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Autonomy and the Rule of Law

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Abstract. In this paper I am concerned with the belief that the moral value of the rule of law is based upon some kind of connection between the rule of law and the respect and promotion of personal autonomy. I identify and analyse two possible connections: the rule of law as a sufficient condition for the respect and promotion of personal autonomy, and the rule of law as a necessary condition for personal autonomy. My conclusion is that neither of these two connections grants the moral value of the rule of law.

Introduction

Many believe that the rule of law has a moral value. Some of them believe that this is because the rule of law respects and promotes people's autonomy. My aim is to analyse this second belief, which makes up what I call the "argument of autonomy" in support of what I call the "thesis of the moral value of the rule of law." This paper consists of four sections. In the first section, I seek to clarify the meaning of the thesis and of the argument. It will turn out that the argument has two versions that are in fact two distinct arguments. In the second section, I examine the first of such arguments, the "argument of the sufficient condition," which is based on the premise that the rule of law is a sufficient condition for the respect and promotion of a certain degree of personal autonomy. In the third section, I examine the second argument, the "argument of the necessary condition," which is based on the premise that the rule of law is a necessary condition for the respect and promotion of personal autonomy. In the fourth and final section, I provide a conclusion and make some prospective remarks. The conclusion can be advanced here: The thesis is supported by neither of the two arguments.

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I. Some Conceptual Explanations

I.1 What is the Rule of Law (in this Paper)

For the purposes of this paper, the "rule of law" will mean the rule of men through law, as opposed to the rule of men not through law[1]; that is:

> The state of affairs consisting in political power being exercised through rules that have been previously settled and that are known by the people.

Therefore individuals subject to that power have the possibility of predicting its use and acting accordingly. In other words, under the rule of law, people are able to predict how officials will behave when performing their functions. Similar (but maybe not identical) definitions of the rule of law are to be found in Dicey (1982, 110), Hayek (1976, 54), Fuller (1969, 209–10), Rawls (1973, 235–43), Raz (1979, 212–4), Finnis (1980, 270–3), Summers (1993, 129), Waldron (1989, 80) or Marmor (2004, 2).[2] To be sure, the term "rule of law" may be used to designate or express other concepts. Dicey himself thought that the "rule of law" expressed two more concepts (in short, equality before the law and the judge-made quality of the constitution), and some think that the "rule of law" expresses the rule of reason or some kind of rule different from that of men. In addition, even if the words are taken to designate the same concept (the state of affairs described above), this very concept can be understood in different ways, thus generating different conceptions. Linguistic and conceptual matters are not my concern in this paper.[3] However, given that we are dealing with a concept that admits different conceptions, it becomes necessary for the purposes of my argument to specify the conception that I shall rely upon.

I.2 A Formal Conception

I shall rely upon what has been called a *formal*, *thin* or *legalistic* conception of the rule of law (see Craig 1997; Hutchinson and Monahan 1987, 100–2; Barber 2004, 475).[4] It is formal in the sense that the rule of law thus conceived does not call for any substantive contents of the law, but just for

[1] Like "many legal positivists," I "regard the idea of the rule of laws, not men, as a non-starter. Since laws are made, interpreted and enforced by men, there is really no contrast" (Waldron 2002, 155).

[2] The rule of law has been defined not only as a state of affairs but also as a "principle" (Rawls), an "ideal" (Raz), a "doctrine" (Raz) or a "theory" (Summers); I do not see any serious theoretical complication arising from this diversity.

[3] The diversity of meanings of "rule of law" (or even its meaninglessness) might be due to "ideological abuse and general over-use" (Shklar 1987) and to its "essential contestability" (Waldron 2002).

[4] I am aware that the words *formal*, *thin* and *legalistic* (as used by these and other authors) may not mean exactly the same thing.

a certain structure and way of functioning. This is captured by what Fuller named the inner morality of law: That is, the requirements that the rules be general, promulgated, non-retroactive, clear, coherent, requiring the possible and constant through time, and that there be congruence between official action and declared rule (Fuller 1969, 46ff. See also Rawls 1973, 236–9; Raz 1979, 218; Finnis 1980, 279; Summers 1999, 1693–5).[5] This conception of the rule of law is not to be associated with any particular legal tradition. Clearly, the concept of the "rule of law" belongs to the Common Law tradition, but the same state of affairs (as described previously) is named in other languages through expressions such as *Rechtssicherheit*, *seguridad jurídica* or *certezza del diritto*, and even *Rechtsstaat* and their equivalents (although *Rechtsstaat* has the same kind of essential contestability as the "rule of law").[6]

As a formal conception, it is opposed to substantive conceptions. In Barber's words, "a line can be drawn between those conceptions that focus on questions of legal procedure, structure, and the formulation of laws, and, alternatively, those which include social and political rights at their core" (Barber 2004, 475; although he talks of legalistic and non-legalistic conceptions instead of formal and substantive ones).[7] Good examples of substantive conceptions are the ones developed by Weinrib (1987) and Allan (2001, 1–29). I will not discuss whether these conceptions are better understandings of the rule of law, nor will I defend the possibility, or coherence, of a formal conception of the rule of law.[8] I assume this possibility and believe that "if the rule of law is the rule of good law [as it is implied by substantive conceptions] then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function" (Raz 1979, 211).[9] Moreover, it would be redundant to raise the question of the connection between autonomy and the rule of law if we relied upon a substantive conception of the latter: For most, if not all, substantive conceptions favour autonomy by definition. Nor would it make much sense to ask whether the rule of law has a moral value if we assumed that law itself necessarily has a moral value: For if we ascribe a moral value to law, then it seems obvious that the rule of law will have it too. Substantive conceptions of the rule of law and morally loaded conceptions of the law are closely related, but we do not need to specify this relationship now.

