The Rule of Law: A Foucauldian Interpretation

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Although Foucault can be rightly seen as one of the most influential thinkers of our times, his ideas have hardly been straightforwardly accepted. His vision of law in the modern era, in particular, has drawn some severe criticism. Scholars as diverse as Habermas and Poulantzas have expressed strong doubts with regards to Foucault's approach to law, accusing him of downplaying the role of the legal phenomenon in modern society to an unacceptable extent and with a distorting result. Such attacks are far from unwarranted. Foucault's argument appears almost counterfactual: How is it possible to claim that in the modern "age of rights" the individual, formally protected by a sphere of legal autonomy, is, in fact, subject to the continuous gaze of biopolitical forms of power? The present article is a contribution to the debate concerning this question. Focusing on the concept of the Rule of Law I will try to demonstrate that the basic tenets of the modern legal system are not incompatible with Foucault's reconstructions of the dynamics of modern power. My claim is that the problematic relationship between biopolitics and law within Foucault's theory is to be understood as the problem of the contemporary gendering of freedom. Building on Foucault's suggestion that freedom and power should be seen as an almost co-extensive couplet (and not as oppositional poles) I suggest that modern law does indeed foster individual liberty but it does so in a way that also allows a deeper penetration of power within the social body. In this perspective, I argue that the Rule of Law, shifting the legal paradigm from that of Hobbesian commands to that of the norm, proved instrumental for the flourishing of normalising dynamics that rely on the freedom of the individual for their establishment and propagation. Law, analysed through a biopolitical prism, appears as a normalising apparatus both in the sense that it translates the person into the discrete entity of the legal subject and in the sense that it provides the structuring rules framing the general landscape and environment of social life.

Jürgen Habermas’s attack on Foucault’s supposedly dismissive stance toward modern law well summarizes a general criticism levelled against the French philosopher. Taking into account Foucault’s description of the modern penal system in Discipline and Punish (Foucault, 1977), Habermas argues that it is the entire phenomenon of modern law that is overlooked in Foucault’s grim account of the modern penal system. Foucault is bound to disregard it otherwise:

[H]e would have to submit the unmistakable gains in liberality and legal security, and the expansion of civil-rights guarantees even in this area, to an exact interpretation in terms of the theory of power (Habermas, 1994, 102).

Foucault has been accused by many to understand law as a mere spectacle for the manipulating play of a fathomless power, being consequently unable to recognise the development of legal rights as limits to the influence of power itself and as instruments for individual and collective freedom and self-determination.¹

Such reading of Foucault’s work in relation to law is strongly misleading. It takes some of Foucault’s sparse remarks on the regression of law in our times (e.g. Foucault, 1979, 144) at face value without putting them within the broader context of his genealogical enterprise and reaching the conclusion that he disregarded the liberating effect of modern law for the individual. This line of

criticism implicitly assumes that, according to Foucault, in modern societies the individual is not freer than before or, at least, she is only apparently free, while, in fact, secretly manipulated by the cunning of power. It is easy, however, to demonstrate that Foucault never addressed the relationship between freedom and power in the crude terms of a zero-sum game (more freedom, less power, and vice versa), but, more subtly, as a matter of different regimes of freedom. To this extent, he suggested that power and freedom are almost co-extensive. Power does not subjugate the individual, rather it activates certain patterns of behaviour and thinking that follow power’s own discourse and that need a certain space of freedom to flourish and be effective:

Power is exercised only over free subjects, and only insofar as they are free. ... [F]reedom may well appear as the condition for the exercise of power (at the same time its precondition, since freedom must exist for power to be exerted, and also its permanent support, since without the possibility of recalcitrance, power would be equivalent to a physical determination). (Foucault, 2002, 342).

The question of law within Foucault’s theory therefore should not be posed in the oppositional form of a dichotomy (“Does modern law effectively grants us an individual sphere of freedom or not?”), but, more subtly, should be framed as the problem space of what is the nature of the freedom that law contributes to generate against the background of contemporary dynamics of power. The present article is an attempt to contribute to the exploration of this problem space. Focusing on the concept of the Rule of Law (hereinafter RoL) I will try to demonstrate that the basic tenets of the modern legal system are not incompatible with Foucault’s reconstruction of modern power’s dynamics. My claim is that the RoL, shifting the legal paradigm from that of Hobbesian commands to that of the norm, proved instrumental for the flourishing of normalising dynamics that rely on the freedom of the individual for their establishment and propagation. Law, analysed through a biopolitical prism, appears as a normalising apparatus both in the sense that it translates the person into the universal entity of the legal subject and in the sense that it provides the structuring rules framing the general landscape and environment of social life.

