INTERNATIONAL CENTRE FOR ECONOMIC RESEARCH
ICER

WORKING PAPER SERIES

E. Colombatto

IT WAS THE RULE OF LAW. WILL IT BE THE RULE OF JUDGES?

Working Paper No. 41/2007

Forthcoming in Revue Économique, November 2007

It was the rule of law. Will it be the rule of judges?

Enrico Colombatto*

Abstract

The Gregorian revolution introduced the rule of law in the West and created necessary (but not sufficient) conditions for growth to take off. This paper analyzes some of the consequences provoked by the evolution in the notion of the rule of law – from being based upon God-given natural law to relying on popular sovereignty. It concludes that the importance of the rule of law, of the differences in legal systems and of constitutions is probably overstated. It suggests that the successor to the medieval notion of the rule of law is in fact a mix of procedural political correctness, social preferences and efficiency. As a result the main player becomes the judiciary, whose behavioral patterns should become the object of further analysis.

* Professor of Economics at the University of Torino, Director of ICER and Fellow at the Collegio Carlo Alberto. Previous versions of this paper were presented at seminars organized by the Líberalní Institut (Prague) and by the Universities of Montenegro, of Paris II, of Ancona. I am grateful to B. Deffains, E. Grosso, Ch. Henderson, J. Kapás, R. Kast, A. Marciano, M. van Meerhaeghe, A. Melnik and M. Zöller for their useful comments on a previous draft.

It was the rule of law. Will it be the rule of judges?

1. An introduction to the Western miracle and the rule of law

It is widely recognized that the economic supremacy of the so-called Western Civilization ('the West') has been one of the most successful grand stories over the last centuries. There is also substantial agreement about its beginning, which dates back when 'great trading and manufacturing centers sprang up all over western Europe' (Berman, 1983, p.102). Then, aggregate growth gathered pace towards the end of the Middle Ages, innovation escalated from the mid-18th century, while during and after the 19th century extended trade encouraged and allowed specialization. Access to new and growing markets rewarded and further contributed to entrepreneurial efforts, especially in manufacturing[1]. As a result, fresh energies found their way towards productive purposes on a large scale, scientific progress and technological insights ceased to be of mere academic interest and were turned into powerful instruments to increase factor productivity, reduce production costs, develop new and better products. Indeed, even when some Western regions have failed to evolve as expected, like Latin America, it has been argued that in those cases the Western pattern has been abandoned or simply ignored (Vèliz, 1994) [2].

Surely, many actors in other regions of the world could also have taken advantage of low transportation costs, population growth, technological breakthroughs.

---

[1] World GDP per capita was virtually stagnant throughout the world until 1500 and grew at about 0.05% per year (0.14% in the West) from 1500 to 1820. Differences in income levels across nations/states started to be significant in the 18th century, also as a result of quasi-stagnation in the non-Western world. See Maddison (2005).

[2] See however Goldstone (1998), who argues that the economic boom of the West was by and large accidental (related to the exploitation of coal mines in England) and recent (as from the mid-19th century, possibly a few decades earlier for England): that would apply to living standards, technology, institutions. Another significant exception is Landes (1999), according to whom the Western background is not a necessary condition for growth: 'even without a European industrial revolution, the Japanese would sooner or later have made their own' (p.368).

However, the West presented two key features that other societies lacked: the ethics of productive entrepreneurship and the somewhat unique rules of the game that gradually started to emerge towards the end of the 11th century.

This paper mainly focuses on the rules of the game[3]. Following Hayek's research program on political philosophy and Scully's empirical findings (1988), nowadays references to the rule of law – broadly defined as a legal system characterized by non-arbitrary rule making and impartial enforcement[4] – have become almost imperative in most recipes for growth and development. For instance, in relatively rich countries different economic performances are often rationalized by examining the effectiveness of their institutional and legal systems. Similarly, government agencies and international organizations are persuaded that the key to explaining poverty in the undeveloped world is the lack of the rule of law, a synonym for arbitrary rule and unconstrained rent-seeking. Put differently, bad institutions reduce the scope for market transactions, encourage non productive activities, discourage investment. Not surprisingly, attempts at modeling optimal sets of regulations and agencies are increasingly frequent.

Still, from a historical perspective things are more complicated. To begin with, the meaning of the rule of law has changed in various ways since its appearance in the Western world, some eight centuries ago[5].

---

[3] The role of entrepreneurship – which includes openness, curiosity, as well as ambition and greed – should not be overlooked, though. For instance, in the Greek and Roman societies technological insights and great minds were not absent, but the institutions of the time encouraged their use for political purposes (including impressive public works), rather than to improve the economic conditions of the population on a large scale (Finley, 1985). Change started to unfold when monasticism emphasized that labour was not just suffering and, some time later, entrepreneurship was perceived as a way to fulfil human nature and honour God. Landes (1999) provides ample evidence of the interaction between technology and entrepreneurship in the West: how entrepreneurial spirits led to technological progress and how technological superiority was exploited to get richer.

[4] As mentioned in Kapás and Czeglédi (2007, p.10), according to the standard (Hayekian) definition, 'the Rule of law is concerned *only* with the coercive activities of the government. It limits the functions of governments to those that can be carried out by means of general rules, but it does not tell anything as regards the non-coercive activities of the government'. More on this in later sections.

[5] The modern meaning of the rule of law varies following the emphasis laid upon its components. Hayek focused on political philosophy by defining the rule of law as a set of 'rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances' (1944 [1979, p.54]). More recently the mainstream economic literature has tended to identify the rule of law with the credible enforcement of given rules – preferably within a democratic context. See for instance Hoff and Stiglitz (2005) and Dam (2006a, p.3), according to

With the purpose of explaining at least some aspects of the role played by the rule of law in the Western context, this article tries to make three points. It clarifies the birth and evolution of the rule of law in Western culture (sections 2. to 4.); it evaluates to which extent the rule of law contributed to economic growth (section 5.); contrary to the mainstream argument, it submits that the rule of law plays a relatively little role in today's societies, and calls attention to the influence of the judiciary (sections 6. and 7.). Section 8. concludes.

