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LAW AND RULE OF LAW: A REPLY TO PROFESSORS THOMAS ADAMS AND XIAOBO ZHAI

ABSTRACT: This paper has been inspired by the reading of the interesting 'conversation' between Professors Thomas Adams and Xiaobo Zhai published in the previous issue of this Journal. Adams and Zhai discuss the meaning and role of the rule of law and touch upon the notion of law. The present essay respectfully criticises the way these distinguished colleagues deal with both issues. On the one hand, the focus is on the limited notion of law which both they and the mainstream debate take for granted. On the other hand, my aim is to show how a historic and comparative law driven reappraisal of the rule of law is able to unearth its intimate legal foundations as well as its limited potential for adoption outside Western societies.

KEYWORDS: Notion of Law, Unofficial Law, Rule of Law, Legal History, Comparative Law, Global Law

I. INTRODUCTION

The brilliant conversation between Professors Thomas Adams and Xiaobo Zhai[1] tackles one of the most cherished topics in the global (political and philosophical and) legal debate, that is, the meaning and role of the rule of law. In this paper my aim is to discuss critically the way these distinguished colleagues deal with the above issue. But, as Professor Zhai rightly says: 'We have to know what law is in order to know what the rule of law is.'[2] This is why Part II of the essay concisely introduces the debate on the notion of law, unveiling the language and the cultural attitudes that characterise the debate itself and that confine it within limits that are seldom discussed by either domestic or comparative law scholars. Yet, it is only within these limits that the rule of law, as we know it, can exist.

[1] Thomas Adams and Xiaobo Zhai, 'A Conversation on the Rule of Law' (2024) 1 Macau Journal of Global Legal Studies 67, 76.

[2] Adams and Zhai (n 1) 69. See also Jeremy Waldron, 'The Rule of Law', in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall edn 2023) <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/> accessed 19 August 2025.

With this proviso in mind, Part III will briefly analyse the mainstream legal discourse surrounding the notion of the rule of law. The latter will be reappraised from a historic and comparative law point of view in order both to unearth its intimate legal foundations and Western mould, and to understand its potential for adoption outside Western societies.[3] Concluding remarks will follow.

II. LAW

1. Political and legal theories have long taken for granted the idea that law is the province of government and governmentally recognised authorities, including the judiciary. In the long post-Westphalian era, these theories have concentrated on the processes and principles, by which the form and substance of State law are determined, implemented, and enforced. This law is what I will call official or State law. By contrast, many non-official sites of legal production have always existed and still exist (outside and) inside the West. These sites produce rules that may flourish independently or even in opposition to official law, and take the settlement of disputes arising out of the application of those rules outside the ordinary circuits of adjudication. Even though the discussions about the relation between the latter rules (especially those developed by merchants) and official law is one of the ancient debates of the law, stretching back centuries,[4] in the

[3] I have dwelt in greater detail upon the above issues in Mauro Bussani, 'Strangers in the Law: Lawyers' Law and the Other Legal Dimensions' (2019) 40 Cardozo Law Review 3127; Mauro Bussani, 'Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law' (2019) 67 American Journal of Comparative Law 701.

[4] Limiting the references to English-language literature, one can see, e.g., Bruce L. Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 Southern Economic Journal 644; Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge University Press 2006); Avner Greif, Paul Milgrom and Barry R. Weingast, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild' (1994) 102 Journal of Political Economy 745; Paul Milgrom, Douglass C. North and Barry R. Weingast, 'The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs' (1990) 2 Economics & Politics 1; Leon E. Trakman, *The Law Merchant: the Evolution of Commercial Law* (Littleton Col Rothman 1983); See also the refinements brought to the mainstream narrations of the role and functioning of the *lex mercatoria* by Charles Donahue Jr., 'Benvenuto Stracca's De Mercatura: Was There a Lex Mercatoria in Sixteenth Century Italy' in Vito Piergiovanni (ed), *From Lex Mercatoria to Commercial Law* (Duncker & Humblot GmbH 2005) 69.

last two hundred years the Western positivist attitude[5] has been able to obscure and fence off the multifaceted dimensions of the legal experience from the spotlight of critical investigation.[6]

Yet, in the last decades, the unofficial dimension of the law has gained new scholarly traction. Law and society scholars inquire into the social structures that induce compliance;[7] law and economics scholars examine non-State law rules and institutions that allow for efficient and desirable social results;[8] law and psychology scholars scrutinise the motivations that ground loyalty to non-State and State laws;[9] and all (should) profit from the long trodden path of legal anthropologists and from their findings on the cross-cultural features of social ordering,[10] as well as from legal historians' studies on how private and commercial law has been thriving for ages in the absence of constitutions, almighty legislatures, and State court orderings.[11]

The above literature shows that whenever there is a bond tying together a group of people, such a group tends to have their relationships and disputes controlled by their own sets of rules. Bonds and rules may

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[5] 'Positivism is a self-fulfilling prophecy or ideology which so influences behaviour that it has become true. But that does not mean that positivism covers the field as far as understanding law is concerned; there are also alternative readings of law and many practices which compromise the positivist boundaries.' Margaret Davies, 'The Politics of Defining Law' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Bloomsbury Publishing 2010) 159. For the various strands of legal positivism, as discussed in the transnational debate, see Michelle Cumyn, 'The Structure of Stateless Law' in Helge Dedek and Shauna Van Praagh (eds), *Stateless Law: Evolving Boundaries of a Discipline* (Routledge 2016) 71; as discussed in legal philosophy, Leslie Green and Thomas Adams, 'Legal Positivism', *The Stanford Encyclopedia of Philosophy* (Winter edn 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 19 August 2025.

[6] 'Indeed, the organised state with a monopoly over the legitimate exercise of force is a relatively recent phenomenon.' Gillian K. Hadfield and Barry R. Weingast, 'Microfoundations of the Rule of Law' (2014) 17 Annual Review of Political Science 21, 31; See also Helge Dedek, 'Stating Boundaries: The Law, Disciplined' in Dedek and Van Praagh (n 5) 9.

