(Rule of) Law and Development in Palestine

(Paper presented in the Colloquium on Law and Development in the Middle East and North Africa, Cornell University, Law School, April 20, 2010)

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Preliminary Notes about the Topic and the Paper

It is often the case that discussions on law and development end up being reduced to the role of law as *positive* law and development as *economic* development. As such 'law' is perceived as a 'command' emanating from certain authority, legitimate or at least effective, that takes – often but necessarily – the form of a piece of legislation, that is enacted – often but necessarily – by a legislature, that is elected – often but not necessarily. In that sense, 'law' is reduced to up-down '*posited* law'.

On the other side, the fact that development is reduced to economic growth explains why the insistence is not on particularity or identity (who we are or at least on who we want to be), but rather universality and possession (how much we have or at least on how much we want to have). According to such logic, 'worth' equals 'have'; not 'be'. What matters is the growth of products (GDP - Gross Domestic *Product*) and income (GDI – Gross Domestic *Income*), no matter what it takes for us to change and no matter what model we adopt. Those who insist, on the contrary, on the specificity and particularity of each nation (on who we "are") arguably find themselves more comfortable with the part of scholarship that effectively criticizes law and development as such, ending up calling it a form of modern imperialism.

This reductionist approach to law and development is pervasive, not only in the field, but also in scholarship. In fact, such a reductionist approach to law and development often makes sense in current state of affairs of modern societies. It is indeed characteristic of modern and complex societies to use legislation and top-down legal reform aiming at realizing specific political, economic and societal goals. It is also characteristic of modern

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The author profited a lot from auditing the course on the Rule of Law by Prof. Jeremy Waldron during Spring 2010 at NYU School of Law. Special thanks to Chantal Thomas and Steven Raga for revising initial draft.

societies to consider economic growth as an essential component to development, especially given the increasing interdependency between nations, and the importance of international commerce in local economies. It is accordingly completely 'normal' and completely legitimate for those who are on the field to be so interested in this process of "legal reform" aiming at facilitating economic growth, and it is completely legitimate for scholarship to dedicate energy and power for that purpose too.

The other side of the coin, however, remains largely hidden. The reductionist approach to law as 'posited law' leads inevitably to placing a central role to central governments in the 'law' part of "law and development", as a counterpart (the interlocutor, the other, etc.) to society, central to 'development' reduced to economic growth, thus leading to consolidating further the dichotomy between state – reduced to central government – and society, that tend to be defined in negative, as what is not government. This dichotomy is further consolidated between what is 'public' largely confined to what government does; and private confined to what society undertakes.

Accordingly this approach, while reducing both law and development, paradoxically expands these concepts to embrace two aspirational ideals, political in the first (Rule of Law) and economic in the second (free market). But, since law in "Rule of Law" is not only about 'posited law', but embraces the whole legal system, 'law' (in law and development) is often enlarged further to reach the whole system of government ('liberal legalism', or 'constitutionalism', etc.); and since the 'market' in "free market" is not reduced to the economy, development is often enlarged further to reach the whole society ('capitalism').

The above may have added more confusion to "law and development", both whenever it is used to refer to that phenomenon in which international organizations (mainly post World War II) encourage, or impose on, states to effectuate legal reform as a pre-condition for receiving international aid (that I will call for a matter of convenience, "Law and Development as Practice"), or as a field of study (that I will call for a matter of convenience, "Law and Development as Scholarship").

It is possible for example that in "Law and Development as Practice" international organizations will limit their concerns towards effectuating changes in domestic legal systems (the assumption here is that the legal system matters for economic growth). This is what happened in many countries; and it is often the case that reproaches done to "law and

development" (from within the liberal tradition) is largely related to such a reductionist approach to Law and Development, whenever it leads to consolidating a "Rule of State Law".[1]

It is possible nonetheless that Rule of Law is invoked. This time however, the concerns are different. This political ideal whenever incorporated forms a guarantee for the establishment of a free market (the assumption here is that free market is necessary for that country to realize a growth in GDP and GDI, for which some changes in the legal system were needed at first place). Again, it is possible to show from different third world countries the insistence on the need of a "Rule of Law State".

A third level is possible though; one that does not seem to be primordial until now in the "Law and Development as Practice" and for that reason largely unexplored. It is a concept of Rule of Law that goes beyond the imposition of certain restrictions on the making of rules, that establish rule through and by law, but also in the way the government governs, i.e. constitutionalism. The discussion with regards to what comes first (Rule of Law or Democracy and Human Rights) fits largely in here.

On the other side, the involvement of governments in such a largely voluntaristic enterprise (unless one considers that a choice done based on need is not a choice at all, which is not my case) may be motivated by their interest in the growth of their GDP and GDI as such. They may not be interested in free market, although they may be open towards it as a possibility, and they may have more or less strong opposition to capitalism as an economic and social system. It seems that the interaction between those different variables may take a defined shape that may look like this:

1. The Rule of Law is presented as a guarantee for a free market to be established;
2. The free market is necessary for economic growth;

[1] I make a distinction between "Rule of Law State" and "Rule of State Law" in the way described by Robert Cooter (1998, 191): "*In a rule-of-law state the law is consistent with social norms that embody citizens' sense of justice, and the law is obeyed out of respect. Under such a system private citizens supplement official enforcement of the law, which is critical because officials lack the information and motivation to enforce the law effectively on their own. In a rule of state law, by constrast, people disobey the law or they obey it out of fear of punishment. The rule-of-law state facilitates economic development; the rule of state law impedes it. The policy implication for the World Bank and other development institutions is that technical legal assistance should focus not on establishing new codes and regulations but on developing intermediate institutions and a community of judges, lawyers, and scholars that can shape law so that it conforms to reality.*"

3. Economic growth requires and often may cause changes in domestic legal systems, often by *posited* law;

4. Change in existent laws set up a Rule of Law system.

It is clear that this equation is based on a lot of assumptions that need to be proved right or wrong by empirical data provided by "Law and Development as Scholarship". Similarly, comparative studies may help in individualizing how "Law and Development as Practice" worked out in X country and show the necessary for it to work out in Y country. In any case, what seems at first instance a closed circle, a model that is ready to be exported and applied elsewhere, is in reality different outputs depending on the possible combinations between the variables in the equation; here are some examples:

Case (1):

- It is possible that for the sake of Free Market, a process of comprehensive changes in domestic legal system is put in motion;

- This change in domestic legal system occurred without respecting principles set up by the ideal of Rule of Law but is limited to changes in legislation;

- Accordingly, changes in legislation do not lead to free market;

- Most importantly changes in legislation may not even lead to the desired economic growth that justified the change at first place (although it is not excluded a priori as a possibility).

Case (2):

- Rule of Law has requirements that need to be met by effectuating changes in legal system;

- It is true that Rule of Law is necessary for free market, but in order for a free market to be established, specific kind of changes in domestic legal system are needed and the respect of the formalities of the Rule of Law as such is not enough;

- The absence of a free market economy may hinder economic growth.

Case (3):

- Although the Rule of Law is a guarantee for Free Market it is possible that adoption of a free market as an ideal is established by imposition, or by supporting certain regimes (authoritarian regimes, for example) that permit the establishment of free market without respecting the formalities imposed by the Rule of Law;

- The cost of changes in domestic legal system is arguably reduced in terms of time and effort.

- This may even lead to economic growth as a possibility;

Notice however that both constitutionalism and capitalism are outside the equation, and that their inclusion may extend the equation, but may nonetheless fit within this same circular logic of the law and development. However, in "Law and Development as Practice" concerned actors seem to have already sacrificed constitutionalism, and insist that this has nothing to do with establishing a capitalist system. Since the Rule of Law is aspirational and since various conceptions of the Rule of Law are theoretically possible, they may encourage accepting a minimal conception of the Rule of Law. The tendency is strong, nonetheless, to maintain the free market at any cost, while insistence on the Rule of Law as such will depend on how much is needed for a free market economy to take place.

I contend that what took place in the Palestinian Authority after Oslo oscillated *grosso modo* between above Cases (1), (2) and (3). In earlier study I tried to show the deficiency of an approach like in the first two cases, that arguably took place after Oslo, for reasons that I called "structural", i.e. related to the nature of the Palestinian Authority itself.[2] In this study I intend to show the deficiency of an approach like in case (3). My reflection is accordingly centred not on the *law* as such (*posited* law) but on the Rule of Law. This is why I found it more opportune to change the title of this paper to better reflect its content.