2. Authority, power and the birth of the rule of law

Authority refers to the individuals or groups of individuals who have the right to issue and enforce the rules. The notion of power refers to the kind of rules that the authority can rightfully introduce and to the instruments that a ruler can make use of in order to enforce them. By the end of the 11th century authority and power rested on the sacredness of tradition. Authority was legitimized by the very fact that it dated back in time, and was sacred because it was believed that its long-lasting past could not have been such without divine consent. With a limited number of exceptions the ruler was responsible for his use and abuse of power to God only. That explains why the legitimacy of authority and that of power were one.

The early medieval world came to its closing stages when Pope Gregory VII succeeded in questioning the principle of authority validated by tradition, and in replacing it by that of power justified by (natural) law. Natural law was considered to be part of the Divine Order, either revealed by God through the Holy Scriptures or to be discovered by philosophers through the use of reason. Indeed, power justified and restrained by the law was the essence of the original Western approach to the rule of law[6], whereby there exists a system of divine natural rights, which (a) define basic

---

whom the rule-of-law problem appears 'whenever a system of law is not in place or does not work effectively'. The present article will focus mainly on the Hayekian perspective, since the alternative view actually assumes the existence of optimal rules and amounts to a public-choice inquiry into their inadequate implementation.

[6] To be fair, the Classical world had already doubts about the role of tradition. According to stoicism, for instance, the law is embedded in human nature and does not originate from myth or tradition. The rule-of-law question had also been addressed. For instance, Aristotle had maintained that the purpose of the law was 'to make citizens good and just' (Politics, III.9), and ways had to be found to restrain abuse (Politics,

moral standards[7], (b) are binding for everybody, and (c) the elites have the duty to comply with and enforce. Of course, all sets of man-made norms must be consistent with such basic natural rights. Aquinas was perhaps the commanding authority in this respect. In particular, power legitimized by (God-made) law meant that the ruler was subject to the law; and also that legitimate power could only be exercised by and under the law (see Berman 1983).

3. From divine legitimacy to popular sovereignty

Until the end of the 18th century the prevailing account of the rule of law referred to the general and everlasting moral principles embedded in divine natural rights – beyond which the exercise of power becomes an abuse and revolt is rightful[8]. In particular, natural law implied that power is legitimate if geared to protect individual freedom and enforce property rights.

This vision of a lawful society was gradually undermined when the Prince searched for a new source of legitimacy, so that power could be made independent of Church control. As a result, absolute monarchy triumphed with few exceptions for some two centuries[9], until the French Enlightenment and the Revolution brought the *Ancien Régime* to its knees. And legitimacy conferred by divine (rule of) law was definitely replaced by the notion of popular sovereignty: According to its monarchic version, the Prince would be legitimate because God had identified him as rightful representative of

---

V.8): That is why the law must be sovereign (Politics, III.16). The rediscovery of Aristotle at the end of the 'Dark Ages' surely contributed to the success of the Gregorian Revolution and to the rise of the Western mind.

[7] That is, individual rights and duties are based on shared fundamental values: in particular, all individuals have equal dignity – hence the principle of freedom from coercion and the right to self-preservation – and have a right to pursue harmony and eternal beatitude in God (hence the right to the use of reason).

[8] See Rice (1993, Question 4). The divine version of the natural law was virtually uncontested until well into the 17th century (notably by Hobbes) and continued to prevail for most of the eighteenth. Being God-based, divine natural law is deemed to be eternal, for eternal are the meta-notions of truth and right/good. This contrasts with the procedural version of the rule of law, which was introduced during the nineteenth century and where the focus shifted towards the definition of – and compliance with – predictable and stable norms.

[9] The success of absolutism was also the consequence of the weakness of the Church, whose prestige had been weakened by the Reformation and had suffered an almost fatal blow in April 1606, when the Pope excommunicated the Venetian government; and nothing happened. For the record, Paul V took his word back about a year later.

the people. Whereas the republican approach would argue that legitimacy comes from below (for instance, by means of elections). Of course, in both cases the medieval moral structure, which restrained power despite the holder, is absent.

The crucial novelty introduced with the notion of popular sovereignty, however, was neither the form of government (people's monarchy or republic); nor the new source of legitimacy (divine natural law or man's law). Rather, it was the object. Within a God-given natural-law institutional framework the question of legitimacy regards the exercise of power: how far rule-making can go. The identity of the ruler plays a relatively small role[10]. Instead, from a popular-sovereignty standpoint legitimacy regards the authority, and therefore the procedure through which the authority is selected. In turn, power becomes a question of legal positivism; and all laws are legitimate as long as they are issued by the legitimate authority.

Of course, the notion of rule of law also changed: from a medieval conception to one influenced by rational constructivism; to the final one characterized by procedural justification. As argued earlier, the medieval perspective referred to the rules required to enforce (God given) natural law, a component of the divine order. Instead, during the 18th century the French Enlightenment considered natural law to be the result of human design (constructivism). Whereas from the current post-(French) Revolutionary perspective it has referred to the compliance of the political machine with the agreed-upon procedure to select the ruler. For instance, Westerners now regard democracy as the best procedure to select those in charge of the job. Legitimacy is thus warranted by the existence of (political) freedom, which includes freedom of speech, freedom of association and more or less frequent elections. Disregard for the medieval view of the rule of law also corresponded to a shift from a deontological to a consequentialist approach to social matters, which became explicit after the success of (legal) instrumentalism and culminated with the Chicago approach to law and economics. Institutions are no longer good or bad because they conform to God-given moral standards. Instead, their evaluation/quality depends on their compliance with man-made

[10] Not surprisingly, this led to countless dynastic conflicts over centuries. As noted by Cristi (1984), that is why Hume observed that in order to prevent a race to power by competing claimants you need a ruling elite identified by *a priori* criteria, such as blood and birth.

goals (e.g. social efficiency). Therefore, and consistent with this view, the rule of law identifies what is necessary to enforce procedural correctness, which by and large corresponds to the democratic political process.

