

IS THE RULE OF LAW A LIMIT ON POPULAR SOVEREIGNTY?¹

*David Haljan*²

1. INTRODUCTION

Welcome to our quaint hypothetical, democratic, and pluralist state – let us call it “Herculeum”. The majority of the inhabitants are white and of a Christian background (whether practising actively or not), with the minority comprising a collection of other major and minor religious creeds, as well as atheists and agnostics. The full range of political views finds representation, from arch-conservatism, through liberalism, to socialism, and Marxism. It is also blessed with the standard organs of state provided for in a constitution (legislative, executive, and judicial), a constitutionally-entrenched bill of rights, and the ordinary principles and tenets of a modern constitutional democracy, such as representative and responsible government, the separation of powers, the rule of law, and so on. Indeed, Herculeum could be any or all of the current Western democratic states.

For whatever reason, things have become unsettled of late in Herculeum. A minority have become dissatisfied with the requirement that shops and businesses must close on Sunday – statutorily prescribed as a day of rest, but seemingly without any account for the particular beliefs and interests of that minority. If these wish to observe their respective faiths, they stand at a disadvantage to the majority, having thus to close two days rather than one.³ Others have ruffled feathers over such issues as the requirement that pharmacists cannot refuse to sell contraceptives or tie the sale to a moralising lecture or the acceptance of anti-abortion pamphlets⁴, or such as the acceptance of homosexual conduct and same-sex marriage.⁵ Would it truly be surprising then to observe that a number of lawsuits have been filed to challenge the relevant laws and rules, all claiming some form of breach of some constitutionally-guaranteed rights and freedoms? Hardly. But this is not all. The Herculeum courts have also been active in responding to challenges against various governmental acts, from the delimitation of electoral constituencies⁶, to committing military resources to conflicts abroad⁷, to the decisions to deploy various types of weapons.⁸ Judicial review of the constitutionality of laws and governments acts is alive and well in Herculeum.

¹ A somewhat reworked final version of this text appears as Chapter 16, in E. Claes, W. Devroe & B. Keirsbilck (eds) *Facing the Limits of the Law* (Springer Verlag, 2009) 273–298.

² *HiiL Research Fellow, Dep’t. of Constitutional and Administrative Law, University of Utrecht, and Senior Research Fellow, Institute for Constitutional Law, University of Leuven.*

³ See, e.g., *R v Big M Drug Mart* [1985] 1 Supreme Court Rep. 295, *Hy and Zel’s Inc. v Ontario (AG)* [1993] 3 Supreme Court Rep. 675 (Canada).

⁴ For reports on such US cases, see: <http://jurist.law.pitt.edu/paperchase/2007/10/settlement-proposed-in-illinois.php>; and related lawsuits in Washington State: <http://www.aclu-wa.org/detail.cfm?id=727>.

⁵ See, e.g., *Reference re Same Sex Marriage* [2004] 3 Supreme Court Rep. 698; *Lawrence v Texas* 539 US 558 (2003); Arrest 2004/159 (20 oct. 2004) (Belgium).

⁶ See, e.g., *Baker v Carr* 369 US 186 (1962), *Lucas v Forty Fourth Gen Ass’y* 377 US 173, but see *Vieth v Jubilireer* 541 US 267 (gerrymandering cases non-justiciable) (US); *Reference re Prov. Electoral Boundaries (Sask.)* [1991] 1 Supreme Court Rep. 158 (Canada); Arrest 2003/30 (26 feb. 2003) (Belgium).

⁷ For example, such US cases as *Lafitig v McNamara* 373 F 2nd 664 (1967) (CA DC), *Orlando v Laird* 443 F 2nd 1039 (1971) (CA 2nd Cir.) (cert. denied), *Sarnoff v Schultz* 409 US 929 (1972), *Healy v James* 408 US 169 (1972), *Holtzman v Schlesinger* 414 US 1316 (1973), (a selection of the anti-Vietnam jurisprudence); *Campbell v Clinton* 203 F 3rd 19 (CA DC) (2000), *Maborner v Bush* 224 F Supp 2nd 41 (DC) (2002) and *Doe v Bush* 323 F 3rd 133 (CA Mass) (2003).

⁸ For example, *Operation Dismantle v The Queen* (1985) 1 SCR 441 (Cabinet decision to allow testing of cruise missiles in Canada not unconstitutional), *Pauling v McNamara* 331 F 2nd 796 (CA DC) (1964) (injunction against US detonating nuclear weapons refused); *Greenham Women Against Cruise Missiles v Reagan* 591 F Supp 1332 (SDNY) (1984) (injunction against US deployment of cruise missiles in England denied).

To the perceptive observer, at least three critical elements underlie this idyllic picture of a democratic *Rechtsstaat*. In order of increasing significance, they are as follows. First, the courts are empowered to review some, if not all, laws and administrative acts. This refers not only to some conception of judicial independence, but also by implication to the separation of powers. Second, the standard of review – the normative metric – is one of law, and in particular constitutional law. The focal point is the constitution. This speaks to some active conception of constitutionalism. Third, and following, it is assumed that both citizens and state will defer not merely to the decisions of the courts, and obey and implement them, but also defer to and obey thus the mandates of law and constitution.

What makes this idyllic picture so peculiar, however, is the easy and seemingly uncontested acceptance of the third proposition in a democratic state. The fundamental characteristic of a democracy is to maximise the social freedom and equality of all its rational and autonomous participants, so that no restriction on that liberty and equality may arise except through a political process whereby those participants consent to (or participate directly in) the formulation and imposition of those restrictions upon themselves. Thus a Kant-inspired self-government is the hallmark of a democracy. And this is frequently translated into the phrase “popular sovereignty”: the people decide for themselves what their laws shall be.

But as we know, the actual practice of the democratic form only proceeds by way of majority rule. Given the endless diversity among people and their respective desires and interests, a standard of unanimity is unattainable. So for every restriction *cum* law, there will be a dissenting minority. Yet good democrats still consider these dissenters bound and compellable by that law. Is it then sufficient that the law merely issue from a constitutionally-prescribed process? That is, is the solution so easy as simply positing constitutional legitimacy *qua* validity?⁹ Moreover, almost every modern democracy has representative government, and citizens do not thereby have direct, active control in proposing and approving laws. A smaller group of officials, “members of parliament” say, propose and enact legislation, and that (perhaps too cynically) with their own voters and constituencies in mind. Matched with this distancing of the author and addressee of the law is the sense that “the problems of the modern state” are too complex and technical to allow for anything other than a managerial, technocratic approach of expert committees.¹⁰ In the result, the system of public administration has diminished the real and effective power of the ruler, by separating the decisions from the decider.¹¹ At the same time, it has also separated the decision from the individual affected, making it the decision of one to be applied to another.

Far from the “innocent” concept of popular sovereignty with direct and immediate effect, modern democracies exemplify a heavily institutionalised version in which the linkage between “popular sovereignty” and “actual power” is mediated through layers of rules and procedures. It is this constituted order, a system of rules and procedures, of institutions and organisations¹², which officials and citizens alike rely upon to justify any exercise of actual power. The actual exercise of political power in a (democratic) society must first pass through the optic of “being constitutional” in order to be recognised as legitimate, as an authentic expression of “popular sovereignty”. In effect the constitution symbolises popular sovereignty. And if we pursue this line of thought further, we should conclude that popular sovereignty can only find

⁹ F. Michelman “Constitutional Legitimation for Political Acts” (2003) 66 *Modern Law Rev.* 1 suggests persuasively that no such easy solution exists, let alone *a* solution. See also his “Ida’s Way: Constructing the Respect-Worthy System of Government” (2003) 72 *Fordham Law Rev.* 345.

¹⁰ The facts and arguments tracing the development of the bureaucratic welfare state need not be rehearsed here. See, e.g., G Poggi, *The State: Its Nature, Development, and Prospects*, (Polity Press, 1990), 30ff, 109ff and M. van Creveld, *The Rise and Decline of the State* (Cambridge UP, 1999) 128ff, 137, 239ff (bureaucracy and welfare), 258ff (“apotheosis” of the state), 354–377 (retreat of welfare).

¹¹ Poggi, *The State*, suggests that the state is in fact a cluster of “attributes”, being a series of agencies, each having various official functions, and various degrees of coercive power (including sovereignty).

