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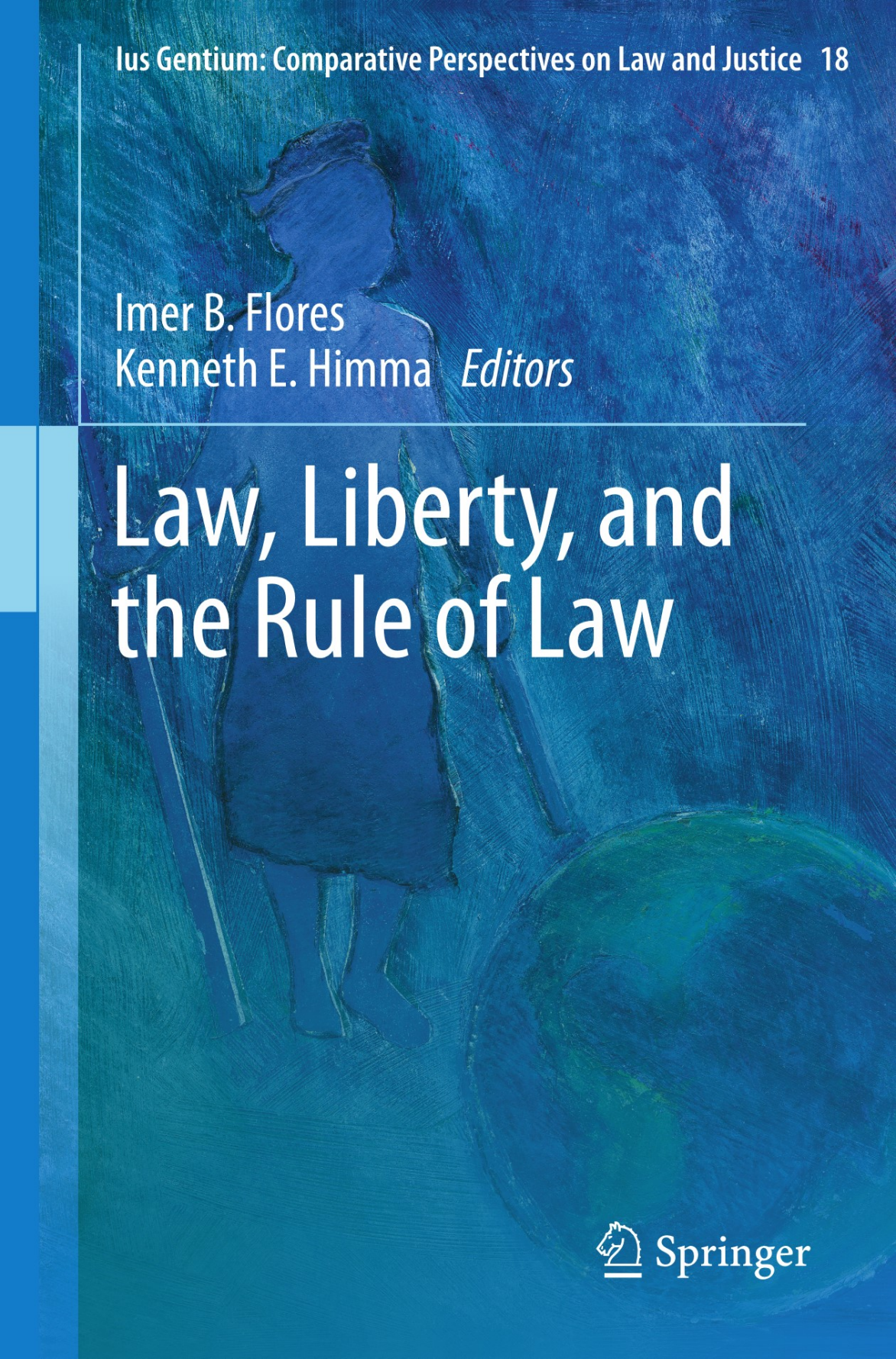

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Chapter 7
The Rule of Law: Is the Line Between the Formal and the Moral Blurred?

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7.1 Introduction

Jeremy Waldron states that "some things are green, some are blue; but on the borderlines there are blue/green cases of uncertainty" (2002, 149). Waldron rightly states that we can encounter some cases that are sort of green and sort of blue (2002, 161). Similarly, the principles of the rule of law may be regarded on the line between formal and moral and one may claim that this line is blurred. To explain this point, we may move from Waldron's ideas about competing conceptions of the law. Waldron states that there are "arguments of reason that maintain competing contentions about what exactly the law is. Inevitably, the line between characterization and normativity in these arguments will be blurred. One party will argue that a particular proposition cannot be inferred from the law as it is; the other party will respond that it can be inferred if we just credit the law with more coherence than people have in the past. Our account of what the law is, then, is not readily separable from our account of how the law aspires to present itself. Our response to the pressure for coherence may well alter our sense of what the law already contains." (2008, 49)

Similarly, regarding the principles of the rule of law, one party will argue that a particular proposition cannot be inferred from these principles; the other will argue that the inference is possible. If we have an account of the rule of law connected with the inner morality of law, we may claim that our formal account of the rule of law is not separable from the political ideal of it.

In this paper, I will argue, in Sect. 7.2 that the rule of law has features that lead to claims that it is on the line between the formal and the moral, and I will explain why this line is blurred. Secondly, in Sect. 7.3, I will try to show that our formal account of the rule of law is not separable from the political ideal of it.