[7] See, e.g., Richard Nobles and David Schiff, 'Law, Society and Community' *Socio-Legal Essays in Honour of Roger Cotterrell* (Ashgate Publishing 2014).

[8] See, e.g., Robert C. Ellickson, *Order Without Llaw: How Neighbors Settle Disputes* (Harvard University Press 1991) 253.

[9] See, e.g., Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 1990, republished with a new Afterword 2006); Jason Sunshine and Tom R. Tyler, 'Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values' (2003) 66 Social Psychology Quarterly 153.

[10] See, e.g., James G. Frazer, *Folklore in the Old Testament: Studies in Comparative Religion, Legend and Law* (Macmillan 1918) vol. II, pt. II, ch. VI; Bronislaw Malinkowski, *Crime and Custom in Savage Society* (Routledge 1926); Claude Lévi-Strauss, *Les structures élémentaires de la parenté* (2nd edn De Gruyter 1967); Leopold J. Pospisil, *Anthropology of Law: a Comparative Theory* (Harper & Raw 1971); Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 21(28) The Journal of Legal Pluralism and Unofficial Law 149–57; Franz von Benda-Beckmann, 'Who Is Afraid of Legal Pluralism?' (2002) 47 The Journal of Legal Pluralism and Unofficial Law 37–83; Gordon R. Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 Journal of African Law 152–67.

[11] Bussani (n 3).

have diverse origins (religious, ethnic, ideological, commercial, financial, professional, transnational), and they are relied on daily by hundreds of millions of people. They all serve the purpose of regulating activities, for which State law is perceived by the concerned group as unfit (or, at most, as a second best choice) to meet their needs.

2. As is well known, a conventional (and all-Western[12]) dividing line between norms and the law sees law as the subset of norms that are created and enforced by governments. Yet, when lawyers take into account non-State law they usually do it not only with a blasé attitude, assuming that unofficial law may thrive (only) in societies where independent judiciaries have not (yet) taken root,[13] but also looking at history through instrumental glasses, i.e., focusing on the progressive path that enlightens how our societies came to get rid of legal disorder and unpredictability to embrace the current legal framework.[14] In other terms, one could say, the mainstream legal debate places the cart of legal monotheism before the horse of its historical meaning.[15]

Moreover, what is common across the disciplinary fields (that is, in the law-law and in the 'law & …' fields) is the use of the label 'informal' as the controlling adjective to describe any sort of legal arrangement or enforcement that does not stem from State law. This is an inaccurate and, to a certain extent, unfortunate choice.[16] 'Formal' usually means something like 'pertaining or following established procedural rules,

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[12] Outside the west, comparative and field researches have long shown how state law is constantly challenged by the relevance which societies assign to other dimensions of legality: see the references in Bussani 'Strangers in the Law: Lawyers' Law and the Other Legal Dimensions' (n 3) 3137 and note 28.

[13] See, e.g., Marcel Fafchamps, 'The Enforcement of Commercial Contracts in Ghana' (1996) 24 World Development 427–48; John McMillan and Christopher Woodruff, 'Dispute Prevention without Courts in Vietnam' (1999) 15 Journal of Law, Economics, and Organization 637–58; John McMillan and Christopher Woodruff, 'The Central Role of Entrepreneurs in Transition Economies' (2002) 16 Journal of Economic Perspectives 153–70.

[14] Richard A. Posner, 'Social Norms and the Law: An Economic Approach' (1997) 87 American Economic Review 365, 366; Margaret Davies, *Law Unlimited* (Routledge 2017) 26–41.

[15] Let me stress how this view is nothing but the fruit of European ethnocentrism and of its legacy being taken on by the rest of the Western world. That it is mainly due to the way European legal thought has systematised the reality with which it was faced. To the European rulers of the last few centuries, it has been only too convenient to imagine that the law and the State coincide because both have long been their own particular realm. See also Davies (n 14).

[16] Barak D. Richman, *Stateless commerce: The Diamond Network and the Persistence of Relational Exchange* (Harvard University Press 2017) 11; See also Elizabeth A. Hoffmann, 'Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice' (2005) 39 Law & Society Review 51; Susan M. Olson and Albert W. Dzur, 'Revisiting Informal Justice: Restorative Justice and Democratic Professionalism' (2004) 38 Law & Society Review 139.

customs and practices,'[17] and the formal character of the law is found in that 'rules and other legal precepts, basic functional elements of law such as legislatures and courts, and the legal system taken as a whole … conform to accepted conceptions of their essential forms'.[18] Thus, neither the general nor the technocratic definitions exclude from their meanings or scope any set of rules that have their source outside the State. By contrast, if by formality we mean the respect of ritual and/or solemn and/or written procedures, we must acknowledge that formality varies widely across and within State[19] and non-State law. The latter too—as is well known—may rely on the absence of formality, on loose formalities, or on sophisticated formalised infrastructures. This is why I prefer the more neutral dichotomy of official/unofficial law (and rules), with the former term referring to State law and the latter to the remaining legal dimensions.

3. As always though, language is telling. The inaccuracy in the use of the term 'informal' has a cultural pedigree that is worth disclosing. First, as I said, most of the participants in the legal debate identify the word 'law' exclusively with the explicit product of the State. This compels dissidents to underline the adjective (non-State, informal, soft, customary or, as in this paper, unofficial) when discussing any other type of law. Secondly, facing the potential deficiencies of this posture, a series of intellectual strategies are deployed to keep connecting the positivistic dogma with a reality that shows many other dimensions, in which rules live and thrive without any sort of blessing by the state. Two of these strategies are common: denial and accommodation. Drawing on the late Roderick Macdonald,[20] one can describe these strategies as follows:

Denial is a simple strategy. It relies on the assumption that any data challenging the mainstream approach are either unreliable, misconstrued, irrelevant, or said to evidence no more than a failure of analysis. Denial simply requires the repeated assertion that all law comes from the State and that accepting any other definition would blur the borders of the law, undermining its role in society and opening the floodgates of the

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[17] Black's Law Dictionary (6th edn Thomson Reuters 1991) ad vocem; See also Arthur J. Jacobson, 'The Other Path of the Law' (1994) 103 Yale Law Journal 2213, 2217–19.