Power, freedom, and liberalism

Foucault famously claimed that modern forms of power functions are “biopolitical “ as they pose individuals’ lives at the centre of explicit political calculations (Foucault, 1979, 143). Starting from the end of the XVIIth century, Foucault suggested that a vast array of techniques emerged aiming at enhancing individuals’ “productive force” (Foucault, 2003, 242). Initially, the focus was on the single person who, through a series of apparatuses (e.g prison, factory, army and so on) was disciplined so as to internalize specific rules of conduct and behave as a functioning cog in the mechanism of society (Foucault, 1977). Subsequently the play of power progressively included in its calculations the life of populations as a whole aiming at optimizing the relationship among certain regularities (e.g. fertility, morbidity, mortality, productivity, etc.) emerging within the social body. This was done thanks to a phenomenon that Foucault termed “governmentality” (Foucault, 1991).
In general terms the term governmentality – a portmanteau for the words “government” and “mentality” (Gordon, 1991) – defines a new kind of political rationality which abandons the Hobbesian model of sovereignty (Foucault, 2003, 34) in order to embrace the model of “government” understood as the “conduct of conducts”\(^2\) (Foucault, 2007, 192-3), i.e. a model that is not concerned with imposing the will of the sovereign upon the social body but rather attempts to “guide” society towards a set of (self-referential, society-generated) goals through the application of a set of rational norms and rules (Dean, 2010, 18).

Foucault and his successors further argue that liberalism is the ideology which provides the wider theoretical framework for the rise of such dynamics of power (Foucault, 2008; Dean, 2010; Rose 1999; Rose, Barry & Osborne, 1996) as it represents a critique of older political schemes that embraced top-down approaches to social order (e.g. the XVIIIth century formulas of *raison d’État* and *polizeiwissenschaft*) rather than society’s capacity of self-regulation. They claim that liberalism, with its emphasis on freedom and its limitation on sovereign power, historically pushed forward a new mentality concerning the relationship between power and freedom. Personal autonomy and individual liberty are conceivable only within the broader context of society’s efficiency and manageability. The individual is not subject anymore, at least in principle, to the command of an unbound supreme authority which exploits him or her for its own advantage, rather, people are free to act in so far as they follow certain rules of conduct that are optimal for them and for society as a whole. Individual improvement is free to pursue and indeed fostered as it is seen as part and parcel of society’s progress.

It is within such context that the relationship among the individual, freedom and power is cast in a new light. With the movement towards biopolitics, power operates upon individual subjectivity in order to create mould people into “docile” members of society. Hence, the idea of personal conduct comes to prominence as the most important element to achieve positive change, charging the subject with a specific responsibility to act in relation to oneself and society. The individual is not the passive recipient of heteronomous principles of conduct, but emerges as an autonomous agent that, pursuing her own good, also does the good of society at large (Rose, 1998, 84). In this sense, the single person is not only free to choose her own path, but she is also “obliged to be free”, invited to actively shape her life according to the standards of optimization that are generally accepted (Rose, 1998, 88).

Foucauldian studies – and in particular governmental ones – have thus shown how the freedom we enjoy as modern individuals is ingrained within a close-knit web of rationalities, policies and practices that effectively orient our mindset, choices and practical options. They suggest that such freedom is not an unqualified one, rather it represents a spectrum of strategic possibilities that are acceptable – even favoured and fostered – within a given, historically and contextually specific dynamics of power. As Miller and Rose clearly put it:

\(^2\) Such slogan is now part of the Foucauldian jargon, but it should be noted that, although widely cited, the term “conduct of conduct” was not used by Foucault in relation to government per se but to *power understood as government*: “The exercise of power is a ‘conduct of conducts’ and a management of possibilities. Basically power is less a confrontation between two adversaries or the linking of one to the other than a question of government” (Foucault, 2002, 341).
The practices of modern freedom have been constructed out of an arduous, haphazard and contingent concatenation of problematizations, strategies of government and techniques of regulation. This is not to say that our freedom is a sham. It is to say that the agonistic relation between liberty and government is an intrinsic part of what we have come to know as freedom. (2008, 216)