[5] These requirements are not expected to be fulfilled jointly to the maximum (see Fuller 1969, 41–4; and Marmor 2004).
[6] See Neumann 1986, 179–86; Cotterrell 1986, 452; Peczenik 1989, 31; Van Caenegem 1993, 4; 1995, 17; Finnis 1996, 2; Kirchheimer 1996; Barber 2003.
[7] See also Dworkin 1985, 11–2; Shklar 1987; Hutchinson and Monahan 1987; Craig 1997, 467; Dyzenhaus 1999.
[8] Endicott (2003, 105) denies such a possibility.
[9] See also other arguments favouring a formal conception in Summers 1993, 136–8; 1999, 1709–11.

To label a conception of the rule of law as formal does not mean ignoring the fact that the state of affairs described above does have certain *implications* (or prerequisites) that may be said to go beyond the law's structure and way of functioning; that is, it does not mean ignoring the fact that the rule of law thus conceived has a *social* dimension, as opposed to a strictly legalistic dimension (Barber 2004, 483). There are many of those implications: At the very least, the implication that people should be educated and have easy access to legal services, and these requirements may give rise to others. But it does not follow that we are no longer dealing with a formal conception. This is so, first, because those requirements could be satisfied without the help of any legal provision. People *might* still be educated even if there were no right to education; people *might* still have easy access to legal services even if there were no right to free legal services. Secondly, even if it were the case that education and access to legal services required legal provisions, such legal provisions would have to be thought of as secondary rules in the Hartian sense, thus not affecting the formal character of the rule of law. In fact, the rule of law formally conceived calls for (or is favoured by) many other secondary rules, such as rules concerning promulgation, clarity, non-retroactivity, congruence between official action and declared rule, and so on. Thirdly, some social requirements of the rule of law cannot be thought of as being satisfied mainly, if at all, through law, such as the ideological homogeneity of the community and a certain kind of integrity in judges. Standard legal theory has certainly failed to fully acknowledge these social implications, or requirements, of the rule of law; yet to acknowledge them does not mean giving up a formal conception of it (see, for instance, Corsale 1979, II; Furmston 1981; Sexton and Maher 1982; Aarnio 1987, 4–5; Peczenick 1989, 31–2; Abel 1990[10]).

The rule of law thus conceived is fulfilled by any legal system to a certain extent. If it were not, it would not be a legal system at all, not even a normative system, as it would be unable to guide human conduct (Hart 1994, 117; Fuller 1969, 39; Raz 1979, 86, 226). To recognise or not this connection between the law and the rule of law has no impact on our enquiry as such. However, if there is such a connection, then to ask whether the rule of law has a moral value means asking whether any legal system has a moral value. If we answer by asserting the moral value of the rule of law, then the separation between law and morality could not be sustained any more or, at least, should be qualified accordingly.[11] In sum, to admit that the existence of law is a sufficient condition for the existence

[10] All of them concerned about different social implications of the rule of law.

[11] For instance, it could no longer be sustained that "the moral value of law (both of a particular law and of a whole legal system) or the moral merit it has is a contingent matter dependent on the content of the law and the circumstances of the society to which it applies" (Raz 1979, 37).

of (some degree of) the rule of law does have an impact on the relevance of our enquiry.

I.3 Rule of Law and Legitimacy

Now we return to the thesis of the moral value of the rule of law and say something more about its meaning. The thesis is based on the following reasoning: Under the rule of law, people are able to predict the use of political power to some degree and, thus, to act accordingly. In such a situation people are able to plan their lives, at least to a certain extent. This ability to plan, the reasoning goes, is morally valuable because it enhances personal autonomy. Thus, the rule of law is morally valuable and the fact that a legal system is designed and functions according to the rule of law is morally valuable. This value does not depend on the contents (just or not) or on the sources (democratic or not) of the legal system's rules, but merely on their formal features. In other words, there is something morally valuable about the fact that authorities use their power through rules that have been previously enacted and that are known by their addressees. If this was so, then political power would acquire a certain legitimacy to the extent it acted through the law, a legitimacy that we may call *formal* or *procedural*, and that would provide an answer to the old Augustinian question: "[J]ustice being taken away, then, what are kingdoms but great robberies?" (*Civitas Dei*, IV–4). If we supported the thesis of the moral value of the rule of law, we would answer that the difference between kingdoms and great robberies lies at least in the fact that kingdoms, provided they conform to the rule of law (and all present *kingdoms* conform to it to a certain extent because all of them operate through a legal system), enable their subjects to predict public action, and that this is relevant from a moral point of view, even when justice has been taken away. So the belief in the moral value of the rule of law becomes an element of key importance when it comes to reflecting on legal and political legitimacy. And especially so in times of moral relativism, legal complexity and distrust in the proper working of political representation, because the formal legitimacy of the law seems much easier to ascertain than the one that could flow from its democratic sources or from its substantively just contents. In such times (maybe ours), the belief I am talking about would warrant the following line of reasoning: Even if the legal rules are not just or democratic enough, or if we are not sure about them, the plain fact of conformity to the rule of law provides government action with some legitimacy, weak though it might be. Then it would come as no surprise to find someone trying to justify a *prima facie* obligation to obey the law based on it; and, as I said before, we would have found a necessary connection between law and morality, however weak, but enough to reject the thesis of the separation between law and morality.