[18] Robert S. Summers, 'How Law Is Formal and Why It Matters' (1997) 82 Cornell Law Review 1165–66.

[19] Robert S. Summers, 'The Formal Character of Law' (1992) 51 The Cambridge Law Journal 242, 255.

[20] Roderick A. Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism' (1998) 15 Arizona Journal of International and Comparative Law 69, 72–4; See also Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (The Belknap Press of Harvard University Press 1991).

legal system to chaos.[21] Accommodation rests on the idea that law is posited as an 'instrumental technology'.[22] According to this idea, lawyers' law exists as an identifiable datum, and if sometimes law may appear irrelevant or ineffective to the social or economic phenomena, this simply is a descriptive deficit, or the result of society's over-inflated and unrealistic expectations of law. Should one scale down the expectations of law's reach, any failure would appear either as (again) a failure of understanding reality or as a failure of adapting the law to it,[23] and both may be easily fixed through more appropriate doctrines or through an intervention of State law itself. [24]

It seems that halfway between these postures one can place Professor Adams' view according to which, 'The law—meaning the standards in force in a community—is a set of rules, rules that are either enacted or endorsed by institutions, institutions that arise from social practices, practices that depend for their intelligibility on common understandings'.[25]

What is certain is that these strategies are each designed also to preserve an intellectual and professional status quo. To hold to a limited definition of law buttressed by denial and accommodation allows official legal debate and actors to keep on theorising that law's universe is dynamic but operates within strictly defined borders. Beyond the latter, it becomes hard to imagine law schools, textbooks, lawyers, judges, and technocratic apparatuses as we know them, and this is enough to falsify or discredit any different theory claiming the existence of law outside those frontiers.

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[21] Why is it so difficult to find a word for non-state law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all of these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the name law confounds the analysis. See Sally E. Merry, 'Legal Pluralism' (1988) 22 Law & Society review 878–79.

[22] Macdonald (n 20) 73.

[23] 'Legal pluralists (and legal sociologists generally) have repeatedly shown that social norms (or non-state "law") often conflict with and are more compelling than state legal norms. Their point is that the state is not always successful in its efforts in relation to normative ordering. I am suggesting a different tack: we should not automatically see the state legal system as an institution involved in maintaining normative order. It often does more than that and less than that. We should view it as a socially-constructed power-yielding apparatus, then observe what this apparatus does.' Brian Z. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 Journal of law and society 216–17 note 81. On all this see also Roderick A. Macdonald, 'Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law' in Guy Rocher, Roderick A. Macdonald, Andrée Lajoie, Richard Janda (eds), *Théories et émergence du droit: Pluralisme surdetérmination, effectivité* (Editions Thémis 1998) 12–23.

[24] Hadfield and Weingast (n 6) 32.

[25] Adams (n 1) 69.

III. RULE OF LAW

4. It is only within these frontiers just outlined, though, that the bulk of literature concerned with the rule of law could develop, and that is what happened.

> *The 'rule of law' is indeed a key notion in understanding Western legal lingo. But it is also a notion that helps explain the ethnocentric discourse clustered around it, as well as any possible argument circulating about the expansion of Western law, its reasons, aims, and patterns. This is also because, whereas after the end of World War II and during the Cold War, the rule of law was invoked as a principle of desirable political international order, since the 1980s it has become closely associated with the overall current achievements of Western civilisation.*[26]

But, first of all, what is the 'rule of law'? In the Conversation, Professor Adams considers the question a philosophical one.[27] In the following pages I will respectfully disagree, but in the meantime, it is worth reminding ourselves that many authoritative definitions of this notion are in circulation, setting the tone for mainstream discourse. Besides those discussed in the Conversation, let me refer to some definitions whose authority is uncontested.[28] For example, an oft-cited report by the UN Secretary-General reads: '[The rule of law is] a concept at the very heart of the [U.N.] Organization's mission. It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.'[29]

The Council of Europe, of which forty-six states from across

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[26] See, e.g., Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 178–79.

[27] Adams (n 1) 67.

[28] It should be remembered that 'there are almost as many conceptions of the rule of law as there are people defending it'. Olufemi Taiwo, 'The Rule of Law: The New Leviathan?' (1999) 12 Canadian Journal of Law & Jurisprudence 151–52, see also Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept', in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 121; A survey of the definitions circulating in the literature, from Aristotle to contemporary writers, can be found in Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004); Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar Publishing 2014) 33; Jeremy Waldron (n 2); Gerald J. Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2022) 3–22.

[29] UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (UN Doc S/2004/616, 23 August 2004).

Europe are currently members, undertook a close analysis of the 'rule of law' across many legal traditions. In its Report on the Rule of Law, the European Commission for Democracy Through Law (known as the Venice Commission, the Council of Europe's advisory body on constitutional matters), discerned the following fundamental elements of the rule of law: 'Legality, including a transparent, accountable and democratic process for enacting law; legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts, including judicial review of administrative acts; respect for human rights; and nondiscrimination and equality before the law.'[30] Similarly, the British jurist Tom Bingham crafted an incisive definition with eight sub-rules or principles,[31] which he summarised as follows: '[The rule of law means that] all persons and authorities within a state, 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.'[32] Jeremy Waldron defines the rule of law as requiring legal equality, legal constraints on those in authority, clarity and predictability of laws, and 'legal procedures . . . available to ordinary people to protect them against abuses of public and private power. All this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of legal procedures' themselves.[33] According to Joseph Raz, the rule of law presents two fundamental aspects: '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be

[30] European Commission for Democracy Through Law (Venice Commission), 'Report on the Rule of Law' (25-26 March 2011), <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e> accessed 28 July 2025. In reaching this definition, the Venice Commission relied heavily on Thomas H. Bingham, *The Rule of Law* (Penguin Books Ltd 2010). On the same lines, see European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union. State of play and possible next steps' (3 April 2019), COM(2019) 163 final, 1, <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163> accessed 29 July 2025.