**Law and Foucauldian scholarship: an “indigestible” meal**

The Foucauldian “tools” of biopolitics, discipline, and governmentality, as fascinating as they might be, have not been welcomed by those thinkers working in the liberal legal tradition. Liberal scholars have generally rejected such allegation as a distortion, offering a more straightforward vision of the relationship between power and freedom in our society. Surely they do not claim that our era is characterized by an unblemished state of individual liberty (that would be almost a contradiction in terms), nevertheless they argue that in modern societies the individual is protected from the ploy of power to a previously unknown extent. This result has been achieved, above all, thanks to the development of a complex and sophisticated system of rights ensuring both at a formal and substantial level an autonomous sphere of action for the single person (Habermas, 1999; Bobbio, 1996; Dahrendorf, 1988; Hayek, 1944).

Such attacks are not unwarranted. The “province” of law seems to represent for Foucauldian theory a somewhat “indigestible meal” (an expression Foucault used with regards to the notion of the state – Foucault, 2008, 77). Foucault himself produced, as it is well known, very sparse, cursory and sometimes contradictory remarks on law, and never offered a comprehensive analysis. Foucauldian scholars, on the other hand, have frequently addressed the issue of law in modern society. They have done this mainly from an “applied” perspective “deploying Foucault’s various methodologies or concepts in the service of a range of different critical approaches to law (and in a range of different legal contexts)” (Golder, 2008, 749).³ Rose and Valverde methodological suggestions on how to explore law from a biopolitical perspective are quite exemplar of this approach (Rose & Valverde, 1998). Arguing that law is in itself “just a fiction”, they urge us to study law in concatenation with specific disciplinary and governmental practices and strategies in order to unearth its biopolitical usages. Such approach demonstrates how, in practice and within certain specific fields, law falls far from the ideal of freedom, following, in fact, biopolitical lines of subjection.

Taking a more theoretical approach, Golder and Fitzpatrick (Golder & Fitzpatrick, 2009), reach a similar conclusion. They argue that law, in Foucault’s thinking, is not to be seen as directly opposite to discipline and governmentality. Rather modern law acts as a framing discourse that both legitimates and delimits such power mechanisms. Law, in other words, provides human sciences with a normative anchor they would otherwise be missing while, at the same time, it tames their most extreme manifestations. On the one hand, Golder and Fitzpatrick argue, law authorizes the application of human sciences in coordinating and disciplining society providing them with a normative basis; on the

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³ Foucauldian approaches have thus been used to formulate feminist critiques of law (Drakopoulou, 2007), and to analyse various legal fields such as human rights (Sokhi-Bulley, 2011; Evans, 2005), international law (Hammer, 2007) or criminal law (Garland, 2001), among others.
other hand it delimits their application by entitling individuals with certain basic legal rights thus counterbalancing the intrusiveness of disciplinary and governmental apparatuses.4

These criticisms, while offering useful and provocative insights, appear however to beg the liberal challenge to a Foucauldian reading of power and, as a consequence, of freedom. Liberals, in fact, do not dismiss as fantasy the idea that modern societies can be oppressive notwithstanding the presence of a developed legal system and individual rights. Quite the opposite, they often recognize the wrongs of our times. They suggest, however, that law is the primary instrument to right those wrongs. No doubt, certain laws and rules can be an integral part of oppressive and freedom-quashing discourses when strategically situated within a broader biopolitical landscape, nevertheless the idea that fundamental legal rights protect the individual against the abuses of power still retains its theoretical validity. As Habermas argues, criticising Foucault’s interpretation of modern penal systems:

In prisons, indeed, just as in clinics, schools, and military installations, there do exist those ‘special power relationship’ that have by no means remained undisturbed by an energetically advancing enactment of legal rights (Habermas, 1994, 102).

It is undeniable, from this point of view, that even Foucault sometimes resorted to the old idea of “legal rights” as arms of resistance and subversion against practices of subjection (Foucault, 2002, 437-438). But such reasoning would imply that law is a field that is, so to speak, biopolitically inert in the sense that it could be used for or against biopolitical ends but would have no biopolitical nature of its own. According to this vision, biopolitical dynamics of power would thus represent only a “gravitational field” with regards to law and between the two there would be a sort of external and instrumental relationship. Discipline and governmentality can influence the legal field, but they have not structured modern law’s internal logic – what one could call its fundamental “syntax” – which can therefore be used to subvert biopower. The result is that the internal logic of law is left unexplored from a biopolitical perspective, leaving unanswered attacks such as those moved by Habermas or more comprehensive criticisms such as that presented by Hunt and Wickham (Hunt & Wickham, 1994) according to which law is expelled from the locus of power and colonized by discipline and governmentality.