I.4 What is Autonomy, and Its Connection to the Rule of Law

The preceding paragraph shows how the idea of autonomy can be used to support the thesis of the moral value of the rule of law. So let us take a brief look at the concept of autonomy. I will understand "autonomy" as:

> The capacity of an individual to meaningfully orientate his or her life by following his or her own decisions.

This succinct characterisation will be enough for our purposes. Similar characterisations can be found in works by Nozick (1974, 49), Raz (1986, 369),[12] Dworkin (1988, 20) or Nino (1991, 132). Thus conceived, autonomy is usually considered as a powerful moral ideal; some would even say that autonomy is a necessary condition for morality. I will not deal with these issues and will just take for granted that autonomy is morally valuable.

Though many scholars appear to detect a connection between autonomy and the rule of law, it is not always clear in their writings what kind of connection it is and whether such a connection leads them to assert that the rule of law is morally valuable. I will not discuss any particular statement of the connection; instead, I suggest two possible ways of linking autonomy with the rule of law: (1) the rule of law is a sufficient condition for the respect and promotion of a certain degree of autonomy; (2) the rule of law is a necessary condition for the respect and promotion of autonomy. This way of rendering the question makes it possible to capture the core ideas common to most of those proposals and, therefore, to discuss them in terms of that core rather than to focus on what distinguishes them from one another, which is only accessory to that core idea. In subsequent sections I will try to find out if such connections between autonomy and the rule of law exist, and whether any of them grants moral value to the rule of law.

II. The Argument of the Sufficient Condition

II.1 The Argument Stated

The argument runs as follows: The rule of law is a sufficient condition for the respect and promotion of a certain degree of autonomy; but autonomy has a moral value, and therefore the rule of law has a moral value. It can be explained thus: The rule of law allows people to predict how officials will make use of their power; this capacity to predict favours their autonomy, enabling them to take decisions relating to their life, increasing

[12] Raz distinguishes between autonomy and the capacity for it: "[T]he ideal of autonomy is that of the autonomous life. The capacity for autonomy is a secondary sense of 'autonomy'" (1986, 372). I am using "autonomy" in its capacity sense, i.e., as the capacity to be autonomous.

their capacity to plan it. Autonomy is favoured to the extent that people are able to predict the consequences of certain courses of action. If a certain legal norm N attaches consequence C to action A, and if there is the rule of law, then, the argument goes, I can freely choose to do A or not-A, knowing in advance that the consequence will be C or not-C. The fact that I can choose between at least two courses of action in an awareness of the consequences beforehand enhances my autonomy in a way that is not dependent on the content of the norm, but on the facts that the norm is properly enacted before the course of action is chosen and that the norm is properly applied after the course of action is chosen. Given that the rule of law has nothing to do with the justice or injustice of the norms, it may well be that norm N is not just (that it is not just to attach consequence C to action A). But this does not affect the autonomy that the proper enactment and application of norm N has granted to me. Thus, the rule of law grants a certain degree of autonomy to every person subjected to the law. Now, given that autonomy is morally valuable, there is a case for conferring moral value on the rule of law. In other words, the argument is based on the assumption that the rule of law is a sufficient condition for the respect and promotion of a certain degree of autonomy. The supporters of the argument are clearly aware that the degree of autonomy granted by the rule of law may be low and may coexist with gross violations of autonomy on the part of the law's contents, but they will insist that it is not to be neglected, as any degree of autonomy granted to the people is to be morally appreciated. Hayek (1976, 54), Fuller (1969, 162), MacCormick (1992, 122–3), Moore (1992, 222), Campbell (2001, 34), Marmor (2004, 39) or Hasebe (2004, 489) seem to endorse this argument or a version of it.

II.2 The Argument Questioned

The argument of the sufficient condition can be questioned by contrasting the circumstances in which it can be said that we have the possibility to act autonomously with the circumstances that hold under the rule of law. I will draw on Raz's account of autonomy to sketch the first set of circumstances. Raz sets three necessary conditions of autonomy: appropriate mental abilities, adequate range of options, and independence (Raz 1986, 372–3). People with learning difficulties may lack sufficient mental abilities; during a famine people clearly lack an adequate range of options and so do people imprisoned in certain harsh conditions; and slaves and serfs lack independence. If Raz is right, as I think he is, then a person lacking any of these three conditions cannot lead an autonomous life. So it may well be that people with sufficient mental abilities, i.e., people who are in full use of their capacities to discern and choose, do not enjoy autonomy at all when using such capacities. For if the use of these capacities takes place in conditions of dependence, or if it makes it possible only to choose between

non-adequate options (non-relevant or non-valuable courses of action or plans of life), then that use cannot be considered an exercise of autonomy: Not every use of discernment and choice is an exercise of autonomy.

Let us return now to the argument of the sufficient condition. It says that the rule of law grants a certain degree of autonomy, as it allows people to choose between at least two different courses of action, knowing their respective consequences. Is this "a certain degree of autonomy?" It does not seem so. What is granted by the rule of law is not, in itself, anything to be considered as autonomy in its proper sense. The fact that authorities use their powers through previously enacted rules that are known to their addressees may grant neither independence nor an adequate range of options nor, of course, mental abilities. What the conditions of autonomy require from the law is that the law be filled with certain substantive contents, and not merely that it be shaped according to certain formal features concerning the way it is enacted, structured and enforced. Yet the rule of law (as described in this paper) does not make any substantive requirements whatsoever of the law. The rule of law is consistent with starvation, and with harsh conditions in prisons, and with slavery or serfdom.

