



Rule of law, rule of men, and rule of women. Reforming power and decision-making processes

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ABSTRACT

The necessity to provide new guidance to States parties on ensuring equal and inclusive representation of women in decision-making systems according to Articles 7 and 8 of the CEDAW Convention presupposes a renewed vision of global and local governance that in my opinion passes through the reconsideration of the principle of the rule of law and its ability to avoid arbitrary power. On the one hand, a women-friendly rule of law should emphasize the demands of participation in deliberation and consultation in decision-making processes, both in formal and in informal settings. On the other hand, a women-friendly rule of law gets along with a horizontal reading of the rule of law able to detect violations in inequalities and discriminations often conveyed by bias and stereotypes. Among the requirements of the rule of law, explainability and accessibility to justice, but also to those essential goods – including access to technologies – necessary for an equal inclusion, could make the difference.



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SUMMARY: 1. Introduction – 2. Rule of law over the rule of men: the state of the art – 3. Three ideas on the rule of law – 4. Possible recommendations for the States and parties involved in the implementation of art. 7 and 8 CEDAW.

1. Introduction

After more than 25 years, many of the points indicated in the General Recommendation No. 23 (1997) regarding the implementation of Articles 7 and 8 of the CEDAW Convention are still unsolved.¹ In consideration of this state of affairs, my topic will not be the diagnosis of the conditions of women that prevent them to take part in decision making processes. The question I would like to launch is more radical and thought provoking. Could it be that to include women in decisions-making processes we need to reconsider those processes? This question would appear at first sight too abstract, but I hope to show it is not. I am convinced that starting from this question, it is possible to design specific guidance to ensure equal and inclusive presence of women in decision-making systems, with particular attention to their social economic and cultural rights. I will work on how those decision-making processes should be shaped to include women with a double approach: to work on endemic deficiencies regarding the inclusion of women, but also to foresee new challenges, such as those related to the use of artificial intelligence in decision making processes, to avoid damaging impacts.

I will start from some elements that are already a relevant part of our political and cultural environment at the domestic and international domains. My proposal is to connect the problem of including women in decision-making processes with a specific version of the rule of law. I am fully aware that this means to open a very big and controversial chapter, but after showing its importance both in the domestic and international fields, I will propose a strategy in dealing with its main criticisms and propose some ideas on what I will call the rule of women, i.e. a women friendly rule of law.

¹ This contribution has been discussed in the Conference *Promoting Equal and Inclusive Representation of Women in Decision-Making Systems: A Holistic Approach to Economic Empowerment*, organized by the World Trade Institute in Bern, on February the 23, 2024. The conference has been dedicated to the preparation of a new General Recommendation, no. 40, by the UN-CEDAW Committee.

2. Rule of law over the rule of men: the state of the art

Despite being widely appreciated over the last fifty years,² the rule of law is still the topic of intense discussions. From the point of view of its implementation, there are many difficulties related to authoritarian regimes, to new democracies, but also to democratic societies with long traditions in which we detect violations and deficiencies emerging along the way³. From a theoretical approach, there are problems about its content, its moral value, its status, and its extension, i.e. whether it is possible to implement it beyond the State.

The best known of the difficulties with the rule of law is perhaps the countless checklists of requirements that are used to describe its content. Critically, they are sometimes indicated as laundry lists⁴. The United Nations has identified 135 indicators to be used to measure the real presence of the rule of law in countries around the world⁵. I completely share the criticisms on reducing the rule of law to a checklist. What matters about the rule of law is its point, its inspiring idea, that is to limit any form of arbitrary power. But I understand the utility of the lists of requirements as a tool for focusing on some distinctive points of the rule of law particularly important in a specific context. In general, those lists are the result of an effort of adapting the principle of the rule of law to new challenges or to the features of a local context. But those lists are not exhaustive at all. My guess is that it is necessary to understand the rule of law as a polity, as an institutional ethos, as a cultural achievement⁶. For grounding properly this proposal, we should discuss the moral value of the rule of law, that is neither liberty without equality, nor

² Even those that are against the rhetoric of the rule of law and indicate it as an international slogan eventually recognize its importance in almost all the different legal traditions. See M. Krygier, *The Rule of Law: Pasts, Presents and Two Possible Futures*, in *Annual Review of Law and Social Science*, 2016, Vol. 12, n. 1, p. 199-229. As an introduction to the rule of law see B. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge University Press, Cambridge, 2004.

