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## Publicity and the Rule of Law\*

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## I. INTRODUCTION

By the ‘Rule of Law’ I mean, as has now become usual among legal theorists, a set of formal and institutional features the law may possess in varying degrees (see section II). These features define an ideal, which laws have traditionally been expected to live up to.

One of these features is *publicity*. Part of what constitutes the Rule of Law is the requirement that the laws should be public. This is the subject of this chapter. When it is claimed that the Rule of Law requires that the laws should be public, what is to be understood by this claim? How is the relevant notion of publicity to be defined?

The question itself raises some puzzlement. What kind of question is it? I try to handle this problem in section 2. Answering our main question requires, as we shall see, an understanding of the point, or points, of the publicity requirement, and of the Rule of Law generally. Sections 3 and 4 will be devoted to a first approximation to an answer to our main question. In sections 5 and 6 I will propose an amendment to this answer, leading (or so I hope) to a richer understanding of the point of publicity. Answering the question will also require (sections 7 and 8) focusing our attention on a particular version of the Rule of Law—I shall call it the ‘Enlightenment Rule of Law’—in which legislation plays a prominent role. Section 9 will raise a further difficulty, leading to a final amendment of our proposed definition of publicity.

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My main claim is that the Rule of Law requirement of publicity is best understood in terms of the notion of common, or mutual, knowledge. When it is required that the laws should be public, what should be meant by this is not only that each one of the law's addressees should know what the law is, but also that everybody should know that everybody knows what the law is, that everybody should know that everybody knows that everybody knows what the law is, and so on. This may look unnecessarily complicated. I'll try to show that this is a false impression, and that understanding the publicity requirement along these lines illuminates various aspects of the normative ideal that the publicity requirement may be taken to embody. Think of a regime in which laws are made known to their addressees by sending each one of them sealed envelopes. Everybody knows what the law is. But, would the Rule of Law requirement of publicity be met? I think many would be inclined to answer in the negative. Why? What is implied in our inclination to answer in this way?

## 2. UNDERSTANDING THE QUESTION

There are many different ways of understanding the phrase 'the Rule of Law'. Here I adopt the one which has become common in contemporary jurisprudence in the last forty years or so:<sup>1</sup> by 'the Rule of Law' (RoL, for short) I mean a loose cluster of (1) formal features of the laws (prospectivity, publicity, relative generality, relative stability, intelligibility and relative clarity, practicability,<sup>2</sup> consistency), plus (2) institutional and procedural desiderata (such as, for instance, that the making of particular norms, providing for individual cases, be guided by general rules; and, further, so-called principles of 'natural justice': that the resolution of disputes be entrusted to somebody not having an interest at stake in the judgment, and not being otherwise biased; the principle *audi alteram partem*: and so on).<sup>3</sup> Items on the list partly vary according to the accounts given by different authors. The core, however, is stable.

<sup>1</sup> Accounts in this family have the form of "a sort of laundry list of features that a healthy legal system should have. These are mostly variations of the eight desiderata of Lon Fuller's 'internal morality of law'" (Waldron 2002, 154).

<sup>2</sup> i.e. conformity to the principle '*ought implies can*'.

<sup>3</sup> For a list of these institutional and procedural requirements, see, e.g., Raz 1977, 215–18. On principles of natural justice cf. Hart 1961, 156, 202. For similar lists of the RoL requirements see Fuller 1969, ch. 2, Finnis 1980, 270–1; Marmor 2004, 5 ff.; Kramer 2007, ch. 2.

Before we venture any answer to the question of how to understand publicity, let us ask what sort of question this is. One could say that what the question calls for is stipulation; or, alternatively, an historical inquiry into what different theorists—as well as lawyers generally, and, perhaps, the public at large—mean when they claim that laws should be public. The question could, no doubt, be understood in these ways. However, I'll follow a different tack.

RoL features define an ethico-political ideal which laws are usually expected to live up to. In order to determine how each one of its features is to be understood, we have to gain some understanding of this ideal and to unravel its various aspects. We have to understand, that is, what the point, or points, of the RoL are, so as to determine what its various requirements should properly be taken to mean. At the same time, we could not gain any understanding, however rough, of the ideal without a preliminary understanding of the various requirements it encompasses. One step ahead on one count (what is the point of the Rule of Law?) is supposed to enable further steps on the other (how is this Rule of Law requirement to be understood?), and vice versa. The circle is supposed to be a virtuous one. But we have to jump in somewhere.

This is a normative, substantive ethico-political inquiry.<sup>4</sup> When I ask what is the best way of defining the RoL requirement of publicity, it is in this sense that the word 'best' has to be understood.

### 3. THE INSTRUMENTAL VALUE OF PUBLICITY

What then is valuable in publicity, from the perspective of the RoL ideal? A first answer to this question is quite simple.<sup>5</sup> Given what the point of

<sup>4</sup> Such an inquiry is not unrelated to the two alternatives I mentioned two paragraphs above. The outcomes of a substantive normative inquiry of the kind described can only be deemed plausible to the extent that they on the whole agree with the *endoxa* (i.e. the opinions held by all, or by those who are competent enough, or by the main authors) in the relevant field; and they must be capable of being upheld as resting on—or leading to—plausible redefinitions of the relevant concepts, given their current usage (mere stipulation is, of course, a different matter). Thus, the two alternatives mentioned (stipulation, understood as plausible redefinition of ordinarily used concepts, and critical understanding of what others have said) work as—partially defeasible—constraints on our inquiry.

<sup>5</sup> The arguments I shall put forward are not meant to show that publicity is always, under any circumstances, required, or desirable. They only provide *pro tanto* reasons in its support (cf. for an inventory of "the forms of legal secrecy" in the modern state Kutz 2009, 203–9). Besides, publicity is discussed, in this chapter, as part of the RoL. The RoL itself is one ethico-political

the RoL is, the value of publicity is instrumental. For the laws to achieve the end the RoL assigns them, they have to be public. Let us see why.

What is the point of the RoL? A first, rough answer to this question is close at hand. What the RoL says is, first of all, that the laws should be such that they can be followed and obeyed.