¹² Drawing upon the definitions of “organisation” and “institution” proposed by A. Zijderveld, *The Institutional Imperative* (Amsterdam UP, 2000) 22, 31–39.

real expression in a constitutional language (“constitutional symbolisation”).¹³ This has the effect of limiting and qualifying it, with the result that popular sovereignty can only be articulated in and through the rule of law: the rule of law limits popular sovereignty in a democratic state. Or to recite the recent words of Canada’s Supreme Court in its advisory opinion on the constitutionality of provincial secession:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.¹⁴

To sum up, the rule of law would thus seem to limit popular sovereignty, in the negative sense of containing and harnessing its exercise, and in the positive sense of delimiting or defining it. But does this quick sketch of an argument clearly and sufficiently explain the idyllic practice of Herculeum, and the peaceful co-existence of social power and individual freedom?

2. THE PROBLEM OF BOUNDARIES

Let us re-cast the issue into broader, conceptual terms. In the long and turbulent history of social power, a state most conducive to peace, order, and general happiness among men, is said to be one ruled by and under laws which have been authored wholly by those who are themselves subject to, and administer, those laws.¹⁵ The expansion of peace and security over time would track the development of popular sovereignty – the will of the people. Constitutional law is the present articulation of that historical process by which a society would characterise and institutionalise the use and control of power among and against its members.¹⁶ As such it is delimited by surely two important principles: the will of the people and the rule of law.

These are interesting precisely because, at their convergence in constitutional matters, they represent an antinomy. The first principle establishes in general terms that citizens are collectively the only legitimate source of all legislative power, and thus the only legitimate author of any law binding them. The second establishes broadly that the author of the laws is an addressee, and that the laws bind authors and addressees alike.¹⁷ The piece is thus set for the question of sovereignty. For sovereignty consists in not being subject to any higher law than one’s

¹³ See the analysis of H. Lindahl “Democracy and the Symbolic Constitution of Society” (1998) 11 *Ratio Juris* 12 to this effect, drawing upon the work of Claude Lefort (mediation between an inner reality and an external ideal) and Ernst Cassirer (symbolisation as a means of understanding and conferring meaning).

¹⁴ *Ref. re Secession of Quebec* [1998] 2 Supreme Court Reps. 217, para. 67; see also paras. 71 and 72.

¹⁵ J.S. Mill “Considerations on Representative Government” in *Utilitarianism, On Liberty, and Considerations on Representative Government* (H.B. Acton ed.) (Everyman Library, 1983) 207.

¹⁶ Traced out in G. van der Tang, *Grondwetsbegrip en grondwetsidee*, Sanders Instituut / Gouda Quint 1998.

¹⁷ See, e.g., T.R. Allan “The Rule of Law as the Rule of Reason: Consent and Constitutionalism” (1999) *Law Quarterly Rev.* 221.

own will, which of course is mutable.¹⁸ This would suggest that sovereignty acts outside of, or independently of, any given legal framework. Yet the rule of law would clearly reduce sovereignty to an exercise of political will inside a particular legal framework. Hence popular sovereignty would exist inside, in virtue of, a legal framework.

At one level, the traditional antimony between the rule of law and popular sovereignty poses the question of where “politics” ends, and “law” begins. Is any boundary between the rule of law and popular sovereignty inherent in the concept of law, or does it merely represent a functional understanding relative to historical social circumstances? When and how should the law bend to popular will, and vice versa? We might reasonably be tempted to formulate answers thereto based on a conception of law categorising in advance its principal functions and characteristics. This approach offers the safety of having limits and limitations to the law already built into our analytic efforts. But at a deeper level, the antimony between the rule of law and popular sovereignty requires an answer to what we mean in this context when we speak of a “boundary” between law and politics. Our task becomes the reverse of that set out above, one perhaps seen as “re-inventing the wheel”. Rather than simply proceed from a pre-set category of limits and limitations, we should finish by formulating any limits and limitations afresh: why should there exist any boundary at all?

So to foreshadow what will follow, a signal point of conjunction between law and power *cum* sovereignty is the question of normativity. The modern approach is of course to treat each of law and sovereignty abutting at that point as competitors. Inasmuch as the one can be reconciled to the other, it occurs through the optic and language of sovereignty, where sovereignty subsumes law as its instrument. The law “limits” sovereignty only in terms of what the law itself can achieve. Beyond that, sovereignty must seek out other instruments, such as brute force, psychological tools, persuasion, and so on, to achieve its ends. Hence the limits here are “functional” or “instrumental” inhering in the *tools* used, and not “substantive” or conceptual attaching to the nature and ends of sovereignty itself. But what should be the result – if attainable – of erasing the borders between law and sovereignty, by unifying both through the normativity concept? Let us reconstrue the rule of law, and then sovereignty, through the optic of normativity to assess whether such a workable conjunction might resolve the tension between law and politics.

3. THE RULE OF LAW

The third proposition sketched out above in our picture of a *Rechtsstaat* (about obeying the law) does more than simply confirm the insight to the rule of law that it represents more than an instrumental conception of law as a tool of effective and orderly governance.¹⁹ The standard analysis parses the idea of the rule of law into two branches: (1) that the government ought to rule by law (“ruled by laws, not by men”) and (2) that to achieve this objective, laws must meet certain formal conditions relating to practicability and certainty.²⁰ Explicating the nature, scope,

¹⁸ W. Blackstone, *Commentaries on the Laws of England* (Facsimile 1st ed.) (S. Katz intro) (U Chicago P, 1979) Vol. I, 160; Bodin, cited in G. Sabine, *History of Political Theory* (rev'd) (Henry Holt, 1950, 406; A. V. Dicey, *An Introduction to the Study of the Constitution* (E.C.S. Wade intro.) (Macmillan/St. Martin's Press, 1967) (relying on Austin's theory); see also the essays in N. MacCormick, *Questioning Sovereignty* (Oxford UP, 1999), esp. “The State and the Law” 18–22 and “On Sovereignty and Post-Sovereignty” 127ff, and W. Wade “The Basis of Legal Sovereignty” [1955] Cambridge LJ 172 (restating the classical (Dicey–Austin) view).

¹⁹ Allan “Rule of Law as Rule of Reason” 229.

²⁰ For the bipartite *analysanda* of the rule of law, see e.g., J. Raz “The Rule of Law and its Virtue” in J. Raz, *The Authority of the Law* (Oxford University Press, 1979) 210, 212–218 (a reprint of (1977) 93 Law Quarterly Rev. 195), A. Marmor “The Rule of Law and Its Limits” (2004) 23 Law and Phil. 1, and P. Craig “Formal and Substantial Conceptions of the Rule of Law: an Analytical Framework” [1997] Public Law 467. The *locus classicus* for the conditions to be met remains L. Fuller, *The Morality of the Law* (2nd) (Yale UP, 1969) Ch.2: generality of proscription, publicity – publication, no retroactivity, clarity of proscription, internal coherence, no impossible proscriptions, stability, and consistency. Raz reconstructs that list in his

and nuances of those conditions has attracted the most attention, together with a concomitant and unexpressed premise that obedience to thereby formally valid laws follows more or less a matter of course. The principal benefit to those subject to law is thus having a clear and certain grasp of what conduct the law compels of all like subjects, so to facilitate obeying it.²¹ While the former is championed as reducing desultory discretion and arbitrary rule, the latter tags unobtrusively behind.

But this governmental, top-down perspective tends to overlook an important unexpressed premise. Not only does the rule of law bind addressees, but also the authors.²² It bears constant reminder that the rule of law has the bilateral nature of relating author and addressee through the legal order.²³ Both are equally bound to the law, and to compliance therewith. At a very minimum, the rule of law certainly imposes restrictions on the purposes and procedures a public authority may impose by and through the law. By that means, the rule of law would prosecute its principal objective of minimising arbitrary applications of power.²⁴ By respecting the boundaries to the exercise of power created by the rule of law, the state thereby seeks the assent of its citizens to the legal and political order. That is, in consideration for the state abiding by the limitations imposed by the rule of law upon its administrative capacity, it can expect in return that its citizens will generally abide by the law. So the conditions regarding predictability and certainty must guide as much the conduct of officials as that of citizens. Hence the bilateral nature of the rule of law does not reside in the formal effectiveness *per se* of its commands, but in a mutuality and reciprocity between the author of the law and its addressee in relation to obligation under law.

So if we ask, “Of what good is the rule of law?”, the above suggests our answer may be so simple as, “To facilitate our obeying the various rules of law in a coherent and regular fashion, to ensure public order and reasonable governance.” This belies somewhat the social complexity underlying such a response. We could, with Raz, expand on the reply somewhat so as to read it, in addition to limiting the risk of an arbitrary application of political power, as also stabilising otherwise erratic or unpredictable social relationships, and as providing “a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning”.²⁵ The insight above concerning reciprocity and mutuality assists us here. So our good citizens of Herculeum enjoy peace and stability because the conditions of the rule of law enable them to plan and manage their affairs under the law with (relative) certainty and coherence.