I will leave aside (maybe for more competent scholars) to discuss other assumptions related to the relationship between rule of law and free market, free market and economic growth, legal rules and institutions and economic growth, etc. My objective, however, is to suggest that the Rule of Law has a role that goes beyond and independently from the free market. Besides, as a political ideal, the Rule of Law has a value in itself that is valuable regardless of realizing economic growth, and independently of the free market.

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[2] (Salem and Khalil 2007).

I will try to show how the establishment of the Palestinian Authority as such constituted a breakthrough for the possibility to establish the Rule of Law in Palestine after Oslo; to establish a system substantially different from the Israeli military government of the "areas" that fell under its control in 1967, deemed "occupied territory" by the international community. A systematic change in legal system had been undertaken since then. Those changes are *sine qua non* for the establishment of Rule of Law system. Those efforts of legal reform, I will argue, may lead to the opposite of what the Rule of Law is. The fact that such a process took place under the Palestinian Authority, while Israeli occupation persisted, is one of the main factors to reaching that outcome. The risk I will try to shed the light on is that Law and Development as Practice will end up supporting the establishment and consolidation of authoritarian regimes.

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I. Introduction

Regardless of attitudes one may have towards Law and Development as a field of study, or about the role of law in society in general or to the market in particular, in this paper I depart from a premise based on simple observation of facts on the grounds: as a matter of fact, law, and in particular *statutory* law, is used in contemporary states (and proto-state, as it is the case with the Palestinian Authority) to engineer societal change aiming at realizing public policies, that include, but are not limited to, "economic growth". Such change is often accompanied by a whole process of legal reform that goes beyond the legislature, to encompass the judiciary and the executive.

The first perplexity with such a process is a question that is often present in any process of change: If the change is the natural destiny of all institutions and legal systems, what are the motivations to use statutory law to effectuate such change? One possible explanation is that statutory laws intend to accelerate the process of socio-economic change, through planned process of legal reform and often in response to a crisis. This does not mean that goals that were set are necessarily realized; on the contrary. The Palestinian experience (and many other parts of the "third world countries" or "*les pays en voie de developpement*"), and despite the economic developmental goals present in Oslo strategies and discourses, legal reform in the economic sector was paralleled by continuous deterioration and dependency of the Palestinian economy.

The tendency to explain the failure of law in realizing its developmental goal by making reference to factors that go beyond the legal rules and institutions (making reference for example to existent structural and contextual impediments to development), beyond the law (making reference to institutional social and cultural obstacles), and beyond the local (making reference to capitalism as a form of creation of dependency of third world countries, or to

imperialism) is strong. Similar tendencies are existent in any discussion related to law and development in Palestine, and in other parts of the world.

This paper's goal is to contribute to such discussions by providing a critical analysis of the role and place of law in engineering social change, arguing that the "liberal legalism" approach may lead, not to liberalism nor to legalism, but to authoritarianism. Regardless of the possible positive impact of such a regime on economic development (if any), the risks accompanying the rise of such regimes go beyond the economy. They have severe consequences for state structure and societal dynamics, rendering law, not an instrument of social *engineering*, but an instrument of social *control*. This process makes the price of complying with rules higher, depending on the authority of the regime to maintain its power, and its capacity to make *its* rules effective. The fact that law is legislated by national authority, as opposed to an occupying power, does not make such an instrumental use of law to control society more attractive and less oppressive. In any case, the results of such an approach to law are so mitigated (in terms of realizing economic growth) that it makes it even harder for a utilitarian interested in the results to accept such an enterprise as a whole.

Most importantly, the fact that law is used by the national legislature for the purposes of social control makes it harder to find any effective difference between the law of an occupying authority (Israel since 1967) -- recognized by an increasing body of authoritative and prominent scholarship to have caused systematically not development but *under*-development and *de*-development – and law by a national authority (the Palestinian Authority since 1994). How can law be substantially different between these different regimes, if in both cases it will depend on force and coercion rather than social legitimacy or consent? What makes abiding by rules imposed by national authority in this way more attractive than rules imposed by an alien authority?

II. Is the Palestinian Authority – and its Law – Different?

During the Second World War, Lord Atkin famously contradicted Cicero's 2000-year-old dictum (*Silent enim leges inter arma*),[3] when he said: "In this country, amid the clash of arms the

[3] The laws fall silent amidst the clash of arms. Quoted in: (Barak 2003, 130).

laws are not silent. They may be changed, but they speak the same language in war as in peace."[4]

In contemporary states, it is rare to rule by brutal force, even in times of emergencies, threats to national security, and even in times of occupation. Israel indeed ruled West Bank and Gaza Strip using instruments of law and legality as one aspect of military occupation. Changes to local Palestinian legal and judicial systems were often introduced through military orders.

By contrast, changes to the Palestinian legal system since the 1994 establishment of the Palestinian Authority have been undertaken primarily through parliamentary legislation. As *posited* law, what make both enactments (military orders and legislated statutes) substantially different?

It may be argued that what seems *prima facie* to distinguish between both kinds of enactments is the participation or the absence of the governed themselves in the process of law making. Palestinians indeed were simply recipients of Israeli enactments or fiats, unilaterally adopted and vertically imposed on them. In the case of legislated statutes on the other hand, enacted by a national authority and by an elected body, Palestinians are somehow participants in the process of law making. In this account, it is the participation of the ruled themselves in the process of law making that makes the rule by legislated statutes substantially different from the rule by military orders. Democracy and democratic institutions, in other words, distinguish between both legal enactments.

This kind of argument is misleading, though. In fact, the above premises may serve to postulate a second conclusion, almost inevitable, i.e. in case of deficiency in the participation of the governed in the law-making process, the rule by statute by a national authority, would not be substantially different from a rule by military orders by an alien authority. Accordingly, there would be no substantial difference between rules set up by a non-democratic national regime and rules set up by alien authority, whether colonial or occupation authorities. This conclusion is somehow disturbing, but it is also contrary to the way international law deals with occupation on the one side and undemocratic regimes on the other. Most importantly it means that it cannot be ruled out, *a priori*, whether or not rules

[4] Quoted in: (Lowry 1992, 119). For a discussion, *see generally* (Dyzenhaus 2004).

by statutes are substantially different from rules by military orders, because one should first assess whether the law giver, in the case of a national authority, is the legitimate authority to make law. It is also impossible to rule out a priori what constitutes enough level of participation of the governed in the process of law making.

A second approach is possible; an approach that uses the goals targeted by the enactments as a criteria of differentiation, rather than the authority of their creator. Here, the law is a tool, not an objective; and the law-making is nothing else but the machinery for politics (as a result of the will or interests of the law giver). This approach takes the discussion to a different level, evaluating laws according to a single results-oriented yardstick. In both cases, indeed, the enactments are perceived as tools towards certain objectives; both may be accordingly evaluated and tested based on agreed standards or criteria. Such standards may include, but not limited to, whether the rules served the interest of the governed, or served as a colonial tool, for example.

While rule by legislated statutes might often result in different and better outcomes than rule by military orders, such an approach may not help to conclude definitively that the opposite postulation is excluded *a priori*; rather, this approach will be inclined to suggest a case by case analysis, where each statute and each military order needs to be scrutinized according to the agreed upon standards. Challenges to conventional narratives of legal legitimacy would arise if some of the military orders really served the local population, and that some legislated statutes are not adopted to serve national interests. In both cases, it cannot be ruled out a priori what the national interest is. This will lead us to conclude, that such an approach is unable to differentiate substantially between rules by statute, and rules by military orders.

A third approach is possible, an approach that looks at the way certain individuals exercise governmental power over individuals. Governing by rules and processes alone, rather than coercion and brutal force, may differentiate between both types of regimes. The advantage here is that the law has certain objectivity, regardless of the authority of its author, and regardless of the objectives or goals it may be targeting, or the interests they may be serving. The disadvantage is that it cannot provide a differentiating tool, since it is absolutely rare, in times of occupation and even in times of colonization, to govern exclusively by applying brutal force. The recourse to law and legality serves even in those extreme cases to facilitate

governability of the population, and reduce its cost.[5] Israel indeed used military declarations and orders to rule the territories occupied in 1967 (or to use the Israeli term, to 'administer the areas under its control').[6] This means that in both cases, in fact, the effective authority used rules to govern the population under its control, rather than brutal force (or at least reduced to the bare minimum the areas where brutal force was applied). Accordingly, this approach also does not provide adequate tool of differentiation between legislated statutes and military orders.