Most of the RoL features specify, more or less directly, what is instrumentally required in order to achieve an end—namely, the end of guiding human behaviour through rules.<sup>6</sup> Thus, many of them are features the laws must possess if they have to be capable of being followed and obeyed. So understood, the features constituting the RoL are features an instrument (laws) must possess in order to perform its function (guiding human behaviour), and to perform it well. In this way, the RoL requirements are to law what sharpness is to a knife (Raz 1977, 225).

To illustrate: if they are to be able to guide human behaviour laws have to be laid out in advance (prospectivity), and to be clear enough for their addressees to understand them (intelligibility). The same line of reasoning obviously holds for publicity: if they are to be capable of guiding human behaviour, laws have to be public.<sup>7</sup>

This gives us a first, obvious (though by no means unimportant) determination of what ‘public’ should be understood to mean here. If they are to be capable of guiding human behaviour, laws have to be *made known* to their addressees.<sup>8</sup>

#### 4. PUBLICITY AND HUMAN DIGNITY

There is, however, more to publicity—understood as the laws’ being made known to their addressees—than its instrumental value.<sup>9</sup>

ideal among many other commendable ideals; it should not be taken as setting requirements that always, under any circumstances, override any other ethico-political consideration.

<sup>6</sup> In Fuller’s (1969, 106) phrase, “the enterprise of subjecting human conduct to the governance of rules.” Cf. Raz 1977, 214.

<sup>7</sup> This is the main *rationale* for viewing publication as a necessary condition for enacted laws to acquire full legal validity (cf. Guastini 2010, 77–8).

<sup>8</sup> This holds only for what may be called ‘normal’, or standard, guidance—i.e. guidance through an understanding, by the agent, of what the law, according to its tenor, requires of him, and that it is required of him (Celano 2013b). All sorts of non-standard cases can be devised (e.g. parents may sometimes, in order to make their children do A, tell them not to do A, thus relying on their children’s standing disposition to do the opposite of what they tell them to do).

<sup>9</sup> There is one aspect of the value of publicity which I take to be unproblematic, and with which I shall not be concerned here. Publicity is a necessary condition for accountability. One

This requirement of publicity also embodies a basic insight about justice: it is unjust that an agent should be judged blameworthy, and punished, for having acted against a standard of conduct—or norm (I shall use these terms interchangeably)—that was unknown to them.<sup>10</sup> Call this moral principle the *ignorantia legis excusat* (ILE) principle.

The status of the ILE principle is precarious. There may perhaps be good reasons (which I shall not explore here) for holding people morally blameworthy for violations of moral standards they have no knowledge of. Likewise, there may be good reasons (pragmatic or otherwise) grounding, in the legal domain (specifically, in the field of criminal law), the principle *ignorantia legis non excusat*. The moral ILE principle, however, expresses, I think, a sound default position: barring special considerations, *ceteris paribus*, etc., it would be unjust to judge an agent blameworthy, and to punish them, for having violated a norm, or normative requirement, of which they have, and had, no knowledge.<sup>11</sup> Quite sensibly, we may wish to amend, and weaken, the principle in order to take account of the hypothesis of faulty ignorance: *ceteris paribus*, it is unjust to judge an agent blameworthy, and to punish them, for having violated a norm, or normative requirement, they did not know, and were faultlessly not in a position to gain knowledge of (reasonable ignorance). By so weakening the principle we impose on agents the burden of doing their best in order to ascertain what the standards their behaviour is subject to are (thereby licensing a defeasible presumption: absent special evidence, the agent is supposed to know what the relevant norms are).

way in which the RoL “restricts the discretion of government officials, reducing wilfulness and arbitrariness,” argues B. Tamanaha (2009, 7, 8), is “by insisting that government officials act pursuant to and consistent with applicable legal rules”; one way in which the law operates to obtain this benefit is this: “legal rules provide publicly available requirements and standards that can be used to hold government officials accountable during and after their actions” (this, I take it, includes judicial decisions). The case for publicity is even stronger, of course, when one looks to *democratic* accountability (Kutz 2009, 200).

<sup>10</sup> Cf. for a vivid illustration of this point F. Kafka’s *In der Strafkolonie* (1919).

<sup>11</sup> The point is that ignorance is an *excuse* (and, thus, it prevents blameworthiness), although the act is, in fact, wrong (cf., on the legal count, Husak 1994, 109, 114). The principle obviously allows for cases in which, to use B. Williams’s phrase (1989, 43), “it will be merely unclear what, if anything, blame [blame “in a focussed form, as opposed to its acting as a broader instrument of correction and disapproval”] is effecting” (cases in which it may be an “unintelligible mystery” what blame is up to; Williams 1989, 44).

These considerations are especially important in providing moral grounds for the legal principle *ignorantia legis non excusat*.<sup>12</sup> In the light of these considerations, in fact, the legal principle may itself come to be understood as a corollary of the principle of publicity: where the laws are made accessible to their addressees, *ignorantia legis* may (defeasibly) be presumed to be blameworthy.<sup>13</sup>

Our weakened ILE principle, it seems, neatly applies to publicity: *ceteris paribus*, it is unjust to judge an agent blameworthy, and to punish them, for having violated a norm that has not been made known to them. This only works, however, under a *proviso*. The *proviso* is that the relevant standard, or norm, be of a certain kind: it must be a norm that an agent can gain no knowledge of unless it is made known to them—i.e. a norm with which an agent cannot become acquainted unless it is somehow communicated to them.<sup>14</sup>

Standards of conduct that exist only if someone, individual or body, has laid them down, or more generally that exist only as the upshot of contingent human action or behaviour, I shall call ‘positive’. Positive standards of conduct (including positive law) fit the relevant condition: agents whose behaviour is subject to positive norms could gain no access to such norms unless they are somehow made known or communicated to them. In their case, then, the *proviso* is satisfied. Where positive norms are concerned, it would be unjust, *ceteris paribus*, to hold an individual blameworthy, and to punish them, for having violated a norm that was not made known to them, i.e. was not public. This is what the RoL requirement of publicity expresses. Correspondingly, we can posit a (moral) right, held by individuals

<sup>12</sup> On reasonable mistake as a legal excuse, cf. Husak and von Hirsch 1993, 166–70.