Not surprisingly, from the early 19th century private property was no longer sacred[11], legal constructivism began to gain ground and the ideals of national interest and common welfare progressed. The promotion of the common interest justified encroachment upon property rights and ultimately led to various forms of nationalism, further contributing to the validation of discretionary policy-making[12]. In particular, and contrary to what is often argued, the medieval approach to the rule of law was not the victim of French styled civil code, but of the triumph of popular sovereignty[13]. Some have maintained that in the United States and the United Kingdom change has been slower, possibly as a consequence of their different legal history, whereby homogeneity of the formal rules governing society was not the outcome of scholarly rationalization[14]. That would explain why the policy and legal implications of an order conceived through rational (goal-oriented) design were less easily accepted. But accepted they were[15]. The fact that in those countries infringements upon private property rights occasionally raise public outcries hardly conceals that personal freedom is being curtailed and that today

---

[11] At the beginning the French Revolutionary leaders had mixed feelings about private property. Although Barnave and Robespierre were clearly against it, the 1793 Declaration of Human Rights was strongly in favour, although one may conjecture that this formal claim was largely influenced by the fear to lose support from the peasantry.

[12] When creating the pan-German state, Bismarck insisted on the importance of creating a large class of 'state rentiers, grateful to the state' (Meerhaeghe 2006, p. 290). More generally, see Freeman and Snidal (1982) on the interaction between industrialization, the ambition to have more centralized policy-making and the notion of popular legitimacy, which ultimately led to universal suffrage.

[13] More on this in section 7.

[14] The continental legal systems were designed to reflect and enforce a social order that was originally almost one with a general (God-given) moral order. The so-called common-law tradition, on the other hand, reflected concern for day-to-day practical problems, with no ambition to follow or create grand social designs (David and Jauffret-Spinosi, 2002). That would explain why the constructivist revolution did not play a significant role in the Anglo-Saxon world until recently, when the medieval notion of the rule of law had to give way to political necessity and was finally replaced by its procedural counterpart in the 20th century.

[15] Tocqueville (1835 [1961]) was already aware of all this. He had noticed the Americans' resistance to discretionary policy making, but had also predicted that such resistance would eventually give way to the *tyrannie de la majorité* (vol I, chapter VIII).

the role of the state is often defined and constrained by expediency and majority voting, rather than by basic objective values[16].

True enough, economists have attempted to soften the hiatus between the basic (i.e. based on general, God given moral standards) and the procedural approaches. For instance, the neoclassical school has justified policy making by referring to social efficiency and alleged market failures. By doing so, it has assumed that markets can fail while governments hardly ever do; and it has replaced subjectivism with utilitarianism (otherwise individual outcomes could not be compared and aggregated). As a result, the rule of law has become some kind of technocratic game, whereby a small number of leading civil servants and politicians exercise power by defining the objective function; which may or may not correspond to the principled protection of individuals and individual rights; while other bureaucrats and politicians are rewarded according to loyalty and connivance.

Another attempt to bridge the gap has been Hayek's spontaneous order, a dynamic process where interacting individuals unconsciously adopt the desirable solutions by means of a quasi-Lamarckian selection process (Hayek 1988, chapter 1). In particular, the Hayekian approach would widen the rule of law to include what is necessary to allow the unobstructed unfolding of the spontaneous order. As a result, freedom to choose is combined with procedural efficiency. However, by making the spontaneous order the ultimate ruling principle of a dynamic society one has to concede that morality eventually boils down to a set of routines that characterize a community as a whole, with little role for purposeful behaviour (Hoppe 1994, Jasay 1996). In the end, 'no universally valid system of ethics can ever be known to us'[17]. Clearly, the ethics of property also disappears, to be replaced by the legitimacy of authority, which Hayek ultimately identifies in democracy. It follows that it is up to the democratic elites to assess whether political action is consistent with the spontaneous order (or their

---

[16] The Kelo case is a good example of the interaction between political interest and individual perceptions (López and Totah, 2007). See also Sandefur (2006) and Napolitano (2004) for more examples on the violation of fundamental (constitutional) principles in the American context. On the other hand, Cass (2001) offers a more optimistic evaluation. However, the point raised in this article is not about the extent to which fundamental principles are in fact violated. Rather, it is about the extent to which violations are admissible and therefore no longer an abuse.

[17] Hayek (1988, p.20), quoted in Hoppe (1994).

understanding of it), and take action accordingly. Put differently, this notion of the rule of law becomes a mere screen, behind which discretionary power can be exercised with latitude.

A more comprehensive compromise solution has been offered by Buchanan's social contract, the content of which would be established by simulating a representative individual who chooses the grand rules of the game behind a veil of ignorance. Such grand rules would materialize as the Constitution, which would stand above ordinary policy-makers and therefore be qualified to set the limits to politicians' and bureaucrats' power. By making the rule of law equivalent to compliance with the social contract (and therefore with the Constitution), Buchanan strives to obtain a procedural dimension without losing moral legitimacy. Consistent with this view, Buchanan and much of the Ordoliberal tradition are strong advocates of rigid Constitutions, rich in procedural contents (checks and balances) and poor in normative prescriptions[18]. Still, unless popular sovereignty is denied, it would be hard to prevent ordinary policy-makers – politicians and top bureaucrats alike – from reading the social contract their own way, choosing the relevant Constitution[19], interpreting it, filling in the normative gaps.

Put differently, the conflict between the basic view and proceduralism rests on the discrepancy between the notions of popular sovereignty and moral society and can hardly be solved. If one requires that power be limited, its legitimacy must refer to principles established outside the community; otherwise privileged members or groups within the community can conceive or modify such principles in order to suit their own interests. But if this happens, then the acceptance of popular democracy would of course become problematic, for the will of majorities and/or interest groups would become almost irrelevant (Cristi, 1984).

---

[18] The poverty of normative content can generate ambiguities though. For it is hard to conceive a contract without specifying its terms. Of course, an agreement about how to agree is a procedure.

[19] As pointed out by prof. Andrea Simoncini (private correspondence) this problem arises more and more frequently in the European context, where an EU citizen could refer to his national constitution, to the European Court of Justice, to the European Court of Human Rights.