As a consequence, current Foucauldian legal scholarship does a praiseworthy job in criticizing law in its practical application and contextuality, but only superficially scraps the liberal ideal of freedom that (reformed) law can still theoretically offer. The Foucauldian argument that power and freedom are coextensive, within the legal field, therefore appears weakened. The theoretical “enjeu” here is particularly high: if law can, at least in principle, serve the purposes of individual freedom, then Foucault’s vision of modern forms of power loses a good deal of its radical appeal as it amounts to little more than an internal critique of the liberal project, something liberals themselves are very good at.

4 I am not including in my analysis authors such as Agamben (2007, 2003, 1995), Esposito (2008), and Hardt and Negri (2004, 2000) as they do not address the legal field proper, but take in consideration law only in an oblique fashion in order to address higher political and philosophical issues of sovereignty, immunity and capitalist exploitation.
To answer this challenge, Foucauldian scholarship has to resolve a difficult conundrum: what is the logical relationship between law and biopolitical forms of power? Is it possible to identify in the theoretical discourse of law a biopolitical function? How and to what extent are law and biopolitics connected? This is certainly an ambitious task and this is not the place to embark in such an endeavour. More modestly, I would like to sketch the beginnings, or at least the contours, of this project. In order to do so I will analyse the concept of the RoL as the fundamental structure of our modern legal systems. It is widely believed that a legal system upholding the RoL is one that ensures the freedom of individuals, offering them a way to project their lives autonomously, protected by arbitrary external intromissions. I will try to go beyond this classical reading and to suggest that, at a clear scrutiny, the RoL does not simply foster freedom and autonomy but also represents an ideal reflecting certain distinctive features of the modern biopolitical discourse. If this is true, the “indigestible meal” for Foucauldian scholarship that modern law seems to represent could begin to be fully metabolized, opening up, it is hoped, new ways to scrutinize the complex relationship between law, power and freedom.

What is the RoL?

Generally speaking, the RoL is considered the bastion of the modern legal order and the most basic safeguard of individual freedom against the abuses of power. Danilo Zolo defines the concept in the following terms: “The rule of law is a normative and institutional structure of the European modern state, within which, on the basis of specific philosophical and political assumptions, the legal system is entrusted with the task of protecting individual rights, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives” (Zolo, 2007, 19).

Modern rule of law theories can be divided in two different conceptions: formal v. substantive theories. Paul Craig states the differentiation as such:

Formal conceptions of the rule of law address the manner in which the law was promulgated ..., the clarity of the ensuing norm ..., and the temporal dimension of the enacted norm. ... Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between “good” laws, which comply with such rights, and “bad” laws which do not. (Craig, 1997, 467)

Brian Tamanaha adds a further axis of categorisation arguing that formal and substantive theories also present, within their own group, variations in relation to the thickness or thinness of their account, that is in relation to the number and quality of the parameters deemed necessary to establish the existence of the rule of law (Tamanaha, 2004). So on the one hand of this quadrangular map we have thin formal theories (epitomized by A.V. Dicey’s simplified understanding of the rule of law –
Dicey, 1959, lv) while the opposite end is occupied by thick substantive theories (as the one championed by Ronald Dworkin – Dworkin, 1985).

Notwithstanding the differences, it can be said that formal and substantial conceptions of the rule of law are not, in effect, so distant from each other. Certainly their approaches differ considerably, but, at a closer examination, they seem to share a sort of continuity. As a matter of fact substantial visions of the rule of law normally embrace the procedural principles set forth in formal theories. On the other hand, the adoption of the latter, at least from the point of view of historical coincidence, has normally produced legal systems which mostly uphold the liberal democratic standards identified by substantial theories. What is the reason of this coincidence? Jeremy Waldron, in analysing the divergent versions of the rule of law, made the following suggestion:

Taking all into account, what we then have in regard to the Rule of Law is a form of contestation which amounts to an on-going debate among jurists and political theorists about the practicability of law being in charge in a society. … Perhaps there is no exemplar of the Rule of Law, but just a problem …: how can we make law rule? On this account, the Rule of Law is a solution-concept rather than an achievement-concept, it is the concept of a solution to a problem we’re not sure how to solve; and rival conceptions are rival proposals for solving it or rival proposals for doing the best we can in this regard given that the problem is insoluble. (Waldron, 2002, 21, 157-158, italics in the original).

