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THE LEGAL BALANCE BETWEEN LIBERTY AND EQUALITY

The paper explores the specific legal balance between liberty and equality, distinguishing it from political theories and constitutional settings, where they are often considered in opposition. In order to find the specific legal balance between liberty and equality, and after identifying some of their relevant meanings for the purpose, it becomes necessary to focus on the rule of law, and to examine the relationship between liberty and equality in its different versions. Once the core meaning of the rule of law in terms of liberty and equality is enucleated, it is possible to consider extending it to the international field.

Key words: *Liberty. – Equality. – Rule of law. – Reciprocity. – International rule of law.*

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1. INTRODUCTION

Sometimes liberty and equality seem to be mutually exclusive, but this is a controversial opinion within law and politics. The reason for excluding their opposition in this context is the double essence of legal and political institutions, and of their sciences accordingly. As a matter of fact, legal and political institutions inevitably deal with the combination of individualities in a social regime. They are social entities and thus they require a mix of individual liberty (or, in the negative, they are characterized as forms of domination) and equality (or, if it is missing, they produce inequality). Liberty and equality are the two sides of the same coin, being the coin of the legal and political domains.

In addition, a specific balance between liberty and equality is a point of no return in the institutional framework of the political and legal Western tradition of democracy and the rule of law, far from extreme forms of liberalism (as libertarianism) – that exalt liberty as the absolute value over any pretended interference in the political context, as well as far from extreme socialist political doctrines – that boost equality over liberty. In very general words, this Western tradition involves a wide development and deep transformation of legal and political institutions in favor of equal freedom and participation. In order to limit the otherwise too wide spectrum of possibilities regarding the balance between liberty and equality, this article will mainly make reference to this modern framework.

The central claim is that it is possible to differentiate a specific *legal* setting of liberty and equality from other (different) *political* models. The former looks at the legal relations, in particular, in its best pattern, the rule of law. The latter covers a wide variety of versions of, on the one hand, constitutional backgrounds and, on another hand, a broad assortment of political theories. Constitutions are generally understood as tangible and given instruments of historical evolution and mediation among pluralistic values in which a specific balance of liberty and equality usually reigns. On the other hand, the more abstract scenario of political theories is where the thesis about the opposition between liberty and equality has prospered. In this latter context, it is sometimes assumed that liberty and equality are inversely proportional: the more liberty we want, the less equality we can guarantee, and vice versa. This idea is consonant with neo-liberalist ideologies and with their free-markets policies, and it could lead to the impression that the more state intervention we have, the less freedom of exchange we can guarantee, forgetting that in order to have a free market we need at least equal access for all incomers and owners (because all others are denied access to market). In consumerist societies like ours, the only relevant

freedom seems to be the access to market. Nevertheless, the challenge here is to identify the *legal* balance between liberty and equality, and this task concerns necessarily the concept of law, which must be distinguished from markets. As an introduction to the topic, it can be noted that even an inverse proportionality is the result of a balance, or a tension. But even a tension shows the link between them.

After presenting a schematic map of the concepts at stake (liberty, equality), in so far as they are relevant for the rule of law as the core of the concept of law, and examining different forms of their relationships, the specificity of the relationship between liberty and equality in the legal context will be established. It will be suggested that a combination of liberty and equality is the very basis of every legal society guided by the rule of law. This circumstance explains the requirements of rule of law and serves to distinguish its more or less suitable version among different possibilities. The suggestion about the legal setting of liberty and equality contrasts with both the idea of an irresoluble opposition between liberty and equality – typical of some political theories – and with the merely formal conceptions of the rule of law. It implies that the rule of law is the core of law and that, consequently, it is possible to design an international rule of law for the international arena, where liberty and equality take partially different forms.