While there seems to be a tacit assumption that Israeli military orders are substantially different from the Palestinian Authority legislated statutes, the above examples show that there can easily be a disagreement about *why* this is so. Most importantly, there appears to be no interest in the literature to distinguish between both kinds of legal enactments. The fact that we assume it, rather than try to explain it, is significant. It may be explicable in two different ways: First, it is possible that for many people this may seem simply obvious to the point that explaining it may be considered merely a superfluous academic exercise. Accordingly, they simply assume that they are different, without further explanation. Second, others may be skeptical about the whole enterprise, *ab initio,* because differentiating between statutes enacted by a national authority on the one side and military order enacted by an occupation authority on the other side may suggest –indirectly but inevitably – that since comparable, they share a minimum of characteristics that justified the comparison at first place.

My postulation in this paper is that the assumption about a substantial difference between the two legal enactments is correct. My objective is to provide an account of the reasons *why* they are so. The (hopefully plausible) claim I make in this paper is that it is possible to distinguish between the rule by legislated statutes and the rule by military orders by making reference to the ideal of Rule of Law, as an ought-to-be law, which is, in my account, strictly connected to the concept of law, concerned with the nature of law itself, i.e. to what makes a

[5] The recourse to legality does not necessarily have a legitimating objective but may simply serve other objectives, such as the rationalization of oppressive policies where law is used to realize colonial projects, but also reflects the need of maintaining internal cohesion and morale or gain international approval for their policies. *See* (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 468-71). For Yuval Shany law serves as a discourse "[g]iven that law is generally respected in Israel." (Shany 2008, 7).

[6] As pointed out by Yuval Shany the fact that Israel is generally committed to the rule of law in its internal affairs, adds another important dimension to the assessment of the utility of the legal discourse in occupation-related matters." (Shany 2008, 7).

law, at first place, law.[7] Before that; however, let me set up the terms of my enterprise, which serve as premises for the arguments I intend to make in later stages.

First, in this paper, I depart from an understanding of both statutes and military orders in a very neutral way. For me they both represent legal enactments: (1) at a specific historical moment (accordingly I exclude any reference to rules that emerged over time, with the possible contribution of the judiciary or the administration itself) (2) by a law-giver (regardless of who is the law-giver, whether a national or alien authority) (3) aiming at creating new norms (regardless of the content of those legal norms) which are (4) enforced by the authority having an effective or at least the minimum of control over certain territory and certain populations (regardless of the goals they may be implicitly or explicitly willing to achieve).

Second, my account is based on a distinction that I draw between rule *by* and *through* law on the one side, and the Rule *of* Law on the other.[8] While the former are essential for the latter, if they are taken alone, this paper argues, the rule *by* and *through* law may lead to what is the complete opposite of the Rule of Law. This distinction will serve in later stages to distinguish between what I perceive to be Hart's position of a legal system which exists regardless of the

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[7] The fact that I connect the Rule of Law as an ideal to the concept of law means that I agree with Waldron's proposition that both indeed need to be grasped together, and that "we cannot really grasp the concept of law without at the same time understanding the values comprised in the Rule of law." (Waldron, The Concept and the Rule of Law 2008, 10).

[8] The rule *by* law means that the government itself subjects its will power to the constraints of the law and the rule *through* law means that the acts of domination must acquire the form of the law. For Preuss, those are the "twofold meaning" of the rule of law. (Preuss 1996, 16). However, as rightly pointed out by Jeffrey Kahn, the rule *by* law and the rule *through* law describe a political system in which statutes and other legislation are the supreme authority in the state by virtue of adherence to a formal legislative process of passing statutes and other legal acts." (Kahn 2006). For him, this system represents a *Rechtsstaat* but not a rule of law. In this paper we adopt a concept of the rule of law similar to Kahn, not Preuss. To my understanding, early positivist, such as the eighteenth century utilitarian theorist and reformer, Bentham, would have individualized principles needed for controlling the abuse of power. Hart for example believed that in Bentham work it is possible indeed to identify the elements of *Rechtstaat.* For him, those principles are now revived by natural law theorists (Hart 1958, 595).

Accordingly, it is possible to conclude that the rule of law goes beyond the limits imposed by the state itself in the way it makes laws, execute them, or apply them. In such a system, "the state is not the sole source of law and adherence to procedural formality is necessary but not sufficient for law to be made." (Kahn 2006, 364). This is why the evaluation I will make to both military orders and statutes is not done based on constraints imposed by the law giver itself in the way he decides to make law, execute and apply them, but rather on the basis of principles (or sets of principles), individualized to be forming the meaning of the phrase "rule of law".

inner morality of the law; while Fuller claimed that it is a sine qua non for a legal system to exist at first place.[9]

Third, while claiming that the Rule of Law provides a valid (paradigm for understanding and a valid) tool for differentiating between rule by legislated statutes and rule by military orders, I do not argue that the establishment of the Palestinian Authority automatically converted the legal system to a Rule *of* Law. Accordingly my point of departure is a distinction between the legal system on the one side, that can exist in any system (i.e. a system that uses law to rules to govern), and on the other side, the rule-of-law legal system.

III. What is (Rule of) Law?

I do not pretend to give an exhaustive answer to what the Rule of Law is (Nobody does!) or even to what the law is; there are indeed different approaches to and different conceptions of the law. In what follows I will provide two sets of principles that stand in completely opposite extremes; the first is held by legal theorists that are often grouped under the umbrella of legal positivism, with special attention to Austin, Kelsen and Hart (that I will call, for an issue of convenience, "Rule of Law tout court"), and the second is held by Fuller, and his insistence on the inner morality of law (that I will call, "Rule of Law as legality"), completed by Waldron's insight (that I will call, "Rule of Law as procedure").

In Austin positivism, law is a phenomenon of large societies with a sovereign (that can be one person or one group) who have supreme and absolute *de facto* power. Accordingly, law is nothing else but the sovereign command backed by threat of force or sanctions. Austin's sovereign seems to be the Leviathan of Hobbes, who is not Subject to the Civil Laws, since he has the power to make, and repeal such laws.[10] This means that law is law, regardless of the existence of a moral right to rule or whether the commands are meritorious.[11] As much as there is a sovereign, there is unity, and accordingly, there is a legal system.

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[9] See the famous debate of Hart and Fuller on Harvard Law Journal, (Hart 1958); (Fuller, Positivism and the Separation of Law and Morals - A Reply to Professor Hart 1958). John Quigley for example used Fuller's argument to argue that the Israeli military government of the occupied Palestinian territory, although used legality, cannot be considered as a legal system proper, but rather "a set of arbitrary rules" (Quigly 1981, 119).

[10] (Hobbes 1904 (1651), 190). *See generally* chapter 26 of Hobbes' Leviathon.

[11] (Green, Legal Positivism 2003).

Kelsen and Hart instead maintained that law is normative and must be understood as such.[12] The unity of the legal system depended not on the imperative character of rules and their connection with a sovereign's command, but rather in their linkage to each other.[13] Kelsen and Hart differed in the way they explained this linkage. For Kelsen, each rule is linked to another, in one chain of authority.[14] Hart considered law as the union of primary and secondary rules.[15] At certain point the inquiry regarding the linkage of norms, Kelsen stops and presupposes a (hypothetical) "basic norm". Such a norm, because foundational, is not a legal norm, and cannot be social fact (no "ought" from "is").[16] It is that last assertion that Hart rejects. Hart indeed seems to favor an empirical view of rules, rather than a transcendental one. For him, the ultimate criterion of validity in a legal system is social (secondary rules) that exists only because it is actually practiced (according to the rule of recognition).[17]

If we pose the above two questions to Austin, Kelsen and Hart, what tips can they provide him to proceed with his investigation? On the issue of the nature of the rules included in those enactments, I take Austin to be interested in checking out whether or not military orders and legislated statutes are the commands of the sovereign, backed with the threat of sanction. On the contrary, I take Kelsen to insist on investigating whether those enactments are issued by an authorized law-giver according to superior norm. Finally, I take Hart to be interested on investigating whether those enactments (containing primary rules) are coherent with the secondary rules, practiced and recognized as such by the officials.