[31] Bingham (n 30) Chapters 3–10.

[32] ibid 8.

[33] Jeremy Waldron, *The Rule of Law and the Measure of Property (Hamlyn Lectures 2011)* (Cambridge University Press 2012) 6–7. See also Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed), *Getting to the Rule of Law* (Harvard University Press 2011) 3, 6–7; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315–17.

able to be guided by it.'[34]

5. Paradoxically, some of the just mentioned features attached to the rule of law either cannot be found or are not fully fledged in all Western societies.[35] At the same time, some of those features (think, for example, of accountability to the law, publicly promulgated laws, obedience to the law, the guidance role of the law) can be found in many non-Western societies, including Islamic and autocratic ones, which Westerners do not consider to live by the rule of law itself.[36] In order to defuse the impact of these paradoxes on the mainstream definitions, two discrete arguments have been advanced.

First, to reject or scrutinise the membership of autocratic and Islamic

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[34] Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 Law Quarterly Review 195, 198, reprinted in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 210, 213. See also the discussion of Raz's thought over time in Adams and Zhai (n 1) 68–72, 75–76; Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 33–94 (proposing and discussing eight features: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence). Fuller and Raz advocate what is usually considered the 'thin' or 'formal/procedural' view of the rule of law; See also John M. Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011) 270–71; Cass R. Sunstein, Legal Reasoning and Political Conflict (Oxford University Press 2018) 119–22, as opposed to the 'thick' or 'substantive' one, for which, see Bingham (n 30); Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467.

[35] For instance, on the 'extreme reluctance on the part of federal or state governments to make the U.S. law available to people with little or no means' see Frank K. Upham, 'Mythmaking in the Rule of Law Orthodoxy' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press 2010) 75, 88. See also the still binding US Supreme Court decision, 6 April 1970, n 397 US 471 (Dandridge v Williams), stating that the US Constitution contains no affirmative state obligation to care for the poor—and upholding the welfare cap regardless of family size. On the treatment of African-Americans, minorities, and the lowest socioeconomic classes in the United States, see Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press 2016) 189–95; Cathy Albisa and Jessica Schultz, 'The United States: A Ragged Patchwork' in Malcolm Langford (eds), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 230, 247–9 (on the obstacles faced in the United States by the implementation and justiciability of economic and social rights). For the lack of a 'meaningful correlation' between gender equality and the rule of law in many 'developed' countries, see Katharina Pistor, Antara Haldar and Amrit Amirapu, 'Social Norms, Rule of Law and Gender Reality: An Essay on the Limits of the Dominant Rule-of-Law Paradigm' in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge-Cavendish 2010) 241, 257.

[36] 'A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity with the rule of law'. Raz (n 34) 211; Raz's remarks befit the systems ruled by the so called 'autocratic legalism' as well: see, e.g., Kim L. Scheppele, 'Autocratic Legalism' (2018) 85 The University of Chicago Law Review 545; Susanne Baer, 'The Rule of—and not by any—Law. On Constitutionalism' (2018) 71 Current Legal Problems 335, 350–52. See also Adams and Zhai (n 1) 69–70, 73; Martin Krygier, 'Why Do We Want the Rule of Law?' (2025) 2 Macau Journal of Global Legal Studies 4.
M. Cherif Bassiouni and Gamal M. Badr, 'The Shari'ah: Sources, Interpretation and Rule Making' (2002) 1 UCLA Journal of Islamic and Near Eastern Law 135, note that modern Arabic translates the 'rule of law' as *siyadar alqanun*, meaning the 'sovereignty of law'. Further, one must remember that 'the 1936 Soviet constitution provided for judicial independence and the supremacy of law, equal rights, free speech, free press, and a whole host of other liberal-democratic ideals.' Gowder (n 35) 178.

societies in the rule of law club, most include respect for human rights in the core definition[37]—at the price of emphasising its all-Western nature.[38] This perspective, however, calls for some refinement. There is a wide array of rights—civil, political, economic, social, cultural, collective—that are celebrated by the public discourse as 'human rights', and might therefore be considered as candidates for the inclusion in the definition of the rule of law. Are they all to be included? If the answer is in the negative, one should make it clear not only which human rights Westerners and the whole of the non-Western world can accept as part of the core definition of the rule of law, but also who decides which human rights may or may not be part of the definition.[39] If the answer is in the affirmative, one should conclude that the rule of law can be fully recognised only when and only where the whole range of human rights (including the social and economic ones) are actually enforced. Otherwise, to say the very least, whichever rule of law definition is chosen may (wherever) either raise the selection issues mentioned above, or end up making little or no sense for the poor or disadvantaged—thereby breaching even the 'equality before the law' requirement, the fundamental and ubiquitous promise of any rule of law and of any human rights discourse.[40]

The second line of argument is different. It focuses on the idea that 'the existence of the rule of law is a matter of degree, with all legal systems being on a spectrum with no rule of law at all at one end and a complete

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[37] See, e.g., the definitions offered by Bingham, the Council of Europe and the UN Secretary General, above, notes 29–-30 and accompanying text.

[38] As made clear, in the very process of drafting the UDHR in 1947, by the American Anthropological Association: see The Executive Board, American Anthropological Association, 'Statement on Human Rights' (1947) 49 American Anthropologist 539. On the professionalisation of human rights activists (and of their discourse), in lieu of many others, see David Kennedy, *A world of struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) 249–51.

