole is approached as a subset of the social system. The object of research is the interactions between the two systems according to a cybernetic model.

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[499] Norbert Wiener, *The Human Use of Human Being. Cybernetics and Society*, cit., p. 117 e 134

[500] Lucien Mehl, *La Cybernetique et l'administration*, in *La Revue administrative*, 1957, 10, 58, pp. 410-419

[501] Djanger A. Kerimov, *Cybernetics and Soviet Jurisprudence*, in *Law and Contemporary Problems*, 1963, 28, p. 71

[502] Viktor Knapp, *O možnosti použití kybernetických metod v právu*, Nakladatelstvi Ceskloslovenske Akademie Ved, Praha, 1963. For the italian translation, Viktor Knapp, *L'applicabilità della cibernetica al diritto*, Einaudi, Torino, 1978; some research are available in French: Viktor Knapp, *De l'application de la cybernétique au domaine du droit*, in *Revue de droit contemporain*, 1963, 9, 13-34; Id, *Théorie du droit et cybernétique*, in *Etudes juridiques offertes à Léon Julliot de la Morandière*, Paris, Dalloz, 1964, pp. 233-242; and in English: Victor Knapp, Vladimir Vrecion, *Research on the applicability of methods of cybernetics in Law conducted in Czechoslovakia*, in *Law and Computer Technology*, 1970, 3, p. 154-162

[503] The term is identified by Losano himself as the English word for *Giuscibernetica*, see Mario Losano, *Giuscibernetica*, cit. p. 106. It is interesting to notice that the success encountered by cybernetics was such that the vocabulary of the European jurists was permeated by metaphors and appeals to Wiener's theories. As Losano pointed out, the post-war period was in fact distinguished by a widespread abuse of cybernetic notions, to the point that cybernetics was assuming a role as the jurist's security blanket, see, Mario Losano, *Giuscibernetica*, cit., pp. 147-152

> II. Law is studied as a normative, dynamic and self-regulating system; in other words, the law is understood as a whole of which not the external relation (as at n. I), but the internal relations, i.e., the relations between its singular parts are investigated.
> III. Cybernetic models, in general, should be thought with a view to their implementation through cybernetic machines. Such transition to the machine (the computer), however, presupposes a formalization of legal language: the application of formal logic to law, the analysis of legal language and the general theory of law are investigated at this third level of Juscybernetic inquiry. Here, the norm is not studied as a part of a whole (the law), of which the relationships with other parts of the same whole are addressed (as at n. II); here the norm becomes itself a subset of which the singular parts and their reciprocal relationships are studied.
> IV. Thus, those aspects of the law and of norms that *may* serve to make some legal phenomena accessible to computers have been addressed: however, the transition to concrete application poses many problems not dealt with at the preceding levels. These problems presuppose not only legal, but also technical notions: thus, the sector of the treating of legal norms as information (i.e. the sector of information retrieval) is the multidisciplinary sector that marks the border between juscybernetics and computer technology.[504]

Such hierarchical, top-down, structure reflects the perspective of inquiry whose focus is on legal systems. Losano's ambition is to bridge the gap between theoretical and empirical approaches, or rather, to enable a practical application of the theories elaborated within the tradition of continental legal science. In this perspective, cybernetic theory provides the conceptual toolbox to put to test the elaborations of legal science through legal informatics. While the concrete applications may to a great extent overlap, the assumptions motivating Juscybernetics are opposite to those of Jurimetrics. Here the object and methods of jurisprudence not only are not rejected, as in Loevinger's perspective: thanks to computers, they are augmented.

Jurimetrics and Juscybernetics have been two major attempts to make sense of and direct a magmatic technological development. The flaw that Losano attributed to Jurimetrics – that the computer was the only common thread to its research program – was in fact a common feature of a pioneering phase distinguished by a theorical attempt to chase a whirling experimentation[505] and a lively debate discussing the methods and objects of different lines of research[506].

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[504] Mario Losano, *Giuscibernetica*, cit., p. 108; my translation

[505] Such development is reflected in the first academic materials, which address a range of issues belonging to different disciplines such as IT Law and Legal Informatics. See, Roy N. Freed *Materials and Cases on Computers and Law*,1 collected for a course 1968–69; Robert P. Bigelow (ed.), *Computers and the Law: An Introductory Handbook*, Commerce Clearing House, Chicago, 1966. An overview of the diffusion of computers applications belonging to documentary paradigm is offered by the survey conducted by Bigelaw in 1973. The author identifies the use of computer by the legislative power, by the judicial system, practicing lawyers. Robert P. Bigelow, *The Use of Computers in the Law*, in *Hastings Law Journal*, 1973, 24, p. 707

[506] Giancarlo Taddei Elmi distinguishes fourteen different systematic-theoretical approaches, see Giancarlo Taddei Elmi, *Origine, sviluppo attualità e prospettive dell'informatica giuridica*, in Antonio A. Martino (ed.), *Pre-proceedings of the III International Conference on Logica, Informatica, Diritto. Legal Expert Systems. Appendix*, CNR-IDG, Firenze, 1989, p. 46

It is my opinion that, beside the success or failure of the concrete applications, as well as the fortunes of the label Juscybernetics and Jurimetrics, the expectations that such approaches expressed and the conceptual elaboration they have developed are particularly interesting for understanding not only the roots of the debate on machines and law, but also the assumptions underlying the current attempts to address law by Computational Social and Legal Science[507].
In the short term, however, such approaches were in part clouded, in part absorbed, by the success of another paradigm, that of Artificial Intelligence.

2.4. Artificial Intelligence

"Can machines think?", as Turing asked in 1950 in *Computing Machinery and Intelligence*[508], is a game-changer question for the relation between law and computers. From the perspective of the jurists, indeed, such question can be intended not only as "can machines think *like* jurists", but also as "can machine think *better than* jurists?".
A full understanding of the conceptual challenges posed by such questions requires an analysis of the background in which the English mathematician came to formulate his theory of machine intelligence. Such perspective can indeed offer a set of insights that afford to appreciate how the answers provided by Turing relate to the way in which one addresses questions such as "what do we do when we follow rules" and "what role do rules play in our life".
The very possibility of machines that think depends indeed on the articulation of an account of intelligent behaviour that circumvents the issue of meaning by building a framework in which it becomes an unnecessary concept. Turing's theses oscillate between, on one hand, a more radical ontological approach that denies the existence of such thing as meaning - intelligent behaviour is a "*just very much more complicated*"[509] stimulus-response mechanism – and, on the other, an epistemological perspective that consider meaning simply dispensable for the explanation of intelligence.
Discussing the argument from "informality of behaviour", Turing concedes that it may be impossible to formalize rules dictating *"what a man* should *do in every conceivable set of circumstances*"[510]. These would be rules with a normative character, distinguished by a standard of correctness for the rule following activity and, therefore, requiring an understanding of the correct meaning of the rule. As Turing points out, however, it may be nonetheless possible to discover and describe "*complete laws of behaviour*"[511] that, while not telling us what one should do,

[507] See, *infra*, § 2.6.
[508] Alan. M. Turing, *Computing Machinery and Intelligence*, in *Mind*, 1950, 59, 236, p. 433
[509] Peter Winch, *The Idea of A Social Science and Its Relation to Philosophy*, Routledge, 2008, London, p. 68
[510] Alan. M. Turing, *Computing Machinery and Intelligence*, cit., p. 452
[511] Ivi

could tell us what one would in fact do[512]. According to this view, human "rule-following behaviour" can be explained in the same fashion as the movement of planets according to orbits, i.e., through a formalization of a set of discrete relations that accord with a rule.
By advancing such a *reductio ad unum* of all the possible understanding of rules, Turing introduces and develops a level of analysis that reduce to each other also a threefold kind of explanation: mechanical-physicalist, psychological and behaviouristic. Elaborating an account of information-processing and learning as procedures consisting of a set of steps carried out according to mechanical rules, Turing explains intelligence as the emerging result of a mechanism that not only is, in itself, devoid of intelligence but that, above all, is devoid of meaning.
In the following paragraphs, I will undertake a further exploration of Turing's theses with the goal of outlining an account on the conceptual framework that sustained and constrained the first developments of the Artificial Intelligence research program.
I will then trace the connections that, as for the Seventies, Artificial Intelligence started to establish with the legal field, highlighting how AI determined a change of gear not only in the research efforts but, before all, in the expectations that jurists develop in relation to the question "what can we do with computers".

2.4.1. "Can machines think?"

As Stuart Shanker points out, Turing addressed the *philosophical question "Can machines think?"* by answering the different, *psychological*, question "*Can thought be mechanically explained?"*[513]. It is indeed by giving a mechanical explanation of thought that Turing can bridge the gap necessary to ascribe intelligence to machines.
The first step in this direction is represented by the account of calculation that Turing elaborates in *On Computable Numbers*[514]. Here Turing equates the operations of a calculating machine - *"[t]he possible behaviour of the machine at any moment is determined by the m-configuration q_n and the scanned symbol $O(r)$"*[515] – and the activity carried out by a computing human: *"[t]he behaviour of the computer at any moment is determined by the symbols which he is observing, and his 'state of mind' at that moment […]"*[516].
For the successful description of the machine as *calculating*, what Turing does is reducing human calculation to a matter or mere mechanics. As Shanker highlights, the calculus can be defined by Turing as "purely mechanical" only by breaking down the rules of calculation *"into a series of* meaningless *subrules, each of which*

[512] Hubert Dreyfus, *What Computers Still Can't Do*, cit, p. 192
[513] Stuart Shanker, *Wittgenstein's Remarks on the Foundations of AI*, Routledge, London, 1998, p. 34
[514] Alan M. Turing, *On Computable Numbers, with an Application to the Entscheidungsproblem*, in *Proceedings of the London Mathematical Society*, 1937, 42, 2, p. 230
[515] Ivi
[516] Alan M. Turing, *On Computable Numbers*, cit., p. 250

is devoid of cognitive content, and for that reason are such that 'a machine could carry it out'"[517].

> Turing's analysis reduces *calculation* to a level where there is no difference between *following a rule mechanically* and *following a 'mechanical rule'*: i.e., where the 'utterly simple rules' of algorithms are collapsed into 'simple mechanical rules'.[518]

In this perspective, what we observe when humans perform a correct calculation is the overt emerging behaviour that is *caused* by an unconscious mechanical process consisting in simple discrete steps.

The greatness of Turing's mechanist account lies in the fact that the explanation he provided of calculation could have been extended to any other complex behaviour: by addressing it to as a sequence of mechanical and unconscious elementary steps formalizable as an effective procedure, also thinking could have been given a mechanical explanation.

For justifying the attribution of intelligence to computational machines, Turing provides an account of learning that aim at explaining – without in its turn assuming - intelligence. For this purpose, Turing harkens back to the behaviouristic picture that describes stimulus-responses and cognitive abilities as phenomena that present only quantitative, not qualitative differences, lying on a *continuum* along the line of which any change can be explained in terms of complexity, not of kind[519]. This way, Turing explains intelligence as a function of the complexity of the stimulus—response connections that an organism, as much as a mechanism, is capable to forge. Moreover, Turing was able to overcome the behaviourist rejection of the psychologist concept of mental states – the behaviourist has to drop off "*from his scientific vocabulary all subjective terms such as sensation, perception, image, desire, purpose, and even thinking and emotion as they were subjectively defined*"[520] – by transforming mental states in observable machine-state configurations[521]. Having thus bridged the gulf between behaviourism and psychologism, Turing is able to explain the emergence of intelligence precisely by extending to his machines the behaviourist account of learning as a stimulus-response mechanism.

On the basis of the continuum assumption, the question of machine intelligence becomes empirical[522]. In this sense, the *continuum* allows to flatten any conceptual

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[517] Stuart Shanker, *Wittgenstein's Remarks on the Foundations of AI*, cit., p. 10
[518] Ivi, p. 28
[519] Stuart Shanker, *Wittgenstein's Remarks on the Foundations of AI*, cit., p. 45
[520] John B. Watson, *Behaviourism*, Kegan Paul, Trench, Trubner, and Co., London, p. 2
[521] Cfr. Stuart Shanker, *Wittgenstein's Remarks on the Foundations of AI*, cit., p. 40
[522] Compare, also, Edward A. Feigenbaum, Julian Feldman, *Introduction*, in Id (eds.), *Computers and Thought*, McGraw-Hill, New York, 1963, p. 3. As Paul Armer put it, "*the question of how far we can push machines out along that continuum is to be answered by research, not dogma*", Paul Armer, *Attitudes Toward Intelligent Machines*, in Edward A. Feigenbaum, Julian Feldman (eds.), *Computers and Thought*, cit., p. 391

distinction between man and machine through a mereological approach[523]: the machine can be described as calculating in that the brain can be described as calculating, the machine can be said to learn in that the neural system can be said to learn. Based on these premises, learning can be explained as the process of stimulus-response through which new internal rules get embodied - in the case of the human – or hardwired, in the case of the machine program.

Lastly, through the *continuum picture*, Turing closes the circle of his account of what we do when we follow rules: by postulating the identity of human and machine learning, the activity of learning a rule is in fact translated into a "being guided by a rule" that comes down to a causal mechanism such as the mechanical procedure that the computer carries out does when modifying its program[524].

It is precisely on the basis of such a theory that, few years after the publication of Turing's article, in 1955, John McCarthy, Marvin L. Minsky, Nathaniel Rochester and Claude E. Shannon drafted the famous proposal that marks the beginning of the AI research program: based on the assumption that "*every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it*", the Authors decided to direct their research effort towards the attempt "*to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves"* [525].

The first decade of AI research, whose results are collected in the volumes edited by Feigenbaum and Feldman[526] and Minsky[527], is distinguished by the shift from a psychological-centred approach – represented by the research in Cognitive Simulation conducted by Simon and Newell[528] - to the *"attempt to build intelligence machines without any prejudice toward making the system simple, biological, or humanoid*"[529]. Intelligent behaviour does not necessarily need to be strictly human-like. The efforts of AI researchers working under the paradigm of knowledge-engineering were guided by the assumption that intelligent behaviour is a function of both the heuristics employed by an information-processing program and the quality and structure of the knowledge offered to such program in the form of data.

This sort of Platonic-Fregean account of the relation expertise-knowledge, depicted as an effective procedure carried out on explicit elements defined in terms of necessary and sufficient conditions, underpins the AI efforts towards modelling

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[523] Maxwell R. Bennett, Peter M. S. Hacker, *Philosophical foundations of neuroscience*, Blackwell Publishing, Oxford, 2003, p. 68; p. Peter M. S. Hacker, 148

[524] cfr. Stuart Shanker, *Wittgnestein's Remarks on the Foundations of AI*, cit., p. 56

[525] John McCarthy, Marvin L. Minsky, Nathaniel Rochester, Claude E. Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, 1955

[526] Edward A. Feigenbaum, Julian Feldman (eds.), *Computers and Thought*, cit.

[527] Marvin Minsky (ed.), *Semantic Information Processing*, MIT Press, Cambdridge, 1969

[528] Allen Newell, Herbert A. Simon, *GPS: A Program which Simulates Human Though, in* Edward A. Feigenbaum, Julian Feldman (eds.), cit., p. 263

[529]Marvin Minsky (ed.), *Semantic Information Processing*, cit., p. 6

domain-expert as well as common-sense knowledge[530]. In this way, while departing from the cognitive-psychological paradigm, AI research extends and entrenches the idea that knowledge, experience, understanding and action could be explained, formalized and processed by framing them as a set of meaningless rules, according to the account provided by Turing.
According to the well-know and debated account provided by Dreyfus[531], the so called GOFAI – "*Good Old-Fashioned AI*" [532] – paradigm identified the intelligent human being with a general-purpose symbol-manipulating device on the basis on four assumptions:

> 1. A biological assumption that on some level of operation - usually supposed to be that of the neurons - the brain processes information in discrete operations by way of some biological equivalent of on/off switches.
> 2. A psychological assumption that the mind can be viewed as a device operating on bits of information according to formal rules. […]
> 3. An epistemological assumption that all knowledge can be formalized […]
> 4. Finally, since all information fed into digital computers must be in bits, the computer model of the mind presupposes that all relevant information about the world, everything essential to the production of intelligent behavior, must in principle be analysable as a set of situation-free determinate elements. This is the ontological assumption that what there is, is a set of facts each logically independent of all the others[533]

2.5. (Good Old-Fashioned) Artificial Intelligence and Law

The encounter between Law and Artificial Intelligence can be seen as the answer to an increasing dissatisfaction with the results obtained in computer and law research. The common feeling was that it was time to overcome the boundaries of the documetary paradigm, almost entirely focused on the development of legal information retrieval system. That which, during the Forties, was the great aspiration of Kelso[534] - the computer as a "storehouse" of legal information -, at the turn of the Seventies had become a too tight-fitting metaphor that devalued "*the cognitive potential of computers*"[535].

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[530] John McCarthy, *Programs with common sense*, in Marvin L. Minsky (ed.), *Semantic Information Processing*, cit., p. 410; the developments of such paradigm are exemplified by Minsky's idea of frames, i.e., "*data-structures to represent stereotyped situations*" Marvin Minsky, *A Framework for Representing Knowledge*, in Patrick H. Winston (ed.), *The Psychology of Computer Vision*, McGraw-Hill, New York, 1975, p. 212
[531] Dreyfus's criticism earned him the name of *"black knight of AI*" Frank Rose, *The Black Knight of AI*, in *Science*, 1985, 6, 2, p. 46
[532] As successfully named by Haugeland, see John Haugeland, *Artificial Intelligence: The Very Idea*, The MIT Press, Cambridge, 1985, p. 112
[533] Hubert Dreyfus, *What Computers Still Can't Do*, cit., p. 156
[534] See, *supra*, § 2.1
[535] Bruce G. Buchanan, Thomas E. Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, in *Stanford Law Review*, 1970, 23, p. 43

Such potential could have been exploited to answer need other than those of legal practitioners[536]. As argued by Luigi Lombardi Vallauri, restricting the use of computers to information retrieval frustrates the role that such tools may play in a democratic perspective: only the development of meta-documentary programs could have made the computer a tool capable of affording the layperson to dispense with the need of consulting an intermediary[537].

The key for the emerging rearticulation of the relations law-computer lies once again in the exploration of new metaphors bridging the two fields.

On one hand, it was argued that "[*t*]*here is more than a superficial resemblance between laws and computer programs"*[538]. Given this premise, the "essential questions" become "*how can the computer be used to discover and to apply the legal norms embodied in the sources of law?"*; how can the computer be used to store and retrieve "*not just the texts of the law but the legal norms which they contain*"[539]?

On the other hand, it was claimed that by "*codifying the decision-making processes of lawyers*" one could design a computation model of legal reasoning and build "*a system that would produce legal arguments"*[540]. It is precisely through these "speculations", as presented by Bruce Buchanan and Thomas Headrick in a seminal article, that the path of AI and Law starts in the beginning of the Seventies[541]. By joining forces with computer scientists, not only jurists could have improved "*the study and performance of their reasoning processes*", but also contribute to the development of machines capable of operating "*on the legal data base the way a lawyer does*"[542].

The depiction of legal practice offered by the Authors as premise of their arguments in some respect resembles that presented by Loevinger[543]: also Buchanan and Headrick, indeed, point to obscurity of legal reasoning and the lack of a systematic analysis of such processes. However - and in that lies the essential difference with Loevinger's assumptions - for Buchanan and Headrick the computer is seen as the instrument that enables to both open the black box and study and formalize the inner legal reasoning process.

