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Liberal multiculturalism, neutrality and the Rule of Law

1. *Introduction*

Most contemporary liberal theories of justice agree that principles of justice should be neutral between citizens' conceptions of the good life. Liberals are committed to the claim that government should treat citizens with equal concern and respect; and, it is claimed, treating citizens with equal concern and respect requires not taking sides in favour of any one of them, as regards the conceptions of the good life they endorse (DWORKIN 1978a).

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Liberal neutrality has been the object of serious criticism. Objections raised against the original formulations of the doctrine of neutrality have prompted the shift towards forms of so called 'political' liberalism (RAWLS 1985; Larmore 1990). In contemporary pluralistic societies, claims to the effect that autonomy and individuality are paramount ethical values sound themselves sectarian. Liberal neutrality, in so far as it is envisaged as entailed by these values, cannot be expected to be widely agreed upon. In order to avoid being one sectarian doctrine among others, liberalism, it is argued, should apply the principle of toleration to philosophy itself. This way, liberal principles of justice may be recast as the core of an overlapping consensus between different and partially conflicting ethical, religious, or philosophical doctrines held by different groups or individuals in society (RAWLS 1993). Political liberalism implies, I think, that in its original versions the doctrine of neutrality is too naïve, or simply wrong. Its main tenets should be understood, I submit, as an attempt at reformulating, and improving, the received doctrine.

Not all liberal theorists have endorsed the shift towards political liberalism. Among liberal philosophers who reject the claims of political liberalism, some simply reject the doctrine of neutrality (e.g., J. Raz). Others hang on to the doctrine in its – more or less amended, as the case may be – original form.

My aim is not to provide a reconstruction of the main steps in this debate, nor an assessment of the main arguments for and against liberal neutrality. I simply record that the debate about whether principles of justice can and should be neutral between the different conceptions of the good held in society is still a lively one. In retrospect, the distance between the doctrine of neutrality in its original formulations, on the one hand, and political liberalism, on the other hand, may appear less dramatic that it might have seemed at first sight.

In what follows, I will assume – no argument will be provided supporting this assumption – that the liberal doctrine of state neutrality can somehow be defended against its critics. Of course, its defense requires some caution. So, for instance, liberal neutrality must be understood as "limited in scope" (KYMLICKA 2002, 218), and as "a matter of degree" (GOODIN, REEVE 1989, 7). Crucially, the quest for a morally neutral justification of neutrality – prompted by concern that "nonneutral justifications of neutrality betray the ideal" (WALL, KLOSKO 2003, 4) – is misguided; there is no such a thing (the very notion is incoherent). But, I assume, once our theoretical ambitions are cut down to reasonable size, defending neutrality is not an impossible task[1]. (According to W. Kymlicka, it is even possible to provide a satisfactory defense of the stronger principle of the state's 'benign neglect' of religious doctrines, and at least some conceptions of the good life[2]). My first aim is to show that a certain connection holds between liberal neutrality, suitably understood, on the one hand, and, on the other hand, the Rule of Law.

By the 'Rule of Law' (henceforth RoL, for short) I mean, as has now become usual among legal theorists, a set of

[1] Which doesn't mean, of course, that it is an easy task. Cf. e.g. KYMLICKA 1989b, 899-905; ID. 2002, 251, 265-6.

[2] That, according to Kymlicka, 'benign neglect' is an incoherent notion in the case of culture and language (1995, 108, 110-1, 113) does not contradict this. Precisely under this respect, the case of religious doctrines is not analogous to language and culture (*ibid*., 111; KYMLICKA 2002, 344-5). KYMLICKA (2002, 344) distinguishes between a weaker principle of neutrality (that leaves it open the possibility that a given conception of the good life is promoted on grounds different from its alleged intrinsic superiority over other views) and a stronger principle of the state's 'benign neglect' of (some) differences. As far as religious views are concerned, liberalism, he claims, can afford endorsing both principles.

formal and institutional features the law may possess in varying degrees. These features define an ideal, which laws have traditionally been expected to live up to. It is, under many respects, a modest ideal. Specifically, the RoL, by itself, does not guarantee liberal neutrality. But, I shall argue, there is something neutral about it. More precisely. a specific version of the RoL requirements – I shall call this 'Enlightenment Rule of Law' (ERoL, for short) – illuminatingly instantiates part of what is involved in the idea of liberal neutrality. This, as we shall see, concerns the form, not the content, of the law.

My first aim, then, is to show that the RoL – specifically, ERoL – realizes one important aspect of liberal neutrality[3]. I will show, secondly, that the RoL is part and parcel of what is involved in liberal multiculturalism.

I use the label 'liberal multiculturalism' (LM, for short) in the sense developed by W. Kymlicka. So understood, it designates a loose set of policies, and the principles supporting them, designed to acknowledge and accomodate ethnocultural minorities, and to secure to individuals the good of cultural membership. (I will not say nuch about which policies and principles these are; the reader is referred to Kymlicka'a work.) There is one simple argument for showing that the RoL is part and parcel of what is involved in LM, of course. If LM is a form of liberalism, if liberalism entails the principle of state neutrality, and if state neutrality entails the RoL (or ERol), then LM entails the RoL. This argument is not, however, very illuminating. I shall put forward a different argument. Laws that fully meet the requirements of the RoL may certainly run counter human rights. Conformity to the

[3] Some conceptual kinship between discussions of the RoL in jurisprudential circles and contemporary talk of liberal neutrality is noted in GOODIN, REEVE 1989, 8.

RoL – specifically, ERoL – however, is a necessary condition for respecting human rights. Respect for human rights, in turn, is required by LM. Thus, respect for ERoL is a necessary condition of LM. And, if ERoL expresses part of what is involved in the ideal of liberal neutrality, so too LM may be understood accordingly.

I shall proceed as follows. After briefly explaining what I mean by the 'Rule of Law' (s. 2), ERoL will be introduced, as a particular version of traditional RoL doctrine, and the connections between ERoL and liberal neutrality will be explored (sections 3 and 4). Then, coming to LM, I will set up the required premises about, first, LM and human rights; and, second, about human rights and the RoL (s. 5). From these premises my announced conclusion about LM, liberal neutrality, and the RoL will follow (s. 6) – or so I hope.

2. *The rule of law*

There are many different ways of understanding the phrase 'the Rule of Law'[4]. Here I adopt the one which has become common in contemporary jurisprudence in the last forty years or so[5]. Accordingly, by 'the Rule of Law' I understand a loose cluster of (1) formal features of the laws (prospectivity,

[4] For a survey cf. WALDRON 2002, 155-7; ID. 2004, 319-20; BENNETT 2007, 92-4. According to some (including WALDRON; see 2002, 157-9), the concept of the RoL is an "essentially contested concept", in W.B. Gallie's sense. This claim will not be discussed here.

[5] Accounts in this family have the form of "a sort of laundry list of features that a healthy legal system should have. These are mostly variations of the eight desiderata of Lon Fuller's 'internal morality of law'" (WALDRON 2002, 154). Cf. *ibid*., 154-5, for a survey of the main accounts in this vein (L.L. FULLER, J. RAZ, J. FINNIS, J. RAWLS, M. RADIN).

publicity, relative generality, relative stability, intelligibility and relative clarity, practicability[6], consistency), plus (2) institutional and procedural desiderata (such as, for instance, that the making of individual norms applying to individual cases be guided by general rules; and, further, so-called principles of 'natural justice': that the resolution of disputes be entrusted to somebody not having an interest at stake in the judgment, and not being otherwise biased; the principle *audi alteram partem*, and so on)[7]. Items on the list partly vary according to the accounts given by different authors. The core, however, is stable[8]. My concern in what follows will be only with the features belonging to the first group ('formal' requirements) – in fact, when talking of ERoL (below, 3 and 4), only some of them.