4. A preliminary conclusion

Let us summarize the argument so far. The essence of the Gregorian context was characterized by the legitimacy of authority being founded on the 'just' exercise of power; where 'just' meant compliance with the natural law. Hence, the legal systems were supposed to develop so as to make ordinary rules consistent with natural-law principles. In particular, the Prince was to enforce the law, and the Church was to make sure that the ruler would not abuse his power. When abuse of power happened, being toppled was more than just a remote possibility. This was the essence of the fragmentation of powers – far more important and effective than the separation of powers. For fragmentation stands for institutional competition. When different authorities try to legitimize their own claim to exercise power, they are necessarily constrained by the fact the people are free to choose. Abuse and lack of legitimacy are punished by opting out, and opting out or revolt are legitimized when conformity with fundamental principles (moral standards) is credibly contested. On the contrary, the notion of separation of powers implies the existence of an exogenously determined concentration of power that does not need external legitimacy. Opting out by the members of the group (subjects or citizens) is very limited and the possibilities of collusion among the managers of power are ignored. Morality is defined through compromise and guaranteed by the various actors monitoring each other.

Contrary to this basic approach derived from the divine order, the procedural version of the rule of law has been defined by the way the rules of the game are established and enforced in order to obtain the common good. The hoped for instruments have been identified in democracy, impartial law-making, judiciary independence. Within this framework, the classical-liberal tradition has emphasized predictable behaviour by the judiciary and the policy-maker, so as to enable individuals to act 'efficiently' (long-term individual planning for productive purposes). Others have focused on political accountability, so as to enhance positive freedom (fairness). Be as it may, the move from everlasting moral principles to moral relativism has favoured an approach to the rule of law whereby consequentialism (positive rights) has ultimately replaced deontology (negative freedom). Hence, the social efficiency of the norm –

whatever this means – has prevailed over its intrinsic ethical features (moral legitimacy).

In particular, today the emphasis has moved towards the legitimacy of authority, which depends on the consensus periodically expressed by the majority of voters and – to a minor extent – on political liberties. The morality of power is no longer an issue, for power can be exercised with little restraints, as long as free elections under universal suffrage are guaranteed. That explains why discretionary encroachment upon individual economic freedom has become substantial at a national level and why efforts are under way to create and empower international agencies so as to prevent individuals from voting with their feet and authorities from being obliged to compete.

5. The rule of law and growth

It is generally accepted that economic growth depends heavily on economic freedom: individuals must be free to choose and property rights must be enforced (Weede, 2006). These requirements also define the limits to government intervention: taxation should be modest and not exceed what is necessary to protect and enforce private property rights; while regulation should be geared to the reduction of transaction costs.

This article has argued that today's prevailing view of the rule of law allows deviations from the notion of economic freedom. It defines sets of procedures aimed at (a) legitimizing authority (Tocqueville's *tyrannie de la majorité*) and (b) making sure that the exercise of power is predictable and effective. Individuals are indeed allowed to pursue entrepreneurial projects when growth is needed to satisfy the median voter. Their efforts are however stifled when the majority or selected pressure groups can be pleased otherwise – say, by means of regulation or other forms of redistribution.

From a broader standpoint, however, it has been observed that Western economic growth took off when the basic approach to the rule of law began to decline, to be gradually replaced by its relativistic/rationalistic version, at least on the Continent. Furthermore, the highest-growth period in Western history occurred between 1950 and 1970, a time clearly characterized by the procedural rule of law. One would thus be

tempted to conclude that the basic, medieval version is actually an impediment to economic growth, while the procedural rule of law is sufficient, and perhaps even necessary for sustained expansion[20].

As already aired in the first section, growth is in fact the result of rules (favorable institutional context), culture (the ethics of productive entrepreneurship), market size (transportation costs and demography). Most of this paper has been devoted to discussing the rules. It has been recalled that God-given moral guidelines were more or less in place as from the 12th century and widely accepted until the mid-18th century. Still, for many centuries abuse of power by the local lords was widespread. Wars were frequent and meant looting, destruction, short lives. Surely, property rights were far from secure. Similarly, travel was far from being a safe undertaking. In a word, the Law was there, but its enforcement was not particularly effective. The entrepreneurial side was also deficient, at least in two respects. Although the Middle Ages did not suffer from the lack of great minds, often times ideas could not be put into practice, for nobody was able to build the required items and machinery, let alone on a large enough scale to reduce average costs (see Mokyr, 1990). Put differently, the Industrial Revolution needed skilled engineers to conceive, plan and make possible large scale production, rather than craftsmen producing one unit a time starting from scratch. In turn, skilled engineers failed to come to the surface because the Middle Ages were mainly characterized by humanistic societies, where the elites would devote their intellectual efforts to studying theology, philosophy, law and possibly medicine. Technical skills remained a matter of interest for the uneducated lower class, and were to be learnt through apprenticeship. That was hardly conducive to innovation and, more important, did not attract ambitious young men from the upper ranks of the population[21].

---

[20] Dam (2006b) provides a detailed analysis of the Chinese case. He argues that although growth was not sparked by the procedural rule of law, credible and enforceable rules are required for growth to continue in the long run. See also Trebilcock and Leng (2006) for a review of the role of formal rules in promoting growth.

[21] In fact, mercantile capitalism was often a family matter based on extended networks and risk taking; but with relatively modest technical content. Apprenticeship played a significant role, but required manual labour ('dirty hands') and was thus shunned by the elites. The analysis of the reasons why technical education – with the exception of architecture and perhaps military engineering – enjoyed low

As we know, the picture began to change in the 17th century. The Enlightenment contributed heavily to undermining the medieval notion of the rule of law. The rational vision it embodied greatly influenced the way people looked at technical matters. Engineering was no longer considered dirty work, but the way to prove one's own qualities. Progress in the metal industry and the new chances for social advancement offered by money-making eventually brought innovators and engineers together. And together they could build on the insights of scientists.