What modern theories of the rule of law seem to have in common is a general historical, political and philosophical discursive dimension that has delineated the contours of the field where this “solution-concept” has been looked for. Recently the late Lord Thomas Bingham in the Sir Davis Williams Lecture enumerated a series of criteria which mixing procedural and substantial standards can be taken as a representative template of the modern discourse on the rule of law. While stating in general terms that the rule of law means “that all persons, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts” (Bingham, 2010, 7), Lord Bingham further added that these directives tell us relatively little about “what the rule of law means to us here and now” (Bingham, 2010, 37). He thus acknowledged that any general conceptualisation of the rule of law needs to be accompanied by a thorough account of its implementation if we are to understand its practical meaning and that the rule of law is both a matter of formal principles and of substantial accomplishments. In this perspective Lord Bingham suggested eight themes that, in their historical evolution and international practice, have delimited the field of the rule of law. These themes are not particularly original or innovative and they are not meant to be exhaustive (they include: accessibility of the law, restraint on discretion, equality before the law, fair exercise of public power, respect for human rights, the institution of an

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5 As a matter of fact it is difficult to single out any legal system that, adopting the formal principles of the rule of law, has not eventually developed in some form the standards supported by substantive theories.
adjudicative system, due process of law and the respect of international law) but together they offer a valuable cartography of the modern rule of law as it has developed historically.\(^6\)

**The shift towards the norm**

The RoL truly appears as a mechanism that, correctly and fairly implemented, would guarantee to the largest possible extent individual freedom. The RoL, in effect, represents a shift from legal systems where law is the expression of an unbound sovereign power to systems based on fundamental universal rules, where the exercise of power (both public and private) is constrained by legal means. In this sense, it would seem, nothing is above or stronger than the law, not even disciplinary practices and governmental rationalities which certainly can exploit the legal means for their strategic purposes but could also be contrasted (and reformed) through law, in the name of freedom. This notwithstanding, it will become clear, at a closer scrutiny, that the RoL is strongly connected with biopolitical forms of power and that its fundamental logic can be read in biopolitical terms. Before proceeding into such an analysis, however, it is necessary to take a step back and to explore more in detail a concept that stands at the foundation of biopolitical forms of power: the norm.

Modern biopolitics tends to understand the subject through the grid of the “normal”. Foucault, following Canguilhem (Canguilhem, 1991) derived the concept “normal” from that of the “norm” understood in a socio-scientific sense as a rule that functions as “a minimal threshold, as an average to be respected or as an optimum towards which one must move” (Foucault, 1977, 183). The concept of “normal” thus represents a fundamental key to manage society as it provides power with a guideline for its regulatory operations. It does not only offer a matrix by which to interpret society but also a scale by which to judge and differentiate each individual from the next. In this regard, Foucault observed: “the power of normalisation imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialities and to render the differences useful by fitting them one to another” (Foucault, 1977, 183).

Within this context Foucault stressed that power, in modern society, largely ceases to be articulated along the scheme of sovereign commands, and it is instead structured along the logic of the norm (Foucault, 1996, 196-199; 1979, 144). The norm, according to Foucault, is a concept that is not limited exclusively to the moral, ethical or legal realm, but defines a whole mode of thinking that is distinctively modern. François Ewald, following Foucault, suggests that the concept of the norm, at the beginning of the XIX\(^{th}\) century, ceased to be plainly equated with the legal or moral rule and came to be linked with the idea of normality. In the modern sense the norm designates both “a particular variety of rules and a way of producing them and, perhaps most significantly of all, a principle of valorisation. ... Its essential reference is ... to the average; the norm now refers to the play of oppositions between the normal and the abnormal or pathological” (Ewald, 1990, 140).