Some of these are features that the law may possess in varying degrees. Most of them specify, more or less directly, what is instrumentally required in order to achieve an end –

6 I.e., conformity to the principle *'ought' implies 'can'*.

7 For a list of these institutional and procedural requirements see e.g. RAZ 1977, 215-8 ("the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules"; "the independence of the judiciary must be guaranteed"; "the courts should have review powers over the implementation of the other principles"; "the courts should be easily accessible"; "the discretion of the crime-preventing agencies should not be allowed to pervert the law"). On principles of natural justice cf. HART, 1961, 156, 202. For similar lists of the RoL requirements see FULLER 1969, ch. 2, FINNIS 1980, 270-1; MARMOR 2004, 5 ff. For sorting out principles constituting the RoL in formal and procedural ones see Waldron 2008a (but cf. also RAZ 1977, 218).

8 As noted by WALDRON (2002, 155), the accounts given by these authors (Fuller, Finnis, Raz, Rawls, Radin) – their partly differing "laundry lists" – "seem quite congenial to each other; they are filling in the details of what is more or less the same conception in slightly different ways".

namely, the end of guiding human behaviour through rules[9]. In other words, they are features the laws must possess if they are to be capable of being followed and obeyed[10]. So understood, the features constituting the RoL are features an instrument (laws) must possess in order to perform its function (guiding human behaviour) well – they are analogous to the good-making properties entailed by the meaning of any functional term. RoL requirements are analogous to the sharpness of a knife (RAZ 1977, 225; cf. nalso MARMOR 2004, 7).

RoL features define an ethico-political ideal, which laws are usually expected to live up to[11]. But, I emphasize this, this view of the RoL has nothing to do with ideologically-driven views, widely spread in contemporary (non-jurisprudential) literature, that oppose the RoL to social and economic legislation, which – it is complained – "interfere[s] with market processes, limit[s] property rights, or make[s] investment in the society more precarious or in other ways less remunerative"[12]. Such conceptions of the RoL I take as spurious[13]. I side with traditional, formal *cum* institutional and procedural, understandings of the RoL.

[9] In L.L. Fuller's phrase, "the enterprise of subjecting human conduct to the governance of rules" (1969, 106).

[10] According to RAZ (1977, 214) the "basic idea" underlying RoL requirements ("the basic intuition from which the doctrine of the rule of law derives") is "that the law must be capable of guiding the behaviour of its subjects" ("if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it", *ibid*., my emphasis). Cf. also MARMOR 2004, 5.

[11] The much debated question whether the features constituting the RoL are part of the very concept *law* I simply leave aside here. Cf. e.g. BENNETT 2007; WALDRON 2008a; ID. 2008b.

[12] I draw this characterization from WALDRON 2007, 92.

[13] Cf. generally WALDRON 2007.

3. *Enlightenment rule of law*

Not only the view of the RoL adopted here is in no way opposed to social and economic legislation. Also, it is no way opposed to *legislation*, as such.

In what follows, I shall focus on a particular version of the ideal of the RoL. Its building blocks have been developed, very roughly, in European legal culture in the 18th and 19th centuries; it is is associated, *inter alia*, with J. Bentham's understanding of the formal features laws should possess. In this understanding, what is central to the RoL is the activity of legislating – i.e., of issuing prescriptions.

Prescribing, as a kind of purposive human activity (roughly, trying to make people do something by telling them to do it), and prescriptive relationships (i.e., the kind of relationship which comes into being, by virtue of the happy issuing of a prescription, between a prescriber, or lawgiver in a wide sense, on the one hand, and those to whom her prescriptions are addressed, on the other hand) have many formal features. As with any other purposive, goal-oriented activity (and functional terms generally) some of these features express the requirements that the activity has to meet, in order to achieve – and to achieve well – its constitutive purpose. Some of these features aptly instantiate elements of the RoL ideal. So, for instance, prescribing is a procedure openly and publicly directed at the issuing of public directives[14]. And, as we have seen, publicity of the relevant standards of behaviour is one of the requirements of the RoL. Thus, where prescriptions are involved, not only the standard itself, but also its mode of birth, are laid out in the open[15]. Further, prescriptions typically have

[14] For a detailed discussion of this point see below, s. 4.

[15] Cf. WALDRON 2007, 99: the legislature "is an institution set up explicitly to make and change the law. (…) Law-making by courts is not a

to be prospective, and intelligible; if they are to be capable of achieving their purpose (i.e., guiding human behaviour), they have to be laid out in advance, and clear enough for the addressee to understand them (cf. MARMOR 2004, 19-20, 26-7). And the activity of prescribing is subject to rational pressure in favour of conformity to the principle *'ought' implies 'can'*, and the avoidance of conflicts (so called 'antinomies')[16]. The latter, too, are, as we have seen (above, 2), among the requirements of the RoL – respectively, practicability, and consistency.

This legislative twist to the RoL should not be surprising. After all, most of the requirements of the RoL follow, as I have remarked, from what is instrumentally

transparent process; law-making in a legislature by contrast is law-making through a procedure dedicated publicly and transparently to that task" (the "transparency" of legislation). See also WALDRON 2009, 693.

[16] These are all features that prescriptions *typically* exhibit, and pressures prescriptions are *standardly* subject to. The possibility of non-standard prescriptions is not ruled out (below, n. 42). These will be cases of abuse of the institution of prescribing. So, for instance, one assumption which makes possible the issuing of prescriptions, and the coming into existence of prescriptive relationships, is that the prescriber wants the addressee to do what she tells him to do (VON WRIGHT 1963, 7, 119; ID., 1983, I, 8; CELANO 1990, 127). This is a defeasible presumption. It is, however, standardly true; and an explicit denial of this condition would prevent a prescription from coming into being ('I hereby order you to do A, but I don't care whether you do it or not'; cf. SEARLE 1969, 60, 64 ff.). In the light of this presumption, the principle *'ought' implies 'can'* applies to prescriptions (so, e.g., a prescription enjoining an action explicitly acknowledged to be physically impossible would sound odd). Likewise, purported logical relations between prescriptions may be interpreted, *via* the assumption that whoever prescribes somebody to do something wants the addressee to do it, as criteria of a rational lawgiving will (VON WRIGHT 1983; BOBBIO 1971; CELANO 1990, 268-82).

required when we want to subject human behaviour to the guidance of rules ('subjecting human conduct to the governance of rules'; above, 2). And, of course, prescribing just *is*, in a straightforward sense, trying to subject human behaviour to the guidance of rules (trying to make somebody do something by telling them to do it)[17]. True, prescribing is not necessarily the issuing of *general* directives, or of 'rules' proper. Under this, and perhaps other, respects the requirements of the RoL do not apply to prescribing, as such. But let us abstract from these, and focus on the respects listed above, in which prescribing does indeed instantiate the kind of activity RoL requirements apply to. When we see things in this light, a particular version of the RoL emerges, comprising the conditions which a certain form of guidance of human behaviour has to satisfy, if it has to succeed; comprising, i.e., what is in fact involved in a particular method of social control which consists primarily in the issuing of prescriptions, that is, of directives communicated to persons, who are then expected to understand and to conform to these directives[18]. This includes, of course, orders backed by threats; it is not, however, limited to these. It encompasses (with some qualifications, to be spelt out along the way) all cases of *telling somebody what she should do*[19]. Henceforth, I shall

[17] WALDRON (2007, 109-10) rightly observes that L.L. Fuller's treatment of the subject in FULLER 1969, ch. 2, "illustrates a strong (…) tendency to associate the rule of law with formal features of legislation, as opposed to other modes of law and law-making".