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7.2 The Rule of Law on the Borderline[1]

What are the reasons that lead to the claim that the rule of law is on the line between the formal and the moral?

1. There are requirements associated with the rule of law that lead to regard it as being on the borderline.

The rule of law has multiple requirements. We may explain these within a single conception of the rule of law. However, there are also different such conceptions. It is difficult to classify these conceptions because some of them are not completely different from each other. They are "different but compatible conceptions of the rule of law" (Barber 2004, 475).

On the other hand, some are competing conceptions of a single concept. An example of these competing conceptions concerns the instrumental version and the substantial version of the rule of law. While the instrumental version is connected with an efficacious legal system, the substantial version is the basis of political morality (Radin 1989, 783). Their main questions about the requirements of the rule of law are different. The instrumental version focuses on the requirements of the rule of law for an efficacious legal system. These requirements are related to the formal aspect of the rule of law and are usually explained according to Lon Fuller's version of the rule of law.[2] On the other hand, the substantive version stresses the values furthered by such as fairness, freedom, autonomy. It is also possible to explain this aspect of the rule of law according to its formal features or Fuller's version of it. Then, we may say that there are formal aspects of the rule of law that lead some theorists to regard it as an inherently moral ideal but some others to regard it not as a moral-political ideal. To explain how this is possible, we should move from the formal aspects of the rule of law.

Generally, one may say that the formal aspects of the rule of law are connected with the formal constraints on lawmaking, law-application, and law-enforcement (MacDonald 2001, 98). Robert S. Summers classified these constraints as methodological, procedural, accommodative and authorizational. Some of the principles of the rule of law, such as clarity and prospectivity, are methodologically formal, *i.e.* they are connected with the creation of the law, "with how that very law itself is to take shape, and with what that shape is" (1999, 1701). Some of the principles of the rule of law, such as due process, are procedurally formal and they apply to law-making and law-applying processes. In relation to accommodatively formal, all of the principles of the rule of law have extensive generality of scope (1999, 1701). Furthermore, some of the principles of the rule of law are authorizationally formal. "That is, they confer or limit authority and so pertain to validity" (1999,

[1] In this part of the article, I am indebted to David Luban for valuable suggestions on both content and style.

[2] Fuller's eight principles are publicity, retroactivity, clarity, constancy, feasibility, prospectivity, generality, congruence (Fuller 1978, 65).

1702). Summers collected these four senses of the formal under the title of affirmatively formal "in that each signifies a positive feature or features actually present, as distinguished from merely lacking or failing to express an opposite attribute" (1999, 1702).

In addition to the affirmatively formal, we might use the term formal to contrast the rule of law with something else – for example, substantive principles such as human rights (Summers 1999, 1702). The second meaning of the contrastively formal is connected with the governance by law, not men (1999, 1703). In fact, the rule of law is generally regarded as opposed to the governance by people.

Focusing on the supposed contrast between governance by law and governance by people, Joseph Raz rightly stated that we must be governed by human beings. Legal actors such as legislators and judges are human beings (2001, 290). In this regard, we may say that governance by law is impossible without human beings. If so, can we say that there is no difference between governance by law and governance by people? Is there "no rule, acting as a metaphorical wall separating the law from politics, or law from men"? (West 2003, 24)

If not, what is the meaning of the governance by law?

We may say that it includes constraints on arbitrariness. In connection with this arbitrariness, there can be two views in the literature. One of them derives from the political theory, the other from the analysis of the concept of law. The former is related to the restriction of the arbitrary use of public power. For this, government in all its actions is bound by rules fixed and announced in advance. According to the latter, the rule of law is related to certain features that the law should possess to be able to guide human conduct. In this regard, the ideal of the rule of law reduces the arbitrariness that is connected with the law itself (Dyzenhaus 2009, 12–3).

There are grounds supporting both views. To evaluate them, we should examine the relationship between the rule of law and the legal system.

2. There is a relationship between the rule of law and the legal system: anything purporting to be a legal system must satisfy the rule of law criteria to at least some extent if the system is to be recognizable as a legal system at all.[3]

Legal systems must meet most of the formal requirements of the rule of law, at least to some degree. In fact, the rule of law and the legal system are intrinsically connected concepts. Legal rules guide human conduct, and to regulate conduct these rules must have certain characteristics that are associated with the formal requirements of the rule of law. As John Rawls rightly stated, these requirements are "implicit in the notion of regulating behaviour by public rules" (1991, 238). From this definition we may derive the claim that every legal system by its nature needs procedural rules. In this manner the rule of law and the legal system are intrinsically connected: "A legal system can be in better or worse shape, but after a point it can be in such bad shape that it does not satisfy the criteria for being a legal system at all" (Waldron 2008, 45).

[3] I am indebted to David Luban for pointing out the need to make this point explicit.

3. If the rule of law and the legal system are intrinsically connected, we may say that a legal system should embody the ideal of the rule of law. But is this ideal a moral-political one, or not, or is the line between the formal and the moral blurred? I argue that the line is blurred.