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[536] Bryan Niblett (ed.), *Computer Science and Law: An Advanced Course*, Cambridge University Press, Cambridge, 1980, pp. 7,

[537] Luigi Lombardi Vallauri, *Democraticità dell'informazione giuridica ed informatica*, in *Informatica e diritto*, 1975, 1, 1, p. 1

[538] Bryan Niblett (ed.), *Computer Science and Law*, cit., p. 8

[539] Ivi

[540] Bruce G. Buchanan, Thomas E. Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, cit., pp. 45, 51

[541] Ivi

[542] Ivi, pp. 40-41. Moreover, the challenge that the two Authors launch is depicted as a win-win scenario: the attempt to build such machines would have gone hand-in-hand with an improving understanding of both legal reasoning and of the problem-solving capacities of machines.

[543] *Supra*, § 2.2.

As the Authors claim, "[r]*esearch in artificial intelligence* […] *has illuminated our capacity to use computers to model human thought processes"*[544]. In this sense, their points of reference are represented by the research of Simon and Newell on Cognitive Simulation and especially by the Knowledge Engineering approach developed by Feigenbaum[545]. On one hand, as they put it:

> To begin designing […] a system, we have to know more about the mental processes a lawyer uses to solve his legal problems. Only in this way can we begin to structure the processes so that a computer could imitate them[546]

In this perspective, the Authors share with the cognitive approach the basic assumption that "[i]*f the fit of such program were close enough to the overt behaviour of our human subject – i.e., to the protocol – then it would constitute a good theory of the subject's problem solving"*[547]. This is reflected by the process of research and development outlined by the Authors: the starting point of their research is the attempt to outline two models "*derived from introspection and tested upon our colleagues*" aiming at providing a "*frame-work for looking at lawyers' underlying thought processes by describing a portion of their cognitive task"*[548].

On the other hand, in order to deal with the processes of legal reasoning thereby identified – i.e., "*(1) finding conceptual linkages in pursuing goals, (2) recognizing facts, (3) resolving rule conflicts, and (4) finding analogies"*[549] – Buchanan and Headrick are inspired especially by the knowledge representation techniques and the forms of reasoning developed within the project Heuristic DENDRAL, a program developed by a team lead by Feigenbaum and of which Buchanan was a member.

In essence, the way out of the numerous challenges inherent in extending AI models to the legal field, as the Authors point out, cannot be but that of addressing them within the frame of a computational theory of legal reasoning. In such a way, however, the Authors' proposal explicitly assumes that legal reasoning is computable and implicitly excludes any other account centred on the non-discrete

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[544] Ivi, p. 40

[545] Edward A. Feigenbaum, *The Art of Artificial Intelligence: Themes and case studies of knowledge engineering*, Stanford Heuristic Programming Project, Memo HPP-77-25, August 1977, Computer Science Department, Report No. STAN-CS-77-621, available at http://i.stanford.edu/pub/cstr/reports/cs/tr/77/621/CS-TR-77-621.pdf. Moreover, the Authors refer to the program STUDENT developed by Daniel Bobrow and the Semantic Memory Program developed by Ross Quillian. See Daniel Brobow, *Natural Language Input for a Computer Problem-Solving System*, in Marvin Minsky (ed.), cit., p. 135; Ross Quillian, *Semantic memory*, in Marvin L. Minsky (ed.), *Semantic Information Processing*, cit., p. 227. For a critique see, Hubert Dreyfus, *What Computers Still Can't Do*, cit., pp. 132, 142

[546] Bruce G. Buchanan, Thomas E. Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, cit., p. 51

[547] Allen Newell, Herbert A. Simon, *GPS: A Program which Simulates Human Thought*, in Edward A. Feigenbaum (ed.), *Computers and Thought*, McGraw-Hill, New York, 1963, p. 283

[548] Bruce G. Buchanan, Thomas E. Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, cit., p. 47

[549] Ivi, p. 53

nature of the intellectual activities performed by jurists. Their model is indeed founded on a twofold assumption relating to human problem-solving: i.e., that "*(1) problems can be broken down into a set of subproblems, and (2) the solution to any subproblem requires a series of decisions that are governed by decision rules*"[550].
One may wonder in which sense are such "*rules*" to be intended, and the answer is provided by the Authors' account of the twofold set of potential obstacles that may hinder the implementation of such mechanism in a computer program. The first one, which we may be called the "Kantian" obstacle, relates to lawyers and their potential inability to "articulate *their methods and thought processes*"[551]. The other relates to the "*rigorous demands of computer programming languages*"[552].
What the highlighting of such challenges points to, in fact, is not much the need of questioning the assumption of the rule-guided nature of legal reasoning, or rather, the account of rules that such picture assumes, but the need of both getting better insights on such process and elaborating more expressive programming languages.
Working within the general AI paradigm, as shown by the first pioneering projects[553], the task of AI and Law will be articulated in the attempt to provide answers to the questions such as "what kind of knowledge is required to solve legal problems? How can it be represented? Which computational procedures can be used to process such knowledge?".

2.5.1. The spring of the AI and Law Community

Beginning on the second half of the Seventies and then throughout the Eighties, that of AI and Law establishes itself as a community united by a set of shared methodologies and ambitions[554]. Between the many possible "formalizations" of the research program of such community, that expressed by Edwina Rissland in 1990 identifies as the goals of AI and Law research:

> 1. Reason with cases (both real and hypothetical) and analogies; 2. Reason with rules; 3. Combine several modes of reasoning; 4. Handle ill-defined and open-textured concepts; 5. Formulate arguments and explanations; 6. Handle exceptions to and

[550] Ivi
[551] Ivi, p. 45
[552] Ivi, p. 46. As the Authors add, it is likely that the lawyers will be frustrated by "*the gap between what they want to say and what the computer language lets them say"*
[553] As the research that McCarthy conduced on TAXMAN as of 1972, the program JUDITH, and the approach adopted in the project LEGOL by the team led by Ronald Stamper at the London School of Economics. See L. Thorne McCarty, *Reflections on "Taxman": An Experiment in Artificial Intelligence and Legal Reasoning*, in *Harvard Law Review*, 1977, 90, 5, pp. 837-893; Id., *The TAXMAN Project: Towards a Cognitive Theory of Legal Argument*, in Bryan Niblett (ed.), *Computer Science and Law: An Advanced Course*, Cambridge University Press, Cambridge, 1980, p. 23; Walter G. Popp, Bernhard Schlink, *JUDITH, A Computer Program to Advise Lawyers in Reasoning a Case*, in *Jurimetrics*, 1975, 15, p. 303; Ronald Stamper, *LEGOL: Modelling legal rules by computer*, in Bryan Niblett (ed) *Computer Science and Law*, Cambridge University Press, Cambridge, 1980, p. 45
[554] The first international meeting was organized in 1979 in Swansea by Bryan Niblett, see Bryan Niblett (ed.), *Computer Science and Law: An Advanced Course*, cit.. In 1981 the First International Conference on Informatica, Logica, Diritto was organized in Florence and, in 1987, the first International Conference on Artificial Intelligence and Law (ICAIL) was held in Boston.

> conflicts among items of knowledge, like rules; 7. Accommodate changes in the base of legal knowledge, particularly legal concepts, and handle non-monotonicity, that is, changes in which previous truths no longer hold as more becomes known; 8. Model common sense knowledge; 9. Model knowledge of intent and belief; 10. Perform some aspects of natural language understanding[555]

Contemporaneously, Thorne McCarty distinguished the two main motivations driving the first phase of AI and Law research: on one hand, a practical motivation, that of building "*intelligent legal information systems that can assist both lawyers and nonlawyers in their interactions with both legal and nonlegal rules"*; on the other hand, a theoretical motivation, that of "*trying to gain a better understanding of the process of legal reasoning and legal argumentation, using computational models and techniques*"[556].

Even if, in practice, the two motivations often go hand in hand – a better understanding of legal reasoning benefits the design of tools directed to practitioners, and vice versa – it is worth highlighting that, while the cognitive approach was receding in AI, AI and Law was largely interested in using computers to explain the actual functioning of human legal reasoning. Whether, on one hand, this may be interpreted as a feature descending from the focus, in the legal realm, on issues of legitimation and validity - we want computers to decide as humans do according to law, on the other it can be seen as the acknowledgment that an explanation of law could not be provided only by looking at "the theory", but only by opening the human black box. In this sense, a comment made by Danièle Bourcier, who encourages the study of "*the judge's reasoning (rather than judicial reasoning)*", is particularly telling[557].

The constant confrontation with the epistemological plausibility, the concrete computational viability and the legal relevance of the specific entanglement of the relation law-jurist-machine advanced by the AI and Law community is reflected in the way in which knowledge representation and reasoning models are articulated throughout the first decades of research.

The first of the knowledge representation challenges faced by the AI and Law community was one which is peculiar of the legal field, that is how to represent legal rules and the relations between them. The assumption is clearly presented by Jon Bing:

> There can be a dependency between causal and legal relations. An observer can find a causal relation between a criminal act and custodial sentence, but behind this causal relation there will be a normative relation since it is a legal norm that establishes that

[555] Edwina L. Rissland, *Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning*, in *The Yale Law Journal*, 1990, 99, p. 1963

[556] Thorne L. McCarty, *Artificial Intelligence and Law: How to Get There from Here*, in *Ratio Juris*, 1990, 3, 2, p. 189

[557] Danièle Bourcier, *The Judge's Discourse: Research on the Modelization of Reasoning in Law*, in Costantino Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, cit., p. 106

> the criminal act has to be classified as a "S" to which the custodial sentence "C" is connected.
> It is easy to see that a normative relation can be represented as a causal relation (or rather probabilistic). Currently, this is what it is assumed in representing a legal norm in a computer: the normative relation established by the legal norm is represented as a causal relation governed by the program of the computer[558]

As with Turing for machine intelligence, such a translation of norms into causal mechanisms defines the great power as much as the limitations of machine *legal* intelligence.

The implementation of the first Legal Information Systems[559] is distinguished by an approach oriented towards the modelling of programs that, as Prakken and Sartor highlight, reason *with* the law, which is represented as an axiomatic system[560]. Legal knowledge is represented as a concatenation of rules tied by relations of implication, while statutory reasoning is carried out through logical deduction[561]. The Eighties are marked by a considerable interest in developing such paradigm. The representation of law as executable logic program is experimented in particular by the Logic Programming Group at the Imperial College, that codified the British Nationality Act 1981[562] and the Supplementary Benefit Legislation[563].

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[558] Jon Bing, *Sistemi deontici: un tentativo di introduzione*, in Antonio A. Martino, Enrico Maretti, Costantino Ciampi (eds.), *Logica, Informatica e Diritto*, Le Monnier, Firenze, 1978, p. 123, my translation

[559] Costantino Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, North-Holland, Amsterdam, 1982; Antonio A. Martino, *Deontic Logic, Computational Linguistics and Legal Information Systems*, North-Holland, Amsterdam, 1982

[560] Henry Prakken, Giovanni Sartor, *Law and Logic: a Review of an Argumentation Perspective*, in *Artificial Intelligence and Law*, 2015, 227, p. 217

[561] Kevin. D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age*, Cambridge University Press, Cambridge, 2017, p. 38

[562] Marek J. Sergot, Fariba Sadri, Robert A. Kowalski, Frank Kriwaczek, Peter Hammond, H. T. Cory, *The British Nationality Act as a Logic Program*, in *Communications of the ACM*, 1986, 29, 5, p. 370

[563] Trevor J.M. Bench-Capon, Gwen O. Robinson, Tom W. Routen, Marek J. Sergot, *Logic programming for large scale applications in law: A formalisation of Supplementary Benefit Legislation*, in *Proceedings of the First International Conference on Artificial Intelligence and Law*, ACM Press, New York, 1987, pp. 190. Since the first attempts to design operative computational models of legal systems, the degree of isomorphism required for the representation of statutes have been object of debate. See, for instance, the attempt to develop a formalized representation of the Argentinian *ley 9688* concerning injuries on workplace in Ricardo A. Guibourg, *Formalizzazione del ragionamento in materia di infortuni sul lavoro*, in Antonio A. Martino, Enrico Maretti, Costantino Ciampi (eds.), *Logica, Informatica e Diritto*, Le Monnier, Firenze, 1978, p. 244. Beside Sergot's approach, based on resemblance, Jurgen Karpf developed the concept of isomorphic representation and defined it as the representation in which *"(i) Each legal source is represented separately. (ii) The representation preserves the structure of each legal source. (iii) The representation preserves the traditional mutual relations, references and connections between the legal sources. (iv) The representation of the legal sources and their mutual relations.., is separate from all other parts of the model, notably representation of queries and facts management. (v) If procedural law is part of the domain of the model then the law module will have representation of material as well as procedural rules and it is demanded that the whole system functions in accordance with and in the order following the procedural rules*". See, Jurgen Karpf, *Quality assurance of legal expert systems*, in

In parallel to the attempts directed towards specific bodies of law, the AI and Law community elaborated an ontology of the legal relations, from the characterization of deontic modalities[564], to the rights related to other's obligations, permissive rights, *erga-omnes* rights, normative conditionals, liability rights, different kinds of legal powers, potestative rights (rights to produce legal results), result-declarations (acts intended to produce legal determinations), and sources of the law[565].

Referring in particular to analogical reasoning, already in 1981 Leo Reisinger affirmed that "*The application of AI to legal systems is hindered by the fact that some of the most important elements of legal decision-making have so far not been satisfactorily described by means of formal logic*"[566]. In a way, those which were seen as the inherent limits of the rule-based approach[567] were taken by the AI and Law community as the evidence motivating the exploration of different computational formalisms capable of expressing "what jurists do" when they reason *about* the law and the relations between law and facts.

The need to both enlarge the knowledge base to include those rules that are not expressed into statutes, and develop more complex models for expressing the process of legal reasoning is clearly articulated by Anne Gardner in PhD dissertation, published in 1987 as *An Artificial Intelligence Approach to Legal Reasoning*[568] and in the research conducted by Edwina Rissland, Kevin Ashley and David Skalak. What these researchers proposed was to address case-based reasoning by developing a formalism capable of complementing those forms of rule-based processes used in statutory reasoning with models capable of both, representing facts, principles and values, and reason with them through analogy.

On the basis of the advances in both rule-based and case-based systems, throughout Nineties AI and Law researchers headed towards the development of new forms of

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Antonio A. Martino (ed.), *Pre-Proceedings of the Third International Conference on Logica, Informatica, Diritto, Volume I*, CNR, Florence, 1989, p. 411. The notion of isomorphism was then elaborated and made popular especially thanks to the work of Trevor Bench-Capon. See Trevor J. M. Bench-Capon, *Deep Models, Normative Reasoning and Legal Expert Systems*. In *Proceedings of the Second international conference on Artificial Intelligence and Law*, ACM Press, New York, 1989, p. 37–45; Trevor J. M. Bench-Capon, Frans P. Coenen, *Isomorphism and legal knowledge based systems*, in *Artificial Intelligence and Law*, 1992, 1, p. 65

[564] Leyman E. Allen, Charles S. Saxon, *Analysis of the logical structure of legal rules by a modernized and formalized version of Hohfeld fundamental legal conceptions*, in Antonio A. Martino, Fiorenza Socci Natali (eds.), *Automated Analysis of Legal Texts*, North-Holland, Amsterdam, 1986, p. 385.

[565] Giovanni Sartor, *Fundamental Legal Concepts: A Formal and Teleological Characterisation*, in *Artificial Intelligence and Law*, 2006, 14, 1-2, p. 101

[566] Leo Reisinger, *Legal Reasoning by Analogy. A Model Applying Fuzzy Set Theory*, in Costantino Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, cit., p. 151;

[567] Philip Leith, *Clear rules and legal expert systems*, in Antonio A. Martino, Fiorenza Socci Natali (eds.), *Automated Analysis of Legal Texts*, North-Holland, Amsterdam, 1986, p. 661

[568] Anne von der Lieth Gardner, *An Artificial Intelligence Approach to Legal Reasoning*, The MIT Press, 1987

logics capable of expressing the non-monotonic dialectic that distinguishes legal argumentation[569].

In any case, both when intended narrowly, as in rule-based system, or more broadly, as in case-based system and computational models of legal arguments, legal rules are necessarily understood as formal procedures akin to a *calculus*.

2.6. Law and computation after the data-driven turn

The most recent successes of Artificial Intelligence are due to a change of paradigm, or better, to the advancements that have been registered in some fields of research thanks to the development of an approach which, at least in the first decades of AI research, was recessive, that is, machine learning and connectionism. As discussed above, from the work of Turing, the question of machine intelligence has been tied with the questions of learning: as the English mathematician put it, the goal of his research was to develop "*a machine that can learn from experience*", and the "*mechanism*" for achieving such goal was "*the possibility of letting the machine alter its own instructions*"[570].

In the wake of the resurgence of the research on the connectionist paradigm[571], from the mid-Eighties, the interest in machine learning started to shift from the rule-based approach that distinguished GOFAI to inductive methods[572]. For the purpose of the present work, among the most relevant developments led by such a paradigm shift are those relating to the field of natural language processing (NLP)[573]. The combination between the availability of ever larger corpora of data representing language, the increasing development of processing techniques based on statistical approaches and, more recently, the diffusion of pre-trained linguistic models[574] has enabled the automation of many tasks which previously required human intervention, i.e., labelling of data and feature engineering.

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569 Trevor Bench-Capon, *Argument in Artificial Intelligence and Law*, in: Proceedings of JURIX 1995, 1995, pp. 5–14; Id., *Before And After Dung: Argumentation in AI And Law,* in *Argument & Computation*, 2020, 11, 1–2, pp. 221–238

570 Alan M. Turing, *Lecture to the London Mathematical Society on 20 February 1947*, in *Barry Cooper, Jan van Leeuwen (eds.), Alan Turing: His Work and Impact*, Elsevier, Amsterdam, 2013, p. 496

571 David E. Rumelhart, James L. McClelland, PDP Research Group, *Parallel Distributed Processing, Explorations in the Microstructure of Cognition*, Bradford Book, 1986

572 Ryszard S. Michalski, *A Theory and Methodology of Inductive Learning*, in Id., Jaime G. Carbonell, Tom M. Mitchel (eds.), *Machine learning*, cit., p. 83; Pat Langley, *The changing science of machine learning*, in *Machine Learning*, 2011, 82, p. 275

573 For an overview of the first programs and approaches in the field of language translation, information retrieval, human-machine interaction developed within the GOFAI paradigm, see Avron Barr, Edward A. Feigenbaum, *The Handbook of Artificial Intelligence*, Volume I, William Kaufmann, Los Altos, 1981, pp. 226 ff; 323 ff

574 Mark Johnson, *How the statistical revolution changes (computational) linguistics,* in *Proceedings of the EACL 2009 Workshop on the Interaction between Linguistics and Computational Linguistics*: *Virtuous, Vicious or Vacuous?* Association for Computational Linguistics, Stroudsburg, 2009, p. 3; Yorick Wilks, *Computational Linguistics: History*, in Keith Brown (ed.), *Encyclopedia of Language and Linguistics*, 2nd Edition, Elsevier, Amsterdam, 2006, p. 761; XiPeng Qiu, TianXiang Sun, YiGe

While the interest in exploring the connectionist paradigm has emerged within the AI and Law community already in the late Eighties and the early Nineties[575], only the more recent "virtuous circle" between the increasing availability of data, the growth of computational power and development of learning algorithms has fostered a widespread application of methods based on machine learning to the legal field[576].

Through the application of such techniques, legally relevant texts are turned into data and become the direct object of quantitative statistical analysis which afford the development of a "distant reading" approach to law[577]. In this light, network analysis[578], that is, the computational analysis of the network of links between different items of information representing, for instance, case law[579] or legislation[580], can be employed for purposes such as the improvement of information retrieval or the mapping of legal change[581].