The capacity for autonomy is not enhanced through the margin of action that is left by the mere existence of a norm properly formulated and applied, that is, through the mere possibility of choosing whether or not to follow it in an awareness of the consequences of both courses of action in advance. The capacity for autonomy "requires that many morally acceptable options be available to a person" (ibid., 378), and it is obvious that this is not what the mere existence and application of a norm or set of norms attain, even under the rule of law. The argument of the sufficient condition is based on a false premise: That the rule of law grants a certain degree of autonomy to the people subjected to the law; consequently, the argument does not prove the thesis of the moral value of the rule of law.

II.3 Autonomy qua Cognitive Fact and qua Moral/Political Ideal

A similar line of criticism has been trailed by Kramer against one of Fuller's arguments in favour of the moral value of what he calls the inner or internal morality of law (Kramer 1999, 58–62).[13] Kramer also offers a plausible explanation of why the argument of the sufficient condition may be endorsed, either by Fuller or by others. There are two distinct senses of "autonomy," i.e., "autonomy *qua* cognitive fact" and "autonomy *qua* moral/political ideal":

[13] "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults" (Fuller 1969, 162).

> The former notion deals with the sheer ability of a person to deliberate and to make choices; the latter notion, by contrast, pertains to deliberation and the making of choices under circumstances where a person's will is not unduly coerced or cabined by someone else. (Ibid., 59–60)

The argument of the sufficient condition seems to be rooted either in the failure to distinguish between these two notions, or in the attribution of moral value to the first one. But it is clear, on the one hand, that the two notions are different, even if they are related: Autonomy *qua* cognitive fact is one of the necessary conditions of autonomy *qua* moral/political ideal, just what Raz calls "appropriate mental abilities," entailing the capacity to understand rules and to decide whether or not to follow them. It is also clear, on the other hand, that autonomy *qua* fact does not have any moral value: It is only a mental ability or set of abilities.

It is true that the rule of law is a sufficient condition for autonomy *qua* fact, in the logical sense that autonomy *qua* fact is a necessary condition for the rule of law. For the rule of law to be effective, there have to be individuals provided with the capacity to design, understand, and decide whether or not to follow and apply rules, and all these capacities may be conceived of as components of autonomy *qua* fact. It may also be true that the existence of the rule of law entails a certain development of autonomy *qua* fact, to the extent that the rule of law *trains* that human capacity and increases our knowledge of the world (as it enables us to predict certain facts that were not predictable before, for instance, how officials will behave). But it does not follow that the capacity for autonomy *qua* moral ideal will thereby increase in any way. All that can be said here is that if the rule of law entails a certain development of autonomy *qua* fact, and if autonomy *qua* fact is one of the necessary conditions of autonomy *qua* moral ideal, then the rule of law entails a certain development of one of the necessary conditions of autonomy *qua* moral ideal. If that certain development of autonomy *qua* fact caused by the rule of law is a necessary condition for autonomy *qua* moral ideal, and if it can be caused *only* by the rule of law, then the rule of law is a necessary condition for autonomy *qua* moral ideal. Such reasoning may be appealing, but it leads us to the second argument, the argument of the necessary condition, to be analysed in section III.

II.4 Formal Justice and Disappointed Expectations

Yet it might be objected that the rule of law is a sufficient condition for autonomy in this sense: Once a legal rule is enacted, it generates an expectation; if the legal rule is not properly applied when the time comes for it, then the expectation is frustrated, and frustrated, or disappointed, expectations are signs that autonomy (*qua* moral ideal) has been harmed.

This would be true for every legal norm, even if it is unjust. We may call such a line of reasoning, the argument of formal justice, as it is formal justice that is at stake, understood here as "congruence between official action and declared rule." Formal justice is a component of the rule of law, the eighth element of Fuller's inner morality of law. Therefore, conformity with the rule of law requires respect for formal justice. If this occurs, expectations raised by the enacting of rules will be met and thus autonomy will be respected. See, for instance, how Campbell expresses the value of formal justice:

> In the case of an arbitrary rule that redheads in the workforce be paid an extra day's wages each week, it is felt to be formally unjust if some redheads do not receive the unmerited and discriminatory benefit while yet other redheads do receive the benefit. The idea is that the inconsistent application of benefit-or-burden-allocating rules is not a mere technical inefficiency or logical inconsistency, but an actual type of injustice which is quite distinct from the type of benefit or burden in question and from the reasons for having the rules in the first place. What is at stake, it is argued, is simply a matter of the justice of treating like cases alike. (Campbell 2001, 31)

Let us dwell for a moment on this example, as it is possible that in so doing we reach a better understanding of the sense and worth of the argument of the sufficient condition. At first glance it seems that redheads who do not receive the unmerited and discriminatory benefit have a right to complain because other redheads do receive the benefit. They can say: "We are aware that the rule is unjust but, once enacted, it is also unjust not to apply it consistently, because we developed an expectation and now it has been frustrated, thus reducing our autonomy" (one of them might have asked for a loan and now she cannot pay the instalments, another one might have planned to spend his holidays in an expensive place and now he cannot afford it, and, besides, it is too late to find cheaper accommodation; and so on).