The norm, understood in this way, becomes something akin to an epistemological and ordaining idea of the world. The norm, in other words, functions both as a scheme that allows us to efficiently categorize reality and also as a parameter by which to regulate it. To this extent, the norm fulfils two

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\(^6\) This kind of approach that includes formal and substantial paradigm is also the standard at an international level. See the Report of the Secretary-General “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616).
functions. In the first place it works as a method of communication as it allows the comparison of different entities on the basis of a common standard. At the same time it transforms reality with its illocutionary force: the norm divides reality into discrete comparable entities that can be articulated through the norm itself. As Ewald puts it:

The norm implies a rule of judgement, as well as a means of producing that rule. It is a principle of communication, a highly specific means of resolving the problem of intersubjectivity. The norm is equalizing; it makes each individual comparable to all others; it provides the standard of measurement. Essentially, we are all alike and, if not altogether interchangeable, at least similar, never different enough from one another to imagine ourselves as entirely apart from the rest. If the establishment of norms implies classification, this is primarily because the norm creates classes of equivalency. (Ewald, 1990, 154, emphasis added).

The emergence of the norm in the play of power marks for Foucault the beginning of a dynamics of power that is at odds with the sovereign scheme as it attempts a broader and more penetrative rule over society. To this dynamics, Foucault gave the name of “normalisation” (Foucault, 1977; 1979).

More specifically, and with regards to law, Ewald suggested that the turn towards the norm implicates, in general, the emergence, within the legal field, of a new rationality that he calls “normative” (in this sense that is built on the concept of the norm as explained above) in the place of the one that Foucault termed “juridical”. This shift caused the ingraining of rational-scientific, socially generated norms within the legal discourse and the abandonment of the arbitrary impositions of a sovereign will. Law and society are thus both “normative” because they both follow the same paradigm of the norm (Ewald, 1990, 154-155).

Such argument provides a great insight with regards to the relationship between biopolitics and law, showing that the two share the same paradigm of the norm. This intuition, however, does not solve entirely the theoretical problem that, as I mentioned above, haunts current Foucauldian analyses of law. Ewald, in effect, explains how in modernity the source of authority/legitimation of law shifted from the unbound discretion of sovereign power (which is still present in the structural form of current legal systems – hence the famous Foucauldian dictum that, in political theory, we still have to cut off the king’s head – Foucault, 1980, 121), to that of the norm emerging from society’s rational-scientific discourse, but such reasoning does not clarify how biopolitics affected the internal discourse of modern law and to what extent the latter changed in the face of the emerging dynamics of normalisation. This is not the place to attempt a detail solution to this dilemma, but an analysis of the RoL as the fundamental framework of the modern legal system, it is hoped, will point us to a promising direction and provide us with an initial answer.

Reading the RoL biopolitically

In my opinion, Ewald’s argument that law adopts the benchmark of rational-scientific norms to regulate society, should be brought a step further. Modern law not only “interrogates” the human
sciences to know the truth about the world, subdelegating to them a certain degree of authority in order to regulate society (one could think about the status of psychiatrists in criminal cases), but has itself developed as a discourse that is structured upon the concept of the norm. The RoL represents a clear evidence of this. It is easy to recognize that the RoL represents the backbone of a legal discourse that is based upon the concept of the norm, precisely because it establishes universal rules through which we can “read” and regulate our society.

At a first, superficial level, the very syntagma “the Rule of Law” presents an almost self-explanatory normalising undertone. From this perspective, the concept of the RoL has not been left completely untouched by Foucauldian scholarship. Foucault himself, exploring liberalism as the theoretical backdrop for the emergence of biopolitical forms of power, suggested that the RoL establishes certain general and abstract legal criteria that are instrumental for the process of governmentalization of society (Foucault, 2008). Building on Ewald’s analysis of the norm, Dean, further argues that the idea of the RoL was the fundamental instrument that liberalism used to criticize sovereign power and to establish norms of good government (Dean, 2010, 144).

Under the RoL society is organized in accordance with a system of legal norms and the idea of an unbound supreme authority is necessarily excluded. Of course the concept of sovereignty is still very much alive in our days, however, and precisely because of the RoL, it can be exercised only in conformity with certain legal procedures and in abidance of certain basic human rights. In this sense it can be said that, in normal conditions, there is no sovereign authority within a liberal democratic state. Quite differently we have a “sovereign discourse” – that of the RoL – that frames the ways in which Parliaments, Governments, public entities but also private entities and subjects, can act. What is crucial in “RoL societies” is the fact that power is channelled into pre-set patterns, and nobody can act beyond the limits posed by law. From this point of view it is possible to argue that the RoL operates as a mechanism of normalisation of power both public and private.