<sup>13</sup> So that, conversely, ignorance due to failure of publicity exonerates (Husak and von Hirsch 1993, 166, 173). Cf. also Husak 1994, 115: “good citizens make an effort to learn the law of the state. But duties inhere in both directions. Good states make an effort to teach citizens the law.” The presumption, and the corresponding burden, may appear especially plausible in the case of (1) power-conferring rules, specifying the procedure and formalities to be respected in order, e.g. to write a valid will; and (2) rules which apply to “people who occupy very specific roles” (cf. Goodin 2010, 620–1).

<sup>14</sup> This may suggest the idea (Goodin 2010) that, in order to avoid the ILE stricture, it is desirable that the law—in its duty-imposing aspect (not relating to special roles or activities)—should closely track (and be known to do so) morality, on the (both unrealistic and theoretically problematic, I think) assumption that, on the whole, the dictates of the latter are known to everybody, or at least can be easily worked out by everybody. I shall not discuss this proposal here.

subject to a given jurisdiction, that (positive) norms in that jurisdiction be at least made known to them. This is not the much stronger requirement that norms to which individuals are subject should be justifiable to them, so that they can understand and endorse the reasons supporting them.<sup>15</sup> It is the far more modest requirement that it should be somehow communicated to them that they are supposed to act in this or that way.

If we now ask *why* it would be unjust, *ceteris paribus*, to judge an individual blameworthy, and to punish them, for having violated a positive standard not made known to them, we find it hard to give a further answer. We seem to have reached moral bedrock. We could say, however, more or less circularly, that violations of the principle would be violations of human dignity: they would show lack of respect for human beings as responsible, autonomous agents. The argument might go like this.

Respect for human beings as responsible, autonomous agents entails taking due account of their capacity for making informed choices: leaving room for their capacity to be, in Raz's phrase, (part) authors of their own lives (Raz 1986, 369). Judging an individual blameworthy, and punishing them, for having violated a positive standard not made known to them contradicts this attitude—no choice was left to them. This is why it expresses disrespect for human dignity (cf. Kramer 2007, 151).

J. Raz has claimed that "observance of the rule of law is necessary if the law is to respect human dignity" (Raz 1977, 221). "Respecting human dignity," he argues, "entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity entails respecting their autonomy, their right to control their future" (Raz 1977, 221). The main way in which disregard for the RoL "violates human dignity" is by allowing the frustration of expectations the law itself has encouraged (this is, says Raz, often "analogous to entrapment"; Raz 1977, 222).

The argument for publicity (as presently understood) sketched two paragraphs above illustrates this. Punishing an individual for having

<sup>15</sup> According to J. Waldron (1987), a similar requirement, concerning the principles of government, is the fundamental ethico-political requirement at the heart of modern liberalism.

violated a positive standard not made known to them is also a sort of entrapment, showing disrespect for their status as a responsible, autonomous agents. There is something deeply misconceived in putting the blame on such an agent for having acted against a norm of conduct unknown to them (provided always that they are not at fault for their ignorance—see above). Being exposed to the possibility of such punishments generates serious uncertainty, restricting the agent's opportunities for making informed choices and planning their future—as typically do, according to Raz (1977, 222), violations of the RoL. Thus, the RoL requirement of publicity, so understood, neatly fits the picture of the RoL as a shield against (certain forms of) disrespect for human dignity.<sup>16</sup>

#### 5. PUBLICITY AS COMMON KNOWLEDGE

So far, the law's being public has been understood in a way compatible with the (unrealistic) hypothesis of laws that are communicated to their addressees by way of sending each one of them sealed envelopes (section 1). But this, I argue, is too narrow an understanding of the concept of publicity. We have to enrich the set of those to whom the relevant standards should be made known, by giving it a special structure. The relevant standards are to be understood as being made known neither *to one person at a time*, nor to a plurality of persons *independently of each other*, though simultaneously. They are to be made a matter of *common*, or mutual, knowledge.

I define the notion of common knowledge thus:

It is common knowledge among A and B that p if and only if

- (1) A knows that p;
- (1') B knows that p;
- (2) A knows that B knows that p;
- (2') B knows that A knows that p;

and so on, *ad infinitum*.

<sup>16</sup> That the point of (many of) the RoL requirements is to warrant, *inter alia*, (certain forms of) respect for human beings as responsible agents, entitled to make autonomous choices, is common ground. Cf. Fuller 1969, 162–3; Finnis 1980, 272–3; MacCormick 1985, 26; Mar-mor 2004, 21, 32; Kramer 2007, 162, 171, 176; Waldron 2008, 76.



Or, in other words

p is common knowledge among the members of group G if and only if each one of the members of G

- (1) knows that p;
- (2) knows that each one of the members of G knows that p;
- (3) knows that each one of the members of G knows that each one of the members of G knows that p;

and so on, *ad infinitum*.<sup>17</sup>

<sup>17</sup> On the notions of common, or mutual, knowledge see respectively Lewis 1969, 52 ff.; Schiffer 1972, 30 ff. (differences between the two notions need not detain us here). The connection between common knowledge and publicity is no surprise. In fact, the notion of common knowledge is supposed to capture “the idea that some fact is ‘out in the open’ or ‘entirely public’ with respect to certain individuals” (Gilbert 1987, 188; cf. also Chwe 2001, 13). A number of caveats are in place here. (1) In the text common knowledge is defined in terms of a hierarchy of epistemic iterations. This is the simplest and intuitive way of introducing the phenomenon; the definitions provided by the main authors usually have, however, a different structure—such that they entail, or otherwise generate, epistemic iterations of the kind indicated. (2) Its being common knowledge that p requires, apparently, an infinite set of epistemic states, or unbounded computational capacities, by the relevant individuals; and, it is argued, since human cognitive capacities are limited, common knowledge is impossible. This objection can be met (various strategies have been proposed; cf. Vanderschraaf and Sillari 2007, sections 2.2, 2.5, 4). But, even if it can be, (3) it remains true that “it is almost impossible for something to become common knowledge in a large society” (Binmore 2008, 17, 23). I assume that some suitable notion of *approximate common knowledge*, or “ordinary common knowledge” (Paternotte 2010), can be built, by weakening some of the conditions for common knowledge proper, thus overcoming this and similar objections. (4) Here, and in the next section, common knowledge is presented as a necessary condition (for the law to be efficacious in its intended way, here; for it to respect human dignity, in the next section). Strictly speaking, I do not show this (specifically, I do not demonstrate that the series of higher-level epistemic iterations is bound to be closed, in whatever way it is supposed to be closed when common knowledge proper obtains). I show, rather, that common knowledge proper, or some suitable form of approximate common knowledge, is a necessary condition for those feats to be achieved. (5) Highly sophisticated formal definitions of the concept of common knowledge (and of approximate common knowledge) have been worked out (cf. for a survey Vanderschraaf and Sillari 2007, section 2). An assessment of these proposals is both beyond my competence and unnecessary here. For our purposes, an intuitive grasp of the phenomenon is all that is needed. It is an undoubtedly real phenomenon (cf. Chwe 2001, 77–9), which the definition given in the text, though informal and imprecise, vividly depicts. (6) I talk, following the tradition, of common *knowledge*; the distinction between knowledge and belief is, however, of obvious importance in this context. Under this respect, too, I leave matters undetermined, relying on entrenched ways of characterizing the phenomenon. It should be stressed, however, that common ‘knowledge’ is usually the upshot of guesswork by the individuals involved, and a defeasible achievement.