This cultural revolution was unique to the West, and remained unique for at least a hundred years[22]. The fact that the Netherlands and subsequently England took the greatest advantages was the consequence of the incentive structure on productive talents, who migrated to areas characterized by religious tolerance and decentralized authority. In fact, tolerance was not an issue where power was decentralized and where – therefore – the tools of oppression were less effective. At the same time the question of popular sovereignty remained meaningless, for there was no absolute/centralized power to oppose and/or to grab. Instead, it was less successful on the Continent, where the incentives to compete for political power were greater and the rent-seeking game seemed to promise greater rewards. Indeed, the key to the Western institutional revolution was not the separation of powers, say that of the ruler from that of the judges. But that the ruler had to face competition by other actors, both secular and religious.

Put differently, it is here maintained that the medieval approach to the rule of law made power accountable. As a result entrepreneurial energies were released: They prevented the West from stalling and actually allowed Europe to catch up with the rest of the world during the Middle Ages. In fact, the East (China and the Islamic area) began its relative decline when it could not replicate the fragmentation and the

---

status in the Medieval culture is beyond the purpose of this paper. Let it suffice to draw attention to the power structures of the time: Social mobility was low; prestige and careers did not depend on the ability to make money, but rather on achievements in warfare, advising the prince, climbing the Church hierarchy.

[22] The importance of undergoing a cultural revolution as a prerequisite for growth was already clearly perceived by Kuznets (1973): 'Advancing technology is the permissive source of economic growth, but it is only a potential, a necessary condition, in itself not sufficient. If technology is to be employed efficiently and widely, and, indeed, if its own progress is to be stimulated by such use, institutional and ideological adjustments must be made to effect the proper use of innovations generated by the advancing stock of human knowledge' (p.247). Abramovitz's (1986) reference to social capabilities goes in the same direction.

limitation of legitimate power introduced in the West by the Gregorian Revolution. The gap widened further when the West began to consider and appreciate the development of technical reasoning, thereby providing substance and legitimacy to the notion of productive entrepreneurship.

To summarize, the Western miracle unfolded over three different periods. The first began towards the end of the 11th century and featured the basic version of the rule of law, which guaranteed fragmented power, encouraged scattered innovation, but had relatively modest consequences on economic growth: overall growth rates were indeed positive, but not high enough to overcome the Malthusian trap. The second period was characterized by the rise of rationalism. The use of the human mind (in all domains) became a matter of pride, while the legitimacy of popular sovereignty, when accepted, opened new avenues for social enhancement. This explains why during the 1750-1913 time span the West succeeded in creating a productive-entrepreneurial culture by bringing together innovation, engineering and, in the last decades of that period, also science.

From the standpoint of the rule of law, the West has thus witnessed two phenomena. One was made possible by God-given natural law, which fragmented power and prevented stalemate, if not decline. Another one occurred when the rational version of natural law came to the surface and co-existed with basic, everlasting moral standards. The former applied to the individual sphere, the latter to the public one. The synthesis was the Scottish Enlightenment, which led to productive entrepreneurship, technological progress and a path dependent process that interacts with the political and moral spheres.

As for today – the third period – in modern democracies rent-seeking pressures have often become a secondary problem, possibly because the Industrial Revolutions 'unleashed' large enough opportunities for growth. Natural rights are neither a question of widely acknowledged moral standards, nor of applying purposeful rationality. Actually, natural rights are hardly perceived as a problem at all[23]: The features of what

[23] Although Westerners do not trust their governments, parliaments, political parties, they are fairly happy about their lives and rather optimistic about the future. See for instance http://ec.europa.eu/public_opinion/archives/eb/eb64/eb64_en.pdf

today is known as 'institutional effectiveness' rely less on the letter and purpose of the formal rules of the game, than on the extent to which they are enforced and on finding means to produce *ad hoc*, discretionary solutions to general problems. Of course, that raises many questions in terms of interpretation, thereby giving considerable power to the judiciary. And it also opens the way to more or less detailed sets of 'necessary' legal arrangements, agencies and regulatory systems that are supposed to address specific problems. This does not deny that the debate on the rule of law has found new energies in the recent past. But the focus of the debate has changed with respect to the period before the 20th century. It now concentrates on (1) the features and dynamics of rule-making institutions in a democratic context and (2) the consistency between the network of formal and informal rules that the allegedly optimal regulatory system is supposed to integrate and/or replace. Clearly question (1) applies to areas where the rule of law is more or less established. On the other hand, question (2) has been of greater interest for the so-called 'undeveloped/developing countries', where the main problem regards either the nature and consequences of institutional shocks (if there are any), or the interaction between the existing and the imported rules of the game. Thus, if the analysis of the rule of law regards the working of today's institutions, a partially new approach is required, to the features of which we now turn our attention.

6. Constitutional and judiciary architectures

As the notion of popular sovereignty made quick progress and soon occupied the front stage of daily politics, the downfall of the medieval principles of the rule of law has evolved into new characterizations:

- A system designed to protect the individual against the state legitimized by a social contract (the Lockean classical-liberal legacy)
- A set of procedural rules characterized by predictability and stability (the Hayekian approach)
- Optimal regulation, allegedly designed to reduce transaction costs and market failures (the neoclassical standpoint)

- A synonym for economic freedom broadly understood (low regulation, low taxation)
- Credible enforcement of socially desirable rules and sometimes outcomes (social-democracy)

Common to all are a distant connection with the rational version of the rule of law and ample reliance upon some notion of social efficiency, which ultimately calls for Constitutional guarantees. However, in democracy a constitution must be approved by qualified majorities[24]. That inevitably leads to compromise. The outcome is an extensive, vague and frequently inconsistent list of principles[25]; since at a constitutional stage organized interest groups usually find it easier to introduce additional articles or clauses, rather than veto somebody else's proposals, especially when the latter are formulated in relatively ambiguous terms. Furthermore, relativism makes sure that the main purpose of a modern constitution is to define the procedure through which social goals are identified. That explains why modern constitutions tend to focus on the guidelines that define the political structure and the ordinary law-making process. For the rest, they often look like empty boxes and/or wishful thinking. As a result, much of the burden of protecting the rule of law eventually falls on the shoulders of the judges and on their abilities to check abuse by the decision-makers.