³ In Europe: Poland, Hungary, and recently Spain with the problem of amnesty for Catalan separatists.

⁴ J. Waldron, *The Rule of Law as an Essentially Contested Concept*, in J. Meierhenrich & M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, Cambridge, 2021, p. 121-136. On the limits of the anatomical approach of list of desiderata, M. Krygier, *The Rule of Law: Pasts, Presents and Two Possible Futures*, cit.

⁵ *The United Nations Rule of Law Indicators. Implementation Guide and Projects Tools*, by the Department of Peacekeeping Operations and Officer of the High Commissioner for Human Rights, 2011. See also the World Justice Project Rule of Law, <https://worldjusticeproject.org/rule-of-law-index/global>.

⁶ M. Krygier, *What's the point of the Rule of Law?*, in *Buffalo Law Review*, 2019, Vol. 67, n. 3, p. 743-791.

liberty against equality,⁷ but liberty and equality. I must skip this foundational question. I will concentrate on three features of the idea of the rule of law and on two “women-friendly” requirements.

On the international front, and at the United Nations, a milestone in the promotion of the rule of law is the article n. 9 of the United Nations Millennium Declaration of 2000, of the United Nations General Assembly, which aims to strengthen the rule of law in international and domestic law. It has activated countless further initiatives, actions and even funding to implement it. In this context, the reference to the rule of law can be summarized in the famous definition of Secretary Kofi Annan, of the rule of law as “a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”⁸.

At a different level, in the European Union, integration through law indicates the project of strengthening the rule of law, considered as a precondition for the protection of rights. The Preamble and Article n. 2 of the Treaty on European Union treasure the rule of law as one of the founding values shared by the Union and the Member States, together with human rights⁹. In 2016 the plenary meeting of the European Commission for Democracy Through Law (the so-called Venice Commission) worked on a list of indicators – one of the possible checklists of the rule of law – which develops the various aspects to be brought to attention of the Member States: (1) a transparent, accountable and democratic process for lawmaking; (2) legal certainty; (3) the prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) nondiscrimination and equality before the law. The Venice Commission maintains that the rule of law must be reinforced because it is able of producing certain and predictable rules, in which everyone has the right to be treated by those who make decisions with dignity, equality and rationality, and where everyone could challenge decisions

⁷ About the predominance of liberty on equality there is a debate: see for instance J. Shklar, *Political Theory and the Rule of Law*, in A.C. Hutchinson & P. Monahan (eds.), *The rule of law. Ideal or ideology*, Carswell, Toronto, 1987, p. 1-16.

⁸ UN Doc. S/2004/616 (2004), para. 6.

⁹ On the synergy among the three pillars of the European Union, rule of law, rights, and democracy, see J. H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in *Philosophical Foundations of European Union Law*, in *Philosophical Foundations of Law*, online edn., Oxford Academic, Oxford, 2013.

affecting herself before independent people, in impartial courts and through fair procedures.

Before presenting my version of the rule of law, it is worth noticing that, from the historical point of view, the rule of law is famously defined in contrast to the rule of men. Against the Platonic idea of the government of the best men (the most virtuous, the wisest), Aristotle supports the superiority of the government of the law¹⁰. On the one hand, Aristotle is speaking of the process of decision making of collective legislation, that has the advantage of being the synthesis of several points of view, and not just the whims and unilateral vision of one single person. The superiority of the former is well exemplified by the analogy with the banquet in which everyone brings a food, compared to the one in which one person provides the menu of the day. The former is probably richer than the second. On the other hand, collective legislation is plausibly grounded on reasons without passions and emotions. It is interesting to notice that at least on this occasion the emotional and passionate – irrational? – human behavior for which it is necessary to find a rational alternative is referred to males and not to women. Women certainly had no part in the decision-making process being discussed at the time.