The best way of understanding the RoL requirement of publicity is in terms of such common knowledge.<sup>18</sup> There are three reasons for this. The first concerns the efficacy of the law, and will be discussed in the present section. The second and the third will be discussed, respectively, in sections 6 and 7. A fourth reason for requiring that the laws should be commonly known among their subjects goes beyond the RoL ideal, and involves further ethico-political assumptions (section 8).

Let us return to our understanding of publicity as instrumentally valuable—indeed, necessary—in order for the laws to achieve their intended (normal) purpose (section 3). If laws are to provide guidance for human behaviour, as we have seen, they have to be made known to their addressees. But efficacy also requires mutual knowledge, in two ways.

First, as noted by H. H. Clark and T. B. Carlson (1982), when what is required is a “joint act,” shared beliefs *among the addressees* is crucial. By a ‘joint act’ is meant “an act by two or more people who must, in general, intentionally co-ordinate their separate actions in order to succeed” (Clark and Carlson 1982, 2).<sup>19</sup> When for example, X tells A and B to shake hands “for [X] to expect [A and B] to be able to carry it out, he must intend each of them to recognize not only what he asked of *him* but also what he has asked of the other. If they are told separately and have no guarantee the other has been told, they should realize they cannot carry out that joint act without further negotiation” (Clark and Carlson, 1–2; cf. also Chwe 2001, 9, 111).

The law may enjoin a plurality of addressees to perform joint acts. Think, for example, of regulations that assign tasks to collegial bodies, or set up the provision of public services. In such cases, it will not be enough that the relevant directive be made known to each of the addressees separately (as with the sealed envelopes). It will also be necessary, if the directive is to guide behaviour in the intended (standard) way, that

<sup>18</sup> For a suggestion in this sense (regarding public policies), cf. Luban 1996, 170. According to Rawls (1971, 48), it is a “reasonable simplifying assumption” (for the purposes of a theory of justice) to see publicity as common knowledge as a defining property of the rules constituting an institution; accordingly, the law is characterized as a system of “public rules” (Rawls 1971, 207; Rawls, however, does not use the phrase ‘common knowledge’).

<sup>19</sup> Examples include “shaking hands..., rowing a boat, speaking and listening, driving down a highway, signalling in Morse code, walking in a crowd of people, meeting, and dancing” (Clark and Carlson 1982, 2).

it becomes common knowledge among them. In such cases, then, what the RoL requires, by way of publicity (making positive laws known to their addressees), is common knowledge.<sup>20</sup>

But, second, this turns out to be true of a huge number of legal requirements,<sup>21</sup> including cases of actions each one of us can perform on our own (not involving coordination in the above sense), under a certain plausible condition.

Consider a group of individuals G, all addressees of a positive requirement R, such that, for each member of G, part of the reason for complying with R is the expectation that the other members of G will comply (because they have this expectation, because they expect the others to have this expectation, and so on). Everybody is expected to comply because, *inter alia*, each expects the others (to expect the others...) to comply; everybody complies, in part, because each has this set of expectations about the others' expectations and conduct.

The condition under which our finding turns out to be true of many positive laws is that, where a legal system exists (which requires its being generally efficacious), the population of its addressees is, to a varying extent, a group of the kind described. This may be understood in two ways.

First, it may be a matter of the actual subjective motivations of the addressees. Where (nearly) all (nearly) always comply because (*inter alia*) they are disposed to comply on condition that they expect the others to comply, and they in fact expect the others to comply because they expect them to expect the others to comply (and so on), the laws cannot guide behaviour (in the standard way) unless they are matters of common knowledge.<sup>22</sup>

It may also be understood, second, as a matter concerning what (objectively) good reasons each addressee has for complying. Many legal requirements are such that it would make no sense to comply with them

<sup>20</sup> A special case is when the law enjoins the performance of a set of actions providing the solution of a coordination problem in the strict, game-theoretical sense. In order to work, in this way, as solutions to coordination problems laws have to be common knowledge among their subjects (cf. generally Lewis 1969). In such cases the law works as a mere indicator. Once one of the many equilibria available is made salient to the parties by being singled out by the law, all individuals involved will, by hypothesis, do their part in it (cf. Ullmann-Margalit 1981; Green 1988, 111–15).

<sup>21</sup> Bentham's idea (cf. Postema 1986, 246).

<sup>22</sup> Remember, here and in what follows, caveat (4) in n. 17.

unless one expected most of the others to comply as well. Examples range, it may be argued, from complying with many traffic regulations to paying taxes or, on some accounts, keeping one's word. It is, in general, the case with legal directives that can plausibly be explained as attempted solutions to multilateral Prisoner's Dilemmas and similar sorts of collective action problems. In such cases, it is necessary for the addressees to have reason to comply that it is common knowledge among them what the requirements imposed by the laws are. In this interpretation, then, what the RoL requirement of publicity expresses is the idea that, in order for the laws to provide good reasons for action to their subjects, they should be common knowledge among them.