They are right to complain because this particular rule raised a genuine expectation of greater autonomy (the extra day's wages can be so considered). Certainly, it may be the case that the employer has not applied the rule consistently because of respectable reasons, for instance, because he or she wanted to benefit other workers who needed the money more than our group of discriminated redheads. If this is the case, then the employer may have acted justly, but this action does not mean that the group of discriminated redheads' autonomy has not suffered. It only means that the benefit granted to the other group of workers is greater than the harm done to the group of discriminated redheads or, in other words, that the autonomy gained by the other group of workers is greater than the autonomy lost by the group of discriminated redheads. So the employer may have acted justly, but the redheads' complaint remains. Clearly, the right course of

action on the part of the employer might have been to apply the rule consistently, if the balance between harm and benefit had been the opposite, either (1) taking into account only the interests, needs and merits of the immediately concerned workers, or (2) if, even though in the specific case it was more just to misapply the rule, it served justice better in the long run to apply the rule consistently in every instance. It may be the case that the pro-application balance occurs more often than the anti-application balance; that is perhaps why Rawls thinks that "even where laws and institutions are unjust, it is often better that they should be consistently applied" (Rawls 1973, 59). But what is important to bear in mind now is that, even in the case in which the employer acted justly when misapplying the rule, the redheads do have a right to complain.

The reason why they have a right to complain is not the one pointed out in Campbell's last comment ("what is at stake, it is argued, is simply a matter of the justice of treating like cases alike": Campbell, 2001, 31). Treating like cases alike is just, but in the redheads' example there is no reason to suppose that like cases have not been treated alike. We can only be sure that cases that the rule considers to be alike have not been treated alike. Yet cases that a particular rule considers to be alike are not necessarily so. It may well be that it is the employer who has treated like cases alike by misapplying the rule. What is at stake then is not "a matter of the justice of treating like cases alike" but a matter of respecting autonomy by respecting previously raised expectations.

So, if the discriminated redheads' complaint is still there, does it not mean that the argument of the sufficient condition is correct? Is it still possible to counter the argument? Let us recall that, as we established above, the redheads' complaint can be sustained because they suffered a curtailment of their autonomy. However, this is not always the case when a rule is not properly applied. The illustrative example is not that of a merely unjust rule, for many unjust rules enhance some people's autonomy when properly applied. So let us change the example. If the rule says that redheads will be paid a day less (instead of a day more), then what if the rule is not applied to some of them and, instead, they get the regular wages? They, for sure, will have no reason to complain; but what about the other redheads, the ones who pursuant to the rule were paid a day less? It seems to me that they do have the right to complain, not because the rest of the redheads got the regular wages but for one or two different reasons: First (at any rate), because the rule itself is substantially unjust; yet this does not have anything to do with the conditions of application of the rule, i.e., with formal justice. Second (only on some occasions), when it is the case that the rule has been applied on a substantially unfair basis, for instance, if the employer wanted to benefit blue-eyed redheads by paying them the full wage instead of a day less as the rule demands. However, let us stress that, in this or similar cases, the reason for the complaint is not

that formal justice has not been respected: It is that a new substantive injustice has been done (in addition to the one created by the rule itself). The situation would be different if the exception made was rightly based (for instance, if the employer wanted to benefit the poorest redheads); then, the second reason to complain would not apply, and this shows that this reason is not based on the violation of formal justice (because formal justice *is* violated whether or not the exception is rightly based), but on the substantially unfair manner in which they have been treated. And the same applies to the first reason.

So, regardless of whether only the first reason applies, or if both reasons do, our redheads have not experienced a decrease in their autonomy resulting from the violation of the rule of law requirements, even if an expectation has been frustrated. Their autonomy did not decrease as a result of the violation of formal justice because they had never expected to receive the wages which they indeed did not receive. And the frustrated expectation consisted in their belief that *none* of the redheads would get regular wages, whereas, contrary to this belief, some of them ended up getting the wages. The situation described is thus an instance of violation of the rule of law requirements with no decrease of autonomy. It shows that respect for formal justice does not necessarily enhance autonomy (for a violation of formal justice does not necessarily entail a decrease of autonomy). It therefore yields a further way for countering the argument of the sufficient condition.[14]

To summarise: (1) when a rule is not properly or consistently applied, then an expectation is frustrated or disappointed; (2) to frustrate an expectation is often a morally wrong action; (3) the reason for this wrong lies in the fact that autonomy has been damaged; (4) sometimes there is a disappointed expectation, but autonomy is not damaged; (5) failure to properly apply a rule does not always harm autonomy because not every rule generates an expectation to be valued in terms of autonomy; (6) to ascertain whether failure to properly apply a rule will result in harm to autonomy, we have to look at the rule's contents; (7) formal justice, by itself, does not grant any degree of autonomy.

In fact, there was a shorter way of showing that the formal justice argument is not compelling, provided we take for granted what was argued in paragraphs II.2 and II.3. If the rule of law as such is not a sufficient condition for any degree of autonomy, then formal justice by

[14] *Mutatis mutandis*, a similar comment can be made about the following example: "[W]here—say in a death camp case—one approves of unprincipled exceptions and cheating exemptions that save lives, even at random, one ought (I believe) to concede that those who don't escape have suffered an extra injustice, they are both being murdered and are being unfairly picked on within a class of people who all ought not to be discriminated against, and who, being innocent, ought not to be killed" (MacCormick 1992, 123).

itself cannot grant any degree of autonomy, as it is just one of the requirements of the rule of law.