Xu, YunFan Shao, Ning Dai, XuanJing Huang, *Pre-trained models for natural language processing: A survey*, in *Science China*, 2020, 63, 10, p. 1872

[575] Richard K. Belew, *A connectionist Approach to Conceptual Information Retrieval*, in *Proceedings of the First International Conference on Artificial Intelligence and Law*, ACM Press, New York, 1987, p. 116; Gert-Jan van Opdorp, R.F. Walker, J.A. Schrickx, C. Groendijk, P.H. van den Berg, *Network at work, a connectionist approach to non-deductive legal reasoning*, in *Proceedings of the Third International Conference on Artificial Intelligence and Law*, ACM Press, New York, 1991, p. 278; Trevor Bench-Capon, *Neural Networks and Open Texture, in Proceedings of the Fourth International Conference on Artificial Intelligence and Law*, ACM Press, New York, 1993, p. 292; John Zeleznikow, Andrew Stranieri, *The Split-Up System: Integrating Neural Networks and Rule Based Reasoning in the Legal Domain*, in *Proceeding of the Fifth International Conference on Artificial Intelligence and Law*, ACM Press, New York, 1995, p. 185

[576] Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 *Georgia State* University Law Review, 2019, 35, p. 1305; David Lehr, Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, in *University of California Davis Law Review*, 2017, 51, p. 653; Henry Surden, *Machine Learning and Law*, in *Washington Law Review*, 2014, 89, p. 87

[577] Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., pp. 169 ff , 234 ff; Michael A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data*, cit.,, p. xvii, xix; Michael A. Livermoore, Daniel N. Rockmore, *Distant Reading the Law*, in Id. (eds.), *Law as Data*, cit., p. 3; Nina Varsava, *Computational legal studies, digital humanities, and textual analysis*, in Ryan Whalen (ed.), *Computational legal studies*, cit., p. 29; Franco Moretti, *Distant Reading*, Verso, London, 2013; See, *Artificial Intelligence and Law, Special Issue: Legal Text Analytics*, 2018, 26, 2

[578] Radboud Winkels, Nicola Lettieri, Sebastiano Faro (eds.), *Network Analysis in Law*, Edizioni Scientifiche Italiane, Napoli, 2014

[579] Dafne van Kuppevelt, Gijs van Dijck and Marcel Schaper, *Purposes and challenges of legal network analysis on case law*, in Ryan Whalen (ed.), *Computational legal studies*, cit., p. 265; Henrik Palmer Olsen and Magnus Esmark, *Needles in a haystack: using network analysis to identify cases that are cited for general principles of law by the European Court of Human Rights*, in Ryan Whalen (ed.), *Computational legal studies*, cit., p. 293

[580] Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., p. 70; Adam Badawi, Giuseppe Dari-Mattiacci, *Reference Networks and Civil Codes*, in Michael A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data*, cit., p. 335; p. 143; Romain Boulet, Pierre Mazzega, Danièle Bourcier, *Network approach to the French system of legal codes part II: the role of the weights in a network*, in *Artificial Intelligence and Law*, 2018, 26, 1, p. 23; Id., (2011) *A network approach to the French system of legal codes—part I: analysis of a dense network*, in *Artificial Intelligence and Law*, 2011, 19, 4, p. 333; Marios Koniaris, Ioannis Anagnostopoulos, Yannis Vassiliou, *Legislation as a complex network: Modelling and analysis of European Union legal sources*, in Rinke Hoekstra (ed.), *Legal Knowledge and Information Systems*, IOS Press, Amsterdam, 2014

[581] Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., p. 354

Particular attention has been paid to the data-driven techniques developed for the prediction of legal outcomes. "*Quantitative Legal Predictions*"[582] have been identified as the instrument for answering a multifaceted array of questions, such as

> Do I have a case? What is our likely exposure? How much is this going to cost? Are these documents relevant? What will happen if we leave this particular provision out of this contract? How can we best staff this particular legal matter?[583]

The adoption of Machine Learning and Deep Learning techniques in the field of computational legal predictions has marked a change of direction which, on one hand, deviates from the approaches developed by the AI and Law community[584] and, on the other, gets closer to the perspective of Jurimetrics. In this respect, the focus of data-driven predictions is strongly centred on predictive performance and, in some cases, the latter supersedes the *prima facie* relevance of the data used to train the predictive system. Whether, on one hand, some approaches are based on the annotation of the text of legal decisions or also of the arguments thereby contained[585], on the other hand, accurate predictive models are built on the basis of metadata, i.e., data concerning judges, time of decision, etc.[586], or behavioural data such as attorney attorneys' vocal features "*in the first three seconds of speech"*[587].

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[582] Daniel. M. Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, in *Emory Law Journal*, 2013, 62, p. 909

[583] Ivi, pp. 912; 928. For an overview of the debate concerning the use of such tools by legal practitioners, see: Richard Susskind, *Tomorrow's Lawyer. An Introduction to Your Future*, Oxford University Press, 2017; Dana A. Remus, Frank. Levy, *Can Robots be Lawyers? Computers, Lawyers and the Practice of Law*, in *Georgetown Journal of Legal Ethics*, 2017, 30, 3, p. 501; Drury D. Stevenson, Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, in *Florida Law Review*, 2016, 67, 4, p. 1337; Dana. A. Remus, *The Uncertain Promise of Predictive Coding*, in *Iowa Law Review*, 2014, 99, p. 1691

[584] As the prediction systems based on case-based reasoning models, for an overview, see Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., pp. 107 ff

[585] Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., pp. 285 ff; Masha Medvedeva, Michel Vols, Martijn Wieling, *Using machine learning to predict decisions of the European Court of Human Rights*, in *Artificial Intelligence and Law*, 2020, 28, p. 237; Haoxi Zhong, Zhipeng Guo, Cunchao Tu, Chaojun Xiao, Zhiyuan Liu, Maosong Sun, *Legal Judgment Prediction via Topological Learning*, in *Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing*, Association for Computational Linguistics, Brussels, 2018, p. 3540; Aletras, Nikolaos, Dimitrios Tsarapatsanis, Daniel Preoţiuc-Pietro, Vasileios Lampos, *Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective*, in *PeerJ Computer Science*, 2016, 2, 93; for a discussion of the latter article, see Mireille Hildebrandt, *Algorithmic Regulation and the rule of law*, in *Philosophical Transactions of the Royal Society A*, 2018, 378, pp. 6-7; Frank Pasquale, Glyn Cashwell, *Prediction, Persuasion, and the Jurisprudence of Behaviourism*, in *University of Toronto Law Journal*, 2018, 68, 1, p. 63; Trevor J. M. Bench-Capon, *The Need for Good Old-Fashioned AI and Law*, in Walter Hötzendorfer, Christof Tschohl, Franz Kummer (eds), I*nternational Trends in Legal Informatics: A Festschrift for Erich Schweighofe*r, NOVA MD, Vachendorf, 2020, p. 23

[586] Daniel Martin Katz, Michael J. Bommarito II, Josh Blackman, *A general approach for predicting the behavior of the Supreme Court of the United States*, in *PLoS ONE*, 2017, 12, 4; Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., pp. 111 ff

[587] Daniel L. Chen, Yosh Halberstam, Manoj Kumar, Alan C. L. Yu, *Attorney Voice and the Supreme Court*, in Michael A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data*, cit., p. 367

Beside the prediction of judicial outcomes, classification tools have been deployed even for the automatic identification and judges' modes of moral reasoning[588].

Alongside practice-oriented applications, the advances in computational techniques and the growing availability of data have driven the development of tools and conceptual approaches directed at framing and analysing the legal phenomenon through a scientific, i.e., empirical, enabling to explain and understand "*law as a fact*" [589] and investigate "*the intricate networks of cognitive and social mechanisms through which law emerges, is applied, and exerts its effects*[590]. In this sense, the computational turn in legal scholarship[591] extends to law of the interdisciplinary approach which distinguishes the *Computational Social Sciences* (CSS)[592] and the latter's assumption that *"[i]nformation and communication technologies can greatly enhance the possibility to uncover the laws of the society"*[593].

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[588] Keith Carlson, Daniel N. Rockmore, Allen Riddell, John Ashley, Micheal A. Livermoore, *Style and Substance on the US Supreme Court*, in Michael A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data*, cit., p. 83; Jens Frankenreiter, *Writing Style and Legal Tradition*, in Michael A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data*, cit., p. 151; Nischal Mainali, Liam Meier, Elliott Ash, Daniel L. Chen, *Automated classification of modes of moral reasoning in judicial decisions*, in Ryan Whalen (ed.), *Computational legal studies*, cit., p. 77

[589] Nicola Lettieri, *Law in Turing's Cathedral: Notes on the Algorithmic Turn of the Legal Universe*, in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms*, Cambridge University Press, 2020, pp. 695, 719; Sebastiano Faro, Nicola Lettieri, *Walking Finelines between Law and Computational Social Science*, in *Informatica e diritto*, 2013, 22, 1, p. 16

[590] Nicola Lettieri, *Law in Turing's Cathedral*, cit., p. 719 .As Lettieri highlights: "*Based on the identification of the scientific explanation with the reproduction "in silico" (that is, in a computer simulation) of the social processes being investigated, ABM underlies a generative approach to research in which social macrodynamics and structures are interpreted, described, reproduced, and then explained as the result of micro-interactions between computational entities (agents) simulating the behavior of real individuals",* Nicola Lettieri, *Law in Turing's Cathedral*, cit., p. 711-713; Bruce Edmonds, *What Social Simulation Might Tell Us about How Law Works*, in *Informatica e diritto*, 2013, 12, 1, pp. 47; Martin Neumann, *The cognitive legacy of norm simulation*, in *Artificial Intelligence and Law*, 2012, 20, 4, p. 339. In general, see the special Issues of *Artificial Intelligence and Law: Simulations, norms and laws*, 2012, 20, 4 and 2013, 21, 1

[591] Ryan Whalen, *The emergence of computational legal studies: an introduction*, in Id. (ed.), *Computational Legal Studies. The Promise and Challenge of Data-Driven Research*, Edward Elgar Publishing, Cheltenham, 2020, p. 1; Ginevra Peruginelli, Sebastiano Faro (eds.), *Knowledge of the Law in the Big Data Age*, IOS Press, 2019; Micheal A. Livermoore, Daniel N. Rockmore (eds.), *Law as Data. Computation, Text, and the Future of Legal Analysis*, Santa Fe Institute Press, Santa Fe, 2019; Nicola Lettieri, *Law in Turing's Cathedral: Notes on the Algorithmic Turn of the Legal Universe*, in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms*, Cambridge University Press, 2020, p. 691

[592] Claudio Cioffi-Revilla, *Computational Social Science*, in *WIREs Computational Statistics*, 2010, 2, 3, pp. 259-271; David Lazer, Alex (Sandy) Pentland, Lada Adamic, Sinan Aral, Albert Laszlo Barabasi, Devon Brewer, Nicholas Christakis, Noshir Contractor, James Fowler, Myron Gutmann, Tony Jebara, Gary King, Michael Macy, Deb Roy, Marshall Van Alstyne, *Computational Social Science*, in *Science*, 2009, 323, 5915, pp. 721-723; David M. J. Lazer, Alex Pentland, Duncan J. Watts, Sinan Aral, Susan Athey, Noshir Contractor, Deen Freelon, Sandra Gonzalez-Bailon, Gary King, Helen Margetts, Alondra Nelson, Matthew J. Salganik, Markus Strohmaier, Alessandro Vespignani, Claudia Wagner, *Computational social science: Obstacles and opportunities*, in *Science*, 2020, 369, 6507, p. 1060-1062

[593] Rosaria Conte, Nigel Gilbert, Giulia Bonelli, Claudio Cioffi-Revilla, Guillaume Deffuant, Janos Kertesz, Vittorio Loreto, Suzy Moat, Jean-Pierre Nadal, Angel Sanchez, Martin A. Nowak, Andreas Flache, Maxi San Miguel, Dirk Helbing, *Manifesto of Computational Social Science*, in *The European Physical Journal Special Topics*, 2012, 214, pp. 327

2.7. Conclusions: back to Jurimetrics, and towards the Rule of Machines

On the other hand, the success achieved through computational approaches in the development of tools for both legal practitioners and legal scholars can hardly be denied[594]. Precisely in order to valorise the contribution that such tools can make for law, it is necessary to consider the meaning that they assume in the context of the practices in which they are put into use, i.e., which conclusions can jurists draw from computational tools, and what it is that jurists do in drawing such conclusions. In this respect, it is worth highlighting that a computational approach to law is instrument-enabled as much as it is instrument-constrained. The main source of concern, in this respect, is the extent to which the computational perspective could supplant the qualitative, understanding-oriented approach which distinguish law without altering the very nature of that which constitutes the object of study. On this matter, computational approaches, and data-driven methods in particular, raise a set of concerns. On one end of the spectrum are the methodological issues, for instance those related to the inductive and statistical methods adopted in machine learning[595]. In this regard, it is possible to identify some potential assumptions of questionable character, i.e., that data *are* the phenomenon they represent, and not one of the possible representations of it, that the regularities detected by machines actually describe the rules governing the phenomenon represented in data. To some extent, these concerns can be addressed, and possibly solved, through the development of practices fostering methodological integrity within the very frame of computational disciplines. The problems laying at the other end of the spectrum, however, concern the very epistemological frame underpinning the computational and data-driven perspective and the consequences of its application to some areas of meaningful action[596]. In

[594] First of all, legal and sociologic scholarship quantitative methods of analysis, which provide useful for qualitative research. Undoubtedly, new computational tools can improve this line of research and further the critical analysis of the legal phenomenon. On the concept of early predictability as used to detect judicial biases through ML predictions highlight potential biases in decision-making, Daniel L. Chen, *Machine Learning and the Rule of Law*, in Micheal A. Livermore, Daniel N. Rockmore (eds.), *Law as Data*, cit., p. 429; Daniel L. Chen, Matt Dunn, Levent Sagun, Hale Sirin, *Early Predictability of Asylum Court Decisions*, in *Proceedings of the ACM Conference on AI and the Law*, 2018; Daniel L. Chen, Matt Dunn, Levent Sagun, Hale Sirin, *Early Predictability of Asylum Court Decisions, in Proceedings of the ACM Conference on AI and the Law*, 2018; Daniel L. Chen, and Jess Eagel, *Can Machine Learning Help Predict the Outcome of Asylum Adjudications?*, in *Proceedings of the ACM Conference on AI and the Law*, 2018

[595] General problem of induction, from the Humean version to the Nelson Goodman, see Nelson Goodman, *Fact, Fiction, Forecast*, 4th Edition, Harvard University Press, Cambridge, 1983

[596] Petter Törnberg, Anton Törnberg , *The limits of computation: A philosophical critique of contemporary Big Data research*, in *Big Data and Society*, 2018, 2; Jose van Dijck, *Datafication, dataism amd dataveillance: Big Data between scientific paradigm and ideology*, in *Surveillance and Society*, 2014, 12, 2, p. 197; Craig Dalton, Jim Thatcher, *What Does a Critical Data Studies Look Like, And Why Do We Care?*, in *Society and Space*, 12 May 2014; Lisa Gitelman (ed.), *"Raw Data" is an Oxymoron*, MIT Press, Cambridge, 2013, p. 3; Danah Boyd, Kate Crawford, *Critical Questions for Big Data*, in *Information, Communication and Society*, 2012, *15*, 5, p. 662;

these cases, the attempts to overcome the current limitations of computational approaches risks resulting in a form of "algorithmic reformism"[597], i.e., a "*calculated critique of a particular algorithm*" which drives the modification of implementation details but leaves unchanged the very assumptions that certain problems can be addressed and solved through computational methods[598].

These limitations relate moreover to a set of problems which are raised precisely by the use of computational techniques. Since, in a way, discrimination is precisely that which make possible for data-driven systems to learn, the problems which emerge at the interplay between machine bias and illegal biases can hardly be addressed from within the framework of data science[599]. When applied to law and, in general, to meaningful behaviour, the limits of computational and data-driven approaches result first of all from the differences which distinguish the rules followed by the agents whose behaviour has been translated into code and data and the rules-mechanisms which govern computer programs. As the meaning of rules is not exhausted in their formal expression, accurate machine-driven predictions or classifications cannot replace the normative standpoint emerging within the meaningful interactions which are subject to formalization. When computational approaches are deployed in the context of rule-governed action, problems such as those concerning the transparency and explainability of algorithmic decision-making, or those related to the incidence of spurious correlation and causation in pattern detection[600], have to be faced, respectively, with the problem of justification and of the conceptual relation between meanings; the problems of generalization in learning intertwines with the question of *what counts as the same* from the perspective of the rule.

Precisely in relation to meaningful behaviour, the current AI spring seems to endorse that which McQuillan has effectively called "*Machinic Neoplatonism*"[601]. Such approach seems to harken back to, and further entrench, a certain "idea of a social science" that, as highlighted by Winch, aimed at developing a *"Science of Human Nature"* on the basis of the assumption of a sceptic stance with respect to the reasons articulated by actors for justifying their action. Such perspective seems

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[597] Peter Polack, *Beyond algorithmic reformism: Forward engineering the designs of algorithmic systems*, in *Big Data & Society*, 2020, 1

[598] In this sense, which machine learning techniques does not but further the effects inherent to actuarial approaches, see. Bernard E. Harcourt, *Against Prediction. Profiling, Policing, and Punishing in an Actuarial Age*, The University of Chicago Press. Chicago, 2007

[599] As discussed above, inductive learning is based on bias. See Tom M. Mitchell, *Machine Learning*, cit., pp. 39-44; Nils J. Nilsson, *Introduction to Machine Learning. An Early Draft of a Proposed Textbook*, 2005, p. 9, at https://ai.stanford.edu/people/nilsson/MLBOOK.pdf; Mireille Hildebrandt, *The issue of bias: the framing powers of ML*, in Marcello Pelillo, Teresa Scantamburlo (eds.), *Machine Learning and Society: Impact, Trust, Transparency*, MIT Press, forthcoming 2020.

[600] Cristian S. Calude, Giuseppe Longo, *The Deluge of Spurious Correlations in Big Data*, in *Foundations of Science*, 2017, 22, 3, p. 595; Causal AI Lab della Columbia Universrity https://www.cs.columbia.edu/labs/causal-artificial-intelligence-lab/ o da Microsoft Research https://www.microsoft.com/en-us/research/group/causal-inference/#!publications

[601] Dan McQuillan, *Data Science as Machinic Neoplatonism*, in *Philosophy and Technology*, 2018, 31, p. 253

to endorse the idea that human behaviour is "*just much more complicated*"[602], but not different in kind, from the phenomena studies by natural sciences and that, therefore, it is possible to explain social phenomena in terms of causal and statistical laws[603]. As discussed above, in a similar fashion, Jurimetrics first, and the work of Turing and AI researchers then, promoted an epistemological approach which set aside rules-norms, as seen from the perspective of rule followers, to address their behaviour in terms of rules-mechanisms.

These questions are not just of epistemological interest. While, on one hand, "accounts do", i.e., the vocabularies one adopts constitutes the world in which she acts, on the other hand, when it comes to computation, the constitutive force which distinguishes such accounts is complemented with the effects which result from the possibility to implement them into actual architectures and those generated by the computational tools which are put into use in legal practice, administration and policymaking. In this respect, one can notice that, notwithstanding the continuous successes achieved by AI and Law research, cyclical AI winters had the effect of freezing the most radical claims related to the successes *achievable* by the latter[604]. Driven by the enthusiasm provoked by the current data-driven AI Spring, the debate concerning the idea of using AI technology as a tool of government - *in support of, as*, or *in alternative to* law - has regained particular vitality [605].