The restrains that the RoL imposes upon power have been generally linked with what can be seen as the most important functional goal of the RoL, i.e. the predictability of human interaction. To this extent the RoL marks a shift from legal systems characterized by “Hobbesian” sovereign commands to those organised according to legal norms. Commands, as Hayek clearly noted, do not leave to the subject any autonomy in performing the demanded task and they are rules that are meaningful only “here” and “now”. The RoL, on the other hand, is structured in the language of legal norms understood as general and abstract laws, i.e. laws that apply generally to all subjects of law.

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7 Waldron, 1989; Hayek, 1960. Fuller’s position that law must guarantee a framework where individuals can program their life, and Raz’s idea that law must provide a criterion of effective guidance go in the same direction (Raz, 1979; Fuller, 1969 – in the same vein see also Finnis, 1980, 272).

8 Hayek, 1960, 150, suggests a theoretical distinction between commands and abstract laws: “The important difference between the two concepts lies in the fact that, as we move from commands to laws, the source of the decision on what particular action is to be taken shifts progressively from the issue of the command of law to the acting person. The ideal type of command determines uniquely the action to be performed and leaves those to whom it is addressed no chance to use their own knowledge or follow their own predilections. The action performed according to such commands serves exclusively the purposes of him who has issued it. The ideal type of law, on the other hand, provides merely additional information to be taken into account in the decision of the actor”. 
and that regulate an abstract category of actions. In this regard Ewald has rightly pointed out that Foucault's emphasis on "the action of the norm" in modern society should be interpreted as the awareness that modern legal systems are not to be conflated with sovereign commands but are constructed according to the language of norms (Ewald, 1990).

The exercise of power, to be valid, must always follow the path designed by law. This, obviously, does not mean that law determines all the declinations of power nor that power can never act beyond the limits of law. As a matter of fact, after 9/11 we are too much aware of how the state of exception can trump the "normal" equilibrium of law. However, it must be noted that in societies founded on the RoL, the state of exception represents precisely an exception, something unusual, temporary, a mechanism to react against a surplus of danger that the legal system cannot cope with in "normal" conditions. As such, the state of exception and the unbound exercise of sovereign power are configured as a residue outside the field of "normality" established by the RoL which, on the other hand, delineates the proper contours of the modern legal dimension.

That the RoL shows intrinsic biopolitical traits, can be see also at a deeper level. I believe that the shift towards the paradigm of the norm – which, according to Foucault, characterizes the modern mode of thinking and it is exemplified by the RoL – created, in the passage from sovereign forms of power, a very peculiar relationship between law and disciplinary/governmental apparatuses. We have already seen that, according to Foucault, norms are intrinsically connected with normalisation. Norms, in fact, delimit the field of normality. As Ewald has shown, norms are the necessary conditions for a process of normalisation because they provide society with a common denominator by which to measure, understand and transform reality (Ewald, 1990, 154). In this perspective the RoL, structuring the legal dimension as a field delineated by norms, not only has restrained the use of sovereign power – as we have seen above – but it has also had a normalising effect on individuals. Before modern law all individuals are transformed into general and abstract "legal subjects". Legal systems based on the RoL erase to the largest extent differences among individuals and mutate the citizen into a "generalized other", an abstract bearer of rights. Even further, they define what normal patterns of social interaction are by empowering certain actions (granting rights or prerogatives) and thwarting others (by prohibitions and punishment). In this sense law's work embodies both dynamics of normalisation that Foucault termed "normation" and "normalisation in a strict sense". Normation, Foucault argued, entails the primacy of the norm over the conduct: the norm is set in advance and people have to abide to it (Foucault, 2007, 57). Normalisation in the strict sense, on the other hand "consists in establishing an interplay between ... different distributions of normality and in acting to bring the most unfavourable in line with the more favourable" (Foucault, 2007, 63). Modern law covers both dynamics. It works as a mechanism of normation as it explicitly demands certain patterns of behaviour in accordance with given norms of conduct. It also operates as a normalising mechanism in the strict sense to the extent that it coordinates, arranges and manages the relationship among different (social) normalities.

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9 This ideal was first explicitly formulated by Rousseau in his Social Contract (Part II, Book 6 – Rousseau, 1995) and has been since endorsed by almost any following legal theorist. For more recent examples see Neumann & Kirchheimer, 1996, 101-142; Hart, 1994, 21; Weber, 1968, 655-658; Kelsen, 1945,135, 287.