III. The Argument of the Necessary Condition

III.1 The Argument Stated

The argument runs as follows: The rule of law is a necessary condition for autonomy; but autonomy has a moral value; therefore the rule of law has a moral value. And it can be explained this way: If there is to be autonomy at all, there have to be rules of the legal kind, even if these rules may not be enough to grant by themselves a degree of autonomy. The existence of a legal system in good shape is fully compatible with the complete absence of autonomy; but the absence of a legal system in good shape is not compatible with the existence of any degree of autonomy. So, if the rule of law is a necessary condition for autonomy, the latter *transmits* its moral value to the former. It is worth stressing the difference with the argument of the sufficient condition. The latter argument is rooted in the belief that the rule of law always grants a certain degree of autonomy, and I have tried to show that this is not the case. The argument of the necessary condition is compatible with denying the argument of the sufficient condition. For it is based on the belief that, even if the rule of law does not by itself grant any degree of autonomy, a degree of autonomy is not possible without the rule of law. A weak version of the argument would depart from a different premise: It may be that a *certain* degree of autonomy is possible without the rule of law, but a *decent* degree of autonomy is not possible without the rule of law. I will not take this possible qualification into account and will jointly analyse both versions of the argument since my reasoning applies equally to both.

The assertion that the rule of law is a necessary condition for autonomy is widespread. We can find instances of it in Fuller (1969, 157, 168), Rawls (1973, 236, 239–40), Raz (1979, 221), Waldron (1989, 85, 93) and Summers (1999, 1705). Bearing in mind Raz's account of the conditions of autonomy, we may wonder whether the rule of law is a necessary condition for the training of appropriate mental abilities, or of an adequate range of options, or of independence. It may serve all three conditions or just one or two of them, but I will not discuss this now, as it is of no import for my purposes. As for the affirmation of the moral value of the rule of law based on this connection, it is not always easy to tell whether authors make it or not. I would say that it is made by Fuller and Summers, and maybe also by Rawls and Waldron, but certainly not by Raz. At any rate, we are now concerned with the argument of the necessary condition as such, and we may thus disregard the sometimes diverging ways in which the argument is deployed by particular authors.

III.2 The Argument Questioned

The argument of the necessary condition can be questioned along two separate paths. The first one consists of showing that the conclusion does not follow from the premises (i.e., the inference is invalid). The second one consists of denying the first premise, that is, showing that the rule of law is not a necessary condition for autonomy (i.e., the first premise is false). I will pay more attention to the first of the two, as it seems more promising, and very little attention to the second, as it seems intricate, and moreover avoidable if the first one takes us where we want to get.

In order to question the inference, I will draw on the following principle: Necessary conditions of an action do not necessarily represent a feature of the action. A particular application of the principle would be this one: Necessary conditions of a moral action are not necessarily part of the moral worth of the action. This is easy to see in ordinary life: If I have the moral duty to visit my parents, then visiting them is a moral action; if the only way to visit my parents is by taking a train, then taking a train is a necessary condition to perform the moral action. But it does not follow that taking a train is, in itself, a moral action. Given our common knowledge of the world, we can say that taking a train is, in itself, neither a moral nor an immoral action. The morality, amorality or immorality of taking a train will depend on outside factors (but, of course, it is true that I have the moral duty to take a particular train in that particular case). This line of reasoning may be supported by the following passage from Moore's *Principia Ethica*:

> The part of a valuable whole retains exactly the same value when it is, as when it is not, a part of that whole. If it had value under other circumstances, its value is not any greater when it is a part of a far more valuable whole; and if it had no value by itself, it has none still, however great be that of the whole of which it now forms a part. (Moore 1971, 30)[15]

If we apply this line of reasoning to the argument of the necessary condition, then it turns out that the argument is not valid, as it contains an inference that cannot be accepted. The rule of law may be a necessary condition for the respect and promotion of autonomy, but it does not follow that, if autonomy has a moral value, the rule of law will have it as well. We may admit, for the sake of the argument (as we have been doing), that not respecting the rule of law implies a violation of human autonomy, freedom or dignity. But this alone does not provide the rule of law with any moral value whatsoever, because respecting the rule of law, in itself, does not imply respecting human autonomy, freedom or dignity. One has to be careful to distinguish between being a necessary condition for

[15] See a similar, Moore-inspired, way of reasoning in Flemming 1978, 273.

something and having its properties. Generally speaking, many instrumental actions are needed to carry out moral actions, but we are not allowed to attach to the former the moral worth we attach to the latter. And, as Moore shows, that is so not only if we are talking of *means* (to carry out a morally valuable action), but also if we are talking of *parts* that integrate a morally valuable whole (ibid.). We can wonder whether the rule of law is just a means to carry out the action of "respecting and promoting autonomy" or whether it is a part of the whole "respecting and promoting autonomy." But this enquiry will not contribute to solving our question: For Moore's caveat applies to means as well as to parts. In short, the argument of the sufficient condition seems to be an instance of the division fallacy, consisting in ascribing to the parts of a whole the properties of that whole, a fallacy described by Aristotle in his *Sophistical Refutations* (177a 33–177b 34), although there the fallacy is applied to the "division of words."[16]

III.3 The Rule of Law as a Necessary Condition for Violating Autonomy

Rousseau, in his *Du contrat social* wrote that "*le plus fort n'est jamais assez fort pour être toujours le maître, s'il ne transforme sa force en droit et l'obéissance en devoir*" (Rousseau 1966, 44).[17] If Rousseau was right, then we have found an additional way of showing that the argument of the necessary condition is not valid. The rule of law may be a necessary condition for the respect and promotion of autonomy, but it may as well be a necessary condition for certain violations of autonomy. For autonomy to be violated (or disregarded and not promoted) in a systematic and enduring way in our complex world, the rule of law is required. Without its help, certain gross violations of autonomy would not be possible. That is, without the help of a legal system in good (formal) shape it is impossible (or, at least, very difficult) to organize the violation of people's autonomy. This is what Hart pointed out when he wrote:

> The step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not. (Hart 1994, 202; see also Hart 1983, 353)

[16] Aristotle, *On Sophistical Refutations*. http://classics.mit.edu/Aristotle/sophist_refut.html.
[17] "The strongest is never strong enough to be the master unless he transforms strength into right and obedience into duty"; trans. G. D. H. Cole, http://www.constitution.org/jjr/socon.htm.