#### 6. COMMON KNOWLEDGE AS A PRECONDITION FOR CERTAINTY

Once again, however, the common knowledge requirement is not merely a matter of the law's being efficacious. Here too publicity is a matter of respecting human dignity.

Why? Because in order for each individual to enjoy—or to have the opportunity of enjoying—his status as a responsible, autonomous agent, it is not enough that the way the legal system will react to his actions be predictable to him (on the basis of his own knowledge of the laws). It is also necessary that he is in a position to predict, with reasonable confidence, how it will react to *the other citizens'* behaviour. It is necessary, generally, that he be able to form reasonable expectations about how the others will act in response to the existing legal standards; and, once again, how they act will depend in part on how they expect the legal system to react to their behaviour, and that of others. Thus, in order for the laws to make room for their subjects' autonomy it is necessary for them to be common knowledge.

Observance of the RoL is necessary if the law is to respect human dignity, because laws meeting RoL conditions will guarantee a measure of certainty in the relations between the law and its subjects (thus making room for their autonomous choices) and do not act as 'entrapment' devices (section 4). This applies to individual citizens in their relation to the government. But it also applies to citizens in relation to each other; or, better, to each individual citizen's relation to the government in relation to *the other citizens'* relation to the government. Certainty, and the avoidance of 'entrapment', will only be possible if

the laws work as commonly known social interaction devices that are a common focus for relatively stable mutual expectations. Only laws meeting the condition of publicity understood as common knowledge are apt to give rise to a stable, reliable set of concordant mutual expectations at all levels, thus guaranteeing a measure of firmness and predictability in the interaction of rulers and ruled, and of law's subjects with each other.

To sum up. Certainty of the relations between the law and its subjects requires that an individual can form reliable expectations about the behaviour of government's officials and of the other citizens (and of government's officials in relation to other citizens, and vice versa), in respect of existing legal standards; this holds for all alike (and each is aware of this...). It is only by being public in the deeper sense of being a matter of common knowledge that law contributes to the establishment, among its subjects, of a system of relatively stable and relatively reliable interlocking mutual expectations. And this is a necessary condition if the law is to show respect for the subjects' ability to make meaningful autonomous choices.

#### 7. THE RULE OF LAW AS THE RULE OF LEGISLATION

Let us now ask ourselves what kind of norms are best able to satisfy the publicity condition in the sense of common knowledge. The answer is, it seems to me, *prescriptions*.<sup>23</sup>

Prescribing is, roughly, the purposive activity of trying to get people to do something by telling them to do it. Prescribing has several formal features. As with any other purposive, goal-oriented activity some of these express the requirements that the activity has to fulfil in order to achieve its constitutive purpose. Some of these features instantiate elements of the RoL ideal. This is no surprise, of course, since, as I remarked in section 3, most of the RoL conditions follow from what is instrumentally required when we want to subject human behaviour to the

<sup>23</sup> "Prescriptions are *given or issued* by someone. They 'flow' from or have their 'source' in the will of a norm-giver... They are, moreover, addressed at some agent or agents, whom we shall call *norm-subject(s)*" (von Wright 1963, 7; further features which he sees as "characteristic of norms which are prescriptions" (von Wright 1963, 7) are of no interest for us here).

guidance of rules; and prescribing just *is* trying to subject human behaviour to the guidance of rules.<sup>24</sup>

So, for instance, prescriptions typically have to be prospective and intelligible if they are to be capable of achieving their purpose of guiding human behaviour. Further, the activity of prescribing is subject to rational pressure in favour of conformity to the principles that *'ought implies can'* (practicability), and that conflicts are to be avoided (consistency).<sup>25</sup>

A conceptual connection between the issuing of prescriptions and a constraint of common knowledge is not hard to find. When prescriptions are issued, what happens between lawgiver and addressee is out in the open among them.<sup>26</sup> A prescription is typically issued with a certain intention and its workings rest on a complex set of interrelated intentions, and their successful expression and detection (Grice 1957; Strawson 1964, 256–7; Schiffer 1972, 19; Celano 1990, 127–51, 205–13; cf. also Raz 1996, 283). The lawgiver normally has, first, the intention to make the addressee perform a certain action; and, second, the intention to make the addressee perform a certain action as a consequence of his uttering a sentence. Third, he intends to make the addressee perform a certain action (as a consequence of his uttering a sentence) by virtue of the recognition, by the addressee, of these very same intentions.

In issuing a prescription, then, the lawgiver assumes his addressee to be capable of detecting—and of expressing her detection of—a complex set of nested intentions. The addressee is presumed to be capable of understanding: (1) that the speaker wants her to behave in a certain way; (2) that he wants to make her behave in the desired way; (3) that he wants to produce this outcome as a consequence of his uttering a sentence; (4) that he wants to produce this outcome by virtue of her recognition of these intentions, (1) to (4). It follows that for a prescription to affect its addressee's conduct in the way it is intended to, it is necessary that the

<sup>24</sup> This should be qualified. Prescribing is not necessarily the issuing of *general* directives, or of 'rules' proper. Under this respect the requirements of the RoL do not apply to prescribing as such. But we may abstract from this, and focus on the respects in which prescribing does indeed instantiate the kind of activity RoL requirements apply to.

<sup>25</sup> Cf. Celano 2013b. These are all features that prescriptions *typically* exhibit, and pressures prescriptions are *standardly* subject to. The possibility of non-standard prescriptions is not ruled out. These will be cases of abuse of the institution of prescribing.

<sup>26</sup> Cf. for a detailed treatment of this point Celano 2013a, section 6.

addressee understand that her understanding of the prescription is itself a necessary condition for it to produce the desired outcome. A prescription is a kind of tool that works (in the way it is intended to work) only if the object it causally affects understands that it is so working. It also follows that the operation of a prescription—Y's conduct being guided by X's uttering a sentence—is grounded on X's anticipating Y's practical reasoning, including Y's representation in her practical reasoning of X's practical reasoning, and of this very anticipation.