As for the second question (concerning the obligation to obey or abide by the law), I believe the answer would be unanimous in refusing to rule out any moral obligation of obedience or disobedience. They may even agree on the possibility of having a moral obligation to disobey evil laws, but the core issue for them will still be the same: Law is separated from morality.

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[12] (Green, Legal Positivism 2003).

[13] For Kelsen, "[l]aw is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system. It is impossible to grasp the nature of law if we limit our attention to the single isolated rule." (Kelsen 2007(1945), 3).

[14] (Green, Legal Positivism 2003).

[15] (Hart, The Concept of Law 1961, 77-96)

[16] (Green, Legal Positivism 2003).

[17] (Green, Legal Positivism 2003).

However, as it least well pointed out by Hart, the separation theory need not to lead to the trap of legalism,[18] in which the insistence on the separation between law and morality is simply exploited to realize evil objectives, thus refusing criticism of bad laws in the name of "law as law". In any case, for legal positivists, I take them to insist, the fidelity to law is different from the nature of law, because law is separated from morality. Accordingly, a rule may fail the test of morality, but is still a rule of law.

The other extreme position on the spectrum is the one defended fiercely by Lon Fuller, who revived the tradition of natural law. For him, a rule that does not pass the test of legality is not a legal rule. Legality of rules depends on satisfying eight principles that Fuller individualized: law ought to be general, publicly promulgated, prospective, intelligible, consistent, practicable, not too frequently changeable, and actually congruent with the behavior of the officials of a regime.[19] A similar list is present in John Finnis writings, although with different order,[20] as much as in the writings of Joseph Raz.[21]

For Fuller, those principles constitute the *inner* morality of law. Since law is not separated from morality in Fuller's account, an immoral law is not law at all. It is "morality that makes law possible",[22] because "[t]o command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos."[23] It is not surprising then, based on that rationale given by Fuller of his eight principles, that other scholars reduced his list to one basic idea (law should be capable of providing effective guidance, such as in Joseph Raz[24]) or two (there must be rules and those rules must be capable of being followed, such as in Margaret Radin[25]).[26]

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[18] *See generally* (Green, Positivism and the Inseparability of Law and Morals 2008).

[19] (Fuller, The Morality of Law, Revised Edition 1969, 43), (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[20] (Finnis 1980, 270), cited in: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[21] (Raz 1979, 214-9).

[22] (Finnis 1980, 41).

[23] (Fuller, The Morality of Law, Revised Edition 1969, 37).

[24] (Raz 1979, 218), cited in: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[25] (Radin 1989, 785).

As a logical consequence of the second sets of principles, Waldron suggests to give due consideration of the way law is enforced on concrete cases. Simply stated, it means that law will be enforced exactly in the same way it was intended originally; thus individuals guided by rules, will not fall in the trap of law. In other words, once conflicts arise, justice will be administered impartially, and parties in conflict will not be disappointed by enforcing on them a law that is different from the one that have guided their actions at first place. Waldron suggested calling them procedural principles, as complementary to Fuller's principles,[27] that Waldron considers as being rather formal and structural in character.[28]

In my account, despite being separated apart from Inner morality of law, Waldron's Rule of Law as Procedure are simply fuller's other face of the coin, at least when Waldron consider those procedural principles as forming part of the formal conceptions of the Rule of Law. If, instead, Waldron perceives those procedural principles as requiring something 'substantive', such as fairness and non-arbitrariness, they may be in tension with the ideal of Rule of Law as legality, because they go beyond the formal aspect of rules and the way they were enacted.[29] Waldron himself refers to Dicey's account of the Rule of Law as portraying both

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[26] For a discussion of those different views, see: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154-5). I believe that those who try at any cost to interpret Fuller account *positivistically* miss the essential point that law is and cannot be separate from morality.

[27] (Waldron, The Rule of Law and the Importance of Procedure forthcoming 2010). Waldron even tried to individualize eight 'laundry list' that correspond to Fuller eight principles, a hearing by an impartial tribunal; a legally-trained judicial officer; a right to representation by counsel; a right to be present at all critical stages of the proceeding; to confront witnesses against the detainee; to an assurance that the evidence presented by the government has been gathered in a properly supervised way; to present evidence in one's own behalf; to make legal argument about the bearing of the evidence; to hear reasons from the tribunal when it reaches its decision; and finally some right of appeal to a higher tribunal of a similar character.

[28] (Waldron, The Concept and the Rule of Law 2008, 7).

[29] Waldron himself admits that: For the most part, there are two currents of thought sit comfortably together. They complement each other. Clear, general public norms are valueless if they are not properly administered, and fair procedures are no good if the applicable rules keep changing or are ignored altogether. But there are aspects of the procedural side of the Rule of Law that are in some tension with the ideal of formal predictability. The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontation with power. It requires that public institutions sponsor and facilitate reasoned argument in human affairs… By emphasizing the legal process rather than the formal attributes of the determinate norms that are supposed to emerge from that process, the procedural aspects of the Rule of Law seem to place a premium *on values that are somewhat different from those emphasized in the formal picture.*" (Waldron, The Concept and the Rule of Law 2008, 8) (Emphasis added). Since I will dedicate a section for substantive conceptions of the Rule of Law, I will refer to Waldron's insight in sections III and IV as being complementary to Fuller's Rule of Law as legality. It should be noted however, that Waldron had identified some features that are not being substantive features, because they simply related to characteristics that define "a mode of governance that takes people seriously as dignified and active presences in the world." (Waldron, The Concept and the Rule of Law 2008, 40).

the emphasis on the normal operation of the ordinary courts, as much as on the characteristics of the norms they are administered.[30]

If we pose the same two questions to Fuller and Waldron, what will be their insights? I take Fuller suggesting the need to check out whether the concerned rules pass the test of legality (the eight principles of the inner morality of law). If they do, then they are moral, and accordingly, they are law; if they don't, then they are not law at all. Waldron would not be satisfied by this inquiry alone. He would rather suggest continuing the inquiry on the way justice is administered. In case of moral law, there is no way to escape the simple conclusion that there is a moral obligation to obey moral law.

IV. Testing Legal Enactments

There are different examples in the literature that show how Israeli military orders fail the test of legality, based on one of Fuller's desiderata.[31] It is true that Fuller himself admits that the eight desiderata work as a system and, accordingly, he seems to agree that it is a matter of degree. However, in Fuller's account, some are more important than others, such as public promulgation for example.[32]

John Quigley since 1981 – reviewing Shehadeh's book on Israeli military orders applied in the West Bank– made explicit reference to Fuller principles, especially the one that states that a law ought to be publically promulgated.[33] In fact Quigely was fascinated by the book's revelation that "texts of the military orders that constitute legislation in the West Bank are inaccessible to the public and available only on a limited basis to practicing lawyers".[34]

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[30] (Waldron, The Concept and the Rule of Law 2008, 7).

[31] It can be argued for example that Israeli military orders imposing and institutionalizing discriminatory practices vis-à-vis local Palestinian population, and applying dual system of law directed towards local population on the one side, and Israeli settlers on the other (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 63-75). Israel also issued thousands of military orders and changed constantly the law, thus failing the principle of constituency and the stability of law. It is also by military orders that settlers were exempted from the Palestinian courts' jurisdiction. In 1980s, Israel established "municipal courts" for each settlement, rendering the settlers also *de iure* excluded from Palestinain courts' jurisdiction. *See* (Kassim 1984, 32). Through Oslo agreements, Israel and the PLO agreed to limit jurisdiction of the Palestinian Authority, excluding jurisdiction over Israeli citizens (*See* article XVII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995). Concerning legal status of Israeli settlers, *see generally* (Quigley, Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory 1998).

[32] (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[33] (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 119).

[34] (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 118).