I have no doubt that, as Hart added, "this risk has materialized and may do so again" (ibid.), i.e., that law has been frequently used as a means to oppress people and may do so again, and oppression can be a good word to express the regular and widespread perpetration of flagrant offences to people's autonomy. Now we only have to accept that "the legal world" Hart is talking about is the world of the rule of law (or just accept that the legal world accommodates better to the ideal of the rule of law than the "simple form of society"), to conclude that, in certain circumstances, the rule of law is a necessary condition for the violation of people's autonomy.

If the rule of law is a necessary condition both for the respect and promotion of autonomy and for the systematic violation of it, that is, if the rule of law is a necessary condition for certain kinds of moral as well as immoral actions, this provides a further reason (to the one developed in the previous paragraph) not to attach inherent moral value to the rule of law on the grounds that it is a necessary condition for, or means to, or part of, the respect and promotion of people's autonomy.

Furthermore, it should be clear that respect for the rule of law in no way *guides* political authorities to morally correct ends. If this were true, it would qualify the previous claim that the rule of law is a necessary condition for oppression: The rule of law could not function as a necessary condition for oppression at least to the extent that it made it likely that political authorities would promote autonomy through law. There is simply no reason to believe that law-abiding authorities will tend to be justice-abiding authorities too, as Fuller thought. He claimed that respect for the law's internal morality was fully compatible with a variety of substantive aims, but not with *any* substantive aim (Fuller 1969, 153). He was probably right that some social goals are better attained by means of social ordering other than law (for instance, as he used to say, through managerial direction); but he also thought that some social goals were not compatible with the law's internal morality because of their wickedness and, more precisely, because they implied a lack of respect for people's autonomy. Yet, it is difficult to find a wicked end that cannot be reached through law *because* of its wickedness (slavery? death penalty? torture? genocide? destruction of a whole country?). Finnis, finding a core of good sense in Fuller's idea, has tried to put it in more precise terms, saying, first, that a tyranny will have "no reason" "to submit itself to the discipline of operating consistently through the demanding processes of law," if it holds in contempt the values (reciprocity, fairness, and respect for persons) to be served by such self-discipline; and, secondly, that "adherence to the rule of law [. . .] is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom of manoeuvre" (Finnis 1980, 273–4).

Concerning Finnis' first statement, it is worth noting what Finnis himself added: That this kind of regime may have "tactical and superficial" reasons

to comply with the rule of law. Then, what if those reasons are indeed "tactical and superficial?" Someone who acts on those reasons may well hold in contempt the values of "reciprocity, fairness, and respect for persons," and therefore not be guided by these values in determining law's substantive aims. Moreover, though this might be a less usual case, one may indeed abide by the requirements of "self-discipline" (rule of law) for reasons of "reciprocity, fairness, and respect for persons" and still disregard those reasons in his or her determination of law's substantive aims. In other words, Finnis' first statement can be accused of underplaying both the distinction between having a (good) reason and acting on that reason, and the distinction between acting on a reason on one occasion and consistently acting on that reason in further occasions as well. Differently put: The claim that the reasons that speak in favour of abiding by the rule of law also speak in favour of respecting autonomy (which in itself is questionable) is not sufficient as an argument to prove that, *as a matter of fact*, officials respecting the rule of law will also *tend* to respect autonomy in their determination of law's substantive aims. (This is not to say that Finnis' claim is meant, by him, exclusively as an argument to prove this point.)

Concerning Finnis' second statement, we can accept that adherence to the rule of law systematically restricts the government's freedom of manoeuvre. But this restriction, in itself, is not necessarily good (nor bad) from a moral point of view. The government's freedom of manoeuvre may be restricted by adherence to rules that are as evil as the government and, in this case, the restriction does not seem to have any morally relevant upshot. The efficiency of an evil government has little to do with its freedom of manoeuvre since many evils can (and often must) be pursued through the law. As far as I can tell, most governments, *tyrannical* or not, make use of legal and non-legal means to attain their ends, and they choose the former or the latter depending on many different factors, but I do not know of any enduring modern *tyrannical* government that has not made use of legal means. In short, as Shklar puts it, "the 'inner morality' of the law, far from imposing the rule of reason that it is supposed to create, may well serve to render political irrationality more efficient and more attractive to those who benefit from it" (Shklar 1987, 14); or, in Kramer's words, "evil regimes may find law an indispensable vehicle for their heinous ends. Not only can the workings of law fail to discourage wickedness, but they can be crucially serviceable for wicked objectives" (Kramer 1999, 44; he develops this point convincingly ibid., 62–71).

Things may be otherwise in a democratic or liberal or constitutional context, as Summers and Allan have pointed out, also trying to take the best out of Fuller. Summers considers that respect for the rule of law, in a democracy, "tends to beget good substantive law content in the law made, or at least not bad content" (Summers 1999, 1707); and Allan thinks that

Fuller's theory is to be rightly interpreted "as an exposition of the liberal or constitutional ideal of the rule of law" (Allan 2001, 61–2). They might be right, but if the rule of law or law's internal morality are to be valued only under certain political and legal circumstances, then this does not yield any proof in support of the argument we are dealing with, as the argument does not presume a democratic or liberal or constitutional context, whatever this may mean.