[18] I am here paraphrasing HART (1961, 202, speaking of "any method of social control" consisting primarily of "general standards of conduct" addressed to "classes of persons").

[19] Two qualifications. (1) In order to make room for power-conferring rules (and, especially, for ules conferring to private

call this version of the RoL 'Enlightenment RoL' (ERoL), due to its embodying some more or less utopian, eminently rationalistic (see below) and, perhaps, simplistic desiderata. ERoL gives pride of place, in law's development and operation, to legislation.

A few comments about the role of legislation in ERoL are in order. (1) Some conceptions of the RoL celebrate it as a spontaneous, non-manufactured, unintended, gradually evolving order of human interaction whose administration and piecemeal development is entrusted to the collective, 'artificial' reason of the judiciary. But, as J. Waldron notes, such views forget "the rule of law difficulties of the Common Law – its opacity, the ad hoc character of its development, its impredictability, its inherent retro-activity"[20]. There is no need for us, here, to adjudicate this controversy. It is enough that we establish the credentials of a 'legislative' version of the RoL.

(2) The notion of a legislation-oriented RoL – ERoL – runs counter the well-established contrast between the RoL and 'the rule of men'. But this is a mythical contrast[21].

individuals the power to achieve some ends of theirs: 'If you wish to do this, this is the way to do it', HART 1961, 28), this phrase, as I use it here and in what follows, should be understood as including cases of *telling people how to pursue the goals they want to achieve* (or *telling people how to do what they want to do*). (Cf. RAZ 197, 215: "power-conferring rules are designed to guide behaviour".) 'Prescribing', so understood, covers both the issuing of mandatory directives, and the issuing of power-conferring rules. (2) 'Telling' people what they should do, as I mean it here, refers to cases of *issuing* prescriptions, not to 'detached' statements of what the addressee should do according to a given set of prescriptions (RAZ 1979, 153-7).

[20] WALDRON 2007, 95; cf. also BOBBIO 1961, 91-6.

[21] Cf. RAZ 1977, 212; BOBBIO 1983; MARMOR 2004, 2-3; WALDRON 2007, 101-4.

Traditionally, formal and procedural or institutional aspects of the RoL have played a central role in the ideal; and "in both cases, the importance of these features in the rule of law tradition belies any claim that legislation is incompatible with or repugnant to the rule of law"[22].

I do not mean to rule out the possibility of giving a definite meaning to the 'Rule of Law' *vs.* 'rule of men' antithesis. So, e.g., a non-mythical way of understanding the contrast might be the one suggested by F. Schauer (2003, 276). Generalizations – thus, treating unlike cases alike –, Schauer notes, are ubiquitous in legal practice (witness decision-making by rules, reliance on precedent, and the practice of giving reasons). And, Schauer argues

> "when the 'rule of law' is contrasted with the 'rule of men', the core idea is that individual power, creativity, initiative and discretion have their dark side. The rule of men would be fine if all men were good, but when many men are not so, and when a degree of risk-aversion is justified, we may often prefer to lose the most positive efforts of the best of men in order to guard against the most negative efforts of the worst of them. (…) [L]aw may be the institution charged with checking the worst of abuses even if in doing so it becomes less able to make the best of changes" (*ibid.*).

And, we may add, there is such a thing as limited (constitutional) government. or 'government under the law'. But,

[22] WALDRON 2007, 104. Cf. also *ibid.*, 105: "traditional rule of law theorists" (e.g., FULLER) have emphasized "procedural requirements, like due process in legislation and the separation of powers, and formal requirements, like generality, publicity, prospectivity, constancy and so on"; "these standards implicitly acknowledge that law is an instrument wielded by men; the traditional view concedes that men rule; it just insists that their rule be subject to the formal and procedural constraints of legality".

unless by 'law' we mean, here, natural law, room has to be made, in these ways of understanding the traditional antithesis, for the idea that it is men that make the laws. So, when men rule 'under the law', it is man-made law that the government rules under. And, in fact, Schauer's understanding of the traditional antithesis implies that the rules and generalizations constraining the discretion of individual officials are themselves made by men. So understood, the contrast is about the allocation of decisional power, i.e., the desirability, as regards certain classes of decisions to be made by certain classes of decision-makers, of decision-making on the basis of entrenched generalizations (themselves framed, it is assumed, by other human decision-makers), or of "rule-based particularism", rather than (purely) particularistic decision-making (SCHAUER 1991, ch. 7). Taken literally, I think, there is no such a thing as 'the rule of laws, not men'[23].

(3) There may be various, more or less weighty ethico-political reasons for endorsing, as an ideal, a conception of the RoL which – just like ERoL – emphasizes the role of legislation in law's development and operation[24]. Its connection with liberal neutrality (below, 4) is only one of these.

(4) In focusing on the activity of prescribing, and on prescriptive relationships, considered in themselves, I am abstracting from the complex, articulated procedural and institutional aspects of legislation proper, as it occurs in

[23] Or, alternatively, *all* legal systems are cases of the 'rule of laws, not men' (KELSEN 1945, 36; cf. CELANO 2000; and see also RAZ 1977, 212).

[24] See e.g. WALDRON 2007, 99-100 ("in general, legislation has the characteristic that it gives ordinary people a stake in the rule of law, by involving them directly or indirectly in its enactment, and by doing so in terms of fair political equality", *ibid*., 100). What Waldron has in mind, here, clearly is *democratic* legislation.

developed legal systems. These, too, may be interpreted as instantiating the RoL, or as dictated by RoL considerations[25], but I shall not follow this path here. Prescribing is legislation at its minimum, so to speak. True, issuing prescriptions may also be the instrument of ad hoc decisions. The aspects of prescribing I shall focus on, and which constitute its distinctive sort of neutrality, however, are not peculiar to the ad hoc issuing of decrees.

So, I assume that the very simple fact of someone trying to make someone else do something by telling him to do it (and the relationship that comes into being as a consequence of this fact) is a suitable model for understanding what goes on in legislation proper (although it certainly does not give us an exhaustive picture of it). This is by no means obvious, or undisputed. Under many respects, the activity of a legislature in a modern democracy cannot be assimilated to that simple model (cf. e.g. WALDRON 1999, Part I). But I shall not try to defend this assumption here.

4. *What is neutral about the Rule of Law?*

Laws meeting RoL requirements may have almost any content. But, I suggest, what is peculiar, as regards the RoL, is the *form* that the exercise of power takes. The RoL is, in the first instance, a specific mode of the exercise of power by men over men.