[39] Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 International & Comparative Law Quarterly 277, 282, 292; Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018) 29–57; Rachel Kleinfeld, 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press 2010) 44–6.

[40] See Mauro Bussani, *El derecho de Occidente: Geopolítica de las reglas globales* (Maria Elena Sánchez Jordán trs, Marcial Pons, rev edn 2018) chapters 10–13. See also International Commissionn of Jurists, *The Rule of Law in a Free Society* (1959) vi–vii ('The "dynamic concept" of the Rule of Law … does indeed safeguard and advance the civil and political rights of the individual in a free society; but it is also concerned with the establishment by the State of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercized by demagogues over an unenlightened electorate; freedom from governmental interference must not spell freedom to starve for the poor and destitute.').

actualisation of the rule of law at the other',[41] thereby acknowledging both that even the legal systems which 'subscribe to [the rule of law] find it difficult to apply all its precepts quite all the time' and that the rule of law 'remains an ideal, but an ideal worth striving for, in the interest of good government and peace, at home and in the world at large'.[42] These arguments, straddling pragmatism and messianism, may be taken as generic ideals, to be deployed in political discourses.[43] Or can they be taken as an implicit acknowledgement of what has long been clear to historical and comparative scholarship. This is to say that the dynamism of legal (and social, and political, and economic) phenomena may in the long term accommodate multiple stop-and-go processes, as well as allow for a deep change in the legal (and social, political, and economic) cultures themselves. In other words, we are faced with an argument that either hinges on a messianic idealism or aims at (what for legal historian and comparative law scholars simply is) reinventing the wheel. But for our purposes, the point is that even the 'reinvention of the wheel' line of reasoning relies: i) on arguments usually deprived of the historical and comparative reservoir of knowledge that could help better understand the reasons and the back-and-forth of the ongoing processes; and, therefore, ii) on a logic that ends up underpinning the short-termism of Western legal transplants into the 'Rest' as we have so far known them.[44]

6. The variable degree of awareness (and, sometimes, of opportunism) brought by the participants in the debate is further evidenced by the public discourse and scholarly discussions about functions to be assigned to the rule of law.[45] Going over the wide-ranging literature, one can see the 'rule of law' used as a spearhead to defend social and human rights, oppressed minorities, and democracy, as well as to strengthen

[41] McCorquodale (n 39) 291. See also John Tasioulas, 'The Rule of Law' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020) 1, 15–16 <ssrn.com/abstract=3216796> accessed 19 August 2025; Fuller (n 34) 122–33; Raz, (n 34) 215, 222.

[42] Bingham (n 30) 174. See also Friedrich A. Von Hayek, *The Constitution of Liberty: The Definitive Edition* (University of Chicago Press rev. ed. 2011) 311; and Adams and Zhai (n 1) 71–72.

[43] The rhetoric of rule of law as an ideal should be assessed 'critically to expose false claims in its name', Martin E.J. Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 Annual Review of Law and Social Science 199, 211.

[44] An attitude that is actually not contested by the (re)inventors of the wheel arguments.

[45] See generally Taiwo (n 28); Judith N. Shklar, 'Political Theory and the Rule of Law' in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Cambridge University Press 1987), reprinted in Stanley Hoffmann (ed), *Political Thought & Political Thinkers* (University of Chicago Press 1998) 21–37 (the rule of law 'has become meaningless thanks to ideological abuse and general over-use': ibid., at 21); Waldron, *The Rule of Law and the Measure of Property* (n 33) 47 (criticising the current debates where 'everyone clamors to have their favorite value, their favorite political ideal, incorporated as a substantive dimension of the Rule of Law').

the judiciary, market-friendly legislative reforms, and guarantees for foreign investment[46]—thereby meaning especially the protection of private property and contractual rights.[47] It is notable that following one or the other of the above directions (taken at face value, heedless of the complexity of history and geography) can lead to very different assessments, and much functional mismatching could follow.[48] But, once reminded of the low degree of realism achieved by the mainstream definitions, whose lists of features characterising the rule of law tend to refer to the whole of Western legal civilisation, of their ambiguous and confusing references to the human rights requirement, and of their mostly perfunctory allusion to the dynamism of legal experiences, the reader might agree that the question we started from keeps recurring: What is the rule of law? What is the rule of law that Westerners are so proud of, to the point of wanting to promote and transplant it everywhere else?

All the conceptions of rule of law surveyed above come from, are entrenched in, and aim to reflect the whole of current political, socioeconomic, and institutional Western frameworks—as well as the role and work of legal thought producers, and of lawyers, judges, and law

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[46] See Thomas Carothers, 'The Rule of Law Revival' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad. In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 3. See also Allan C. Hutchinson and Patrick Monahan, 'Democracy and the Rule of Law' in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Cambridge University Press 1987) 97, 100–104; Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing 2008) 12, 14–29; Robert W. Gordon, 'The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections' (2010) 11 Theoretical Inquiries in Law 441; Waldron (n 33) 11–14, 42–58; Jothie Rajah, 'Rule of Law as Transnational Legal Order' in Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 340–373; Martin E.J. Krygier, 'Rule of Law (and Rechtsstaat)' in James R. Silkenat and others (eds), *The Legal Doctrines of the Rule of Law and the Legal State* (Rechtsstaat) (Springer International Publishing 2014) 51.

[47] To put it differently, from this perspective the imposition of the rule of law would be functional to solve the problem of high and volatile transaction costs attached to 'Defining, Protecting, and Enforcing the Property Rights': see Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge university press 1990) 91. These costs are to be minimised through the ability of the state to protect property rights and enforce related contracts. See also Brian Z. Tamanaha, 'Functions of the Rule of Law' in Martin Loughlin and Jens Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 1, 15–17, 221; Robert J. Barro, 'Determinants of Democracy' (1999) 107(S6) Journal of Political economy 158.