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[602] Peter Winch, *The Idea of a Social Science and Its Relations to Philosophy*, cit., pp. 64-65; John Stuart Mill, *System of Logic, Ratiocinative and Inductive*, Book VI, Chapter III

[603] Peter Winch, *The Idea of a Social Science and Its Relations to Philosophy*, cit., Chapter III

[604] The "rise and fall of the expert systems", in particular, led the GOFAIL community to a major readjustment of expectations with respect to the degree of automation achievable, see Philip Leith, *Formalism in AI and Computer Science*, Ellis Horwood, New York, 1990; Id., *The rise and fall of the legal expert system*, in *European Journal of Law and Technology*, 2010, 1, 1

[605] Dag Wiese Schartum, *From Legal Sources to Programming Code: Automatic Individual Decisions in Public Administration and Computers under the Rule of Law*, in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms*, Cambridge University Press, Cambridge, 2021, p. 301; Monika Zalnieriute, Lisa Burton Crawford, Janina Boughey, Lyria Bennett Moses, and Sarah Logan, *From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making*, in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms*, Cambridge University Press, Cambridge, 2021, p. 251; Ronan Kennedy, *The Rule of Law and Algorithmic Governance*, in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms*, Cambridge University Press, Cambridge, 2021, p. 209; For a Chinese perspective, see Yadong Cui, *Artificial Intelligence and Judicial Modernization*, Springer Singapore, 2020; Emre Bayamlıoğlu, Ronald Leenes, *The 'rule of law' implications of data-driven decision-making: a techno-regulatory perspective*, in *Law, Innovation and Technology*, 2018, p. 12; Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, in *The George Washington Law Review*, 2019, 87, p. 1; Frank Pasquale, Glyn Cashwell, *Prediction, persuasion, and the jurisprudence of behaviourism*, in *University of Toronto Law Journal*, 2018, 68, 1, p. 63; Richard M. Re, Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, in *Stanford Technology Law Review*, 2019, 22, p. 242; Benjamin Alarie, Anthony Niblett, Albert H. Yoon, *How Artificial Intelligence Will Affect the Practice of Law*, in *University of Toronto Law Journal*, 2018, 68, 1, p. 106; Monika Zalnieriute, Lyria Bennett Moses, George Williams *The Rule of Law and Automation of Government Decision-Making* in *Modern Law Review*, 2019, 82, 3; Anthony Casey, Anthony Niblett, *The Death of Rules and Standards*, in *Indiana Law Journal*, 2017, 92, p. 1401; Benjamin Alarie, *The Path of the Law: Toward Legal Singularity*, in *University of Toronto Law Journal*, 2016, 66, 4, p. 433; Eugene Volokh, *Chief Justice Robots*, in *Duke Law Journal*, 2019, 68, 58, p. 1137; Robert F. Weber, *Will the "Legal Singularity" Hollow Out Law's Normative Core?*, in *Michigan Technology Law Review*, 2020, 27, p.

That which has emerged in the last years is a narrative distinguished by a strong technological optimism picturing legal automation as feasible, desirable and, to some extent, inexorable. Such arguments are generally sustained by making reference to a common script – the accuracy of Moore's law, the enumeration of the hall of fame of AI, i.e., the successes achieved first in chess, then in Go, then in Jeopardy[606], and then by a set of examples from the fields in which AI "*has been used to generate better predictions and insights than humans ever could provide*"[607]. Providing the ground for such line of argument is the assumption of the commensurable character of law and the other tasks in which AI has registered its successes: as AI has worked in these fields, it will work in law. Accordingly, also law will see an incremental technological revolution which will start from the use of AI in tasks of assistance and support and then, driven by increasing reliability of the tools, it will ultimately lead to the automation of most of the activities performed by jurists: as with medical malpractice, ignoring machine advice will become a sign of negligence and, finally, technology will provide the law directly to the regulated subjects without the need of any form of human mediation[608].

On the other hand, a set of recurring *tòpoi* is directed at undercutting potential concerns and scepticism with respect to automation: recalcitrance and distrust are framed as further manifestations of human biases and irrational fears and, consequently, turned into further arguments in favour of the need to delegate decisional power to machines. With respect to the contrasting expectations regarding automation, an interesting position is that advanced by Alarie, who maintains that "*[n]aysayers will continue to be correct until they are, inevitably, demonstrated empirically to be incorrect*"[609]. I believe that, indeed, one of the possible ways to unravel the current entanglement between AI, government and law is afforded precisely by addressing the question of what could count as an "empirical proof" of the superiority of machines. As I shall discuss in the next chapter, addressing such very question can show the way in which the current attack moved to the "citadel of jurists" by the Rule of Machines narrative is an

97; Stephen Wolfram, *Computational Law, Symbolic Discourse, and the AI Constitution*, in Ed Walters (ed.), *Data-Driven Law: Data Analytics and the New Legal Services*, CRC Press, 2019, p. 144; Micheal A. Livermore, *Rule by Rules*, in Ryan Whalen (ed.), *Computational Legal Studies. The Promise and Challenge of Data-Driven Research*, Edward Elgar Publishing, Cheltenham, 2020, pp. 238–264; Rebecca Crootof, *"Cyborg Justice" and the Risk of Technological–Legal Lock-In*, in *Columbia Law Review Forum*, 2019, 119, 7, p. 233; Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, in *Columbia Law Review*, 2019, 119, 7, p. 2001

[606] Michael A. Livermore, Daniel N. Rockmore, *Introduction*, in Id (eds), *Law as Data*, cit., p. xiii; Eugene Volokh, *Chief Justice Robots*, cit., p. 58; Anthony Casey, Anthony Niblett, *The Death of Rules and Standards*, cit., p. 1424

[607] Anthony Casey, Anthony Niblett, *The Death of Rules and Standards*, cit., p. 1408; Benjamin Alarie**,** *The Path of the Law*, cit**.;** Benjamin Alarie, Anthony Niblett, Albert H. Yoon, *Regulation by machines*, cit., pp. 2,3

[608] Anthony Casey, Anthony Niblett, *Self-Driving Laws*, cit., p. 434-435

[609] Benjamin Alarie, *The Path of the Law: Towards Legal Singularity*, cit.

attack to the concept of law as a normative practice that is conducted by blurring the lines between empirical and normative. As, in this light, I shall argue, that which is presented as a further "step forward" might actually reveal itself as conducive to the entrenchment of a mode of behavioural regulation which significantly departs from law and its affordances.

CHAPTER III

THE GOVERNMENT OF MACHINES

Law must be stable and yet it cannot stand still"[610].

"*Every sign* by itself s*eems dead*" "What *gives it life? – In use it is* alive. *Is life breathed into it there? – Or is the* use *its life?*"[611].

The individual's own good (or bad) judgment is the guide. There is no label, on any given idea or principle which says automatically, 'Use me in this situation' — as the magic cakes of Alice in Wonderland were inscribed 'Eat me'[612]

3.1 From *deus ex machina* to the *deus est machina*: overcoming the Rule of Men

Reformulating the infamous passage of Bentham, it is possible to picture the Rule of Machines narrative as the claim that, as a system of *legal rules*, the Rule of Law is "*a thing merely imaginary*"[613]. For this reason, the latter inevitably turns into the Rule of Men. In the present chapter I will argue that such stance depends on a strict and misleading understanding of legal rules the assumption of which is the direct consequence of the attempt to combine different forms of legal and computational formalism. In this respect, the standpoint adopted by such narrative resembles that which Hart described as that of the stance of the *"disappointed absolutist"*: *"either rules are what they would be in the formalist heaven* […] *or there are no rules,*

[610] Roscoe Pound, *Interpretations of Legal History*, Cambridge University Press, Cambridge, 1923, p. 1
[611] Ludwig Wittgenstein, *Philosophical Investigations*, § 432
[612] John Dewey, *How We Think*, Gateway Edition, New York, 1971, p. 125
[613] *Supra*, § 2.6.1.

only predictable decisions or patterns of behaviour"[614]. The assumptions grounding such position can be framed into two main arguments: the *argument from the inadequacy of jurists* and the *argument from the inadequacy of legal rules*. The first argument draws a pessimistic picture of humans as rule followers and identifies their irreducible unruliness as the obstacle which hinders the correct application of rules and, therefore, the effectiveness and certainty of the legal order. The second argument addresses the incompleteness of formalized legal rules and highlighting how the latter cannot determine, nor account for that which actually drive, the behaviour of rule followers.

The Rule of Machines narrative contrasts such anthropological and normative pessimism with technological optimism. Automation, indeed, is presented as the solution capable of addressing the limitations of both human rule followers and legal rules: through machines and machine rules, it is possible to realize a system of government capable of overcoming the Rule of Men. As I will try to show, the understanding of rules and rule following which grounds this perspective rests on, and risks exacerbating the aporias of the Rule of Law discussed in Part I.

3.1.1. The inadequacy of jurists and Rule by Code

The tension between formulation and application of rules which, as illustrated above, runs through Western legal history and the Rule of Law doctrine, provides the starting point for the Rule of Machines narrative. The theme of the arbitrariness of the interpreter is appropriated together with the picture of rules advanced by the formalistic conceptions of law discussed in the previous chapters. In the perspective advanced by the Rule of Machines, the aporias resulting from such picture do not affect the desirability and feasibility of the project of formalism: what is wrong with such project is that it has backed the wrong rule followers, i.e., humans. Enriched by the perspective of behavioural economics, Law and Economics and the "New Legal Realism"[615], the Rule of Machines rearticulates the anthropological pessimistic picture of the formalist framework into a computational-cognitivist version of the doctrine of the "digestive jurisprudence"[616]. Framed into a cognitivist-behaviourist perspective, the critical aspects of human rule following are explained in terms of the cognitive limitations which determine a systematic – and therefore predictable - deviant and inconsistent

[614] Herbert L.A. Hart, *The Concept of Law*, cit., p. 139

[615] Thomas J. Miles, Cass R. Sunstein, *The New Legal Realism*, in *University of Chicago Law Review*, 2008, 75, p. 831; Christine Jolls, Cass R. Sunstein, Richard Thaler, *A Behavioral Approach to Law and Economics*, in *Stanford Law Review*, 1998, 50, pp. 1471; Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in *University of Chicago Law Review*, 1998, 65, p. 571; Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, in *Notre Dame Law Review*, 2009, 84, p. 1195; Christine Jolls, Cass R. Sunstein, *The Law of Implicit Bias*, in *California Law Review*, 2006, 94, p. 969; Ozkan Eren, Naci Mocan, *Emotional judges and unluckily juveniles*, in *American Economic Journal: Applied Economics*, 2018, 10, 3, p. 171

[616] Benjamin Alarie, *The Path of the Law: Towards Legal Singularity*, cit., p. 450

behaviour[617]. The cognitive bias framework provides the Rule of Machines narrative with a vocabulary capable of bringing the gaps between law, human rule followers and the computational perspective. The most relevant pathological elements of law, i.e., "*arbitrariness, political favouritism, covert influence, inconsistency, and discretionary justice*" are reformulated in terms of cognitive biases[618] and then formalized and analysed in computational terms. Once legal phenomena are represented through code and data, it is possible to identify and characterize patterns as much as the deviations from such patterns as manifestations of bias, or lack of consistency, and to adopt forms of measurement directed at weighting the factors determining outcomes of decision-making processes[619]. On this basis, the Rule of Machines perspective turns its object of criticism from arbitrary *human rule followers* into defective *carbon-based biological machines*, and redescribes their deviation from the rules-rails as a malfunctioning of internal cognitive mechanisms. By framing the problem of incorrect rule following in such terms, its solution can be envisaged in the substitution of legal rules and humans' untrustworthy cognitive mechanisms with code and code-driven machines[620]. Drawing on the picture of machines as "*rule following beasts*"[621], i.e., exact and incorruptible executors of the rules-instructions received, the Rule of Machines can claim the opportunity to substitute biased human rule followers with a computational version of Dworkin's Hercules[622]. As Casey and Niblett point out, *"[t]he biases and inconsistencies found in individual judgments can largely be washed away using advanced data analytics"*[623]. Automation is the mean to both "*increase legal certainty and facilitate the neutral application of law*"[624].

In this perspective, the Rule of Machines can claim to answer the demands of the normativist-decisionist paradigm of the Rule of Law and, at the same time, to

[617] Daniel Kahneman, *Thinking, Fast and Slow*, Penguin Books, London, 2011; Daniel Kahneman, Olivier Sibony, Cass R. Sunstein, *Noise: A Flaw in Human Judgment*, Little, Brown Spark, New York, 2021

[618] Anthony Casey, Anthony Niblett, *The Death of Rules and Standards*, cit., p. 1408

[619] Daniel L. Chen, *Judicial analytics and the great transformation of American Law*, in *Artificial Intelligence and Law*, 2019, 27, 1, p. 15; Anthony Casey, Anthony Niblett, *The Deaths of Rules and Standards*, cit., p. 1428

[620] In this perspective, once can read Lord Sales's position according to which - even if "*we are not there yet*" - the *"[a]pplication of rules of equity or recognition of hard cases, where different moral and legal considerations clash, is ultimately dependent on pattern recognition, which AI is likely to be able to handle*" Lord Sales, Justice of the UK Supreme Court, *Algorithms, Artificial Intelligence and the Law*, The Sir Henry Brooke Lecture for BAILII Freshfields Bruckhaus Deringer, London 12 November 2019, p. 7; see, also, Anthony Casey, Anthony Niblett, *Self-Driving Laws*, cit., p. 436; Iid., *The Death of Rules and Standards*, cit., pp. 1429-30

[621] Douglas Hofstader, *Gödel, Escher, Bach. An Eternal Golden Braid*, Penguing Books, Middlesex, 1980, p. 26

[622] Michael A. Livermoore (eds.), *Law as Data*, cit., p. xiii; Daniel Goldsworthy, *Dworkin's dream: Towards a singularity of law*, in *Alternative Law Journal*, 2019, 44, 4, p. 289

[623] Anthony Casey, Anthony Niblett, *Self-Driving Laws*, cit., p. 437

[624] Michael A. Livermore, *Rule by Rules*, cit., p. 238

overcome its aporias[625]. The features of computer code, indeed, seem to afford the exact, impartial and predictable application of rules formulated by the programmer-Legislator and, on the other hand, to make it possible the implementation of a legal system which is capable of "running by itself"[626]. As discussed above, the formalist account of rules encountered a limit in the infinite regress problem[627]. The rules formulated into code make true what legal rules formulated in natural language can never obtain, i.e., the bridging of any gap and elicitation of any medium between the formulation of the rule and its application[628]. This results from the reformulation of the rule into a different language, that is, a formal *calculus* which, in the last instance, corresponds to causal relation at the level of the hardware[629]. Precisely by virtue of the simultaneous nature of language-*calculus* and causal mechanism, the "interpretation-reformulation" of rules into code does not "hang in the air"[630]: the hardness of the rule-*calculus* merges with the hardness of a material.

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[625] Indeed, as Wiese Schartum points out, code seems to offer the perfect implementation of the Rule of Law intended in a formal perspective, see Dag Wiese Schartum, *From Legal Sources to Programming Code*, cit., p. 327. While acknowledging that, on one hand, "*effective human design and implementation*" are not sufficient to ensure the respect of the Rule of law, and that, on the other, "*some forms of technology raise intractable problems*", Zalnieriute, Bennett Moses and Williams maintain that, once that a set of "*questions of design*" - i.e. transparency, accuracy, relevancy, significant control by a human in the loop - are appropriately addresses, "*automation can improve the predictability and consistency of decision-making by removing the arbitrariness for which humans are well known"*. This is possible in that *"[a]utomation according to human-crafted rules (derived from statute or judge-made law) can ensure that the correct decision is made every time and can overcome issues with human error and corruption". […] A system with pre-programmed rules can ensure that decisions are made based on factors recognised as legally relevant and hence avoid or minimise the risk of corruption or favouritism by officials*". Moreover, not only such systems can enhance consistency by giving "*same answer when presented with the same inputs"*, but also eliminate "*both conscious and unconscious bias by only applying criteria that are truly relevant to making the decision",* see, Monika Zalnieriute, Lyria Bennett Moses, George Williams *The Rule of Law and Automation of Government Decision-Making*, cit., pp. 20, 25

[626] Cfr. supra, § 2.3.1.4.; Carl Schmitt, *Political Theology,* cit., p. 48. For the debate on the regulative character of code, see Lawrence Lessig, *Code, Version 2.0*, Basic Books, New York, 2006; Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, in *Texas Law Review,* 1998, 76, 3, p. 553; Polk Wagner, *On Software Regulation*, in *Southern California Law Review, 2005*, 78, p. 457; James Grimmelmann, *Regulation by Software*, in *The Yale Law Journal*, 2005, 114, p. 1719

[627] *Supra*, § 2.4. See, also, Robert Brandom, *Making It Explicit. Reasoning, Representing, and Discursive Commitment*, Harvard University Press, Cambridge, 1994; José Medina, *The Unity of Wittgenstein's Philosophy*, cit., pp. 104 ff

[628] Laurence Diver, *Digisprudence: Code as Law Rebooted*, Edinburgh University Press, Edinburgh, 2021; Id., *Computational legalism and the affordance of delay in law*, in *Journal of Cross-disciplinary Research in Computational Law*, 2020, 1, 1, p. 6

[629] Stuart Shanker, *The Decline and Fall of the Mechanist Metaphor*, in Rainer Born (ed.), *Artificial Intelligence: The Case Against*, Routedge, London, 1987, p. 81 ff; Id,, *Wittgenstein's Remarks on the Foundations of AI*, cit., p. 30; Cfr., also, *supra*, Jon Bing, *Sistemi deontici: un tentativo di introduzione*, in Antonio A. Martino, Enrico Maretti, Costantino Ciampi (eds.), *Logica, Informatica e Diritto*, Le Monnier, Firenze, 1978, p. 123

[630] This aspect is in part concealed in the passage from low-level to high level programming languages, and such concealment is precisely that which makes possible for machines to work, that is, which facilitates making sense of computer outputs *as* meaningful signs and interact with them in a meaningful way, ascribing them the performance of correct inferences, or a correct.

