CHAPTER TWO

THE TWO ‘RULES OF LAW’ BETWEEN TRANSITION TO AND QUALITY OF DEMOCRACY

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Although there is a good traditional literature and a growing more recent one on the rule of law and democracy (see Magen and Morlino 2008), a number of key aspects still need to be spelled out when the relationships with democracy are empirically and more closely analyzed. Especially when we consider that the rule of law is a pre-condition for the analysis of democratic change and at the same time can be influenced by other institutional and non institutional aspects in established democracies, the complexity of those relationships becomes more evident, its salience can be immediately understood and some ironic features emerge as well.

This chapter builds on my previous empirical research experiences (Morlino 2003, Diamond and Morlino 2005, Morlino and Magen 2008) and a long, fruitful debate with Gianluigi Palombella, co-editor of this volume. It starts with a preliminary general definition of the notion of the rule of law and links it to other definitions provided in the present volume. In the first and second sections it is shown that empirical research can better be carried out if we provide different definitions of the same concept in relation to the two main contexts where an analysis of the rule of law is mostly salient, that is, the transition to democracy and the quality of consolidated democracies. Such a multiple notion can be useful for a better empirical analysis of the two phenomena just mentioned above. This point will be better clarified in the last section, where the rule of law will be seen in connection with two other democratic dimensions, accountability and responsiveness. A few short concluding remarks will point out the main aspects of theoretical analysis proposed here.

1 I would like to warmly thank my co-editor Gianluigi Palombella for what I consider a very fruitful interdisciplinary collaboration.
To anyone who has done any research or even just some reading on the topic it will be almost obvious that the expression ‘rule of law’ is afflicted by an extraordinary divergence of understandings. It is a highly contested term that is at the same time evolving in the use made by practitioners and scholars from different disciplines. I would like to start here from Palombella’s contribution to this volume (see ch. by him), where the rule of law is viewed as a credible limitation on arbitrariness and a safeguard of individuals and minorities only when, within legal structures and institutions, a dual track is available or gradually developing in existing positive law. Thus, there is some “other” law, which has slowly developed outside of the “gubernaculum” area, whose content and sources on a legal plane are neither under the purview of the ruling powers, nor can they be legally changed at their whim (as holds true, in different settings, from ancient English common law to the present western constitutional orders). Indeed, the latter might prove to have a sound and less ambiguous significance, connoting, from the legal vantage point, the principle of the supremacy of law, that is, the Ciceronian legum servi sumus, and entails at least the capacity, even if limited or very limited, to make authorities respect the laws.2

From a political science perspective, this is the core of a high normative notion of the rule of law that requires a corresponding empirical notion. Such an empirical, general notion cannot be only the actual enforcement of legal norms. As a first, key aspect, the rule of law is fundamental to achieve some sort of civil order, that is, a basic requirement for every democracy (see also Morlino 1998). Additionally, as Kleinfeld (2006) observes, in contemporary use the notion the of rule of law can refer to at least five meanings: (1) government bound by law; (2) equality before the law; (3) law and order; (4) predictable, efficient justice, and (5) public power respectful of fundamental rights.3 Consequently, it should be immediately clear that some of these meanings, i.e. especially the second, fourth and fifth ones, imply a pre-existing democracy whereas others do not. That is, the necessity to specify

2 For the minimal definition of the rule of law see Maravall (2002) and here at p. 47.
3 For a more developed discussion of this point see Magen and Morlino (2008, ch. 1), Belton (2005), HiiL (2007), Trebilcock and Daniels (2008, 12ff.).