10 For the concept of the “generalized other” see Benhabib, 1992.
Moving from these assumptions it can be said that, through the RoL, the two poles of law and discipline/governmentality worked in a mutually enforcing relationship, effectively constituting a normalising complex. On the one hand, discipline and governmentality created at a substantial level a seemingly homogenous social body upon which law could inscribe the universalism of the modern legal subject. On the other hand, law activated and enabled disciplinary/governmental practices and strategies in so far as it was able to recodify the single person in the universal terms of the legal subject upon which biopolitical apparatuses could legitimately operate, backed by law’s authority. On this basis, I would thus suggest that there is no “external” relationship between law and discipline/governmentality as current Foucauldian scholarship seems to imply. Quite the contrary, the paradigm of the norm establishes between the two almost a necessary co-dependence. We experience the freedom (or “unfreedom”) generated by the norms of law only in so far as we fall within the field of normality as delineated by discipline/governmentality and defined by the norms of human sciences (Dean, 2010, 144-145). Only when the person is understood as the universal subject of law she can be legitimately ascribed to a specific social field upon which the “judges of normality” (Foucault, 1979, 304), backed by law, exercise their infra-legal authority. Only when the social body is sufficiently normalised at a substantial level, law can efficiently impose its universal norms and effectively establish the reach of its order.

Conclusions

In a vein similar to the one I have followed in the present article, Tadros suggests that modern law works between discipline and governmentality, managing the passage of the individual from one system to another (Tadros, 1998). I would go even further than that and, on the basis of what I have argued above, I would claim that law does not function simply as a neutral “chain of transmission” between discipline and governmentality but it provides the structuring rules framing the general landscape and environment of social life. Modern law, embracing the paradigm of the norms, does not only favour the normalising effect of biopolitical apparatuses; most importantly it works itself as a normalising dispositif. It is through law, in fact, that all major aspects of social life are subsumed under the logic of the norm; from public authorities to personal interactions, from scientific practices to market dynamics, everything is recodified by the norm of law. In a society structured around the idea of the norm, the normative language of law becomes the master language of normalisation as it coordinates and regulates with its own norms all the field of normality within society (the ethical, the scientific, the criminal, the medic, etc.). Moreover, law itself – as we have seen more in detail with regards to the RoL – with the establishment of fundamental rights and freedoms identifies the basic norms that that will eventually develop its normative reach.

Against this background, the claim that liberalism, through the medium of law, protects the freedom of the individual appears severely underdetermined. Modern law does indeed constitute a previously unknown field of freedom, but such freedom can be enjoyed only within the context of broader biopolitical dynamics. Modern law, as I have tried to show, activates and enables practices and strategies of normalisation by transforming the person into the universal legal subject, imprisoning her within a “plane of immanence” whose horizon is represented by the “norm”. After all,
could not we say, in a very provocative fashion, that the limit of liberalism – especially in its legal declination – is represented by liberalism itself? Is not the “normative” nature of liberalism the only thing that liberalism cannot criticize, on pain of its own collapse (Geuss, 2002)?

Moving from the idea that Foucault’s theory does not “expel” law from the locus of power but, in fact, provides a fruitful approach to the legal phenomenon, the present article attempted to offer the contours of a biopolitical analysis of law by taking in consideration the RoL as the fundamental structure of the modern legal landscape. More precisely, I have shown that the RoL presents a distinctive normalising structure and logic and I have suggested that modern law is not, in fact, opposite to biopolitical forms of power but constitutes a concatenation with it, building a mutually enforcing normalising continuum. As Dean suggests with reference to Habermas, liberalism’s reliance on the concept of the norm places it within the contemporary “goldfish bowl” of biopower from which it cannot see out, and the task of a Foucauldian critique is to “describe the conditions of emergence and existence of such forms of power and knowledge, and at least provide glimpses of an exterior view of the goldfish bowl” (Dean, 1999, 190). This is indeed a daunting task and, especially with regards to the theoretical structure of law, much research is needed to evaluate its meaningfulness and explore its depths. More modestly, it is hoped that the present article has provided a first step towards the reading of law through a biopolitical prism. The above analysis was conducted at a high theoretical level and a more substantive and detailed argument must be developed in order to test the feasibility and usefulness of a biopolitical understanding of modern law. A biopolitical analysis of law is still a largely unexplored continent, one that appears fruitful against the changing contours of the coming future.

Bibliography