With regard to the connection between the rule of law and the legal system, it is possible to see it as a better vehicle and also a moral ideal. As a better vehicle, the rule of law is understood as "a prerequisite for any efficacious legal order" (Radin 1989, 783). It is necessary for the efficacy of the legal system. As a moral ideal it serves moral values. In this regard, we may say that the rule of law is not only a moral ideal to which the law should aspire, but also it is a criterion that enables the evaluation of legal systems (as better or worse). This claim is connected with the procedural aspects of the rule of law. According to a generally accepted view, the formal understanding of the rule of law does not require, at least directly, anything substantive. For example, Fuller's account of the rule of law requires that "the state should do whatever it wants to do in an orderly predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so" (Waldron 2008, 8). David Luban observes, however, that one of Fuller's aims in bringing his eight canons is "not simply conditions of efficacy of a legal system, but moral requirements".[4] Specifically, "Fuller in fact emphasizes the practical efficacy of governance through rules. But Fuller also believes that the canons push the law away from a certain kind of moral badness" (Luban 2010, 39), namely a despotism that operates by creating uncertainty about what the rules are that people must follow.

At this point, we may claim that the line between the formal and the moral is blurred in respect of the rule of law. But one may oppose to this view. For example, Matthew H. Kramer considers it a divided phenomenon: "As the set of conditions that obtain whenever any legal system exists and operates, the rule of law is *per se* a morally neutral state of affairs. Especially in any sizeable society, the rule of law is indispensable for the preservation of public power and the coordination of people's activities and the securing of individuals' liberties; but it is likewise indispensable for a government's effective perpetration of large-scale projects of evil over lengthy periods… It therefore lacks any intrinsic moral standing. All the same, when the rule of law is operative within a benign regime, its moral value goes beyond lending itself to worthy uses. It does indeed promote the attainment of worthy ends by enabling governmental officials and private citizens to pursue and realize such ends, but, within a benign regime, it also does more. Instead of merely being instrumentally valuable, it furthermore becomes expressive of the very ideals which it helps to foster. Its basic features take on the moral estimableness of those ideals, for the sustainment of the rule of law in such circumstances is a deliberate manifestation of a society's adherence to liberal-democratic values" (Kramer 2007, 102).

[4] Luban states with regard to Fuller's other aim: "he announced that the canons are conditions that make law possible – in other words, that enactments which deviate too much from the canons are not bad law, but rather no law at all" (*vid*. Luban 2010, 31).

In this regard, Kramer defines two principal incarnations of the rule of law: "Firstly, as a general juristic phenomenon, it amounts to nothing more and nothing less than the fundamental conditions that have to be satisfied for the existence of any legal system. Secondly, whenever that juristic phenomenon obtains specifically in liberal-democratic societies – which exhibit rich diversity among themselves in their detailed institutions and practices – it is a morally charitable expression of commitments to the dignity and equality of individuals. Yet, because the rule of law is a morally precious desideratum in some settings and not in others, any attribution of invariance to its key features is prone to mislead" (2007, 102).

Kramer says that his conception of the rule of law belongs to the domain of legal philosophy, not of political philosophy. He claims that the jurisprudential conception of the rule of law implies sufficient conditions for the existence of the legal system. This conception of the rule of law is itself morally neutral. On the other hand, Kramer states that the moral-political conception of the rule of law belongs to the domain of moral-political theory. In this respect, formal principles of the law are not to be regarded as "necessary and jointly sufficient conditions for the existence of the legal system, but as precepts of political morality". Though they are compatible with each other, the moral-political conception of the rule of law is larger than the jurisprudential conception of it (Kramer 2007, 143). Kramer explains this divided phenomenon by referring to Fuller's eight principles.

In respect of morality, Fuller's eight principles are closely linked to the law regimes that are liberal-democratic in substance. In this regard, one may claim that in liberal-democratic societies the matters of form can become matters of substance.

7.3 The Moral Non-neutrality of the Rule of Law

"Our formal account of the rule of law is not separable from the political ideal of it" or the rule of law is not a morally-neutral concept.[5]

To explain this, first, I move from the relationship between the legal system and the rule of law and following Waldron I claim that there are two aspects of this relationship.

1. The relationship between the legal system and the rule of law has two aspects.

According to Waldron legal systems need to fulfil certain elementary requirements. These are the existence of functioning courts, general public norms, positivity, orientation to the public good, and systematicity. Waldron states that among these requirements, three "are intimately connected with Rule-of-Law requirements: (A) systematicity is associated with the Rule-of-Law requirement of consistency or integrity; (B) the existence of general norms is associated with the Rule-of-Law requirements of generality, publicity, and stability; and (C) the existence of the distinctive institutions we call courts is associated with the Rule-of-Law requirement of procedural due process" (2008, 44).

[5] I was inspired in this point by Waldron (2008, 49).

One of these aspects is connected with the "a conceptual account of the rule of law… that emphasizes rules and a Rule of Law ideal that concentrates on their characteristics like their generality, determinacy, etc." (Waldron 2008, 58). While this aspect of the rule of law is about general rules, the second aspect of the rule of law is connected with the impartial administration of such rules. The procedural aspect of the rule of law is connected with the procedural aspects of the courts (their distinctive procedures and practices-like legal argumentation) and the features of natural justice (2008, 55). The first and second aspects of the rule of law, Waldron states, "are intimately connected with one another" (2008, 59), since a legal system requires more than rules and this system and the rule of law are bound together (2008, 58):

> There is a natural correlation between a conceptual account of the rule of law… that emphasizes rules and a Rule of Law ideal that concentrates on their characteristics like their generality, determinacy, etc. Additionally, there is a natural correlation between a conceptual account of law that focuses not just on the general norms established in a society but on the distinctive procedural features of the institutions that administer them, and an account of the rule of law that is less fixated on predictability and more insistent on the opportunities for argumentation and responsiveness to argument that legal institutions provide.