It is certainly not unusual to characterize the RoL as "a particular mode of the exercise of political power". When it is so characterized, the RoL, understood as "governance through law", is usually contrasted with "managerial governance or

[25] Cf. WALDRON 2007, 107.

rule by decree"[26]. Or it is contrasted with 'arbitrary' power, meaning by this public power wielded in the pursuit of private interests (RAZ 1977, 219-20). These contrasts are not mistaken, of course. But, I suggest, in order to understand what is peculiar to the RoL (and to ERoL), and to see what is neutral about it, we have to widen the scope of the comparison. We have to contrast the RoL (specifically, ERoL) with other modes of the exercise of power over human beings – modes that are by no means anomalous, rare or bizarre, but often go unnoticed in these debates[27]. Power exercised by *telling* people to behave in the desired ways – thus, power exercised by issuing laws meeting ERoL requirements – has to be distinguished from power exercised through different means, or through linguistic means used differently. Thus, it has to be distinguished from symbolic, charismatic, and pastoral[28] power; from power exercised through manipulation, indoctrination, propaganda, or various forms of deceit (such as, e.g., power exercised through lying, or by modifying, unknown to the agent, the options that are available to him); and, finally, from persecution, disciplinary power (*pouvoir disciplinaire*; FOUCAULT 1975 159-227), mute punishment, and sheer physical interference. What distinguishes it from these forms of power is the combination of two features: (1) it is rational; (2) it is public, transparent, out in the open. Let me explain.

When the government treats its subjects in accordance with the ERoL, it treats them as adults, capable of making their own decisions on the basis of their own preferences

[26] The quoted phrases are taken from Waldron 2008a, 78.

[27] But cf. Raz's discussion of "enslavement" and "manipulation" in RAZ 1977, 221; and A. MARMOR's (2004, 15-6) discussion of "subliminal advertising".

[28] On "pastoral" power cf. FOUCAULT 1981.

and their own understanding of the relevant facts. It tells them explicitly 'I want you to behave in such and such a way; these will be the consequences – I shall inflict you such and such a harm – in case you don't; now it's up to you'. Let us contrast this mode of exercising power over a human being with the way in which children are often treated. In order to make children do what we want them to do we sometimes tell them lies ('Candy shops are closed now'); we fake non-existing unpleasant consequences ('The wolf will come and get you'); in various ways, we distort reality. Or we try unknown to them directly to manipulate the environment, or their preferences, by working behind their back, so to speak. Or, again, we rely, in trying to make them do what we want them to do, on an aura of parental authority, or on symbols. In acting in these ways, we do not recognize children the dignity of responsible agents, capable of autonomous choice; we do not treat them as autonomous agents capable of – and entitled to – making their own choices on the basis of preferences and beliefs which are in fact their own (on the basis, thus, of their awareness of the way things in fact are, or of the way they see things, rather than on the basis of a mistaken understanding of reality, that we have induced on purpose) [29].

Let us try to spell out what is involved in this contrast. We are considering a simple situation: X issues a prescription addressed to Y – for instance, X orders Y to do something, and his order is backed by the threat of visiting her with an evil in case of non-compliance. The latter is what HART (1961) famously referred to as 'the gunman situation'. In what follows, I shall use this label, because I

[29] What matters. here, is not that their preferences and beliefs are not the upshot of some form of conditioning or other disreputable process. It is, first and foremost, that *we* are not the authors of these processes.

think it is important to stress, in the present context, that it is also this kind of situation that I am focusing on. But it should be remembered throughout that the gunman situation is only one among different kinds of prescriptive relationships. What I am interested in is, generally (albeit with some qualifications), the mode of power exercised in trying to make somebody do something by telling her to do it.

The gunman situation has two basic features: it relies on the rational agency of the parties, and it is fully public. (I stress that these are features that prescriptions *typically* exhibit, and defeasible presumptions. Non-standard prescriptions are possible, of course).

(1) *Rationality*. In the gunman situation, appearances notwithstanding, rationality is pervasive. The gunman situation is, conspicuously, a form of *rational* interaction – i.e., a kind of situation an adequate description of which is premised on the assumption that the parties involved possess, and are capable of exercising, distinctively rational abilities, and that their attitudes, choices and actions meet standards of minimal rationality (Celano 2002, 2.1). True, in the gunman situation X exerts a kind of causal influence over Y. But, contrary to what happens in cases, e.g., of sheer physical force, or of straightforward manipulation of the agent's preferences, or of symbolic influence, the influence being exerted on the subject's behaviour is mediated by (thus, it depends on, and requires) the exercise, on the part of the individual whose behaviour is being affected, of a varied set of complex rational skills and abilities.

(a) The individual whose behaviour is affected by the gunman's order is presumed by the gunman to be a rational agent. 'Rationality', here, designates in the first instance the ability to understand the utterance of a sentence, to grasp its meaning and force. The act of issuing an order backed by a threat is a communicative linguistic act: the order is a

message addressed to somebody of whom it is assumed that he is able to understand a message, and to act in one or the other of two alternative ways on the basis of this understanding. (This is why it is usually assumed – a plausible assumption – that it would make no sense to address an order backed by a threat to a stone, a colour, or a number).

The gunman situation is, thus, a situation whose description (when adequate) entails that the individual whose behaviour is affected is endowed with highly developed communicative competences – specifically, linguistic competence. The relevant competence includes the mastery of – i.e., the ability to grasp and to apply correctly – concepts.

Moreover, an order backed by a threat is issued, typically, with a certain intention, and its workings rest on a complex set of interrelated intentions, and their successful expression and detection (GRICE 1957; STRAWSON 1964, 256-7; SCHIFFER 1972, p. 19; CELANO 1990, 127-51, 205-13; cf. also RAZ 1996, 283). Typically, the lawgiver has, first, the intention to make the addressee perform a certain action; and, second, he intends to make the addressee perform a certain action as a consequence of his uttering a sentence. Third, he intends to make the addressee perform a certain action (as a consequence of his uttering a sentence) by virtue of the recognition, by the addressee, of these very same intentions. It is not enough, for a prescription to come into existence, that the aim of the lawgiver be that the addressee act the way he desires, and that this should happen as a consequence of his uttering a sentence. It is necessary, further, "that the speaker should intend the person addressed to recognize that this is his purpose in speaking"[30], and to recognize this intention. In issuing a prescription the

[30] HART 1961, 235; cf. also ID. 1982, 250-2. This is the set of intentions constitutive of what H.P. GRICE (1957) has called "non-natural meaning".

lawgiver assumes his addressee to be capable of detecting – and of expressing her detection of – a complex set of nested intentions. The addressee is presumed to be capable of understanding (i) that the speaker wants her to behave in a certain way; (ii) that he wants to make her behave in the desired way; (iii) that he wants to produce this outcome as a consequence of his uttering a sentence; (iv) that he wants to produce this outcome by virtue of her recognition of this whole set of intentions, (i) to (iv). Thus, for a prescription to affect its addressee's conduct in the way it is intended to, it is necessary that the addressee understand that her understanding of the prescription – this very understanding – is a necessary condition for it to produce the desired outcome.