As illustrated in the previous chapter, the research conducted by the AI and Law community have attempted to elaborate an even better formalization of legal knowledge and of the processes of legal reasoning, that is, more efficient methods to represent and process legal information and more accurate simulations of what jurists do. The difficulties encountered in such endeavour have resulted in the acknowledgement of the limitations of code and have motivated an ongoing redefinition of the scope of the research program[631]. The hardest challenges have been identified as resulting from specific features of the "nature of the law", i.e., among others, the syntaxis required to representing law, the open texture of law, the dynamic character of legal systems, and from the obstacles posed by the knowledge representation bottleneck, or the difficulty of both identifying and formalizing the common-sense knowledge required for legal reasoning[632]. The way in which the obstacles encountered in the computational formalization of law are framed affords the elaboration of different positions with respect to the possibility of overcoming them. In this light, in section § 4.2. I will address the limitations related to the possibility of understanding rules as code. For the moment, I will examine the different path which can be taken, and is indeed taken, by the Rule of Machines narrative. As long as the limitations of the rules of code are understood in terms of knowledge representation, i.e., which and how much codified rules are required[633], the solution of the limits of GOFAIL can be identified in the

[631] In this respect, Ashley maintains that even the most promising advances in argumentation logics do not go beyond a level of toy examples: being dependent on the manual representation and input of all the relevant elements, such computational models perform well as much as they are *ad hoc* applications Kevin D. Ashley, *Artificial Intelligence and Legal Analytics*, cit., p. 144

[632] As showed by the discussion on the kind of logic required to formalize legal rules, Helmut Schreiner, *Information Systems and Artificial Intelligence in Law. Logical Procedures for the Application of Technical Intelligence in Juridical Decisions*, in Costantino Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, cit., p. 165; As McCarty had emphasized at the turn of the Nineties, "*The advancement of both rule-based expert systems and theories of legal reasoning are bounded to the 'solution' of the knowledge representation problem*", Thorne L. McCarty, *Artificial Intelligence and Law: How to Get There from Here*, cit., pp. 196-197. Another relates to the problem of legal qualification, i.e. the gap between "*world and regulation knowledge*". See, moreover, Trevor Bench-Capon, Michał Araszkiewicz, Kevin Ashley, Katie Atkinson, Floris Bex, Filipe Borges, Daniele Bourcier, Paul Bourgine, Jack G. Conrad, Enrico Francesconi, Thomas F. Gordon, Guido Governatori, Jochen L. Leidner, David D. Lewis, Ronald P. Loui, L. Thorne McCarty, Henry Prakken, Frank Schilder, Erich Schweighofer, Paul Thompson, Alex Tyrrell, Bart Verheij, Douglas N. Walton, Adam Z. Wyner, *A history of AI and Law in 50 papers: 25 years of the international conference on AI and Law*, in *Artificial Intelligence and Law*, 2012, 20, p. 21; Joost Breuker, Nienke den Haan, *Separating World and Knowledge: Where is Logic?*, in *Proceedings of the Third International Conference on Artificial Intelligence and Law*. ACM Press, New York, 1991, p. 92. For what concerns the limitations of Legal Expert Systems, see the discussion between Philip Leith and Marek Sergot, Marek Sergot, *The Representation of Law in Computer Programs*, in Trevor J. M. Bench-Capon (ed.), *Knowledge-Based Systems and Legal Applications*, Academic Press, London, 1991, p. 27; Philip Leith, *Clear rules and legal expert systems*, cit., p. 661; Id., *Rise and fall of expert systems*, cit.

[633] McCarty has maintained that the development of a "complete" computational model of reasoning would require the formalization of "*an ontology of all human (and animal!) activities and interactions*" , see Bench-Capon Trevor, Michał Araszkiewicz, Kevin Ashley, Katie Atkinson, Floris Bex, Filipe Borges, Bourcier Daniele, Bourgine Paul, Conrad Jack G., Francesconi Enrico, Gordon

possibility, offered by machine learning and deep learning, to automate the formalization of rules.

3.1.2. The Inadequacy of Legal Rules and the Rule of Data

The assumption of machine operations as the model of rule following behaviour lays the foundation on which the Rule of Machines narrative bases also the argument from the inadequacy of legal rules. Machines can be described as behaving according to rules and these, in turn, are represented as the set of explicit instructions which determine the rule following behaviour.

At the same time, the argument from the inadequacy of *legal* rules takes up the critique articulated by anti-formalist perspectives to advance a sceptic position with respect to both the determinacy of legal rules and the capacity of the reasons articulated by rule followers to account for their rule following behaviour. The Rule of Machines perspective pictures current systems of legal rules as inconsistent and distinguished by gaps, and identifies the cause of such state of affairs in both the defective capacity to formulate rules by lawmakers-programmers, and on the epistemic opacity which hinders rule followers to access the rules which drive their behaviour. In the case of silicon-based machines, the incompleteness of formulated rules makes the latter halt; in the case of carbon-based machines, it leaves open spaces for the operation of further rules: where rules are pictured as rails, the rails at some point stop, and cease to provide guidance. If, nevertheless, rule followers do not halt, behaving in a way that cannot be accounted for on the basis of the formulated rules, such behaviour must be driven by a *quid pluris* which falls outside of the formal legal system[634]. In this perspective, for instance, Casey and

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Thomas F., Governatori Guido, Leidner Jochen L., Lewis David D., Loui Ronald P., McCarty L. Thorne, Prakken Henry, Schilder Frank, Schweighofer Erich, Thompson Paul, Tyrrell Alex, Verheij Bart, Walton Douglas N., Wyner Adam Z., *A history of AI and Law in 50 papers: 25 years of the international conference on AI and Law*, in *Artificial Intelligence and Law*, 2012, 20, p. 83

[634] In some respect, it is possible to derive from Aristotle's discussion of the application of general rules as involving a potentially unavoidable moment of indeterminacy, Aristoteles, *Nicomachean Ethics*, cit., V, 1137b; Fred D. Miller, *Aristotle's Philosophy of Law*, in Id, Carrie-Ann Biondi (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics, A Treatise of Legal Philosophy and General Jurisprudence, Volume 6*, Springer, Dordrecht, 2015, p. 99; Albert R. Jonsen, Stephen Toulmin, *The Abuse of Casuistry*, cit., p. 68. Without any claim of completeness, it is possible to point to three examples of this development in Realism, Normativism, and modern Positivism. First, discussing Aristotle's concept of the Government of Law, Frank underlined that judges "*have authority to decide matters which the law is unable to determine".* The American jurist then insists that "*when we find set forth […] the slogan 'a government of laws, and not of men', let us remember that its first author, Aristotle, was not talking of rigid, inflexible rules of law mechanically applied; he was referring to rules administered, by judges or other officers, selected to 'determine matters, which are left undecided by' general rules, and to determine them 'to the best of their judgment'. Why? Because, 'the decision of such matters' in particular cases 'must be left to man'",* see Jerome Frank, *Courts on Trial*, cit., p. 407. Secondly, in Kelsen's account of law, "*[t]he higher norm cannot bind in any direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower can only have the character of a frame to be filled by this act. Even the most detailed command must leave to the individual executing the command some discretion."* The latter has to take decisions "*that depend on extraneous circumstances which the ordering organ has not foreseen and to a certain extent cannot foresee*".

Niblett identify a limit of computational machines in the fact that judges do "*more than simply apply rules or standards*"[635]. As a result of the adoption of a mechanist conception of rule following, however, such *quid pluris* must consist in an implicit process-mechanism which govern the behaviour of rule followers without the latter being able to access and formulate it. In this light, the endorsement of the anti-formalist critique of *legal* rules does not lead to the rejection of formalism. On the contrary, the Rule of Machines perspective takes very seriously the ideal of a form of government based on a complete system of rules. Once again, the solution to overcome the aporias of legal formalism[636] depends on the reframing of the reasons

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Hans Kelsen, *Pure Theory of Law*, cit., p. 349. Thirdly, Hart contrasted the dogma of completeness of the legal system by considering the latter as distinguished by an inevitable open-texture character. Discussing Jhering's criticism against the *Begriffjurisprudenz*, Hart refers to the "porosity of concept" *(porositat der Begriffe)* to argue that "*We have no way of framing rules of language which are ready for all imaginable possibilities. However complex our definitions may be, we cannot render them so precise so that they are delimited in all possible directions and so that for any given case we can say definitely that the concept either does or does not apply to it*"[634]. While in the *Essays* it is presented in terms of linguistic precision, in *The Concept of Law*, the British philosopher configures the problem in terms of anthropological limitations: "*men who make laws are men, not gods. It is a feature of the human predicament, not only of the legislator but of anyone who attempts to regulate some sphere of conduct by means of general rules, that he labours under one supreme handicap - the impossibility of foreseeing all possible combinations of circumstances that the future may bring. A god might foresee all this; but no man, not even a lawyer, can do so*", Id., *The Concept of Law*, cit., pp. 269-270. Lastly, the theme of rule-scepticism and legal indeterminacy has been subject to extensive discussion in relation to Wittgenstein's remarks on rule following, Saul A. Kripke, *Wittgenstein on Rules and Private Language*, Blackwell, Oxford, 1982; Charles M. Yablon, *Law and Metaphysics*, in *The Yale Law Journal*, 1987, 96, 25; Margareth Radin, *Reconsidering the Rule of Law*, cit.; Brian Bix, *The Application and MisApplication of Wittgenstein's Rule Following Considerations to Legal Theory*, in *Canadian Journal of Law and Jurisprudence*, 1990, 3, 2, p. 107; Andrei Marmor, *No Easy Cases?*, in *Canadian Journal of Law and Jurisprudence*, 1990, 3, 2, p. 61; Christian Zapf, Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, in *The Georgetown Law Journal*, 1996, 84, p. 485; Dennis Patterson, *Wittgenstein on Understanding and Interpretation (Comments on the Work of Thomas Morawetz)*, in *Philosophical Investigations*, 2006, 29, 2, p. 129. Many contributions are collected into two volumes: Dennis M. Patterson (ed.), *Wittgenstein and legal theory*, Westview Press, Boulder, 1992; Id. (ed.), *Wittgenstein and Law*, Routledge, London, 2004.

[635] Anthony Casey, Anthony Niblett, *The Death of Rules and Standards*, cit., pp. 1433-34; 1445. The Authors identify as a field in which legal decisions seem to require "something more" than mere rule-application in the assessment of constitutional legitimacy of statutes. In their view, this would explain the difficulty which machines might encounter in making such decisions. Cfr, also, Anthony Casey, Anthony Niblett, *Self-Driving Laws*, cit., p. 436; Daniel Goldsworthy, *Dworkin's dream: Towards a singularity of law*, in *Alternative Law Journal*, 2019, 44, 4, p. 289

[636] As discussed above, the ideal of completeness inspired the supporters of Codification and the understanding of legal system advanced by the nineteenth century German legal science. On one hand, the achievement of completeness was sought by attempting to formalize rules with such a degree of explicitness as to fill any possible gap. On the other, the methodological approach that jurists were to adopt - literal interpretation, logical deduction – was held to be capable of ensuring that legal propositions conveyed their meaning in an undisputable way. The capacity to regulate any possible case was considered an attribute of the system itself, the jurist only had to passively follow the path set out by the norms. The activity of the interpreter was reduced to the retrieval of rules formally expressed in positive law or logically entailed by the system. In this respect, it is particularly interesting the case of the French School of Exegesis. Such school, whose spirit is traditionally represented by the quote attributed to Jean Joseph Bugnet "*Je ne connais pas le droit civil: je n'enseigne que le Code Napoléon"*, aimed at approaching the text of the Code by relying only on deductive methods and literal interpretation, quoted in Francois Gény, *Méthode d'interprétation et*

determining the failure of such perspective, i.e., inexhaustive legal rules. Thanks to machines, the gaps left open by legal rules can be filled by further rules that can be formulated by making explicit that *quid pluris* which drives the behaviour of rule followers. Precisely by detecting, formalizing and implementing into code the rules implicitly followed by jurists, Artificial Intelligence can solve the problem of the indeterminacy of legal rules and contribute to the implementation of a complete legal system[637].

The picture advanced by the Rule of Machines narrative seems to harken back to, and re-present in a computational fashion, some of the positions discussed with reference to the family of conceptions of the Rule of Law centred on the idea of order[638]. On one hand, common lawyers' idea of the body of law as containing an immanent reason accessible through observation and study[639] is reformulated by substituting the former with the data representing the body of law and the latter with machine learning techniques; accordingly, the "wisdom of the ages"[640] is turned into the "wisdom of the data"[641]. The contours of the "artificial reason of the

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sources en droit privé positif, Librairie Gènèrale de Droit & de Jurisprudence, 1919, vol. I, part I, p. 30. According to the rhetoric of servility towards *la lettre de la loi*, each article of the Code was to be read as a theorem: the task of the jurist was to draw conclusions and ascertain the immutable and codified meaning of the law impressed by the legislator. Another exemplar case in which the ideal of the completeness of the Code proved to be unattainable is the discussion on article 4 of the Code Civil. The article provided that *"Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice"*. As Hermann Ulrich Kantorowicz, one of the fathers of the German Free Law Movement (*Freirechtslehre*), argued "*We can now say honestly and with some confidence that the gaps in the written law are no less important than the words*!", quoted in Paolo Grossi, *A History of European Law*, cit., p. 119.

In a different perspective, another experience that made evident that a complete system of law was an impracticable ideal was that of the drafting of the *Allgemeines Landrecht für di Preussischen Staaten* (ALR). The Emperor Frederick the Great was determined to enact a Code designed as a "*body of perfect laws*" in which "*everything would be foreseen, everything would be combined, and nothing would be subject to absurdities",* quoted in Pierre Legrand, *Strange power of words: Codification situated*, cit., p. 15. The pursuit of such goal, however, turned out into an *ante litteram* illustration of the challenges posed by legal knowledge representation. The attempt to fit all law into written legal rules led to a contradictory result, an "*elephantine mass of rules quite in contravention of the Enlightenment ideals of simplicity and clarity*", see Paolo Grossi, *A History of European Law*, cit., p. 87. The legal text that finally entered into force in 1794 was, more than a code, an extraordinary complex *consolidation* composed of more than 19.000 articles. As Alexis De Tocqueville notoriously commented, "*Beneath this quite modern head there emerged* […] *a quite Gothic body*", see Jon Elster (ed.), *Tocqueville: The Ancien Régime and the French Revolution*, translated by Arthur Goldhammer, Cambridge University Press, 2011, p. 203. On the difference between codification and consolidation, see Mario E. Viora, *Consolidazioni e codificazioni: Contributo alla storia della codificazione*, Giappichelli, 1990.

[637] One of the solutions presented, indeed is that of personalized law, micro-directives which are output by machines. On the other hand, the code-driven approach can be combined with the "rules" derived from data-driven tools. See, Micheal A. Livermore, *Rule by Rules*, in Whalen Ryan (ed.), *Computational Legal Studies. The Promise and Challenge of Data-Driven Research*, Edward Elgar Publishing, Cheltenham, 2020, p. 238

[638] *Supra*, §§ 1.5. ff

[639] *Supra*, § 1.6.1.3.

[640] Ivi

[641] In this sense, Casey and Niblett maintain that "*the judgment of one human is outweighed by the wisdom of a decision generated by predictive technology that takes into account millions of judgments*

law" blur into those of Artificial Legal Intelligence, resulting into a form of "computational Langdellianism"[642]. On the other hand, the Rule of Machines appropriates and further develop the account rule following elaborated by Hayek[643]. In this respect, Casey and Niblett discuss the inherent limitations of jurists' capacity to identify and articulate the rules they follow providing as examples two notable arguments of American case law: on one hand, the renowned position adopted by Justice Stewart in the context of the definition of what counts as hardcore pornography under the First and Fourteenth Amendments, i.e., "*I know it when I see it*"[644]; on the other, Justice Cardozo's statement that "*[w]here the line is to be drawn between the important and the trivial cannot be settled by a formula. 'In the nature of the case precise boundaries are impossible' […]"*[645]. According to the Authors, these cases make manifest how jurists' implicit ability to detect distinctions is not complemented by the capacity to articulate the rules according to which such distinctions are made. On the other hand, through the processing of data, machines can detect and formalize the "laws which rule", that is, the rules determining the behaviour of decision makers:

> [m]achine-learning algorithms learn by *recognizing features, concepts, principles, and ideas* that humans instinctively recognize but find difficult to program or code. Rather than having to structure a program in order to code rules, the *rules are crafted and understood* by the artificially intelligent machine[646]

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and decisions", see Anthony Casey, Anthony Niblett, *Self-Driving Laws*, cit., p. 437; Id., *The Deaths of Rules and Standards*, cit., pp. 1426, 1430; Benjamin Alarie, *The Path of the Law*, cit., p. ___ . The Authors refer to James Surowiecki, *The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations*, Doubleday, Anchor, 2004

[642] Langdell developed an axiomatic conception of law that was inspired by the works of Wolff and Leibniz and by the model provided by natural sciences. For the American jurist, as botanists and chemists had their botanical gardens and laboratories, lawyers had libraries: in the same way scientists infer axioms from empirical observations, the legal scientist can come to know legal principles and their connections through the observation of empirical data. The data that the legal scientist has to deals with are case law. Each legal case is seen as the expression and instantiations of a set of principles that govern law at a higher level. On the basis of a careful observation and an activity of systematic ordering, the legal scientist could "compress" legal data into axioms from which the solution of legal cases could be logically deduced. See Micheal H. Hoeflich, *Law and Geometry*, cit., p. 120. In this sense, taking as an example the difference between independent contractors and employees, Alarie points out that, notwithstanding the number of cases dealt with, *"judges have not been able to articulate a single bright line test"*. According to the Author, a precise test is available: it is implicit in the case-law and it can be detected and formalized through machines, see Benjamin Alarie, *The Path of the Law: Towards Legal Singularity*, cit., p. 446

[643] *Supra*, § 2.3.1.3.

[644] *Jacobellis v. Ohio*, 378 U.S. 184 (more)84 S. Ct. 1676; 12 L. Ed. 2d 793; 1964 U.S. LEXIS 822; 28 Ohio Op. 2d 101

[645] *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921) 230 N.Y. 239; 129 N.E. 889; 1921 N.Y. LEXIS 828; 23 A.L.R. 1429

[646] Anthony J. Casey, Anthony Niblett, *The Death of Rules and Standards*, cit., p. 1426, fn 99, emphasis added

As it were, thanks to data-driven tools, jurists will be able to progress from "I know it when I see it" to "the machine knows it, even if I can't see it". But there is more: as the Authors put it, "*[d]eep-learning technology will find hidden connections in the law, elucidating principles that do – and more importantly, should – underpin the law*"[647].

In this way, the perspective of the Rule of Machines proves to rest on, and carries further, an all but unproblematic overlapping between *legal rules* and *laws* describing behaviour. In this respect, *mutatis mutandis*, one could notice a common thread linking the post-war debate on Jurimetrics[648], the discussion on connectionism started from the Eighties within the AI and law community, and the themes discussed within the current debate on AI. That which unites the latter is indeed the common concerns for the relations between the empiricist perspective assumed by data-driven approaches and the normative standpoint which underpins the practice of law. Especially during the Nineties, the results of the first applications of neural networks in the legal field led the GOFAIL community to address the legitimacy of the "decisions" generated by the machine[649], that is, the possibility to justify them as legal decisions in light of an explanation of the process through which they were output[650]. As the perspective underlying the current Rule of Machines narrative shows, not only the last two decades of research on connectionism and law have not solved the concerns with the problem of the normative significance of data-driven approaches; on the contrary, such problem has possibly been further deepened by the successes, i.e., performance, achieved by the latter especially in tasks such as binary classification[651]. Recalling Losano, one

[647] Iid, *Self-Driving Laws*, cit., p. 433

[648] As illustrated above, already in the post-war period the research on quantitative predictions of judicial decisions encountered a set of censures pointing to the lack of relevance from a legal perspective, as exemplified by Stone's claim that such methods would at best be capable of predicting what future decisions will, and not *should*, be Julius Stone, *Law and the Social Science in the Second Half Centrury*, cit., p. 54; see, also, Frederick Bernays Wiener, *Decision Prediction by Computers: Nonsense Cubed-and Worse*, cit., p. 1023. See, *supra*, Chapter IV, §§ 4.3, 4.3.1.

[649] David R. Warner Jr, *A neural network-based law machine: The problem of legitimacy*, *Information and Communications Technology Law*, 1993, 2, 2, p. 135.