But then we should also continue to follow Raz along this path to his conclusion that protecting freedom, autonomy, and dignity represents the ultimate objective of the rule of law.²⁶ Raz does not have to commit himself to any one particular philosophic camp with this tripartite objective. Instead he would simply accept that the law intends to influence and affect decisions to act which presupposes that the subjects of the law are rational, deliberating upon their prospective actions, and autonomous, being free to choose or reject reasons and suggested acts.²⁷ A violation of the rule of law, such as in the inconsistent and desultory nature of arbitrary rule, offends against dignity and freedom by producing uncertainty and frustrated expectations. This

“Rule of Law” 214–218, departing in some respects from Fuller’s. Marmor “Rule of Law and Its Limits” also discusses a like list.

²¹ A central contention in Raz “Rule of Law”.

²² While even Dicey, *Introduction*, 193–4, 202–3, speaks of officials being bound by the law as an instance of “equality under the law”, he intends more to distinguish the UK from the continental situations where in the former the ordinary courts and general law have jurisdiction, rather than a specialised body of rules and courts.

²³ Namely, the entirety of that system which, in its various parts, creates, administers, applies, adjudicates law, etc..

²⁴ See, e.g. *Roncarelli v Dupelssis* [1959] Supreme Court Rep. 121 (per Rand J).

²⁵ Raz “Rule of Law” 220.

²⁶ Raz “Rule of Law” 220–222.

²⁷ Raz “Rule of Law” 221 (“respecting people’s dignity includes respecting their autonomy”), 222 (“rational autonomous creatures”), and taken up in Allan’s reconstruction of Raz along moderate substantive lines: Allan “Rule of Law” 235–237.

in turn leads to disrespect and disregard of the law and its organs.²⁸ Peace and order are thereby put at risk. So the peace and order enjoyed by the good citizens of Herculeum are actually reflections of their rational, free nature. Thus it would appear (following Raz) that the rule of law – and so, obedience to law – depends upon a rationality criterion and an autonomy criterion.

Now having undertaken this line of enquiry, there is really nothing to prevent us from pushing its boundaries yet further. If the immediate purpose of the rule of law and its criteria is ensuring obedience to a rule, then we have seen that an implied condition is that the addressee of the rule has the rational capacity to understand and comply (rationality criterion) and the will and interest to comply (autonomy/free will criterion).²⁹ There is of course an obvious, further condition that a rule in fact exists and is binding. In particular, the rule must have a normative character commanding certain conduct and thus claiming obedience on those terms. A rational, autonomous agent, such as the good citizen of Herculeum, has no reason to obey or comply with any third party stipulation not in accord with his own interest or desire (his own “will”, most broadly put) unless it is a command. Clearly some extra attribute to a mere iteration is necessary to impress compliance and obedience upon the addressee in that case. By way of answer, it is the nature of being an imperative statement, a normative expression, that offers the necessary and sufficient reason to obey, to comply. No other reason is necessary. Normative statements, to borrow from Raz, provide exclusive reasons for action.³⁰

Laws are characteristically normative, imperative, statements. Stipulations that merely state facts, or exhort and urge, or invite the auditor, are not understood to be normative because they do not mandate or command. Normative statements serve as standards by which conduct is approved or disapproved, is adjudged good or bad, conforming or non-conforming. Serving as an evaluative benchmark, they represent necessary and sufficient reasons in themselves to do or forgo certain acts. They demand or compel compliance. Legal rules and moral rules are the pre-eminent standard bearers for this class of expression. “Stores must close on Sundays.” “Discrimination based on race, colour, ethnic identity, sexual orientation, or other personal characteristic is forbidden.” These require us to behave in a certain way. Statements of fact, exhortations, or invitations may reasonably factor into such deliberations, but do not in themselves represent equally exclusive reasons for action. No demands for obedience inhere in these forms of expression. Indeed, such a demand is by definition inconsistent with an exhortation or invitation. And a statement of fact does not require us to undertake any action at all. “Shops in Herculeum are closed on Sunday.” “The military arsenal of Herculeum contains horrifically destructive nuclear weapons.” Obviously the context may require us to account for the fact in our deliberations, and so, guide the latter. But no obligation is articulated therein.

The reference to the context of the expression signals a further important aspect. The above explanation clearly emphasises usage, the form of the expression. But naturally the context in which these utterances occur is relevant too. It would present a peculiar state of affairs if, “Buy now, pay later!”, “Don’t miss this television extravaganza!”, or “Try some of the red wine!” demanded us to do what was expressed therein. Our understanding of the imperative style is not only conditioned upon the form of its expression, but also the context in which it is uttered. Indeed it is just that juxtaposition of an imperative context with the use of inapposite or unusual styles such as invitation or exhortation, which can create humour or social tension such as a veiled threat or hidden insult, a play on words or a poetic flourish, and so on.

²⁸ Raz “Rule of Law” 222.

²⁹ Points to the second of the two implied conditions (rationality and autonomy criteria): “Rule of Law” 221 (“respecting people’s dignity includes respecting their autonomy”), 222 (“rational autonomous creatures”).

³⁰ J. Raz “Legitimate Authority” in Raz, *Authority of Law*, 1, 17–20 (“exclusionary reasons”), J. Raz, *The Morality of Freedom* (Oxford UP, 1986) 53–62. and his *Practical Reason and Norms* (Hutchinson, 1976). See also S. Perry “Second-Order Reasons, Uncertainty and Legal Theory” (1989) 62 Southern Cal. LR 913 and M. Moore “Authority, Law and Razian Reasons” (1989) 62 Southern Cal. LR 827, esp. 854ff for critical evaluation.

Part of what we understand to be “the context” must also include the relationship between author of the directive and its addressee. Not only must the author have or claim the capacity to command, but the addressee must recognise or acknowledge that capacity. There exists a social context in addition to the bare factual, linguistic situation, that which is perhaps best and simply expressed as the power relationship between the parties. By “power” here, we mean at its broadest the capacity actually to alter a person’s behaviour or to cause a person to do or refrain from a particular act. It seems self-evident that we do not accept just anyone ordering us about. Adults do not generally recognise the authority of children to issue binding commands. And we do not follow the orders of just anyone. So this is undoubtedly a *social* context, arising in and through socialisation, rather than through some genetic or otherwise naturally occurring human attributes. Inasmuch as the relationship depends on socialisation and reflects the relative social power between the parties concerned, it therefore must presume some social *order*: an articulated construct of existing and developing interrelationships among people which distributes in varying degrees and arranges the exercise of social power across the range of participants.

Important for the rule of law arising from this social order premise is the claim of authority and its recognition. The addressee of the order must recognise the authority issuing the order as just such an authority: the critical perspective is that of the addressee.³¹ We can better understand why this is so by considering a number of interesting issues this proposition suggests. As a preliminary, we can assume without hesitation that the recognition of authority operates at two levels: content and status. That is, we evaluate an imperative statement both in terms of what it says, what it commands us to do, and in terms of who is issuing that command. So as a first question, what happens when we as addressees do not regard the content of the supposed order as authoritative? What we are ordered to do, so contradicts all that we believe and hold dear, or what we expect such an authority to command us to do. We need not search for obscure or extreme examples. Consider rather the Christian fundamentalist pharmacist who cannot fathom why the law would compel her to sell contraceptives.³² Or the terminally ill patient who may not choose when and how to end his own life.³³ Indeed, we can even refer to that perennial favourite of those who consider there to be no obligation to obey the law: the disregarded stop-sign in the otherwise lifeless middle of a desert.³⁴ Moreover, the response under the rule of law may well differ when only one or a few dissent, or when a substantial number dissent: civil disobedience or mass protest. And we should rightly enquire why the number of dissenting voices should make any difference at all. The second question pertains to questioning the authority of the person issuing the order. What happens when we as addressees do not consider the latter as an authority? Perhaps the most cataclysmic versions of this are secession and coup d’état or revolution. In the one, a group would reject the continuing jurisdiction of the state over them

³¹ Thus D. Hume, *Essays, Moral, Political, and Literary* (E. Miller ed.) (Liberty Classics, 1987) 109 “... [F]orce is always on the side of the governed, the governors have nothing to support them but opinion.” Cited with approval and developed by Dicey, *Introduction*, 77ff concerning the internal and external limits on sovereignty.

³² See, e.g., s.4 of the *Health Care Right of Conscience Act* 745 Illinois Compiled Statutes 70 (“No physician or health care personnel shall be civilly or criminally liable to any person, estate, public or private entity or public official by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.”), Illinois Governor’s Emergency Rule of 1 April 2005, and details of the lawsuit (*Menges v Blagojevich*), available at: <http://jurist.law.pitt.edu/paperchase/2007/10/settlement-proposed-in-illinois.php>. Related lawsuits in Washington State: <http://www.aclu-wa.org/detail.cfm?id=727>.