So, in order for the lawgiver to achieve his aim, it is necessary for him to make his intention of making the addressee perform a certain action through the utterance of a given sentence known to the addressee (this is our first notion of publicity; see section 3). This is not, however, sufficient. If odd or deviant ways of influencing others' behaviour are to be ruled out (Strawson 1964, 256–7, 263; Schiffer 1972, 30), a condition of common knowledge also has to be satisfied. In prescribing, the lawgiver intends to make the addressee perform a given action by virtue of the recognition, by the addressee, of this very intention. Thus, an utterance may count as a prescription only if the addressee believes that the lawgiver has the relevant intentional structure, if she believes the lawgiver to believe that she believes he has it, and so on. Likewise, it is necessary that the lawgiver believes that the addressee recognizes this structure, that he believes her to believe that he believes this, and so on. In short, a prescription only has been issued if it is common knowledge among lawgiver and addressee that it has been issued.

Let us return now to the law. What kind of legal standards most naturally fit this model? The answer may appear obvious: statutes—i.e. the upshots of legislative activity. (I do not mean to claim that statutes are the only kind of legal standards that may fit this picture, but that they are the ones that most naturally come to mind and are good candidates.) At a first glance legislation plainly *is* the issuing of prescriptions.<sup>27</sup> So the kind of positive law the RoL requirement of publicity as common knowledge most naturally applies to is statutes, the product of legislation. Admittedly, prescriptions must be common knowledge *between lawgiver and addressee* and the RoL requirement of publicity, as presently understood, requires that the laws be common knowledge (also) *among their addressees*. This is a further step. But prescriptions (and thus,

<sup>27</sup> But see the last paragraph of this section.

statutes), given the role common knowledge plays in their coming into existence and in their intended (normal) workings, will typically meet this further condition. Prescriptions are thus doubly public. Under normal conditions, prescribing is a procedure openly and publicly directed at the issuing of public directives. Where prescriptions are involved not only the standard itself, but also its mode of birth, are normally out in the open. As noted by J. Waldron, legislation is ‘transparent’: the legislature “is an institution set up explicitly to make and change the law...[L]aw-making in a legislature...is law-making through a procedure dedicated publicly and transparently to that task” (Waldron 2007, 99).<sup>28</sup>

So understood, legislation is a special kind of power. When the government exercises that power over its subjects, it addresses them as adults: it accords them the dignity of beings worthy of being publicly, openly addressed, and of being guided through their understanding of the way in which power is being exerted over them. In short, it treats them with and shows them *respect*.

This way of exercising power over a human being is different from the way in which people sometimes try to guide children’s behaviour—distorting reality, or trying to manipulate, unknown to them, the environment or their preferences, by working behind their back. These, of course, are ways in which even adult men and women are often treated—and sometimes wish to be treated (or have to be treated). But they are not respectful ways.<sup>29</sup>

In short, then, to the extent that they are all addressed as the addressees of prescriptions, individuals are treated with *equal respect*. This concerns, of course, only the form of the relationship, not the content of the prescription. It is compatible with all sorts of disrespect and unjust discrimination.<sup>30</sup> But it positively is, it seems to me, a further aspect involved in the point of the publicity (common knowledge) requirement.

All this gives a legislative twist to the RoL. The RoL has to be understood—according to the understanding of the requirement of publicity

<sup>28</sup> Cf. also Waldron 1999b, 12; and 2009, 693.

<sup>29</sup> Remember that we are dealing, here, with standard cases. Abuses are possible (n. 25).

<sup>30</sup> Orders may be harsh, brutal; they may be wielded as weapons by people intending only to make other people do certain things—or positively aiming at humiliating them. Prescriptions, as discussed in the text, are an ideal communicative type.



we are now considering—as the rule of legislation. This is a specific version of the ideal of the RoL, whose building blocks were laid down, roughly, in European legal culture in the 18th and 19th centuries. I shall call it ‘Enlightenment RoL’ (ERoL for short). ERoL gives pride of place, in the development and operation of law, to legislation.<sup>31</sup>

This version of the RoL raises several problems. I simply note some of them here, deferring to another occasion any attempt at solving them.

- (1) The RoL is often depicted as a spontaneous, non-manufactured, unintended, gradually evolving order of human interaction whose administration and piecemeal development is entrusted to the collective, ‘artificial’ reason of the judiciary. Obviously, ERoL does not fit this picture.
- (2) The notion of a legislation-oriented RoL—ERoL—runs counter to the well-established contrast between ‘the Rule of Law’ and ‘the rule of men’.<sup>32</sup>
- (3) The most serious problem is, I think, raised by the apparently obvious claim that legislation plainly is the issuing of prescriptions, that statutes are prescriptions. Legislation proper, as it occurs in developed legal systems, has many complex, articulated procedural and institutional features, which have no obvious equivalent in the case of simple acts of prescribing. Most important, there is no obvious way in which a multi-membered legislature, composed of individuals and groups who sharply disagree with each other on the relevant issues, and making decisions on the basis of majority rule, may be assimilated to an individual, enacting his own will by expressing it in the form of a prescription (Waldron 1999a, part I; 1999b, 26–8).

## 8. THE ENLIGHTENMENT PROJECT

There is, then, a conceptual connection holding (via the centrality of legislation) between ERoL, on the one hand, and an understanding of

<sup>31</sup> A commitment to ERoL is conceptually linked to the endorsement of normative legal positivism—the view that it is a good and desirable thing that the laws have easily identifiable, readily accessible, as far as possible non-controversial social sources (Celano 2013a).

<sup>32</sup> This is noted in Raz 1977, 212, and explained in Waldron 1999b, 24; 2007, 101–4. For a discussion, cf. Celano 2013a, section 5.

publicity as common knowledge, on the other hand. This connection points to a further reason—a fourth reason (section 5)—for understanding the RoL (specifically, ERoL) requirement of publicity as a requirement of common knowledge. It rests on some aspects of what I shall rather loosely call, with no pretensions of historical exactness, ‘the Enlightenment project’. The endorsement of ERoL is one of its main components; some of its further facets will emerge in what follows. The connection between the Enlightenment project and publicity as common knowledge goes beyond the ideal of the RoL (and ERoL), as here understood. It comes into light when ERoL is seen as an element in the Enlightenment project.