[48] See data and analysis in Bussani, 'Deglobalizing Rule of Law' (n 3) 717-720; see also Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace 1999) 7–12; Linn A. Hammergren, 'International Assistance to Latin American Justice Program' in Erik G. Jensen and Thomas C. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press 2003) 290, 321–22; Jedidiah Kroncke, 'Law and Development as Anti-comparative Law' (2012) 45(2) Vanderbilt Journal of Transnational Law 485; Katharina Pistor, 'Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Associations November 9–10, 2005' (2007) 25(1) Berkeley Journal of International Law 7, 40–2.

enforcement agencies.[49] The attempt to embody an entire civilisation in an expression of only three words might be viewed as the legitimate use of a conventional linguistic shorthand,[50] and yet adopting this attitude would involve unfortunate consequences from both the normative and the analytical points of view. In normative terms, the point is that this oversized notion of the rule of law would ridicule from the very outset any serious discussion of the possibility of having it transplanted outside the West (within less than a thousand years, unless we supply history with a made-in-the-West accelerator). In analytical terms, a rule of law as equated with an entire legal civilisation would confuse the rule of law with the whole of our legal techno-structures, making it indistinguishable from the other features of our legal systems. Thus, we could either discard the notion as an unwieldy linguistic convention devoid of any analytical or normative meaning,[51] or try to understand whether there exists a core notion of the rule of law that can be taken as a distinctive feature of Western legal experience and as the germ of our legal accomplishments, whatever they may be. Does this core notion exist (beside and beyond the variable degrees of compliance with any other requirement surrounding that core)? And where and when was this core notion generated?

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[49] One can further note that 'the legal culture shared by judges and theorists encompasses shared understandings of proper institutional roles and the extent to which the status quo should be maintained or altered. This culture includes 'common sense' understandings of what rules mean as well as conventions (the identification of rules and exceptions) and politics': Joseph W. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 The Yale Law Journal 1, 22. This is precisely what differs most across legal cultures and jurisdictions.

[50] From the mainstream perspective, translating the English locution 'rule of law'.into other languages turns out to be a difficult endeavour. Duncan Fairgrieve has shown that even translation between English and French is far from simple with possibilities including règle de droit, la primauté de droit (used in Canada), préeminence du droit (used in the Council of Europe), and état de droit ("law-governed state"), the last of which is considered by the author to be the closest to the common law meaning. Duncan Fairgrieve, 'État de Droit and Rule of Law: Comparing Concepts—a Tribute to Roger Errera' (2015) Public Law 40–59. See also Martin E .J. Krygier, 'Rule of Law (and Rechtsstaat)' in Neil Smelser and others (eds), 20 International Encyclopedia of the Social and Behavioral Sciences (Elsevier 2nd ed. 2015) 780; Jean-Louis Halpérin, 'L' état de droit, un concept occidental?' (2025) 193 Pouvoirs 21.

[51] The lack of historical and comparative accuracy in singling out roots and technical background of the rule of law (besides facilitating the no more rigorous 'idealistic' or 'gradualistic' approaches mentioned above: notes 41–44 and accompanying text) fails to acknowledge what is also noted by Kroncke (n 48) 524: '[T]hroughout the twentieth century, authoritarian and even fascist regimes have not shied away from developing instrumental law or what is now considered "thin" rule of law principles. In fact, the attraction of authoritarian regimes to the rule of law is not a new concept historically speaking. A range of scholars describe the predemocratic origins of rule of law ideals as well as its common law genesis as a result of elite power struggles in England. Scholars also note the way that fascism in Germany was compatible with procedural notions of the rule of law. Others have even cited the complicated relationship between the rule of law and antimajoritarian debates in U.S. history. Thus, it should not be wholly surprising that reference to rule of law ideals has now become the norm for contemporary authoritarian regime.' (footnotes omitted).

7. It is a common opinion that the 'rule of law' as we understand it today was first coined in England, with the Magna Carta (1215), or, some centuries later, when the famous judge Edward Coke 'forbade' King James I (reigned 1603–1625) to sit in 'his' Court, because he considered that the King lacked the technical knowledge requisite to administering the law.[52] These were paramount events that marked a point in time (and space) in the development of Western law's efforts to constrain the power of the sovereign.[53] But in order to understand what the rule of law is, one should bear in mind that the law stands in a reciprocal bi-univocal correspondence with the culture from which it stems and which it contributes to generating,[54] and that Western culture and law were not born in England. Thus, to the very same purpose, one should go beyond focusing on the apportionment of powers between the sovereign and its subjects. One should go deeper when understanding what made the technocratic uprising of Justice Coke possible. Indeed, in a broader historical and comparative perspective, the seed of the rule of law can be found in an organisational model that was born in Roman law when, in the presence of an increasing articulation and complexification of society,

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[52] See for all Tamanaha (n 28) 25–31. See also Shklar (n 45) 26 'Dicey's unfortunate outburst of Anglo-Saxon parochialism ... . The Rule of Law was thus both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it.'; on the point made by Shklar see, however, John W. F. Allison, 'Turning the Rule of Law into an English Constitutional Idea' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 167.