Furthermore to provide determinacy or predictability or to make a clear rule we need the second aspect, *i.e.* impartial administration of justice. But impartial administration is not enough to provide determinacy or predictability, because our aims are not determinate and our words have open texture, particularly in vague or general rules. For this reason, for example, a judge cannot decide according to pre-existing rules or two judges, both aiming at impartial interpretation, might arrive at different answers to the same interpretive question.[6] Accordingly, we may claim that to provide predictability to the law, it is necessary to regard legal practices and especially legal argumentation. In this regard judges should be aware of the true grounds of the rule of law, namely substantive aspects of it (West 2003, 23): "Courts, hearings, and arguments are aspects of law which are not optional extras; They are integral parts of how law works and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, …, is to truncate what the rule of law rests upon: respect for the freedom and the dignity of each person as an active center of intelligence" (Waldron 2008, 60).

Inspiring Fuller's lawyers as lawgivers and law-appliers, we may regard the second aspect not only from the standpoint of judges but also of other law-appliers, for example lawyers, prosecutors.[7]

To explain the first aspect in the context of the moral-political ideal of the rule of law I move from Kramer's claim about the relationship between liberal democratic-society and the rule of law. Then, I explain that the second aspect of the relationship between the legal system and the rule of law needs substantive accounts.

[6] Here I elaborate an idea of David Luban's stated in his comments.

[7] I was inspired at this point by David Luban (2007, 104)

2. In connection with the first aspect of this relationship, it is true that in a liberal-democratic society the rule of law can become a deliberate manifestation of a society's adherence to liberal-democratic values.

If we accept this statement, we should also accept that the rule of law has a minimum of moral content.

However, Kramer claims that the rule of law is an instrument and can be used for good or bad purposes. For example, according to Kramer, "the rule of law, as the realization of the necessary existence of the necessary and sufficient conditions for the existence of a legal system, is itself morally neutral. It is indispensably serviceable for the pursuit of benevolent ends on a large scale over a sustained period, but is also indispensably serviceable for the pursuit of wicked ends on such a scale over such a period" (2007, 143). In other words, like coordinating people on the one hand and pursuing of government's effective projects of evil on the other, it serves opposite aims. Kramer also states that "it is neutral on all moral and political questions, for example, concerning the uses to which law should be put, the appropriate limits on legal regulation of individuals' lives, the legitimacy or illegitimacy of various patterns of differentiation among people under the terms of legal norms, the conditions under which a regime of law is a just regime" (2007, 143).

In fact, formal principles of law, at least directly, do not limit the content of the rules. It is true that the formal principles of the rule of law have form-prescriptive content, they prescribe formal features of the precepts, institutions. Almost all of them are connected with the procedures in which law is created and implemented. Some of them are connected with the judicial procedures and structural institutions (Summers 2006, 337). In this regard they do not specify the policy or other substantive content of value. For example in connection with clarity, Hart says that "there is no (…) special incompatibility between clear laws and evil. Clearer laws are (…) ethically neutral though they are not equally compatible with vague and well-defined aims" (Soper 2007, 62; Hart 1965, 1287).

There is always a possibility that a well-designed norm may be combined with a bad policy (Soper 2007, 63). This does not imply, however, that the rule of law has not any moral value.

The state may use it for good or bad policies. "But the qualified serviceability of legal practices for self-interested goals does not undermine the claim of those practices to embody moral standards; nor does it suggest that the practices are morally neutral" (Simmonds 2005, 63). The rule of law does not justify bad policies. It is an essential precondition for the attainment of certain good states of affairs.[8] If the legal system is recognizable despite its bad shape, we may demand from it other requirements of the rule of law. In this regard to say that it is a legal system does not mean that "we rest satisfied with these minimum credible degrees. There is always room for improvement, and there is also danger of deterioration" (Waldron 2008, 46). In this respect, it is an essential precondition for the attainment of certain

[8] I was inspired in this point by Nigel Simmonds (2005, 62).

good states of affairs. That is, "adherence to principles of the rule of law tends to beget good content in the law being made" (Summers 2006, 343). However, we should notice that the formal principles of the rule of law guarantee the impartial and regular administration of rules. These principles "impose rather weak constraints in the basic structure, but ones that are not by any means negligible" (Rawls 1991, 236).

There are many ways to explain why these principles impose weak constraints or include a moral minimum, or why in the liberal-democratic society the rule of law can become a deliberate manifestation of a society's adherence to liberal-democratic values. For example, like Rawls, one may state the relationship between the formal conception of the rule of law and substantive values. Rawlsian principles of the rule of law are different from Fuller's and his principles may be easily connected to substantive values.[9] Rawls states that these principles provide a more secure basis for liberty: "It is clear that, other things equal, the dangers to liberty are less when the law is impartially and regularly administered in accordance with the principle of legality… One who complies with the announced rules need never fear an infringement of his liberty." (1991, 241) A second way is to regard these principles as constitutive of the same values: "Consider, for example, procedural fairness, as served by principles of the rule of law requiring fair notice of a criminal charge or of an adverse claim, and requiring fair opportunity to respond in court. The form-prescriptive contents of these principles go far to define the very nature of such fairness. Here form is constitutive and not merely instrumental" (Summers 2006, 343). In this regard fair procedures have values intrinsic to them, "for example, a procedure having the value of impartiality by giving all an equal chance to present their case" (Rawls 1996, 422). A third way to derive morality from the principles of the rule of law is not to begin with those principles but with the political ideal that the rule of law aims to realize.