The Enlightenment project, as I understand it, involves a set of substantive ethico-political assumptions concerning the status and the rights of citizens of a republican political community. They can be best spelt out in broadly Kantian terms. I list those that are relevant to our inquiry: members in a just political community are free and equal; as autonomous agents, they are entitled to being subject to laws that they at least understand and recognize as such, and they have a right to criticize freely these laws. I am not going to defend these views here. In this section, the RoL publicity requirement will be worked out within the framework of these assumptions. I argue that, in this framework too, publicity is best understood as common knowledge.

It is part and parcel of the Enlightenment project that positive laws should be fully accessible to all. This requires that their existence be ascertainable by each of their addressees (this is, as we shall see in a moment—section 9—the offspring of publicity in our first sense). It also requires that they be intelligible to common human understanding. The laws must not be the jealous possession of (in Bentham’s phrase) “Judge & Co,” purportedly requiring, for their knowledge and understanding, a special, ‘artificial’ reason, which is somehow beyond the capacities of all cognitively normal adult human beings. Lawyers should not function as priests having unique access to the sacred books.

But the Enlightenment project also requires that the law should be public in a further, stronger sense. The laws must be such that they can be the subject of public discussion, and the object of open criticism. They are meant to constrain the actions and interactions of free and equals; and only laws that can be openly discussed and criticized are compatible with the status of individuals as free and equal.

This, once again, requires that the laws should be not merely known to each addressee, but also common knowledge among them. In one sense, this is a trivial point. Only standards of conduct commonly known can be the object of public critical debate.<sup>33</sup> But why, one may wonder, are only laws that are public, in this way, fit for free and equals?

Part of the answer follows from what I have said already about common knowledge as a condition for the law's respecting the dignity of responsible, autonomous agents. In order for each individual to enjoy that status it is necessary that the laws may become the common focus for relatively stable mutual expectations (section 6). Government by prescriptions (and thus by legislation) shows respect for its subjects (section 7). Moreover—and this is the present point—autonomous individuals have, as such, a right to openly criticize any claim, doctrine, theory or institution (especially so, when it purports to guide them, and it claims the authority for doing so), including, of course, their own views, laying down their criticism under the eyes of the public at large—that is, in the public sphere (Kant 1781, AXI, A738-9/B766-7; Kant 1784). And only laws that are public—i.e. commonly known—can be so criticized (non-public laws would *eo ipso* lose their status in the process).

The point can be elaborated. The Enlightenment project includes a commitment against secrecy of laws, and of governmental action, as a general principle (Bobbio 1980, 94; Luban 1996, 154–7). It includes, for example, a rejection of the Platonic Noble Lie (Plato, *Resp.* 414b–c), *arcana imperii*, or ‘Government House utilitarianism’.<sup>34</sup> Why? Because free individuals are subject to public laws: their being subject to the constraint of a law is only compatible with their autonomy if they openly and frankly acknowledge it, under everybody else’s eyes.<sup>35</sup> It must be out in the open that something is required, as must what is required, and

<sup>33</sup> On publicity as a condition for the “public scrutiny” of the laws, cf. Kramer 2007, 151–2 (but cf. also Fuller 1969, 51).

<sup>34</sup> This is part of what J. Waldron (2009, 693; see also 2001, 418), following Rawls, calls “the liberal principle of publicity”: “the idea that the legitimacy of our institutions should not depend upon any widespread public misapprehension about the way they operate.”

<sup>35</sup> According to Waldron (2009, 693, “transparency” (i.e. conformity to the principle of publicity; see this chapter, n. 34) “conveys the idea that the law in some sense *belongs* to the members of the public. It is *their* law.”

what is supposed to follow as a consequence of behaviour not conforming to the requirement. Free people do not hide their subjection. Their right to criticize freely presupposes this openness of acknowledgment.

I assume that individuals in a political community are free and equal only if they recognize each other as free and equal. And, given that being subject to a law is only compatible with autonomy if openly and frankly acknowledged, under everybody else's eyes, individuals can only recognize each other as free and equal, when subject to a set of laws, if these laws are common knowledge among them.<sup>36</sup>

Thus, in a community of free and equal people under law it is out in the open what the laws they are subject to are. (This can be accomplished, as we have seen—section 7—through a Gricean structure of interrelated intentions extended to encompass common knowledge of the laws among addressees.) Free and equal people can only be subject to forms of power that satisfy this condition, and this is the kind of power that the Enlightenment project distinctively supports.

Let us now take stock. Publicity (common knowledge) is a necessary condition if the law is to respect the autonomy of its subjects (section 6). It is an essential element in ERoL, accounting for the way in which laws meeting the ERoL ideal show respect for their subjects as adult human beings (section 7). And it stands out as a prominent desideratum when the RoL (specifically, ERoL) ideal is seen, as it is in this section, as part of the Enlightenment project. The RoL (ERoL) is essentially a form of *public* power, whose operations are commonly known among its subjects, as contrasted with forms of power that operate 'behind the back' of individuals (by manipulating, unknown to them, their environment, preferences, or beliefs). And, for this reason, it is a mode of power which fits the dignity of adult, responsible, autonomous agents.<sup>37</sup>

<sup>36</sup> If publicity is understood as common knowledge, the RoL condition of publicity corresponds to Rawls's "first level" of publicity concerning the acceptance of the principles of justice in a well-ordered society (cf. Rawls 1999, 292–3, 324). (The assumption that in a well-ordered society principles of justice should be public in this sense is there already in *A Theory of Justice*, Rawls 1971, e.g. at 48–9; cf. Larmore 2003, 369–75.) Further, when seen in the light of the Enlightenment project, the requirement of publicity (common knowledge) sets the stage, or prepares the ground, for what Rawls (1999, 293, 324) calls "full publicity"—a much more exigent condition, concerning the shared *justification* of the relevant standards.

<sup>37</sup> This is why ERoL is germane to a critique of power: an anatomy, and exposure, of the mechanisms distinctive of forms of power not compatible with the autonomy of subjects. The import of the publicity condition in this regard is shown in the fact that some of these mechanisms are refuted—both made ineffective, and shown to be disreputable—by their being laid

## 9. PUBLICITY FOR OFFICIALS?

But, it will be objected, all this is too naive. In modern states, citizens do not know much of the law, let alone its complexities and intricacies. And it is extremely unrealistic to think that it could be otherwise. The division of labour applies to the legal domain, too. Detailed knowledge of the law is the lot of a specialized profession. How could it ever be otherwise?