Similar reaction appears in the forward made to the same book by Niall Macdermot, Secretary-General of the International Commission of Jurists.[35] This does not mean that Israel was not "legalistic"[36] or "legalized"[37]; on the contrary. It is often the case that Israel's policies in the West Bank and Gaza Strip passed through legal or legal-like enactments.[38] This explains the thousands of military orders adopted separately for both West Bank and Gaza Strip, in the first place. In this sense, Israeli rule was not different from colonial societies characterized by the reliance on law.[39] Based on the Rule of Law as Legality, military orders that do not pass the test of legality are simply not law at all. To Fuller's discontent, Hart was right.[40] The inner immorality of certain military orders changed nothing in practice to its being applied by courts, and continually enforced (Austin's trilogy of sovereign, command, and sanction are satisfied present). Most importantly, it is difficult to imagine the opposite, since all Palestinian judges since 1967 (until the establishment of the PA) were appointed by, and receive their salary from, the Area Commander,[41] and their functions are exercised under the supervision of the (Israeli) officer in charge of the judiciary.[42]

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[35] "There have been isolated cases, as in Chile, where one or two decrees of a military government have been treated as secret documents and not published. However, this is the first case to come to the attention of the International Commission of Jurists where the entire legislation of a territory is not published in an official gazette available to the public." Quoted in: (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 151).

[36] Shehadeh for example argued that: "Israel's occupation has been legalistic" (Shehadeh, Occupier's Law: Israel and the West Bank 1988, vii). "Israeli pronouncements have tended to be very legalistic, using expedients common to the craft of lawyers." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 4). George Bisharat argued: "Israel has since 1967 administered the West Bank and Gaza Strip through highly legalistic and strongly repressive military governments." (Bisharat, Courting Justice? Legitimation in Lawyering under Israeli Occupation 1995, 349).

[37] Yuval Shany noticed that one of the characteristic of Israeli occupation of West Bank and Gaza Strip is that it is "exceptionally legalized" (Shany 2008, 7).

[38] As pointed out by Anis Kassim: "By virtue of these Orders, Israel has changed, amended or repealed virtually every piece of legislation in these two parcels of Palestinian territory. These changes, primarily designed to serve the expansionist policies of the occupying power, have adversely affected, in turn the legal system, the judiciary and the law enforcement agencies in the Occupied Territories." (Kassim 1984, 30). For more about the Israeli changing modes of power and policies in the occupied Palestinian territories that go beyond the political proclamations, in which there was an attempt to expropriate the occupied land without fully annexing it (with the exception of East Jerusalem, which was officially annexed by Israeli Knesset, although deemed contrary to international law of occupation), *see generally* (Gordon 2007).

[39] *See* (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 496)

[40] (Hart 1958), making reference to Austin argumentations in favor of the separation between law and morality.

[41] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 77).

[42] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 76).

As rightly pointed out by Hart, rules of law, as separate from morality, should not be confused with the command theory.[43] For Austin indeed, it is possible that he would conclude that the Israeli Area commander – although subordinate to Israeli Military Defence Minister, and to certain limitations imposed by Israeli legal system as such (under the last scrutiny of the Israeli Supreme Court)[44] – has in fact sovereign power; maintaining the effective control of the areas, he is deemed as the supreme power. Accordingly, military orders are simply the command of the sovereign, backed by the threat of sanction. Hart nonetheless differentiated between the two doctrines of the early positivists, Austin and Bentham: the first doctrine is epistemological and related to the way one can trace the law, its source, and the second one is ontological, related to the nature of law. Hart then rejected the command theory, without, for that same reason, scarifying what he considers the pillar of legal positivism that is the separation between law and morality.[45]

In support of the positivist approach using "Rule of Law tout court", one can cite the simple fact that since the 1980s, Israel made a considerable effort to make those military orders available.[46] Many were still unavailable and unpublished, but the issue is that many deficiencies from the perspective of the inner morality of law could be accordingly ameliorated, and Fuller would be incapable of denying the legal character of an evil law, whenever his tests of legality are respected. The fact that many Palestinian judges and lawyers adopt the second approach (thus applying Israeli military orders) may constitute for a Hartian jurists to claim that there exist even a rule of recognition. Such judges and lawyers

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[43] (Hart 1958, 601)

[44] About the jurisdiction of the Israeli Supreme Court in its capacity of High Court of Justice, s*ee generally* (Farrell 2002-2003, 879-81); (E. R. Cohen 1986); (Weiner 1995).

[45] For Hart a legal system according to Austinian trilogy (command, sanction, and sovereign) is assimilated to a gunman saying to his victim, "Give me your money or your life." Then he simply argued that "[l]aw surely is not the gunman situation writ large, and legal order is *surely* not to be thus simply identified with compulsion." (Hart 1958, 603).

[46] "In 1982, fifteen years after the beginning of the Israeli occupation, the mitliary orders were finally published in their totality. Many of the secondary regulations as well as a number of orders made by virtue of the published orders, still remain unavailable." (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 151-2).

in fact seem to depart from the simple fact that the effective authority is Israel, as occupation authority, and sometimes Palestinian judges had to deal with those military orders.[47]

The hierarchical connection between rules, until a basic rule, according to Kelsen version, seems to be also possible to individualize. Israeli military occupation, according to a Kelsenian jurist, had created a new fact, that a jurist is not responsible of discussing, but simply observing as a matter of fact. This is what I understand from the insistence of Meir Shamgar (by then the Military Advocate General) on that the "proclamation [No.1 of 1967] was not constitutive but only declaratory."[48] In other words, with the Israeli Army entrance into the West Bank and Gaza Strip, what changed was simply the basic norm, the foundation of the new legal system. Such a view will deal with military orders as valid law as much as they are linked to superior norms and adopted according to the criteria and authority set up by that norm.[49] This explains also why State's attorneys justify Israel's actions in the territories that restrict the rights of Palestinians on the basis of the law of occupation, while at the same time consistently argue that the West Bank and Gaza Strip are not occupying territory.[50]

It seems that the discussion related to the applicability of international humanitarian law (whether Hague regulations, or Geneva Conventions)[51] fits perfectly in this context. Positivists would then rather suggest applying military orders that are adopted according to procedures and by the authority of superior norms (Kelsen), or by secondary rules (Hart). Even when a prominent Palestinian scholar, such as Raja Shehadeh, argues convincingly that Israel, through its military orders, went beyond its powers as occupying authority in

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[47] The West Bank attorneys, immediately after the beginning of the occupation, went on strike, "refusing to litigate in court while the Israeli army controlled the West Bank. Gradually, however, most have taken up law practice again." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 121).

[48] (Shamgar 1982, 14). For more about the way Israel assumed powers in the areas under its control, *see* (Farrell 2002-2003, 876-8).

[49] Shehadeh argued: "Perhaps the single most empowering order issued by the area commander, by which the commander assumed all legislative, executive, and judicial powers, is Proclamation No.2. This order was issued on the first day that the Israeli army occupied the West Bank. Having assumed the power to legislate without consultation in any form with the people to whom the legislation would apply, the Israeli commander became very prolific. Over forty orders of major importance were issued before the end of the first month of occupation." (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 152).

[50] (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 610).

[51] For a discussion, *see* (Hassouna 2001), (Imseis 2003)

international law of occupation,[52] it seemed that he is also using the same positivist/Kelsenian approach. Similarly the discussions towards the Israeli use or misuse of British mandate emergency regulations,[53] or about the applicability of Geneva Conventions,[54] international human rights conventions,[55] fits also within this positivist paradigm.[56]

For Israel, maintaining the "Rule of Law tout court" was clearly of concern, from the very first days (it is often not so in practice, but the intention and tendency seems to be there, at least since the 1980s). The two declarations that followed the first one cited earlier are in fact a possible example: Proclamation No.2 states the assumption by the Area Commander of all powers,[57] and, Proclamation No.3 created military courts.[58] Interestingly, as the Geneva conventions were supposed to apply, they were later on deleted, again, by a successive military order, and defended based on positivist approach to international law.[59] Emma Playfair pointed out: "The military government invariably seeks to defend its actions in the Occupied Territories with reference to legal provisions of principles, whether international or local law." [60] A similar attitude is also present whenever discussion about the occupation power to change local legal system,[61] and local judicial system.[62] Similarly, many of Fuller's principles would have been satisfied if the Israeli military Area Commander followed the

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[52] See for example discussion with regards to administrative detention, (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xi); (Rishmawi 1989). Other scholars inquires the respect of international humanitarian law by Israel, *see* (A. Cohen 2005); (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005).

[53] For a discussion, *see* (Farrell 2002-2003, 874-5)

[54] Insert discussion about the applicability of Geneva according to initial military orders.

[55] *See generally* (Harris 2008).

[56] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xiv).

[57] For a discussion, *see* (Farrell 2002-2003, 882).

[58] (Farrell 2002-2003, 879).

[59] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xi). For more about those military orders, *see* (Kassim 1984, 29-30).