A fourth way is to follow Fuller's idea that the eight canons of the rule of law contain the moral minimum. In this way, we can move from features of these canons and explain how it is possible to say that governance by law implies morality. This way provides an argument against Kramer's views. In this regard, I will follow Luban's views about Fuller's eight canons.

Unlike the positivists who deny the necessary relations between legal rules and morality, Luban states that Fuller insists that lawmaking is itself a moral enterprise. Luban says that "Fuller's arguments about the morality of law are meant to show that lawmaking has its own distinctive virtues (conformity to eight canons) and its own distinctive moral outlook (respect for the self-determining agency of the governed), both of which follow from the nature of the lawmaking enterprise and not directly from general morality" (2007, 118).

[9] Rawls, in the list of the first principle of justice, also gives a place to the rights and liberties covered by the rule of law beside other rights and liberties (Rawls 2003, 44). For example, "freedom from arbitrary arrest and seizure as defined by the concept of the rule of law". In this respect his rule of law conception provides a more secure basis for the liberties.

This view is different from Kramer's. Kramer says that "we can… benefit from Fuller's reflections in two ways, which correspond to the two versions of the rule of law" (2007, 103). As we stated before, according to Kramer, the two versions of the rule of law are the jurisprudential conception of the rule of law and the moral-political conception.

Luban's views about Fuller's idea reflect a different understanding of the rule of law.[10] Far from the concept of the rule of law as a divided phenomenon, the rule of law has its own moral "properties that designers may never have intended or even thought about, and that are connected only indirectly to general morality. Identifying the morality of institutions, the virtues and vices of participating in them, is a matter of discovery, not invention – a matter of reason rather than fiat" (Luban 2007, 118).

Luban stresses that Fuller's eight canons have substantive features, since they constrain legal content (Luban 2010, 32). He claims that "there is nothing procedural about them. To say that laws cannot be vague, or logically inconsistent with each other, are content-based conditions. So too the requirement that the behaviour laws demand is feasible for people to perform. And so too the canon of prospectivity: forbidding, as it does, laws that penalize behaviour retroactively, the canon builds a content-based dating requirement into the law" (2010, 34).

Luban's claim about these canons' substantive features does not mean that they constrain legal content according to requirements of morality or public policy choices (2010, 35):

> Rather, they are substantive in a more literal way: they constrain what laws can say, what requirements can say, what requirements can or cannot be included in the corpus juris. A law cannot demand something inconsistent with an existing law that remains in force, or require the impossible, for example that subjects change their behaviour retroactively. To be sure, these requirements place quite minimum constraints on the content of law. But they are nevertheless constraints on law's content, and – equally important – they have nothing to do with the procedures through which laws are enacted.

Luban does not ignore that "obviously, very harsh laws can be promulgated clearly, publicly, prospectively, and so on. But the rule of law does deprive governments of some of their favourite devices of intimidation, namely vague laws, secret laws, retroactive laws, confusing and inconsistent laws, all of which are used to keep citizens cautious and fearful… The point is not that the rule of law is logically incompatible with despotic government or harsh laws. Rather, the point is that the rule of law robs despotism of some of its most characteristic devices, and in this way it is practically incompatible with despotism" (2010, 40).

If the rule of law is practically incompatible with despotism, we cannot claim that a despotic regime is best protected by the rule of law. If so, we may say that there is no relationship between a despotic regime and the rule of law like the relationship

[10] In this respect, we should notice three perspectives regarding the rule of law in this text. Two of them are Kramer's two conceptions of the rule of law. The third one, which occurs as the basic problem of this text, explains it in connection with moral theory (I am indebted to Brian Bix for the distinction among three perspectives regarding the rule of law in this text).

between a liberal regime and the rule of law. Thus, we cannot say that in a despotic regime, the rule of law can become a deliberate manifestation of a society's adherence to the despotic regime. If we cannot claim this, we should accept that the rule of law contains a minimum morality.

As stated before, Fuller does not ignore that his eight canons are connected to the efficacy of the legal system. As Luban rightly observes, however, "while Fuller agrees that the principles of legality are instrumentally necessary to make governance by law effective, he thinks that governing by law rather than managerial direction represents a sacrifice of expediency in the name of principle. The ultimate justification of the principles of legality is therefore moral, not instrumental" (2007, 112). Regarding this, Luban stresses Fuller's distinction between governance by law and managerial direction. Fuller states that the canons of clarity, consistency, feasibility, constancy through time, and publicity are in a different context in the managerial direction from the governance by law. While these canons concern only efficacy in the managerial direction, in the governance by law they reflect morality. "There, they are professional virtues of the lawgiver, part and parcel of the mutual respect that Fuller believes is at the heart of the relationship between a lawmaker and those whom she governs" (Luban 2007, 115).

In the relationship between governor and governed, Luban states these eight canons as virtues of law-making. The canons of generality and congruence between rules and their enforcement which are specific for the governance by rule, require the commitment to bind the governed only through general rules and that the commitment that "also binds the lawmaker establishes the moral relationship of reciprocity between governors and governed. These two canons are moral commitments that define the enterprise as lawgiving rather than something else" (2007, 116).

In accordance with this minimum morality, following Luban, we may claim that Fuller's eight canons of the rule of law enhance human dignity. As Luban rightly states, the reason for this is "not that procedural requirements can generate substantive requirements, but rather that surprisingly minimal substantive requirements can unexpectedly implicate far-reaching choices about freedom and dignity" (2010, 35). Luban says that "Fuller believes that the rule of law enhances human dignity" (2010, 40) for two reasons. One of them is that the rule of law is practically incompatible with a despotic regime. To explain this point, Luban invokes his human dignity conception. According to Fuller, human dignity is thought to be connected with respectful relationships. While respectful relationships honour human dignity, humiliating relationships violate it (2010, 40). For this reason "lawmaking that violates Fuller's canons offends against human dignity by subjecting people to an especially humiliating condition: that of perpetual uncertainty and fearfulness because one's fate lies in the hands of official whim, which can choose at will to stigmatize conduct as criminal" (Luban 2010, 41).