III.4 Does Autonomy really Need the Rule of Law?

I said I would not pay much attention to the second way of questioning the argument of the necessary condition. But let us at least show how such reasoning might go. It may be that the rule of law is not a necessary condition for autonomy. This could be stated if we believed that it is possible to order social relations without resorting to the law (for instance, through a non-coercive institutionalized normative system), but in such a way that everyone's autonomy would be secured as firmly and thoroughly as through law, or more (because it is not unreasonable to think that the fact that authorities did not resort to coercion would, all things being equal, increase people's autonomy). This is a controversial question and we need not deal with it if our first way of testing the argument of the necessary condition has already revealed a flaw in the argument. However, let us stress that it is hard to find conclusive evidence that people will never be able to live in a well-ordered society without law. It is at least as hard as it is to find evidence for the opposite claim. I do not regard the belief supported by Marx and his followers about the law vanishing at some time in the future as more foolish than the belief that there will always be law.

IV. A Conclusion and Some Prospective Remarks

IV.1 A Conclusion

The conclusion of this paper is that when trying to find foundations for the thesis of the moral value of the rule of law, there are two autonomy-based arguments available: the argument of the sufficient condition and the argument of the necessary condition. If my analysis of them is correct, neither of them provides enough support for the thesis.

IV.2 And Some Prospective Remarks

(1) To be sure, the conclusion we have arrived at is not enough to prove that the thesis of the rule of law's moral value is not correct. Other arguments are still ready to support it, such as the one that can be built on

the value of reciprocity between authorities and ordinary people: A reciprocity, it is said, that would be served by the rule of law. Or the argument based on the value of formal justice, a version of which I have analysed here, but which has still a second version, namely, the one that could be built, for instance, on a way of thinking like this: "[T]hough the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice" (Hart 1994, 213). Proving that the thesis of the rule of law's moral value is not correct would require not only an analysis of those other possible arguments that may support it, coupled with the conclusion that neither of them is valid, but also the articulation of a positive argument against the thesis. I believe that such a positive argument can be developed on the basis of the rule of law's purely instrumental value, showing that when there is the rule of law, it *only* means that a legal system is working well.[18] If the thesis were thus proved to be incorrect, then we would be forced to admit that only law's sources and substantive contents are relevant factors when we ask ourselves about law's legitimacy, and that there is no such thing as a formal or procedural legal legitimacy.

(2) To affirm that the rule of law has no moral value does not entail that it has nothing to do with moral duties. On the contrary, under certain circumstances of legal legitimacy, there may be a moral duty to promote the rule of law, a duty which applies in a particularly interesting way to lawyers (see, for instance, Gardner 2004, 178–81); and which is, as far as I can tell, too often neglected or poorly developed. So here is a task for legal ethics, a branch of ethics which should probably be rooted in the rule of law: The task would consist in identifying the ways in which lawyers, in their distinct roles, should serve the rule of law. We should remind ourselves that this duty (or, rather, set of duties) would arise only after an appraisal of the law's sources and substantive contents. If this appraisal is not made or cannot be made, then legal-ethical duties will have no foundation.

(3) The fact that the argument of autonomy has been used so often to support the thesis of the rule of law's moral value seems to reflect a degree of confusion between legal form and legal substance which is fairly widespread in standard legal thought. The rule of law has been attributed moral value on the basis of the sources and substantive contents of modern liberal law. But form and substance are different things in the legal context. Certainly, the fact that the moral significance of enforcing the rule of law principles finds (probably) its sole foundation in the law's sources and substantive contents has not always been overlooked. However, it is mostly demoted to brackets, footnotes or passing remarks. It therefore seems

[18] Corsale and Raz have developed compelling versions of that argument in Corsale (1979) and Raz (1979, 210–29).

useful that this fact should be restated and clearly spelled out, if only as an exercise of legal hygiene. Sometimes it looks as if lawyers, including legal philosophers, are trying, consciously or not, to give law (and thus legal work) a dignity which it does not, and cannot, have *per se*, thereby helping to elude the necessary analysis of the real and distinct features of any legal system, as well as the necessary reflection on the value of legal work in each different context. For it may turn out that not all legal work has the same moral value, even within one and the same legal system.

(4) Finally, it must be noted that the rule of law virtues, technical and instrumental as I intend them to be, may prove that *normative* systems generally (not only legal systems) are useful, or even necessary, for the respect and promotion of people's autonomy. If so, such virtues would not be distinctive virtues of legal systems *qua* legal, but virtues of legal systems *qua* normative. What has been said about Fuller's theory of the inner morality of law can be applied to a good number of rule of law theories: That is, that they provide "criteria of legality by which rule systems of many kinds can be judged" (Cotterrell 1989, 138), or that they are "best seen as an enquiry into some putative features of practical laws generally, whether legal or not" (Raz 1994, 180–1). It would follow that demonstrating the usefulness of the rule of law for the respect and promotion of autonomy would mean demonstrating the usefulness of normative systems in general—not the usefulness of legal systems in particular—for such an undertaking. It would also follow that any estimation of the usefulness of legal systems for the respect and promotion of autonomy should take into account (possibly as a qualifying factor) the distinct means that characterise legal systems, mainly coercion or, to use a cruder term, violence.

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