True enough, the deontological legacy has not been suppressed everywhere. In particular, survival has been easier in countries where the last deep institutional change[26] generated political structures that were legitimized by the medieval view of the

---

[24] There are exceptions, though. For instance, the proposed European Constitution has to be accepted by the simple majority of the population of each country or Parliament.

[25] The American Constitution was a notable exception. It was built on the Declaration of Independence, which explicitly referred to God-given natural law, i.e. to the Laws of Nature and to the inalienable rights to Life, Liberty and the Pursuit of Happiness (Introduction and Preamble). Thus, the US Constitution 'does not grant rights but rather recognizes their existence, guarantees their exercise, and requires the government to protect them' (Napolitano 2004, p. xv).

[26] The institutional-economics literature identifies an institutional shock as the moment when new path dependent processes begin (North 1990, Olson 1982): because of a political uprising, a war or a price shock alter the structure of society. It is here believed that this definition is too vague to be operationally useful. A distinction is therefore made between institutional shocks and deep institutional changes. The former refer to the appearance of new behavioral routines as a consequence of new incentive systems. The latter refer to the shaping of new behavioral routines and of new psychological patterns. That is,

rule of law. That was typically the case for the United States and, perhaps to a minor extent, for a number of other Anglo-Saxon countries. Under such circumstances rent-seeking activities do take place, so that regulation and government intervention gradually expand following the rules dictated by public opinion and democratic majorities. However, even if the original moral foundations of a just society are no longer binding, they remain part of the culture (shared beliefs and psychological patterns). This has had and still has consequences on the role of the judiciary, which in these countries is called upon to monitor and (de)legitimize power[27]: when the victims of the rent-seeking game react, or when the quiet fight for power gets out of control and one party asks the referee to intervene. In turn, the judicial authority maintains the prestige it requires in order to carry out this function by producing a fairly homogenous, consistent and predictable stream of verdicts (Cass 2001, ch.4).

This contrasts with situations where the historical legacy features a deep institutional change molded under the influence of the French Enlightenment and legal positivism. Where this happened, judges have been required to supplement policy-making, rather than to ensure consistency with moral standard. Put differently, the French legacy has led to a system where the judge is frequently called upon as the ultimate policy-maker, but with relatively little legitimacy, other than that provided by the fact that the judiciary is part of the state; and that the state is deemed necessary to keep worse predators at bay (Holcombe, 2004). Two consequences have followed. First, the judiciary is not recognized as having much intrinsic legitimacy other than contributing to law and order – the judges are not above the constitution, do not need to be consistent and *de facto* enjoy considerable discretionary power. Precedents are indeed important. But whereas in the Anglo-Saxon system the role of precedent contributes to strengthen judicial consistency (so as not to undermine the judge's own legitimacy as well as that of the whole profession), in the French tradition precedent

---

people change their behavior not only because they face different incentive structures, but also because they think in a different way.

[27] One may wonder whether the judiciary is called upon in order to make a decision about legitimate authority or, rather, about legitimate power. In the USA a tentative answer is offered by two examples related to the requests for impeachment of presidents Nixon and Clinton. The different verdicts reached in those cases suggest an emphasis on the abuse of power, which was evident in the former case, less so in the latter. See Cass (2001, ch. 3) for a full account of the constitutional questions involved.

offers non-binding guidance about how a particular court might behave and exercise its own discretionary power[28]. Second, French-styled legal systems enjoy less prestige than their Anglo-Saxon counterparts. Absent any (basic) latent moral standard, the law is commonly accepted as a man-made rule with no further connotation about right or wrong. Hence, breaking the law is not perceived as a major offence *per se*. Personal relations and duties to an informal community carry greater weight. In the end, criminal behavior depends on the strength of such community links: when they are weak, breaking the law is more frequent and not necessarily socially disgraceful.

Not surprisingly, in this light most efforts undertaken by the economic profession to find out the optimal legal system are bound to be vain. And praise of the common-law structure seems premature, if not fragile[29]. More important, today's common law and civil law systems should be examined as the result of separate cultural and historical traditions, which have led to different ways to consider the law and thus define the rule of law. For instance, the record of absolute monarchy and totalitarian ideology (the product of the French Revolution) shows that the fragmentation of powers was probably more successful in England than on the Continent. That is hardly surprising, for in the Anglo-Saxon tradition sovereignty is embedded in the people;

---

[28] This does not shed much light on the variance of verdicts, though. Empirical research in this domaine is difficult and scarce (see for instance Osborne 1999 and Eisenberg 2001). For instance, although 'French' judges may not be bound by explicit consistency constraints, they often rely on expert advice for the sake of technocratic accuracy and/or to share responsibility. When this happens variance in damages awards seems drops. On the other hand, it is relatively easy for a common law judge to dodge consistency by claiming that the case under scrutiny differs from others that may appear to be similar at first sight. When so, it becomes extremely difficult to assess actual variance.

[29] Common-law systems are supposed to provide superior protection to individual freedom and internal consistency, given the allegedly greater distance between the judiciary and the political process ('judiciary independence'). It is further maintained that such qualities are strengthened by the reliability and predictability of precedents, to be preferred to that of statutes enacted by legislative assemblies (see Mahoney, 2001).

Although popular among economists, this thesis has not remained unchallenged. One can draw attention to many countries where a wide variety of common- and civil law systems have been transplanted, but with little consequence in terms of economic performance or other respects. In addition, Voigt (2005) suggests that the notions of legitimacy and accountability of judges seem to affect economic performance much more than the general structure of the legal system (common law vs. civil law). Clearly, there is nothing in the construction of civil law that inhibits Parliaments or Constitutions from making judges more accountable, or that prevents judges from acquiring greater esteem among their fellow citizens. From a different standpoint, Pollin and Vaubourg (2006) show that the origin of judiciary systems does not affect economic performance, unless it is considered as an element of a broader economic and social organization – the institutional context.

whereas in much of the post-revolutionary Continental tradition sovereignty is in Parliament, where the *volonté générale* is formed. Hence the functioning of the judiciary turned out to be modeled accordingly, since in the former case the judiciary serves the purpose of protecting people's sovereignty against encroachment, whereas in the 'French' case the *volonté générale* (the legislative) cannot be restrained by any other authority. Of course, the emphasis on the historical heritage draws attention towards the features of the deep institutional changes, and necessarily downplays the importance of the formal divergences in the legal systems. In fact, formal issues can be interpreted or modified in order to suit the current cultural climate with relative ease.