³³ *Rodriguez v British Columbia (AG)* [1993] 3 Supreme Court Rep. 519; but see *Gonzales v Oregon* 546 US _ (2006); *Schiavo v Schiavo* _ F 3rd _ (11th Cir., March 2005).

³⁴ W. Edmundson “Legitimate Authority Without Political Obligation” (1998) 17 Law & Phil. 43, 45 (and his note 4, listing others who have discussed the example); D. Lefkowitz “Legitimate Political Authority and the Duty of those Subject to It: A Critique of Edmundson” (2004) 23 Law & Phil 399, 415–416; W. Edmundson “Sate of the Art: The Duty to Obey the Law” (2004) 10 Legal Theory 215, 235.

and a defined territory.³⁵ In the other, the current governmental authority is replaced – usually by violent means – with another. It also conceivable to picture rebellion on an individual, or much smaller scale: civil disobedience.³⁶ And again, we should enquire whether the response does or ought to differ depending on the number of participants. All this leads us to a third issue concerning the nature of the addressee’s perspective to the binding nature of law. This probes the former’s active or passive character, its durability, and such like. Is the recognition of the authority of government and its organs a daily matter for us as addressees, in the nature of Renan’s “daily plebiscite”³⁷? Or is its exercise valid only once? And have we ever actually and really ever been asked to give our assent and recognition to the authorities commanding us?

Now we do not have to attempt an answer to these three complex and profound issues in order to understand what the underlying issue actually is. In fact the third question already began to lay it open. We had remarked above that if a stipulation already conforms to the addressee’s will, then it will be done regardless of any imperative iteration. The latter adds no determinative quality to the iteration. But if that stipulation does not conform thereto, then clearly some extra attribute to the stipulation is required to impress compliance upon its addressee. Hence the binding nature of the law only really comes into play when an addressee could realistically want to act other than as mandated. Put practically, the binding nature of the law is relevant and effective only when an actual or potential conflict exists with the will or interests of the addressee. At the point of conflict, the binding nature makes itself felt by impressing its authority upon the addressee. The binding nature, the law’s normativity, does not issue from its conformity to certain formalist criteria.³⁸ In fact these simply reflect a deeper set of normativity criteria – equally “law-oriented” – which ultimately ground our sense of obedience.

Thus the real nature of rule of law lies in the underlying conception of (social) normativity. Whether we concentrate on content, or competence, or consent, we must eventually, inevitably stipulate what constitutes “normativity”. That is the central idea common to all three. For each asks, from its own perspective, what is it that binds us? How does content, social status, or consent establish a duty or obligation to obey? Why we view certain commands, or certain commanders, as authoritative depends inherently upon some understanding – and practice – of normativity. It may be one based on the threat or application of violence, or on religious or humanistic grounds. It may ground itself in a some sort of solipsistic consequentialism or materialistic utilitarianism. We can lay out possible grounds so long as vocabulary and ideas permit. They all carry at their core a suggested answer to why we obey. And that core operates as the unarticulated, implicit premise to each and every legislative act, to each and every judicial decision.

4. BORDER CROSSING: FROM LAW TO SOVEREIGNTY

So where do we stand now? We should conclude from this that the interest in or act of obeying the law does not derive merely from the law’s formal characteristics, but also from its overall context and content. These two categories refer to how a law comes to be, what it purports to regulate and how, and the manner in which it is enforced. Both tie the law inextricably to social

³⁵ See, e.g., S. Caney “Self-Government and Secession: The Case of Nations” (1997) 5 J Pol. Phil. 351, 353; L. Brilmayer “Secession and Self-Determination: A Territorial Interpretation” (1991) 16 Yale J Int’l Law 177; L. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale UP, 1978) 13; J. Crawford, *The Creation of States in International Law* (Oxford UP, 1979) 247.

³⁶ See, e.g., M. Kadish & S. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford UP 1973).

³⁷ E. Renan, *Qu’est ce que c’est une nation?* (Conférence faite en Sorbonne le 11 mars 1882) “... L’existence d’une nation est (pardonnez-moi cette métaphore) un plébiscite de tous les jours, comme l’existence de l’individu est une affirmation perpétuelle de vie.” Available at: http://ourworld.compuserve.com/homepages/bib_lisieux/nation04.htm.

³⁸ Acknowledged in effect even by Dicey *Introduction*, 76–82 by virtue of his discussion on “internal” and “external” limits on sovereignty. See also J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford UP, 1999), 17–20.

circumstances, politics, and morality. Together, context and content represent the substantive underlay of the rule of law. Whereas the formalistic account of the rule of law traded freely upon that unarticulated premise, the substantive account begins to unpack its manifold levels through the ideas of justice and fairness.

We have here a choice in how we understand this substantive underlay. On the one hand, we may choose a fully substantive account of the rule of law, one which relies on a particular model or theory of justice.³⁹ They turn immediately to substantive theories of normativity. Questions of legality and validity are answered in respect of the justness and moral content of the law. On the other, we may choose a substantive procedural account, one which relies on a model of such “procedural goods” as equality, participation, fairness, and so on.⁴⁰ These do not rely on any one conception of normativity, but rather develop frameworks wherein such conceptions can produce their just results. But whichever substantive conception of the rule of law can be successfully and persuasively elaborated, our attention has certainly shifted from the formalistic, instrumental characterisation of the law, to one based on substantive, legitimacy-oriented criteria.

Returning to the examples in Herculeum, the questions before the courts are not whether the laws have been duly passed by the appropriate legislative organ, but whether their application and their content meet societal notions of justice and fairness; that is, whether those proscriptions have (normative) legitimacy. In a constitutional law context, it is legitimate law which commands respect and obedience. So the binding force of law – its normativity – arises from the criteria of social legitimacy. Put another way, the relevant conceptions of normativity apply (or we articulate them) through the language of legitimacy. What those criteria are play into and represent the normative basis for the law and a legal order.

To understand this proposition requires an understanding of what “legitimacy” means and how it relates to normativity. Legitimacy pertains to the source, the nature, and the application of power. Less broadly perhaps, any exercise of social power (of which the law is one instance) must issue from a source and in a manner accepted by the addressees of that power. If the former is not accepted by its addressees, then it either evaporates as ineffective or represents acts of brute force. If the citizens of Herculeum ignored the Sunday-closing laws, or if Herculeum officials simply terrorised citizens into obedience by the free and easy application of violence, we could hardly speak of “legitimacy” in relation to the legal system and yet retain any semblance of credibility or reasonability.⁴¹ The term would carry no meaning there, for it would not characterise nor qualify the exercise of power in any way, other than what was already represented. Hence “legitimacy” does indeed warrant the power and its exercise as presumptively deserving respect and obedience.

Examined this way, legitimacy obviously delimits the normative. To lay claim to our assent and obedience, whether as official or citizen, requires some idea already of what and how such obedience may be sought and maintained. That is, normativity regards the dominant power relationships in a society. And this brings us neatly to our opening statement that a state most conducive to peace, order, and general happiness among men, is said to be one ruled by and under laws which have been authored wholly by those who are themselves subject to, and administer, those laws. Normativity of law resides in popular sovereignty. Is it so, then, that law, the rule of law, cannot therefore limit popular sovereignty?

5. POPULAR SOVEREIGNTY AND NORMATIVITY

³⁹ For example, R. Dworkin *Taking Rights Seriously* (Harvard UP, 1978) and *Law's Empire* (Belknap/Harvard UP, 1986) (to cite two prominent works) and J. Rawls *Theory of Justice* (Harvard UP, 1971) and *Political Liberalism* (Columbia UP, 1996) (to cite two prominent works), most notably, argue that the rule of law necessarily relies on context and purpose which are dependent for content on (a theory of) justice.

⁴⁰ As does Raz “Rule of Law”.

⁴¹ As with Dicey, given *Introduction*, 76ff, 202.