2. LIBERTY AND/VS. EQUALITY?

2.1. Liberties

Liberty or freedom (here used as synonyms) are not usually considered to be a value or a good in and of itself but rather a general condition, a tool for obtaining some other goods or guaranteeing their pursuit. Those goods are generally associated with human flourishing: wellbeing, self-respect, self-sufficiency or wealth, or whatever other aim human beings decide to pursue in the social context. The point is not that liberty is a necessary mean for obtaining these goals, but rather that all these goals have to be pursued and enjoyed with liberty, since liberty is a human prerogative to be protected in social interaction. The problematic comparison and consequent opposition between the liberty of ancients and that of moderns (Constant 1988, 309) seems to diminish the importance of liberty in the public sphere in modern times, whereas it was clear that the Romans considered *libertas* to be strictly linked to *civitas*. The first point is then that what is at stake in the legal and political context is not a sort of natural liberty, but rather its legal and political implications. In any case, whatever liberty is in the legal

and political realm (collective political autonomy for ancients or individual private freedom for moderns, accepting the difference indicated above), its protection is an appropriate treatment for human beings in the context of social interaction.

The instrumental character of liberty does not reduce its importance. On the contrary, it is intrinsically related to its basic meaning: whatever the content of liberty in general is, to protect liberty implies to leave individuals free to decide and act by themselves. Liberty implies autonomy of judgment and self-determination, features that show the existence of an independent source of action and behavior. In sum, liberty is a crucial characteristic of human agency, to be performed and protected in the social context.

In the modern legal and political framework, freedom is not conceived only as a desirable condition, but it is affirmed as a right, and in particular as a right to specific claims: freedom of expression, of conscience, and a wide range of rights to choose and to self-determination, which must be specified in consideration of contexts and circumstances. The demand for freedom can be advanced as an abstract claim, but it is concretely assessed in consideration of specific contexts. These rights and many others are considered manifestations of liberty in the framework of interactions because they are necessary for the exercise of liberty. Liberties (in the plural) are then due to individuals. It is not a matter of concession.

As it is well known, within the general background of liberalism, in which liberty is the most relevant if not the only political value, a distinction between negative freedom and positive freedom – also relevant for understanding the rule of law – has prospered (Berlin 1969, 121–122). Negative liberties are generally considered immunities; they seem to require some actors (states, institutions, powers, agents) to restrain from, or to inhibit, interference with free people. Traditionally, negative liberties are believed to be self-executing; such rights seem to exist for the simple fact that it is imperative to protect freedom. On the other hand, positive liberty is the capacity of acting upon one's will without internal constraints. Observed closer – and from the perspective of multiple implications of liberty in the social context – what really distinguishes negative and positive liberties is the correlative position of others *vis à vis* the free agent. In the first case it is required not to interfere; in the second one – to contribute to the production of conditions for self-mastering. Notoriously, according to Berlin, positive liberty is dangerous because it could justify authoritarianism, or, in other words, interferences and domination. The distinction, however, is graspable only in a liberal context, where an existent general liberal legislation, together with executive and adjudication powers, make the simple idea of a negative liberty possible. In addition, budget and resources are necessary in both cases, because the

two forms of liberty require institutions, policies and actions, then they are not distinguished from the point of view of their cost.[1] Both types of liberty are entrenched in relationships. Liberty in a social context depends on others' behaviors and is influenced by them, and this is the case of law.

These interactions/interferences can be considered against liberty only if they are illegitimate, as any interaction is from the point of view of anarchy (Wolff 1970, 18). On the other hand, legal and political contexts must take interactions seriously and think of liberty within the social framework. Liberty in the legal and political context is always a liberty embedded in a network, and in some way conditioned by specific relationships. This aspect seems to weaken liberty because it seems to justify interferences, but at the same time it strengthens it, because freedom becomes a common commitment and not only an individual concern. Pushing this argument further, the promoters of Republicanism have noticed that interactions and interferences, even when supported by coercion, can be subjected to our control, and then be in favor of liberty (Pettit 2008, 202–203). In other words, interactions/interferences are not necessarily incompatible with liberty. Interferences are against freedom when they are arbitrary and generate a state of domination. From this point of view, the opposite of liberty is domination, as arbitrary interference, and not equality. And it is worth noticing that it is no accident that the avoidance of arbitrary interference or domination has always been the main task of the rule of law. Law then plays an important role in avoiding arbitrary interferences.