This pessimism is reflected in contemporary jurisprudence. As noted by J. Waldron (2009, 692), rules of recognition are typically thought of, following Hart, as stating the criteria *officials* are supposed to avail themselves of in identifying valid legal norms. The identification of the law is a task that, it is assumed, belongs primarily if not exclusively to officials and to professional lawyers. At the limit, perhaps, a legal system could exist where only officials have cognizance of the law.<sup>38</sup>

Moreover, if we follow the lines of Hart's (1961, 89–95) conceptual genesis of developed legal systems, the views about publicity laid out in the previous sections look less plausible still. It is precisely in a (hypothetical) 'primitive', pre-legal society—a closely-knit community whose members share a *Weltanschauung*, ruled by a regime of social rules of obligation only—that individuals all know, with confidence and in some detail, what the existing rules are, and what they require. (And, we may add, only in such a society do individuals also know that the others know... what the rules are.) It is precisely where, as a consequence of social development and of changing circumstances, uncertainties as to what are the rules of the group arise and become endemic that secondary rules are needed, and a legal system comes into being. Publicity, as here understood, is it seems distinctive of a *pre-legal* community. By definition, where law exists, knowledge of it is the more or

out in the open, and made explicit. Think, for example, of religious indoctrination, when prompted by the unstated assumption that widespread religious belief, no matter whether true or false, is necessary for the maintenance of a stable social order.

<sup>38</sup> Publicity for officials only may lead to non-standard forms of guidance of citizens' behaviour (cf. Kramer 1999, 45–6; Kutz 2009, 210). There may be sound ethico-political reasons favouring "selective transmission" of some legal standards (specifically, some criminal law decision rules) to officials only, keeping citizens unaware of their existence ("acoustic separation," Dan-Cohen 1984). It is debatable (to say the least) whether, as Dan-Cohen argues (1984, 667–73; cf. also Kutz 2009, 210), this is compatible with the RoL. Be that as it may, as I remarked (n. 5) the RoL should not be taken as an ideal that always, under any circumstances, overrides all other relevant ethico-political considerations.

less exclusive possession of a restricted class (officials, professional lawyers) employing special, technical tools (rules of recognition) in order to find out what it is.<sup>39</sup>

It would be foolish to deny the main claims upon which the objection rests. True, one could reply that the ideal of publicity, as here understood, is precisely that: an ideal. An ideal's realization need not be an easy matter. But an ideal must be such that its realization has at least a minimum of plausibility. Rather, replying to the objection calls, I think, for a revision, and weakening, of our understanding of the ideal of publicity. The needed revision is not dramatic. Law, in contrast to a regime of customary rules of obligation, is characterized by rules that make possible deliberate changes of existing rules—i.e. the deliberate modification or destruction of previously existing rules, and the deliberate creation of new ones. Hart calls such secondary rules “rules of change”; where such rules exist, the rule of recognition of the system will necessarily refer to them (1961, 93). Only in following these rules can people make (or change) positive laws (section 4). We should modify our claim to hold that publicity requires that *these rules*—i.e. the procedures for making positive law—be, at least in their rough outlines, common knowledge among the citizens, that an official, reliable, public record of the outcomes of the activities they define (i.e. legislation) should be available and that the existence of a device for publication of the laws itself be common knowledge among the citizens.

<sup>39</sup> Cf. Waldron 1999b, 13–14. So far, I have been talking of publicity as a matter of the laws being (commonly) known *by their addressees*. But who are the addressees of the laws? Officials, or the citizenry at large? Considerations along the lines set out in the text may lead to an option for the former hypothesis. More generally, many legal theorists (notably Kelsen) have held, for various reasons, that what legal norms purport directly to guide is the behaviour of officials only. Such views press us further away from the understanding of the ideal of publicity I have been defending—indeed, in the opposite direction. True, we might content ourselves with the claim that what the RoL requires is that laws, understood as directives addressed to officials, should be common knowledge among the latter. This would be a way of meeting—in fact, of eluding—the objection discussed in the text. A mistaken way, however. It is true that, if rules of recognition are to be understood, along the lines of Hart's *Postscript* (1994), as conventions of official behaviour (which is by no means devoid of problems; cf. Green 1996, 1695–7; Celano 2003; Dickson 2007), then it might perhaps follow, by definition, that they are common knowledge among officials (it all depends on how the concept of convention is moulded). But this has little to do with the ideal of the RoL, as usually understood. The RoL—and, *a fortiori*, ERoL—is a set of ethico-political requirements concerning basically the law in its relationship to ordinary people.

Prescribing is a procedure publicly directed at the issuing of public directives: both the created norms and their mode of birth are out in the open (section 7). This—plus an official, accessible, public record of the prescriptions issued—is what the publicity of legislation consists in.<sup>40</sup> It is true that laws cannot literally be *made known* (section 3) each one of them to each one of their addressees; nor can they, one by one, in detail, literally become common knowledge among them. But by such means they can become *ascertainable* by those whose conduct they purport to rule—with the aid, no doubt, of professional lawyers.<sup>41</sup>

Is this enough? It still remains true that few citizens know even a few statutes; they are not assiduous readers of official records of legislative proceedings (Guastini 2010, 83). Where ERoL, and the Enlightenment project generally, have gained some footing, however, records of the relevant legal material are there and available to everybody. Rough knowledge of the ways in which laws are created and applied is a matter of basic civic education. And legal education is, in principle, open to all, on an equal footing; you do not have to prove allegiance to a church or party, nor special personal qualities or family descentance, in order to have access to it. In principle, anybody can acquire it.

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<sup>40</sup> Cf. Waldron 2009, 692–3.

<sup>41</sup> Realistically, ascertainability with the aid of legal experts is what the RoL requirement of publicity, in the end, boils down to (Kramer 2007, 115–17, 150). Accessibility of legal advice to all citizens may be taken to be one of the main institutional RoL desiderata (this chapter, n. 3).

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