7. Common law, civil law and the optimal design of judiciary systems

Western history shows that in countries where power was fragmented and central authority enjoyed weak legitimacy, the legal context was focused on establishing procedural systems through which individuals could sort out their conflicts. On the other hand, when the abuse of power was a realistic threat, the rule of law referred to the relation between the individual and the ruler's exercise of power. In this light, restraint initially coincided with divine law, later with rational constructivism (codes). Surely, precedents were both everywhere and nowhere. They were everywhere in that the notion of justice cannot be subject to frequent change. Thus, good principles were always to be complied with. They were nowhere, for every case was considered a story on its own and the judge was expected to apply justice, not to operate the Xerox machine (or its equivalent)[30].

Change took place in the 19th century, when centralized law-making became relevant in much of the West. And again in the past few decades, when top-down law making became pervasive. As pointed out earlier, however, the departure from the medieval natural approach to the rule of law was not the result of the Napoleonic code

[30] Indeed, verdicts issued by Parliaments in France in the 16th and 17th centuries were binding precedent. Precedents became binding in England only in the second half of the 19th century. In fact the role of precedents should not be overestimated. Much more important was the principle of consistency, which was the foremost requirement of all European legal systems until the 19th century (see David and Jauffret-Spinosi, 2002).

per se, but of the idea of the nation state based on popular sovereignty. This was the essence of the deep institutional change that justified legislators in making the law (irrespective of the agents' preferences); and thus in violating individual freedom and private property in the name of the collective good. Of course consistency requirements were necessarily weakened; and judges were offered considerable (discretionary) power in interpreting the law whenever they felt it was needed.

It follows that the future of the rule of law depends on what has been labeled as the battle of ideas (creating opportunities for deep institutional changes). Surely, it does not depend on the optimal design and export of Western judiciary systems. For judges tend to behave as an interest group that aims at preserving their prestige and privileges: whichever country they belong to and whatever the formal judiciary system they are supposed to apply. Sometimes the coalition is tighter and internal selection gives priority to group consistency. In other cases personal or political loyalties prevail. Under all circumstances, however, judges use their own reasoning to uphold their own notion of justice: by drawing upon statutes, jurisprudence and sometimes doctrine. In the end, as legislative machineries become increasingly complex and the shaping of consensus absorbs politicians' energies and talents, the judges gradually extend their roles as enforcers and *de facto* become the makers of the law (Bork, 2003). In this respect the difference between the common-law and the civil-law traditions is almost negligible.

One may hope that when top-down law making is perceived as excessive by public opinion (whatever it means), renewed attention might be devoted to the basic natural foundations of the rule of law, at the expense of the procedural approach. Still, that will not necessarily be the result of a new objectivist morality. Rather, it may be a deliberate choice of the judiciary, which might be tempted not to rely only on statutes and jurisprudence to preserve its status and legitimacy. Or of competition, if more and more agents reject the rule of law as conceived and enforced by a given system and buy judiciary services elsewhere. The obvious solutions at present are arbitration and extra-territorial litigation, whereby judges are chosen according to their personal qualities and

legal systems according to their content[31]. Surely, all this does not imply a comeback to medieval natural-law notions. Indeed, it could be more of the same in many ways, e.g. in terms of procedures, rules of the game, etc.. Still, it incorporates principles of institutional competition that the rise of the nation state had obscured for centuries.

8. Summary

This paper has examined the meaning and role of the rule of law in a historical perspective. This notion is frequently mentioned as the key to understanding the reasons of economic growth and the prospects for success in undeveloped countries. Contrary to this currently prevailing view, it has been argued that such conclusions are questionable, for the rule of law has meant different things in different times – only recently has it presented a positive correlation with Schumpeterian growth.

In particular, it has been maintained that

(1) Western civilization has evolved thanks to the rise of new ideas and the interaction of such ideas with the quest for power by autocrats and interest groups. The various forms of the rule of law have been byproducts of such phenomena, rather than a clearly-identifiable driving force;

(2) Today's engine of growth is indeed economic freedom: freedom to choose and enforced property rights. Still,

   i. The mainstream (procedural) notion of the rule of law does not necessarily promote economic freedom. Instead, it frequently offers legitimacy to its aggressors.

   ii. History shows that the basic (medieval) version of the rule of law is not sufficient (nor directly necessary) to produce Schumpeterian growth.

[31] See Dammann and Hansmann (2007). The authors however provide evidence that arbitration and extra-territorial litigation are not common legal practice. It is quite likely that their use is constrained by lack of satisfactory enforcement.

iii. In fact, the Western economic miracle was produced by the Scottish Enlightenment. It led to the Industrial Revolutions, which in turn unleashed opportunities for growth that have eventually reduced the role of the institutional context.

(3) The great meta-change that has characterized Western value systems in the last two centuries has been the acceptance of the notion of popular sovereignty, with major consequences:

i. It changed the notion of the rule of law by transforming the object of legitimacy from a question of power (what the rules does) to a question of authority (who appoints the ruler).

ii. It made the rule of law equivalent to procedural correctness – the key words being democracy, impartial law-making, judiciary independence – thereby reinforcing the role of the judiciary.

iii. It encouraged a shift in the accepted role of institutions, from protecting the individual to fostering social efficiency (i.e. desirable social goals).

(4) In order to understand today's institutional architectures and the role of the judiciary, attention should focus on the last deep institutional changes. That can help understand why in some countries the judiciary takes pride in monitoring the legitimate use of power, whereas in other cases the judiciary tends to replace or supplement the policy-maker.