2.2. Equalities

Even more than liberty, equality fits well with the plural. Different forms and plural parameters of equality can be found: equivalence – typical of commutative or corrective justice, equality of reciprocity – a more complex system of mutuality in which the correspondence is not univocal,[2] equality in distribution or allocation of resources, rights, chances, opportunities. In addition to the different forms of equality and to the wide range of parameters of equality, there are also different methods for obtaining a possible equality, levelling down or levelling up standards and parameters. All these differences explain the diversity of accounts of equality. What

[1] It is also difficult to say which one costs more (see Holmes, Sunstein 1999).

[2] The principle of reciprocity has been proposed as a complementary economic logic, different from the equivalence of market logic (Bruni, Zamagni 2007, 159–175).

is common to all the versions is the comparative concern: equality is the quality of a comparison between two or more agents in one respect. The comparison should be said to be equal when it shows proportionality or equilibrium among those interested. Nevertheless, in the legal context, equality is not a starting point but a final achievement. In other words, equality is a normative principle. To say that human beings are equal means then that they must be treated as equal. When individuals are equal under this or that parameter, a proportionality in their relationship is due, even if, as a matter of fact, human beings are unequal. From this point of view, when Article 1 of the Universal Declaration of Human Rights (1948) says that all human beings are born free and equal in dignity and rights, it means that all human beings must enjoy all those rights connected to their freedom and dignity. The thesis according to which perfectly realized human rights are compatible with inequalities (Moyn 2015, 13) is grounded precisely on the assumption that taking freedom seriously jeopardizes equality. But perfectly realized human rights (if there could ever be such a world) would reduce inequalities, as far as equality is served when people's access to desirable conditions of life – like those established in the form of rights in the Universal Declaration of Human Rights – is equal, within reasonable personal differentiations (Cohen 2008, 181). Hence, unreasonable differentiations or, in other words, unjustified and arbitrary discriminations, are the opposite of equality, instead of liberty. Those unreasonable discriminations open the door to domination in so far as they provide a status of oppression.

2.3. Opposition or Complementarity?

The relationship between liberty and equality is intricate, even if the two can hardly be separated. The adoption of this or that concept of freedom and equality complicates their relationships, but some points can be fixed. First, the postulation of their radical opposition is born in the same tradition of liberalism, famously represented by Hayek's doctrine (Hayek 1960, 85), and it is stressed by libertarians – a group of political theorists who emphasize liberty at the cost of intentionally jeopardizing equality. The background of this trend is the anarchical assumption that any interaction is an arbitrary interference and produces a state of domination. But even libertarians – if they are coherent – must support the same liberty for everyone. In their case, they would aim at the highest possible level of freedom for all, or perhaps at the freedoms related to markets, but always claimed for everyone. Otherwise, they would run into the fallacy of restricted universalism (Black 1991, 357).

Second, a balance does not prevent the tension between liberty and equality, and the different opinions about which one must prevail. Notwithstanding his liberalism, Dworkin affirms that liberty will lose out in any conflict with the best conception of the abstract principle of equality, because governments should show the same concern for the lives and liberties of all citizens (Dworkin 2002, 131). This aptly highlights the features of the context in which the balance must be found: a social context of interactions among individuals in which the comparative concern cannot be dismissed.

Finally, while the opposite of liberty is domination and not equality, the opposite of equality is inequality and discrimination, rather than liberty. Liberty without equality is incompatible with an even minimal social order. Equality without liberty is incompatible with a respectful human social order. In so far as unreasonable inequalities and discriminations can produce domination, they are enemy to both freedom and equality.

In general, it can be correctly said that the liberal centrality of the rule of law is linked to its ability to protect liberty (Tamanaha 2004, 1) and to avoid domination. The question then is how to match liberty and equality within the rule of law? In other words, which is their proper balance in the legal context?

3. LIBERTY, EQUALITY AND THE RULE OF LAW

As it is well known, the rule of law is a contested concept, as is its role in the concept of law (Waldron 2016, §2). In this article, these major questions will be assumed as established. The purpose is, instead, to test the rule of law's relationships with liberty and equality. It will be possible to achieve this goal by examining different readings of the rule of law, in which the relationships involved can be observed according to a vertical and one-way pattern, to a vertical and a bidirectional one, or according to a reciprocity model. These different models rely on different ways of thinking of the rule of law.