[650] Interestingly, the account provided by Aikenhead with respect to the different methods proposed to "*get explanations and justifications from neural nets"* is current debate: "*(1) Extract rules from the neural net; (2) Present to the user those nodes (factors) that had a positive contributory influence along with those that had a negative contributory influence on the decision; (3) Present the training set of the neural net to the user; and (4) Create a hybrid system where the output of the neural net is explained ex post facto by other systems*". As Aikenhead put it "[…] *while rules [extracted from the network] may provide an explanation of a result, it is hard to regard them as a justification*". Michael Aikenhead, *The Uses and Abuses of Neural Networks in Law*, in *Santa Clara High Technology Law Journal* 1996 12, 1, pp. 62-63; see, also, Trevor J. M. Bench-Capon, *Neural Networks and Open Texture*, cit., p. 292; Daniel Hunter, *Out of their minds: Legal theory in neural networks*, in *Artificial Intelligence and Law*, 1999, 7, 2-3, p. 129

[651] Along the same lines, the criticism and concerns recent raised by Bench-Capon: the Author points to the limitations of data-driven approaches and emphasized the reasons why "*GOFAIL still has a place in AI and Law*" Trevor J. M. Bench-Capon, *The Need for Good Old-Fashioned AI and Law*, cit., p. 23

might question the extent to which that which is measured and formalized on the basis of the analysis of data can be called law[652].
As I will discuss in the next section, the overlooking and blurring of the lines of different understanding of rules is one of the main reasons why not only the Rule of Machines does not solve the aporias of the Rule of Law, but actually entrenches them.

3.2. The *rules* of Machines

Harkening back to some of the classic *topoi* of the debate on the Rule of Law, the Rule of Machines presents the ideal of a legal system based on automation. On one hand, such picture appropriates the behaviourist approach elaborated by Turing and endorsed by AI research[653] to support a mechanical account of rules and rule following. On the other hand, the Rule of Machines further blurs the lines of the concept of rules: overcoming the distinction that Turing had drawn between rules of behaviour and rules of conduct[654], it equates the *laws* which pertain to the frame of nomological explanations with *legal rules*. In so doing, however, the Rule of Machines does not, and indeed cannot, as yet it aspires, dispose of human rule followers and the understanding which emerge within their normative practices: more simply, it replaces it with the practices and understanding of those who design, develop and implement the socio-technical architecture supporting legal automation. As I will attempt to show, by severing the assessment of what counts as a rule from the normative practice of the community of jurists, the translation of rules into mechanisms threatens at its foundations the affordances of the Rule of Law discussed in Part I.

3.2.1. Rules as mechanisms

To the extent that it grounds its ideal picture of automation on the Platonist-Fregean understanding of rules advanced under the Rule of Code and the Hayekian account of rule following assumed under the Rule of Data, the Rule of Machines commits to a perspective which actually undermines the intelligibility of "what machines can do" in terms of rules. On the other hand, what it is necessary for overcoming such impasse, and which indeed is brought back through the back door, is precisely that which the Rule of Machines aims at taking out, i.e., rule followers capable of engaging into normative practices.
While, thanks to machines, it is possible to correctly apply rules and produce meaningful legal knowledge by leveraging causal and statistical laws, it is not the latter which make machine outputs "correct", "meaningful", or "legal", but the normative practice in which machine outputs are read and understood as relevant

[652] *Supra*, § 2.3.1
[653] *Supra*, §§ 2.4. - 2.4.1; cfr., also Hubert Dreyfus, *What Computers Still Can't Do*, cit., pp. 68, 195; John Haugeland, *Artificial Intelligence. The Very Idea*, cit., p. 117
[654] *Supra*, § 2.4.

from the point of view of legal rules. While *"computer software, after all,* makes *the machine produce just this answer",* as Baker and Hacker point out, *"what* makes *this answer the right answer?*"[655]. Not only *calculi* or empirical generalizations cannot stand in place of the rules which emerge within normative practice: the very possibility to understand the former in terms of correctness and incorrectness presupposes the assumption of a perspective embedded into a normative practice: only *from within* the practice of the community of jurists and with respect to the *rules that its members follow*, it is possible to understand the operations of a machine and draw meaningful conclusions from the outputs they produce. Only in the context of a normative practice a regular pattern can be detected and understood as a rule[656]. As Wittgenstein pointed out, following rules is "*a human activity*"[657], a "*custom*"[658]: the context in which rules and rule following are intelligible is that of meaningful action and linguistic communication[659]. Linguistic interactions which provide the "*framework of the possibility of following a rule*" and the "*logical environment of rule-following actions*" [660]. It is indeed the mutual understanding and agreement in judgments reached in language[661] which forges the *must* which characterizes conceptual

[655] Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., p. 197

[656] The concept of rules is connected to the concept of regularity and identity by a constitutive relation: what counts as following the rule and what counts as doing the same belong together: as Wittgenstein put it, "*the use of the word 'rule' and the use of the word 'same' are interwoven. (As are the use of 'proposition' and the use of 'true')*", Ludwig Wittgenstein, *Philosophical Investigations*, § 225; cfr., also, Id., *Remarks on the Foundations of Mathematics*, VI, 2

[657] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, 29

[658] Ludwig Wittgenstein, *Philosophical Investigations*, §§ 198, 199; Id., *Remarks on the Foundations of Mathematics*, VI, § 27

[659] Cfr. Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, § 17

[660] These activities include the ability to explaining, articulate the meaning of the rule, being able to justify one's action by making reference to the rule. The role played in interaction shifts, assess other's action with reference to the rule, and being able to criticize it. Also being able to anticipate the – predict – action in conformity with the rule, that is, to extend it and, in turn, being able to explain, justify etc. the reasons for such articulation. Instruct another, being able to communicate to others the rule, them to learn and understand the rule, see Baker, Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., p. 52

[661] It is worth spending some disentangle the relationships between understanding and interpretation. The primacy which understanding is given in Wittgensteinian account of rule following has indeed qualms with hermeneutic tradition, see James Tully, *Wittgenstein and Political Philosophy. Understanding Practices of Critical Reflection*, in *Political Theory*, 1989, 17, 2, p. 172. In this respect, it is important to distinguish between the concept of interpretation-*Deutung* adopted by Wittgenstein, and that of interpretation-*Auslegung* discussed by Gadamer. The former stipulates that interpretation-*Deutung* should be used to refer to the substitution of the expression of a rule with another expression of the rule, i.e., a reformulation (Ludwig Wittgenstein, *Philosophical Investigations*, § 201). Accordingly, interpretation does not, by itself, ensure understanding, in that it does not bridge the gap between the expression of a rule, i.e., a set of signs, and one's actions: I can reformulate a rule, articulate it, explain reasons, and still not be understood (cfr. ivi, § 198). On the other hand, Gadamer uses the concept of interpretation-*Auslegung* to characterize the interpretation as the medium in which understanding occurs, see Hans Gadamer, *Wahrheit und Methode*, cit., German, p. 392; Italian, p. 793; English, p. 390. Gadamer maintains that "*[t]hrough interpretation, understanding acquires linguistic expression, but the linguistic expression thereby produced does not have a second meaning, beside that which has been understood and interpreted*". This use of interpretation can be compared to Wittgenstein's "explanation of meaning". It is possible to conciliate

determination and constitutes what *counts as* following a rule. Being able to follow a rule implies having mastered a technique: such mastery is manifested in one's ability to *do things* with the rule, i.e., apply it correctly and articulate the reasons which justify acting in a certain way as conforming with the rule[662].

In light of this perspective, the degree of explicitness and completeness of a rule cannot be assessed *in abstracto*, nor, as it were, exhaustively, i.e., once and for all, irrespective of the context of application: contrasting an understanding of rules as a *"calculus of signs governed by strict rules that budget for all possible circumstances"*, Wittgenstein emphasized that what matters is whether "*under normal circumstances"* the rule *"fulfils its purpose"*[663]. What counts as purpose and normal circumstances, in turn, depends on the situated understanding of the community of rule followers. Being able to get the point of the rule, anticipating and solving the set the potential questions that may arise at the moment of execution, apply the rule beyond the examples one has been given are the precondition and manifestation of the capacity of understanding explicit instructions mean, not the result of the consultation of some other set of instructions.

Following this account of rules, Wittgenstein pointed out that "*[t]he difficulty here is: to stop*", i.e., to acknowledge that rules are transparent to practitioners[664] and that the *grounds* which license the ascription of normative value to action are those articulated publicly in speech and action, as recognized by the other rule followers. The need to halt the analysis of rules at the level of rule followers' overt linguistic behaviour does not signal an empirical limitation - of course, one can continue to "dig down the ground" in search of hidden mechanisms or more complete

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the two perspectives by intending the interpretation-expression of the rule as the meaningful *act* of expression, manifesting understanding, and not as further expression-formula that is still not necessarily understood. The possibility to read Gadamer's reference to interpretation as "explanation of meaning" can be grounded on the consideration that the German philosopher points out that interpretation brings understanding to an explicit justification and foundation, and that interpretation is not the means through which understanding is produced, but the content which is understood. cfr. Hans Gadamer, *Wahrheit und Methode*, cit., German, pp. 392, 402, 461, 475, 479; Italian, pp. 793, 813, 931, 959, 967; English, pp. 390, 399, 454, 466, 469. Moreover, in the work of both Wittgenstein and Gadamer it is possible to identify a deep conceptual nexus which intertwines the idea of mutual understanding, communication, interaction and which is emphasized by the relevance that both Authors acknowledge to the concept of *Verständigung*, which is used to mean "understanding", "agreement", "communication", "coming to an agreement through language", "coming to an understanding". Cfr., "*Zur Verständigung durch die Sprache*", which Hacker and Schulte translate as "*communication by means of language*", see Ludwig Wittgenstein, *Philosophical Investigations*, revised 4th edition by Peter M. S. Hacker, Joachim Schulte, Wiley-Blackwell, Oxford, 2009, p. 94e. Cfr. the Italian translation *"la comprensione che si raggiunge tramite il linguaggio"* ("*the understanding achieved through language*", my translation), see Mario Trinchero (ed.), *Ludwig Wittgensten, Ricerche filosofiche,* translation by Renzo Piovesan, Piccola Biblioteca Einaudi, Torino, 2014, p. 104. Similarly, in Hans Gadamer, *Warheit und Methode*, cit., German, pp. 449-450; Italian, pp. 907-909; English, p. 433

[662] Ludwig Wittgenstein, *Philosophical Investigations*, § 217

[663] "*The sign-post is in order—if, under normal circumstances, it fulfils its purpose"*, Ludwig Wittgenstein, *Philosophical Investigations*, § 87

[664] Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., p. 67

descriptions[665] - but a conceptual one: any attempt to provide an explanation of rule following which disregards the reasons articulated by rule followers and adopts as *explanans* different elements would imply the adoption of a vocabulary which would make the *explanandum* not anymore intelligible as rule following. The result would not be a better account of rules, but the account of something else[666].

This is manifest in a series of challenges posed by the *rules* of machines. In this sense, indeed, can be framed the issues relating to the explanation and justification of machine decisions. The problem is not much that of the possibility to explain the rules governing machine decisions, but that the rules thereby explained would be rules different than those which are followed in normative action. In asking an explanation of machine decisions, the meaning of the "why" and "because" which introduce, respectively, the question and the answer potentially belong to different linguistic games, each of which has its own vocabulary and forms of explanation, and make reference to different kinds of rules. Such distinctions are reflected by the grammatical differences affecting concepts such as detection and prediction: while, on one hand, it is perfectly intelligible to speak of the activity of jurists, and rule followers in general, in terms of pattern detection and prediction, on the other, that which is detected and predicted respectively by machines and rule followers differs significantly.

The decisions made in the phase of design and development, i.e., choices concerning data, their labelling, learning algorithms, similarity functions, baselines, etc., structure the inductive bias which makes possible for the machine to learn and determine what counts as the "same" and as "correct" within the rules-*calculi* which govern the machine in the phasis of learning and application. While these decisions manifest designers' and developers' understanding of the rules governing the phenomena whose datified analogue is object to processing, the pattern-rules learnt by the machine cannot be deemed as having normative value if not on the basis of an assessment informed by the very criteria which govern the practice which is subject to computational analysis[667]. As it is always possible to bring a course of action into accord with a rule through some formulation of the rule[668], it is always possible to find a rule-pattern which fits a certain behaviour-data: the accuracy of predictions or classifications achieved on the basis of the rule-patterns learnt, do not exclude the underdetermination and, above all, does not overlap with, nor it can substitute, the assessment of correctness and incorrectness with reference

[665] Ludwig Wittgenstein, *Zettel*, § 314.
[666] Cfr., Ludwig Wittgenstein, *Zettel*, § 320
[667] Assuming the rule-pattern learnt by the machine as representing the rule which govern the action of rule followers there would be no space for judgments of correctness and incorrectness of the operation of the machine. The hiatus between understanding what counts as the rule and the rules-pattern detected in data and implemented in code is manifested by the concerns raised by the risk of adversarial attacks in the case of data-driven approaches and, in general, by the alarm related to the possibility of "gaming the system" which machines leave open
[668] Ludwig Wittgenstein, *Philosophical Investigations*, § 201

to the rules which are articulated in legal practice[669]. As Baker and Hacker point out

> The concepts of regularity, predictability, agreement, in respect to techniques and practices, do not make it possible to break into the circle of normative notions 'from the outside' […]. Each of these concepts, applied to practices, must be grasped from the point of view of the particular practice[670]

Indeed, there is no such thing as regularity, identity, similarity or continuity in itself[671]: what counts as regular, identical or similar presupposes a "*frame of reference"*[672] and criteria which are established, and intelligible, *from the point of view of a rule*[673]. While following a rule can be considered as "being doing always the same", on the other hand, what counts as "doing the same" is established in the practice of following such rule[674]. Following a rule can be described as continuing a series, i.e., projecting a regularity which has been detected. When referred to rules, the capacity to predict "the next step of the series" involves the understanding and, if necessary, the articulation, of the relations of conceptual implication which constitute what counts as following it. In this sense, to predict a decision concerning the application of a rule is to make such decision[675]: the ground which is assumed as basis for the prediction is the understanding of the rule which justifies the particular decision predicted.

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669 Trevor J. M. Bench-Capon, *Neural Networks and Open Texture*, cit., p. 296

670 Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., p. 147

671 Cfr. Ludwig Wittgenstein, *Philosophical Investigations*, § 226 "[…] *If, from one day to the next, someone promises: "Tomorrow I'll come to see you"- is he saying the same thing every day, or every day something different*?". Similarly, ordering someone to "do the same" would misfire unless one had already learnt to grasp what counts as the same, cfr,, Ludwig Wittgenstein, *Zettel*, § 305

672 As Nelson Goodman pointed out "[…] *we must recognize that similarity is relative and variable, as undependable as indispensable. Clear enough when closely confined by context and circumstance in ordinary discourse, it is hopelessly ambiguous when torn loose. In this, similarity is much like motion. Where a frame of reference is tacitly or explicitly established, all is well; but apart from a frame of reference, to say that something moves is as incomplete as to say that something is to the left of. We have to say what a thing is to left of, what it moves in relation to, and in what respect two things are similar. Yet similarity, unlike motion, cannot be salvaged merely by recognizing its relativity. […] As it occurs in philosophy, similarity tends under analysis either to vanish entirely or to require for its explanation just what it purports to explain"* Nelson Goodman, *Seven strictures on similarity*, in Id., *Problems and Projects*, Bobbs-Merrill, Indianapolis, 1972, p. 437.

673 One could wonder whether she is always doing the same. It would make not make sense to say that, since one is doing something different every time, she is not following a rule. Cfr, Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VII, § 51; Id., *Philosophical Investigations*, §§ 226-227

674 Cfr. Wittgenstein's remarks on sameness and the law of identity: "'*A thing is identical with itself.' - There is no finer example of a useless sentence* […]", Ludwig Wittgenstein, *Philosophical Investigations*, § 216.

675 Winch refers to Cranston's claim that there are cases, such as those of an invention or a poem, in which predicting the latter would amount to actually make the invention or write the poem; Peter Winch, *The Idea of a Social Science and Its Relations to Philosophy*, cit., pp. 87-88; cfr., also, Richard Rorty, *Philosophy and the Mirror of Nature*, Princeton University Press, Princeton, 2018, p. 387

This differs from the prediction of the likely occurrence of *signs* or behaviours on the basis of causal or statistical laws. In these cases, an inaccurate prediction might signal an error in calculation or an imprecise formalization of the laws governing the phenomenon object of investigation, and the disappointment of the cognitive expectations of the predictor might prompt the adjustment of the model and methods of prediction adopted. In rule following, on the contrary, there is no "experimenting"[676], discovery, trial and error or "wait and see": with respect to the rule, the expectations one adopts are normative, not cognitive[677]. Expressions such as "if I fulfil legal condition x then legal effect y will be produced" do not describe a causal relation nor the projection of a statistical regularity: in these cases, as Wittgenstein put it, *"the allusion to the future and to yourself is mere clothing"*[678], and the production of the legal effect y would be the criterion which would license the ascertainment that the legal condition x have been correctly fulfilled[679].
In this light, it is possible to go back to the argument from the "inadequacy of jurists". What counts as biased, incorrect or inconsistent behaviour – as much as that which, on the other hand, counts as unbiased, correct, consistent - cannot be assessed "from the outside", on the basis of criteria different from those which inform the practice in which rules are followed. While, once again, the use of machines can undoubtedly contribute to the analysis of normative behaviour, quantitative approaches cannot but integrate, and not substitute, the consideration of the reasoning articulated by rule followers. No matter how a machine might perform thanks to the rule-patterns detected, the normative significance of such rules is still in need of a justification from the point of view of the *legal* rule.

3.2.2. Mechanisms and rules

In the course of the present work, I have highlighted the central role which the concept of understanding plays both in giving an account of rule following and in affording legal protection under the Rule of Law. With respect to the latter, I have emphasized how the possibility to articulate or challenge a certain understanding of what counts as the rule depends not only on the possibility to address the subject which will make a decision to such effect, but also on the circumstance that such subject is capable of understanding. As discussed in the previous paragraph, mutual understanding and agreement in speech and action is precisely that which makes it

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[676] Cfr. Wittgenstein: "*Imagine that calculating machines occurred in nature, but that people could not pierce their cases. And now suppose that these people use these appliances, say as we use calculation, though of that they know nothing. Thus e.g. they make predictions with the aid of calculating machines, but for them manipulating these queer objects is* experimenting", Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, V, § 3, emphasis added
[677] Respectively, those that are "*given up when they have been disappointed*" and those which are retained despite their disappointment Niklaas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004, p. 149
[678] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, § 15. Cfr., also, with specific reference to law, Hans Kelsen, *Causality and Imputation*, in *Ethics*, 1950, 61, 1, p. 2
[679] Cfr. Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, § 18

possible to develop and use formal languages[680] and, consequently, to implement machines for the identification and application of rules. Once formalized into the artificial language-mechanism of code and data, however, rules might cease to belong to the dimension of practice.