[60] (Playfair 2003, 205).

[61] *See for example* (Benvenisti 1992).

[62] (Shehadeh, The West Bank and the Rule of Law 1980); (Shehadeh, Occupier's Law: Israel and the West Bank 1988); (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992).

guidelines present in the "Manual for the Military Advocate in Military Government", prepared in fact for that same purpose.[63]

Waldron's insistence on the concept of "Rule of Law as procudre" will take him to consider the way justice is administered, not only by Israeli military courts but by the Palestinian local courts themselves,[64] and the responsibility of the Israel, as an occupation authority.[65] It is in that sense that I understand the insistence of many scholars and human rights activists to ensure protection of Palestinians and the application of "due process" to their proceedings. It is also in that sense that I understand the preoccupation of Palestinian lawyers about the situation in which justice is administered in the territories under Isareli control. As a matter of fact, it seems that the intervention of the Israeli Supreme Court in several cases related to the Palestinians,[66] fits perfectly within this conception of "Rule of Law as procedure".

It is possible to show that the Israeli military orders have failed to establish such a system in which justice is administered in the way envisaged by the "Rule of Law as procedure".[67] The same fact that the law giver is the same judge undermines the possibility of realizing such an enterprise, despite the fact that Military Courts as such were established.[68] Similarly, Israel maintained police power, and the enforcement of courts' decision would depend on the

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[63] Such a manual for example provided that every enactment "must be drawn un in Hebrew and Arabic", shall "not come into force until published in written form", "must be published in an official series available to everyone", "no retrospective legislation was permitted", etc. *See* (Shamgar 1982, 30-1).

[64] For more about changes introduced to Palestinian Judicial System, *see* (Kassim 1984, 30-31).

[65] "There is a widespread corruption amongst the judges, who are appointed by the military authorities, and the police refuse to cooperate with the courts in ensuring that the accused or witnesses are brought to court or that the decisions of the courts are executed." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 7). "Shehadeh argues that the Israeli military government has effectively subjugated the Palestinian courts by controlling the judges and by removing significant categories of cases from their jurisdiction." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 120).

[66] Concerning the jurisdiction of the development of Israeli Supreme Court case law in civil cases, *see generally* (Karayanni 2009). While in many cases, the Israeli Supreme Court declined to subject Israeli government policies – such as the "targeted preemptive killings" – deeming it to be non-justiciable. (Ben-Naftali and Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings 2003, 235)

[67] *See generally* (Paust, Glahn and Woratsch 1990)

[68] "Judges in [Israeli Military] courts are Israel army officers (one with legal training, two without). The principal function of these courts is to try security offences, but they have jurisdiction over all criminal cases and do take some non-security cases, too." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 120).

military willingness to do so. Israel made use of security justification to exercise extensively and pervasively.[69]

Nonetheless, it is possible in abstract to envisage the possibility of ameliorating the way justice is administered under Israeli occupation in order to meet criteria set out by "Rule of Law as procedure". It is in that sense that I perceive the establishment in the 1980s of a "Civilian Administration" which institutionalized the civilian and military functions of the military government of the West Bank and Gaza Strip.[70] Such creation also resulted in converting military orders, from security measures, to essential part of the law of the land. The Area Commander gave the Head of the Civilian Administration the power to proclaim subsidiary legislation.[71] It is in that sense that I understand the acceptance of the Israeli High Court to hear petitions from Palestinian subjects.[72] It is in that sense too that I perceive changes in the way military courts functioned through time, and the attitude of Palestinian lawyers towards dealing with them at the first place.[73] At the same time, the Palestinian Authority may fail this test of Rule of Law as Standard, for the way justice is administered and the reticence of adopting a Judicial Law and the Basic Law itself (until 2002). Similar critics were raised by Human Rights Organizations concerning the establishment of State Security Courts, by Presidential Decree (later on abolished).[74]

V. Rejecting Formal Conceptions of the Rule of Law

The formal conceptions of the Rule of law do not provide an adequate tool for deciding on the nature of military orders, and the attitude towards them. Besides, such analysis is unsatisfactory because the above insights did not deal with the substance but only with the form of rules. A positivist approach to the Rule of Law is incapable of explaining the original sin of the new legal system, and the possibility of building legality over an illegal act of

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[69] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 9).

[70] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 69-70).

[71] Order 947, cited in: (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 88).

[72] *See generally* (Karayanni 2009).

[73] For more about Israeli Military Court, *see generally* (Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 2005).

[74] For a discussion of the State Security Courts, and critiques of Human Rights Organizations, *see* (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 72-5).

occupation.[75] The Rule of Law as Legality cannot escape recognizing a colonial law, or an apartheid law, whenever the standards of the inner morality of law are respected. Finally, even the Rule of Law as Procedure is incapable of dealing with 'justice' administered under occupation, the opposite of justice.[76] Indeed, there seems to be no reference to a particular content of those rules, to the legitimacy of the law giver, and to the goals that are realized by them.

For a Palestinian jurist (whether judge or lawyer),[77] it seems absolutely absurd to be neutral towards those enactments, simply because, as he may rightly observe, such military enactments are often used to realize colonial objectives, rather than Palestinian people's interest: land is expropriated from Palestinians,[78] where Israeli settlements are built instead,[79] water rights largely curtailed,[80] houses are demolished,[81] Palestinians are detained administratively,[82] targeted and killed without process.[83] It is also by military orders that

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[75] About the illegality of occupation, *see generally* (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005);

[76] Even the role of Israeli High Court of Justice may lead to undermining the fact of occupation. As pointed out by Martti Koskenniemi: "The acceptability of the use of discretion by a law-applying institution such as the Israeli High Court of Justice is based on the assumption that its preferences and moral sensibilities are broadly reflective of the preferences and sensibilities of the community in which it exercises its jurisdiction. When jurisdiction is exercised in conditions of occupation, however, such consensus cannot be easily presumed. On the contrary, recourse to moral pathos by an institution of the occupying power will appear to normalize its jurisdiction and add an element of hypocrisy to the felt illegitimacy of its possessing jurisdiction in the first place. Moreover, it will undermine the moral and political significance of the fact of the occupation, even diminishing the urgency of bringing it to an end." (Koskenniemi 2008, 13) (emphasis omitted).

[77] Although I dealt in this paper with those questions from the perspective of a Palestinian judge, similar questions can be raised with regards to legal responsibility and moral obligation of Israeli soldiers and officials to obey Israeli military orders. *See generally* (Osiel 1998).

[78] "However, it remains the preference of all Israeli authorities that land acquisition be carried out by "legal" means. The determination of the legality or illegality of an action can be arrived at only in relation to a legal framework." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 42). "Despite the dubious international legality of the changes made to the laws in force in the West Bank, it is these laws which Israel utilizes to transfer ownership of land from Palestinian to Jewish hands. When the legality of Israeli practices in this sphere is challenged, the legality or illegality is determined according to the legal order imposed by Israel since it has been occupying the West Bank." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 43)

[79] *See generally* (Quigley, Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory 1998); (Jiryis 1985); (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 579-88).

[80] *See generally* (Dillman 1989); (Scobbie 1994-1995);

[81] For a discussion of Israeli practice of house demolitions, (Farrell 2002-2003); (Halabi 1991);

[82] *See generally* (Rishmawi 1989).

[83] *See generally* (Ben-Naftali and Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings 2003)

freedoms (of movement, of religion, of the press, of opinion, and so on) are restricted.[84] It is through military orders that persons are denied re-entry to the West Bank and Gaza Strip,[85] access to East Jerusalem,[86] families are separated,[87] Palestinians denationalized,[88] workers denied access to their place of work, farmers to their land, and students to their schools.[89]

In other words, the three formal conceptions of the Rule of Law do not seem to deal with the core issue. Such conceptions of the Rule of Law, on the contrary, simply facilitated Israeli control of the Palestinian population and Palestinian land.[90] It provided the occupation power with a very sophisticated tool, law and legality, to realize what may be considered as basic rights of the Palestinians, as a people or as individuals. Besides, the Palestinian Authority legislated statutes may easily fail such a test set out by a formal conception of the Rule of Law, at least as a theoretical possibility. For Palestinian jurists the formal conceptions of the Rule of Law are simply not enough to differentiate substantially between legislated statutes and military orders.[91]

The formal conceptions of the Rule of Law seem to tell only half of the story. They do not tell us much about the rationales that justified at first place, the imposition of limitation or at

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[84] Through military orders, "Israeli military government […] imposed on [the Palestinians] long-term curfews that restrict their movement, and censored their newspapers." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 119).