From the point of view of liberty, the relationship between the rule of law and human agency, and the rule of law's ability to exclude arbitrary interferences, will be relevant. From the point of view of equality, the correlation between reasonable differentiation and the rule of law, and the opposition between the rule of law and discrimination, is applicable.

3.1. Different Versions of the Rule of Law

Even limiting the focus to its most recent development – and looking at legal institutions and their mechanisms more than at the theories – different readings of rule of law can be sketched. The differences among them depend on which institutions or agents must be disciplined by the rule of law, but also on the way of conceiving the subjects of the rule of law, i.e. those who are protected by it, and their relationships (Sellers, Tomaszewski 2010, 1).

A first account sees the rule of law as a mechanism for controlling public powers through well-established public norms. It is the tradition of the *Rechtsstaat*, a typically domestic and public account widespread in Continental Europe, and promoted originally by nineteenth century German legal science. According to this view, the rule of law requires the separation of legislature, executive power and judiciary, and the legality principle, in its two variants: preserving rights *through* the law and public powers acting *by* the law. The mechanism serves the protection of individual rights: not only negative liberty rights, but any other rights established through law. Nevertheless, the position of individuals in this historical model is controversial as it was not able to avoid totalitarianism. The reason could have been the predominance of equality before the law over the protection of individual liberty, triggered by an unlimited legislative power. And in fact, its (corrective) evolution has led to constitutional systems that introduce limits on content legislation, as well as mechanisms of judicial review.

This tradition is to some extent different from the one built around the common law system, shaped by a different set of powers and legal constraints, mostly derived by *stare decisis* customary law. It is no accident that this second account pays more attention to the way in which adjudication must be performed according to the rule of law – by public officials subject to the same rules, who apply them impartially, according to the due process of law – and to its role in the system of checks and balances. Obviously, the judiciary is in itself a power and as such it has to be controlled according to the rule of law. However, adjudication is more sensitive to individual cases, and it compensates the weight of general categories (a claim of equality and liberty, in so far as privileges produce domination) in favor of particular cases (a claim of liberty and sensible equality). The relationships between a general law and an individual case and among different cases are built through a process of reasoning and argumentation in which the argumentative burden is inversely proportional to the weight of the individual case differentiation. In other words, it is the justification of differences to equate the different positions, according to the principle „equals are to be treated equally and unequals unequally".

However, these two traditions of the rule of law focus on public powers and seem to suggest that law is a set of authoritative directives identified by their sources and imposed and applied top-down, following a vertical and one-way pattern. But the rule of law is about guiding people's behavior, and not only about government and public powers and about the way in which they must apply equality of treatment. The contribution of the contemporary debate in legal philosophy about the rule of law has been illuminating precisely on this point. Law guides people's behaviors (free and rational human agents) through authoritative reason-giving for actions (Raz 1975, 19). It necessarily requires the involvement of freedom. The famous list of rule of law's specific features can be explained precisely in light of its human agency: law must be general, clear, prospective, non-contradictory and practicable, publicly promulgated, relatively stable, applied impartially by officials subordinated to the same rules. All these features exclude domination in so far as they assure that the (inevitable) interference by the government and others does not offend individuals' human agency as long as it is not arbitrary. The general rules are aimed at guaranteeing *prima facie* equality of treatment and require human agency in the task of determining appropriate individual behavior. Clarity makes the process of deliberation by the individual possible, while prospectivity assures that the act of compliance or defiance corresponds to free choice, and at the same time represents a limit for the exercise of power, even the legislative. Noncontradictory and practicable rules make obedience possible. Public promulgation in advance assures common knowledge of the law and predictability, promoted also by the stability of rules. The principle according to which rules have to be applied by officials impersonally and with impartiality also ensures equality of treatment in the application phase.