The translation of the rules guiding actors in normative practices into computational mechanisms poses several challenges: some relates to the identification of the elements to be formalized, others to the expressivity of the formal language adopted[681]. In part, their overcoming depends on the ability of the programmer, of the capabilities of the domain experts which the latter consults, on the quantity and quality of data or the sophistication of the learning techniques adopted. There is, however, a different obstacle which affects any attempt to reduce the rules governing normative interactions to *calculi*-mechanisms, and it concerns the very nature of computational mechanisms on one hand, and of legal rules on the other. The translation of law into computable rules, i.e., the reduction of all rules to *calculi*, requires the discretization of that which, as legal meaning, is inherently continuous. As a consequence, there exists an inexhaustible risk of conflict between rules-*calculi* and the constitutive and evolving character of rules followed in the context of a practice. In this respect, it can be useful to distinguish different levels at which the entanglement between mechanisms, the rules of artificial languages and those of practice can results into conflicts and misfires. On a first level, machines can behave unexpectedly due to a malfunctioning of the hardware: despite the confidence of the programmer in her formalization of rules and relations of conceptual necessity into the *calculus*-program - as laid down, for instance, on paper -, the machine produces unexpected outputs due to a failure of its electro-mechanical components, i.e., an overheating of the processor. Only on a different level it is possible to distinguish actual *errors in the application of rules*. In this respect, one can discern, on one hand, those errors-bugs which result from the programmer's misunderstanding of the rules-*calculi* governing either the programming language or the program itself. On the other hand, however, there is a different possibility of error which concerns rules others than those of the artificial language, and which, potentially, is far more insidious: that which qualify the latter as errors, indeed, may not depend on the ability of the programmer in translating rules between different languages or in following the rules of the artificial language, but on her (mis)understanding of what counts as a rule in the context of the normative practice which she aims at expressing into a computational formalism. To some extent, such an eventuality is not the programmer's fault: the fact is that what counts as the correct understanding of a rule cannot be merely apprehended and translated once and for all[682].

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[680] Cfr., Hans Gadamer, *Warheit und Methode*, cit., German, p. 450, Italian, p. 909; English, p. 444

[681] Recall, in this sense, the comments made by Buchanan and Headrix, *supra*, § 2.5.

[682] Similarly, in the case of machine learning, one can distinguish the cases in which the results of the learning phase disappoint the expectations of the developers – i.e., the algorithm overfits the data,

The stability of the understanding of a rule both affords communication and makes it possible its computational translation. As such stability depends on the normative practice in which the rule is followed, it also derives from it its emergent character. On the other hand, while the choices which inform the design, development and application of code and data driven tools manifest a certain understanding of what counts as a rule, they also entrench such understanding into computational mechanisms, the pre-empting and precluding other possible understandings. The establishment of what counts as the rule and the assumption of a fix "bedrock" is a necessary precondition for its computability. For machine to "mechanically follow" rules, "*all steps* must have been *already taken*": ultimately, the requisite of completeness and explicitness is imposed by the necessity to establish a correspondence between the rules-*calculi* governing computer programs and programming languages and the discrete states of the machine which function according to relations of causal necessity. Such affordance-constraint of computational machines is maintained in the higher-level languages in which legal rules are formalized. Any implementation of legal rules into machines depends on the previous formalization of the conceptual connections which characterize the latter - as Haugeland put it, indeed, "*meanings exert no mechanical forces"*[683] - and the formalization of a "*theory on what amounts to justification"*[684].

In this respect, one can identify a certain resemblance between computational mechanisms and the rules which are followed in practices. Any normative practice, indeed, depends on the circumstance that certain rules are followed "mechanically" or "blindly" [685], that is, "*without reflection*" and with complete certainty[686]: the very possibility to speak of a rule-governed activity entails the absence of radical disagreement or doubt in relation to what counts as following rules[687]. Practices rest on a bedrock which marks the point where "*the chain of reasons comes to an end"*[688] and what counts as following the rule is manifested in action[689]. In this sense, the resemblance with machines, however, is more apparent than substantial.

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lacking to generalize - from those in which, despite the high performances of the algorithm, the significance of the classifications or predictions is contestable on the basis of normative grounds relating to the very understanding of the phenomenon represented into data

[683] John Haugeland, *Artificial Intelligence. The Very Idea*, cit., p. 117

[684] Michael Aikenhead, *The Uses and Abuses of Neural Networks in Law*, cit., p. 63

[685] When framed in an epistemological perspective, this points to the absence of doubt and, as it were, the presence of a certain bias. *"[…] the questions that we raise and our doubts depend on the fact that some propositions are exempt from doubt, are as it were like hinges on which those turn*", Ludwig Wittgenstein, *On Certainty*, § 341; cfr., also, ivi, § 335, 337, 342

[686] Ludwig Wittgenstein, *Philosophical Investigations*, § 219; Id., *Remarks on the Foundations of Mathematics*, VI, 28, *passim*; Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit. pp. 97; 197. A discussion in this sense with respect to habitual rule-following, see Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy*, cit., chapter II, § 4

[687] Ludwig Wittgenstein, *Philosophical Investigations*, § 241; Id., *Remarks on the Foundations of Mathematics*, VI, §§ 39 ff; Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., pp. 223 ff

[688] Ludwig Wittgenstein, *Philosophical Investigations*, § 326; cfr., also, § 217

[689] Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, cit., pp. 224 ff

The complete certainty and lack of reflection which distinguish normative action depend on the rule followers' having bond their *judgment* about what counts as according to the rule[690]. While the existence of a bedrock is a constitutive feature of practices of rule following, however, this neither establishes the point at which such bedrock is reached, nor it implies that such point is fixed once and for all. Both what counts as a reason for an action and the "length" of the chain of reasons required to justify it are "fixed" by, and "as fixed as", the agreement in understanding and judgment reached within the linguistic interactions between rule followers[691]. As a consequence, while both natural and artificial languages afford the coexistence of different and competing expressions-formalizations of what counts as a rule and what counts as a justification, on the other hand, only a language which is spoken between partners who share a common form of life affords the latter to emerge in the course of the interactions between rule followers, tuning mere rule-application into the constitution of a new understanding of what counts as a rule. Only the interactions between rule followers affords the "*making up*" and "*alteration*" of the rules "*as we go along*"[692], making it possible that what counts as a rule changes and yet that following it remains "doing always the same". In this respect, a distinguishing feature of normative practices is the conceptual circularity between rules, application, and criteria of justifications: what rule followers *do* contributes to the determination of what they *should do*[693].

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[690] As Wittgenstein highlights, "*what we call 'measuring' is in part determined by a certain consistency in results of measurement*", Ludwig Wittgenstein, *Philosophical Investigations*, § 242; cfr., also, Id., *Remarks on the Foundations of Mathematics*, VI, § 27

[691] This aspect is emphasized especially by Charles Taylor, see *To follow a rule*, in Id., *Philosophical Arguments*, cit., p. 168

[692] Ludwig Wittgenstein, *Philosophical Investigations*, § 83; Peter Winch, *The Idea of a Social Science and Its Relations to Philosophy*, cit., pp. 55-56. Such distinctive aspects of normativity emerge especially in the studies concerning practices of improvisation, see Davide Sparti, *On the Edge: A Frame Analysis for Improvisation*, in Lewis George E., Piekut Benjamin, The Oxford Handbook of Critical Improvisation Studies, Volume 1, Oxford University Press, Oxford, 2016, p. 199; Id., *Suoni inauditi*. *L'improvvisazione nel jazz e nella vita quotidiana*, Il Mulino, Bologna, 2005; Gerald J. Postema, *Melody and Law's Mindfulness of Time*, in *Ratio Juris*, 2004, 17, 2, p. 203; Id., *Salience Reasoning*; in *Topoi*, 2008, 27, p. 41; Claudio Ciborra, *The Labyrinths of Information. Challenging the Wisdom of Systems*, Oxford University Press, Oxford, 2002, pp. 49 ff; 153 ff.. There are of course important differences between "continuing the series" in legal practice and the practices of improvisation like jazz. Sparti distinguishes between *reactive* forms of improvisation, induced by the need to react to unforeseen unfolding of events, and *elective* forms of improvisation, intentional form of aesthetic experimentation, see Davide Sparti, *On the Edge: A Frame Analysis for Improvisation*, cit., p. 199. Precisely in this respect, one can notice that, while jazz improvisation makes a point in originality and distinctiveness, legal practice, conversely, is distinguished by the stress it puts on the continuity with the past, on "doing always the same" and rejection of creativity.

[693] Davide Sparti, *Se un leone potesse parlare*, cit., p. 135. As Nelson Goodman pointed out, "*[p]rinciples of deductive inference are justified by their conformity with accepted deductive practice. Their validity depends upon accordance with the particular deductive inferences we actually make and sanction. If a rule yields inacceptable inferences, we drop it as invalid. Justification of general rules thus derives from judgments rejecting or accepting particular deductive inferences. This looks flagrantly circular. I have said that deductive inferences are justified by their conformity to valid general rules. But this circle is a virtuous one. The point is that rules and particular inferences alike*

Discussing the limitations of the GOFAIL paradigm, Leith maintained that "*the rule-based nature of computer programs disproves the rule-based nature of law*"[694]. In the light of the above, I believe it is necessary to reformulate such position and stress that what is disproved by the attempt to translate legal rules into computational mechanisms actually is the computational nature of rules: the rules governing law, and meaningful action in general, cannot be exhaustively expressed by the narrow conception of rules-*calculi* which govern computer programs. The fact that legal rules cannot be reduced to a *calculus* - or better, that they can be formalized as a *calculus* in many different ways, and not once and for all - does not mean they are not rules, but that the model of *calculus* does not exhaust the possibility of normative action.

The constitutive nature of the relation between rules and practices defines the limitations of rules-mechanisms and of the machines which they govern. Machines, *qua* machines, do not follow rules nor participate to the shared understanding which grounds normative action: not only machines do not know what *is not* in code or in the data, they do not know what *is* the code and the data. The programmer, and even less data, cannot unilaterally and once and for all anticipate and represent the understanding which can emerge into practices and which is not there yet. As anticipated, the dimension in which understanding is achieved and manifested is the public dimension of the language in which rules are "put into play", i.e., articulated, taught, justified, contested, etc.. Rule following depends on the affordances of action and speech[695] and with the latter it shares its generative character: in action and speech new meanings can emerge and being understood. In this perspective, as Arendt has emphasized, the meaning of the concept of action encompasses taking initiative, leading, ruling, setting something into motion, generating new beginnings[696]

> It is in the nature of beginning that something new is started which cannot be expected from whatever may have happened before. This character of startling unexpectedness is inherent in all beginnings and in all origins. […] The new always happens against the overwhelming odds of statistical laws and their probability, which for all practical, everyday purposes amounts to certainty; the new therefore always appears in the guise

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are justified by being brought into agreement with each other. A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend. The process of justification is the delicate one of making mutual adjustments between rules and accepted inferences; and in the agreement achieved lies the only justification needed for either. All this applies equally well to induction. An inductive inference, too, is justified by conformity to general rules, and a general rule by conforming to accepted inductive inferences", Nelson Goodman, *Fact, Fiction and Forecast*, Harvard University Press, Cambridge, 1983, p. 64

[694] Philip Leith, *Common Usage, Certainty and Computing*, in Id., Peter Ingram (eds), *The Jurisprudence of Orthodoxy: Queen's University Essays on H.L.A. Hart,* Routledge, London, 1988, p. 109

[695] Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, VI, § 17; Hannah Arendt, *The Human Condition*, cit., p.

[696] Hannah Arendt, *The Human Condition*, cit., p. 178

> of a miracle. The fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable.[697]

Far from being a character inherent to the sounds uttered or movements made by an agent, or something depending on her stance or will, that which makes an action a beginning "*depends upon the future — that is, upon the way others respond to it*", on the "*the intersections between individuals, as well as those between individuals and the events that bring them together*" [698]. Normative action and the possibility of change are strictly tied between themselves and, in turn, with the inherently shared character of understanding. Being involved in normative practices is a matter of "*muddling through*"[699] and "*finding our feet*[700]" with the other partners of rule-governed interaction: in following a rule "*we benefit of the opportunity or right to act and assert, that is the right not to be interrupted in continuing a series of acts consistently with the conditions of assertibility*" instituted by the community of rule followers[701]. Mutual understanding is that which grounds the stability of rules and of the distinctions that are drawn within rules and in the application of rules. Those between literal and non-literal meaning, or between easy and hard cases, are distinctions *in language* which are encountered *in practice*: they are intelligible and justified only in the context of the interactions within which such distinctions are constituted, i.e., through the arguments which sustain, argue, contrast them[702]. In this respect, as Fish points out, ambiguity and straightforwardness

> are not linguistic, but contextual or institutional. Since those circumstances (the conditions within which hearing and reading occur) can change, the properties that

[697] Ivi, pp. 177-178

[698] Davide Sparti, *On the Edge: A Frame Analysis for Improvisation*, cit., p. 196 On the other hand, by herself, the agent cannot know whether what she has detected constitutes a series nor whether what she does will count as the continuation of it. As Santoro puts it, she cannot establish the meaning that the metaphor she has introduced will have once it has been appropriated and become language, see Emilio Santoro, *Autonomy, Subjectivity, Rights*, cit., p. 263; Id., *Diritto e diritti*, cit. p. 317. Since it is only such public dimension that it is intelligible to talk of rules – "*it is not possible to obey a rule privately*" – dissolves the subjectivism and arbitrariness. And the problem of the inadequacy of jurists and legal rules. There is no *aut aut* between the determination of a mechanism and "anything goes". that between these two alternatives is *precisely* the space in which normativity unfolds, affording both stability and flexibility. Ludwig Wittgenstein, *Philosophical Investigations*; see Emilio Santoro, *Diritto e diritti*, cit., pp. 299 ff; Stanley Fish, *Doing What Comes Naturally*, cit., pp. 11-12

[699] Davide Sparti, *Suoni inauditi*, cit., p. 215

[700] Ludwig Wittgenstein, *Philosophical Investigations*, II, xi, § 325; Davide Sparti, *Se un leone potesse parlare*, cit., p. 121

[701] Davide Sparti, *Se un leone potesse parlare*, cit., p. 120

[702] This dynamic is exemplified by the discussion of the relevance for AI of the distinction between easy and hard cases conducted by Anne Gardner. Gardner assumed that AI was only suitable for easy cases and, consequently, tried to develop forms of heuristics to distinguish whether a case was easy or hard. That between hard and easy cases, however, is a distinction that cannot be but *made* – and not *detected* – and, above all, the ground on which is made are precisely those which AI cannot formalize: the understanding of the meaning of the rules, of the actions and of the facts in light of their relevance for the present situation. Anne Gardner, *An Artificial Intelligence Approach to Legal Reasoning*, cit.. As Marek Sergot put it "*the nature of the law is such that we can never say with certainty whether a legal concept does or does not apply in a given case. In all but exceptional circumstances, it is not computer programs but courts of law or other adjudicating authorities that decide such questions*", Marek Sergot, *The Representation of Law in Computer Programs*, cit., p. 14

> sentences display can also change; A sentence is never apprehended independently of the context in which it is perceived, and therefore we never know a sentence except in the stabilized form a context has *already* conferred. But since a sentence can appear in more than one context, its stabilized form will not always be the same[703].

The "same" applies to legal cases. As the American scholar emphasizes

> A plain case is a case that was once *argued*; that is, its configurations were once in dispute; at a certain point one characterization of its meaning and significance of its rule was found to be more persuasive than its rivals; and at *that* point the case became settled, became perspicuous, became undoubted, became plain. Plainness, in short, is not a property of the case itself there is no case itself but of an interpretive history in the course of which one interpretive agenda complete with stipulative definitions, assumed distinctions, canons of evidence, etc. has subdued another. That history is then closed, but it can always be reopened. That is, on some later occasion the settled assumptions within which the case acquired its plain meaning can become unsettled, can become the object of debate rather than the inplace background in the context of which debate occurs; and when that happens, contending arguments or interpretive agendas will once again vie in the field until one of them is regnant and the case acquires a new settled and plain meaning"[704]

The fact that stable understanding of what counts as a rule has *become* stable implies that there is always the possibility of a new and different stabilization, once the circumstances in which it was first stabilized change. On the contrary, the ideal of complete automation advanced by the Rule of Machines perspective necessarily implies the hypostatization of legal understanding and of such distinctions, and, on the other hand, freezes the possibility of "coming to an understanding and agreement" which is afforded through linguistic interaction, and which constitutes the precondition for the possibility of the recognition of what might deserve legal protection. Ultimately, the risk posed by turning rules belonging to a practice into a *calculi*-mechanisms is that of their reification, that is, the risk that they cease to be rules and become mere mechanisms. Severed from the practices in which they are followed, and disengaged from the normative framework constituted by meaningful interactions, the rules that are formalized risk losing contact with the ground(s) which provide their justification[705]: the relations of conceptual determination which were subject to formalization lose their meaning, and there remains only the causal determination of a mechanism. When this happens, the possibility to conceive such mechanism as "rules" cannot but rest on the authority of those who have designed and implemented them.

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[703] Stanley E. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities*, Harvard University Press, 1980, pp. 281-284

[704] Id., *Doing What Comes Naturally*, cit., p. 512

[705] In this respect, Wittgenstein emphasizes that "*it is essential to mathematics that its signs are also employed* in mufti. *It is the use outside mathematics, and so the meaning of the signs, that makes the sign-game into mathematics. Just as it is not logical inference either, for me to make a change from one formation to another (say from one arrangement of chairs to another) if these arrangements have not a linguistic function apart from this transformation*", Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, V, § 2

3.3. Conclusions: back to Hobbes, again?

The Rule of Machines narrative present automation as the means to overcome the aporias of the Rule of Law. The practice of law, legal rules and human rule followers, are delegitimized and presented as deemed - as it were, by design – to degenerate into the Rule of Men. That which is offered in contrast to this picture, however, is either a system which is not intelligibly understandable in terms of rules or either a system in which normativity shifts from the community of jurists to that of programmers. The results is a complex mechanism of behavioural regulation which is alternative to law[706] and an ideal of government and legal order which is almost four centuries old, that is, a computational form of Hobbesian contractarianism: one can imagine that, through an "umbrella *social* contract"[707], the consociates put themselves in the hands of a computational Leviathan and commit to accept as the law "*the [programmer's] reason, "be it more, or less […] and not the Reason, Learning and Wisdom of the [jurists]*"[708]. In light of the considerations set out in Part I, I believe that, more than the overcoming of the Rule of Men, the Rule of Machines is precisely that which the elaboration of the doctrine of the Rule of Law aimed at contrasting. One of the merits of the conception of the Rule of Law emerging from the common law tradition is the key role accorded to the affordances of the language of jurists and the related practices of justification-assetibility. As such language is the *medium* through which power is exercised, it also preserves that "*freedom from the names that we give things"* which Gadamer identifies as the guarantee of the freedom of human action from the "*determination of the environment*"[709]. The linguistic practice of jurists, indeed, affords to oppose whoever claims to herself the "power of naming", a form of sovereignty akin to that of Humpty Dumpty, who claims that "[w]*hen* I *use a word*

[706] Mireille Hildebrandt, Bert.-Jaap Koops, *The Challenges of Ambient Law and Legal Protection in the Profiling Era*, in *Modern Law Review*, 2010, 73, 3, p. 428; Mireille Hildebrandt, *Legal and Technological Normativity: more (and less) than twin sisters*, in *Techné: Research in Philosophy and Technology*, 2008, 12, 3, p. 169; Ronald Leenes, *Framing Techno-Regulation: An Exploration of State and Non-State Regulation by Technology*, in *Legisprudence*, 2011, 5, p. 143; Wolfgang Schulz, Kevin Dankert, *'Governance by Things' as a challenge to regulation by law*, in *Internet Policy Review*, 2016, 5, 2; Roger Brownsword, *Technological management and the rule of law*, in *Law, Innovation and Technology*, 2016, 8, 1, p. 100

[707] I reformulate Dewitz's concept of "umbrella contract" between users, which the Author identifies as the means for attributing authority to a fact-determiner system, see Sandra Dewitz, *Using Information Technology as a Determiner of Legal Facts*, in Zenon Bankowski, Ian White, Ulrike Hahn (eds.), *Informatics and the Foundations of Legal Reasoning*, Springer, Dordrecht, 1995, p. 365. For a discussion, see Laurence Diver, *Interpreting the Rule(s) of Code: Performance, Performativity, and Production*, in *MIT Computational Law Report*, 2021, p. 15. Available at https://law.mit.edu/pub/interpretingtherulesofcode

[708] Thomas Hobbes, *A Dialogue*, cit., p. 19. Such a perspective would represent that which Diver efficaciously describe as Computational Legalism, see Laurence Diver, *Digisprudence Code as Law Rebooted*, cit., pp. 43 ff; Id.,*Computational legalism and the affordance of delay in law*, in *Journal of Cross-disciplinary Research in Computational Law*, 2020, 1, 1, p. 6

[709] Hans Gadamer, *Warheit und Methode*, cit., German, p. 448; Italian, p. 905; English, p. 441

[…] it means just what I choose it to mean—neither more nor less"[710]. The techno-regulatory perspective advanced by the Rule of Machines elicits the affordances which distinguish rules in language and places freedoms and rights, where intelligible, in the hands of the holder of the "power of labelling or coding".