The seminal idea of the superiority of the rule of law has developed afterwards in many different forms of limitation of power, from the medieval distinction of different kinds of power (*iurisdictio* and *gubernaculum*)¹¹ to the revindication of rights (first of all, the *habeas corpus*); from the model of the *Rechtsstaat* to the list of requirements able to distinguishes the rule of law from a managerial government¹². What distinguishes the law from a managerial regime is that according to the latter those who command establish ends and means, and the action of the subordinates has a merely executive character. On the contrary, the rule of law is a way of governing that respects the autonomy and dignity of the recipient of the rules. To realize this aim, law must be prospective and non-retroactive, practicable, promulgated, clear, intelligible, coherent, and consistent, stable, and applied by officials subjected to the same rules than citizens¹³. It is possible to elaborate different lists of requirements in consideration of different sets of institutions, actors involved, local difficulties. But there is a consensus on the organic idea of the rule of law meaning the limitation of arbitrariness for the protection of free, rational, and equal individuals. Nonetheless, along all this history looking for fair and rational decision processes, women have been set aside. This is the reason for reconsidering some of its features.

¹⁰ Aristotle, *Politics*, III, 15, 1286a, 8-9.

¹¹ On the idea that the scope of the protection of rights (justice) always constitutes a limit to sovereign power see G. Palombella, *The Rule of Law and its Core*, in G. Palombella & N. Walker (eds.), *Relocating the Rule of Law*, Hart Publishing, Oxford, 2009, p. 17-42.

¹² L.L. Fuller, *The Morality of Law*, Yale University Press, New Haven, 1969.

¹³ L.L. Fuller, *The Morality of Law*, cit., p. 33-38.

I will sketch three aspects of the rule of law inspired by these ideas, necessary for working on the more operational level.

3. Three ideas on the rule of law

Since the end of the 1990s, the theoretical discussion on the rule of law has concentrated around the distinction between its formal and substantive conceptions. The most known version of this problem emerges in the opposition between the rights-thesis and the no-rights thesis¹⁴. According to the formal version, the rule of law is not engaged in any way with human rights, whereas the substantive version links the rule of law to the protection of rights¹⁵. I cannot even argue with this point here. I will only say that, even though the rule of law has not the task of defining which rights we have, it belongs to the field of legal guarantees and its implementation can be measure in terms of protection of rights¹⁶. From the historical and institutional point of view, the protection of rights has been clearly part of the fight against tyranny and despotism.

The better-known feature of the rule of law, in fact, is its formality, that has to be understood as focussed on legal procedures. The rule of law regards the way in which law works. To examine this aspect, we need to put aside for a moment the coercive side of State law and focus on law as an enterprise built on different argumentative processes – legislation, negotiation, adjudication, administrative decision making, mediation –. The limitation of arbitrariness in all those contexts comes from participation in deliberative decision-making processes. Participation is related to the involvement of those that the decisions affect, according to the old legal principle *quod omnes tangit ab omnibus approbari debet* (what touches all ought to be approved by all). The opinion of those affected count. And women are the half of the possible affected. This principle conveys two demands: the demand for an active and inclusive participation, and for consultation in deliberation. There are important implications of that principle in many branches of law: obviously in the legislative, but also in adjudication – where the parties must be involved at every stage – and in administrative law. Everyone should be able to present arguments in decisions that affect them in all the stages of a decision-making process: in the consultation before establishing any rules, in the implementation of those decisions, in the resolution of conflicts produced, in contesting those decisions. In this sense, the rule of law is inclusive and democratic, because it is open to any person and to any argument.

¹⁴ E. Fox-Decent, *Is The Rule of Law Really Indifferent to Human Rights?*, in *Law and Philosophy*, 2008, Vol. 27, p. 533-581.

¹⁵ On the relationship between human rights and the rule of law, see T. Bingham, *The Rule of Law*, Penguin, New York, 2010.

¹⁶ I. Trujillo & F. Viola, *What Human Rights Are Not (or Not Only)*, Novascience Publishers, New York, 2014, p. 95-104.

From this point of view, there is a difference between the mere political decision-making processes, that are usually a question of preferential entitlements (citizenship) and numerical advantage (where majorities win), and a more comprehensive area of decision-making processes regulated by the rule of law. Unlike voting, which is in the end the expression of a preference,¹⁷ rule of law's procedures are argumentative and potentially universal. This feature is crucial for the extension of the rule of law beyond the States,¹⁸ and it is not a small problem. We could say that the principal feature of the rule of law participation is more comprehensive than the mere representative requirement.