So, in claiming that the gunman situation is a case of rational interaction, what I mean by 'rationality' is, first, an individual's ability to understand a non-naturally meaningful message addressed to her – an ability which, in turn, involves the mastery of concepts, and the ability to have, to recognize and to express the recognition of complex intentional structures of the required sort. As a consequence, the influence exerted by the lawgiver on the addressee may be said to be a kind of 'causal-*cum*-rational' influence: in order for the addressee's conduct to be affected in the desired way, she has to understand that it is being affected in this way, and what this way consists in. A prescription is a kind of tool that works (in the way it is intended to work) only if the object it causally affects understands that it is so working. Under this respect, it is a kind of tool very different from tools whose operation relies on physical processes only. (Imagine a hammer which works in pinning down nails only if the nail understands (i) that it is being pinned down, and (ii) the physical laws according to which the hammer's blows cause its being progressively pinned down.) The addressee's understanding of the process

leading her to act in the relevant way is a necessary step in this very same process.

(b) But how can understanding an utterance of the relevant sort lead an individual to act in a given way rather than another?

X orders Y to perform action A, and he threatens her with the infliction of a sanction – something unpleasant – in case Y does not comply. If Y understands the order (and the annexed threat), and if X is in fact capable of, and is willing to (or, if Y believes he is)[31] visit her with the threatened evil in case of non-compliance, it may happen that Y decides, on the basis of her understanding of the order, and of her desire to avoid the unpleasant consequence X has threatened, to do what X ordered her to do. This illustrates a further sense in which the influence a prescription produces on its addressee's conduct may be said to be a form of 'causal-*cum*-rational' influence. The influence which is being exerted on the addressee's behaviour depends on, and is grounded in, a piece of reasoning – drawing the conclusion of an inference – on the addressee's part (e.g., 'Unless I do A, I shall incur in S; I do not wish to incur in S; thus, I ought to do A')[32].

Orders backed by threats, thus, 'work' – i.e., they manage to produce their intended outcomes – by relying on their addressees' ability to perform practical inferences, and to act according to the latter's conclusions. A prescription's characteristic mode of operation is, in short, mediated by its addressee engaging in a piece of practical reasoning[33].

[31] I shall leave this complication aside here.

[32] On this variety of practical inferences cf. VON WRIGHT 1962. This is only one among many possible forms, of course.

[33] Specifically, orders backed by threats 'work' (when they do work) by altering the addressees' preference ordering. A given option (e.g., giving one's purse to a stranger) – an option the agent, if rational, would

Let us take stock. A prescription is addressed to an individual of whom it is assumed that she can understand the utterance of a sentence, and is, further, capable of deciding, on the basis of this understanding, to act in a certain way rather than another – is, i.e., capable of making choices on the basis of the weighing of reasons for and against compliance. The kind of – causal – influence a prescription is meant to exert on an individual, thus, may be said to be a kind of rational influence in so far as the working of a prescription – Y's conduct being affected by X's uttering a sentence – (1) is premised on Y's (and, of course, X's) ability to speak a

not have chosen, given his current preference ordering, had the order not been issued – becomes, by virtue of the order, and the associated threat, the preferred one, so that (on a simple maximizing conception of practical rationality) choosing it is, now, rationally mandated (i.e., it has now become what a rational agent, given his newly shaped preference ordering, should do). Behaviour in accordance with the order is the object of a choice; this choice is, in turn, the outcome of a piece of practical reasoning. The order does indeed affect the preference ordering of its addressee; it does so, however, in a peculiar way, very different from the one involved in manipulating the agent's preferences by acting 'behind his back'-e.g., by pouring, unknown to him, a drug in his tea, or through brainwashing. In the latter cases, X operates 'behind Y's back' in the following sense: X produces the desired outcome – making a given option Y's preferred one (thus, altering Y's preference ordering) – by exerting a purely causal influence. Typically, the agent will remain unaware of the way in which her preference ordering has been modified. In the case of an order backed by a threat, on the contrary, the agent is made to face a choice. Her being aware of the mechanism through which X tries to make her behave in a certain way, her taking this mechanism's workings into account, is part and parcel of its very same workings. An order backed by a threat is a device, which works only if the individual on which it exerts its influence understands that, ad how, it is exerting its influence. When an order backed by a threat has success, its addressee chooses, decides to comply (*coactus tamen voluit*).

language – thus, on their mastering concepts, and their ability to form, express, and detect complex intentional structures of a Gricean sort; (2) is grounded in Y's – and X's – performing the relevant pieces of practical reasoning – and, crucially, on X's anticipating Y's practical reasoning (including Y's representation, in her practical reasoning, of X's practical reasoning, and of this very anticipation); and (3) under both respects, it relies on Y's understanding of this working itself. It is in virtue of these features that, I think, the gunman situation may be characterized as a form of rational interaction – a kind of situation an adequate description of which entails, or presupposes, that the parties involved be endowed with rationality[34].

(2) *Common knowledge*. The mode of power we are discussing is a kind of power whose exercise takes place out in the open between lawgiver and prescription-addressee.

In order for the lawgiver to achieve his aim, it is necessary for him to make his intention – the intention of making the addressee perform a certain action through the utterance of a given sentence – known to the addressee. This is not, however, sufficient for his utterance to count as a prescription. If odd or deviant ways of influencing others' behaviour through linguistic means have to be ruled out (STRAWSON 1964, 256-7, 263; SCHIFFER 1972, p. 30), a condition of common knowledge has to be satisfied. In

[34] J. Austin was well aware of this; see AUSTIN 1832, at 18, 20; this is also Bentham's view (see HART 1982, 244, 251). Cf. also RAZ 1977, 222: "a legal system which does in general observe the rule of law (…) attempts to guide [people's] behaviour through affecting the circumstances of their action. It thus presupposes that they are rational (…) creatures and attempts to affect their actions and habits by affecting their deliberations".

prescribing, the lawgiver intends to make the addressee perform a given action by virtue of the recognition, by the addressee herself, of this very same intention (cf. above). Thus, an utterance may count as a prescription only if the addressee believes that the lawgiver has the relevant intentional structure, if she believes the lawgiver to believe that she believes he has it, and so on. Likewise, it is necessary that the lawgiver believes that the addressee recognizes this structure, he believes her to believe that he believes this, and so on. In short, a prescription only has been issued – and a prescriptive relationship between X and Y only comes into existence – if a suitable system of interlocking mutual beliefs comes into place: only if it is common (or mutual) knowledge between lawgiver and addressee that it has been issued[35].

By the way: this, I suggest, is how we should understand – at the level of the community as a whole – what is involved in the RoL requirement of publicity. When it is required that laws should be public, what is meant by this is not only that each one of the addressees should know what the law is, but also that everybody should know that everybody knows… (and so on, up through a chain of suitable mutual beliefs) what the law is[36]. (Think of a regime in which a law is made known to its addressees by sending each one of them a sealed envelope. Everybody knows what the law is. But, would in this case the RoL requirement of publicity be met?) Legislation – i.e., the

[35] On the notion of common or mutual knowledge see respectively Lewis 1969, 52 ff.; SCHIFFER 1972, 30 ff.

[36] So understood, the RoL condition of publicity corresponds to Rawls' first level of publicity of the principles of justice in a well-ordered society (cf. e.g. RAWLS 1999, 292-3, 324; thanks to José Juan Moreso and Jahel Queralt for reminding this to me).

issuing of prescriptions – egregiously qualifies as a way of meeting this requirement.

Thus, the mode of power exercised in trying to make somebody do something by telling her to do it has two basic features: it relies on the rational agency of the parties, and it is fully public. When power is exercised in this way – thus, when ERoL requirements are satisfied – I suggest, a kind of neutrality is achieved. Lawgiving neutralizes some of the differences between lawgiver and addressee, levelling, in a sense, their respective positions. By this I mean two things.