The other reason connected with the human dignity concerns the connection between general rules and autonomy. In the framework of these rules, people can plan their life and make decisions (Luban 2010, 41). "Rule of law regimes count on citizens to understand and interpret their requirements in particular cases"

(Luban 2010, 42). In other words, the generality of rules provides a framework within which citizens behave like an autonomous agency.[11]

In short, Fuller's eight canons are related to respect for human agency[12]: "To embark on the enterprise of subjecting human conduct to the governance of rules involves… a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults" (Waldron 2008, 27–28). In this manner, we may claim that the morality of the rule of law has primacy over the efficiency.[13]

3. We cannot avoid relying on substantive content.

As stated before, according to Waldron, there are two aspects of the rule of law. Regarding the first aspect which insists on rules and their characteristics like their generality, determinacy, *et cetera*, I moved from Kramer's claim, but unlike him I tried to show that the rule of law contains a minimum morality. While I was doing this, I based on Luban's ideas and tried to explain law's minimum morality regarding the enterprise of lawmaking. Concerning the second aspect of law, I will start with a paragraph from Rawls and try to explain how this aspect is related to morality (1999, 495–6):

> The rule of law means the regulative role of certain institutions and their associated legal and judicial practices. It may mean, among other thing, that all officers of the government, including the executive, are under the law and that their acts are subject to judicial scrutiny, that the judiciary is suitably independent, in that civilian authority is supreme over the military. Moreover, it may mean that judges' decisions rest on interpreting existing law and relevant precedents, that judges must justify their verdicts by reference thereto and adhere to a consistent reading from case to case, or else find a reasonable basis for distinguishing them, and so on. Similar constraints do not bind legislators; while they may not defy basic law and can try to politically to change it only in ways the constitution permits, they need not explain or justify their vote, though their constituents may call them to account. The rule of law exists so long as such legal institutions and their associated practices (variously specified) are conducted in a reasonable way in accordance with the political values that apply to them: impartiality and consistency, adherence to law and respect for precedent, all in the light of a coherent understanding of recognized constitutional norms as viewed as controlling the conduct of all government officers.

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[11] On the other hand, whether legal autonomy enhances human dignity is a different problem. In fact, this conception of autonomy, David Luban rightly states, does not suffice to guarantee human dignity: "Private oppression, domestic violence, workplace exploitation, and radical inequality are evils that legal autonomy will not cure. Indeed, legal autonomy may contribute to them by insulating private power from the state" (2010, 43).

[12] In this respect, Luban rightly states that this is also connected with what is wrong in Fuller's theory: "those whose self-determining agency law aims to further need not include the entire population subject to the law, because the rules may really be addressed only to a numerical or power majority … That is, it may well be that the legal edifice of patriarchy aims to enhance the self-determining agency of men. But it does so at the expense of women, who are subject to the tyranny… of their husbands and fathers. Justice for guys coexists with injustice for women" (2007, 126).

[13] Meanwhile, these canons are also considered in the context of the law's action-guiding function. But, Waldron rightly states, positivists, although they accept this function of the law, may not accept that it is connected with a dignitarian value. In this respect, it seems important to insist on distinctiveness of "an action-guiding rather than a purely behaviour-eliciting model of social control" (2008, 28).

It is possible to deduce three points from this paragraph:

(A) Following Rawls, first, it is important to state that there are legal institutions and their practices in the legal system and the rule of law is a regulative model for these institutions. In this regard, it is also important to regard Fuller's eight canons as governing not only lawgivers, but also law-appliers. Rawls considers judges as law appliers. However, he uses general terms such as legal institutions and their practices. Then, we may claim that this includes other law-appliers.

One of the means of the rule of law as a regulative model for legal institutions is its requirement that independent courts act and control the conduct of all government officers. It is also possible to explain the relationship among the rule of law, natural justice, and the courts according to Waldron and Fuller.

According to Waldron, the courts constitute one of the necessary elements of the legal system. To explain this he moves from Hart's distinction between primary and secondary rules. Among the institutions connected with the rules of adjudication regarding secondary rules are the courts (2008, 21). Waldron also mentions Raz's ideas about courts as norm-applying institutions. According to Raz, courts are a key to understanding a legal system (Waldron 2008, 22).

According to Waldron, the relationship between the rule of law and the courts is connected to the procedural aspects of the courts and the features of natural justice. Waldron says that "when people say, for example, that the Rule of Law is threatened on the streets of Islamabad or in the cages at Guantanamo, it is the procedural elements they have in mind, much more than the traditional virtues of clarity, prospectivity, determinacy, and knowing where you stand. They are worried about the independence of Pakistani courts and about due process rights of detainees in the war on the terror" (Waldron 2008, 9). Waldron is right to stress this aspect. In Turkey, for example, the rule of law is discussed in the context of these two requirements. In connection with the independence of the courts, we have serious problems regarding political power, especially with the executive branch. When people claim that the rule of law is threatened, they intend to explain this point. We also have problems with the rights of detainees.