[53] One can indeed recall the coeval efforts carried out with the same purposes in other parts of Europe, for example, through the Golden Bull (1222) of King Andrew II of Hungary, that granted the Hungarian nobility the right to disobey the king when he acted contrary to law (*jus resistendi*) whereas the nobles and the church were freed from all taxes, could not be forced to go to war outside of Hungary and were not obligated to finance it. See János M. Bak, 'Online Decreta Regni Mediaevalis Hungariae. The Laws of the Medieval Kingdom of Hungary' (2019) 156–71 <http://digitalcommons.usu.edu/lib_mono/4> accessed 19 August 2025. See also Harold J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Harvard University Press 1983) 293–94. By the Peace of Constance (or Second Treaty of Constance) of 1183, signed by emperor Frederick Barbarossa and representatives of the Italian Lombard League, the cities in the Kingdom of Italy (northern and central Italy, apart from Venice) retained several regalia of local jurisdiction over their territories, and were free to elect their own councils and enact their own legislation. See Alfred Haverkamp, 'Der Konstanzer Friede zwischen Kaiser und Lombardenbund (1183)' in Helmut Maurer (ed), *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich* (Jan Thorbecke Verlag 1987) 11; Gianluca Raccagni, 'The Teaching of Rhetoric and the Magna Carta of the Lombard Cities: The Peace of Constance, the Empire and the Papacy in the Works of Guido Faba and His Leading Contemporary Colleagues' (2013) 39(1) Journal of Medieval History 61. By the *Statutum in favorem principum* ('statute in favor of the princes') of 1232, Frederick II relinquished a number of important royal rights (*'regalia'*) to the secular princes; the latter received the rights to mint coins and levy tolls in the German part of the Holy Roman Empire and were granted the power of jurisdiction over their territories and the right of approval over any legislation proposed in future by the Emperor. see Walter Koch, 'Statutum in Favorem Principum' (1997) 8 Lexikon des Mittelalters 75–76.

[54] John H. Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed. Stanford University Press 2007), 1–2; Jaakko Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6(2) Chinese Journal of Comparative Law 129, 138–45.

it gave way to the secularisation and professionalisation of the law-giving process.[55] When one looks at the deepest roots of the notion, that is, when one looks for the essential ingredient of whatever the recipe of the rule of law is, it can be seen as a social legal institution whereby the power of deciding conflicts that arise within a society is assigned to an independent secular lawyer. More precisely, in this model, the public figure who is legitimised to settle disputes is the technocrat, on the basis of her specialised notions, and not a popular lay assembly, nor a figure provided with religious wisdom, either philosophical-moral or traditional, such as the Islamic *qadī*, the African chief of the community, or the delegate of the political party (as in socialist legality).

This is the core of the rule of law. This is a feature that surfaces in many of the mainstream definitions referred to above (it is usually presented as 'independent adjudication' or as 'access to justice before independent and impartial courts'),[56] but the role of this element is decentralised by the parallel emphasis on a long list of attributes deemed crucial and substantial to the very definition of the rule of law.[57] Yet, without the independent, secular dispute-resolving technocracy, none of the features of the rule of law those definitions emphasise (from 'supremacy of law' to 'accountability to the law', to 'prohibition of arbitrariness' and

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[55] The latter point has been made, for example, by Berman (n 53) 7–9; see also Bruce W. Frier, *The Rise of Roman Jurists: Studies in Cicero's "Pro Caecina"* (Princeton University Press 1985) 184–96, 269–88; Franz Wieacker, *Römische Rechtsgeschichte: Einleitung, Quellekunde, Frühzeit und Republik* (C.H. Beck 1988) 519–617; Franz Wieacker, 'Foundations of European Legal Culture' (1990) 38 American Journal of Comparative Law 1, 23–24; Alan Watson, *The Spirit of Roman Law* (University of Georgia Press 1995) 57–63; Halpérin (n 50) 338; Michel Humbert, 'Droit et religion dans la Rome antique' (1993) 38 Archives de Philosophie du Droit 35; *David Johnston, Roman Law in Context* (Cambridge University Press 1999) 5–8; Fritz Schulz, History of Roman Legal Science (Oxford University Press 1946) esp. 6–12, 30–31, 60–61. See also Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 794–7 (Ephraim Flschoff, Hans Gerth, A.M. Henderson, Ferdinand Kolegar, C. Wright Mills, Talcott Parsons, Max Rheinstein, Günther Roth, Edward Shlls, Claus Wittich trans.) in Günther Roth and Claus Wittich (eds.), (University of California Press, 1978). See also John R. Commons, *Legal Foundation of Capitalism* (The Macmillan Company 1924) 67, 86, 249; Von Hayek (n 42) 243–46.

[56] See the definitions offered by the UN Secretary General, the Council of Europe, Bingham, Waldron, and Raz (n 29–34) and accompanying text. See also Mortimer N.S. Sellers, 'What Is the Rule of Law and Why Is It So Important?' in Silkenat, Hickey Jr. and Barenboim (eds), (n 46) 3, 4–6, 13; Adriaan Bedner, 'The Promise of a Thick View' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 37; Robert S. Summers, 'A Formal Theory of the Rule of Law' (1993) 6 Ratio Juris 127, 133–34; Jeremy Waldron, 'Faces of the Rule of Law' (2023), <https://www.law.nyu.edu/sites/default/files/Waldron%20FACES%20OF%20THE%20RULE%20OF%20LAW.pdf> accessed 19 August 2025, 20.

[57] Let me just add that the arguments grounded in overlapping of the rule of law and what it should achieve, such as 'global justice' or 'good governance' (see Amartya Sen, 'Global Justice' (n 35), James J. Heckman and others (eds), *Global Perspectives on the Rule of Law*, Routledge-Cavendish 2010, 53, and, in a more articulated way, Waldron (n 33) 93–97, Raz (n 34) 211) can, at best, simply complement the present comparative analysis on what the rule of law is and where it comes from. This is because without the technocratic dispute solver, any assessment of the practices of 'justice' or 'good governance' can be only set against a legal (and cultural) background different from the Western one.