Less obvious is another aspect of the rule of law I want to stress, its horizontality. The rule of law does not apply only to authorities or to the relationship between authorities and those who are subject to them, according to a mere vertical version of the rule of law such as the one focused on public powers. This is only a partial reading for two different reasons. The first reason is that the vertical dimension cannot be explained without mutuality and reciprocity between authorities and the subordinates. Compliance with law is the result of the authority's conformity with certain requirements, according to a vertical but reciprocal direction. The rule of law embodies a mutuality of bonds between rulers and ruled. Following the standard check lists of requirements, we could say that, on the one hand, the authorities establish general, clear, prospective, non-contradictory, practicable, promulgated and relatively constant rules; those rules also apply to the authorities themselves according to the principle no one is above the law, and officials apply those rules impartially and consistently. On the other hand, all this makes it possible for individuals to comply with the law. Individuals can conform to the rules promulgated, clear, practicable, applied by officials subject to the same rules¹⁹. If they defy those rules, they justify the legitimate use of coercive power, which in turn must be exercised according to the canons of the rule of law. This means that the rule of law describes a form of association in which authorities and subordinates cooperate in shaping their interactions as equals. And, in fact, those who are not included in this virtuous circle are not treated with

¹⁷ Against the risk of paternalism, Donald Bello Hutt considers that preferences and not interests are the core of the rule of law in the domestic field. See D. Bello Hutt, *Rule of Law and Political Representation*, in *Hague Journal of the Rule Law*, 2022, Vol. 14, p. 1-25.

¹⁸ There are different versions of the international rule of law. Apart from Bingham's work, indicated in note n. 15, see also F. De Londras, *Dualism, Domestic Courts, and the Rule of International Law*, in M. Sellers & T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Springer, Dordrecht Heidelberg London New York, 2010, p. 217- 243 and S. Chesterman, *An International Rule of Law?*, in *American Journal of Comparative Law*, 2008, Vol. 56, n. 2, p. 331-361.

¹⁹ G.J. Postema, *Law's Rule*, Oxford University Press, Oxford, 2022.

equal concern. We could discuss whether this exclusion is a question of justice or of humanity.²⁰

The second reason for defending a horizontal version of the rule of law regards the importance of its protection against horizontal arbitrariness deriving from social inequalities and discriminations that spread in the form of bias and stereotypes. In this case, both the violation of the rule of law and its remedies are horizontal, because inequalities and discriminations constitute forms of arbitrary domination, and to avoid them is the task of the rule of law. Then it is the relationship of equality in dignity, contrary to any form of public or private domination, to justify the rule of law. This horizontal version of the rule of law has been set aside by the old-fashioned vertical version based on the principle of authority and mainly focus on the demand of protection from coercion²¹. The rule of law shapes a relationship of reciprocity and peer hood, both with authorities and with peers so that everyone is responsible for each other. The horizontal dimension of law requires an inclusive participation of rational, free, and responsible subjects in the interactions with authorities, but also the promotion of a fair social ordering.

Rule of men systems are determined by human factors, and they could be unpredictable and overbearing. On the contrary, rule of law systems are governed by rules, procedures, and institutions, with the aim of mitigating the impact of the human influence. But the idea that even the best legal rules, procedures and institutions could work appropriately without the right contribution of human agents is illusory. Suitable rules, institutions and procedures are needed but it is paramount to shape and improve the skills, abilities, and appropriate attitudes of those who take part in them. The question is which are those attitudes and how to cultivate them. In the light of the horizontal reading of the rule of law, this is necessary not only in the case of legal practitioners, but also as a mainstream of civic education. This horizontal version of the rule of law is particularly important for including women. It is from here that we must design the rule of law requirements.

4. Possible recommendations for the States and parties involved in the implementation of art. 7 and 8 CEDAW

Having in mind a participatory, deliberative, and horizontal rule of law, the question is: which requirements are wanted for a women friendly rule of law? I will insist on two features: explainability and accessibility. The first one is related to fair trials, free from bias, and, more generally, it requires reasonable decisions,

²⁰ D. Luban, *On the Humanity of the Enemy of Humanity*, in *Netherlands Journal of Legal Philosophy*, 2018, Vol. 47, n. 2, p. 187-199.