Fuller also sees that courts are necessary for the legal system and states that one of the most important conditions of the rule of law is judicial independence. Furthermore, with regard to his canon of congruence, procedural devices such as elements of procedural due process rights are also important.[14]

(B) Secondly, according to Rawls, as stated above, it is not enough for the rule of law that the judiciary is independent, but also that the judges' decisions are consistent

[14] While Fuller stresses the importance of the courts, for him it is not enough to insist solely on these institutions. Fuller says that "in this country it is chiefly to the judiciary that is entrusted the task of preventing a discrepancy between the law as declared and as actually administered. … there are, however, serious disadvantages in any system that looks solely to the courts as a bulwark against the lawless administration of the law. It makes the correction of abuses dependent upon the willingness and financial ability of the affected party to take his case to litigation" (1978, 81).

and reasonable in the light of a coherent understanding of recognized constitutional norms. The independence of the judiciary is not by itself adequate for the rule of law.[15] Namely, "the problem of judicial constraint is not that simple, and the strategies that are adequate to advance the predictability and uniformity of the law defy easy summary. The rule of law requires sound practical judgement by judges of integrity" (Solum 2002, 23).

We may also explain this requirement according to Fuller's canon of congruence which requires congruence between the law in books and the law in action. According to Fuller, the reality of law is in human action and not in mere words and the existence of the law depends on both (1968, 11). He says that "though much of the law today is statutory, this law is not actually applied to human affairs by the legislature which enacts it. That is the task of the courts. It is in the courtroom, then, that life and law intersect. Here it is that the Word becomes the Deed and in the process acquires a meaning that is identical with its projection into human affairs." (1968, 12).

Fuller accepts that fidelity to law does not make the role of the judges passive and that judges inescapably have a creative role (1978, 87). In this regard, their task is not only to articulate the law, but also to reconstruct it. Kenneth Winston states that "the judge's task of applying the law involves the elaboration of authoritative standards in previously unanticipated directions, under the guidance of common aims and ideals. In this sense, it is an inescapably interpretive and normative task" (1994, 409). However, this creative role does not imply judicial arbitrariness.

Fuller says that in respect of maintaining congruence between law and official action, the matter of interpretation is important. "Legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order" (1978, 82). Fuller states a great variety of ways by which this congruence may be destroyed: "mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and drive toward personal power" (1978, 81). Then, "they may give the law a meaning in action quite different from that properly to be found in its words. When this occurs, the gap separating the Word from the Deed is reopened" (1968, 12).

Fuller gives to interpretation a central position in the internal morality of the law (1978, 91). It is connected with the interpretive agent's ethics. Fuller says that "the human element can of course fail, and it can fail not simply because of corruption or sloth, but for lack of a sense of institutional role and a failure to perceive the true nature of the problems involved in constructing and administering a legal system" (1968, 39–40).

In connection with Fuller, we may claim that judges have an important role in realizing and securing his eight canons. Since there are gaps or indeterminacy in law,

[15] For example, in Turkey, there is a serious problem connected with the discretionary power of the courts, especially in political and gender-related cases. It is possible to see easily that the determinants of law are prejudices, ideologies or the judges' beliefs in many cases.

judges are not only law-applying persons, but also law-makers. When they act as law-makers, they are subject to eight canons[16] and should also justify their decisions. Regarding this and interpretation, however, there should be some methods, argumentation and reason for realizing the inner morality of law.

At this point, it is possible to claim that law enhances human dignity in respect of the decisions of courts. Court decisions affect the basic rights and duties of citizens and "men have to rely on the decisions of courts and shape their affairs by them" (Fuller 1968, 14). If so, judges far from deciding arbitrary should reach a decision according to the requirements of congruence. Fuller says that "to act on rules confidently, men must not only have a chance to learn what the rules are, but must also be assured that in case of a dispute about their meaning there is available some method for resolving the dispute" (1978, 57). In this regard, it is important to emphasize the argumentative aspect of law.

Regarding this point, it is also possible to claim that judges' decisions should meet the expectations of citizens. This is connected with predictability. According to Aleksander Peczenick, to satisfy people's expectations in modern society legal decisions should be not only highly predictable but also highly acceptable from the moral point of view. He says that "Ceteris paribus, the higher degree of such predictability, the higher the chance of an individual to efficiently plan his life. And, ceteris paribus, the higher the degree of moral acceptability of legal decisions, the higher the chance of one to make the life thus planned satisfactory" (2008, 25–6). Then, if the law respects the human being as an autonomous agent, it is necessary to apply argument and reason.

Furthermore, Waldron clearly states that this aspect of the rule of law is "indispensable to the law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to truncate what the rule of law rests upon: respect for the freedom and dignity of each person as an active center of intelligence" (2008, 60).

(C) Thirdly, Rawlsian rule of law also emphasizes the role of justification. As stated before, Rawls says that "the rule of law exists so long as such legal institutions and their associated practices (variously specified) are conducted in a reasonable way in accordance with the political values that apply to them: impartiality and consistency, adherence to law and respect for precedent, all in the light of a coherent understanding of recognized constitutional norms as viewed as controlling the conduct of all government officers". Following this statement, it is possible to say that sound practical judgement requires adherence to law and respect for precedent, accordance with political values and all of these should be made in the framework of coherent understanding of the constitution which is viewed as controlling the conduct of all government officers.

[16] I was inspired at this point by Luban (2010, 44).