Let us set out on our analysis of sovereignty from perspective of normativity from the classic (English) definition of sovereignty by Dicey and Wade.⁴² In the context of parliamentary sovereignty, Dicey proposes that such is “... the right to make or unmake any law whatever and further, that no person or body is recognised by the law of England as having a right to overrule or set aside the legislation of Parliament.”⁴³ This conception parses into three elements. The first is the holder of sovereignty. Now the holder can be a single individual (e.g., a monarch) or body (e.g., “we, the people”, a “*pouvoir constituant*”) or a number of bodies (e.g., as in a federation). The second element is the scope of power exercisable. Obviously, it follows from the division of sovereignty among a number of bodies that each may exercise a co-ordinate jurisdiction but across different territory or people, or exercise separate jurisdiction across the same population or territory.⁴⁴ Again, the federation is the pre-eminent example of the division of powers.⁴⁵ The third element present in the Dicey conception is command and obedience: in short, power. This is, quite understandably, the core to the concept of sovereignty. It hearkens back to Bodin’s first expression of the concept as, “supreme power over citizens and subjects, unrestrained by law”.⁴⁶ As Blackstone has said, the sovereign Parliament can do everything that is not impossible.⁴⁷

Sovereignty does not, however, merely stand as a synonym for “supreme power”. We must also recognise two other critical elements in it. The first incorporates a boundary, or limiting factor: “relative to other competitors”. We can only sketch “supreme” power against a background of other possible holders of power who represent actual or potential challengers to that supremacy. Every power inevitably delimits the extent of its authority with that boundary serving to prevent encroachment by others. That limit to sovereignty serves to identify itself and other like powers. Little wonder then that the concept of sovereignty intended to, and continues to, serve the interests of the state internally (against fragmentation of power centres) and externally (against interference by other states).⁴⁸ Let us call this the “relativity criterion”. The second facet draws, perhaps obviously, upon “over citizens and subjects”. Power is wielded in a social context by someone over another.⁴⁹ Power is a human agency that necessarily implies an intersubjective relationship, between a commander and a follower. Of importance here is the aspect of *relating*, of different individuals associating in specific and recurring ways. As we had remarked above, power relationships come about through socialisation, rather than being natural or genetic givens. The social context reflects the existing and developing interactions among people, as they co-ordinate (intentionally or not, voluntarily or not) their common and respective interests and desires. How that co-ordination proceeds and what it results in, represents the

⁴² From the start, with the progenitor of the analytical concept of sovereignty, Bodin, the common departure point for most all such analyses: see, e.g., Goldsworthy, *Sovereignty of Parliament*, 9ff, 17, Wade “Legal Sovereignty”, and MacCormick, “Sovereignty and Post-Sovereignty” in his *Questioning Sovereignty*, 127 (though he tends more to Kelsen). For a more innovative approach, see M. Loughlin “Ten Tenets of Sovereignty” in N. Walker (ed.) *Sovereignty in Transition*, 53.

⁴³ Dicey, *Introduction*, 40.

⁴⁴ Delegated or overlapping powers do not qualify, because a non-exclusive attribution of power obviously subjects the one or other holder to the authority of the other.

⁴⁵ A regional (sub-state) population is subject to the jurisdiction of both the federal (national) government and the relevant regional (sub-state) government. All regional governments exercise co-ordinate jurisdiction over their respective populations and territories. We leave to the side the more complex, but nonetheless consistent, example of asymmetric federalism.

⁴⁶ Quoted in Sabine, *History of Political Theory*, 405, and analysed there from the optic of power relations. MacCormick agrees: “On Sovereignty and Post-Sovereignty” 127.

⁴⁷ Blackstone, I *Commentaries* 160.

⁴⁸ Sabine, *History of Political Theory*, 399ff. And thus, as prominent examples, *Charter of the United Nations* (1945) UNTS 993 and *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) (24 Oct. 1970).

⁴⁹ This recalls quite obviously the similar discussion above under “the Rule of Law”, namely, that the capacity actually to cause a person to do or refrain from a particular act they would otherwise commit obtains necessarily in a context of extant social relationships. This presumes some social order which distributes and arranges the exercise of social power across the range of participants.

particular expressions of power. Thus the social context represents the source and fund of not merely the power relationships, but of the expressions of power themselves; that is, what counts as norms.

Sovereignty, then, should not be understood in an unqualified sense of political power, absolute or otherwise. Rather, as an attribute of power, its characterising or delimiting the nature of the political power at issue through the relativity criterion and the social context criteria, emphasises its construction in terms of normativity. Those terms outline why we treat certain utterances as authoritative, as requiring our obedience. Sovereignty adverts to the authentic and original source of binding social norms. From the relativity criterion we get the boundary between those norms originating “inside” or “within” a given political association, and those, “outside”. An association generating norms internally is responsible only to itself (through its members) for maintaining and enforcing them. Thus Herculeum generates and observes its own standards of social behaviour, whether or not they accord with those of neighbouring states. From the social context criterion – inasmuch as “popular sovereignty” is in question – we get the boundary between norms originating from the people, and those from some other individual or entity. Only the former attract the character of binding. Hence to the extent of any conflict between the two, the latter must cede to the former. For example, pharmacists in Herculeum are bound to sell contraceptives despite any serious moral objection to contraception. So a normative understanding of popular sovereignty sketches out the source of binding social norms as being the members of a political association. Whether or not we invoke Kantian notions of self-legislation, nevertheless we as members of such an association are creating our own exclusive reasons for action. And we are responsible to ourselves for maintaining and enforcing those norms. So a normative reconstruction of sovereignty does not merely stipulate one authentic source for social norms. It resets our perspective on sovereignty from one of command to one of obedience, from the author’s perspective to the addressees’, and emphasises the nature of power as a social practice. Put another way, the normative reconstruction of sovereignty puts us to explicating the Hart-inspired “internal point of view”.⁵⁰

6. SOVEREIGNTY AND BOUNDARIES

Simply put, popular sovereignty means that citizens determine the content of the laws which bind them. Although variously expressed by different authors, the common element to each particular iteration of the principle is that citizens are both authors and addressees of the law. They themselves, not some other person or entity, determine what the laws should be. Implied in this statement is of course the twofold condition of democratic citizenship: participatory democracy and obedience to the law. If citizens may determine what laws are passed, then they must necessarily have a determinative role in the legislative process. Such a role exists in the various instantiations of democracy, such as republican, liberal, constitutional, and so on. Individuals *qua* citizens are authors of the law. Secondly, if citizens are passing laws, then presumably they are obeying those laws. We have analysed above law’s normativity under the heading of the “rule of law”. Individuals *qua* citizens are also equally addressees of the law.

It bears remark that little if anything at all is said about participation in the *adjudicatory* process. Not as parties, but as judges. While citizens are expected to undertake a legislative role in the concept of popular sovereignty, their contribution to adjudication is generally left

⁵⁰ The division between the internal point of view and the external point of view, first set out in H. Hart, *Concept of the Law* (2nd) (Oxford UP, 1994), and analysed further in, e.g., D. Patterson “Explicating the Internal Point of View” (1999) 52 Southern Methodist Univ. LR 67 (normativity attaching only to the internal); D. Litowitz “Internal versus External Perspectives: Toward Mediation” (1998) 26 Florida State Univ. LR 127 (thus the need for reconciliation and mediation between the two perspectives); T. Morawetz “Law as Experience: Theory and the Internal aspect of Law” (1999) 52 Southern Methodist Univ. LR 27 (a hermeneutics-inspired reconstruction, discounting the “external” as indivisible from, parasitic on, and part of the “internal”); and see B. Bix “HLA Hart and the Hermeneutic Turn in Legal Theory” (1999) 52 Southern Methodist Univ. LR 167.

unaddressed in modern expositions of democracy.⁵¹ Lay juries, such as those chronicled in ancient Greek democracy⁵², or those operating in medieval England⁵³ played a more sizeable part in the translation of legal norms into daily practice. This mediating function, the application of law, has largely been lost or at best subdued in current thinking on popular sovereignty, and politics more generally. In part, the juridical role has presumably become such a specialised area in a technical field that the jury no longer figures as the central pillar of adjudication. In part, it is also one by-product to the history of concentrating political power into the hands of a single person or a small number of individuals, that a concomitant centralising of juridical authority into a smaller number of easily controlled and politically sponsored agencies has occurred.⁵⁴ Likewise, the development of a professional legal class distinct from the ordinary citizenry and the transfer of any mediating function in adjudication to that class, tracks in no small degree the systematisation of political power into the exclusive bipolar relationship rule-givers and rule-followers.

Inheriting this perspective, our modern-day boundary between law and politics and between author and addressee, once blurred and smudged, has become a rather sharply defined boundary.⁵⁵ Only two sides are defined to exist: the author of law and its addressee. It is very much a top-down perspective. The legislator decrees the law, and the rest apply or obey it. Only the legislator may decide on content, its primary task as allocated under the separation of powers doctrine. There is no room seemingly left over for a mutual sharing of the *trias* functions.⁵⁶ Popular sovereignty, like any other instantiation of power, operates in this bilateral framework of law-giver and law-follower. The compartmental model of political power (and its instrumental conception of law, as they have developed throughout our political history) is central to modern

⁵¹ See, e.g., S. Benhabib (ed.) *Democracy and Difference* (Princeton UP, 1996), J. Bohman & W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997), and D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge UP, 1992).