(1) In a prescriptive relationship, lawgiver and addressee are put in a position of reciprocity: they interact as rational agents, in the light of an appropriate set of mutual beliefs concerning, *inter alia*, their status as rational agents. I.e., they presume each other to be endowed with the relevant rational abilities. To this – limited, of course – extent, their respective positions are levelled. They face each other as equally engaged in communicating with each other..

(2) In a prescriptive relationship, the subject to whom the relevant prescription is addressed is lept at a distance, so to speak. She is not regarded by the lawgiver as an appendix to, or an extension of, his own body, as merely a tool, or as one commodity among others at his disposal, or again as something in the environment to be manipulated. Causal efficacy on her conduct is mediated by her own understanding of its being exerted, and how – and this is common knowledge between the two.

All this may look overstated. Orders backed by threats are sometimes brutal. They may be addressed by a master to his slave. The operation of requests may rest on sweeping forces and all too powerful incentives, such as, e.g., life, or parental

love, or the implicit threat of their withdrawal. (Some 'offers' simply 'cannot be refused'[37].) The two features I have listed, however, concern the form, or structure, of the relationship (at least when conditions are satisfied, designed to rule out 'offers that cannot be refused')[38]. When we contrast the issuing of a prescription with recourse to sheer physical force, or to silent manipulation of the subject's environment, I think we can see this twofold difference[39]. Under both respects, I think, one distinctive feature of prescriptive relationships is that rulers regard their subjects, literally, as addressees – i.e., as subjects capable (and worthy; see below) of being addressed. To borrow a phrase from Strawson, their dealings with them, as addressees, are not premised on "objectivity of attitude": a "purely objective view of the agent as one posing problems simply of intellectual understanding, management, treatment and control"[40].

[37] Thanks to José Juan Moreso fo reminding me this point.

[38] Think, for a related case, of threats having a 'Your money or your life' structure. These do not exemplify the structure described in the text: they do not offer the subject a choice. In case the subject complies, the gunman will get her money. In case she doesn't, the gunmen will get *both* her life and her money. This is, in fact, no (well-formed) alternative. The latter hypothesis includes the former – they are not logically independent.

[39] Doesn't charismatic power, too, work by *telling* people what to do? Not in the way described here. Charismatic power does not, by hypothesis, offer the subject a choice – it does not rely on the subject's weighing reasons for and against doing what the leader wants her to do. Rather, it works by virtue of some sort of magnetism (however this may then be explained) a person exerts on another person – and this is, precisely, why the former may properly be said to be the 'leader', rather than a lawgiver.

[40] STRAWSON 1962, 87. "To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a

Lawgiving, thus, in a sense neutralizes asymmetries between lawgiver and addressee, levelling their positions. But, does this kind of 'neutralization' have anything to do with liberal neutrality?

The RoL is one political ideal among many (I mean other respectable ideals: democracy, justice, equality, human rights, and so on), and it should not be confused with any one of them (RAZ 1977, 211). It is, in fact, a modest ideal. Not in the sense that it is easily attainable, but in the sense that it is compatible with gross injustice, and in general with gross violations of other ideals. Specifically, neither the RoL as such, nor ERoL, guarantee liberal neutrality. It may well happen that laws satisfying the RoL – or ERoL – requirements enact and enforce one religious view, or one particular conception of the good among many. As far as their content is concerned, laws meeting RoL conditions need not be neutral. But, when we consider the RoL – and, specifically, ERoL – as a peculiar mode of the exercise of power, we see that there is something neutral about it. And that, under the relevant respects, it has indeed something to do with liberal neutrality: it does in fact instantiate part of what is involved in the idea of liberal neutrality. Let us see why.

One of the main grounds for the rejection of state perfectionism in favour of liberal neutrality is the idea that

subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained" (*ibid*., 79). Strawson writes that "if your attitude towards someone is wholly objective, then though you may fight him, you cannot quarrel with him, and though you may talk to him, even negotiate with him, you cannot reason with him" (*ibid*.). But this, it seems to me, downplays what is involved, by way of reasoning with someone, in *talking* to him.

state policies should respect the "endorsement constraint": in W. Kymlicka's words, "my life only goes better if I am leading it from the inside, according to my beliefs about value" (KYMLICKA 2002, 216; cf. also ID., 1989a, 10-9; DWORKIN 1989, 217). Perfectionist politics tends to be paternalistic, in the sense of violating the endorsement constraint. And – here's my point – the kind of communicative attitude involved in lawgiving – in issuing prescriptions – is a constitutive, necessary component of respect for the endorsement constraint[41].

[41] As KYMLICKA notes (2002, 277), the endorsement constraint rules out "coercive and manipulative forms of perfectionism". True, prescriptions may be the instrument of coercion – coercion is the whole point of the gunman situation. But, I think, the kind of coercion exerted by an order backed by threats (when it satisfies the conditions hinted at below, n. 45) is very different, under the relevant respect, from the other forms of coercion and forms of manipulation listed in the text above, in this section. True, paternalistic interventions may aim at converting people, making them sincerely endorse the desired way of life; this aim may be achieved through mechanisms that lessen the person's "ability to consider the critical merits of the change in a reflective way"; endorsement brought about in this way, though sincere, should not count as "genuine"; and, finally, "threats of criminal punishment corrupt rather than enhance critical judgment" (DWORKIN 1989, 218). So we may want to rule out, on liberal – specifically, anti-paternalistic grounds – the enforcement of a preferred way of life through the criminal law. To repeat, the kind of 'neutrality' involved in ERoL is not, by itself, liberal neutrality. But. it seems to me, the required "conditions and circumstances of genuine endorsement" have to be moulded so as to distinguish neatly between paternalism that can "justify itself by adding chemical or electrical brainwashing to its regime" (*ibid*.) and paternalism that brings about endorsement, though not genuine, through the issuing of prescriptions (granted that these, too, may corrupt our critical judgment).

When the government treats its subjects in accordance with the ERoL, it treats them as rational agents, capable of (1) mastering concepts, and detecting, grasping, forming, expressing and generally finding their way in complex structures of communicative intentions; (2) making their own decisions on the basis of their own preferences and their own view of the relevant facts. By treating them in this way, government recognizes them the dignity of beings worthy of being publicly, openly addressed, and of being guided through their understanding of the way in which power is being exerted on them.

So, when treating its subjects in accordance with ERoL requirements government recognizes people the dignity of responsible agents, capable of autonomous choice; it addresses them openly, and tries to guide their behaviour through their very understanding of what it is trying to do, and how. In short, it treats them with, and shows them, *respect*. (Recall the contrast with manipulation, indoctrination. propaganda, deceit, persecution, *discipline*, mute punishment.) This way of exercising power, I said, is very different from the way in which people sometimes try to guide children's behaviour – distorting reality, or trying to manipulate the environment or their preferences, by working behind their back; relying on the efficacy of symbols or charisma. These, of course, are ways in which even adult men and women are often treated – and sometimes wish to be treated (or have to be treated). But they are not, I submit, respectful ways[42].