[85] *See generally* (Khalil, Irregular Migration into and through the Occupied Palestinian Territory 2009).

[86] For more about the status of East Jerusalem under international law, (Tulman 1997); (Cassese 1986); (Hirsch 2005).

[87] *See generally* (Quigley, Family Reunion and the Right to Return to Occupied Territory 1992); (Khalil, Family Unification in the Occupied Palestinian Territory 2009).

[88] *See generally* (Kattan 2005).

[89] Most recently the building of the separation wall has aggravated the situation in the day-to-day life of Palestinian population of the West Bank. For opinion of the International Court of Justice concerning the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", issued on July 9, 2004, see summary of the opinion available at: http://www.icj-cij.org/docket/files/131/1677.pdf

[90] Bisharat argued convincingly that this is the case with acquisition of land. He argued that "the occupation administration's strategy in acquiring Arab land in the Occupied Territories has been, in its reliance on law, consistent with the approach taken to land acquisition in Israel proper." (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 526). In his many books and articles, Shehadeh provides different examples of how Israel used law to annex Palestinian land and expel Palestinian populations. *See for example* (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 4-5).

[91] Some even called the system with the opposite of Rule of Law (Mis-Rule of Law), *see* (B. Cohen 2001) referring to Israeli legal system's failure to prevent such atrocity to be exercised in the occupied territories; and (Emon 2003) referring to destructions effectuated by Israel of civil institutions, its settlement's policy, and its destruction of Palestinian economy.

least the imposition of certain restrictions on the law giver in the exercise of his main power to legislate, to *create* positive law. Departing from this insight, one may wonder, how can it be possible to read Fuller's insistence on the principle of the legality and use it as if it was simply an argument of technicalities of the way rules ought to be in order to be capable of being followed? Isn't it necessary to read that theory on the light of Fuller's understanding of what the law is and why it is so? "Every departure from the principles of the law's inner morality", to put it in Fuller's same words, "is an affront to man's dignity as a responsible agent." In other words, it seems that Fuller, for didactical purposes distinguished inner morality of law from external morality of law.[92] For that reason, is it possible, without undermining the whole enterprise of having moral law, to separate between internal and external morality of law?

Similar arguments can be said towards positivist conception of law as law. Isn't in the name legal certainty and predictability – thus avoiding to fall in the trap of rulers' whims – that positivists insist on their "Rule of Law tout court", rejecting any interference from outside the domain of the law? Isn't it the insistence on protection of individuals from arbitrary use of power that insistence on fair procedures in the administration of justice could be justified at first place?[93] Those and many other values, implicit to the Rule of Law, make it a fragile and contested ideal, but still attractive and crucial ones, "one of the most important political ideals of our time."[94]

VI. Law, Freedom and Rights

Both military orders and legislated statutes are indeed *human* made laws, thus, positive in nature. "Positivity is partly a matter of what law is: it is human, it is contingent, [and] it is the product of historical process."[95] As such, law is a mode of governance, it is accordingly susceptible to change and modification. Most importantly, the idea of law conveys an

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[92] *See* (Fuller, The Morality of Law, Revised Edition 1969, 153).

[93] For a discussion about those needs implicit in the discourses of rule of law, *see* (Waldron, The Concept and the Rule of Law 2008, 6-7).

[94] (Waldron, The Concept and the Rule of Law 2008, 3).

[95] (Waldron, The Concept and the Rule of Law 2008, 30).

elementary sense of freedom, because the norms we are governed by could be simply different.[96]

But how can freedom co-exist with law, which is, by definition, restriction on freedom? Montesquieu may answer with one simple word: liberty. That is the "power of doing what we ought to will, and in not being constrained to do what we ought not to will."[97] Such a liberty is fragile, and cannot exist when there is an abuse of power. Montesquieu concluded that liberty exists (i.e. freedom from abuse of power) only when powers are separated, and when power checks other power.[98] This makes his ideal type of the "Constitution of Liberty" possible.[99]

As a mode of governance, law, especially positive law, is strictly connected to the government, which is "an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest" or "the empire of laws and not of men".[100] For Harrington, a government for a nation is similar to the soul for a man. The virtue of government is law (equivalent to reason for a human being, not passion). Since human soul can give up its will either to reason or to passion – the one leading to felicity and the other to misery – liberty for a man consists in the empire of his reason. Similarly, it is liberty that makes a commonwealth a government of law, not of men. Since it uses rules (the government gives up its will to reason) not rulers' whims (thus giving up its will to passion). The Americans, much earlier than Montesquieu, had reached the same conclusion. To use Madison's words: "ambition" that "counteracts ambition".[101] To explain the genius solution of check and balance, Harrington uses the metaphor of two silly girls willing to divide and share a cake, "you divide" said one of the two girls, and "I will choose".[102]

The idea of freedom, thus of liberty, inherent to the idea of law, limits the government, in that it imposes restrictions on the way sovereign power is exercised. This limitation has sense

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[96] (Waldron, The Concept and the Rule of Law 2008, 31).

[97] In chapter of his "The Spirit of the Laws" (1748), *see* (Montesquieu 1777, 196).

[98] (Montesquieu 1777, 197).

[99] (Vile 1967, 93).

[100] (Harrington 1656).

[101] From Federalist n.51 (James Madison), *see* (Hamilton, Ray and Madison 2001, 268).

[102] (Harrington 1656).

only if explained by the existence of rights for individuals that are beyond the sovereign power of the government, before it, and independently from it. It is the idea of right, to use Tocqueville's words, that "enabled men to define anarchy and tyranny, and that taught them how to be independent without arrogance and to obey without servility."[103] One of those rights, a basic one, is property. Tocqueville himself, describing what he had witnessed in America, concluded: "As everyone has property of his own to defend, everyone recognizes the principle upon which he holds it."[104]

Interestingly enough, F.A. Hayek picks up this same idea of liberty, central to Montesquieu, and makes it the core of his theoretical construction of the Rule of Law.[105] However he uses this idea exactly to justify the need of abstention of the state from certain domains or areas, which are private, and need to remain so. Hayek's conception of liberty seems to be negative, since it can be interpreted as being the absence of coercion. It is nonetheless connected to individuals' autonomy and independence; i.e. individuals perceived as free agents. Hayek indeed perceives "the recognition of private […] property is thus an essential condition for the prevention of coercion,"[106] although not the only one. For Hayek indeed, the rule of law "stripped of all technicalities […] means that government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[107]

Hayek's conception of the Rule of Law (that I will call, for an issue of convenience, "Rule of Law as Freedom") perceives law in a similar way to the laws of nature that enable individuals to plan their lives accordingly. Predictability of the law, its character as being general, impersonal and stable, etc. become necessary characteristic of the law. This position, if taken to the extreme, means that many (or maybe all) contemporary legal systems may fail the tests

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[103] *See* chapter 14 of (Tocqueville 1831), available online at: http://xroads.virginia.edu/~HYPER/DETOC/1_ch14.htm.

[104] *See* chapter 14 of (Tocqueville 1831), available online at: http://xroads.virginia.edu/~HYPER/DETOC/1_ch14.htm.

[105] *See* (Hayek, The Constitution of Liberty 1960).

[106] (Hayek, The Constitution of Liberty 1960).

[107] (Hayek, The Road to Serfdom 1944, 54), cited in: (Raz 1979, 288). Raz pursued his analysis to show why he thinks that the conclusion that Hayek draws from that, according to Raz, show one of the fallacies of the contemporary treatment of the rule of law: "the assumption of its overriding importance."

of Rule of Law as Freedom. Most importantly Hayek seems to be reticent of using legislated laws, in a way that coerce agents' freedoms. It is in that sense that legislation, even by a democratically elected body, may constitute an obstacle to Hayek's conception of the rule of law. Hayek seems in a sense to be more inclined to encourage the development of law, not planning its creation. He seems to go exactly to reach the completely opposite conclusion of Bentham, who in the name of predictability, considered common law as obscure and customary law as "fiction from beginning to end",[108] which explains his attack on judge-made law, or case-by-case law.[109]

Dworkin's insight at this point becomes crucial. His conception of the Rule of Law is substantive because it seems to favor a commitment to a theory of rights.[110] Whenever a judge needs to decide hard cases, judges do not exercise discretion; rather he/she approaches law integrity[111] (that I will call, for an issue of convenience, Rule of Law as Integrity). In other words, Dworkin seems to be adding a new characterization for that agent that needs to apply the law - whether this agent refers to the individual that needs to abide by the law, and of the judge that needs to apply the law. Such free agent as Hayek would insist is also a moral agent. It is maybe this idea of integrity in both legislation (accordingly lawmakers try to make laws morally coherent) and common law (judges try to make laws adjudicatively coherent) that may favor at the same time codification and systematicity in law.[112]

VII. Legislated Statutes and the Rule of Law

The suggestion I made in this paper is that only a substantial conception of the Rule of Law can provide a valid tool for differentiating between both enactments. While rule by military orders by definition fails the tests of Rule of Law as Freedom and as Integrity,[113] the

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[108] (Bentham 1970 (1782), 103).