⁵² See, e.g., C. Carey “Legal Space in Classical Athens” (1994) 41 *Greece & Rome* 172, S. Smith “The Establishment of the Public Courts at Athens” (1925) 56 *Trans. and Proc. of the Am. Philol. Assoc.* 106, A. Lanni “Spectator Sport of Serious Politics? *oi periestekotes* and the Athenian Lawcourts” (1997) 117 *J. Hellenic Studs.* 183.

⁵³ Broadly, up to the start of the Tudor dynasty (1465). See, e.g., G. Jacobsohn “Citizen Participation in Policy Making: The Role of the Jury” (1972) 39 *J. Pol.* 73, R. Goheen “Peasant Values? Village Community and the Crown in Fifteenth Century England” (1991) 96 *Am. Hist. Rev.* 42, P. Schofield “Peasants and the Manor Courts: Gossip and Litigation in a Suffolk Village at the Close of the Twelfth Century” (1998) 195 *Past & Present* 3, and R. Turner “The Origins of the Medieval English Jury: Frankish, English or Scandinavian?” (1968) *J. Brit. Studs.* 1.

⁵⁴ See, e.g., F. Maitland’s treatment of the historical development of jury trials in England in his *The Constitutional History of England* (H. Fisher ed.) (Cambridge UP, 1961) 120ff. and M. Loughlin

⁵⁵ The apparent lack of attention to the citizen’s role in law application and enforcement no doubt reflects the deeply seated acceptance of the separation of powers doctrine: see Carey “Legal Space”. Montesquieu’s principle that the reciprocal check and balance achieved by dividing the three fundamental elements to public power among separate agencies would minimise the risk of an abuse of power concentrated in the hands of but one. Only by barring a commingling of these functions, and hence any expansion thereof, can the general public benefit from a disinterested, even-handed application of each power function. This guarantees the full political liberty of the subject: see, e.g. L. Claus “Montesquieu’s Mistakes and the True Meaning of Separation” (2005) 25 *Oxford J Leg. Studs.* 419 (an “anti-essentialist” reading of Montesquieu, arguing in effect to the same conclusion as M. Vile, *Constitutionalism and the Separation of Powers* (Oxford UP, 1967)). Indeed, we might well consider the separation of powers doctrine to be a reaction to that historical process of concentrating power, particularly in the circumstances of 17th century France. Nevertheless, as a principle of general application, the boundaries separating the legislative role, the executive, the judicial, and the general public become certain, clear, and above all, impermeable.

⁵⁶ Vile, *Constitutionalism*, esp. 297ff, however, offers a persuasive argument that such a sharing does in deed exist.

constitutional law. It arguably accounts for the development of constitutionalism.⁵⁷ Bounding and institutionalising social power through a (legal) instrument, a “constitution” – and requiring the organs so created to justify their exercise of power in relation thereto – offers a concrete manifestation.

This bilateral understanding of political power, with the opposing poles of author and addressee now so familiar here, reconstrues law as an instrument (one among many) of power. The consequence of this instrumental view is to establish conceptual limits or boundaries between law and sovereignty. Law and sovereignty (or “politics”, for short) separate practically and conceptually. Law now is viewed as “falling outside” the conceptions of political power and sovereignty, and each traces out its own borders.⁵⁸ Of course, in certain matters the one may run contiguously with the other, yet each remains nonetheless a separate system of meaning and action, with its own vocabulary. Contrast this with the lay juries, for example, which offered a less abrupt transition from law–giving to law–following.

Consider, for example, the two principal ways in which “sovereignty” becomes a live (legal) issue. First, it is used to justify parliamentary authority to legislate in certain ways and in certain fields. The law is simply one instrument of that power, having no separate status. So to return to Herculeum, the state (or more precisely, the government) will invoke its sovereignty as part of its justification for its various actions under scrutiny, to exclude the application of standards, precedents, or norms not emanating from the local parliament. Herculeum norms recognised or established by its Parliament only, have effect. This is not simply the “dualism–monism” debate of applying international law in national legal orders again, but includes also the hobby–horses of positivism (moral content in law?), and a rights–oriented constitutionalism (is there a natural limit on the exercise of power?). Second and following, sovereignty is used to justify the primacy of parliamentary bodies over the courts and other political entities. This parses into two elements. To begin, Parliament may legislate in certain areas as it sees fit, without being limited in what and how it may regulate a matter. Again, a matter of power, the “law” aspect being a secondary formality. Hence the Herculeum courts should have no jurisdiction to interfere with legislation or the legislative process.⁵⁹ They may not review legislation for constitutionality. The breadth of application is, however, limited where a constitution expressly⁶⁰ or implicitly⁶¹ allows for such judicial review. This is carried then further

⁵⁷ G.F.M. van der Tang, *Grondswetsbegrip en grondwetsidee* (Gouda Quint/Sanders Instituut, 1998). The division lies at the heart of the US “political questions doctrine” and the debates surrounding the interaction between the US Supreme Court and the US Congress (and government officials generally): see, e.g., the classic expositions of H. Wechsler “Toward Neutral Principles of Constitutional Law” (1959) 73 Harvard LR 1, A. Bickel, *The Least Dangerous Branch* (2nd) (Yale UP, 1986); J. Hart Ely, *Democracy and Distrust* (Harvard UP, 1980); J. Choper, *Judicial Review and the National Political Process* (U Chicago P, 1980); and B. Ackerman “A New Separation of Powers” (2000) 113 Harvard LR 633.

⁵⁸ Best conceptualised by, e.g., the “systems theory of law” of N. Luhmann, *Social Systems* (J. Bednarz trans.) (Stanford UP, 1984). From a more practical orientation, e.g., this division is the primary premise to the US constitutional doctrine of “political questions”: see, e.g., L. Henkin “Is there a ‘Political Questions’ Doctrine” (1976) 85 Yale LJ 597; M. Redish “Judicial Review and the Political Question” (1985) 79 Northwestern U LR 1031; R. Nagel “Political Law, Legalistic Politics: A Recent History of the Political Questions Doctrine” (1989) 56 U Chicago LR 643; L. Sandstrom Simard “Standing Alone: Do We Still Need the Political Questions Doctrine?” (1996) 100 Dickinson LR 303.

⁵⁹ As was the case in the UK, until proclamation of the *Human Rights Act*. For the classic statement, see, e.g., Wade “Legal Basis of Sovereignty”.

⁶⁰ As in the Constitutions of Belgium (art. 144) and of Germany (art. 93). In Canada, the *Constitution Act 1982* does not explicitly confer jurisdiction on any court. Rather, the courts have assumed jurisdiction by reference to s.25, granting aggrieved parties standing to apply for a remedy for infringement of rights, and to s.52, making all constitutional provisions the supreme law: see, e.g., *Re Manitoba Language Rights* [1985] 1 SCR 721, *R v Big M Drug Mart* [1985] 1 SCR 295, *Operation Dismantle v The Queen* [1985] 1 SCR 441, and *Weber v Ont. Hydro* [1995] 2 SCR 929.

⁶¹ As derived from the reasons in *Marbury v Madison* (1803) 5 US (1 Cranch) 137; and see also *Harris v Min. Interior* [1952] 2 SA 428 (AD) and *Min Interior v Harris* [1952] 4 SA 769 (AD), and the articles of D

by a more foundational claim that Parliament, as a responsible and representative organ of state, has a privileged position relative to the executive and the courts, in its access to the ultimate normative source: the good citizens of Herculeum.

This suggests that sovereignty and “popular” sovereignty more specifically, cover two inter-related propositions which may or may not be intentionally conflated. First there is the more common institutional claim.⁶² This stipulates the supremacy of Parliament over the courts and beyond, such as over international bodies. As one of the three basic, constitutionally prescribed organs of government, Parliament is supposedly representative of and responsible to “the people” who are the ultimate source of all norms. (This latter point of course foreshadows the second interconnected proposition.) Regular popular elections stamp Parliament with a democratic authenticity across party lines which a judiciary appointed by the executive cannot, it is argued, match. Accordingly, Parliament is better suited and better able to ascertain the authentic “will of the people” and duly articulate it in legislative form. This sets Parliament at the top of the constitutional hierarchy, above the courts and the executive.