²¹ J. Shklar, *The Liberalism of Fear*, in N. Rosenblum (ed.), *Liberalism and the moral life*, Harvard University Press, London-Cambridge, 1989.

well-founded on the relevant information, and discussed in the context of an aware public culture²². There will always be those who make the final decision: on a rule to be established, on decisions to be executed, on the resolution of a conflicts. But inclusion and participation in the argumentation processes are tools that makes the subject of the law an active part in the decision and provides the decision with value in itself, even when that decision is against our interests²³. Especially but not only in an adjudicatory context, the reasons related to the applicable law must be disclosed to show that the arguments of the parties have been examined with equal attention. The justification provides assurance that parties' arguments have been taken into consideration. Explainability aims to protect a universal right to reasons²⁴. For the rule of law to be implemented, the decisions must be justified to those that are subject to them. This is important because the provision of a justification not only helps those subjects to the law to grasp the meaning of the decision. It puts them in a better position to challenge it and it makes possible accountability.

Explainability has been further elaborated against the artificial intelligence's model of the black box. Data and computational driven decision-making processes are not transparent and produce arbitrariness for their opacity. But it is not only a problem of transparency, because decisions must be supported by well informed and not biased reasons.

In continuity with explainability, there is accessibility. A horizontal rule of law extends not only to formal procedures, but also to the informal decision-making contexts. Obviously, this is crucial whenever decisions are made not in official settings (where they are only ratified), but in informal contexts, very often non accessible to women. This problem introduces the question of accessibility as an essential element for the rule of law. This element can be declined in many additional ways. It can be understood as a tool for guaranteeing access to justice for the poor, considering that the quality of the defense in trials depends on economic availability and this can undermine equal treatment²⁵. In the light of a horizontal version of the rule of law, accessibility concerns also access to technology, access to maternity support measures, access to credit, all necessary to remove existing obstacles that hinder people's ability to be treated as equal and jeopardize the rule of law. Otherwise, the rights linked to participation can be completely emptied. In various regions of the world, women have less access to

²² J. Raz, *The Law's Own Virtue*, in *Oxford Journal of Legal Studies*, 2019, Vol. 39, n. 1, p. 1-15.

²³ J. Tasioulas, *The Rule of Algorithm and the Rule of Law*, in *Vienna Lectures on Legal Philosophy 2023*, King's College London Law School Research Paper Forthcoming.

²⁴ J. Zerilli, *Explaining Machine Learning Decisions*, in *Philosophy of Science*, 2022, Vol. 89, n. 1, p. 1-19.

²⁵ John Finnis argued that to Fuller's eight desiderata we should add another four relating to the independence of judges, the publicity of trials (and not only publicity of rules), the review of trials and, access to justice for poor. J. Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1992, p. 271.

technology, including smartphones, than men. This cuts them off from all programs and research where data is collected through these new technologies, including important health protection²⁶.

In conclusion, a women friendly rule of law should aim at:

- Assuring participation of women in decision-making processes as a requisite of the rule of law.
- Promoting explainability as a crucial requirement of the rule of law, both in human and in artificial intelligence decision-making processes.
- Rendering mandatory the gender balanced in advisory bodies.
- Guaranteeing equal access to all deliberation stages of decision-making, including informal settings, as well as transparency of arguments and elements of decisions.
- Controlling the presence of stereotypes in artificial intelligence decisions-making process, both in the data base, and in the aims and in the criteria of the algorithm.
- Expanding awareness that social stereotypes and their presence in legislation and adjudication are violations of the rule of law and must be detected and removed.
- Assuring adequate legal assistance to women in legal procedures (adjudication, Ombudsman) for contesting stereotypes.
- Promoting specialized lifelong learning courses for legal practitioners on stereotypes and the rule of law.

Finally, a women friendly rule of law should aim at educating to the rule of law as a polity of reciprocal responsibilities not only between authorities and subordinates, but also as an inclusive and fair horizontal association.

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²⁶ A. Carnevale, E.A. Tangari, A. Iannone, & E. Sartini, *Will Big Data and personalized medicine do the gender dimension justice?*, in *AI & Society*, 2023, Vol. 38, n. 2, p. 829-841.

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