[710] Emilio Santoro, *Diritto e diritti*, cit., pp. 156, 318; Davide Sparti, *Se un leone potesse parlare*, cit., p. 111

CONCLUSIONS

"*constare non potest ius, nisi sit aliquis iuris peritus, per quem possit cottidie in melius produci*"[711]

"*per varios usus legem experientia fecit"*[712]

4.1. "*Did Multivac tell them*?"

As machines, *qua* machines, inevitably clash against the "*barrier of meaning*"[713], human rule-followers are charitable[714] "bridge builders" capable of overcoming such barrier and engage into meaningful interaction with machines, i.e., "letting them speak" and then reading, understanding and putting into play their outputs. The considerations on rule following made in the previous chapter can help in providing a framework for governing the integration of technology *within* the practice of law in a scenario in which, differently from that pictured by the Rule of Machines, the Rule of *Law* is sustained by humans which make use of machines. Undoubtedly, there are many things that "*we* can do *with* machines". As Alschner points out, "*quantitative models of language can be useful even if they are 'wrong'. The benchmark of any text-as-data representation is not how accurately it can represent meaning, but how useful it is in relation to the performance of a specific*

[711] Digest, 1.2.2., Pomponius
[712] Sir John Davies, *Irish Reports*, *Preface to Third Reports*, p. 23
[713] Melanie Mitchell, *Artificial Intelligence. A Guide for Thinking Humans*, Pelican Books, 2020, pp. 307 ff; Gian Carlo Rota, *In Memoriam of Stan Ulam: The Barrier of Meaning*, in *Physica D Nonlinear Phenomena*, 1986, 22, 1
[714] Willard van Orman Quine, *Word and Object*, MIT Press, Cambridge, 1960; Davide Sparti, *Sopprimere la lontanaza uccide*, La nuova Italia, Scandicci, 1994, p. 53

task[715]. Such practice-oriented perspective leads to the question of "*what* we do with machines", i.e., how the latter are embedded within normative practices. In a way, this "passes the ball" back to jurists and shifts the attention to the standards of assertibility, felicity, justification which characterize their practice. In this perspective, I believe that further research could find inspiration in the approach adopted by Vanderstichele, who investigates the normative value of legal analytics in light of the standards governing judicial activity[716]. Treasuring the insight from philosophy of technology according to which we are reinvented while inventing and interacting with (and through) technologies[717], another important perspective of investigation is that of an ethnographic research on how computational tools are put into use by jurists and the normative effects that their use produces within the practice of law. Some recent rulings concerning automated decision-making systems[718] have reinstated that the latter cannot be considered legal decisions and produce legal effects to the extent that the standards concerning the obligation to state reasons are not satisfied. As Wittgenstein pointed out, "[*w*]*hat people accept as a justification shows how they think and live*"[719]. As discussed above, moreover, what counts as a justification in the context of a practice changes "as the practice goes along". For this very reason, one cannot exclude the possibility that the proverbial "computer says no", or else, that "computer says so", becomes accepted as a sufficient reason to justify a certain judgment, or prompt a shift from "it cannot be so, the machine must have got it wrong" to "since the machine says so, I must have got it wrong"[720]. It is worth highlighting that cognitive and normative expectations are not separated by a rigid line. As Luhmann highlights, "*expectations in the mode of normality and expectations in the mode of normativity*

[715] Wolfgang Alschner, *Sense and similarity*, in Ryan Whalen (ed.), *Computational Legal Studies*, cit., p. 11. The Author refers to the principle formulated by Justin Grimmer and Brandon M. Stewart according to which "*All Quantitative Models of Language are Wrong – But Some are Useful*", see Justin Grimmer, Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, in *Political Analysis*, 2013, 21, 3, p. 269

[716] Geneviève Vanderstichele, *The normative value of Legal Analytics. Is there a case for statistical precedent?*, Thesis submitted for the degree of Master of Philosophy in Law Academic year 2018-2019, University of Oxford. Available at SSRN: *https://ssrn.com/abstract=3474878*

[717] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law*, cit., p. 159; Don Ihde, *Ironic Technics*, Automatic Press, New York, 2008; Paul Verbeek, *What Things Do: Philosophical Reflections on Technology, Agency and Design*, Pennsylvania State University Press, University Park, 2005

[718] Consiglio di Stato, Sezione VI, sent. 2270/2019; Consiglio di Stato, Sezione VI, sent. n. 8472/2019

[719] Ludwig Wittgenstein, *Philosophical Investigation*, § 325

[720] In this sense, the title of this paragraph is inspired by a short story by Asimov, *Franchise*, which is set in future where a machine, called Multivac, through the analysis of Big Data, selects the most representative person of the electoral body: only the person who is selected by Multivac has the right to express his vote. At some point of the story, the grandfather is telling his amazed granddaughter that, when he was young, every citizen had the right to express her vote. Incredulous of what her grandfather is narrating, the young girl asks: "*How did all the people know who to vote for? Did Multivac tell them?*"

are closely related to each other"[721], and practices are capable of hardening empirical propositions into rules.

With this in mind, I will briefly illustrate a series of factors which suggest the possibility that, the more computational tools are widespread, the more some of standards which distinguish legal practice might undertake a change. First of all, as documented especially in the field of medicine, human-machine interactions tend to generate effects such as the de-skilling and re-skilling of practitioners[722]. The possibility to investigate such phenomena with respect to the legal field, however, is complicated by the difficulty in identifying the baseline against which comparing the decision making. As discussed above, the practice of law cannot count on standards of "verification" other than the criteria of assertibility and understanding which constitute the practice itself. As a consequence, the correctness of a legal decision influenced by machine support cannot be "checked" against something external, as a wrong diagnosis or a plane crash. The only parameter is the making of that decision. Another factor which might entrench reliance on machines is complexity and its expectable increasement due to the very use of machines. In this sense, it is worth highlighting that, as discussed in the course of the present work, the complexity of legal information has constantly prompted a rearticulation of the relations and forms of law and legal institutions: from legal consolidations, to codification, to the technologies illustrated in chapter III, the attempt to deal with complexity has changed legal practice and the architecture of government. In the dialectic between the rise of complexity and the attempts to reduce it, the recourse to machines seems a slippery slope. In this perspective, one can mention the

[721] Niklaas Luhmann, *Law as a Social System*, cit., p. 152

[722] Mireille Hildebrandt, *Law as Computation*, cit., p. 32; Federico Cabitza, *The Unintended Consequences of Chasing Electric Zebras*, (IEEE SMC Interdisciplinary Workshop HUML 2016, The Human Use of Machine Learning , 12/16/ 2016, Venice, Italy, 2016); Nicholas Carr, *The Glass Cage: Automation and Us*, W. W. Norton & Company, New York, 2014; Rich Caruana, Yin Lou, Johannes Gehrke, Paul Koch, Marc Sturm, and Noemie Elhadad, *Intelligible Models for HealthCare: Predicting Pneumonia Risk and Hospital 30-Day Readmission*, in *Proceedings of the 21st ACM SIGKDD International Conference on Knowledge Discovery and Data Mining*, ACM Press, New York, 2015, p. 1721; Amirhossein Kiani, Bora Uyumazturk, Pranav Rajpurkar, Alex Wang, Rebecca Gao, Erik Jones, Yifan Yu, Curtis P. Langlotz, Robyn L. Ball, Thomas J. Montine, Brock A. Martin, Gerald J. Berry, Michael G. Ozawa, Florette K. Hazard, Ryanne A. Brown, Simon B. Chen, Mona Wood, Libby S. Allard, Lourdes Ylagan, Andrew Y. Ng, Jeanne Shen, *Impact of a Deep Learning Assistant on the Histopathologic Classification of Liver Cancer*, in *Npj Digital Medicine*, 2020, 23, 3; Andrey A Povyakalo, Eugenio Alberdi, Lorenzo Strigini, Peter Ayton, *How to Discriminate between Computer-Aided and Computer-Hindered Decisions: A Case Study in Mammography*, in *Medical Decision Making*, 2013, 33, 1, p. 98; for a study in the field of aviation, see Linda J. Skitka, Kathleen L. Mosier, Mark Burdick, *Does automation bias decision-making?*, in *International Journal of Human-Computer Studies*, 1999, 51, 5, p. 991. The analogy between the risks emerged in medicine and legal automation was present already in the early Sixties In this sense, Bernays Wiener maintained that "*reliance on computers or on similar devices will, as suredly, blunt a lawyer's professional skills, just as undue reliance on laboratory reports detracts from the accuracy of a doctor's clinical diagnoses*", Frederick Bernays Wiener, *Decision Prediction by Computers: Nonsense Cubed-and Worse*, cit., pp. 1026

development envisaged by Alarie, in which a technological *"legal arms race"* would culminate in a legal system which will be "*extraordinarily complex and will be beyond the complete understanding of any unaugmented person*"[723]. In a hypothetical scenario in which legal practice is distinguished by an increasing crossfire of data-driven predictions, it seems particularly relevant to highlight that "*if machines define a situation as real, it is real in its consequences*"[724]: what is relevant, in this perspective, is not the accuracy of the predictions, nor their correctness from a normative standpoint, but the circumstance that they can nonetheless be adopted as reasons for action. As it were, from the labelling of data to the effects described by the labelling theory is a short step. This becomes significant not only with respect to legal decisions *strictu sensu*, i.e., judgments, but also for a series of decisions which are nonetheless relevant for law. In this sense, the way in which "*machines define a situation as real"* might discourage or encourage some actions - to bring a case or not, to use certain arguments or make reference to a certain precedent, and so on. Whether, on the part of the trustworthiness of machines, the real, performative, consequences of predictions and classifications would alter the distribution of the target variable on which the latter are grounded, the real consequence which are more concerning are those which would affect the practice of law. In this sense, Diver maintains that

> [w]ithout being too alarmist, we might then envisage a moment of hermeneutic singularity, after which the reliance on ML analysis of legal texts creates path dependencies for future legal actions, the seeds of those dependencies having been planted by the normative shortcut of an ML system's design compounded by its reliance on the unchanging text of past judgments. The space for interpretation might thus be constricted, however imperceptibly, each time an ML-predicated legal argument becomes enshrined in a judicial decision[725]

Moreover, one cannot avoid considering a set of factors which characterize current legal systems, and which might foster the tendence to adhere to machine outputs. In this sense, the lack of resources, the increasing of backlog of cases and the quantification of the assessment of the performance of the judiciary already demand judges to behave like *judges-machines*. It is not difficult to see how, in such a scenario, *machine-judges* could represent an attractive solution. On the other hand, the time factor, especially in certain areas of law, represents a strong source of legitimacy for automation. Lastly, there are cases in which relying on automation might simply be "better than nothing": in this sense, already in the Seventies D'Amato contrasted the *"'if they have no bread let them eat cake'*

[723] Benjamin Alarie, *The Path of the Law: Towards Legal Singularity*, cit., p. 455

[724] Mireille Hildebrandt, *Who needs stories if you can get the data? ISPs in the era of big number crunching*, in *Philosophy and Technology*, 2011, 24, p. 379, Hildebrandt reformulates "*If men define situations as real, they are real in their consequences*", William I. Thomas, Dorothy S. Thomas, *The Child in America*, Knopf, New York, 1928, p. 572

[725] Laurence Diver, *Normative shortcuts and the hermeneutic singularity*, in *COHUBICOL Research Blog*, June 4, 2019, available at https://www.cohubicol.com/blog/normative-shortcuts-and-the-hermeneutic-singularity/

attitude"[726] and, more recently, Volokh has maintained that a "*not very good AI lawyer may be better than no lawyer at all*"[727].

The above considerations aim at emphasizing that the direction towards which the interaction between law and technology will lead will depend significantly on the stance which will be adopted by legal actors as much as the meaningfulness of the interactions which will be afforded by machines. Given the inflexibility which distinguishes machines, it is likely that, to some extent, between the partners of human-machine interaction that which will have to adapt in order to facilitate the collaboration will be the former[728]. On the other hand, as humans already constitute "artificial agents" through successful interaction, the intercourse with machines will be increasingly likely to lead to the acknowledgment of forms of normative agency to machines, i.e., machines-jurists. In the light of the account of normative practices discussed above, indeed, the criteria which govern the ascription of meaningful action to agents do not take into account *how they are done*, but *what they do*[729]. The assessment of *"what it is that which they do*", in turn, will depend on the standards which distinguish the practice of jurists. What I am arguing here is not meant to strike a blow for such machines-jurists, quite the opposite: what is concerning, indeed, is not that machines will become rule followers, but the other option, that is, that in making silicon-based machines more humans, humans will become more carbon-based machines.

4.2. Will we become formalist?

On the basis of the analysis of the concept of rules and of the Rule of Law, I have concluded the first part of the present work with the claim that "we have never been formalist". Such claim was grounded on the assumption that formalism should be understood in light of speech act theory, that is, not much in its constative, but in its performative function. A recurring thread of the present

[726] Anthony D'Amato, *Can/Should Computers Replace Judges?*, cit., p. 1286.

[727] Eugene Volokh, *Chief Justice Robots*, cit., p. 1147

[728] In this sense, Dempsey and Teninbaum highlight the need that judges start writing their opinions in a machine-readable form, see Jameson Dempsey, Gabriel Teninbaum, *May it Please the Bot?*, in *MIT Computational Law Report*, August 14, 2020. More in general, see Floridi's discussion of the concept of envelopment, Luciano Floridi, *The Fourth Revolution*, cit., p. _;

[729] An agent capable of (been recognized as) engaging in meaningful interaction would not to be a mere *silicon-based machine* as much as humans are not to be a *carbon-based machine*s. In this sense, Baker and Hacker make an interesting "grammatical" remark: "*If in the distant future it were feasible to create in an electronic laboratory a being that acted and behaved much as we do, exhibiting perception, desire, emotion, pleasure, and suffering, as well as thought, it would arguably be reasonable to conceive of it as an animate, though not biological, creature. But, to that extent, it would not be a machine, even though it was manufactured",* Gordon P. Baker, Peter M. S. Hacker, *Wittgenstein: Meaning and Mind*, cit., p. 169. In this respect, I find brilliant the thought experiment elaborated by Kerr and Mathen, which discuss a scenario in which the Chief Justice of the United States Supreme Court is discovered to be a robot.. However, I do not agree with their conclusions Ian Kerr, Carissima Mathen, *"Chief Justice John Roberts is a Robot"*, in *University of Ottawa Working Paper*, 2014; see, also Eugene Volock, *Chief Justice Robots*, cit.

research has been that giving account is a practice and that accounts are tools: we do different things with different accounts and different accounts do different things. Depending on the practice in which the speaker is engaged, her utterances, as well as the theories and models of explanation through which she makes sense of the world, are subject to different conditions of assertibility, felicity, appropriateness[730].

The second part of the research has presented different accounts of rules and rule-governed behaviour which are afforded by the conceptual and technical toolbox offered by the computational framework. In this respect, I have highlighted the risks connected to the possibility of entrenching certain forms of explanation into computational architectures which do not share the affordances of the language which constitutes the *Welt* inhabited and sustained by rule following agents. Different vocabularies offer different ways of coping with ourselves, our world and our environment; the latter, in turn, are constituted by the accounts we give of them; at the same time, our understanding of what it is to cope with ourselves, our world and our environment constitutes the conditions of felicity of our practices of giving accounts. Computation fits into such set of intricate co-constitutive relations by constituting new environments and partners of interaction, by mediating our experience through different lenses and by offering different vocabularies to make sense of it. As highlighted by Quine, the prevalence of a certain vocabulary depends on its capacity to prove itself more effective "*as a device for working a manageable structure into the flux of experience*"[731]. Which kind of vocabulary is likely to prevail where the *Welt* we inhabit is gradually enveloped into a computational *Umwelt*? Will we become formalist?

On one hand, the consideration of both the character of certain questions and the eloquence of the formalist vocabulary supports a negative answer. Even where we became capable of explaining-predicting every bodily movement and every sound or inscriptions uttered, as Sparti points out, this would still leave us in the position to ask: "and then what?"[732]. Before all, but also at the end of all, we are actors

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[730] As Peter Winch points out, "[…] *would it be intelligent to try to explain how Romeo's love for Juliet enters into his behaviour in the same terms as we might want to apply to the rat whose sexual excitement makes him run across an electrical charged grid to reach his mate? Does not Shakespeare do this much better?*" see Peter Winch, *The Idea of A Social Science and Its Relation to Philosophy*, cit., p. 72. In the context of law, learning which kind of discourses are appropriate in which kind of context is a fundamental part of learning legal practice. For instance, the appropriateness and relevance of explaining a human conduct in causal terms, while perfectly intelligible for criminologists, is artificially circumscribed to some exceptional circumstance in the case of criminal law, where explanations are generally to be given in terms of action, intentions and motives. One can easily imagine many other different contexts (a loving dispute) in which some forms of explanation (as a causal explanation) would not do any good, and provoke reaction like "and what should I do with this?", i.e., replying to a request of proving one's love by presenting a MRI followed by a neurological explanation

[731] Willard V. O. Quine, *From a Logical Point of View, 9 Logico-Philosophical Essays*, Harper Torchbooks, New York, 1961, p. 44

[732] Davide Sparti, *Epistemologia delle scienze sociali*, cit., p. 234; Richard Rorty, *Philosophy and the Mirror of Nature*, Princeton University Press, Princeton, 2018, pp. 357 ff

situated in a meaningful world, and this condition presents us with questions which cannot be answered with the "normal" explanations afforded by formalist perspectives: once again, there are problems for which formalism proves to be a "short-blanket".

On the other hand, precisely because the questions which formalism cannot answer are questions of situated actors, and different vocabularies are different ways of coping, the kind of questions that we consider meaningful to ask and the answers we find more satisfying can change. Depending on the goals we set from within our situated perspective, there might be a great share of questions with respect to which we would find more convenient, as it were, to "make ourselves smaller" in order to fit under short-blanket of formalism. In this perspective, Shanker points out that

> [t]he obvious worry is that if you institute a conceptual revolution in the concept of *thought* so that it henceforward become intelligible to describe mechanical operations as *thinking*, then conversely there seems little reason why the argument should not proceed in the opposite direction, thereby denying human beings the notion of autonomy and consciousness which underpin our conception of man [sic] as a *rule-following creature*[733]

These concerns connect with those expressed by Arendt

> The trouble with modern theories of behaviorism is not that they are wrong but that they could become true, that they actually are the best possible conceptualization of certain obvious trends in modern society. It is quite conceivable that the modern age - which began with such an unprecedented and promising outburst of human activity - may end in the deadliest, most sterile passivity history has ever known[734]

[733] Stuart Shanker, *The Nature of Philosophy*, cit., pp. 41-42

[734] Hannah Arendt, *The Human Condition*, cit., p. 322

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