But we exhaust rather quickly the explanatory potential of the institutional conception on its own. There is no inherent reason why one official or organ should take precedence over another, by mere virtue of being a constitutional judge or parliamentary assembly. Referring to the organ’s connection to an authentic democratic will underscores a particular conception of normative legitimacy. It seems self-explanatory that social, institutional structures would reflect the sources of normativity current in that social context. So the debate moves seamlessly onto normative terrain, examining which organs can deliver the more “authentic” social norms. For example, then, the US debates surrounding *Aaron v Cooper*⁶³ and the constitutional powers of (elected) officials to disregard those judicial constitutional pronouncements considered misguided or wrong⁶⁴ are in fact debates on final source of normative (constitutional) authority in the US.⁶⁵ All these rely on a certain conception of what norms can and should bind. Positions taken on the institutional claim derive from the internal point of view.

7. THE NORMATIVITY IN LAW

Now, the second proposition bearing upon sovereignty under our Herculeum example is just that normative claim. The Herculeum Parliament owes its primacy to the particular Herculeum social context, its social conventions. That in turn represents an agreement and belief that the most clear and authentic expression of its (imperative) democratic will emanates from a local, representative, parliamentary forum, rather than from executive fiat or judicial decision. Moreover, the expression of democratic will occurs in the form of public laws issuing from that forum. The forum is characterised by public participation and deliberation, which underline that norms and norm formation are deliberative, participatory, and public. The sovereignty of that forum, as a question of allegiance and obedience due thereto (and more broadly to civic institutions representative and responsible to the general body of citizens), is in effect a statement of being responsible to and for themselves. The people can decide by what rules they will live in and as a society. The addressees of laws obey those laws they issue for themselves, and not those issued by others outside that social context. Put in other terms, the normative authority of those

Cowen “Legislature and Judiciary” (1952) 15 MLR 282 (Part I), (1953) 16 MLR 273 (Part II), and Wade “Basis of Legal Sovereignty”.

⁶² Characteristic of Goldsworthy’s argument in *Sovereignty of Parliament* in Ch. 10, esp.254ff.

⁶³ 358 US 1 (1958) (Arkansas state officials bound by prior US Supreme Court decision holding racial segregation unconstitutional and no legal or good faith excuse available for delays in implementing desegregation plan for schools)

⁶⁴ See, e.g., M. Paulsen “The Most Dangerous Branch: Executive Power to Say What Law Is” (1994) 83 Georgetown LJ 217 and L. Alexander & F. Schauer “On Extrajudicial Interpretation” (1997) 110 Harvard LR 1359 (an attempt to keep the terms of reference within the institutional domain via the function of law in society).

⁶⁵ E.g., Alexander & Schauer “Extrajudicial Interpretation” 1374ff.

norms arises from citizens legislating for themselves in a participatory and deliberative manner. They are each co-operating in the fashioning of norms in that process and the binding of themselves individually to their particular conception of them, and not just simply adopting “alien” standards.

The second proposition, the normative one, accordingly bears a considerable burden, being the focus of our attention under the sovereignty and the rule of law rubrics. By “normativity”, we mean that standard by which we are judged and we judge others, and in virtue of which we would punish or reward. Normativity arises in the society of others: it is an associative phenomenon. It is also a reflective one, for an evaluative, critical, distancing obtains between us and the object of our consideration – including an image of self. As such a social phenomenon, there exists an number of different sources for the normative, each originating out of our membership, voluntary or not, in the multiple different associations making up our every-day life. Each grouping creates its own standards of behaviour by which its members are judged. Of course, not all such norms have immediate *public* effect; that is, extending beyond the immediate membership of the group. And not all are enforced the same way, even though some measure and type of coercion figures in each and every instance. That coercion reflects the imposition of the standard over present interest and design to compel conformity.

But normativity would not excite such attention if conformity in belief and behaviour were easy givens. Plurality of values, and diversity of meaning and intention, render disagreement and divergence inevitable. Indeed, the very existence of normativity as an issue in itself stands as good proof of that plurality and diversity in any association. For associations to persist, there must be some co-ordination of action and coherence in value orientations. The orchestra must play from the same score, from the same arrangement. Society requires a common iteration of the norms identifying and governing that association, controlling all like instances. The law is an easy shoe-in to provide this central reference point.⁶⁶ Its peculiar characteristics, identified closely in the introductory chapter⁶⁷, reflect a core idea of law being simply a norm, an imperative direction constraining or restraining certain conduct.

What this all suggests is first that the normative proposition of sovereignty focuses on the *addressees*, and not the *author's* perspective, as the classic conception would have it. The formation of norms, their acceptance, and compliance with them all precede from the addressee's perspective. We might say that sovereignty (as a normative conception) is earned, not taken. Second, the addressee's perspective, being the critical optic for normativity, situates the conditions for normative force in the associative relationships of individuals making up (political) society. The coercive force of the normative, that characterising the internal point of view, arises in and through an ideation of self necessarily in a particular social context. It is means of “symbolisation of self” *qua* aspirational goal, as the person we think we are and should be (in the eyes of others). Participating in the deliberative efforts to create norms, we bring our own interests and designs into public view by encouraging others to adopt them as their own. Transforming private interests into public concerns in this fashion sets them apart and idealises or standardises them: in short, creating normative symbols. To re-iterate, those ideas or values which transform into external or public norms become symbols: characters having a certain assigned meaning, not otherwise naturally occurring nor internal to our consciousness. Hence the expression of power in an intersubjective relationship is in fact the projection of that public, common meaning (or “symbols”).

So our attempt to erase the boundaries between (the rule of) law and sovereignty has in fact brought us to the very point where boundaries are being drawn, between what is “internal” to us, what is “private”, and what is “external” or “public”. We could even venture to add between the subjective, and the objective. This occurs through what is characterised as “symbolisation”.

⁶⁶ In effect the foundation for the arguments in Alexander & Schauer “Extrajudicial Interpretation”.

⁶⁷ E. Claes, W. Devroe, & B. Keirsbilck “The Limits of the Law (Introduction)” in Claes, Devroe & Keirsbilck, *Facing the Limits of the Law*.

8. SYMBOLISATION AND LAW'S LIMITING POWER

The raw exercise of political power, as soon as it purports to be anything more than mere brute force or coercion of the instant, must observe some orderly process of articulation. That is, it must come into existence and be administered in some regular fashion. This regularity has two dimensions, one of extension over time, and the other of form. Raw power is the compelling at the instant itself. Unless there exists with the commander some ability and capacity to continue with further application of the threat or the promise of reward, the effect of either threat or promise should evaporate with that instant. Yet it seems obvious to assume that the holding and exercise of social power is intended to persist beyond a certain time and situation. So the enduring application of a threat or promise requires some regularity or ordering articulated in the form of the intersubjective power relationships. Even if the commander should engage others to ensure such continuing application, this merely establishes further, intermediary power relations as between commander and agent (as well as ultimately between agent and subject) where the same considerations of maintaining the promise or threat apply. That is, the agency relationship itself must rely on some ordering to maintain its own version of threat or promise. So we may safely accept that the desired recursivity and permanence of the command relationship depends upon some form of social structure and ordering. Structure and order quite simply serve to minimise the burden and costs of command, principally relieving the commander of re-establishing supremacy whenever issuing orders. It arranges the systematic application of rewards and punishments (threats). And correlated to this are furthermore those reasons cited by Raz concerning the rule of law: settling expectations and allowing a subject better to plan and mould behaviour as law-abiding.⁶⁸

Now, perhaps not unsurprisingly, the legal form offers precisely these two dimensions in intersubjective power relationships. There is more to this proposition than simply rehearsing the formalistic criterion of the rule of law, and noting the enduring presence of some formalised legislative and adjudicative process throughout history.⁶⁹ The deeper connection allies law and power at their conceptual foundations, rather than merely at this instrumental, formal level. The latter, as we have argued herein, reflects this deeper connection rather than standing for it *simpliciter*. It begins to reveal itself in the realisation that social power, other than the actual push, blow, payment, or such like, can only manifest itself, be perceived, through the legal form. Social power expresses itself through law; the law is an expression of the political power to command.

One means to make sense of this proposition is via the symbolisation concept of Cassirer.⁷⁰ “Symbolisation” represents “work”, human action in the world which is the quintessential or defining human characteristic.⁷¹ The concept comprises a grasping of phenomena and a distancing from them. To understand this, we need to picture how it is that we come to know things in the world. Distancing refers to perception and perspective. When we see something, say a book, we see the physical object with all its characteristic attributes. The attributes are “characteristic” because our rationality has us draw comparisons and distinctions with the other objects we have seen. It is also perceived as something “outside” or “other than” us, and as something in a surrounding, in a context – such as “desk”, “bookshelf”, or “library”.

⁶⁸ Raz “Rule of Law” 220. See above note 24 and accompanying text.