From a normative standpoint it follows that advocating the introduction and enforcement of the procedural rule of law is likely to be a futile exercise. If it aims at achieving growth, the establishment of economic freedom is more important; and depends on the existence of the appropriate cultural conditions. Of course, these are the products of the last successful deep institutional change. Such change will also determine what kind of rule of law will eventually prevail. For instance, popular

sovereignty and democracy will necessarily lead to procedural approaches, while other forms of government – such as radical and substantial decentralization following the decline of the national and supranational state – may enhance its basic version.

References

Abramovitz, Moses (1986), 'Catching up, forging ahead, and falling behind', **Journal of Economic History**, 46 (2), June, pp. 385-406.

Berman, Harold (1983), **Law and Revolution**, Cambridge (Ma.): Harvard University Press.

Bork, Robert (2003), **Coercing Virtue: the Worldwide Rule of Judges**, Washington: AEI Press.

Cass, Ron (2001), **The Rule of Law in America**, Baltimore: Johns Hopkins University Press.

Cristi, Renato (1984), 'Hayek and Schmitt on the rule of law', **Canadian Journal of Political Science**, 17 (3), September, pp. 521-535.

Dam, Kenneth W. (2006a), 'Institutions, history and economic development', **John M. Olin Law & Economics Working Papers**, 271, The Law School, the University of Chicago.

Dam, Kenneth W. (2006b), 'China as a test case: is the rule of law essential for economic growth?', **John M. Olin Law & Economics Working Papers**, 275, The Law School, the University of Chicago.

Dammann, Jens and Henry Hansmann (2007), 'A global market for judicial services', **The University of Texas School of Law**, Law and Economics Research Paper, 98, March.

David, René and Camille Jauffret-Spinosi (2002), **Les Grands Systèmes de Droit Contemporains**, Paris: Dalloz.

Eisenberg, Theodore (2001), 'Remedies/damages, Legal aspects', in Neil Smelser and Paul Baltes (eds.), **International Encyclopedia of the Social and Behavioral Science**, Oxford: Elsevier Science.

Finley, Moses (1985), **The Ancient Economy**, Berkeley: University of California Press.

Freeman John R. and Duncan Snidal (1982), 'Diffusion, development and democratization: enfranchisement in Western Europe', **Canadian Journal of Political Science**, 15 (2), June, pp, 299-329.

Goldstone, Jack (1998), 'The problem of the "early modern" world', **Journal of the Economic and Social History of the Orient**, 41 (3), pp. 249-284.

Hayek, Friedrich A. (1944), **The Road to Serfdom**, London and Henley: Routledge & Kegan Paul, reprinted in 1979.

Hayek, Friedrich A. (1988), **The Fatal Conceit: the Errors of Socialism**, Chicago: The University of Chicago Press.

Hoff, Karla and Joseph Stiglitz (2005), 'The creation of the rule of law and the legitimacy of property rights: the political and economic consequences of a corrupt privatization', **NBER Working Paper Series**, 11772, November.

Holcombe, Randall (2004), 'Government: unnecessary but inevitable', **The Independent Review**, VIII (3), Winter, pp. 325-342.

Hoppe, Hans-Hermann (1994), 'F.A. Hayek on government and social evolution: a critique', **The Review of Austrian Economics**, 7 (1), pp. 67-93.

Jasay, Anthony de (1996), 'Hayek: some missing pieces', **The Review of Austrian Economics**, 9 (1), pp. 107-118.

Kapás, Judit and Pál Czeglédi (2007), 'Economic freedom: theory first, empiricism after', **ICER Working Paper Series**, 10/2007.

Kuznets, Simon (1973), 'Modern economic growth: findings and reflections', **American Economic Review**, 63 (3), June, pp. 247-258.

Landes, David (1999), **The Wealth and Poverty of Nations. Why Some are so Rich and Some so Poor**, New York and London: Norton.

López, Edward and Sasha Totah (2007), 'Kelo and its discontents', **The Independent Review**, XI (3), Winter, pp. 397-416.

Maddison, Angus (2005), 'Measuring and interpreting world economic performance 1500-2001', **Review of Income and Wealth**, 51 (1), March, pp. 1-35.

Mahoney, Paul G. (2001), 'The common law and economic growth: Hayek might be right', **Journal of Legal Studies**, 30 (2), June, pp. 503-525.

Meerhaeghe, Marcel van (2006), 'Bismarck and the social question', **Journal of Economic Studies**, 33 (4), pp. 284-301.

Mokyr, Joel (1990), **The Lever of Riches**, Oxford: Oxford University Press.

Napolitano, Andrew (2004), **Constitutional Chaos: what Happens when the Government Breaks its own Laws**, Nashville: Nelson Current.

North, Douglass (1990), **Institutions, Institutional Change and Economic Performance**, Cambridge: Cambridge University Press.

Olson, Mancur (1982), **The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities**, New Haven: Yale University Press.

Osborne, Evan (1999), 'Courts as casinos' An empirical investigation of randomness and efficiency in civil litigation', Journal of Legal Studies, January, pp. 187-203.

Pollin, Jean-Paul and Anne-Gaël Vaubourg (2006), 'Environnement juridique et systèmes de gouvernance', **Revue Économique**, 57 (4), juillet, pp. 919-940.

Rice, Charles (1993), **50 Questions on the Natural Law**, San Francisco: Ignatius Press.

Sandefur, Timothy (2006), **Property Rights in 21st-century America**, Washington D.C.: Cato Institute.

Scully, Gerald W. (1988), 'The institutional framework and economic development', **Journal of Political Economy**, 96 (3), June, pp. 652-662.

de Tocqueville, Alexis (1835), **De la Démocratie en Amérique**, Paris: Gosselin, reprinted by Gallimard in 1961.

Trebilcock, Michael and Jing Leng (2006), 'The role of formal contract law and enforcement in economic development', **Virginia Law Review**, November, pp. 1517-1580.

Véliz, Claudio (1994), **The New World of the Gothic Fox**, Berkeley: University of California Press.

Voigt, Stefan (2005), 'The economic effect of judicial accountability. Some preliminary insights', **ICER Working Papers**, 19/2005.

Weede, Erich (2006), 'Economic freedom and development: new calculations and interpretations', **Cato Journal**, 26 (3), Fall, pp. 511-524.