[42] Remember that we are dealing, here, with standard cases (above, n. 16). Abuses are possible. So, for instance, one interesting way of acquiring and exercising power over human beings is by inducing in them strong feelings of guilt, or the sense of their constitutive insufficiency, or weakness – and setting ourselves as their healers (either

Treating each individual with respect – treating her non-paternalistically, as a responsible agent – is an essential component in liberal neutrality. By an 'essential component' I mean, here, two things: that, for liberals, state neutrality entails treating each individual with equal respect; and that, for liberals, treating individuals with equal respect is the main ground – and spring – for endorsing state neutrality[43]. Thus, to the extent that they involve respect for individuals, ERoL requirements instantiate part of what is involved in liberal neutrality. This is not, of course, being neutral between different conceptions of the good; nor is it not taking sides between different individuals or groups in society. It is not even something distinctive of liberalism as such (DWORKIN 1978a, 187). It is however, in a sense, treating individuals with *equal respect*. Individuals are, to the extent that they are all addressed as the addressees of prescriptions, treated with equal respect[44]. (Remember that

because we are uniquely authorized to guarantee them forgiving for their faults, or because we know how, and are able to, supplement them in their weakness). One way of doing this is by issuing prescriptions we know they will not be able to comply with – setting a standard we (and they) know they will not be capable of living up to. I.e., by flouting the requirement that whoever prescribes wants the addressee to do what he prescribes her to do (see above, n. 16), and tries, by issuing a prescription, to make her perform the desired action. In such cases, we do not actually want the addressees do what we (seem to) require from them; it is thanks to their (expected) *non*-compliance that we (mean to) acquire power over them.

[43] This point I take, here, as axiomatic. But see, e.g., DWORKIN 1978a, 191; KYMLICKA 2002, 221 ("liberals say that state neutrality is required to respect people's self-determination").

[44] This, I think, is the point of Bentham's criticism of the Common Law as "Dog Law" (cf. e.g. BENTHAM 1970, 184, and Postema 1986, 277). Cf. also RAZ 1977, 221-2; MACCORMICK 1985, 24-7. (Raz's

this concerns the form of the relationship only, not the prescription's content[45]). This is compatible with all sorts of

reasons for claiming that "observance of the rule of law is necessary if the law is to respect human dignity" are, in fact, different from the one given in the text. "Respecting human dignity entails treating humans as persons capable of planning and plotting their future", Raz goes on; "thus, respecting people's dignity entails respecting their autonomy, their right to control their future". And, Raz claims, there are two main ways in which disregard for the RoL "violates human dignity": by producing "uncertainty", and by frustrating expectations the law has contributed to encourage. This is not the connection I have tried to highlight in the text; Raz's argument concerns te whole set of RoL conditions, and it does not refer, specifically, to the operation of prescriptions – to ERoL. It seems to me, however, that Raz's argument, though relating to a further layer of complexity in the idea of the RoL – 'further' with respect to the one considered in the text – implies the latter, and implicitly builds on it. "A legal system which does in general observe the rule of law – Raz claims – treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations", *ibid*., 222. The law's frustrating expectations it has contributed to encourage is "often (…) analogous to entrapment"; in so doing the law expresses "disrespect" for its subjects.)

[45] There is, however, a continuum ranging from, at one extreme, prescriptions as a vehicle of respect for their addressees and, at the other extreme, prescriptions wielded as weapons by people intending only to make other people do certain things – or positively aiming at humiliating them. Orders may be barked at night by armed guards to deprived, terrorized people at their arrival at the concentration camp, so as to make them reach as soon as possible their barracks, or the gas chamber. If prescriptions are to work as vehicles of respect, such cases have to be ruled out, by imposing additional conditions. One such condition is, I think, that meaningful options should be open to the

disrespect and unjust discrimination, of course. But it positively is, it seems to me, part of what is involved in the liberal ideal of neutrality[46].

5. *Liberal multiculturalism, human rights, and the rule of law*

So, the RoL – the RoL as a form, and as specified by ERoL principles – instantiates part of what is involved in liberal neutrality. This is the conclusion of my first argument. I

addressee in case he acts as he is ordered to. (On the other hand, I have already hinted at a condition ruling out 'offers that cannot be refused'; more generally, meaningful options have to be open in case of non-compliance.) Or, again, we should allow for the possibility that, in some circumstances, treating somebody as the addressee of a prescription (thus implying that he enjoys the dignity of a rational being) may be a peculiarly effective way of shaming him (thanks to Nicola Muffato for this point). It should also be noted that the utterance of sentences in the imperative mood – or, generally, sentences standardly used for issuing prescriptions – may simply trigger a conditioned reflex, or work through symbolic properties. Prescriptions, as discussed in the text (and as envisaged in ERoL) as the prime instrument of government, are an ideal communicative type.

[46] But, it will be objected, cannot perfectionist politics (or a non-liberal politics of the common good) be pursued through the issuing of prescriptions? In principle, yes. As I said, ERoL does not guarantee liberal neutrality (and cf. above, n. 41.) And yet, we associate – rightly, I think – perfectionist purposes with resort to other modes of power, such as, e.g., taking care that individuals live in a morally healthy environment (thus, gerrymandering the set of options available to them), or indoctrination. From a perfectionist perspective, it is not easy to resist taking, *vis-à-vis* subjects, the stance of a good shepherd. (This is not a necessary, conceptual connection; it is, however, a very material psychological one.)

shall now investigate the connections between LM, state neutrality, and the RoL.

LM is a position associated with the name of W. Kymlicka. By the term 'multiculturalism' I mean, following KYMLICKA (2007, 16; cf. also 2002, 335) "a wide range of policies designed to provide some level of public recognition, support or accommodation to non-dominant cultural groups", such as immigrants or refugees, national minorities and indigenous peoples. LM, in turn, is a brand of political theory, and related policies, in which "multiculturalism is understood as a concept that is both guided and constrained by a foundational commitment to principles of individual freedom and equality" (2007, 7; cf. also *ibid*., 61).

My first premise concerns LM and human rights. I can be brief about this, since the relevant connection is explicitly laid out and repeatedly emphasized by Kymlicka himself. In short, human rights are a necessary condition for LM; that is, the recognition and the – more or less effective – protection of human rights is (in ideal compliance theory) a necessary condition for meaningful liberal policies of recognition and accommodation of ethnocultural minorities, or for liberal rights securing for individuals the good of cultural membership.

In LM (as it has developed during the last forty years or so in the established Western democracies), KYMLICKA claims, human rights play a "dual role", as "inspiration" and as "constraint" (2007, 96). On the one hand, "the trend towards liberal multiculturalism can only be understood as a new stage in the gradual working out of the logic of human rights" (ibid., 89). On the other hand, LM policies "operate within the constraints of [norms of universal human rights]" (ibid., 6)[47]. What is distinctive of LM – what LM "seeks to