⁶⁹ By “legislative and adjudicative”, we mean to avoid restricting the law-making function to some formal *parliamentary* process characteristic of more developed legal systems, per C.K. Allen, *Law in the Making* (3rd) (Oxford UP, 1939) 351, citing Maine. We intend to capture as broad a range of law-giving as possible: custom, precedent, and legislation (to borrow Allen’s three categories).

⁷⁰ See e.g., Lindahl “Symbolic Constitution of Society” who draws upon E. Cassirer, *The Philosophy of Symbolic Forms* (R. Mannheim trans.) (Yale UP, 1953) and *The Myth of the State* (2nd) (Yale UP, 1974). See also E. Cassirer “The Problem of the Symbol and its Place in the System of Philosophy” (1927), (1978) 11 *Man & World* 411; L. Rosenstien “Some Metaphysical Problems of Cassirer’s Symbolic Forms” (1973) 6 *Man & World* 304, and D. Koskum, *Law as Symbolic Form* (Springer, 2007).

⁷¹ This tracks a like concept “agentive function” in J. Searle, *The Construction of Social Reality* (Penguin, 1995) 20–23.

Grasping is perhaps more usefully translated as “comprehending”. We interiorise it, as a concept, and so understand the object. This internalisation occurs by ascribing meaning to the object. So “book” conveys the ideas of writing, communication of ideas, those ideas themselves, the context perhaps of “library” and so on and such like.

The ascription of meaning requires the instrumentality of language. We should understand by “language” that broad conception adopted by Searle who formulates a like proposition that we construct actively, not passively adopt, reality. It encompasses all forms of utterance and expression, not just natural languages like Dutch, English, Esperanto, and Latin. Hence music, dance, pictures, symbols, numbers, and so on. A language is any system of conventional devices which mean or represent or express something “beyond themselves, *in away that is publicly understandable*.”⁷² The meaning they bear is not intrinsic or inherent to them, but is intentionally imposed upon them by human agency. Hence hunger itself as a natural state or “language independent fact” represents the need of a biological entity to take nourishment, but “hunger” or “I am hungry” is the linguistic device intended to mean that state.⁷³

Law is this symbolising language of power, comprising the distancing and interiorising capacities of that symbolising process as applied to the intersubjective exercise of social power. In law, we have that system of conventional devices which represent the projection of behavioural standards, social norms. It is the language of power, of coercion, sanction, and reward, within the social framework but without the need for constant application of sanction or reward. Only the threat thereof remains, albeit implicit. At this level, the symbolic character (or function) of the law gives form to power *qua* sovereignty.

But this only gets us so far. It certainly satisfies as an explanation for popular sovereignty never existing without the legal form as its means of symbolisation. This is, nonetheless, a formal limit on popular sovereignty, rather a substantive one. In other words, the law demarcates the current reach of sovereignty, but does not restrict the content of that expression of power. Hence as long as popular sovereignty adopts the legal form, it may express itself on any subject whatsoever without any restraint or constraint upon the substance thereof. It is unmistakably the classical version of the rule of law, dressed up in more philosophical garb. We have not travelled very far from the central tenets of legal positivism.

9. THE ADDRESSEE’S PERSPECTIVE AND SUBSTANTIVE LIMITS ON SOVEREIGNTY

To prise open the internal point of view, and posit the law (or the rule of law) as a substantive limit on sovereignty, we need to recognise both sides to the symbolisation concept. The one side speaks to transposing internal, private matters into external, public ones. The second aspect, prompted by the addressee’s perspective, requires a re–internalisation, a re–integration of that public norm into the fund of designs, beliefs, desires, and such like – call them all “commitments” – that each one of us holds, as a self–governing individual.

The central premise to rejecting the law’s bounding of a sovereign stipulates that a power binding itself to a particular constitutional order is logically separate and prior to that legal order. Indeed, the latter is derivative upon it, and subsists at its pleasure. The sovereign may withdraw its consent to be bound to any degree at will, and without limitation. By way of contrast, if a power constituted itself through a constitution, then the assumption is that the power exists only in and through that constitutional settlement.⁷⁴

But as argued here, binding oneself engages the addressee’s perspective. First, the sovereign must engage with an “other” to found the obligation, which in the circumstances is society. For the case of popular sovereignty, the people engage themselves. Second, that

⁷² Searle, *Social Reality*, 60-61 (emphasis in the original).

⁷³ Searle, *Social Reality*, 61.

⁷⁴ Thus *Rediffusion (Hong Kong) Ltd v AG (HK)* [1970] AC 1136, 1154ff, 160ff (per Diplock); *Marbury v Madison* (1803) 5 US (1 Cranch) 137; and see also *Harris v Min. Interior* [1952] 2 SA 428 (AD). This reflects the like position of Dicey, *Introduction*, Chap. II “Parliament and Non–Sovereign Law–Making Bodies” 87ff.

engagement invokes the symbolisation stage, where traditionally the sovereign seeks the role of progenitor and protector of the constitutional settlement for the benefit and welfare of its subjects. The symbolic is that fund of externalised, ascribed meaning which will be re-incorporated into the set of private commitments of sovereign and society. As such it is the reference point for an idealised conception of self. In the social, public context, we are speaking of an idealised conception of society.⁷⁵ Sovereignty, as we have suggested, is the projection of norms which in the case of popular sovereignty arise in an interactive, deliberative democracy. The projection of norms occurs in the form of laws, and lawful conduct. And laws arise in through interaction, deliberation, and debate. Hence the content of the symbolic here is not merely “supremacy”, but more significantly, the idealised constitutional settlement, as well as those values and procedures necessary and sufficient for its preservation. Specifically, this means those aspects comprising what in the Introduction is termed “protective legality”.⁷⁶ The addressee’s perspective thus creates an idealised concept of sovereign as one acting in and through the law and integrates that conception into the sovereign’s commitment to the constitutional order. The sovereign’s concept of self becomes one of a sovereign *by* and *under* the law.

To claim that the (rule of) law may act as a substantive limit on (popular) sovereignty, then, is to posit limits of law on the scope and reach of any exercise of social power. Blackstone’s apothegm that Parliament can do anything that is not impossible deserves a significant nuance to “impossible”. For that term is thus bounded by an understanding of obedience, reason, and a social context – all comprising the “addressee’s perspective”, as used here.⁷⁷ A substantive limit on sovereignty means that sovereignty cannot exist or persist without acting in and through law, the legal form, and within the boundaries necessary and sufficient to create binding law. The “bindingness” aspect invokes the addressee’s perspective. That refers to the creation of social norms by the transformation of internal commitments through deliberation, debate, interaction, into external symbols, and the latter’s re-integration into the private, personal domain. All this necessarily obtaining within a social context of recurring contacts with others.

It follows, of course, that inasmuch as that social context admits of a totalitarian level of control, so be it. If not so accepted, then the sovereign cannot arrogate and maintain totalitarian power on a legal basis. On a non-legal one certainly, but in those circumstances of continual brute force and fear, we can hardly contemplate or speak of “law” in any normal or ordinary sense. An entity applying its own will and desires to legal subjects irrespective of their will and desires (an absolute or totalitarian ruler) governs by force, not law. It is with considerable insight and reason that Hume wrote, “[F]orce is always on the side of the governed, the governors have nothing to support them but opinion.”⁷⁸ The addressee’s perspective reorients the idea of power and normativity from one of *imposing* to one of *accepting* norms. And this in turn suggests that for any workable concept of law, the participation of the addressee in the creation of law, its interpretation, and application – all elements to giving content to law – becomes irreplaceable. A concept of law is not merely a theory or model of rules. It is a concept of ruling oneself and others. As addressees of law, we must take responsibility for the law’s content. We must also be able to take up that responsibility. We cannot leave or pass on that responsibility to others or to one of the four estates (legislature, executive, judiciary, people) which remains aloof or divorced from constant interaction and discussion with the others. In the end, the *end* of law is reached when the *ends* of law symbolise no longer a society worth striving for, no longer those values which we aspire to hold.

⁷⁵ See, likewise, Lindahl “Democracy and the Symbolic Constitution of Society” and note 12 above.

⁷⁶ Claes, Devroe, & Keirsbilck “The Limits of the Law”.

⁷⁷ A like bounding to (positive) law is also arguably developed by R. Alexy (relying on Radbruch: R. Alexy “A Defence of Radbruch’s Formula” in D. Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of the Legal Order* (Hart, 1999) 15) and by “internal” legal positivists, such as W. Waluchow, *Internal Legal Positivism* (Oxford UP, 1994).

⁷⁸ Hume, *Essays, Moral, Political, and Literary*, 109.