[109] *See* (Waldron, Retroactive Law: How Dodgy was Duynhoven? 2004, 639).

[110] *See* (Dworkin, Taking Rights Seriously 1977).

[111] *See* (Dworkin, Law's Empire 1986).

[112] *See* (Dworkin, Law's Empire 1986, 176-86), cited and discussed in: (Waldron, The Concept and the Rule of Law 2008, 44-5).

[113] As pointed out by Lisa Hajjar, "the law was utilized [in the decades of Israeli occupation] to dispossess and disempower rather than protect Palestinians. This fostered skepticism about law's positive possibilities." (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 75). For a discussion about human rights under the Palestinian Authority, *see generally* (Weiner 1995, 819-35).

Palestinian Authority commitment to law creation through *legislated* statutes constitute a premise, a necessary one, for the Rule of Law as Freedom and as Integrity.

The law-making through legislated statutes however, is a *sine qua non* of the rule of law. However, legislated statues alone are not enough. On the contrary, the fact that the PLO accepted to maintain military orders unless duly amended,[114] and most importantly, coexisted with Israeli Military Commander in the task of law making,[115] put the Palestinian Authority under a serious risk of committing two extreme, but related, errors: to assimilate with military decrees or to completely disassociate from them. In both cases, the danger is the same; that is to convert legislated statutes exclusively as a tool of social control that serve exclusively to coercing subjects, rather than providing an atmosphere necessary for free agents to exercise their liberties, free of coercion.

The Palestinian Authority, as a law-giver, risks at the same time, two different but intrinsically related tendencies. On the one side, there is a clear tendency to legislate law, as fast as possible, and in as many areas as possible. Hundreds of laws, decree laws, and bylaws were adopted since the establishment of the Palestinian Authority, even before the election of the Palestinian Legislative Council. The risk here is a tendency of the legislature to expand its power, to think that by legislation it is possible to create any law, covering any domain of individuals' life, without any restrictions whatsoever. Most importantly, the elected legislative body, may be willing to expand its powers on the expense of the executive or even the judiciary, and outside a principle which is theoretically included as a basis of the Palestinian Authority legal and political system; i.e. the separation of power. The non-sovereign character of the PA "exacerbates the perceived need and tendency to silence critics and repress political opponents,"[116] while at the same time renders accountability under international human rights treaties *de iure* impossible.[117]

On the other side, the Palestinian Authority seems not to exclude the rule by decree neither; accordingly, granting or maintaining a primordial role of the executive, especially the

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[114] *See* article XVIII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.

[115] *See generally* (Weiner 1995, 814-8);

[116] (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 76). For a discussion of the impact of the character of the Palestinian Authority on protection of human rights, *see* (Aruri and Caroll 1994, 9-12).

[117] *See generally* (Weiner 1995, 795-803);

President of the Palestinian Authority. Such a role is entrenched even in a written constitution-like *legislated* text, the Basic Law of 2003. Following the Hamas coup in Gaza in 2007, the declaration of the state of emergency by President Abbas, a technocratic government under Salam Fayyad was formed, and a new era of "rule by decree" was set in motion in the West Bank, surprisingly with the support of the international community, which saw in this situation an opportunity to realize reforms in many domains, including the security governance and public finance.

Those two risky tendencies may appear at first instance as being contradictory, but they are on the contrary, completely coherent. They are the result of the legacies that the Palestinian Authority had inherited; the first one of decades of Israeli occupation that did not come to an end with Oslo, and on the other the legacy of the PLO, a liberation movement. Military orders in fact are adopted by Israeli military "governors (whether personally or by those authorized by them), in their capacity of a law giver, executer and judge, at the same time. Accordingly, all authorities are concentrated in the same person. The PLO itself, although adopted theoretically three branches of government (the Palestinian National Council acting as a Parliament like body, the Executive Committee, chosen from within the Palestinian National Council, serves as a cabinet, and Military Courts), had such a concentration of powers in the chairman of the Executive Committee.

At the same time (and here is the most relevant distinction in my view, between military decree and legislated status), military orders is about creating law as rules, that leave as less as possible margin of freedom and choice for individuals, that regulate various aspects of social, economic, and political life, in a way that prioritize public order, safety and raison d'état. On the contrary, legislated statutes are interested in putting forward a framework of action, for state agents, and for individuals, to act accordingly, as free and moral agents.

It is my impression, although not in a measure right now to develop it or prove it, that the decades of rule by military orders may have contributed to the creation of this need for social control through regulation of social, economic and political life or at least the perception of it. This leads me to suspect that the decades of occupation somehow contributed to developing authoritarian system in the Palestinian Authority.[118] Not only from

[118] In a recent article with a significant title "Law against Order," Lisa Hajjar reached a similar conclusion, calling the PA rule as "autonomous authoritarianism" (Hajjar, Law against Order: Human Rights Organizations

the perspective of the authority itself, which undertake a systematic regulation of each aspect of individuals and groups life, but also from the perspective of individuals themselves, whether state agents, who need to apply the law, or individuals, who not only feel, but also demand, and insist in having clear and pre-established *legislated* rules. The result is acceptance and advocacy of formalism and statutory positivism, both dangerous risks for a healthy development and change of law to accommodate changing social needs.

Law, whenever enacted by a legitimate authority, merits our obedience. This attitude is somehow justified,[119] but it is nonetheless still within the same system that we have outlined as dangerous, i.e. authoritarianism.[120] Accordingly, it is possible to argue even in the case of a legitimate authority individuals need to approach law in their capacity of moral agents. Their choice is not the result of arbitrary exercise of discretion that undermines the Rule of Law because it subjected individuals' actions to whims of men. Rather their choice is justified by perceiving law as integrity.

Israel had used law and legality to rule the territories under its control. Using legality contributed largely to maintaining the occupation, illegal itself. Such a system of (Mis)Rule of Law coexisted with oppression, restriction of freedoms, and dispossession of rights. It led to the normalization of the 'exception' in the day-to-day politics.[121] The establishment of a *national* authority, while occupation persisted, led to similar attitudes towards law as means of social control. Largely as a result of Oslo agreements and the nature of the Palestinian Authority itself, public order and security prevailed over freedoms and rights. In times of occupation, laws have spoken; and they have spoken disturbingly loud. They were

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and (versus?) the Palestinian Authority 2001). For the impact of the inverted process that took place in the occupied Palestinian territories after Oslo and the impact on women rights, *see* (Ludsin 2005).

[119] This is the position of Hannah Arendt who believed that authoritarianism meant obedience to legitimate authority and hierarchy as a matter of acceptance of traditionally constituted, past authority. Cited and discussed in: (Henderson 1991, 390).

[120] The risk is to pass from substantial authoritarianism to formal authoritarianism, in the way distinguished by Lynn Henderson: "Authoritarianism has at least two different meanings: one simply of unquestioning obedience to authority, and one of obedience combined with the use of authority to repress, punish and oppress human beings. Obedience to authority itself might best be described as formal authoritarianism – it is solely concerned with the process of identifying authoritative commands or directions and then following them. Substantive authoritarianism, on the other hand, not only entails the process of obeying commands or rules, but also involves oppression and punishment." (Henderson 1991, 390).

[121] For a discussion of the character of international law of occupation as temporary and exceptional, similar to emergency times, *see generally* (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 605-8).

oppressive and pervasive of all aspects of individuals' lives. For those who live under the heavy burden of those laws, the language is still the same, as much as their mistrust.

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