'judicial review of administrative acts') would have been able to find their way into the development of Western institutions. Without the independent, secular dispute-resolving technocracy, any defence of one's own entitlements, any claim against fellow citizens[58] or public bodies—including claims related to the implementation of the principles of equality and nondiscrimination, and to the different forms of freedom—would be (and outside the West they can always be) prejudged against a set of political, religious, philosophical, or clannish values, goals, and rules; values, goals, and rules that do not represent the backbone of our legal and institutional infrastructure.[59]

Conferring the power of resolving disputes on an independent, technocratic professional requires a secularised society (that is, a social and cultural context that deeply supports its independence from religious as well as political transcendentalisms), in which individuals and groups have led the ruler or the other customary or religious chiefs to dismiss the power of resolving the disputes arising in the society itself. This is why the Western way of looking at (and thinking of and applying) the law did not take root in societies which arranged their development according to different institutional engineering, according to social beliefs, political and legal balances that are at odds with the primary role to be assigned to the independent, secular dispute-resolving technocracy.[60]

8. It should go without saying that something far more complex than the implantation of the above 'core' of the rule of law on Western soil has allowed us to follow the path toward the construction of sets of notions and principles, as well as of techno-structures capable of supporting the development of the legal institutions that organise our societies today.[61] However, one should be wary of this path. Being aware of this multifaceted historical track would prevent one from synchronically flattening it down and squeezing it into a definition of rule of law that simply musters together everything Western societies have so far achieved. Packaging the bulk of Western legal civilisation and labelling it as the 'rule of law', to use it for export purposes, as if it were a commodity,

[58] This is why I disagree with professors Zhai and Adams' statement that those who 'are not committed to upholding their contracts is no problem for the rule of law': Converation (n 1) 71.

[59] See, for example, Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) 16(3) Hague Journal on the Rule of Law 479, 493.

[60] See e.g., Philip Selznick, *The Moral Commonwealth: Social theory and the promise of community* (University of California Press 1992) 232; Gerald J. Postema, 'An "Almost Sacred Responsibility": The Rule of Law in Times of Peril' (2024) 107(3) Judicature 41, 42-43.

[61] On the role of individual rights, their protection and enforcement, in the development of Western legal culture, see Bussani 'Deglobalizing Rule of Law and Democracy' (n 3) 729-734.

or a turnkey plant, reveals itself as not only faltering on the ground, but also heedless of and ungrateful towards our own history—a history which only with great efforts (and conflicts, and bloody wars) has passed down the complex of tools that are now available to us and that we would like to see adopted everywhere.[62]

Depriving the rule of law of its very historic and comparative value (or assessing it through the lenses of a handful of indicators[63]), as we have seen, transforms the 'export' version of the 'rule of law'—be it referred to for scholarly purposes, or supported by 'big money', states, nongovernmental organisations, or global institutions[64]—into one of the many spongy notions which either serve the interests of those who use them, or offer a vision of the law (and of the world) that lacks the capacity to look beyond the West.

IV. CONCLUDING REMARKS

9. Keeping in mind the foregoing analysis, some final observations are in order.

Part II of the essay put forth some caveats about the dominant notion of law and highlighted the need to acknowledge the social and economic relevance of legal dimensions which bypass the narrow limits of the official law compound. I then made clear that the rule of law debates exist only within the limits in which official law lives; outside those limits, that notion and its surrounding discussions lose their grip on legal reality.

Part III of the paper has shown that even within these limits the mainstream debate keeps itself well apart from the flesh and blood of legal life, often adopting a theoretical posture, which can be intellectually fascinating but (mainly) serves the purpose of academic role-playing. To be clear, all this would be, up to a certain extent, acceptable if we were to discuss the rule of law and its living features in an all-Western

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[62] Stephen Humphreys, *Theatre of the rule of law: transnational legal intervention in theory and practice* (Cambridge University Press 2010) 13, 187; Krygier (n 59) 497; Kroncke (n 48) 488 (but see, id. 533–34: 'With some irony, we should remember that the only other modern country [besides the United States] to so systemically misjudge foreign legal developments through an export-oriented legal culture was the Soviet Union').

[63] For a discussion of the problems associated with the use and abuse of current empirical measures of rule of law, see Marta Infantino, 'Global Indicators' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016) 347.

[64] Veronica L. Taylor, 'Regulatory Rule of Law' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 401–02; Kristina Simion and Veronica L Taylor, *Rule of Law: Issues and Directions* (Folke Bernadotte Academy 2015) 27–52; Marta Infantino, *Numera et impera. Gli indicatori giuridici globali e il diritto comparato* (FrancoAngeli 2019) 104–21.

dimension, and if theoreticians framed their work in terms of 'Western (or American, or European) rule of law'. But this is not the case: the inclination towards universality, timelessness, or both, is implicit—as it is in the Conversation.[65]

Treating the Western rule of law as a notion or an ideal that can be universalised, without paying due attention to its historical sources (and to the different contexts in which it should be applied) is doomed to appear as either preposterous or opportunistic. It comes as no surprise, therefore, that those notions of the rule of law, turned into ahistorical and a-geographical concepts, are put in the service—not of the gradualism evoked in some theoretical approaches, but of strategies unable to build a (pacified and) fruitful relationship between 'us' and 'them'.[66] Western public discourse—totally disregarding, or selling short any role of unofficial law—fuels the belief that the 'other' lacks the rule of law, not as the starting point for an analysis willing to be inclusive of diversity and of a shared perspective, but as a defect to be set straight or condemned—almost like saying that not only is the West the lord of the rule of law, but that it should also be the lord of any law. Along the way, 'decontextualised' and 'naturalised', the rule of law ends up either representing the foolish servant of Western opportunism, or feeding autarchic visions of the world, ill-equipped to understand the 'others'.

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[65] Adams and Zhai (n 1) *passim*.

[66] The mainstream acceptance of the rule of law as a space-less and time-less technology ends up treating law as a 'technical equipment, social machinery, which can be transported and plugged in wherever the need for them arises': Martin E.J. Krygier, 'Institutional Optimism, Cultural Pessimism and the Rule of Law' in Martin E.J. Krygier and Adam Czarnota (eds.), The Rule of Law After Communism (Routledge 1999) 77, 82. See also Christopher May and Adam Winchester, 'Introduction' to Handbook on the Rule of Law (n 56) 1, 3; Husa (n 54) 483–86.