[47] Cf. KYMLICKA 2007, 88: "human rights ideals have not only

do" – is "to filter and to frame [group-differentiated ethno-political claims] through the language of human rights, civil liberties and democratic accountability" (*ibid*., 96)[48]. While allowing (with limitations) group-differentiated minority

helped to inspire and justify claims for multiculturalism, but have strongly influenced how these claims are framed, channelling and filtering them to accord with the underlying values of international human rights norms" ("in […] contemporary struggles [for multiculturalism and minority rights] […] minority rights are tightly interwoven with human rights ideals"). In the West, LM has emerged as "part and parcel of a larger human rights revolution", *ibid*., 135: see also *ibid*., at pp. 6, 18, 254. True, human rights are not, by themselves, sufficient for ensuring ethnocultural justice (KYMLICKA 2001, 72-82); they are, however, necessary for it (*ibid*., 82). In LM, minority group rights are meant to supplement – rather than obliterate – them (*ibid*., 70, 81; cf. also KYMLICKA 2002, 340). As a matter of fact, KYMLICKA claims (2007, 93), in the established Western democracies, "there is no legal space for minorities to set aside human rights norms in the name of multiculturalism" (and usually no wish on their part to do so), due to "the existence of robust legal mechanisms to protect human rights and the existence of a consensus on liberal-democratic values" (cf. also *ibid*., 182: "robust legal mechanisms for protecting human rights, and the more general development of a human rights culture"). "From a legal point of view, policies of multiculturalism operate within the larger framework of liberal constitutionalism" (*ibid*., 93). Thus, "it is legally impossible for minorities in the West to establish islands of illiberal rule" (*ibid*., 94). See also *ibid*., at pp. 144 (on sub-state autonomies operating "within the constraints of liberal-democratic constitutionalism, which firmly upholds individual rights"), 150-2 (on the more problematic case of indigenous peoples; cf. below, 6), 161 (on immigrant multiculturalism policies).

[48] On LM as opposed against "traditionalist" approaches to multiculturalism – in particular. to the understanding of multiculturalism as a "'communitarian' reaction against liberalisation" (and liberalism) cf. KYMLICKA 2007, 99-103.

rights and policies which work as "external protections" – i.e., protections against the larger majority culture and state – for ethnocultural minorities, LM rejects (barring "extreme circumstances") "internal restrictions", that is, "the demand by a minority culture to restrict the basic civil or political liberties of its own members"[49].

In short, then, LM requires the recognition and the guarantee of human rights. My second premise concerns the connection between human rights and the RoL. Here, my point – but I claim no originality for it – is that conformity to the RoL requirements is a necessary condition for respecting human rights.

The connection between human rights and the RoL – specifically, the idea of the RoL as *the* way of protecting human rights – is stated in the Preamble, para. 3, to the UDHR. Indeed, how could human rights be effectively protected and guaranteed, if not by means of the RoL?

One way of establishing a tight connection between human rights and the RoL is DWORKIN's. In his *Political Judges and the Rule of Law* (1978b) Dworkin puts forward a 'rights conception' of the RoL. Dworkinian RoL consists in "rule by an accurate public conception of individual rights" (DWORKIN 1978b, 11-2). The relevant rights are first and foremost moral rights; they qualify as legal rights in virtue of their being entailed by sound principles of political morality (subject, perhaps, to further constraints)[50].

[49] Kymlicka 1995, 152; ID., 2002, 342, 352, 356; see also ID., 1989a, at 170, 197-9; ID., 1996. This should not be understood only in a narrow legalistic sense (KYMLICKA 1999, 32) – though *also* in a legalistic sense.

[50] Cf. WALDRON 2004, 120: "the conception of the rule of law defended by Professor Dworkin in *Political Judges and the Rule of Law* is distinguished by its emphasis on *moral* rights, and by the

This is obviously not the path I am following here. Dworkin's conception of the RoL is very different from, and much more ambitious than, the formal *cum* institutional and procedural one I have adopted (above, 2). The connection between human rights and the RoL, as here understood, is, rather, indirect[51]. Conformity to ERoL is a necessary – though certainly not a sufficient – condition for the law to treat its subjects as responsible agents capable of autonomous choice (above, 4) – capable, that is, of rationally forming, pursuing and revising their own view of the good life, and of forming, adopting, and revising, in accordance to this view, their own plan of life. Moreover, part of what is involved in this is a certain quality – of fairness, and reciprocity – of the interaction between rulers and ruled[52]. Under both respects, ERoL may reasonably be counted as a necessary condition for respect of, and an effective protection of, human rights.

When government treats its subjects in accordance with RoL (specifically, ERoL) requirements, in sum, it treats them with – and shows them – the respect which, it is assumed, is owed to the dignity of rational autonomous agents (above, 4). This way of treating someone, I submit, is entailed by treating her as the bearer of at least some

directness of the link that it seeks to establish between that idea and the idea of legality".

[51] Another way of establishing a connection between fundamental rights and the RoL is RAWLS's (1971, 54-60, 235-43; cf. VIOLA 2004). I shall not consider it here.

[52] FINNIS 1980, 272-3; MACCORMICK 1985, 26. According to WALDRON (2007, 116) Fuller holds that the point of the "internal morality of law" – i.e., the RoL – is "to respect human dignity and secure a certain equality or reciprocity between ruler and ruled" (see FULLER 1969, 39-40, 162-3).

fundamental rights which are usually included in lists of human rights[53]. True, laws that meet the requirements of the RoL – or of ERoL – may authorize, or even enjoin, violations of human rights (RAZ 1977, 221). Respect for ERoL, however, is a necessary condition for respecting human rights. Treating a person as a responsible agent is a precondition for recognizing him as the bearer of some of the rights we usually call 'human rights'. And this way of treating people is, as we have seen, what the neutrality of ERoL amounts to[54].

6. *Liberal multiculturalism and the rule of law*

My conclusion, then, is that the RoL, and the sort of neutrality it instantiates, are part and parcel of what is involved in LM. Thus, LM entails, *via* human rights, the RoL, and its peculiar brand of neutrality.

But, it will be objected, this is no surprise. LM is, by definition, a variety of liberalism; liberalism entails the principle of state neutrality; and, finally, state neutrality arguably entails the RoL (or ERoL); thus, trivially LM entails both the principle of neutrality, and the RoL. This is, however, too simple, and not very illuminating, I think. Rather, as I have been at pains to emphasize, ERoL

[53] I stress that I am not committing the sin of equating conformity to the RoL with respecting human rights (RAZ 1977, 211). What I am claiming is, rather, that the former is a minimal condition for the latter.

[54] But, it might be asked, is conformity to the RoL, or to ERoL, the only way in which government can treat people respectfully, as responsible agents? I have not shown that this is so. I can think, however, of no other way. It seems to me that (to the extent at least that we assume that government operates through the law) there is none.

instantiates, in a peculiar way, part of what is involved in liberal neutrality. Thus, the connection between LM, state neutrality and the RoL that I have tried to lay out is not a straightforward one. LM, I have argued, requires a specific kind of neutrality, *via* the RoL: it requires the specific kind of neutrality instantiated by the RoL – specifically, ERoL.

Armed with this conclusion, we find ourselves facing some open – crucial – issues. Among them, e.g., the issue of exemptions from human rights norms (and, plausibly, RoL requirements) sometimes requested by indigenous peoples, or other minorities, in the name of the recognition and accommodation of their ethnocultural identity[55]. (Specifically, the issue of cultural defenses may involve the weakening of RoL requirements.) And, more, generally, we find ourselves facing the issue of legal pluralism. Legal pluralism is one of the main tools of a multicultural politics. But, how does it impinge on the RoL[56]? This – that we somehow have to face these and other intractable issues – is, indeed, no surprise.

[55] Cf., on requested exemptions from Bills of Rights norms, and from judicial review by national courts, KYMLICKA 1989a, 170-1, 196-9; ID. 1995, 168-9, 230; ID., 1996; ID. 2001, 84 ff.; ID., 2002, 343; ID. 2007, 93, 150-2.

[56] Cf. VIOLA 2007.

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