One may easily see that Rawls incorporates descriptive and normative elements in sound practical judgement. These elements are important for legal reasoning. Peczenick states that legal reasoning consists of two components: one is connected with the sources of law, and the other is "a continual creation of value judgements that tell one whether to follow or not these sources, evaluations and norms" (2008, 36). Rawls states sources of law as statutes and precedents, which are evaluated not only from the political values of the rule of law but also from the political ideal of it.

This definition reflects not only the formal requirements of the rule of law, but also the substantive requirements of it, since it includes political ideal. Then we may say that the second aspect of requirement of the law implies its political ideal.[17]

In fact, not only from Rawls's conception, but also from moving the issue of interpretation of the constitution, it is possible to reach the same result, since this is generally seen as a moral issue. Namely, not only the Rawlsian Constitution, but also most constitutions have moral content, since they regulate the area of human rights and civil liberties and draw the limits of political authorities. If so, we may say that coherent understanding of recognized constitutional norms should include moral and political considerations. This understanding is important for finding a solution to the problems of indeterminacy and moral issues. Ronald Dworkin also states this point (2003, 5):

> In the decades after World War II, more and more of these democracies gave judges new and – except in the United States – unprecedented powers to review the acts of administrative agencies and officials under broad doctrines of reasonableness, natural justice and proportionality, and then even more surprising powers to review the enactments of legislatures to determine whether the legislatures had violated rights of individual citizens laid down in international treaties and domestic constitutions. The impact of moral pronouncement on judicial argument thus became much more evident and pronounced. In recent years international courts of different kinds, including international 'constitutional' courts like the European Court of Human Rights, have become progressively more important, and the role and powers of judges have therefore acquired yet a further dimension.

Dworkin explains the judge's new role in three ways which are connected with each other. Judges confront moral issues. "First, the need for judges to confront moral issues is more pervasive in general administrative regulation, and much more pervasive in constitutional and international adjudication, than it is either ordinary statutory interpretation or common law development". Since standards connected with the judge's role are in moral language, moral judgement is more effective in administrative regulation (2003, 5). Likely, in constitutional and international adjudications there are moral standards. In these adjudications, cases that are connected with moral standards are difficult cases. Dworkin accepts that to a certain degree the judge's moral reflection is shaped by practice and precedent. But how and in what degree it is shaped by them is a difficult question of political morality. Dworkin

[17] At this point, one may claim that arbitrariness in law is connected with the arbitrariness in political theory, since to reduce arbitrariness in law is appealed to political morality.

states secondly that moral issues in constitutional regulation are the most divisive and controversial in the community (2003, 6). Dworkin gives examples from the United States. Some of them are problems of minority groups in relation to discrimination. Thirdly, Dworkin says that the issues for judges in constitutional cases and administrative adjudication are "largely matters of political morality rather than individual ethics" (2003, 7).

Then, we may say that moral consideration is indispensable for justification. If so, regarding the rule of law, we should put emphasis on its political ideal.

7.4 Conclusion

In this paper, I tried to show that the rule of law has a moral minimum and, that legal institutions and practices should be governed in the light of this minimum on the borderline of the formal and the moral. As stated above, this minimum requires the application of its political ideal.

To explain this, I started from the meaning of governance by law, which includes constraints on arbitrariness. In connection with this arbitrariness, there can be found two views in the literature. One of view concerns political theory and is related to the restriction of the arbitrary use of public power. The other concerns the concept of law and claims that the rule of law is related to certain features that the law should possess to be able to guide human conduct. In this regard, the ideal of the rule of law reduces the arbitrariness that is connected with the law itself. These views do not separate each other. When I say that "our formal account of the rule of law is not separable from the political ideal of it", I want to state this point. That is, if the ideal of the rule of law reduces the arbitrariness that is connected with the law itself, it needs its political idea or political morality.

To explain this point, I started from the last view and tried to reach from the internal point of view to the external point of view. For this, I used two important keys. One of them is the relationship between the rule of law and the legal system; the other consists of the rule of law that lead to regard it as being on the borderline of the formal and the moral.

In fact, these two keys are connected to each other, since the requirements of the rule of law which are generally the same as, or close to, Fuller's eight principles, are in a central place in the relationship between the rule of law and the legal system. One can easily see this in the relationship between the rule of law and the legal system. Following Waldron, we may state that there are two aspects of this relationship that are inherently connected with each other.

One of these aspects is connected with the features of rules. In connection with the rules, the formal principles of the rule of law or Fuller's eight canons are evaluated in terms of the efficiency of the legal system and the rule of law is considered a better instrument. From this point of view, if the rule of law is considered a better instrument or it is true that in the liberal-democratic society the rule of law can become a deliberate manifestation of a society's adherence to liberal-democratic

values, formal principles of the rule law or Fuller's eight canons include a minimum morality. Following Luban and Waldron, it is possible to explain this morality according to the relationship between the rule of law and human dignity.

On the other hand, this relationship is connected with the internal morality of law. It does not necessarily imply political morality. For this, we need the second aspect of the rule of law.

The second aspect of the rule of law concerns legal institutions and their practices. Among others, it emphasizes argument, procedure and reason. For legal practice, this aspect is also connected with human dignity. It secures that citizens are treated "with respect as active centers of intelligence" (Waldron 2008, 59). That is, it secures the inner morality of law. At this point, the inner morality of law should be completed by the political ideal of the rule of law, since this aspect requires sound judgements that are justified by political values and the political ideal of the rule of law.

This result may be thought of as the blurred point of both the external and the internal morality of law. If so, the question is not whether the rule of law is on the borderline of the formal and the moral, but whether the rule of law is on the borderline of both the external and the internal morality of law.

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