Even if more persuasive, this account of the rule of law and its legal characters still seems to undertake that law is a set of directives targeting individuals that are rational and able to self-determine, though mainly subordinate. The relationship between authorities and dependents is still unidirectional. It is still necessary to distinguish this model from the managerial direction of actions, which famously Fuller opposes to the rule of law (Fuller 1964, 222). In the managerial model, authorities impose standards, rules and goals on those subject to their power, to which they must be considered unconnected. Vertical and one-way accounts of the rule of law are some of the cases of its partial reading. On the one hand, the vertical relationships within the context of the rule of law are not unidirectional, since the rule of law imposes duties on the authorities and establishes criteria for accountability. The vertical dimension in fact is not explained without reciprocity between the government and individuals addressed by the law. In this view, compliance is the result of the government respecting certain

mandatory requirements, according to a vertical but bidirectional pattern. Reciprocity is a form of equality that implies a mutuality of constraints between the ruler and the ruled. In other words, reciprocity entails that authorities and subordinates cooperate in shaping their interactions (Postema 1994, 372). Authorities make general, clear, prospective, non-contradictory, practicable, promulgated and relatively constant rules; those rules apply also to the same authorities, and officials apply those rules with impartiality and consistency, in response to which individuals comply with the rules or, if they defy them, the use of force becomes legitimate.

At the same time, equality in the rule of law is also a quality of a set of horizontal relationships; it is the solidarity perspective of the cooperative enterprise of making the rule of law possible.

Summing up, first, equality is met if people's standing in the network of interactions is equal within the constraint of reasonable categories proposed by a (limited) legislation (Allan 2001, 22). Second, generality introduces the requirement of justification since all forms of discrimination must be adequately justified. Discrimination is tolerable only if it rests upon reasonable differentiation and classification. Third, these classifications must be revised by adjudication, whose role is to apply these categories to individuals. Equality is then assured by equal access to institutions to settle disputes. This is the content of what is called the procedural part of the rule of law (Waldron 2016, §5.2). Authorities, officials and procedures are the guardians of the system of equal interactions, vertical and horizontal. Those subject to the rule of law are all equals, both in relation to authorities (according to reciprocity), and as subordinates (according to generality and equal access to remedies). The need for cooperation in the enterprise of making possible the rule of law creates solidarity among all participants in the legal project, all called to act according to the law with fair play and exercise the normative power of accountability according to their roles (Postema 2014, 35). In sum, the rule of law is a social order of equal interdependent liberties. This is the reason why the rule of law attracts loyalty, because it is considered not only efficient, but also fair (Postema 1994, 387). It creates links between those who interact in the same contexts, but it requires also some features in those interrelations, in particular, the recognition of the dignity of all partners and, consequently, of their equality.

3.2. Formal vs. Substantive Versions of the Rule of Law?

A classic controversy about the rule of law regards its formal character and its indifference to the content of the law, as well as to liberty and equality (Craig 1997, 468; Raz 1977, 196). There are many versions of this contrast. Sometimes it is indicated as the opposition between rule of law's thick and thin versions, or regarding the link between the rule of law and individual rights (opposing one right concept vs. the no rights thesis: see Fox-Decent 2008, 533; Dworkin 1985, 12), or it is about the connection between the rule of law and private property.

The aim of the *formalists* in the debate is to distinguish the ideal of the rule of law from other political values, such as human rights, democracy, or some specific accounts of liberty and equality. However, the very point that should be highlighted is the concept of law. The distinction between form and substance depends generally on the idea of law as a set of norms addressed to individual law subjects in which it is possible to distinguish form and content. When law is defined as a social practice and the rule of law serves to shape the relationships according to liberty and equality as indicated above, the problem of form and substance must be looked at in a different way. In so far as a social practice is a form of coordination of different agents, the rule of law is understood as the appropriate legal form for regulating interactions between free and equal individuals. More than a problem of form and substance, the point concerns the goal of the practice and its appropriate means. As shown above, the rule of law is able to forge both legislative lawmaking systems and common law adjudication legal orderings, and it is also compatible with different sets of rights and even ownership regimes. However, the rule of law is not compatible with every system, if liberty and equality are not protected. It is not about any model of balance between liberty and equality or about just one of them – for instance, the one that necessarily links liberty and private property (Austin 2014, 81) – but it is about liberty and equality in the legal context, i.e. in a practice of interaction among free and equal human agents.

3.3. The Scope of the Rule of Law: Liberty and Equality in the International Scenario

Being compatible with different systems, as well as being a sort of operating scheme, the next question is whether the rule of law can be extended beyond domestic borders. Regarding this point there is a recent and less-settled but nevertheless useful debate about what should be considered

the international rule of law. It aims to bring international affairs under the control of the law (Koskenniemi 2011, 37), in the framework of a more ambitious project of fine-tuning the rule of law to the present-day features of law, such as pluralism (Viola 2007, 109–114). This legal question should be distinguished from the multiple ways in which the theories of justice (that pertain to the political theories built on a possible, in the abstract, dichotomy between liberty and equality) have discussed the possibility of global justice (Brock 2017, §1.2), different from a domestic (or political so far as it refers to specific political communities) scheme of justice.

From the specific legal point of view, the extension of the rule of law beyond frontiers of states and political communities can be fostered in different forms. Firstly, it can regard the inclusion (in the list of the domestic rule of law's requirements) of the demand for the state complying with its duties in international law, as it should with national law (Bingham 2007, 69). This means that the rule of law implies the recognition of international law as law. Secondly, the extension of the rule of law beyond the domestic domain can be understood in terms of a rule of international law. In this case, the idea is that international law (at least some of its parts) plays a role similar to the domestic rule of law in the domestic domain, as long as it protects human agency against states, thanks to its ability to determine interactions between individuals and their states. The best example is the case of the international law of human rights: they can be protected in regional and international courts (de Londras 2010, 218), in addition to the domestic domain. Thirdly, the international rule of law is the result of adapting the rule of law to the international scenario. In order to achieve this, it is necessary to identify the core and function of the rule of law and to adjust it to the different setting of powers and relationships (Chesterman 2008, 331). Here the controversial point is the convenience of using a sort of domestic analogy, with the aim of translating the domestic model of the rule of law into the international setting, which is not always a good point due to the risk of distorting the very nature of international law. In any case, the distinction between vertical and horizontal versions of equality can be applied also to the international rule of law. The horizontal notion involves certainly interstate relationships, if we assume that states are the main actors in international law, even if they are not the only ones. International institutions and international organizations, as well as private entities and individual actors, also play a legal role in international law, and could transform that presence into forms of domination. In fact, the international domain is a good context in which it is possible to observe that powers are not only public, but also economic, informational, based on knowledge and expertise. For this reason, the rule of law is necessary also beyond the state in so far as it is able to shape relationships beyond borders. The relationships to be shaped by the international rule of law are different: between states or

empowered actors, between empowered agents and those subordinate to them (authoritative relationships), between individuals (between free and equals agents). The liberty at stake in the international rule of law is not that of the state but of humans, with the former being relevant only in so far as it is oriented to protect the latter. The requirements of the international rule of law will depend on how we conceive the relationships between human beings in the international field, even when mediated by states. All this suggests that the international scenario will be a field of expansion of the rule of law because it is a context in which it is necessary to regulate those relationships against arbitrariness and discrimination.

4. CONCLUSION

Liberty and equality are undoubtedly relevant values in the legal field, where they are not in opposition. On the other hand, the rule of law – considered as the core meaning of the concept of law – can be explained in terms of a specific balance of liberty and equality. The opposite of liberty is domination and arbitrary interference of free and rational agency; the opposite of equality is arbitrary discrimination. Preventing both types of arbitrariness is the job of the rule of law. Understanding this idea allows for the expansion of the model of the rule of law to any other level, including the international field. The protection of liberty is a necessary condition for free and rational agents, and in its absence compliance with the law is not possible. Equality is the manner in which the relationships between those exercising authority and those under the authority of the law (all the components of legal relationships) are characterized from the perspective of the rule of law. From this latter perspective all legal relationships are shaped by reciprocity, which is the very name of equality from the vertical and horizontal perspectives.

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